IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA240/2021
[2023] NZCA 615

BETWEEN	REUBEN WAYNE HIRA GIBSON-PARK Appellant
AND	THE KING Respondent

Hearing:	19 June 2023
Court:	Brown, Peters and Mander J
Counsel:	N P Chisnall KC and T Epati for Appellant Z R Johnston and M A Shaw for Respondent
Judgment:	4 December 2023 at 10.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Mander J)

[1] In the early morning of 15 December 2019, Raymond Neilson was subjected to a fatal beating in his own home. His house and body were subsequently set alight. The appellant, Reuben Gibson-Park, together with his co-defendant, Tihei Patuwai, were found guilty by a jury of Mr Neilson's murder. Mr Gibson-Park was also convicted of arson. Both were sentenced to life imprisonment with a minimum non-parole period of 17 years.[1]

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1 *R v Patuwai* [2021] NZHC 675.

[2] Mr Gibson-Park appeals his convictions on a range of grounds relating to alleged errors made by his trial counsel and by the trial Judge which it is argued resulted in a miscarriage of justice.

Background

[3] On the evening of 14 December 2019, Messrs Gibson-Park and Patuwai attended a work function in Tokomaru Bay. After the function, they drove around in convoy together with other men looking for further activity and came upon Mr Neilson, who was walking home. As they drove past him, Mr Neilson called out and struck the side of the car. Mr Gibson-Park, who was driving the car, did a U-turn, got out of the vehicle and confronted Mr Neilson, who ran off to his nearby home.

[4] When Mr Neilson got to his house, he called out to Mr Gibson-Park and his associates. They became angry. A group comprising Messrs Gibson-Park and Patuwai, together with two younger men, Karaitiana Kenworthy and William Reedy, approached Mr Neilson's house. The remaining occupants of the vehicles drove away in one car.

[5] The Crown's case was that Messrs Gibson-Park and Patuwai administered a severe beating to Mr Neilson. This initially took place on the front deck of Mr Neilson's house and then continued inside. During the attack it was alleged both men punched and kicked Mr Neilson, and Mr Gibson-Park used a baseball bat. Messrs Kenworthy and Reedy witnessed the first part of this assault, when the primary violence occurred on the deck, before leaving the house. After the two younger men withdrew, Messrs Gibson-Park and Patuwai recommenced the attack on Mr Neilson, including with the bat.

Messrs Reedy and Kenworthy's accounts

[6] Messrs Kenworthy and Reedy were both called by the Crown as witnesses in support of its case. Mr Reedy described how Mr Neilson had initially been holding a baseball bat but, by the time the group were coming up the steps to the front deck, he had put this down and was holding a knife. Mr Gibson-Park persuaded Mr Neilson to put the knife down. However, he then began punching Mr Neilson. Mr Patuwai joined

in and both men punched and kicked Mr Neilson. Mr Reedy gave evidence that after Mr Neilson had been thrown to the ground, Mr Gibson-Park got on top of him and drove his elbow down into Mr Neilson's face a number of times, while Mr Patuwai stomped on his pelvis and thigh area. Both men at this time were asking Mr Neilson where the drugs were kept.

[7] Mr Reedy said that, on the instructions of the two older men, he and Mr Kenworthy entered the house and searched for drugs. By the time he returned to the deck, Mr Reedy observed that Mr Neilson was still conscious, although yelling with pain. His evidence was that Mr Gibson-Park then used the butt end of the baseball bat twice to hit Mr Neilson in the chest. At this point, Messrs Reedy and Kenworthy left the house. As they did so, Mr Reedy described hearing what he said was a bat striking something. Mr Reedy said he went and sat in the vehicle and turned the music up loud to drown out the sound of Mr Neilson screaming, and was joined by Mr Kenworthy. Mr Reedy described Mr Gibson-Park coming to the truck still holding the bat, grabbing his collar and ordering him to stay in the vehicle. However, Mr Patuwai then shouted from the house for he and Mr Kenworthy to leave. As they drove away, Mr Reedy said he could hear the sound of screaming and the bat hitting something.

[8] Mr Kenworthy's evidence was to similar effect. He admitted to having initially joined in the assault on Mr Neilson on the deck, punching him in the face and kicking him twice in the face and ribs. Mr Kenworthy described how Mr Neilson was thrown to the ground and that, while in that prone position, Messrs Gibson-Park and Patuwai repeatedly punched and kicked him. Mr Kenworthy said he was pulled away by Mr Reedy, which prevented his further participation. He also mentioned how Mr Gibson-Park pinned Mr Neilson to the ground and kneed him in the back while Mr Patuwai punched him. Mr Kenworthy confirmed he and Mr Reedy had gone inside the house to search for drugs. When Mr Kenworthy came back out onto the deck, he described how Mr Neilson was at that point still moving — kicking his legs around. He and Mr Reedy were told to "eff off" by Mr Gibson-Park, and they went to the vehicle.

The neighbour's evidence

[9] As to what happened after Messrs Reedy and Kenworthy left, there was evidence from a neighbour of overhearing what she thought was the sound of a person being repeatedly hit and two people's voices. She gave evidence of hearing what sounded like a person shouting for help before being taken inside the house and it going quiet. The neighbour's evidence was that some 40 minutes later a vehicle arrived at Mr Neilson's house and left soon afterwards. She then noticed a fire and called 111. A subsequent investigation confirmed it was the result of arson. It was the Crown's case that Mr Gibson-Park had returned later that night and lit the fire.

The brother's evidence

[10] Messrs Gibson-Park and Patuwai, at some stage, left Mr Neilson's house and went to Mr Patuwai's brother's place to ask him for a ride home. Shannon Patuwai-Matete gave evidence of being woken by the two men. While driving them home that night, he heard his brother say they had "fucked up" Mr Neilson and Mr Gibson-Park tell his brother, "we need to go torch him, bro".

Mr Patuwai's police interviews

[11] Mr Patuwai was interviewed by police on two occasions a week later, on 22 December 2019. He admitted going to Mr Neilson's house "to give him a hiding" but maintained Mr Neilson was still breathing at the time he left the house after the attack. He admitted to hitting Mr Neilson at least a dozen times, with four of these blows being to the face. He described Mr Gibson-Park as having punched Mr Neilson in the head and chest more than 20 — "might of" been more than 30 — times, including with a bat, all over his body and head, with significant force.

[12] Mr Patuwai described Mr Neilson stumbling inside the house and Mr Gibson-Park using the baseball bat to strike him as he lay on the ground. He said Mr Neilson was struck about 40 times in this way with full force and that while watching this Mr Patuwai was "freaking out".

[13] Mr Patuwai denied any knowledge regarding the fire, although he referred to Mr Gibson-Park saying they needed to "go torch him, bro", in his brother's car.

The trial

[14] The Crown's case was that Messrs Gibson-Park and Patuwai had acted together in administering a fatal beating to Mr Neilson. Their murderous intent could be inferred from the sustained nature and level of force that had been used. Mr Gibson-Park faced the arson charge alone, with the Crown's case being that he had returned to Mr Neilson's house and set the fire in order to cover up the murder.

[15] Mr Gibson-Park's defence was that Mr Patuwai had administered the majority of the violence. He accepted he was guilty of manslaughter but denied having a murderous intent. He denied any knowledge of or involvement with the arson. Mr Gibson-Park had not made a statement to police and gave evidence at his trial. In doing so, he described how all four men were involved in the assault on Mr Neilson on the deck. He admitted punching Mr Neilson several times and striking him in the face with his elbows in order to keep him from getting up. He also admitted having been handed a bat by either Mr Reedy or Mr Kenworthy, which he used to strike Mr Neilson. However, he said he only did this three times and the blows were to the deceased's legs, buttocks and rib area for the purpose of preventing him from getting up.

[16] Mr Gibson-Park's evidence was that Mr Neilson had got up, at which point he punched Mr Neilson again, causing him to stumble inside the house and fall to the floor. He described Mr Patuwai slamming an air gun into Mr Neilson's face several times and that, despite him initially being able to restrain Mr Patuwai, his co-defendant had stomped on Mr Neilson's chest and head. He had then tackled Mr Patuwai to get him to desist before both men left the address. In respect of the arson, Mr Gibson-Park denied being involved. He maintained he was at the beach in the presence of his then girlfriend when the arson was committed.

The appeal

[17] Mr Gibson-Park brings his appeal on four grounds which it is submitted, either individually or in combination, have given rise to a miscarriage of justice:

(a) Errors by counsel are alleged to have occurred in respect of two matters that were said to have shaped the way Mr Gibson-Park's case was run, and attracted criticism from the trial Judge, Cooke J. These were identified as:

(i) Mr Gibson-Park's trial counsel, Mr Ryan, having asserted a defence that relied on a flawed understanding of the law of causation; and

(ii) counsel having impermissibly questioned a witness on the basis of Mr Patuwai's police interview due to a misunderstanding of the law regarding the cross-admissibility of the co-defendant's police statements.

(b) Undue prejudice had been caused by Mr Patuwai's statements to police that illegitimately inculpated Mr Gibson-Park and could not be cured by judicial direction.

(c) The trial Judge erred by only providing a generic lies direction that applied to "witnesses" and failed to give a tailored reliability warning in relation to two key Crown witnesses, Messrs Kenworthy and Reedy.[2]

(d) Trial counsel's failure to file an alibi notice in respect of the arson charge resulted in the Crown erroneously being permitted to call hearsay evidence in rebuttal that unfairly prejudiced Mr Gibson-Park.

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2 Evidence Act 2006, s 122(2)(c).

Errors by trial counsel

[18] Mr Gibson-Park relies upon two aspects of trial counsel's conduct of his defence that are alleged to have given rise to a real risk that the trial's outcome was affected, and caused his trial to miscarry.[3]

Supposed "causation defence"

[19] Trial counsel is criticised for a line of questioning he engaged in with Dr White, the forensic pathologist who conducted the post-mortem examination of Mr Neilson, regarding the cause of Mr Neilson's death. Trial counsel is also criticised for a submission, made in his closing address, that Mr Gibson-Park was not guilty of murder because he was not responsible for the neck injuries identified by the pathologist as a potential cause of Mr Neilson's death.

[20] Dr White's evidence was that Mr Neilson's death was caused by blunt force trauma to the face and head in combination with compression injuries to the neck which restricted his airways. Dr White was unable to determine whether the head injuries or the injuries relating to neck compression had of themselves been the mechanism by which death had been caused. The evidence was that each set of injuries constituted a major operative cause of death and that it was impossible to definitively identify which had been the more severe.

[21] In his closing address, Mr Ryan made the following submission:

> Importantly … Dr White confirmed that Mr Neilson might well have, in the absence of the neck compression, survived the other injuries, but that was dependent on appropriate aid being given. Mr Gibson-Park was not responsible for causing the neck injuries to Mr Neilson. He accepts he punched him; he accepts he kicked him around the body; he accepts he hit him with a baseball bat. None of those injuries were likely to cause Mr Neilson's death.
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> The defendant, he gave evidence that he punched and kicked Mr Neilson. You heard him yesterday afternoon and this morning. He confirmed he struck Mr Neilson with the baseball bat. He confirmed in evidence, on oath, before you that he did not know that the injuries he caused Mr Neilson [were] likely to cause death. Importantly, he gave evidence that when he was in the bedroom of the address, this is after the two other guys had left. He came out

[3] Criminal Procedure Act 2011, s 232(2)(c) and (4)(a); and *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 73 at [70].

> and saw Mr Patuwai stomping on Mr Neilson's chest and neck. I say to you that's when the neck compression occurred. I say to you but for the neck compression occurring Mr Nielson wouldn't have died.

[22] As a result of other criticisms of trial counsel's conduct of Mr Gibson-Park's defence, a waiver of privilege was obtained and an affidavit filed by Mr Ryan in response to those matters. He deposed, in relation to an issue concerning Mr Gibson-Park giving evidence:

> Mr Gibson-Park's defence was that he should be found guilty of manslaughter but not murder. One of the strands of his defence was a line of authority that stated where there are two operating causes of death the jury must be unanimous on what cause resulted in the death of a person and if the jury were not unanimous on this then the appropriate verdict was one of manslaughter.

[23] As a result of the statement contained in trial counsel's affidavit, an additional ground was advanced that had not previously been identified in the original grounds of appeal. Based on what Mr Ryan had stated, it was submitted he had misunderstood the law relating to causation and embarked on a defence that was not available to Mr Gibson-Park, nor one that was sustainable on the state of the pathologist's evidence, who had not accepted the proposition that the neck injuries were the only substantial cause of death. Dr White said that she could not rule out either the compression injuries to the neck or the more general blunt force trauma to the face and head as a singular operative cause, and said that they had likely acted in combination.

[24] It was submitted this error explained why trial counsel had advised Mr Gibson-Park to give evidence and why, when giving his testimony, Mr Gibson-Park stated, "the injuries that I caused him didn't lead to his death". It was argued this concession of having caused some of the injuries was able to be exploited by the Crown by emphasising that Mr Gibson-Park had participated in the joint assault and caused some of the injuries. It was suggested this was the product of counsel's error in believing the assaults to which Mr Gibson-Park had admitted could be divisible from those inflicted by others.

[25] It was also argued that counsel's approach placed an obligation on the trial Judge to provide the following direction, which reflected poorly on Mr Gibson-Park's defence:

> [33] … there has been some reference to whether you can be sure how Mr Neilson died given Dr White's evidence about the cause of his death. The prosecution alleges that there were a number of injuries sustained by Mr Neilson as a consequence of the punches, blows or kicks administered by Mr Gibson-Park and Mr Patuwai. You do not need to be sure that any particular injury was the one that finally resulted in Mr Neilson's death if you are all sure that the injuries that killed him were sustained as part of the one attack. …

Analysis

[26] Trial counsel's apparent belief was that this was a case giving rise to different possible scenarios that required the jury to be unanimous as to which of the alternative distinct acts were causative of death. We accept that this was misplaced. This case involved an ongoing assault that comprised many different blows. As a matter of law, it was not necessary for the Crown to isolate the defendants' particular acts during the course of the beating that were fatal for the purposes of assessing Mr Gibson-Park's state of mind.[4]

[27] However, as noted by Mr Ryan in his affidavit, this was but "[o]ne of the strands" of Mr Gibson-Park's defence. Moreover, whatever its legal worth as a defence, it was a stance that was consistent with his primary defence of a lack of murderous intent. One of the ways that was sought to be demonstrated was Mr Gibson-Park's less violent involvement, that was limited to administering blows that could not have been foreseen as capable of causing death in the same way assaults that resulted in the neck compression injuries may have been considered by the jury as being capable of being fatal.

[28] Much of Mr Gibson-Park's evidence related to how he did not wish to cause Mr Neilson injury or to really hurt him, and he sought to emphasise this under cross-examination when challenged about his reasons for striking Mr Neilson. This was also a focus of the defence in closing, when it was submitted that Mr Gibson-Park could not have known, as a layperson, that the type of injuries he inflicted would likely cause death. Mr Ryan argued:

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[4] *R v Peters* [2007] NZCA 180 at [44]; *Hohua v R* [2019] NZCA 533 at [24]–[26]; and *R v McKeown* [1984] 1 NZLR 630 (CA) at 632–633. Compare *R v Chignell* [1991] 2 NZLR 257 (CA) at 265-266; and *R v Ramsay* [1967] NZLR 1005 (CA) at 1014.

> You can't be sure, on the evidence that you have heard, that Mr Gibson-Park knew that the body injuries that he inflicted on Mr Neilson, at the time he was inflicting them, were likely to cause Mr Neilson's death. And I say to you now, that if you can't be sure then Mr Gibson-Park is not guilty on the murder charge. He is guilty of manslaughter. I'm not trying to beat around the bush, he's guilty of actions that contributed at some stage, to Mr Neilson's death. But, his actions were not causative of Neilson's death.

[29] Mr Ryan had put Mr Gibson-Park's defence in the following way when opening his case:

> Now in this charge notice you will see that charge one is an allegation of murder. He pleaded not guilty to that charge, you heard him do that. Now in relation to that charge he accepts he was present at Mr Neilson's address. He accepts he assaulted Mr Neilson but he denies that he had at any stage [an] intention to kill or that he meant to cause Mr Neilson's death. He also denies the assertion from the Crown that he meant to cause Mr Neilson any bodily injury that was likely to cause Mr Neilson's death. Furthermore he did not have, as my friend from the Crown said, reckless intent.
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> …
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> In relation to the charge of murder his defence is that he did not mean or intend to cause the death of Mr Neilson. You might see that there is another little number under 167 in the charge notice so the alternative or second defence is that the defendant did not cause Mr Neilson any bodily injury that the defendant Mr Gibson-Park knew was likely to cause the death of Mr Neilson and he wasn't reckless.

[30] The thrust of Mr Gibson-Park's defence related to his state of mind and his lack of intention to inflict the type of bodily injuries that could foreseeably result in death. At no stage was a causation defence articulated on the basis the sequence of assaults were divisible, or that he had not been a party to a separate attack or a different event that had been causative of Mr Neilson's death. Both in trial counsel's opening and in the passage of his closing, set out at [21] above, the submission was made that Mr Gibson-Park did not have a reckless murderous intent.

[31] In support of that argument, attention was drawn to the blows that Mr Gibson-Park was actually responsible for inflicting, from which it would not, it was suggested, be reasonable to infer knowledge that the likely consequences would be fatal, or of the possibility of death. By this means, Mr Gibson-Park attempted to distance himself from Mr Patuwai's actions that, it was submitted, had resulted in severe injuries to Mr Neilson, in an endeavour to advance his argument of a lack of murderous intent. This approach was a part of, or at least consistent with, a wider

strategy relating to Mr Gibson-Park's professed motives for the assaults he admitted to having committed. These included holding Mr Neilson down because of a concern he would try and attack them, and that he only struck Mr Neilson with the baseball bat in certain discrete parts of the body for the purpose of making him "stay down". He did not hit him in the head with the bat because, he said, "I didn't wanna hurt him, I was just like, I just like just stay down, yeah".

[32] We do not consider that any mistake by trial counsel regarding a possible causation defence resulted in Mr Gibson-Park giving evidence when he should not have. Mr Patuwai's defence was effectively to cast Mr Gibson-Park as the main protagonist. Mr Gibson-Park had declined to be interviewed by the police. Messrs Kenworthy and Reedy had been called as eyewitnesses, at least to Mr Gibson-Park's initial participation and his use of the baseball bat. In the face of that and other evidence, we consider Mr Gibson-Park's decision to give evidence to advance his defence that he lacked any murderous intent was entirely justifiable and cannot be attributed to any error on the part of counsel regarding a potential causation argument.

[33] Mr Gibson-Park was able to explain his level of involvement and provide evidence of Mr Patuwai using a blunt instrument (possibly an air gun) on Mr Neilson, and of Mr Patuwai having stomped on Mr Neilson's chest and head. That enabled trial counsel in his closing to contrast the level of violence meted out by Mr Patuwai and that used by Mr Gibson-Park, who, on his account, had stepped in to prevent Mr Patuwai from inflicting more injuries. On the basis of his testimony, Mr Gibson-Park was able to submit that Mr Patuwai had by that stage embarked on an enterprise of his own beyond that anticipated by Mr Gibson-Park. This was a legitimate line of argument in support of Mr Gibson-Park's defence that sought to distance him from the level of force used by Mr Patuwai, and his inability to have foreseen that the assault could result in Mr Neilson's death.

[34] In the circumstances, Mr Gibson-Park had little option but to give evidence given the nature of the cut-throat defences both defendants were advancing to blame the other for the worst violence that was used. In that regard, Mr Patuwai had the advantage of his account being before the Court by way of the police interviews, in

which he sought to minimise his actions. We note that Mr Gibson-Park has not offered any evidence on appeal regarding his reason for electing to give evidence, or articulated any complaint as to how or why his decision would have been different.

[35] We also do not consider the trial Judge's direction prejudiced Mr Gibson-Park. Having regard to the respective defences being run by each defendant, that effectively sought to blame the other as the person responsible for inflicting the type of violence that could foreseeably have had fatal consequences, we consider such a direction was always necessary, if not essential, given the factual matrix and the need for the Crown to prove causation as an element of murder. It was important in the circumstances of this trial, notwithstanding any defence sought to be run by an individual defendant, for the jury to be informed it was not necessary for the Crown to identify the fatal blow or for the jury to be sure that any particular injury had caused Mr Neilson's death, so long as the injury/injuries that killed him occurred as part of the attack.

Decision

[36] We are satisfied that Mr Gibson-Park's defence that he did not have a murderous intent at the time he participated in the assault on Mr Neilson was fully advanced. To the extent his trial counsel may have been labouring under the misapprehension that a causation defence was available to him, it is not apparent from the trial record that this was pursued to any great extent, nor, moreover, that it in any way detracted from his defence of not having a murderous intent, or prejudiced Mr Gibson-Park. To the extent it was explored, we consider it largely complemented his defence that he lacked the requisite state of mind.

[37] The cross-examination of Dr White by trial counsel may have been ineffective but it was consistent with minimising Mr Gibson-Park's responsibility for Mr Neilson's injuries. We do not discern any drawback to him from what Mr Ryan sought to achieve in canvassing these matters with Dr White. We accept the Crown's submission that it would have been potentially advantageous to Mr Gibson-Park's case to advance a narrative that the most serious injuries suffered by Mr Neilson were the ones that Mr Gibson-Park denied being responsible for and which he claimed had been

caused by Mr Patuwai, notwithstanding Dr White's inability to identify which of the several types of injuries sustained by Mr Neilson had resulted in his death.

[38] We reject the submission that counsel's misapprehension as to an available defence resulted in little focus being centred on the ingredients of party liability and proof of murderous intent in the context of the group assault, as was submitted on behalf of Mr Gibson-Park. We do not consider there was much, if any, scope to suggest Mr Gibson-Park's actions were not capable of constituting acts of aiding and encouraging,[5] having regard to the evidence of Messrs Reedy and Kenworthy that described Mr Gibson-Park's participation in the assault. The focus understandably was to limit the inferences that could be drawn from Mr Gibson-Park's actions as to whether he had a reckless murderous intent. Efforts to limit Mr Gibson-Park's participation to less violent acts that did not result in particularly serious injuries and could not foreseeably result in death served that purpose.

[39] Mr Patuwai, in speaking with the police, essentially admitted being a party to the assault that had resulted in Mr Neilson's death and therefore to his manslaughter. Similarly, the account Mr Gibson-Park provided to his trial counsel amounted to an acceptance to having at least been a party to manslaughter insofar as he too had participated in the physical attack. Neither man's defence to murder turned on whether they had participated in the assault and aided and encouraged the other. Whether they could be found to be parties to murder turned entirely on whether they held the requisite murderous intent at the time of that participation.

[40] We do not consider there was any realistic basis upon which to contest party liability, other than on the question of Mr Gibson-Park's state of mind at the time. This was the focus of his defence, which we consider was fully advanced to the jury. To the extent an alternative causation defence was persevered with by Mr Ryan, in suggesting to the jury the injuries inflicted by Mr Gibson-Park were not causative of Mr Neilson's death, we do not consider the Judge's direction about causation would have been interpreted as critical of Mr Gibson-Park. We therefore do not consider there was any risk that the approach taken by trial counsel in exploring a possible

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5 Crimes Act 1961, s 66(1)(b)–(c).

causation defence at trial, misconceived as it may have been, affected the outcome of the trial or rendered the verdicts unsafe.

Use of Mr Patuwai's police statements

[41] The second alleged error by trial counsel concerns an attempt made during the cross-examination of Mr Reedy to use statements that Mr Patuwai made to police to impeach that witness's account of his involvement in the assault. It is common ground that, other than as statements against interest admissible against Mr Patuwai, the statements were inadmissible hearsay. In the absence of any hearsay application, the evidence could not be used in the manner sought by trial counsel.

[42] Trial counsel's questioning was objected to by the Crown and, after a discussion in chambers, that line of cross-examination was not pursued. The Judge mentioned the matter in summing up:

> [77] I should also tell you that during the course of Mr Ryan's cross-examination of Mr Reedy Mr Ryan made reference to Mr Patuwai's interview, and in fact asked you to note down a particular reference. That was a mistake. That interview is not relevant to the case against Mr Gibson-Park at all. So I ask you to ignore those questions and answers Mr Ryan put about Mr Patuwai's interview.

[43] We do not consider this attempted use of Mr Patuwai's statements in any way detracted from the Judge's clear directions regarding the status of Mr Patuwai's statements and that they were not admissible against Mr Gibson-Park. We consider this supplementary direction was likely designed to buttress the Judge's earlier statements to the jury to that effect. However, that is not the nub of Mr Gibson-Park's argument in relation to trial counsel's error. It is submitted on his behalf that the trial Judge's direction had the unintended consequence of telling the jury to disregard an important strand in Mr Gibson-Park's case, being that Mr Reedy had downplayed his own involvement in the attack and exaggerated Mr Gibson-Park's actions.

[44] We do not consider the trial Judge's directions had such an effect. The Judge's statement was expressly limited to the questions and answers that had been put about Mr Patuwai's interview. This went no further than clarifying any confusion that may have arisen regarding the status of Mr Patuwai's statements and their inadmissibility

against Mr Gibson-Park. We do not consider it detracted from Mr Gibson-Park's case that Mr Reedy had minimised the extent to which he had been involved in the attack on Mr Neilson.

[45] It was put to Mr Reedy during his cross-examination that he had been involved in the assault and had kicked and hit Mr Neilson. The defence theory that Mr Reedy was an unreliable witness who was attempting to minimise his involvement was squarely put to the jury by trial counsel during the course of his closing. This argument was repeated by the trial Judge to the jury when he referred to this aspect of the defence case in his summing up:

> [124] [Mr Ryan] indicated where those witnesses had given evidence that was consistent with Mr Gibson-Park's evidence, but also where the evidence could be seen to be influenced by a desire to protect their position, or those with whom they were associated. …
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> [125] In terms of the evidence from Mr William Reedy and Mr [Karaitiana] Kenworthy they had eight days until they made their statements to the police. Some of the evidence did not stack up [Mr Ryan] said. For example if Mr Reedy was not involved in the assault as he said, what was he doing picking up the baseball bat, and why was the baseball bat given to Mr Gibson-Park. That is not consistent with the evidence that Mr Reedy just wanted to get out of the house he said. He has not been charged with anything. …

[46] Trial counsel erred when questioning Mr Reedy about the content of Mr Patuwai's statements but we do not consider there is any risk of a miscarriage of justice having resulted from that occurrence or that it contributed to such an outcome. Mistakes regarding the use to which various items of evidence can be put are not uncommon during the course of a trial and we are unable to perceive how either this mistake or the Judge's direction, which was designed to avoid any confusion regarding the use that could be made of Mr Patuwai's statements and was ultimately to Mr Gibson-Park's benefit, could have prejudiced Mr Gibson-Park.

Alleged prejudice caused by Mr Patuwai's statements

[47] It is alleged on behalf of Mr Gibson-Park that a miscarriage of justice arose because of the undue prejudice caused by the evidence of Mr Patuwai's police interviews. It was argued that judicial directions were insufficient to cure the unfair prejudice generated by Mr Patuwai's two statements, which strongly implicated Mr Gibson-Park. Because of the length and content of Mr Patuwai's statements, the

nature of the Crown case that involved an allegation this had been a joint attack, comments made by the interviewing officer, and the fact trial counsel had introduced Mr Patuwai's statements in the course of the cross-examination of Mr Reedy (as previously discussed), it was argued this was one of those exceptional cases where the charges against each of the co-defendants should have been severed. It was submitted the failure to do so had resulted in a miscarriage of justice.

[48] We do not consider the Crown's case that the two defendants acted together in the attack on Mr Neilson, or that their assault could be described as having been a joint enterprise,[6] gives rise to any particular difficulties regarding the status or treatment of Mr Patuwai's statements to the police. Where defendants have been charged jointly on the basis each has been a party to the other's actions, it is a not infrequent occurrence that one or more of them has spoken to the police and implicated their co-defendant. In such a situation it will normally still be in the interests of justice for there to be a joint trial, the defendants having been accused of joint offending. This has the benefit of avoiding the risk of inconsistent verdicts and duplicating the same evidence in multiple trials.[7]

[49] Concerns regarding improper reasoning by a jury on the basis of inadmissible evidence against a co-defendant can ordinarily be mitigated by the use of appropriate directions.[8] However, a residual risk may remain in some cases because of the particular circumstances of the individual case. This was acknowledged by this Court in *R v Fenton*:[9]

> There may, however, be occasions when the weight of the inadmissible evidence, against that of the admissible, makes it unfair to an accused, notwithstanding the trial Judge's directions, to expect the jury to act only on the evidence which is admissible. Similarly, there may be cases in which the difficulties in isolating the admissible from the inadmissible make it unfair to expect the jury to undertake that exercise. Those are the usual circumstances in which severance may be justified. Ultimately the question is whether the applicant for severance can demonstrate some feature of the case which clearly outweighs the ordinary approach and the basis upon which it rests, and which therefore mandates severance in the overall interests of justice.

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6 Crimes Act, s 66(2).

7 *RW (CA660/2011) v R* [2011] NZCA 556 at [11], citing *Shadrock v R* [2011] NZCA 388, [2011] 3 NZLR 573; *Williams v R* [2011] NZCA 245 at [10], citing *R v Fenton* CA223/00, 14 September 2000 at [25]; and *Jones v R* [2015] NZCA 312 at [17].

8 *R v Fenton*, above n 7, at [25].

9 At [26].

[50] No application for severance was made in this case. We consider that was unsurprising in the circumstances. Messrs Gibson-Park and Patuwai were charged with having jointly engaged in a combined attack on Mr Neilson that resulted in his death. The Crown's case was that each, both as a principal and as a party to the other's actions, were full participants in what was an ongoing assault on Mr Neilson. The only part of the evidence that was inadmissible against Mr Gibson-Park was Mr Patuwai's statement, which was a readily identifiable part of the Crown case easily ring-fenced as only being admissible against Mr Patuwai. Immediately prior to this evidence being given, the trial Judge directed the jury in the following way:

> As you have heard, you are about to be played a recording of the interview Mr Patuwai gave to police. I will be giving you instructions about how you should consider this in my summing up to you later in the trial. But there is one thing I want to emphasise to you now before you hear it.
>
> Mr Patuwai's interview is evidence in Mr Patuwai's trial, but it is not evidence in Mr Gibson-Park's trial. As has been said we are really doing two trials at once, and if we were doing Mr Gibson-Park's trial separately this interview wouldn't be played to you at all. You must treat it in the same way. So if Mr Patuwai says things that Mr Gibson-Park did, or didn't do, it is irrelevant to Mr Gibson-Park's trial. You must look to the other evidence of what Mr Gibson-Park did, or didn't do for his trial.

[51] The Judge repeated this direction in his summing up:

> [76] … the video interview is Mr Patuwai's statement and it is relevant only to his trial. Nothing he said in that interview is to be considered in relation to Mr Gibson-Park. When you assess the case against Mr Gibson-Park you must ignore anything that Mr Patuwai said at this interview. It would be most unfair and wrong of you to take that into account in relation to Mr Gibson-Park. …

[52] In addition to those specific directions, the jury were also reminded by the trial Judge that while there was a single charge of murder that both Mr Gibson-Park and Mr Patuwai faced, it was "really two separate charges". The Judge stated that "[i]n fact you are dealing with two separate trials, Mr Gibson-Park's trial and Mr Patuwai's trial". No issue has been taken with the content of the Judge's directions. However, it was argued they were insufficient to ensure the jury divorced their consideration of the content of Mr Patuwai's out-of-court statements from the admissible evidence relating to Mr Gibson-Park. A number of factors were put forward in support of the submission that this was an "unusual" case where each

defendant should have been tried separately. We review each of these arguments in turn.

[53] We have already rejected the submission that any difficulty or complication arose from the Crown's case that the two defendants had acted together in the attack on Mr Neilson. While we accept Mr Patuwai's statements were of some duration, being over three hours long in total, as already noted, it was a type of evidence that was readily distinguishable as being admissible only against Mr Patuwai. In terms of its content, it was submitted there were elements highly prejudicial to Mr Gibson-Park, particularly Mr Patuwai's description of what Mr Gibson-Park did, most notably after Messrs Reedy and Kenworthy had left the house. However, insofar as it is relevant, given the trial Judge's directions to the jury to put Mr Patuwai's statements to one side, his motivation for providing an account that embellished Mr Gibson-Park's role and minimised his own conduct would have been readily apparent to the jury.

[54] A particular concern raised related to questions by the interviewing officer that were focussed on Mr Patuwai's narrative of Mr Gibson-Park's assaults. It was submitted that that those questions were designed to extract an admission about murderous intent, the implication being this was particularly prejudicial to Mr Gibson-Park. However, we consider that enquiry had an obvious direct relevance to Mr Patuwai's participation. His admissions as to his understanding of the consequences of the beating he described were inculpatory of his state of mind at the time. Concerns were expressed regarding mention of the use of a tomahawk, but these portions were excised and not shown to the jury.

[55] A further criticism of the interview related to the use of Mr Patuwai's brother's statement, which included Mr Gibson-Park's utterance in Mr Patuwai's presence that "we need to go torch him, bro". Because this statement by Mr Gibson-Park was said in Mr Patuwai's presence, it was also admissible against Mr Patuwai. We do not consider the interviewing detective's approach was impermissible, nor do we consider this resulted in any real prejudice to Mr Gibson-Park because this evidence was given directly by the brother at trial. We do not consider its repetition during the interview of Mr Patuwai supports severance.

[56] The unambiguous directions by the trial Judge that this evidence was inadmissible against Mr Gibson-Park in large part renders these various criticisms of the police interviews, at least insofar as Mr Gibson-Park is concerned, redundant. Insofar as they have been identified as aspects of Mr Patuwai's statements that were particularly prejudicial to Mr Gibson-Park, we do not consider they are of a nature that would justify separate trials or risked rendering Mr Gibson-Park's trial unfair. There is nothing to indicate the jury would have done other than as directed and put this part of the evidence to one side.

[57] Considerable reliance was sought to be placed on this Court's decision in *Williams v R*,[10] where an appeal against conviction was allowed because of the real risk the jury may have improperly relied upon a very substantial body of inadmissible evidence contained in the co-defendant's statement. In that instance, the Crown case had been severely weakened by the end of the trial because of the unreliability of two key Crown witnesses. The co-defendant's statement to the police placed the appellant at the scene of the murder and attributed responsibility to him for the killing. The prejudicial effect of this statement was required to be assessed in the context of a weak circumstantial Crown case.[11]

[58] We do not consider the analogy sought to be drawn with the present case is available. Here, the Crown was able to rely upon the evidence of two eyewitnesses and other evidence, including of a forensic nature, that supported Mr Gibson-Park's having, together with Mr Patuwai, taken a leading role in the attack on Mr Neilson. This was not a case where the weight of the inadmissible evidence, as compared with the admissible evidence, meant it would be unfair or unrealistic to expect the jury to be able to put the former to one side. The balance of the evidence against Mr Gibson-Park was considerable and, as earlier observed, the inadmissible material was well able to be isolated.

[59] One particular feature of the *Williams* case upon which some reliance was placed in an attempt to draw a parallel with Mr Gibson-Park's trial was the impermissible way in which Mr Patuwai's police interview was referred to in the

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10 *Williams v R*, above n 7.
11 At [44].

course of the cross-examination of Mr Reedy. We have discussed the circumstances of this incident at the trial in relation to the earlier ground of appeal, but it is also relied upon as being analogous to what occurred in *Williams*, where counsel for one of the defendants made use of another's police statement. This Court was concerned with the way that had been allowed to happen and the way the jury had been directed regarding the use that could be made of the statement, which had likely led to confusion. This Court stated:[12]

> [47] Secondly, we need to factor in the possible impact of the approach taken by K's counsel to the use of Mr Tumata's statement. We do not need to decide whether or not that was the correct approach but it did come into the picture late in the piece. Its use meant that the jury were effectively told to disregard the statement in relation to assessing one of Mr Tumata's co-accused but that they could attach what weight they considered appropriate to the statement in relation to the other co-accused, K. This is another feature which marks this case out from *Fenton*, which was in this respect a much less complicated case. We consider there was a risk in this case that the jury may have had difficulties in isolating the admissible from the inadmissible. …

[60] We are satisfied nothing comparable to the risk that was identified in that case arises from the erroneous use of Mr Patuwai's statement to cross-examine Mr Reedy. In the present case, the Judge's actions and directions ruled out any possible confusion. Firstly, the objectionable line of questioning was stopped and a ruling made that prevented it from continuing. Secondly, the Judge could not have been clearer as to how Mr Patuwai's statement was not to be used against Mr Gibson-Park. Unlike in *Williams*, we see no scope for confusion on the jury's part.

[61] We are satisfied that no miscarriage of justice arose from the two defendants being tried together for their joint attack on Mr Neilson, nor that there were any circumstances arising in relation to Mr Patuwai's statements to the police that created a need for them to be tried separately. The evidence against each defendant was substantially the same. The only evidence that was inadmissible against Mr Gibson-Park was readily identifiable and there is no basis to consider the Judge's directions regarding its use did not sufficiently mitigate any potential prejudice arising from its inadmissibility in respect of him.

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12 *Williams v R*, above n 7.

The Judge's directions regarding lies and reliability

[62] Mr Gibson-Park alleges a miscarriage of justice arose as a result of the way the Judge provided a "generic lies direction" which did not cover the mandatory requirements set out in s 124(3) of the Evidence Act 2006, and failed to provide a direction regarding the two key Crown witnesses, Messrs Reedy and Kenworthy, having an incentive to lie.[13]

Lies

[63] It was argued by the Crown in its closing address that Mr Gibson-Park had told lies in the course of his evidence. As a result, it was argued by Mr Gibson-Park on his appeal that the Judge's general direction regarding purported lies was, in the circumstances, insufficient. The direction the trial Judge gave was as follows:

> *Lies and Unreliability*
>
> [68] Avoid jumping to the conclusion that because a witness has given untruthful evidence on one topic, their other evidence should be treated as unreliable. Although it is a strong reason for subjecting the later evidence to critical scrutiny, it can be possible that a witness has a reason to be evasive on one topic but be reliable on another.
>
> [69] The possibility of honest mistake in recollection should be excluded before proceeding to make an adverse finding on credibility.
>
> [70] These are entirely matters for you to weigh up. In doing so, you will exercise your collective common sense and wisdom.

[64] Two complaints were made in regard to the Judge's approach. The first was that the direction undermined an essential plank of the defence case relating to the unreliability of Messrs Reedy and Kenworthy, who it was alleged were motivated to downplay their own criminal involvement in the attack on Mr Neilson. Secondly, it was submitted the direction did not squarely address Mr Gibson-Park's alleged lies. It was argued the direction was inadequate because it failed to caution the jury not to treat a proved lie as a shortcut to a finding of guilt.[14] It was argued that a full lies direction should have been provided which exclusively focussed on Mr Gibson-Park's

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13 Evidence Act, s 122(2)(c).
14 Section 124(3)(c).

purported falsehoods and that, in the absence of having done so, there was a real risk the jury would equate lies with guilt.

[65] We do not consider any miscarriage of justice arises from the trial Judge providing the direction he did or in not providing an orthodox lies direction specifically relating to Mr Gibson-Park. While the direction the subject of scrutiny was provided under the heading "*Lies and Unreliability*", it formed the concluding remarks by the trial Judge regarding the way a jury should approach their assessment of the reliability and credibility of witnesses that is a staple of any summing up. After directing the jury that it was for them to decide what witnesses and what evidence they regarded as being credible and reliable, including that they may think parts of what a witness has said is credible and reliable but have doubts about other parts, the Judge canvassed other factors that may influence the jury's assessment, including motive and demeanour. In relation to the former, the Judge stated:

> [60] … You can look to whether they had a motive to give evidence in a particular way. It has been suggested here that particular witnesses have been influenced by motives to protect themselves or others, so you should take that into account.

[66] The Judge continued:

> [65] In each case, you have also got to look not just at what was told to you by a particular witness but what other evidence there was which helps you to assess the accuracy or reliability of the witness' evidence.
>
> [66] You should test each witness' evidence against the yardstick of human nature or common sense. Does a witness have a good reason for saying what they said? Does it make sense? Is it consistent with the rest of the evidence that you accept? Do other witnesses or other independent facts support or confirm what the witness says? Did the witness make concessions when concessions [were] clearly called for? One of the indications of honesty and integrity can be a willingness to admit a mistake or to make a concession that needed to be made. These are all the kind of factors you should consider.
>
> [67] So, you will need to weigh these contentions in the context of all the evidence you have heard, and make a decision about the credibility of competing witness' testimony.

[67] After giving these directions, the Judge then immediately stated "[a]void jumping to the conclusion", and thereafter gave the direction as set out at [63] above. It is apparent therefore that the direction, insofar as it refers to the possibility of a witness having lied, is but one part of a wider set of directions addressing the jury's

task of assessing the credibility and reliability of the witnesses and is to be viewed in that context.

[68] Mr Gibson-Park sought to place reliance on observations made by this Court in some cases that were critical or voiced the need for caution where trial judges have invited the jury to consider explanations for why a complainant may have lied, which may undermine a legitimate challenge to their credibility.[15] We do not consider the Judge's direction in this case is comparable to such a situation where suggestions have been offered by the Judge as to why a complainant may have not told the truth. We do not consider the direction in any way undermined the conduct of the defence case, rather, as already noted, it formed a legitimate part of the guidance provided by the Judge regarding the jury's task that was of general application.

[69] Nor do we consider the direction could be interpreted as some form of endorsement of a submission made by the Crown in its closing that the jury needed to be cautious about a suggestion that a witness is lying and should reject such a proposition. Notably, while both the Crown and the defence made competing submissions regarding whether Messrs Reedy and Kenworthy had lied, and whether Mr Gibson-Park and Mr Patuwai's brother had told the truth, the trial Judge made no reference to any particular person, such was the generalised nature of the direction provided. It did not serve to bolster the Crown case, nor did it detract from the defence position regarding the Crown witnesses. As earlier observed, when read in context it served as general guidance to the jury about their task when assessing the evidence.

[70] In relation to a tailored lies direction regarding Mr Gibson-Park himself, no such direction was specifically sought. Trial counsel, in his affidavit filed for the purposes of this appeal, explained that in his experience, a lies direction in the circumstances of this type of case would be overly focussed on Mr Gibson-Park and have the undesirable effect of attracting the jury's attention to the possibility he may have been lying. This is a common defence concern and a legitimate consideration when weighing the worth of a lies direction.

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[15] See for example *Bruce v R* [2023] NZCA 159 at [21]–[29]; and *Ngatai v R* [2016] NZCA 352 at [19]–[21] and [23].

[71] It is relevant that the Crown's case did not include proof of any proven or admitted lies. The Crown's submissions regarding Mr Gibson-Park having lied were limited to arguments he had done so in the witness box when providing his account of what had occurred and in his narrative of having been somewhere else at the time of the arson. As indicated by this Court in the recent case of *Bruce v R*, this is not the situation where a lies direction is considered to be mandatory:[16]

> [21] A lies direction in relation to a defendant is typically given when the defendant has lied out of court, or there is evidence the defendant has done so. A lies direction is not typically required when the defendant has given an exculpatory account to Police or where the Crown "simply maintains that a defendant's exculpatory explanation is false." Similarly, a lies direction is "generally inappropriate when a defendant's evidence is no more than a denial of the commission of the offence."

[72] Mr Gibson-Park had not made a statement to police, nor had he made statements to others that could be shown to be untruthful. The lies which the Crown contended Mr Gibson-Park had told were limited to statements he made when attempting to exculpate himself while giving his evidence. There may have been a risk that a lies direction given in that scenario would be interpreted by a jury as an indication the defendant had lied on oath and should not be believed. Such concerns may legitimately outweigh any benefit that may have been thought to have been gained from such a direction.

[73] The decision by counsel not to seek a lies direction and the Judge's choice not to give one were not unreasonable. We do not consider the absence of a lies direction gives rise to any real risk of a miscarriage of justice.

Absence of reliability warning

[74] Mr Gibson-Park submitted that s 122(2)(c) of the Evidence Act was engaged. That provision provides:

> **122 Judicial directions about evidence which may be unreliable**
>
> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—

[16] *Bruce v R*, above n 15 (footnotes omitted).

(a) whether to accept the evidence:

(b) the weight to be given to the evidence.

(2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:

…

(c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:

…

(3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—

(a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or

(b) if the Judge is of the opinion that there is any other good reason not to comply with the request.

(4) It is not necessary for a Judge to use a particular form of words in giving the warning.

…

[75] Messrs Reedy and Kenworthy provided statements to the police. They were both 18 years old at the time of the trial in November 2020. [Redacted]. Both witnesses' credibility was put in issue at trial by Mr Gibson-Park's counsel. In his closing, Mr Ryan stated:

> [Mr Reedy] confirmed that he wasn't charged with anything by the police. This is at stark odds to his evidence of being involved in a home invasion of the deceased's address, … I suggest you treat Mr Reedy's evidence with some caution. He minimised his involvement, he spoke with his best mate Mr Kenworthy at the house on Sunday morning. They had two days together in Tauranga, before they both went to the police and gave their statements. His evidence I would suggest is self-serving, unreliable and he has minimised his involvement, but that's entirely up to you.

[76] In relation to Mr Kenworthy, it was submitted to the jury that they should be cautious of what he said because he had been with Mr Reedy on the Sunday morning following the incident and spent two days in Tauranga with Mr Reedy, where it was suggested there was discussion about the events that had taken place.

[77] On his appeal, Mr Gibson-Park submitted it was apparent that Messrs Reedy and Kenworthy had been treated lightly for their involvement, [Redacted].

[78] These criticisms of Messrs Reedy and Kenworthy's reliability and motivations were understandably available and were made at trial. However, in terms of available evidence, there was little to contradict Mr Reedy's account of not having physically participated in the attack on Mr Neilson, or Mr Kenworthy's limited admissions of punching Mr Neilson and kicking him while he was lying on the deck. Both men did admit entering the house to look for drugs.

[79] As already noted, the Judge, when directing the jury on their assessment of the witnesses, observed that particular witnesses had allegedly been influenced by motives to protect themselves or others and that this should be taken into account. In terms of the reliability of Messrs Reedy and Kenworthy, the defence submission they had colluded about their statements, minimised their involvement, [Redacted], was repeated to the jury by the trial Judge when summing up Mr Gibson-Park's case.

[80] While we accept that some judges may have come to a different opinion from that of the trial Judge, we are not satisfied he was obliged to warn the jury of the need for caution when deciding whether to accept Messrs Reedy and Kenworthy's evidence, or the weight to be given to their testimony. It is apparent the Judge did not consider these witnesses' evidence fell into the category of being admissible but unreliable.[17] Whether Messrs Reedy and Kenworthy had a motive to give false evidence that would be prejudicial to Mr Gibson-Park was an issue for the jury to assess, but we do not consider the state of the evidence imposed a legal requirement on the Judge to formally caution the jury about their reliability.[18] No request was made to the Judge to provide such a warning. In the circumstances, even had the Judge been satisfied Messrs Reedy and Kenworthy had a motive to give false evidence, the decision whether to give a warning remained discretionary. As has previously been observed by this Court, the essential question is whether such a warning would, in the circumstances, have materially assisted the jury.[19]

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17 Evidence Act, s 122(1).
18 Section 122(2)(c).
19 *B (CA58/2016) v R* [2016] NZCA 432 at [59].

[81] The issue of Messrs Reedy and Kenworthy's reliability was clearly before the jury. The circumstances in which they had become involved and come to give their evidence had been traversed, and the challenge to their reliability, based upon their alleged minimisation of their involvement and the way they had been treated by the authorities, had also been canvassed. The Judge alerted the jury to consider the possible motives witnesses may have to protect themselves and recounted the criticism of their reliability which had been a focus of cross-examination and closing arguments.

[82] Messrs Reedy and Kenworthy did not fall into a category of witness who could be described as accomplices seeking to implicate their co-defendant and there was no suggestion, given the extent of their involvement, that they had been responsible for causing Mr Neilson's death. Both the evidence of Mr Gibson-Park himself and the account provided by his co-defendant when speaking to the police largely confirmed the lesser roles these witnesses played on the night, although both defendants had Messrs Reedy and Kenworthy participating to a greater extent in the physical attack than they otherwise had admitted in their evidence. Importantly, both defendants' narratives had these two witnesses leaving the scene when they claimed to have done so.

[83] We do not consider this was a situation where the issue of the potential unreliability of the witnesses was not fully apparent to the jury, or that they would have benefited from such a warning. While we accept it is not always appropriate to leave the jury to consider the risks associated with particular types of evidence on the basis of counsels' submissions, and in some situations the need for caution may require the imprimatur of the trial judge, we are unable to conclude this was a mandatory requirement in this case. Having regard to the evidence traversed at trial, the submissions made by counsel and the directions given by the trial Judge regarding the reliability and credibility of witnesses, we do not consider an explicit warning would have materially assisted the jury with their assessment of these witnesses. In the circumstances of this case, we do not consider that any miscarriage of justice has arisen from such a warning not being provided.

The way the alibi evidence unfolded

[84] In the course of Mr Gibson-Park's evidence, he stated that at the time it was alleged he committed the arson of Mr Neilson's house, he was in the company of his girlfriend, Angel Martin, at the beach. During his evidence it was brought to the Court's attention that no notice of alibi had been given by Mr Gibson-Park to this effect and that, with this evidence having only been disclosed in the witness box at trial, the Crown had not been afforded the opportunity to make enquiries of the person Mr Gibson-Park claimed he had been with at the time of the alleged offence. In the absence of Ms Martin being available, the Crown proposed that it should be permitted to elicit in rebuttal a statement she provided to the police that made no mention of her going with Mr Gibson-Park to the beach.

[85] Because the prosecution could not reasonably have foreseen this evidence was going to be given and had been taken by surprise, the Judge ruled,[20] pursuant to s 98(3) of the Evidence Act, that permission should be granted for the prosecution to call rebuttal evidence as it related to a matter arising out of the conduct of the defence, the relevance of which could not reasonably have been foreseen.[21] No issue is taken with the Judge's conclusion that the interests of justice test for the calling of rebuttal evidence had been met. However, it was argued a necessary prerequisite for the admission of the hearsay statement made by Ms Martin that she, as the maker of the statement, was "unavailable as a witness" had not been satisfied.[22]

[86] After hearing from the police officer who took the statement from Ms Martin, the Judge ruled he was satisfied the statement had been made in circumstances that provided reasonable assurance it was reliable and that, because Ms Martin was "unavailable as a witness (or undue expense or delay [would] be caused if she was required to be a witness)", the appropriate course was to permit Mr Gibson-Park to provide his alibi evidence but to allow the prosecution to call the police officer to give evidence of what Ms Martin had said when interviewed.

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20 *R v Gibson-Park* HC Gisborne CRI-2019-065-91, 24 November 2020.
21 Evidence Act, s 98(3)(b).
22 Section 18(1)(b)(i).

[87] It was argued on behalf of Mr Gibson-Park that the Judge had misconceived the test for the unavailability of a witness. Counsel referred to observations made by this Court that a person does not have to be living in New Zealand in order to be eligible to give evidence.[23] It was emphasised that s 16(2)(b) of the Evidence Act provides that a person is unavailable as a witness if he or she is outside New Zealand, and, additionally, it is not *reasonably practicable for him or her to be a witness*. It was submitted the focus must be on the factual issue of reasonable practicability and what steps would be necessary to secure the attendance of the witness at trial, whether in person or by some technological means such as a video link.[24] It was argued the only indication of the police having made efforts to locate Ms Martin was Mr Ryan's affidavit filed for the purpose of this appeal, where he stated he understood police had made some efforts to locate Ms Martin but were unable to do so.

[88] We consider this criticism of the Judge proceeding on the basis the witness was unavailable is unsustainable. At the time Mr Gibson-Park was cross-examined about being with Ms Martin at the beach, he was asked where she was now. He replied "Australia". Significantly, he also confirmed, when asked, that he had "[b]een in touch with her lately". As will shortly become apparent, despite Mr Gibson-Park having the means to contact the witness, he was unwilling to cooperate. It is also reasonably clear from the Judge's written ruling and the transcript of the preceding legal discussion that Ms Martin's unavailability was not actively contested. Given the circumstances as they prevailed at the time, we consider the conclusion as to Ms Martin's unavailability was inevitable.

[89] Mr Ryan had spoken to Mr Gibson-Park regarding his version of events and he was aware police had taken a statement from Ms Martin when he asked Mr Gibson-Park where she was. Mr Gibson-Park told him she was in Australia but refused to tell Mr Ryan where, as he did not want police to contact her. In those circumstances, we are doubtful Mr Gibson-Park could legitimately have contested the unavailability of Ms Martin when he was aware she was in Australia, had the apparent means to contact her and make her available, but refused to do so despite his

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23 *Solicitor-General v X* [2009] NZCA 476 at [35].
24 At [36].

obligations under the Criminal Disclosure Act 2008.[25] This left the police to make their own enquiries in the short time available. That being the situation, it is understandable there was an acceptance the witness was unavailable.

[90] Given the exigencies of the situation, as a result of the previously undisclosed alibi which was only raised at trial, when Ms Martin's whereabouts were unknown other than to Mr Gibson-Park himself, the trial could not be adjourned for an indeterminate period in the hope that Ms Martin would be able to be located in Australia. In those circumstances, it was not reasonably practicable for Ms Martin to be called as a witness. To locate her would have caused undue delay, which of itself is a basis upon which a hearsay statement can be admitted.[26]

[91] The second matter raised by Mr Gibson-Park is a submission that the failure to provide notice of alibi was an error by counsel that carried a real risk of causing a miscarriage of justice. It was argued that trial counsel had failed to appreciate that the arson charge was important because the motivation for the offending was to conceal Mr Neilson's homicide. It was submitted that, while it was unclear when Mr Gibson-Park had disclosed his alibi to counsel, it was apparent he had done so at some time before trial, and the admission of Ms Martin's statement, it was argued, had allowed the Crown the means to assert Mr Gibson-Park had concocted the alibi during the course of his evidence when that had not been the case.

[92] It was submitted that trial counsel had failed to advise Mr Gibson-Park of the implications of not providing notice of alibi, and that it was foreseeable the Crown would be allowed to adduce evidence of Ms Martin's statement if there was not compliance with the requirements of the Criminal Disclosure Act, including disclosure of Ms Martin's details. As a result, in the absence of trial counsel having given this advice and forewarning to Mr Gibson-Park, events unfolded as they did, to Mr Gibson-Park's prejudice.

[93] We do not consider Mr Gibson-Park was disadvantaged by the failure to provide notice of alibi. He was permitted to adduce his account of where he was at

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25 Criminal Disclosure Act 2008, s 22(3).
26 Evidence Act, s 18(1)(b)(ii).

the time the arson was committed and, to that extent, was in the same position he would have been if there had been compliance with the requirements of the legislation. Such compliance would have required Mr Gibson-Park to have disclosed the name and address of Ms Martin at the time of giving notice of his alibi. This was a continuing obligation up until trial,[27] but was something he was unwilling to do. Mr Gibson-Park did not want Ms Martin to be located, and it is striking that neither Mr Gibson-Park nor Ms Martin have filed evidence in support of this ground of the appeal verifying that she would have provided evidence in support of the alibi.

[94] In the absence of being able to contact Ms Martin, the Crown was left with having to adduce an unsigned statement from Ms Martin that did not address the actual issue of whether or not she had been at the beach with Mr Gibson-Park. The Crown had to be content with a submission that when interviewed, Ms Martin made no mention of going to the beach with Mr Gibson-Park, although she was not asked about that topic when interviewed. Mr Gibson-Park was at least left in the somewhat advantageous position of being able to put forward his explanation for where he was at the time of the arson without contradiction. His evidence on the issue could not be excluded or challenged by any other witness, and the way it was permitted to be adduced accorded with his instructions not to involve Ms Martin.

[95] We do not consider this ground has merit. There is an illogicality in Mr Gibson-Park advancing an argument of having been prejudiced by the Judge's approach to the alibi issue when he was permitted to adduce his alibi, despite being unwilling to disclose Ms Martin's whereabouts in breach of his statutory obligation to do so. As earlier noted, even now on his appeal he has not offered any evidence from Ms Martin to support his contention that a miscarriage of justice occurred. In these circumstances, we are satisfied there is no risk of such an occurrence having arisen.

Conclusion

[96] Having reviewed each of the grounds of appeal individually and collectively, we are satisfied that there is no risk of a miscarriage of justice.

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[27] Criminal Disclosure Act, s 22(3)(c) and (d).

Result

[97] The appeal against conviction is dismissed.

Solicitors:
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