IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA29/2019
[2019] NZCA 293

BETWEEN	ZEN PULEMOANA Appellant
AND	THE QUEEN Respondent

Hearing: 13 June 2019

Court: Brown, Wylie and Moore JJ

Counsel: M A Simpkins and E L Reilly for appellant
K S Grau for Respondent

Judgment: 9 July 2019 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] On 7 August 2017 Raymond Fleet and his nephew, James Fleet, were killed in a remote rural area near Rotorua. Each was beaten to death with a spade wielded by Martin Hone. Before trial Mr Hone pleaded guilty to their murders.

[2] Three other men were charged in relation to the Fleets' deaths. These were Richard Te Kani, Zen Pulemoana and Mikaere Hura.

[3] Before trial Richard Te Kani pleaded guilty to two charges of manslaughter.

[4] Zen Pulemoana and Mikaere Hura each faced two charges of murder. They pleaded not guilty and went to trial before Fitzgerald J in the High Court at Rotorua.

[5] On 2 November 2018 the jury delivered guilty verdicts in respect of Mr Pulemoana and Mr Hura:

(a) Mr Pulemoana was found guilty of the murder of James Fleet and the manslaughter of Raymond Fleet; and

(b) Mr Hura was found guilty of manslaughter on both charges.

[6] Mr Pulemoana appeals only his murder conviction. He advances the following three grounds.

(a) The jury heard inadmissible hearsay evidence from a Crown witness, Nathan Gray. That evidence was unfairly prejudicial and resulted in a miscarriage of justice.

(b) One of the jurors was connected to James Fleet's mother. He should have been discharged because the connection may have influenced the verdict.

(c) The conviction in respect of James Fleet was unreasonable because it was inconsistent with the manslaughter verdict for Mr Hura whose case was all but identical.

[7] On 29 November 2018 Davison J sentenced Mr Te Kani to 15 years' imprisonment.[1] Mr Te Kani appeals that sentence. Although we heard both appeals together this judgment deals only with Mr Pulemoana's conviction appeal.

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1 *R v Te Kani* [2018] NZHC 3134. He was also sentenced for charges of being an accessory after the fact to murder, manufacturing methamphetamine and neglecting a child.

[8] This is because Mr Te Kani's sentence appeal also involves a consideration of his involvement in a related methamphetamine manufacturing enterprise. It is possible this Court's reconsideration of *R v Fatu*[2] in *Zhang v R*[3] will assume relevance on the sentence appeal. After enquiry from the Court, Mr Te Kani elected to proceed on the scheduled hearing date but reserve the right to file further submissions once the decision in *Zhang* is released.

[9] As a consequence judgment on the sentence appeal will be deferred pending the delivery of the decision in *Zhang* with leave reserved for Mr Schulze to file a further submission subsequently. The following timetabling orders are made:

(a) Mr Te Kani is to file and serve any submissions no later than 14 days following the delivery of the *Zhang* decision; and

(b) the respondent is to file and serve its submissions no later than seven days thereafter.

[10] We turn now to consider Mr Pulemoana's appeal.

The facts

[11] Mr Hone and Mr Te Kani were members of the Rotorua Chapter of Black Power, Mangu Kaha. Mr Pulemoana and Mr Hura were prospects.

[12] In early August 2017 Mr Te Kani and Mr Hone arranged with Raymond Fleet to manufacture methamphetamine. In preparing for this venture Raymond Fleet secured the use of the upper level of a house his son, Darius, was renting in Tarena Street, Mamaku. Mamaku is a small rural and forestry settlement about 20 kilometres west of Rotorua. To assist and advise on the manufacturing process, an associate of Mr Hone's, Sheene Holloway, was recruited from Auckland.

[13] Despite the injection of this apparent expertise, the manufacturing process did not run smoothly. It was disorganised and, in certain respects, bungled. As a

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2 *R v Fatu* [2006] 2 NZLR 72 (CA).
3 *Zhang v R* CA606/2018.

consequence, the first batch yielded less methamphetamine than expected. This led Mr Hone and Mr Te Kani to suspect that either Sheene Holloway or one of the Fleets was stealing some of the product.

[14] A few days after the manufacturing process commenced, Mr Te Kani overflowed the upstairs bath when he was cooling down equipment used in the process. The water poured downstairs and woke the landlord. Fearing the Police might be called, the operation was moved to Raymond Fleet's nearby home in Mamaku Street. However, the problems with yield continued as did the increasing paranoia of Messrs Hone and Te Kani.

[15] The manufacturing was completed about four days after it started. But Mr Te Kani and Mr Hone's suspicions lingered. They were convinced methamphetamine had been stolen.

[16] And so, on Monday, 7 August 2017, they decided to take matters into their own hands. First, Mr Te Kani, assisted by Mr Pulemoana, searched Tarena Street. They found nothing.

[17] Then, in the mid-afternoon of that day, Mr Hone and Mr Te Kani drove to Tarena Street in a Mazda MPV (MPV) where they picked up Raymond and Darius Fleet. They took them to a secluded area on Cecil Road, a short distance outside the township. There, under threats, Mr Te Kani and Mr Hone demanded the Fleets disclose the location of the stolen methamphetamine.

[18] Shortly afterwards, Mr Pulemoana and Mr Hura arrived in an Isuzu Bighorn (the Bighorn). The situation quietened and the Fleets were returned to Tarena Street. However, the calm was short lived. In the early evening the MPV and Bighorn turned up at Tarena Street. Mr Te Kani and Mr Hura were in the Bighorn. Mr Hone and Mr Pulemoana were in the MPV.

[19] The men changed places. Mr Hone and Mr Hura got into the Bighorn and drove back out to Cecil Road and buried the clandestine laboratory.

[20] Mr Te Kani, Mr Pulemoana and Raymond Fleet drove back to another address where they picked up Raymond Fleet's nephew, James. In the Bighorn the men returned to Cecil Road.

[21] The two cars rendezvoused on the same part of Cecil Road where Raymond and Darius Fleet had been taken to earlier in the day.

[22] Over the next hour or so there was a series of assaults on Raymond and James Fleet in an effort by the four defendants to extract information on the whereabouts of the "missing" methamphetamine. Mr Hone violently attacked Raymond Fleet. This included an attempt to drown him in a nearby pool of water thwarted only by the intervention of another member of the group.

[23] After this, Mr Te Kani remained in the area for a short while before returning to Mamaku. He appreciated further assaults might take place in an attempt to extract information about the methamphetamine believed to have been stolen. The others went further up Cecil Road in the Bighorn. Mr Hone drove. Mr Hura sat in the front passenger seat. Raymond and James Fleet sat in the back seat with Mr Pulemoana. Some distance up the road Mr Hone stopped. Raymond Fleet was interrogated and beaten. He started to fight back. This enraged Mr Hone who picked up a spade and attacked Raymond Fleet. He hit him about the head. At some point Raymond Fleet was also run over by the Bighorn. It is not known who the driver was. Whether that or the attack with the spade caused Raymond Fleet's death remains uncertain.

[24] James Fleet was violently attacked in the back seat of the Bighorn.

[25] After dealing to Raymond Fleet, Mr Hone then turned his attention to James Fleet. He was taken out of the Bighorn and hit around the head with the spade. He died at the scene.

[26] Leaving the bodies of Raymond and James Fleet by the roadside, Messrs Hone, Hura and Pulemoana returned and met up with Mr Te Kani. They all returned to Rotorua. But not for long. Mr Te Kani contacted Mr Pulemoana and Mr Hura. He instructed them to return with him to the Cecil Road scene to conceal the bodies.

[27] Back on Cecil Road they moved James Fleet's body into a nearby blackberry patch a few metres from the road. Raymond Fleet's body was dragged some distance into the bush where it was hidden in blackberry bushes.

[28] Ten days later the Police found the bodies. Following post mortem examinations it was revealed that Raymond Fleet died from massive blunt force trauma to his head delivered by multiple blows consistent with a spade. His head was massively deformed. He suffered multiple rib fractures. His lungs contained blood indicating he had been subjected to a violent beating before his death. As with his uncle, James Fleet died from blunt force trauma as a consequence of at least six blows to the head by a blunt instrument such as a spade.

[29] A forensic examination of the Bighorn revealed blood spatter on the rear right seat consistent with a violent assault. DNA taken from a sample of the blood revealed it came from James Fleet. Also found in the back of the Bighorn was blood consistent with coming from Mr Pulemoana.

The case against the defendants

[30] In respect of the homicide charges, the Crown case against each of the defendants was as follows:[4]

(a) *Martin Hone:* The principal whose intentional acts were causative of the Fleets' deaths.

(b) *Richard Te Kani:* Although not present at the time of the killings, and unaware of the presence of any weapons, knowingly assisted or encouraged Martin Hone, knowing or anticipating further assaults on the Fleets would take place.

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[4] In the summing-up three scenarios were put to the jury in respect of how Raymond Fleet met his death. These included: (i) Mr Hone running over him in the Bighorn; (ii) Mr Hura running over him in the Bighorn; or (iii) by blows with a spade wielded by Mr Hone. Through the verdicts and as a result of a communication from the jury it was apparent that the third scenario was the factual matrix accepted by the jury for the purposes of its verdicts.

(c) *Zen Pulemoana and Mikaere Hura*: Each through his presence was a party to Fleets' murder through knowing assistance or encouragement. If murder was not proved manslaughter was an available verdict if it was proved the defendants, in assisting or encouraging Mr Hone, knew or anticipated Mr Hone would assault the Fleets.

First ground of appeal – the Gray evidence

Appellant's submissions

[31] Mr Pulemoana's first complaint is that inadmissible hearsay evidence was given by Nathan Gray. Mr Simpkins, for Mr Pulemoana, submitted that in the course of giving evidence Mr Gray gave evidence of what Mr Hura had told him about Mr Pulemoana's involvement and in particular, that he had placed James Fleet in a headlock shortly before Mr Hone killed him. He claims that this evidence was prejudicial inadmissible hearsay in terms of s 27 of the Evidence Act 2006 ("the Act").

[32] Mr Simpkins submitted the headlock evidence was highly prejudicial. It pointed to Mr Pulemoana's involvement in restraining James Fleet shortly before Mr Hone killed James Fleet. It also placed him outside the car at the time the fatal blows were struck. Its admission, he submitted, explained why the jury found him guilty of James Fleet's murder, while acquitting Mr Hura despite the identical nature of the Crown's respective cases against them.

[33] Furthermore, Mr Simpkins submits that Mr Gray's evidence had a cumulative prejudicial effect. That is because Mr Hura, in his Police statement, said that Mr Pulemoana had assaulted Raymond Fleet and "might have assaulted James". Those statements were ruled admissible before trial.[5] The prejudicial effect of this evidence was, in Mr Simpkins' submission, "elevated" by the headlock evidence. As a consequence, the Judge's directions were insufficient to cure the compounding prejudice.

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5 *R v Hura* HC Rotorua CRI-2017-063-3504, 15 October 2018 (Ruling (2) of Fitzgerald J).

How the evidence emerged and how it was treated

[34] In order to examine this question it is necessary to set out the background and the circumstances in which the evidence emerged at trial in some detail.

[35] On 19 April 2018 Mr Gray made a formal written statement to the Police. He described a conversation he had with Mr Hura the day after the killings. The relevant portion of Mr Gray's statement is reproduced below:

> [Mr Hura] told me that [Mr Hone] had lost the plot. That [Mr Hone] was just supposed to beat them up but he got carried away.
>
> He said that it was him, [Mr Pulemoana] and [Mr Hone] there when they died and [Mr Te Kani] was waiting out at the van on the outskirts of the four wheel drive track.
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> [Mr Hura] had run one of them over. He was told to do that by [Mr Hone].
>
> He said he wasn't happy about it but it was a good thing that they were both dead when he did do it.
>
> He said [Mr Hone] had broken the shovel over James' head.
>
> He had kept on beating him until he didn't move anymore.
>
> [Mr Hura] told me that [Mr Pulemoana] had one of them in a head lock.

[36] It is the last sentence which is central to Mr Simpkins' concerns. Prior to trial, Mr Simpkins raised the admissibility of this part of Mr Gray's statement with the Crown. The Crown agreed not to lead it at trial. This agreement was recorded in Fitzgerald J's pre-trial Minute of 3 October 2018 when she noted at [5]:

> Mr McWilliam confirmed that the Crown does not now intend to lead those aspects of Mr Nathan Gray's statement to which Mr Pulemoana had also objected.

[37] Mr Gray gave evidence on 25 October 2018. He did so via a remote AVL link. This was the on eighth day of the trial. Mr Simpkins took the precaution of reminding the Judge that the evidence of the headlock was inadmissible and that the Crown had agreed not to lead it. This is recorded in the Judge's Bench Note of that date.[6] She said:

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6 *R v Hura* HC Rotorua CRI-2017-063-3504, 25 October 2018 (Bench Note (8) of Fitzgerald J).

[2] I also confirmed that the Crown did not propose to lead one aspect of Mr Gray's statement where he recounts statements said to have been made to him by Mr Hura, in relation to Mr Pulemoana's actions at the Cecil Road scene.

[3] I flagged, however, that I did propose to give the jury a direction as to how to treat statements made by one defendant, namely they are admissible only as against that defendant and not the other defendant. Mr Simpkins noted that counsel had been discussing that very issue this morning and defence were going to request that I give such a direction.

[4] We then got underway with the jury. …

…

[6] I then directed the jury on the treatment of defendant's statements. The text of my direction is set out in the schedule attached to this Bench Note.

[38] The direction given by her Honour is set out below:

[1] Just to give you directions on how you are to treat some of the evidence that you may hear in the next session, and perhaps over the next couple of days.

[2] Now, the key point and the basic point, just to note with you, is that any evidence you hear of what one defendant might have said, is only admissible on the Crown case against that defendant, and not admissible on the Crown case against the other defendant. So, by way of example, if you hear evidence of what perhaps Mr Hura might have said, that is admissible in the case of the Crown against Mr Hura, but it is not admissible, and you need to put it aside, when you are considering the case against Mr Pulemoana.

[3] All right? And the converse is the same. If you hear evidence of what Mr Pulemoana has said, perhaps on an earlier occasion, that's admissible in the Crown case against Mr Pulemoana, but is not admissible and needs to be put aside by you when you are considering the case in relation to Mr Hura.

[4] I am sure you will understand the rationale for that. It is just one of basic fairness, because what one defendant says in the absence of another defendant, the other defendant does not have the opportunity to say, "well, hang on, no that's not right" or challenge that. So that is really the rationale for the rule.

[5] Just bear that in mind when you are listening to the evidence. Anything one defendant says, the basic rule, is admissible in the case against them, but *not* in relation to the other defendant. You just need to compartmentalise it in that way.

[39] During Mr Gray's evidence-in-chief, the following exchange took place:

Q. What did [Mr Hura] say happened up in the bush?

A. He basically said that, um, [Mr Hone] had lost the pilot [sic], was smashing Ray in the head with a shovel, um, and that James was in the back of the vehicle, watching this happen.

Q. Did he say where he was, when all of this was happening?

A. I, I can only presume that he was still in the vehicle with James. He said it was [Mr Pulemoana] and [Mr Hone] out on [sic] the vehicle –

[40] At this point Mr Simpkins objected. His exchange with the Bench is not reproduced in the notes of evidence. We have listened to the audio recording. The discussion went as follows:

Mr Simpkins Objection.

Bench Just, just pause.

Mr Simpkins He's going to start to talk about the involvement of [Mr Pulemoana]. I thought we had an arrangement he wouldn't talk about [Mr Pulemoana].

Court Well, just, just pause. I've directed the jury on these matters, thank you.

[41] The notes of evidence record the examination continued:

Q. So you're talking about what Marty's doing with the shovel?

A. Yeah.

Q. Did he – to Ray I think you said?

A. Yes.

Q. Did he talk about what happened to James?

A. Um, he said that James – when they pulled James out of the vehicle, that Zeny had put into …

[42] Having listened to the audio on several occasions we are satisfied that what was actually said was:

A. Um, he said that James – when they pulled James out of the vehicle, that Zeny had put him into a headlock …

[43] Mr Simpkins' response to the Crown's submission that the words complained of were probably not heard by the jury is that he was seated further from the AVL

monitor than the jury. Even in that position he said he could hear the word "headlock" clearly.

[44] While we accept the word "headlock" was uttered it was indistinct. This is partly because Mr Gray was giving evidence remotely and partly because the Judge intervened and spoke over him as he gave the last few words of his answer. Mr Simpkins objected. The Judge told Mr Gray to pause, which he did. After a short interlude Mr Gray continued his evidence without further incident.

[45] Later in Mr Gray's cross-examination the Crown made an unrelated objection. The Judge asked the jury to retire. In the course of the Chambers discussion Mr Simpkins raised his concerns over Mr Gray's evidence and the headlock. The following exchange took place:

> Mr Simpkins — Ma'am I have got an issue in terms of the evidence regarding the head lock which you alluded to this morning. I do not know if you want to hear from me now or shall we park it until the end of his evidence. I just simply want to raise it with you Ma'am.
>
> Court — Well it is certainly I think he said it. I don't understand, it wasn't elicited in my view from Mr Hill and that was precisely the reason why I wanted to give that direction to the jury to the extent that anything unexpected popped out that wasn't [supposed] to pop out.
>
> Mr Simpkins — Yes this is precisely why I objected. I anticipated that this sort of evidence might come out and then –
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> Court — Yes which is why I gave the direction and it is there. I will be dealing with it in my summing up. I'm not sure what you want me to do about –
>
> Mr Simpkins — I'm simply raising at this stage Ma'am that that evidence was flagged in pre-trials, I objected to it, I'm just flagging the Crown agreed that they would not be eliciting that evidence. It has come out despite our discussions this morning. I don't know how in terms of, well you're probably going to [cure] it by your directions and bring further attention to it, would probably not help –
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> Court — Well I don't propose to say anything now because I think right now we are all talking over each other so whether they picked it up or not, but I will certainly be making that point in my summing up. I certainly got the feeling the jury quite followed the direction I gave term earlier and look, this may happen from time to time. I did not understand it to be elicited

actively by Mr Hill. Mr Gray kind of volunteered it and that is why I wanted to give that direction at the outset. So unless there is any other applications you had I will deal with it in my summing up and I will note your objection. Thank you.

Mr Simpkins Thank you Ma'am,that's all I am doing is I'm raising it at this point.

[46] The following day the jury watched Mr Hura's video interview. Before it was played the Judge repeated the direction she had given the previous day. She recorded this in a Bench Note:[7]

> [11] Before the DVD commenced, I also reiterated the formal direction I had given to the jury yesterday, namely that Mr Hura's statements in the interview are only admissible in the Crown case against him and not in the Crown case against Mr Pulemoana. I reiterated the reason for that, being fairness. All of the jury were nodding and appeared to understand the direction.

[47] In his closing address Mr Simpkins dealt at some length with the inadmissibility of Mr Hura's statements against Mr Pulemoana:

> … You heard me say in my address to you that Mr Pulemoana did nothing more than sit in the back of the car, frozen to the seat. You heard other evidence, other evidence in the form of a statement made by his co-accused. *His co-accused's statement was played and through that statement there was disclosures about assaults, by Zen Pulemoana on Raymond Fleet. That evidence is inadmissible. If I haven't heard it once from the Judge I've heard it three or four times, that you must put that evidence to one side, because it is inadmissible.* Her Honour, the Judge, has spoken to you and I'm sure she will address you again on this when she sums up to you tomorrow, that evidence is inadmissible, and it's inadmissible for a number of reasons. Her Honour, the Judge, told you that how could Mr Zen Pulemoana possibly answer what has been said in that video statement, when he wasn't there. Equally as important, ladies and gentlemen, it's my submission to you that the rationale behind this rule, or this area of the law, is that there is the prospect of self-preservation. That the prospect of self-serving statements been given, and you might think that possibly this is what was happening in this video, but that's a matter for you. In essence what I'm telling you, is *there is no evidence at all that Mr Pulemoana actually physically assaulted anyone from eyewitnesses, none. I was very attentive in watching you when this evidence was being played, and I thought I saw a couple of you making notes when this evidence came out, that Mr Pulemoana was, or had assaulted Mr Raymond Fleet. And I saw you take notes and shortly after you walked out into the jury room, with notes, and my sceptical mind thought that you were writing this down as*

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7 *R v Hura* HC Rotorua CRI-2017-063-3504, 26 October 2018 (Bench Note (9) of Fitzgerald J).

> *evidence. But perhaps you were writing it down to remind each other that this evidence is inadmissible.*
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> *Equally the evidence of Mr Nathan Gray and anything he said about Zen Pulemoana, which came from the mouth of Mr Hura, is inadmissible and you cannot use it, and this is why I am so confident when I say that all he did was sit in the back of the motor vehicle.*
>
> (Emphasis added).

[48] As signalled, the Judge covered the question of the admissibility of co-defendants' out of court statements in some detail in her summing up.

> [32] The one further direction to give you in relation to this type of evidence is one that I have spoken to you about on two or three occasions now during the trial. That is, any statements made by Mr Hura, so for example, what any of the other witnesses, such as Mr Raroa, Mr Gray or the like, said he told them, and his own statements made to Police in his DVD interview, are admissible only in the Crown's case against Mr Hura. As Mr Simpkins rightly noted yesterday, and as you are aware from my earlier directions, those statements are *not* admissible in the Crown's case against Mr Pulemoana. And, the reverse of course also applies. Any evidence of what Mr Pulemoana said to other witnesses, or to the Police, is admissible in the Crown's case against him, but is not admissible in the Crown's case against Mr Hura.
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> [33] Accordingly, and I have told you before during the course of the trial, each of the defendant's statements must be disregarded when you are considering the case against the other defendant. *So, by way of example, when you are considering the case against Mr Pulemoana, you must disregard and just put to one side what Mr Hura said in his interview with the Police or any other statements said to have been made by Mr Hura.*
>
> [34] And as I explained earlier and you may recall, the reason for this rule is just one of basic fairness. Statements made by one defendant in the absence of the other mean that there has been no chance for the other defendant to challenge them at the time, to say for example, "no that's wrong, I didn't do that" or "I didn't say that". So, I am sure you all understand that rationale for that rule.
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> (Emphasis added).

Discussion

[49] We must allow the appeal if there has been any error affecting the trial such that there is a real risk that its outcome was affected.[8]

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[8] Criminal Procedure Act 2011, s 232(2)(c) and (4)(a).

[50] It is not disputed that the headlock evidence was inadmissible. However, the inadvertent reception of inadmissible evidence does not, inevitably, lead to a miscarriage of justice. What is required on appeal is a contextual evaluation. An appellate court will not lightly interfere with a trial judge's discretion when dealing with a jury which has received in evidence illegitimate prejudicial material.[9] The exercise of that discretion depends on the nature of what was admitted into evidence, the circumstances in which it was admitted and what, in the light of the circumstances viewed as a whole, is the correct course.[10]

[51] As this Court said in *Edmonds v R*:[11]

> The nature and manner of the [inadvertent] disclosure must be considered. For example this Court would be more likely to find that a miscarriage of justice had occurred if a witness had unilaterally, or at the invitation of the Crown, taken matters into his or her own hands and introduced damaging and irrelevant material that affected the fairness the trial. On the other hand if the answer given is a natural response to a line of questioning in cross-examination, the position may well be different. The nature of the defence case at trial will be another factor. Where the case hinges on the credibility of witnesses, unfairly prejudicial evidence may be considered more significant. However where there is physical or other evidence which corroborates the credibility of one or other of the witnesses, then the effect of the unfairly prejudicial evidence may be lessened. Measures taken after the evidence is given are very likely to be significant. The fact that no jury direction is given where prejudicial evidence is inadvertently disclosed is not determinative. This Court is likely to regard as significant the fact that an experienced trial judge did not see fit to intervene, or see any need to direct the jury about evidence later complained of on appeal.

[52] While it is obviously regrettable this evidence was given, slips of this sort will occur from time to time particularly in complex multi-defendant cases such as this. However, applying the reasoning in *Edmonds*, we are not satisfied that a miscarriage of justice occurred in this case for the reasons which follow.

[53] First, this is not a case of a witness unilaterally or intentionally introducing damaging and irrelevant material. Nor is it a case where the Crown has been complicit in such a strategy. The Judge saw nothing deliberate or improper in the way the

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9 *R v Thompson* [2006] NZSC 3, [2006] 2 NZLR 577 at [16].
10 *R v Weaver* [1968] 1 QB 353 (CA) at 359–360.
11 *Edmonds v R* [2015] NZCA 152 at [24] (footnotes omitted).

evidence was introduced and we agree. Indeed, Mr Simpkins did not attempt to suggest otherwise.

[54] Secondly, the context in which Mr Gray gave his evidence is relevant. By the time he was called the jury had heard from some 23 Crown witnesses. He gave evidence on the Thursday of the second week in a trial where the notes of evidence run to over 500 pages. The word "headlock" is not recorded in the notes of evidence, presumably because the transcriber was unable to hear that part of Mr Gray's evidence for the reasons given earlier. While we accept the word "headlock" was used it was indistinct. Mr Simpkins would have been particularly alert to ensure it was not uttered. He knew what might be coming. But not so the jury. Even if they heard the word, its significance is unlikely to have been fully appreciated. Add to this that there was no further mention by Mr Gray of Mr Pulemoana's actions. We agree with the Crown that it is most unlikely the jury would have picked up on this evidence let alone remembered it and relied on it to convict Mr Pulemoana of murder rather than manslaughter.

[55] Thirdly, even if a juror or jurors heard the evidence, they could not have been left in any doubt that it was inadmissible and should not be considered by them. Before Mr Gray was connected by AVL the Judge directed the jury on the treatment of co-defendants' statements. Then, before Mr Hura's video interview was played, she reiterated that direction, explaining that his statements were admissible only against Mr Hura and not Mr Pulemoana. Consistent with best practice she explained the reasons behind the rule. She also noted the jury nodded and appeared to understand the direction. Her directions were followed by Mr Simpkins' pointed submissions on how Mr Hura's comments implicating Mr Pulemoana in the assaults were inadmissible. Indeed, he went further and explicitly mentioned Mr Gray's evidence noting that anything Mr Gray said about Mr Pulemoana "which came from the mouth of Mr Hura" was inadmissible and could not be used. Finally, in her summing up, the Judge gave a full direction adding, by way of example, that when considering the case against Mr Pulemoana the jury must disregard and put to one side what Mr Hura said

in his interview with the Police or "any other statements said to have been made by Mr Hura".[12] Again she explained the reasons behind the rule.

[56] Fourthly, we note that during the in chambers discussion that occurred in the course of Mr Gray's evidence the Judge asked Mr Simpkins what he wanted her to do and whether he wished to make any applications. Plainly these questions were directed at whether Mr Simpkins wished to apply for a mistrial. No such application was made. In the course of argument before us Mr Simpkins explained that he discussed the issue of applying for a mistrial with Mr Pulemoana. Apparently, Mr Pulemoana's preference was to continue with the trial. That was a tactical call open to Mr Pulemoana. However, that he elected to proceed likely reflects the reality that such an application would have been unlikely to succeed for the reasons discussed above.

[57] For these reasons we are satisfied that this first ground of appeal must fail.

Second ground of appeal – the juror

[58] The second ground of appeal relates to the Judge's refusal to discharge a juror whom we shall refer to as Mr X. The relevant background is set out in the Judge's Bench Note on the second day of the trial.[13] It records:

> [4] Mr McWilliam then raised an issue which had arisen overnight in relation to two jurors. The victim James Fleet's mother, Ms Bronwyn Fleet, had raised with the Officer-in-Charge that she recognised two of the jurors. They are [Ms Y] and [Mr X].
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> …
>
> [17] I then saw [Mr X]. He said he may have been in Ms Fleet's antenatal course, but this would have been 14 years ago. However, he only attended two classes, which got him into trouble with his wife, but he was working night shifts at that time. He confirmed he had had no other interactions with Ms Fleet. He was not aware of his wife having any Facebook contact with her but if she had, thought it would have been several years ago after the antenatal classes. He said his family does not know the Fleets and they have no interactions with the Fleet family, other than as described above.
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> [18] In response to my question, he confirmed he was comfortable he could approach the case with an open and unbiased mind.

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12 See above at [48].

13 *R v Hura* HC Rotorua CRI-2014-063-3504, 16 October 2018 (Bench Note (2) of Fitzgerald J).

…

> [20] In relation to [Mr X], Mr Simpkins noted that he did not have the same level of concern in relation to him [as compared to juror Ms Y], but out of an abundance of caution and given we will have the panel coming back tomorrow, it would be prudent to discharge him also. Mr Edward [for Mr Hura] supported that view, noting that we had a very large panel and thus should not have difficulty getting a further two jurors. Mr McWilliam saw no reason to discharge [Mr X].
>
> [21] I confirmed that I did not propose to discharge [Mr X]. I did not consider it was appropriate to do so unless there was a valid and proper reason, given he had become a member of the jury as a result of a formal empanelling process. I therefore confirmed that I would not be discharging [Mr X].[14]

[59] The following morning Mr Simpkins again raised his concerns with the Judge. With the agreement of all counsel, the Judge again spoke with Mr X. This is recorded in a Bench Note:[15]

> [5] I proceeded to see each of the two jurors.[16] I spoke with [Mr X] first. He did not raise any additional facts or matters. He simply noted that if there was a prospect of the matters discussed yesterday putting the trial in jeopardy, could I please remove him from the jury. He confirmed, however, that he was willing and able to continue. I noted that in light of the matters discussed yesterday, I had formed the view that it was appropriate for him to stay on the jury and I therefore did not propose to discharge him.
>
> …
>
> [8] I then saw counsel in Court for chambers. I noted that I remained of the view that there was no reason to discharge [Mr X]. Mr Simpkins reiterated that he remained opposed to [Mr X] remaining on the jury. He said this was particularly so given it related to a matter so significant as the birth of children. I interpolate to note that the interaction between [Mr X] and Ms Bronwyn Fleet (who is not herself a witness) occurred some 14 years ago, and [Mr X] had attended only two antenatal classes hosted by Ms Fleet and did not otherwise recall or remember her…

[60] As a consequence the Judge concluded the circumstances of the connection between Mr X and Ms Fleet were so remote as not to require the juror's discharge.

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14 Ms Y was discharged.

15 *R v Hura* HC Rotorua CRI-2014-063-3504, 18 October 2018 (Bench Note (3) of Fitzgerald J).

16 An issue in respect of another juror also arose overnight requiring the Judge to speak with both jurors, including Mr X.

Appellant's submissions

[61] On appeal, Mr Simpkins essentially repeated the arguments he advanced before the trial Judge. He said that the birth of a first child is a significant event in every parent's life. Even with the passing of years, the event remains a milestone in the lives of parents; an event so significant that a connection forged by a midwife in antenatal classes, albeit years earlier, is such that Mr X could not discharge his task impartially.

[62] Furthermore, Mr Simpkins submitted that the Judge's questioning of Mr X "would have triggered a recollection of the previous positive connection that [Ms Fleet] had given to his wife, child and family during this important event in their lives".

Discussion

[63] Section 16(3)(b) of the Juries Act 1981 allows a Judge to excuse a person called to attend as a juror if the Judge is satisfied they are closely connected with one of the parties.

[64] We agree that the Judge was correct not to discharge Mr X for the following reasons.

[65] First, Mr X's contact with Ms Fleet was approximately 14 years earlier.

[66] Secondly, Mr X attended only two of the antenatal classes.

[67] Thirdly, although Ms Fleet and the juror's wife had been Facebook friends for a short time, their electronic interactions occurred six to seven years earlier and comprised of approximately 10 comments over a two or three year period.

[68] Fourthly, Mr X had no other interactions with Ms Fleet and was not aware of his wife's Facebook contact. He had no other contact with the Fleet family.

[69] Fifthly, Mr X confirmed to the Judge he was comfortable with continuing to serve as a juror and expressed confidence he could approach the task with an open and unbiased mind.

[70] Finally, it is apparent from the jury's verdicts that they carefully considered all the evidence. Had Mr X been biased against Mr Pulemoana and was somehow able to influence other jurors to that view, it might be expected that the jury would also have convicted him for the murder of Raymond Fleet rather than finding him guilty of the lesser charge of manslaughter.

[71] In our view any concern regarding the juror's qualification to serve is speculative. There is nothing which might lead a reasonably informed and fair minded observer to apprehend or suspect the juror might not have discharged his duty in an impartial manner.[17]

[72] For these reasons this second ground of appeal must also fail.

Third ground of appeal – inconsistent verdicts

Appellant's submissions

[73] Mr Simpkins submitted that the roles played by Mr Hura and Mr Pulemoana leading to the death of James Fleet were extremely similar; there was no reason to distinguish them. He thus submitted that the jury's verdict in finding Mr Pulemoana guilty of James Fleet's murder was factually inconsistent with its manslaughter verdict in respect of Mr Hura.

[74] In support of this submission he pointed out that the question trail was identical for both defendants and thus the different verdicts must mean that the jury determined that Mr Pulemoana knew Mr Hone intended to kill James Fleet but Mr Hura did not. He says this distinction is logically untenable. The only difference between their respective cases is where the men were seated in the Bighorn at the time Mr Hone was beating Raymond Fleet to death. Mr Hura was in the front passenger seat and Mr Pulemoana was seated in the back next to James Fleet. Mr Simpkins said that the

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17 *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79 at [17]–[18].

only way the jury could have drawn the distinction between Mr Pulemoana and Mr Hura was that it must have "concluded Mr Pulemoana was physically involved".

[75] Mr Simpkins links this submission to his first ground of appeal; namely that the only logical explanation is that the jury wrongly placed weight on the inadmissible evidence of Mr Gray and what Mr Hura said about Mr Pulemoana in his Police interview. Thus, Mr Simpkins submitted that Mr Gray's inadmissible evidence "elevated" Mr Pulemoana from being present to being an "active aggressor". He also said it was the main distinguishing factor between the evidence heard in respect of Mr Hura and the evidence heard in respect of Mr Pulemoana. He thus invites the Court to substitute the murder conviction for one of manslaughter.[18]

Discussion

[76] This is a case of factual, rather than legal, inconsistency. As the Supreme Court noted in *B (SC12/2013) v R*, there is likely to be greater scope for differing verdicts in multiple defendant cases.[19] As that Court observed, while courts seek to uphold the integrity of the jury system it may be necessary to intervene to ensure justice is done when juries deliver multiple verdicts incapable of logical reconciliation.[20]

[77] The general approach to inconsistent verdicts was summarised by the majority.[21] For the purposes of this appeal the following seven principles are relevant.

(a) There is a distinction between cases involving legal inconsistency and those involving factual inconsistency.

(b) Factual inconsistency occurs where, given the evidence, two verdicts cannot stand together. This may be between verdicts involving the same defendant or between verdicts involving different defendants charged in connection with related events.

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18 Criminal Procedure Act, s 234.

19 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [68(b)], citing *R v Pittiman* 2006 SCC 9, [2006] 1 SCR 381 at [10].

20 *B (SC12/2013) v R*, above n 19, at [67].

21 At [68], referring to general principles set out in the majority judgment of *MacKenzie v R* (1996) 190 CLR 348 at 366–368.

(c) In relation to factual inconsistency arising from "guilty" and "not guilty" verdicts, where a defendant has been charged with multiple offences, the test is one of "logic and reasonableness". Verdicts will be inconsistent where an acquittal on one charge renders a guilty verdict on another charge unsafe, in the sense that no reasonable jury could have arrived at different verdicts on the two different charges.[22]

(d) Courts are reluctant to conclude that verdicts are inconsistent for two reasons. First, because the jury's function must be respected and, secondly, because there is general satisfaction with the way juries perform their role.[23] If there is some evidence to support the verdicts said to be inconsistent, an appellate court will not usurp the jury's function by substituting its own view of the facts for that of the jury. But any reasonable explanation for the difference between the two verdicts "must be found in the evidence properly used".[24]

(e) An appellate court will intervene in cases where the different verdicts returned by the jury represent "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty".[25]

(f) A case-by-case assessment of the matter is required.

(g) The obligation to establish inconsistency rests with the person challenging the verdict. Where inconsistency is established the court must make such consequential orders as the justice of the case requires.

[78] There is no inconsistency where verdicts are reconcilable because of differences in the nature and quality of the admissible evidence.[26] It will generally be difficult to demonstrate inconsistency between verdicts reached in respect of alleged

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22 *R v Irvine* [1976] 1 NZLR 96 (CA) at 99.
23 *R v H* [2000] 2 NZLR 581 (CA) at [28].
24 *R v O (No 2)* [1999] 1 NZLR 326 (CA) at 333. Also reported as *R v Accused (CA47/98)* (1998) 15 CRNZ 622.
25 *MacKenzie v R,* above n 21, at 368.
26 *R v K* CA49/96, 13 August 1996; and *R v Jack-Kino* CA440/95, 22 May 1996.

co-offenders or co-conspirators. Inconsistency will usually require a conclusion that the same jury has apparently made different findings as to guilt on identical evidence.[27] If there are significant differences between the cases against the various defendants inconsistency will be hard to establish. The court must look to any differences in the evidence admissible against each.[28]

[79] We are satisfied that in the present case the verdicts are reconcilable; there are differences founded in the nature and quality of the admissible evidence relative to the respective cases of Mr Hura and Mr Pulemoana. Our reasons follow.

[80] First, Mr Pulemoana was seated in the back seat of the Bighorn when James Fleet was assaulted. This was before James Fleet was pulled out by Mr Hone and attacked with the spade. Even if he did not participate Mr Pulemoana must have had an unimpeded view of what was happening to James Fleet. This can be contrasted with Mr Hura who was in the front passenger seat.

[81] Secondly, as Mr Simpkins was bound to accept, it was a reasonably available inference that Mr Pulemoana had some level of involvement in the assault of James Fleet in the back of the Bighorn. It was an agreed fact that a number of blood stains taken from various places of the back seat area of the Bighorn were found to contain DNA from James Fleet. Furthermore, a blood stain taken from the back of the driver's seat was found to contain DNA attributed to Mr Pulemoana. It would not be unreasonable for the jury to conclude that this combination of evidence supported the inference that Mr Pulemoana was not a mere, passive bystander but was, in fact, involved, either on his own account or with another or others, in the assault of James Fleet in the back of the Bighorn immediately prior to his death.

[82] Thirdly, Mr Pulemoana did not make a statement. Mr Hura did. Mr Hura denied being involved in any assault. He said he did not see Mr Hone pull James Fleet out of the Bighorn and other than admitting he helped conceal the Fleets' bodies he denied any involvement in their killings. The jury had the benefit of viewing his video interview which lasted some five hours. For Mr Hura, the jury was urged to accept

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27 *Osland v R* [1998] HCA 75, (1998) 197 CLR 316.
28 *R v Pittiman*, above n 19, at [7]–[10].

what he said in his interview, putting in context his initial, feeble and unsophisticated, denials. For Mr Hura, it was submitted that his evidence he stayed in the car should be accepted; specifically that he said, "No", when Mr Hone told him that he ought to carry out the assault. No comparable evidence was available to the jury in respect of Mr Pulemoana. This is not to suggest that the absence of a statement adds to the case against Mr Pulemoana. The Judge correctly directed the jury not to approach their task in that way. However, unlike Mr Hura, the absence of a statement from Mr Pulemoana meant that the jury was unable to consider any explanation by him which might have raised a doubt as to his involvement.

[83] For these reasons we are satisfied that the two verdicts are capable of standing together. This is not a case where the different verdicts represent "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty".[29] We are not satisfied that Mr Pulemoana has established an inconsistency in the jury returning a verdict of murder.

[84] For these reasons this ground of appeal must fail.

Result

[85] The appeal is dismissed.

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[29] *MacKenzie v R*, above n 21.