**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA785/2012**
**[2016] NZCA 79**

| | |
|---|---|
| BETWEEN | WAYNE JAMES BRACKEN<br>Appellant |
| AND | THE QUEEN<br>Respondent |

| | |
|---|---|
| Hearing: | 9 February 2016 |
| Court: | Miller, Fogarty and Toogood JJ |
| Counsel: | W C Pyke for Appellant<br>M D Downs for Respondent |
| Judgment: | 23 March 2016 at 10.00 am |

---

**JUDGMENT OF THE COURT**

---

**The appeal against conviction and sentence are both dismissed.**

---

**REASONS OF THE COURT**

(Given by Fogarty J)

## Introduction

[1] This is an appeal against conviction and sentence. The appellant was convicted of kidnapping and murdering Mr Jack Davis, following a seven-week trial before Wylie J. Mr Neville Dangen, a co-defendant, was acquitted.

[2] When sentencing, Wylie J concluded that the appellant was acting in cold blood, the murder was "in effect, an execution". He applied s 104 of the Sentencing

Act 2002 and imposed a minimum period of 21 years imprisonment. The appellant appeals against the conviction and against sentence.

*Against conviction*

[3] Mr Fairbrother QC was acting for Mr Bracken until December 2015. Mr Bracken then changed counsel and was represented by Mr Pyke at the hearing before this Court. Mr Pyke made arguments on all of the points set out in Mr Fairbrother's memorandum summarising the grounds of appeal, but placed particular emphasis on two arguments:

*Propensity*

(a) He invited reconsideration of the admission of propensity evidence, given the failure of Mr Dangen to give evidence and he submitted there were legal errors on the part of Wylie J who failed, when directing on propensity evidence, to identify those errors and direct accordingly.

*Emotive irrelevant evidence*

(b) Wylie J permitted cross-examination about irrelevant, speculative, emotive and prejudicial claims about the appellant's state of mind: that he was "acting crazy"; claiming to be "the chosen one", the "devil", "dark" and "evil"; and had "one thousand spirits coming to look after him". These questions put to witnesses in cross-examination were so prejudicial that the appellant's ability to present an effective defence was compromised.

Cumulatively, Mr Pyke submitted that a miscarriage of justice had occurred.

*Against sentence*

[4] As to sentence, Mr Pyke submitted that Wylie J double counted, and took account of an irrelevant consideration when imposing a minimum term of imprisonment, and that the term was excessive. The appellant seeks a substituted minimum term of 19 years.

**The Crown case**

[5] The Crown case was that the appellant and the deceased, Mr Davis, knew each other. On 23 February 2011, Mr Davis needed a ride to Northland where he was to compete in a fishing competition based out of Whangarei. A friend made arrangements that the appellant and his brother, Kenneth Bracken, would drive Mr Davis north. The Bracken brothers collected Mr Davis from his home in Mangere on the morning of 23 February. The three men drove north, collecting another brother of the appellant, Frederick, arriving at the Kaeo area in the early hours of the following day, 24 February 2011. The group started to collect and move furniture from the appellant's previous address in Kaeo. Some of the furniture was taken to a farm in Salvation Road, belonging to Mr Dangen where the appellant intended to live.

[6] This shifting of property and furniture continued into the afternoon of Thursday, 24 February 2011. After they had finished the move, the men returned to Mr Dangen's property in Salvation Road and started drinking alcohol in a shed immediately adjacent to the main house. They had also consumed methamphetamine and cannabis during the course of the day. Late in the afternoon, the appellant started threatening Mr Davis, saying he would "beat him up" and "tie him up". He picked up a thistle grubber (an implement with a long handle and bladed steel head) that was in the garage and threatened he would attack Mr Davis if he did not lie on the ground.

[7] Mr Davis lay down on the ground. The appellant then told his brother, Kenneth, to tie Mr Davis up. Mr Kenneth Bracken claimed that the appellant threatened to kill him, his partner and his child if he did not comply with his directions, so he tied Mr Davis' hands behind his back and, again at his brother's direction, placed a shirt over his head. A rope was wound around Mr Davis' head and pushed into his mouth to act as a gag. The appellant told the men that Mr Davis had "done wrong by his bro". The appellant and Kenneth then took the victim from the shed and across the farm to a shearing shed. The appellant told his brother to tie Mr Davis' feet together. Kenneth Bracken used electric cord to "hog tie" Mr Davis, tying his hands and feet together, and pulling his feet up towards his back. At the

appellant's direction, he then tied Mr Davis to a rail in the shed, making sure he was secure and could not escape.

[8] The Bracken brothers then left the property. The appellant returned to Mr Dangen's property the following afternoon. At that point, he and Mr Dangen loaded Mr Davis into the rear of the appellant's Suzuki four-wheel drive. They then drove into a secluded area of the bush. The appellant directed Mr Dangen to roll and push Mr Davis, still bound, about 30 metres down a steep bank into thick native bush. The appellant followed, carrying a thistle grubber with him. While Mr Dangen either returned to the car, or stood by, the appellant then struck Mr Davis multiple times with the thistle grubber. This caused major trauma. It severed Mr Davis' carotid artery and eventually caused his death.

[9] Mr Dangen and the appellant left Mr Davis's body there, still tied up. They had removed only the gag. They then returned to Mr Dangen's property and undertook some sort of cleanup operation, washing down every surface of the vehicle and burning any item which could be linked to Mr Davis.

[10] Later that day, Kenneth Bracken contacted the police to inform them that Mr Davis had been kidnapped. The appellant and Mr Dangen were arrested separately that evening. Mr Dangen cooperated with the police. He told them he played no role in the offending and failed to raise the alarm only because he was too terrified of the appellant. It was Mr Dangen who took the police to Mr Davis' body and identified the discarded murder weapon.

[11] In the previous evening when Mr Davis had been left in the wool shed trussed up, the appellant and Kenneth Bracken had driven to various places, during which Kenneth said the appellant talked of not letting people go once you had tied them up; of the inability of a prosecution to succeed without a body; and said that Kenneth should stay with his brother Frederick, because it may be "too gruesome". Kenneth Bracken also described the appellant as acting irrationally during this time, saying their father had appeared in a dream to warn him his brother-in-law was trying to kill him and of the appellant having a knife in his lap as they drove.

[12] The appellant left Whangarei to return to Kaeo in the early hours of 25 February 2011. There, he visited his sister, Sharon, at approximately 8 am. Kenneth contacted the police later that day to inform them Mr Davis had been kidnapped. The appellant and Mr Dangen were arrested separately that evening. But by this time, Mr Davis was dead. Kenneth Bracken said he was too frightened of the appellant to have acted earlier, and the appellant had threatened to kill his wife and children by cutting their heads off.

[13] Mr Dangen was cooperative with the police. He told them he played no role in the offending and failed to raise the alarm only because he too was terrified of the appellant. Mr Dangen took the police to Mr Davis's body and identified the discarded murder weapon.

**Pre-trial ruling admitting two sets of propensity evidence**

[14] Prior to the trial, the High Court (Heath J) and the Court of Appeal had allowed the admission of propensity evidence. This Court, in its judgment delivered on 30 August 2012,[1] found propensity evidence in two separate incidents admissible at the appellant's trial. The first incident occurred in March 2003 (the Raharaha incident) and the other in February 2011 (the Johns/Cochrane incident). This evidence was led at the trial. The propensity incident involving Mr Johns and Ms Cochrane occurred approximately 10 days before Mr Davis was kidnapped and murdered. The offending relating to that incident was included in the indictment now under appeal.

*The Raharaha incident*

[15] On 28 March 2003, a Mr Raharaha was hitchhiking near Taipa. The appellant stopped and offered him a lift. At that time Mr Raharaha had known the appellant for about six months and considered him a friend, so he got into his car. He was driven to the appellant's place. While there, Mr Raharaha asked the appellant if he had any joints. In response, the appellant invited Mr Raharaha to take a white Subaru station wagon and drive it to a quarry where the appellant said he had a stash of cannabis. Mr Raharaha drove to the quarry. About ten minutes later, the

1 *Bracken v R* [2012] NZCA 395.

appellant arrived, jumping out of his car saying, "Bro where's my weed, you ripped my fuckin' weed". Mr Raharaha denied taking the cannabis. The appellant then tied him up using some rope. He cut two seatbelts out of the white Subaru and used them to gag Mr Raharaha's mouth. He then put a jacket over Mr Raharaha's head and put him in the boot of the white Subaru. The appellant then left in his car, leaving Mr Raharaha unattended, lying there, bound up, for hours without food or drink. Just before dark the appellant returned with an associate. He opened the boot of the car and struck Mr Raharaha with the barrel of a gun. The appellant and his associate asked where the cannabis was and tortured Mr Raharaha by poking him with knives. After two further hours, the appellant and the associate left, leaving Mr Raharaha tied to the seatbelt and gagged. The two men returned to the quarry in the middle of the next morning and resumed using the knives to torture Mr Raharaha. After two hours of attempting to get Mr Raharaha to confess to taking the cannabis, the appellant pulled him out of the Subaru and threw him into some bushes. The appellant and the associate then left.

*The Johns and Cochrane incident*

[16] The second incident involved Mr Johns and Ms Cochrane. On 4 February 2011, at around 1.30 am, Mr Johns woke to the sound of the appellant's voice at his front door. When he answered the front door, he found the appellant holding a sawn-off shotgun at his hip which was pointed to Mr Johns' mid-region. The appellant took Mr Johns to the lounge of the house where he moved a Lazy-Boy armchair up against the door to keep Mr Johns' partner, Ms Cochrane, out. The appellant brought up an incident that occurred four to five years earlier and accused Mr Johns of "ripping some weed" off him. Ms Cochrane barged open the door and asked the appellant what he was up to and how he could do this to them. The appellant continued to threaten Mr Johns while holding the gun (although pointing it at the ground). Mr Johns disputed the allegations and the appellant started to get "real angry". The appellant lifted the gun up with both his hands and, using all his weight, brought it down on Mr Johns' leg which was already injured from another accident. Mr Johns told him to take whatever he wanted, to which the appellant said he would hook his boat onto the back of his car. He forced Ms Cochrane and Mr Johns down the hallway. They assisted the appellant by hooking up a jet-ski

trailer and an aluminium dinghy to his car. The appellant left in the car saying, "You better not be funny guys and ring people".

*The pre-trial rulings*

[17] Justice Heath in the High Court concluded that this evidence showed a propensity:[2]

> … [T]hat the relevant "tendency" should be defined as the detention of a person and the infliction of violence, on the pretext of retribution, through the use of anything that could be used as a weapon at the time.

[18] On appeal the Court of Appeal left in place Heath J's finding vis-à-vis the Raharaha and Johns/Cochrane evidence:[3]

> The accounts given by each of Mr Raharaha, Mr Maeva[4] and Mr Johns are of violent attacks (although with Mr Maeva, the appellant only threatened violence) in connection with some grievance the appellant had against them. The accounts of Mr Raharaha and Mr Johns are clearly more probative in relation to the alleged offending against Mr Davis because in each incident there is the additional element of detention.
>
> Mr Raharaha's account bears a striking resemblance to the Crown case in relation to Mr Davis. Mr Raharaha was tied up. He had an item of clothing tied over his head. He was gagged. He was left over a lengthy period of time without anyone in attendance. The assault and detention was retribution for an alleged wrong against the appellant. The appellant used another person to assist him with the detention of Mr Raharaha. Although the assault occurred about eight years before the charged events, the coincidences and linkages are very strong.
>
> We assess the evidence as having significant probative value as it tends to corroborate Mr Kenneth Bracken's account of the detention of Mr Davis at the appellant's direction. If the jury accepts this evidence, and finds those similarities and linkages, the evidence of Mr Raharaha will be relevant for them in assessing the defence case that Mr Bracken had no involvement in either the kidnapping or murder.

**Summary of the defence at trial**

[19] The appellant's defence was that he was not involved in the kidnapping and murder of Mr Davis; that it was Mr Dangen who killed Mr Davis, and that he did so in the early hours of the morning of 25 February when the appellant was away from

---

2 *R v Bracken (No 2)* [2012] NZHC 649 at [45].
3 *Bracken v R*, above n 1, at [45]-[47].
4 The Court did not allow the evidence involving Mr Maeva to be led as propensity evidence.

the property. The appellant relied on the absence of any DNA or other evidence linking him to the scene, that it was only Mr Dangen's footprint found next to Mr Davis' body, and that the time of death did not exclude this scenario. He pointed to the role of Mano Warmington, a Crown witness, as a substantial drug dealer, said his brother Kenneth Bracken was minimising his role and asked why the kidnapping and beating of the deceased was not reported by Kenneth Bracken and Mr Dangen earlier when they had the opportunity to do so, and even to release Mr Davis.

**Crown sequential evidence**

[20] The Crown contended the appellant and Mr Dangen murdered Mr Davis earlier that day, following a sequence in which the defendants went to the woolshed, bundled Mr Davis into the back of a jeep in a tarpaulin, drove him to a remote location accessible only by narrow bush track, and there rolled him down a steep gully before killing him with the thistle grubber. A mixture of direct and circumstantial evidence was employed to prove the sequence of events:

(a) the appellant's sister, Sharon, described the appellant and Mr Dangen getting a tarpaulin, putting it on a jeep and driving that jeep to the woolshed where, unbeknown to her, Mr Davis had been restrained. She later saw the appellant and Mr Dangen return in the jeep before noticing both men in the vicinity of a fire;

(b) clothing, including the remains of Mr Davis' belt, were subsequently removed from two fire pits on Mr Dangen's property. The jeep used to move Mr Davis had been washed down. Mr Davis' body was still bound when recovered. The body had injuries consistent with being bound and suffering seven separate wounds to the neck;

(c) blood splatter in the gully confirmed Mr Davis had been killed there;

(d) shortly before being arrested, the appellant attempted to run away from his brothers and another man, all of whom then assaulted him. During the assault, the appellant said he was "sorry". An off duty police officer intervened. The appellant told him, "I'm fucked";

(e) the appellant was medically examined the next day. The examination was compromised because the appellant had earlier shaved his head and cut off or "chewed" all of his fingernails down to the quick. And, the appellant appeared to cause other samples to fall onto the floor;

(f) while on remand, the appellant told a fellow prisoner he could not be linked to the murder because there was no DNA on the body and nothing to connect him to the offence, and he had burnt his clothes.

**Use of the propensity evidence**

[21] The Crown submitted that while the propensity incidents differed in some respects from the offending in relation to Mr Davis, the material commonalities included:

(a) the prior association between the appellant and his victims;

(b) a sense of grievance on the appellant's part, with his response in each instance being hopelessly disproportionate to the perceived (and possibly imagined) slight emanating from the victim;

(c) victim detention under threat of violence with a weapon or weapons, including, in two instances, the use of various restraints for prolonged periods;

(d) the administration of actual violence, again, with a weapon or weapons; and

(e) a troubling measure of cruelty. For example, the appellant:

(i) struck Mr Johns' injured leg, barrel first, with a shotgun (in the presence of Mr Johns' partner);

(ii) used knives to torture Mr Raharaha;

(iii) restrained Mr Raharaha and Mr Davis for long periods without food or water;

(iv) engaged in a form of psychological torture of both men by causing them to fear for their lives after rendering them helpless; and

(v) engaged in brazen offending. As observed, the victims knew the appellant. The appellant appears to have hoped or assumed they would not involve the police or the police would fail to prosecute any complaint (as had been the situation with Mr Raharaha).

**Misuse of propensity evidence**

[22] Mr Pyke invited this Court to reconsider the rulings on propensity evidence, notwithstanding *Campbell v R,*[5] in which this Court held that it does not lightly embark on a review of its own decisions, especially in the context of the same proceedings. He submitted that the decision of Mr Dangen not to give evidence appeared to be unanticipated by the Court of Appeal the first time around. We do not agree. The Court of Appeal's analysis anticipated that Mr Dangen may not give evidence.[6]

[23] Nor was Mr Pyke able to take any challenge to the directions by Wylie J, the trial Judge, in respect of propensity evidence beyond submitting that Mr Raharaha's evidence is more probative of kidnapping and less so of murder but he acknowledged this Court in its pre-trial judgment held the propensity evidence to be admissible on both the kidnapping and murder counts.

[24] Mr Pyke submitted that the Judge should have directed the jury to be careful about how much weight to give to the evidence of Mr Raharaha's statement on the question of the appellant's involvement in the murder as distinct from the

---

5 *Campbell v R* [2015] NZCA 452 at [20].
6 *Bracken v R*, above n 1, at [11], [43] and [44].

kidnapping. This became his main point: that the propensity evidence was not probative of proof of murder. Mr Pyke argued that:

> Mr Raharaha's statement is highly probative of kidnapping but less so of murder. It supports a modus operandi to tying up and beating and leaving a victim isolated in order to secure compliance with a demand but not to kill.

Mr Pyke submitted that the trial Judge should have identified the propensity evidence as primarily relevant to the jury's assessment of the kidnapping count since there is little evidence to show a murderous intention in the Raharaha statement and none in the Johns/Cochrane propensity evidence.

[25] In reply, the Crown emphasised that the Court of Appeal's pre-trial judgment was explicit on the admissibility of propensity evidence in relation both to the murder and the kidnapping charges:[7]

> [60] For these reasons we are satisfied that the probative value of the evidence of Mr Raharaha and Mr Johns and Ms Cochrane *in relation to the issue of whether the appellant was involved in the kidnapping and murder of Mr Davis is substantial*. That probative value outweighs the risk that it may have an unfairly prejudicial effect on the appellant. The risk that the jury will focus too much on these incidents and substitute their view on those incidents for the required deliberation as to the guilt of the appellant on the charged incidents, can be met by judicial direction.
>
> (emphasis added)

[26] The Crown submitted correctly, this conclusion reflects the Court's formal order F:

> F. This means that the evidence of the March 2003 incident involving Mr Raharaha and of the February 2011 incident involving Mr Johns and Ms Cochrane is admissible as evidence tending to show the propensity identified at [45] of Heath J's judgment in relation to both Count 1 (the unlawful detention charge) and Count 2 (the murder charge) of the indictment.

[27] In the light of the italicised phrase in [60] we think that no weight can be attached to the appellant's submission arguing the propensity evidence could not be used by the jury when examining proof of murder. Specificity in the context of propensity evidence does not require precise coincidence between the charges that were associated with the propensity evidence and the index charges to which the

---

7 *Bracken v R*, above n 1.

evidence is offered. Neither does it require the underlying conduct to be identical.[8] The Judge told the jury that the Crown case was that this propensity makes it more likely that Mr Bracken kidnapped and murdered Mr Davis.

[28] We have already referred to the finding of this Court in the previous decision that the propensity evidence goes both to the kidnapping and to the murder. We see no need to review that finding. There is a pattern of confining, threatening and assaulting people. The Crown submitted that the propensity evidence showed a combination of detention and significant violence being inseparable, submitting:

> In all of this, the obvious should not be overlooked: restraining people for prolonged periods of time and administering gratuitous violence within that context is unusual behaviour.

[29] The Crown also submitted that the propensity evidence had a measure of additional probative value on the murder count because it tended to confirm as true Kenneth Bracken's evidence that the appellant was intent on killing Mr Davis and the fact that Mr Dangen told Senior Constable Robinson that he was in fear of his life.

[30] Obviously the propensity evidence did not include killing. But the evidence was significantly cruel and unusual and supported the proposition that this man could kill. We find that there is no miscarriage of justice by reason of the use of the evidence at trial and the trial Judge's directions on propensity evidence.

**Admissibility of irrelevant and unduly prejudicial evidence, in breach of ss 7, 8 and 85**

[31] The second main argument is that the trial Judge permitted cross-examination about irrelevant, speculative, emotive and prejudicial claims as to the appellant's state of mind.[9]

[32] There are two aspects to this argument which it is convenient to separate:

---

8 *Hetherington v R* [2012] NZCA 88 at [13]-[20].

9 See [3](b) above.

(a) Whether witnesses giving evidence as to the appellant's state of mind were being descriptive of his conduct in a manner relevant to the issues of the trial; or were giving expert evidence without qualifying as experts.

(b) The extent to which Mr Dangen, as a co-defendant, was entitled to lead prejudicial evidence against the appellant.

*Emotive and prejudicial cross-examination*

[33] Mr Pyke's argument focused on the questioning of Crown witnesses by counsel for Mr Dangen in cross-examination. For example, a Constable Wihongi was asked in cross-examination whether Mr Raharaha told him Mr Bracken said he would visit his mother (being put as a threat). The submission was this proposition had not been put to Mr Raharaha, was hearsay, and had no foundation in the evidence. Counsel ought to have objected and the Judge should have ruled it inadmissible and directed it to be disregarded. As another example, Mr Kenneth Bracken was cross-examined by counsel for Mr Dangen, eliciting evidence from Kenneth that the appellant was carrying a "menacing threat" and his eyes were going "dark, black".

[34] Mr Pyke said that the cross-examination contained prejudicial propositions, whether answered or not. For example, Sharon Bracken was cross-examined:

Q But he's also got a darker side that you're well aware of, hasn't he?

A Darker side as in, I don't understand the question.

Q Well he's got a dark side, he's got an evil side, I suggest to you you know?

A Well I haven't seen an evil side.

Q Well you know he can be extremely threatening don't you?

A Um, not extremely threatening.

Q You know that his threatening side, I suggest, is amplified or made worse by him taking methamphetamine, don't you?

A Oh, I don't know.

Q You know that methamphetamine and your brother, Wayne Bracken, are not a good mix, don't you?

A I don't know.

…

Q I suggest you know very well that methamphetamine and Wayne produces dark, evil behaviour?

A I haven't seen it myself.

Q You would have known that Wayne at least has been alleged to have been involved in an incident back in 2003 with Mr Raharaha, you know that don't you?

A Raharaha?

Q Yeah.

A I don't know that person.

Q Never heard about that incident from March 2003 where it's alleged that Wayne kidnapped this young man and held him in the back of the car and –

A Oh, I –

Q Tortured him?

A I had heard about it, I didn't know about it at the time.

Q Well back in the lead-up to March 2003 Wayne was using a lot of methamphetamine, wasn't he?

A Oh, I don't know for sure.

[35] A police officer, Mr R J Gray, was called. He was involved in the Johns robbery incident. He recorded that Mr Johns was afraid of the appellant. It was put to him that Ms Cochrane told him that she was scared to talk to the police about Wayne Bracken because she regarded him as dangerous, that she was scared of going to Court and that she knew that some day he would be getting out. He answered, "yes" to these propositions.

[36] Mr Pyke submitted that all these questions were objectionable under s 85 of the Evidence Act and ought not to have been permitted.

[37] Section 85 of the Evidence Act 2006 states:

**85 Unacceptable questions**

(1) In any proceeding, the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.

(2) Without limiting the matters that the Judge may take into account for the purposes of subsection (1), the Judge may have regard to—

(a) the age or maturity of the witness; and

(b) any physical, intellectual, psychological, or psychiatric impairment of the witness; and

(c) the linguistic or cultural background or religious beliefs of the witness; and

(d) the nature of the proceeding; and

(e) in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

[38] Mr Pyke placed particular emphasis on the observation evidence of Mr Kenneth Bracken (giving evidence under immunity) that was very damaging. He submitted that it "depended on non-expert speculation about the effects of illicit drugs for its force". He criticised the Judge for not directing the jury not to speculate about the unproven effect of illicit drugs on the appellant. There was no clinical or medical evidence about this and it invited speculation from the jury to explain why the appellant allegedly killed the deceased. The absence of specific directions on this aspect contributed, in his submission, to a miscarriage of justice.

[39] Mr Pyke also focused on cross-examination by Mr Dodds, counsel for Mr Dangen, of the appellant's other brother, Frederick Bracken. He drew attention to cross-examination by Mr Dodds on behalf of the co-accused, putting to Mr Fred Bracken assertions as follows:

(a) The appellant had threatened to kill him.

(b) The appellant had said he was the "chosen one".

(c) The appellant said he had one thousand spirits coming to "look after him".

(d) The appellant claimed he was the devil.

(e) The appellant threatened to cut off Mano Warmington's head and put it on a stake.

(f) The appellant said he wanted to paralyse named people by sticking a knife in their spine and twisting it.

[40] Mr Pyke submitted generally that the questions asked and the answers that were elicited from witnesses by counsel for Mr Dangen were both irrelevant and prejudicial, consisting of character blackening. Trial counsel ought to have objected to them, and the Judge failed to direct the jury on them.

[41] In respect of Frederick Bracken's assertions, Mr Pyke submitted that the assertions set out at [39](b) – (f) were irrelevant and permitting those questions invited speculation about the sanity or mental balance of the appellant, or invited speculation about violent tendencies that had no connection to the charged acts. Mr Pyke noted that it was not part of the Crown or defence cases that the appellant was psychotic at the time or that he suffered from a mental illness. Essentially, he argued that the comments provided an invitation to the jury to find that the appellant was an evil lunatic. This evidence, he says, deprived the appellant of presenting an effective defence, since this evocative picture of him being an evil lunatic came from his brother.

[42] Mr Pyke submitted that the Judge failed to address this prejudice in the summing up and that this evidence required directions that:

(a) There was no evidence that the appellant suffered from mental illness and the jury ought not to speculate about it, or conjecture that this explained his actions: they should focus on the evidence of what actually occurred and put to one side unqualified opinions of this sort.

(b) Evidence about him believing himself to be "the chosen one", about spirits or the devil had no connection to the case, was irrelevant and must be put to one side as it would not help the jury decide what occurred in this case.

(c) The descriptions of him as evil were emotive and baseless, and had no place in a criminal trial, and the jury's task was to decide if he had committed the crimes alleged, not to speculate about such matters.

[43] As is probably apparent to the reader already, all sides relied on the evidence of drug use for varying reasons. The Crown and co-accused both agreed that it fuelled or triggered the appellant's violence.

*The Crown argument of relevance of drug use, crazy behaviour and the like*

[44] Mr Downs, for the Crown, submitted that these matters were relevant to the defence of Mr Dangen, so admissible under s 7, and were not excluded by s 8, nor s 85.

[45] Mr Downs submitted that it was Mr Dangen's defence that the appellant killed Mr Davis without any assistance or encouragement from him. Rather, his presence and inaction were in consequence of his fear of the appellant. Mr Dangen had to establish a basis to explain his fear and his paralysis in the situation. Mr Downs emphasised that it is important to keep in mind that Mr Dangen was a co-defendant on a charge of murder and was entitled to defend himself. Further, he said that such defendants should not be deprived of the right to adduce evidence that is of consequence to the determination of the proceedings. To the extent that this may result in unfairness to the co-defendant, those can be addressed by way of severance or directions.

**Analysis**

[46] The leading case in New Zealand on this point is the decision of this Court in *R v Moffat.*[10] The defendant had been convicted, with five others, of manslaughter.

[10] *R v Moffat* [2009] NZCA 437, [2010] 1 NZLR 701 at [21].

He had sought to adduce evidence of one of his co-defendant's convictions for violence. The trial Judge declined to admit the evidence. This Court wrote three, separate concurring judgments. In his judgment, Baragwanath J undertook an analysis of ss 7, 8, 40, 42 and 43 of the Evidence Act 2006 and reviewed the common law. He concluded that the test is one of relevance, such that a defendant should not be deprived of the right to adduce evidence that is "of consequence to the determination of the proceedings".[11] And that, to the extent that this may result in unfairness, this can be addressed by way of severance or directions.[12]

[47] President William Young's reasoning in the same case was similar. He considered the interrelationship between ss 8, 40 and 42 of the Evidence Act.

[48] *Moffat* involved the efforts by one co-defendant to adduce propensity evidence by way of one of his co-defendant's convictions for violence. The case provides authority wider than its facts. It is authority for the proposition that where there are co-defendants, s 8(2) must apply to the rights of the co-defendant to offer an effective defence. Section 8(2) provides:

> **8 General exclusion**
>
> …
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[49] President William Young considered that the circumstances in which the prejudicial effect might justify a refusal to admit evidence led by a co-defendant are those which might justify severance.[13] In the present case, there was no pre-trial application for severance. Such an application would not have succeeded given the pre-trial propensity ruling of the Court of Appeal.

---

11 At [21].
12 At [23].
13 At [43].

[50] In the recent case of *Olua v R*[14] the defendants were charged with importing methamphetamine. Each blamed the other. The co-defendant, Mr Eze, introduced evidence tending to suggest that Mr Olua had engaged in other drug importations and drug dealing. The Court of Appeal upheld the admissibility of that evidence on the basis of relevance, noting that whether classified as propensity evidence or veracity evidence, it had a tendency to advance Mr Eze's contention that Mr Olua was heavily involved in the drugs trade and had set Mr Eze up. Both the judgments of the Court of Appeal in *Moffat* and *Olua* refer to the English decision in *R v Randall*.[15]

[51] One of the cases discussed in *R v Randall* is a decision of the Privy Council, *Lowery v R.*[16] *Lowery* involved the murder of a young girl. Both defendants were present at her murder and each accused the other. One defendant adduced expert opinion evidence that his co-defendant's psychological profile was consistent with that person being the killer. The admission of the evidence was upheld by the Board. In *Randall* Lord Styne said that while the correctness of *Lowery* in terms of the proper limits of expert opinion evidence was not before them, the case was nonetheless "precedent for the view that, in the circumstances of the present case, the propensity to violence of a co-accused may be relevant to the issues between the Crown and the accused tendering such evidence".[17]

*Expert evidence*

[52] Expert evidence was called in this case. Ms Samantha Coward was called, a forensic toxicologist with the ESR. She gave expert evidence that high doses or chronic usage of methamphetamine could give rise to delusions, psychotic episodes and paranoia. It was put to her by counsel for Mr Dangen that heavy methamphetamine usage could result in "random serious violence" and she agreed with that proposition.

[53] In evidence-in-chief, the appellant accepted that he regularly used methamphetamine in 2010 and 2011, including in the period leading up to the

---

14 *Olua v R* [2014] NZCA 105.
15 *R v Randall* [2003] UKHL 69, [2004] 1 WLR 56.
16 *Lowery v R* [1974] AC 85, [1937] 3 All ER 662 (PC).
17 *R v Randall*, above n 17, at [29].

offending. He said taking the drug made him "quite happy", but he then added he could later "get a bit grumpy but never really violent". The Judge did direct the jury on how they should approach opinion evidence from experts.

[54] These are opinions, naturally expressed when telling the Court what happened. It is commonplace for lay witnesses to describe the taking of drugs – be it alcohol or more serious drugs – and describing the consequent behaviour of those persons in colourful terms. To the extent that it is an opinion, it is allowed by s 24 of the Evidence Act 2006, which provides:

> **24 General admissibility of opinions**
>
> A witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate, or the fact-finder to understand, what the witness saw, heard, or otherwise perceived.

**The time of death issue**

[55] Here, what was required was a fair summing up of the evidence. The Judge reminded the jury that the appellant pointed to the scientific evidence, arguing the Crown cannot exclude as a reasonable possibility that the murder was committed at or about 2.00 am on the Friday morning, at which time he was in Whangarei with his half brother, Kenneth, and to the possibility that the science does not exclude the possibility that the death occurred sometime other than midday on the Friday. We are satisfied that the Judge set out the appellant's case on this point and that nothing more was required.

**The directions to the jury on the appellant's evidence**

[56] Looking at the summing up as a whole, there is no argument for lack of balance or any overall unfairness in the way the Judge explained the defence case.

**The appellant's evidence**

[57] We are unable to find any legal error in the Crown's cross-examination duties to put the case to the appellant or in the Judge's directions to the jury that they were free to evaluate the appellant's testimony against other available evidence. The

Judge left the evidence with the jury in a fair manner; his directions to the jury on inference and circumstantial evidence were orthodox.

**Conclusion**

[58] None of the submissions of both counsel for the appellant have persuaded us that there was any error by the trial Judge. We note also that experienced trial counsel did not criticise the careful summing up. In a trial of this importance, we can be sure that counsel at the trial followed the summing up of the Judge closely and would have taken any points that might possibly arise. We are satisfied that the appellant had a fair trial. The conviction appeal is dismissed.

**Sentence appeal**

[59] Mr Pyke agreed, as he had to, that s 104 of the Sentencing Act was engaged, particularly the factors in s 104(1)(d) and (e), which provide:

> **104 Imposition of minimum period of imprisonment of 17 years or more**
>
> (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
>
> …
>
> (d) if the murder was committed in the course of another serious offence; or
>
> (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness.
>
> …

[60] That established a minimum term of 17 years. Mr Pyke, in his submissions, criticised [42] of the sentencing notes:

> [42] All murders are brutal, but the murder in which you were involved was particularly brutal. The brutality and your callousness are illustrated by a number of factors:
>
> (a) First, Mr Davis was tied up under the threat of violence on the Thursday afternoon. He was left tied up for around 20 hours. During that time, he must have been in a state of

terror and desperation. You forced him to endure a long, agonising and cruel wait until you eventually sent him to his death. You were utterly indifferent to his torment.

(b) Secondly, you bundled Mr Davis into the back of the Suzuki, threw a tarpaulin over him and took him to the track. You then pushed or rolled or kicked him down the steep bank into the gully. You had the thistle grubber with you at the time. It must have been obvious to Mr Davis what was going to happen. You were oblivious to his anguish.

(c) Thirdly, Mr Davis was utterly helpless when you struck him with the thistle grubber. He was hog-tied. He could not defend himself or ward off your blows in any way. Your assault was calculated and vicious. It was, in effect, an execution.

(d) Fourthly, there are the horrific injuries suffered by Mr Davis. Your blows were targeted to his neck. They were repeated and they were significant. Extreme violence was used. Mr Davis did not die immediately. Rather, he bled to death over a period of minutes. You were devoid of any sensitivity or basic feelings of humanity for Mr Davis throughout.

(e) Fifthly, your actions were premeditated. On the Thursday night, you in effect told Kenneth that you were going to kill Mr Davis. You suggested various weapons you might use, or ways to do it. You clearly contemplated a gruesome end for Mr Davis.

(f) Sixthly, there is no explanation for the murder. It appears to have been simply cold-blooded and gratuitous. While there were various suggestions proffered by counsel at the trial, there was no obvious reason for your attack or for its savagery.

(g) Seventhly, there are your reactions after the murder. You came up from the gulley, having murdered Mr Davis, grinning and covered in blood. You then set out to hide all traces of your crime. You thought you could and would get away with it. You were cocky and brazen. You even boasted to a fellow inmate that the police would not find your DNA on anything and that there was nothing to link you to the murder.

[61] Mr Pyke criticised the matters outlined in (f) and (g). He submitted, while these might establish an absence of mitigation, they were not aggravating features and ought not to have been counted. He relied on the Court of Appeal decision in

*Thurgood v R.*[18] He also argued that the Court should not have taken into account the factors in [46](c):

> [46] There are aggravating features personal to you which justify an increase in the minimum term of imprisonment:
>
> …
>
> (c) Thirdly, there is the aggravated robbery, the assault with intent to injure and the burglary. That offending is significant in its own right. It involved stand over tactics, violence and intimidation. It reinforces the fact that you are a violent and dangerous man.

[62] As this Court has emphasised on many occasions, to succeed on a sentence appeal the Court must be satisfied that the end sentence reached is manifestly excessive.

[63] We agree with the trial Judge that the murder involved a very high degree of brutality, cruelty and callousness. The factors listed by the Judge in [42](a)-(g) were properly relied upon as demonstrating a particularly brutal, cruel and unfeeling killing. Paragraphs [42](f) and (g) relate directly to callousness.

[64] By reference to the criteria in s 103(2) of the Sentencing Act, particularly the need to protect the community, the Judge was quite entitled to adopt, as an initial starting point, a minimum term of imprisonment of twenty years. He was then entitled to uplift the sentence by one year to take into account the other offending for which Mr Bracken was charged and his prior offending. We acknowledge that the Judge was in error in referring to lack of remorse as a factor justifying an uplift. Remorse is a mitigating factor, but its absence cannot be treated as an aggravating factor.[19] Nevertheless, lack of remorse was only one of three factors referred to by the Judge as the basis for the uplift and we do not think that the end sentence reached is out of the available range so as to be manifestly excessive. The sentence appeal is dismissed.

---

[18] *Thurgood v R* [2012] NZCA 23.

[19] *R v Miers* (1994) 11 CRNZ 307 (CA) at 313; *Te Awa v R* [2014] NZCA 615 at [41].

## Decision

[65] For the reasons set out in this judgment, the appellant's appeal against conviction and sentence are both dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent