IN THE COURT OF APPEAL OF NEW ZEALAND

CA139/2014
[2015] NZCA 366

BETWEEN	ANDREW PARRY NICHOLSON Appellant
AND	THE QUEEN Respondent

CA170/2014

AND BETWEEN	THE QUEEN Appellant
AND	JOHN GRANT CUTHERS Respondent

CA186/2014

AND BETWEEN	JOHN GRANT CUTHERS Appellant
AND	THE QUEEN Respondent

Hearing:	21 April 2015
Court:	Wild, Clifford and Dobson JJ
Counsel:	C J Tennet for Appellant Nicholson M N Pecotic for Appellant Cuthers K Raftery for the Crown
Judgment:	12 August 2015 at 10.30 am

JUDGMENT OF THE COURT

A The appeal by Mr Nicholson, which is against both conviction and sentence, is dismissed.

B The appeal by Mr Cuthers, which is against conviction only, is dismissed.

C The application by the Solicitor-General for leave to appeal against the sentence imposed on Mr Cuthers is granted. That appeal is allowed. The minimum period of imprisonment of 13 years imposed on Mr Cuthers is quashed. A minimum period of imprisonment of 17 years is substituted.

REASONS OF THE COURT

(Given by Wild J)

Contents

Introduction

[1] In the early hours of 27 July 2011 the appellants arrived together at the home of Mr McMurdo in Helensville intending to steal his possessions. They left some time later having stolen a substantial amount of his property.

[2] Three days later Mr McMurdo's body was found at the back of his property. He had received a severe beating and been left outside to die.

[3] At the end of their trial in November 2013 the jury found both appellants guilty of murdering Mr McMurdo.

[4] On 28 February 2014 Lang J sentenced Mr Nicholson to life imprisonment and ordered him to serve a minimum period of imprisonment (MPI) of 17 years. The Judge sentenced Mr Cuthers to life imprisonment and imposed a MPI of 13 years.[1]

[5] On various grounds, some common, each appellant appeals against his conviction. Mr Nicholson also appeals against the MPI imposed, contending it was manifestly excessive.

[6] The Solicitor-General applies for leave to appeal against the 13 year MPI imposed on Mr Cuthers. He submits it was manifestly inadequate and ought to have been 17 years as for Mr Nicholson.

Background

[7] Mr Cuthers was a drug dealer, in particular selling methamphetamine. On 26 July 2011 Mr McMurdo responded to a text message Mr Cuthers had sent out to customers advising he had methamphetamine for sale.

[8] Mr Cuthers travelled from Mangere to Mr McMurdo's home in Helensville, taking Mr Nicholson and a third man, Mr Edwards, with him.

[9] When they arrived at Mr McMurdo's house, Mr McMurdo told them he wanted the methamphetamine on credit. While they were there Mr McMurdo tried to interest them in buying a drug (described in evidence as "bath salts") he was selling. Mr Nicholson tried some but they did not buy any. Mr Cuthers refused to give Mr McMurdo credit and the three men went away without making a sale.

---

[1] *R v Nicholson* [2014] NZHC 334 [Sentencing notes]. The Judge also sentenced each appellant to lesser, concurrent, terms of imprisonment for other offences to which they had pleaded guilty, including offering to supply (to Mr McMurdo) methamphetamine.

[10] In the early hours of the following morning, 27 July 2011, the appellants returned to Mr McMurdo's house. Evidence of a "spike" in electricity usage in the house indicated they were in Mr McMurdo's home for some hours. During that time Mr McMurdo received a severe beating from Mr Nicholson. Whether this occurred inside or outside the house — or both — was not clear, but the evidence indicated at least a scuffle on the lawn and there were drag marks down the lawn to the place where Mr McMurdo's body was found. The evidence was that Mr McMurdo was alive when his body was dumped, so he was effectively left outside to die.

[11] Both men then stole a substantial amount of Mr McMurdo's property from the house. This included sound equipment, a plasma television and the "bath salts" Mr McMurdo had earlier tried to sell them. The two men then travelled to West Auckland and set about attempting to sell the property they had stolen.

[12] The Crown case at trial was that Mr Cuthers was the "brains" behind this escapade and Mr Nicholson the "brawn". Mr Nicholson was, physically, a very big man. Crown counsel closed on the basis that Mr Nicholson had inflicted the injuries from which Mr McMurdo died, but Mr Cuthers was guilty under s 66(1) of the Crimes Act 1961 as a party, because he encouraged or assisted Mr Nicholson. The Crown case was that the intended methamphetamine sale to Mr McMurdo was Mr Cuthers' drug deal, with Mr Nicholson there to provide "muscle".

CA139/2014: Mr Nicholson's appeal against conviction

Wrongful admission of statements to the police

[13] Mr Tennet submitted evidence of what Mr Nicholson said to the police in three successive interviews was wrongly admitted.

[14] In response, Mr Raftery made the initial point that no objection was taken at trial to the admission of those statements, introduced as part of the evidence of the interviewing police officer, Detective Patterson. Consequently we agree with Mr Raftery's submission that this point ought to have been advanced as an error by trial counsel, rather than as a "substantial misdirection" by the trial Judge, who was not required to give any ruling on the admissibility of the evidence. In terms of the

judgment of Gault J for the majority of the Supreme Court in *R v Sungsuwan*, the issue is whether trial counsel erred in not objecting to this evidence and, if so, whether there is a real risk it affected the outcome at trial.[2]

[15] The first interview took place on 23 March 2012 at Mt Eden Corrections Facility. Mr Nicholson was in custody in respect of drug charges. The Detective told Mr Nicholson he wanted to talk to him about the murder of a Lee McMurdo and explained Mr Nicholson's rights to him. He then asked Mr Nicholson what he wanted to do. Mr Nicholson said "I want a lawyer first …". The Detective next asked Mr Nicholson to confirm that he understood his rights by repeating to the Detective what they were. Mr Nicholson then inquired "How did I become a suspect?". After the Detective again mentioned Mr McMurdo's death, Mr Nicholson asked "Who's Lee Mc … or from"? Following further discussion about choice of a lawyer, the transcript records a jailer coming into the interview room to arrange a phone call to Ms Dyhrberg QC, whom Mr Nicholson had nominated as a lawyer to advise him. After further discussion about the possibility of continuing the interview after Mr Nicholson had spoken to Ms Dyhrberg, the first interview ended.

[16] Mr Tennet submitted prejudice arose because the jury became aware Mr Nicholson was in prison. As Mr Raftery pointed out, the jury were told Mr Nicholson was in custody on the drug counts to which he had pleaded guilty, at the beginning of the trial. There can be no resulting prejudice from the jury learning something they already knew. Given this interview was curtailed when Mr Nicholson said he wanted to speak to a lawyer, we see no force in Mr Tennet's other complaints that this interview was "an attempt to subvert the right to silence".

[17] The second interview took place later the same day, 23 March 2012, after Ms Dyhrberg had come to the prison and spoken to Mr Nicholson. The evidence of this interview comprises a handwritten statement. It was corrected and signed by Mr Nicholson: "I have read this statement and it is true and correct. A Nicholson". The statement records that Mr Nicholson had declined to make a DVD statement or an audio-recorded statement. It also records that he had been told of his right to

---

2 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730 at [70] and [115].

remain silent and not to make any statement. In the course of responding to questions Detective Patterson then put, Mr Nicholson:

- said he had nothing to do with the murder of Lee McMurdo and knew nothing about it.

- added that he knew nothing about Helensville and did not want to answer any more questions about Helensville until told why he is a suspect: "This is wasting my time".

- stated he had been to Helensville, but he did not know where.

- when shown a photograph of Mr McMurdo's home and asked if he had been there, replied: "Yep I've been there … I can tell you I have been to that address a few times, on good terms. I've met Lee, he was a good man. He was good to me, and I was good to him. I can tell you I didn't kill him, I don't know who killed him, I know nothing about killing him. That's all I want to say about that …".

- explained he had met Lee McMurdo through his friend Johnny Cuthers: "And that's how I met Lee, through him. We weren't really going there to see Lee, we were going there to see one of his flatmates, Zac [Edwards]. That's all I have to say for now, until next time".

- asked if he was happy to schedule another time to talk to the Detective again, answered: "If need be".

[18] We can see nothing objectionable in this second statement being adduced in evidence. It was made after Mr Nicholson had conferred with Ms Dyhrberg, who subsequently represented him at trial. His right to remain silent and not make any statement was explained to him, acknowledged by him, and reiterated to him. He did then answer questions from the Detective and he signed the written statement acknowledging it correctly recorded his answers.

[19] The third statement was made on 18 August 2012 at the North Shore Policing Centre. It is the transcript of an audio-recorded interview, the camera having been turned off at Mr Nicholson's request. The transcript records the Detective outlining everything that had happened that morning. That included the police arresting Mr Nicholson at his home, handcuffing him and bringing him to the police station, and other police officers executing a search warrant on Mr Nicholson's home. It records Mr Nicholson's request that he did not wish to say anything until his lawyer had arrived and spoken to him. At that point the interview was discontinued. It recommenced about an hour later, after Mr Nicholson had spoken again to Ms Dyhrberg. The Detective then recorded Mr Nicholson telling him he elected to remain silent. The Detective explained he wished to tell Mr Nicholson of information the police had and give Mr Nicholson an opportunity to comment on it. The Detective outlined in considerable detail the result of the police inquiries to date, in particular those surrounding the events of 26–27 July 2011. This included:

- Mr Edwards had told the police that he, along with Mr Nicholson and Mr Cuthers, had visited Mr McMurdo on the afternoon of 26 July 2011 for the purpose of selling him methamphetamine.

- Mr Nicholson's DNA had been located on a Billy Maverick drink can on the kitchen bench in Mr McMurdo's house.

- A man called Jason had told the police that Mr Nicholson and Mr Cuthers had turned up at his house at about 7 am on 27 July 2011 in a Mitsubishi L300 van with a large amount of property matching descriptions of property stolen from Mr McMurdo's home. It included sound equipment and a plasma TV.

- Two days after Mr McMurdo's body was found, Mr Nicholson and Mr Cuthers had left Auckland and travelled to Northland in a stolen car.

- A woman had told the police that Mr Nicholson had borrowed her car to collect money for drugs from "a guy's house", then:

> Later that night or early the next morning, she saw you at her sister's house where you told her you and Johnny had gone back there in your uncle Harry's van to repo him and you gave the guy a beating, used a sleeper hold on him and dragged him out by the trees and left him there. You told her you didn't mean to kill him. You told her you took a TV, PS3 being a Playstation 3, a DJ mixer and a speaker; she later gave you a ride to an address in Choice Ave, Henderson, where she saw all of those items.

- The pathologist who conducted the post-mortem on Mr McMurdo had advised strangulation was a highly likely cause of death. Mr McMurdo had muscle bruising to the front of his neck and thyroid, and thyroid bone fractures at the left side of his neck. Significant force would have been required to cause such injuries.

[20] After the Detective finished summarising the key points of the information the police had, Mr Nicholson stated "I can see why you think it was me".

[21] Mr Tennet relied on this Court's judgment in *Harder v R* where this Court said:[3]

> Once an arrested person has indicated that he or she wishes to exercise his or her right to access to counsel, the police must not attempt to elicit information from that person until such time as that person has seen counsel.

[22] Again, we can see no basis on which objection might have been taken to this statement being introduced in evidence. Mr Nicholson had just seen Ms Dyhrberg. There could be no suggestion that his right to remain silent had not been hammered home to him. Immediately after his comment that he could see why the police thought it was him, the Detective reminded him that he did not have to say anything and he then reiterated his previous indication that he exercised his right to silence: "Still the same".

[23] Further, in summing up, Lang J suggested to the jury they might find some tracts of the evidence of little assistance. He suggested the jury may place in that category what the two accused had said to the police. He directed the jury:[4]

---

3 *Harder v R* (2004) 21 CRNZ 255 (CA) at [18].

4 *R v Nicholson* HC Auckland CRI-2012-044-5045, 29 November 2013 [Summing up] at [22].

> … the question of what they said to the police at the time when they were spoken to nearly a year later is perhaps of marginal assistance if any. I suggest to you that you focus when you are considering the evidence on the events that closely surrounded those that occurred on the night of the 26th/27 July, that's the afternoon beforehand, as context to the events leading up to that and, more particularly, what you are left with at the scene and what happened in the immediate aftermath in the day or two following the incident, because those, you may well find, are the most helpful indicators to the critical issues you are going to need to consider.

[24] Mr Nicholson's rights were not breached on any of these three occasions, so it is not necessary to consider s 30 of the Evidence Act 2006, which Mr Tennet mentioned in passing in his written submissions. There is nothing in this first appeal point, which we dismiss.

[25] In addition to challenging the admissibility of the evidence of the three interviews or statements detailed in [15] – [20] above, Mr Tennet argued that evidence ought to have been excluded because its unfair prejudicial effect outweighed any probative value it had. Mr Tennet submitted the pattern of the interviews implied an expectation Mr Nicholson would respond to questions about his alleged involvement, giving rise to an adverse inference against him for not doing so, or doing so only in a limited way.

[26] We do not accept there is any basis for this concern. The evidence included repeated acknowledgments of Mr Nicholson's right to remain silent, so there is no basis for a concern that the jury might have drawn any inference adverse to Mr Nicholson when he exercised that right.

Right to silence

[27] Following from the point just addressed, Mr Tennet submitted Detective Patterson had breached s 33 of the Evidence Act and the Judge needed, but had failed, to direct the jury on that breach, resulting in a miscarriage of justice.

[28] Section 33 provides:

> **Restrictions on comment on defendant's right of silence at trial**
>
> In a criminal proceeding, no person other than the defendant or the defendant's counsel or the Judge may comment on the fact that the defendant did not give evidence at his or her trial.

[29] This point rested on several parts of the Detective's interviews with Mr Nicholson, but focused on the Detective telling Mr Nicholson in the course of the first interview:

> … we have an obligation to the person or people responsible for causing Lee McMurdo's death, those people are carrying that knowledge around with them, and what we want to do is create the opportunity to talk about it, to take responsibility for it, to move on, and basically …, there might be a story behind what happened that we need to hear.

[30] This has nothing to do with s 33. As that section applied to Mr Nicholson's trial, it proscribed comment by anyone other than the Judge or Mr Nicholson's counsel on the fact that Mr Nicholson had elected not to give evidence. Mr Tennet also referred to s 32(2)(b), which requires the Judge to direct the jury that it may not draw an inference of guilt from a defendant's silence *before* trial. That section equally does not aid Mr Nicholson, as he did not exercise his right to remain silent before trial, but made the statements referred to at [15], [17] and [20] above. Neither of these provisions has any bearing on the Detective giving Mr Nicholson an opportunity to talk about Mr McMurdo's death.

[31] We dismiss this second appeal point.

Failure to direct on intoxication

[32] Mr Tennet submitted the required evidential foundation for a direction about intoxication comprised:

- The previous day, when Mr Cuthers, Mr Nicholson and Mr Edwards had gone to Mr McMurdo's home to sell him methamphetamine, Mr Nicholson had tried some of the "bath salts" Mr McMurdo had for sale.[5]

---

5 Refer to [9] above.

- On 21 June 2012, when the Detective asked Mr Nicholson whether he had supplied drugs to Mr McMurdo, Mr Nicholson told the Detective he had smoked a cannabis joint a few hours earlier.[6]

- Mr Cuthers' DNA was found on some cans of Woodstock in Mr McMurdo's home.

- An analysis of Mr McMurdo's blood showed he had smoked cannabis within five hours of dying and showed .05 m/l of methamphetamine, a level within the scale for recreational use.

- These last two points were relevant, he submitted, because the appellants had not drunk alcohol during their visit to Mr McMurdo's house on 26 July, nor had they sold methamphetamine to Mr McMurdo — the consumption of both must have occurred later.

[33] These matters come nowhere near establishing that Mr Nicholson was affected by alcohol or drugs at the time he attacked Mr McMurdo. When the Court put it to Mr Tennet that giving an intoxication direction would effectively have invited the jury to guess or speculate as to whether Mr Nicholson might — or might not — have been affected by alcohol or drugs, he indicated he could not take this point any further.

[34] We dismiss this third appeal point.

Inadequate direction on intent

[35] Although he accepted the Judge's question trail was correct, Mr Tennet submitted the Judge had not adequately directed the jury in respect of the alternative "pathways" to murder under s 167(b) and s 168(1)(a) of the Crimes Act. This, in Mr Tennet's submission, was particularly so because it could be inferred that the two

---

[6] Between the second and the third interviews described above at [17] and [19] above, the Detective went to see Mr Nicholson to talk about whether he had supplied drugs to Mr McMurdo. It was on that occasion that Nr Nicholson told the Detective he had smoked a joint earlier in the day, and indicated he would not speak to the Detective again until he had seen his lawyer.

appellants had been drinking and socialising with Mr McMurdo before the murderous attack on him. First, Mr Tennet argued that the Judge had not sufficiently directed on intent. This aspect was not pursued after the Court drew attention to [33]–[34] of the summing-up, which contained detailed and accurate directions on the intents the Crown needed to prove.

[36] Mr Tennet then submitted that further directions were needed in respect of the injuries Mr McMurdo suffered, and the intent to injure that needed to be proved. This aspect was not pursued either when the Court drew Mr Tennet's attention to [29]–[31] of the summing-up.

[37] There is nothing in this appeal point, which is dismissed.

Failure to separate the "pathways" to murder

[38] Mr Tennet was largely content to adopt — appropriately adapted to Mr Nicholson's situation — Ms Pecotic's submissions on behalf of Mr Cuthers, so we will mainly deal with this point when we come to those submissions.

[39] Mr Tennet did make some additional submissions. He made the point that the Crown was relying both on s 167 and s 168, which he described as "competing theories". Because liability under one did not mean liability under the other, the Judge needed to split them and direct the jury that, if they were not satisfied under s 168, then they should move on to s 167. Because that had not been done there was a danger that unanimity had come about in the wrong way.

[40] Mr Tennet submitted "there is a real danger there was a miscarriage of justice in the way the indictment was to them given the unanimity directions of the Learned Judge". This submission makes no sense and we do not understand it. Ultimately, Mr Tennet's complaint seemed to be that it was impossible to tell whether the jury had convicted Mr Nicholson under ss 167(c) or 168(1)(a). His concern seemed to be that this was relevant to sentence — his "felony murder" point referred to in [79](d) below.

[41] We accept that it was never clear on the evidence in the trial quite what had happened after the two appellants returned to Mr McMurdo's home in the early hours of 27 July 2011. That is not an uncommon situation. The sentencing Judge has to determine the facts as best he or she can, which is what Lang J did here.

[42] For the reasons we explain in dealing with Mr Cuthers' appeal against conviction, we find there was no error in the Judge's question trail or in the way he summed up to the jury on ss 66,167 and 168.

[43] This appeal point is also dismissed. We will dismiss Mr Nicholson's appeal against conviction.

Mr Cuthers' appeal against conviction

[44] Ms Pecotic submitted Lang J did not differentiate between s 66(1) and (2), nor between ss 167(b) and 168, of the Crimes Act in summing up to the jury. These complaints were centred on [40] of the summing-up. Before we set that out, it needs to be placed in its context.

The Judge's summing up

[45] In the first part of his summing-up Lang J gave the jury the usual general directions. He then turned to deal with the factual issues the jury needed to decide in respect of each of the two accused. He handed out a two page question trail. He dealt first with Mr Nicholson, who was named first in the indictment. Then he turned to Mr Cuthers. There were two questions relating to Mr Cuthers:

> 1. Are you sure that Mr Cuthers intentionally assisted or encouraged Mr Nicholson to inflict the injuries that caused Mr McMurdo's death?
>
> If Yes and you have found Mr Nicholson guilty of murder, go to Question 2. If Yes, and you have found Mr Nicholson guilty of manslaughter, find Mr Cuthers guilty of manslaughter as well. If No, find Mr Cuthers not guilty of murder and not guilty of manslaughter.
>
> 2. Are you sure that, when he assisted or encouraged Mr Nicholson to cause those injuries, Mr Cuthers:

(a) Knew that Mr Nicholson intended to cause Mr McMurdo bodily injury that Mr Nicholson knew (ie actually appreciated) was likely to cause Mr McMurdo's death; **or**

(b) Knew that Mr Nicholson intended to cause Mr McMurdo really serious bodily injury for the purpose of enabling Mr Nicholson and/or Mr Cuthers to steal Mr McMurdo's property?

If your answer to **either** 2(a) **or** (b) is Yes, find Mr Cuthers guilty of murder. If your answers to 2(a) and (b) are No, find Mr Cuthers not guilty of murder but guilty of manslaughter.

[46] After reading the first question through to the jury, the Judge gave an admirably succinct encapsulation of the Crown and defence cases. As to the former, the Judge said:[7]

> [37] … the Crown case is that this was part of a plan in which the two men were going to go to Mr McMurdo's property, to take, to his house, to take property that belonged to him and to use violence to overcome any resistance that he might give.

And as to the defence case:

> [38] The defence case for Mr Cuthers is he never was party to any plan involving violence. He never intentionally assisted or encouraged Mr Nicholson to inflict the injuries that ultimately caused Mr McMurdo's death.

[47] Next, the Judge led the jury through the options outlined on the sheet after question one. He then directed the jury as follows:

> [40] All right. Well if you are sure that he did intentionally assist or encourage Mr Nicholson in that way, you have gone to Question 2 if you have found Mr Nicholson guilty of murder. You must then consider Question 2 which reads: "Are you sure that, when he assisted or encouraged Mr Nicholson to cause those injuries, Mr Cuthers: (a) Knew that Mr Nicholson intended to cause Mr McMurdo bodily injury that Mr Nicholson knew (ie actually appreciated) was likely to cause Mr McMurdo's death; or (b) Mr Cuthers "knew that Mr Nicholson intended to cause Mr McMurdo really serious bodily injury for the purpose of enabling them to steal Mr McMurdo's property?" So Mr Cuthers must not only intentionally assist or encourage Mr Nicholson, he must do that in the knowledge, in the knowledge, that Mr Nicholson had certain, one of these two intentions.
>
> [41] Again, it is not necessary for you all to agree regarding the state of Mr Cuthers' knowledge of these two points. Some of you may be sure that

---

7 Summing-up, above n 4.

> (a) applies. The balance of you may be sure that (b) applies, but all 12 of you, each one of you, must be sure that either (a), at least either (a) or (b) applies. So if your answer to either 2(a) or 2(b) is Yes, you will find Mr Cuthers guilty of murder. If your answers to 2(a) and 2(b) are No, you will find Mr Cuthers not guilty of murder, but guilty of manslaughter.

Failure to direct on s 66

[48] Ms Pecotic submitted "nowhere in the summing-up is there a detailed summary of party to an offence". Although accepting that Lang J had directed broadly in terms of s 66(1), Ms Pecotic submitted he had not directed in accordance with steps (b) to (d) set out in the majority's judgment in *Ahsin v R*:[8]

> [83] A full explanation of the legal elements of s 66(1)(b) would set out that the Crown must prove beyond reasonable doubt that:
>
> (a) the offence to which the defendant is alleged to be a party was committed by a principal offender; and
>
> (b) the person alleged to be a party assisted the principal offender in the commission of the crime, by words or conduct or both; and
>
> (c) the person alleged to be a party in fact intended to assist the principal offender to commit that particular offence; and
>
> (d) the person alleged to be a party knew both the physical and mental elements of the essential facts of the offence to be committed by the principal offender.

[49] The Judge did not use the somewhat archaic wording from s 66(1), employing instead the commonly understood words "assisted or encouraged". The last part of the Judge's summary of the Crown case against Mr Cuthers was these two paragraphs:[9]

> [55] So far as Mr Cuthers is concerned, the Crown acknowledges that there is no evidence that he participated physically in any assault on Mr McMurdo. The Crown says, however, you need to consider his participation in the light of the way things developed — the fact that he was party to the fruitless trip the previous day, the fact that he came willingly in the van in the middle of the night to steal property and was present throughout, the fact that he then helped load the property in the van and then was instrumental in the attempts that were made to sell it. All of those things make it clear, the Crown says, that Mr Cuthers throughout this whole episode, including the point of time at which the fatal injuries were delivered, encouraged and assisted Mr Nicholson to do what he did. And he

---

8 *Ahsin v R* [2014] NZSC 153; [2015] 1 NZLR 493.

9 Summing-up, above n 4.

> did so. When he saw the beating that was going on, he encouraged it in the knowledge that this was a type of beating and strangulation that would be likely to result in Mr McMurdo's death and that Mr Nicholson appreciated that. At the very least, he must have known and intended to assist and encourage Mr Nicholson, notwithstanding the fact that Mr Nicholson clearly intended to cause Mr McMurdo really serious bodily harm so that they could steal the property.
>
> [56] So the Crown says Mr Cuthers was in this from beginning to end. His intention throughout was to assist Mr Nicholson to obtain that property using violence if necessary, and his intention to assist and encourage him went throughout that period. So on either basis, the Crown says, Mr Nicholson is guilty of murder and Mr Cuthers is guilty of either murder or manslaughter depending on your verdict in relation to Mr Nicholson.

[50] We are not sure whether Ms Pecotic was suggesting the Judge ought to have set out the three statutory provisions in his question sheet, or taken the jury through them in his summing-up. Some Judges do that. But we endorse and commend the approach of Lang J in putting to the jury for their answer clear succinct questions using everyday language.

[51] Ms Pecotic submitted the summing-up, in places, appeared to be referring to s 66(2). For example, in both the passages we have set out in [46] above, the Judge refers to a "plan". But the Judge's use of the words "assisted or encouraged" in [40] of his summing-up is firmly grounded in s 66(1).

[52] Ms Pecotic's next, but related, point was that the Judge did not identify for the jury the evidence from which they might infer assistance or encouragement of Mr Nicholson by Mr Cuthers. If Ms Pecotic was suggesting the Judge needed to put his imprimatur on items of evidence he considered might suggest assistance or encouragement, then that would not have been appropriate. It would have taken the Judge well into the jury's province as the fact finders in the trial.

Failure to direct on ss 167(b) and 168(1)(a)

[53] Ms Pecotic also submitted paragraphs [40]–[41] of the Judge's summing-up did not adequately and accurately direct the jury on ss 167(b) and 168(1)(a) of the Crimes Act, in that there was no direction to the jury that they could only find Mr Cuthers guilty if they were unanimous in finding guilt under either s 167 or s 168. Ms Pecotic argued that failure "to make a clear distinction" had led to a "risk

that the jury convicted Mr Cuthers by reasoning that he was guilty by association or mere presence and/or a combination". Ms Pecotic submitted that Lang J's summing-up was deficient in terms of the Supreme Court's decision in *Ahsin v R*.[10]

[54] We do not accept this argument. First, the Judge's [40], set out above at [47], identified clearly for the jury the two different "pathways" open to them to find Mr Cuthers guilty of murder. All of ss 66(1)(b)–(d) and 167(b), with one exception, is captured in the Judge's pathway (a). The exception is that the Judge did not include a reference to Mr Nicholson being reckless as to whether or not Mr McMurdo died — that is, to Mr Nicholson not caring whether Mr McMurdo died. The way Lang J framed pathway (a) was, if anything, more favourable to Mr Cuthers and Ms Pecotic made no complaint about the lack of a reference to Mr Nicholson not caring whether Mr McMurdo died. The Judge's pathway (b) captures the further definition of murder in s 168(1)(a).

[55] Secondly, the majority in *Ahsin* held the jury, in every case, must be unanimous on the essential ingredients of the offence. But, they noted it is more difficult to identify those essential elements and that a practical and realistic approach by the Judge is required.[11] The appellate decisions in this area rest very much on their own facts,[12] but they do establish that the critical issue in any case is whether the different factual routes to liability amount to separate transactions or are merely different forms of involvement in a single transaction.[13] Unanimity is required as to the particular transaction or event on which criminal liability is based. While the cases are somewhat in tension regarding what constitutes a "single transaction", the following dichotomy where alternative bases of guilt are alleged may assist trial judges:[14]

---

10 *Ahsin v R*, above n 8.

11 At [173]–[174].

12 For example, *R v Ahsin*, above n 8; *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296; *R v Qiu* [2008] 1 NZLR 1 (SC); *Bouavong v R* [2013] NZCA 484; *King v R* [2011] NZCA 664; *R v Shaw* [2009] NZCA 232; *R v Saggers* [2008] NZCA 364; *R v Peters* [2007] NZCA 180; *R v Mead* [2002] 1 NZLR 594 (CA); *R v Ryder* [1995] 2 NZLR 271 (CA); *R v Chignell* [1991] 2 NZLR 257 (CA); *R v Thomas* [1972] NZLR 34 (CA); see also *R v Tirnaveanu* [2007] EWCA Crim 1239; *R v Giannetto* [1997] 1 Cr App R 1 (CA); *Attorney-General's Reference (No 4 of 1980)* [1981] 1 WLR 705; *R v Thatcher* [1987] 1 SCR 652.

13 *Ahsin v R,* above n 8, at [184].

14 *R v Peters,* above n 12, at [38], cited by Ellen France J (as she then was) in *R v Shaw,* above n 12, at [23]. Although her Honour dissented in that case, her judgment was approved by the Supreme Court in *Ahsin v R*, above n 8 at [186].

(a) Where the alternatives relate to which act, out of a series of acts, actually caused the death of the victim or otherwise constituted the actus reus of the offence; or

(b) When the act causing death or otherwise constituting the actus reus is not in dispute, but where the alternatives relate to the surrounding circumstances.

[56] This Court held in *R v Peters* that the first category would require members of the jury to be unanimous as to the particular act on which they find guilt. The second category, for example a case where the only variation was as to the type of involvement under s 66, would not require a unanimity direction.[15] The majority in *Ahsin* also stated:[16]

> … where the alternatives relate only to the form of involvement in a single transaction or event, there will be a sufficient factual basis for a guilty verdict if the jury is unanimously of the view that the defendant was involved in that transaction one way or the other. Separate charges will not be required, and it will not be necessary for the jurors to be unanimous as to the precise manner in which the defendant was involved if each juror is satisfied that one form of involvement is proven. …

[57] As a matter of practice, as suggested in William Young J's judgment in *Ahsin*, where the defence is prejudiced by the complexity of a charge, or where it is possible to have committed the crime in materially different ways, then separate charges should be laid or a decision should be taken to pursue only one charge rather than unnecessarily confusing a jury by leaving them too many options.[17]

[58] *Ahsin* was decided in October 2014, well after this trial (which took place in November 2013). This guidance was therefore not available to Lang J, but we consider he was correct not to direct the jury that they had to be unanimous as to Mr Cuthers' knowledge. This case falls in the second category in *R v Peters*:[18] there

---

15 *R v Peters,* above n 12, at [37].

16 *Ahsin v R,* above n 8, at [187]. In her separate judgment, the Chief Justice made much the same point at [15].

17 *Mason v R*, above n 12; *R*; *Ahsin v R,* above n 8, at [235] per William Young J; *Bouavong v R*, above n 10, at [123]–[124]; Bernard Robertson *Ahsin v R* [2015] NZLJ 101.

18 *R v Peters,* above n 12, at [37].

is no dispute as to the act that caused death and no difference as to time or place. The alternatives relate only to Mr Cuthers' knowledge of Mr Nicholson's purpose.

[59] The factual alternatives in this case — those summarised in [54] above — both required Mr Cuthers to know that Mr Nicholson intended to cause Mr McMurdo serious bodily injury. The difference between the alternatives goes to Mr Cuthers' knowledge of Mr Nicholson's purpose. These factual alternatives are not mutually inconsistent,[19] nor do they amount to separate transactions. They are "no more than different possible ways in which the defendant was involved in the same [murder]".[20]

[60] When Mr Nicholson and Mr Cuthers entered Mr McMurdo's house, Mr McMurdo was alive. He died later of the injuries Mr Nicholson had inflicted. In finding Mr Cuthers guilty of murder, the jury accepted he intended to assist or encourage Mr Nicholson. The jury must also have accepted that Mr Cuthers knew Mr Nicholson intended to cause Mr McMurdo serious bodily injury. If some members of the jury were sure Mr Cuthers knew Mr Nicholson knew the injuries were likely to result in death, but were not sure Mr Cuthers knew the purpose of injuring Mr McMurdo was to facilitate Mr Cuthers and Mr Nicholson stealing his property, and others were satisfied of the converse, it would be egregious to suggest Mr Cuthers should have been acquitted when he knew Mr Nicholson intended to cause serious bodily harm and intentionally assisted or encouraged Mr Nicholson to that end.

[61] Mr Cuthers' appeal against conviction is dismissed.

Solicitor-General's application for leave to appeal against Mr Cuthers' sentence

[62] In sentencing the two appellants for murder, Lang J found ss 103 and 104 of the Sentencing Act 2002 both applied, requiring him to impose a MPI of not less than 17 years unless satisfied it would be manifestly unjust to do so.

---

19 See *R v Thatcher,* above n 12, at [102]; and *R v Shaw*, above n 12, at [26].
20 *Ahsin v R,* above n 8, at [186].

[63] Following the two-step process suggested by this Court in *R v Williams*, the Judge first fixed the MPIs he considered would be appropriate, but for the operation of s 104.[21] For Mr Nicholson he fixed a 15 year MPI. For Mr Cuthers, he decided on a 13 year MPI, explaining the difference in this way:[22]

> [46] Mr Cuthers, I place you in a slightly different position because of the fact that you were a party rather than the principal who carried out the acts. Having said that, you were clearly complicit in everything that happened up until that time. You were obviously a driving force in respect of all of the events of that day, and the jury also found that you intentionally encouraged Mr Nicholson to inflict the blows. I consider a minimum term of imprisonment of 13 years would be appropriate in your case.

[64] Lang J next considered whether it would be manifestly unjust to impose the MPI of 17 years stipulated in s 104, rather than the minimum terms otherwise appropriate. In the case of Mr Nicholson, he did not consider 17 years would be manifestly unjust and accordingly imposed that minimum term.

[65] Turning to Mr Cuthers, the Judge said:[23]

> [52] Mr Cuthers, I place you in a different category simply because of the fact that you were not the principal in this case, and did not inflict any physical violence on Mr McMurdo. The Court of Appeal has indicated in *R v Slade and Hamilton*[24] that the Court is able to recognise the secondary participation of parties in this context. I consider that a leap from 13 to 17 years imprisonment would be manifestly unjust. For that reason, I am not prepared to impose a minimum term of 17 years imprisonment on you. Instead, the minimum term will be one of 13 years imprisonment.

[66] For the Crown, Mr Raftery made two main submissions: the disparity in the MPI periods between the two appellants was wrong in principle; and the 13 year MPI for Mr Cuthers was manifestly inadequate. Amplifying these submissions, Mr Raftery submitted the Judge fell into error at the first step, in fixing a sentence for Mr Cuthers two years lower because he had not actually inflicted the physical violence that led to Mr McMurdo's death.

[67] First, Mr Raftery pointed out that the factor that brought this murder within s 104 was essentially that it had been committed in the course of an aggravated

---

21 *R v Williams* [2005] 2 NZLR 506 (CA) at [52]–[54].
22 Sentencing notes, above n 1.
23 Sentencing notes, above n 1.
24 *R v Slade and Hamilton* CA245/04, 28 February 2005.

robbery of Mr McMurdo's home: s 104(1)(c) and (d). It was a murder committed by two people who were doing a "repo job": robbing Mr McMurdo of all his valuable possessions and transporting them off to sell them, leaving him to die. Although Mr Raftery eschewed reliance on s 104(e) — a murder committed with exceptional brutality — he emphasised that Mr McMurdo had been seriously beaten and also crushed about the throat or strangled, and also stressed the callousness of the appellants dumping him outside, unconscious, to die there.

[68] Having emphasised these aspects, Mr Raftery directed us to the many places in the Judge's sentencing remarks where he had found that the two appellants were in it together, and indeed that it was Mr Cuthers who had orchestrated the events of the previous day and of that fateful night.[25]

[69] Summarising, Mr Raftery submitted, had the Judge approached the matter properly, he would have found no difference between the culpability of the two offenders, with the consequence that an MPI of 17 years was not manifestly unjust for either of them.

[70] The main points of Ms Pecotic's submissions in response were these:

(a) Although Mr Cuthers had, through his trial counsel, acknowledged he and Mr Nicholson had gone back to Mr McMurdo's house with the intention of stealing his property, he did not concede they intended to take that property using violence if need be.

(b) Mr Nicholson, through his counsel in closing to the jury, had accepted he was the person who had inflicted the injuries which caused Mr McMurdo's death.

(c) Mr Cuthers did not accept he intentionally left Mr McMurdo outside to die. There was an inference available on the evidence that Mr Cuthers did not appreciate that the injuries Mr Nicholson had inflicted would result in Mr McMurdo's death. That Mr Cuthers

[25] We set these out below at [71].

thought it necessary to cut the telephone wires to prevent Mr McMurdo calling for help supported that inference.

(d) There was no evidence supporting the Crown case at trial categorising Mr Cuthers as the "brains" and Mr Nicholson as the "brawn" of the pair, and no indication that the jury had accepted that.

(e) The Judge was right to treat Mr Nicholson as the principal in respect of the murder charge, because Mr Cuthers had not inflicted any physical violence on Mr McMurdo. The Crown's attempt to draw analogies with other crimes where two offenders might be of equal culpability was misplaced.

(f) This Court observed in *Kee v R*:[26]

> This Court noted in *R v Williams* that the relative culpability of the s 104 factors vary greatly, both inherently and in any particular case. The mere presence of one of the factors under s 104 does not automatically give rise to a 17 year MPI in every case.

Applying that here, the distinction Lang J drew between the two appellants was justified. It was accepted there was no evidence Mr Cuthers played a lead role in the physical assault on Mr McMurdo.

[71] We start by reverting to Lang J's sentencing remarks, in particular as to the respective culpability of the two appellants:

(a) He noted both had acknowledged during the trial they had gone to Mr McMurdo's house intending to steal his property.[27]

(b) He thought it likely that this mission to take or steal Mr McMurdo's possessions was because "some form of debt was owed to one or both of you by Mr McMurdo in respect of past drug dealing transactions.[28]

---

[26] *Kee v R* [2011] NZCA 299 at [17].
[27] Sentencing notes, above n 1, at [15].

(c) He was satisfied "you both must have known that it was hardly likely that Mr McMurdo would willingly hand over such treasured possessions to you".[29]

(d) He said:

> [18] I am satisfied that you both agreed and accepted before you went there that if he showed any resistance to you taking his property, then you would deal with that resistance by whatever violence was necessary to accomplish your object. So violence was an issue that was firmly in your minds on that evening.

(e) He accepted there was no evidence that Mr Cuthers was physically involved in the "struggle" with Mr McMurdo. He said to Mr Cuthers:[30]

> In the absence of evidence, I proceed on the basis that your culpability arose because you intentionally encouraged Mr Nicholson to inflict that violence.

(f) After mentioning that the two prisoners had left Mr McMurdo lying in his backyard in "what you must have known was a severely injured state", and addressing the suggestion of remorse, the Judge said:[31]

> The best measure of your remorse, I consider, is to be gained from your reactions and actions during the hours that immediately followed this incident. They give the best insight, I believe, as to whether or not you were remorseful for what you both knew you had been responsible for.

(g) In recounting the facts in the early part of his sentencing remarks, Lang J had said the proposed drug transaction with Mr McMurdo was Mr Cuthers' transaction. He described Mr Cuthers and another person going to visit Mr McMurdo on the afternoon of 26 July, adding, "you were accompanied by Mr Nicholson".[32] In dealing with the drug charges for which he was also sentencing the two appellants, Lang J

---

28 At [16].
29 At [17].
30 At [20].
31 At [26].
32 At [9].

described Mr Cuthers as "a very busy retail drug dealer",[33] and Mr Nicholson as "a much less busy drug dealer".[34] Dealing with the particular charge of offering to supply drugs to Mr McMurdo on 26 July, the Judge said "you [Mr Nicholson] were very much a bit player in a transaction that was initiated by Mr Cuthers".[35]

[72] Given all of that, our view is that the Judge did err in principle in drawing any distinction between Mr Nicholson and Mr Cuthers in fixing the sentences he would have imposed, but for s 104. We make two particular points about what the Judge said in [46] of his sentencing remarks, where he drew the critical distinction. First, the Judge said "you [Mr Cuthers] were a party rather than the principal who carried out the acts".[36] Strictly, as Mr Raftery pointed out, that is wrong. The indictment simply charged both men with murder:

> The Crown Solicitor at Auckland charges that Andrew Parry Nicholson and John Grant Cuthers on or about 27 July 2011 at Helensville, murdered Lee Ross McMurdo.

Mr Raftery emphasised that the Crown, quite deliberately, had not distinguished between the two men in terms of principal and party.

[73] Secondly, the Judge said:[37]

> Having said that, you were clearly complicit in everything that happened *up until that time*. You were obviously a driving force in respect of all of the events of that day, and the jury also found that *you intentionally encouraged Mr Nicholson to inflict the blows*.

[74] We cannot reconcile the two passages we have emphasised in this passage. As he had intentionally encouraged Mr Nicholson to inflict the blows that led to Mr McMurdo's death, Mr Cuthers was complicit also in that. We do not consider the Judge, on any principled basis, could have found Mr Cuthers less culpable — the circumstances engaging s 104 are equally applicable to him.

---

33 At [29].
34 At [32].
35 At [34].
36 At [46].
37 At [46] (our emphasis).

[75] Applying the second step under s 104, and in *R v Williams*, there is nothing that would make it manifestly unjust to impose a 17 year MPI.[38] Although the case law and legislative history indicates a finding of manifest injustice need not be exceptional, the courts should not lightly depart from the presumption of a 17 year MPI in serious murder cases.[39] As we have said, Mr Cuthers' culpability was significant and his pre-sentence report identifies no mitigating or other circumstances that would make a 17 year MPI manifestly unjust.

[76] It follows inevitably that the appropriate MPI for Mr Cuthers was also 17 years. That is the position notwithstanding the constraints applying, given this is an application by the Solicitor-General for leave to appeal.

[77] Consequently, we allow the application, quash the MPI of 13 years imposed on Mr Cuthers and substitute an MPI of 17 years.

Mr Nicholson's appeal against sentence

[78] The view we have reached on Mr Cuthers' appeal against sentence removes the force of Mr Nicholson's appeal against his sentence. In particular, Mr Tennet argued Mr Nicholson's sentence lacked parity with that imposed on Mr Cuthers because this was a classic "joint venture" — the brains and brawn, as the Crown put it. As will be obvious, we agree with that submission.

[79] Mr Tennet's other submissions can be summarised in these seven propositions:

(a) The only inference from the fact Mr Cuthers' DNA was found on alcohol cans at Mr McMurdo's home, when the men had not been drinking on the afternoon of 26 July, is that when the two men went back to Mr McMurdo's home in the early hours they had drinks and socialised.

---

38 *R v Williams,* above n 21, at [52]–[54].

39 At [63]–[67]. See also *Desai v R* [2012] NZCA 534 at [56], citing Sentencing and Parole Reform Bill 2001 (148–2) (Select Committee report) at 8.

(b) Consequently, the concession that they went back to burgle Mr McMurdo's home does not assume the importance the Judge placed on it.

(c) There was limited planning (only a plan to burgle), limited violence and unintended consequences.

(d) An available inference is that death was not intended and the jury convicted because this was "felony murder" (that is a reference to s 168(1)(a));

(e) but it is impossible to tell whether the jury found Mr Nicholson guilty under s 167(b) or s 168(1)(a).

(f) This case is "remarkably similar" to *R v Davis* in which Lang J imposed a sentence of 16 years imprisonment for murder.[40]

(g) The 15 year starting point is manifestly excessive, and does not bear comparison with other cases. The starting point should have been in the range 11–13 years.

(h) It was then, again, manifestly excessive to raise that 15 year starting point to 17 years under s 104. The Judge should not have invoked s 104.

[80] What we have said in allowing the Solicitor's application and appeal in relation to the sentence imposed on Mr Cuthers deals with most of these points.

[81] We do not see more than a general similarity with *Davis*. The single offender there had been socialising with an elderly man who lived in a caravan. After leaving, he decided on the spur of the moment to go back and rob the man. In the ensuing struggle, he murdered the man. After an initial denial, Mr Davis admitted what he

---

[40] *R v Davis* [2013] NZHC 2716.

had done and pleaded guilty. In the particular circumstances, the Crown stance was that a 17 year MPI would be excessive.[41]

[82] We agree with Mr Raftery that this Court's decision in *Wilson v R* is more comparable.[42] There, two offenders went to the victim's address intending to use standover tactics to steal money and drugs. One of them was armed with a knife. The victim was bound and gagged and died of asphyxiation. The appeal concerned the sentence of preventive detention imposed on a second charge of assault with intent to rob. The appellant accepted the 17 year MPI imposed for murder was appropriate, having regard to s 104, and there was no indication in this Court's judgment that it thought that sentence excessive.[43]

[83] Mr Nicholson's appeal against sentence is dismissed.

Result

[84] Mr Nicholson's appeal, which is against both conviction and sentence, is dismissed.

[85] Mr Cuthers' appeal, which is against conviction only, is dismissed.

[86] We grant the Solicitor-General leave to appeal against the sentence imposed on Mr Cuthers. That appeal is allowed. The minimum period of imprisonment of 13 years imposed on Mr Cuthers is quashed. A minimum period of imprisonment of 17 years is substituted.

Solicitors:
Crown Solicitor, Auckland for the Crown

---

41 At [17].
42 *Wilson v R* [2010] NZCA 360.
43 At [10].