IN THE COURT OF APPEAL OF NEW ZEALAND

CA454/2016
[2017] NZCA 138

BETWEEN	LEVI HOHEPA REUBEN Appellant
AND	THE QUEEN Respondent

CA473/2016

BETWEEN	AKUHATUA TIHI Appellant
AND	THE QUEEN Respondent

Hearing:	3 April 2017
Court:	Randerson, Clifford and Whata JJ
Counsel:	J R Rapley for Appellant Reuben P J Shamy for Appellant Tihi M J Lillico and C J Hurd for Respondent
Judgment:	27 April 2017 at 11am

JUDGMENT OF THE COURT

A The sentence appeal by Mr Reuben (CA454/2016) is allowed.

B Mr Reuben's sentence in the High Court is quashed.

C In substitution, Mr Reuben is sentenced to six years and six months imprisonment with a minimum period of imprisonment of three years and three months.

D The conviction appeal by Mr Tihi (CA473/2016) is dismissed.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] These two appeals relate to an incident in the Christchurch Men's Prison. The appellants, Mr Reuben and Mr Tihi, were serving prisoners. They and a third prisoner, Mr Betham, carried out an assault on a fourth prisoner who later died in hospital. After a jury trial before Nation J, Mr Tihi was convicted of murder and sentenced to life imprisonment with a minimum period of 13 years.[1] Mr Reuben and Mr Betham were convicted of manslaughter. Mr Reuben was sentenced to seven years and eight months imprisonment with a minimum period of four years. Mr Betham was sentenced to imprisonment for a period of six years but with no minimum period.

[2] Mr Reuben appeals against his sentence on the ground it was manifestly excessive. Mr Tihi appeals against his conviction, contending that letters Mr Tihi

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1 *R v Betham* [2016] NZHC 2107 [Sentencing notes].

wrote to his family after the assault ought not to have been admitted at his trial, and that there was a breach of s 32 of the Evidence Act 2006 by the prosecutor which the Judge did not correct in his summing-up.

Background facts

[3] CCTV footage showed that on 25 March 2015 Mr Tihi and Mr Reuben were outside a cell door, two down from the victim's cell. The Crown case was that they were waiting for the victim to return to his cell. When he did so, Mr Tihi, having bound his hands in white tape, entered the victim's cell. Almost immediately afterwards, Mr Reuben entered the victim's cell. Mr Betham also entered the cell. Mr Tihi was in the victim's cell for one minute and seventeen seconds, Mr Reuben for a few seconds less and Mr Betham for 26 seconds.

[4] The victim was discovered by a prison guard about 25 minutes later. The guard realised the victim was injured but did not immediately appreciate the extent of his injuries. Nevertheless, assistance was sought and the victim taken to hospital. Despite surgical intervention, he died six days later without recovering consciousness. The cause of death was a subdural haemorrhage to the brain.

[5] The pathologist who conducted the post-mortem gave evidence that the victim had suffered extensive blunt-force injuries to the head, face and neck. He had sustained at least seven forceful head impacts. The pathologist's evidence was that this was almost certainly an underestimate because it was likely there were impact injuries to the left side of his head which had been obscured by a scalp haemorrhage. The victim's nose was broken and there were complex fractures of his upper jaw which extended to the lower edge of both eye sockets. It appears the haemorrhage took some time to develop to the point where the victim became unconscious. Before concerns were raised about his wellbeing he had made some effort to clean up blood that had resulted from his injuries.

The Judge's approach to sentencing

[6] Nation J sentenced all three men involved in the attack on the basis they had agreed to assist each other in a premeditated, serious assault on the victim which was

likely to cause him serious bodily injury. The victim was known to be someone who could look after himself physically and the Judge was satisfied it was always intended the victim would be attacked in a way which gave him no opportunity to properly defend himself. For that to be achieved, the victim would have to be seriously injured, probably with a blow to the head. Consistent with that, there was no evidence of any defensive injuries to the attackers or the victim.

[7] The Judge sentenced Mr Reuben and Mr Betham on the basis that, although they agreed to assist in an attack which was going to cause the victim serious injury, they did not know that the injuries to be inflicted would be so serious as to cause his death. In contrast, the Judge found that the jury's verdict meant they had been sure that it was Mr Tihi who inflicted the fatal injuries and that, when he did so, he must have either consciously intended to kill the victim or was reckless as to whether death would result. The Judge sentenced Mr Tihi on the basis that he was reckless as to whether death would result.

[8] A key point raised by Mr Rapley in advancing the sentence appeal for Mr Reuben was that the Judge had erred in making his findings as to how the injuries were inflicted. On that issue, the Judge said:[2]

> [16] I cannot be sure on the evidence that the injuries inflicted on [the victim] resulted from Mr Tihi stomping on his head, although this was probable. I am however sure that [the victim's] head was slammed forcefully into a solid object, probably the floor, so as to cause the severe facial injuries which I have just described and the subdural haemorrhage which ultimately caused his death. I am also satisfied that all three of you left [the victim] on the floor in his cell with those severe head injuries and bleeding profusely. Given the force which had to be used to injure [the victim] in the way that occurred, I consider it makes little difference whether those injuries were caused by Mr Tihi stomping on his head or by forcing his head into a solid object using his hand or a fist.

[9] Mr Rapley pointed out that the pathologist had been unable to say precisely what forcible contact had occurred. The injuries were considered to be compatible with blows from fists, kicks with unshod feet or soft shoes, or forcible contact with the fixed environment such as walls or floor. We revert to this issue later.

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2 Sentencing notes, above n 1.

[10] Nation J found that the victim had continued to be seriously assaulted in a way that caused him serious injury after being rendered defenceless. This was what all three of the attackers had planned and had known was likely to happen. In the Judge's view, they must have known the victim had been severely injured through the way he had been attacked. The attackers had left him alone in that state.

[11] Noting there was no guideline case for manslaughter, the Judge considered culpability was to be assessed in the light of the circumstances of each case and with special consideration of the role of each defendant. He also considered that the guideline judgment of this Court in *R v Taueki* could provide assistance in manslaughter cases involving serious violence and where serious injury was a foreseeable outcome.[3] An appropriate adjustment was required for the fact that the consequence of the serious violence was not just serious injury but death.

[12] The Judge identified the following relevant factors derived from *Taueki*: extreme violence; premeditation; serious injury (in this respect the Judge found that both Mr Reuben and Mr Betham knew that the victim was likely to be seriously injured); attacking the head; the fact that there were multiple offenders; attacking the victim in his cell (which the Judge likened to a home invasion); and the fact that the attack had been meted out for the purpose of punishing the victim because, in some way, he had not behaved in a way others regarded as appropriate (the Judge likened this to vigilante action).

[13] Nation J considered this combination of aggravating features was particularly grave and was comparable to offending within band 3 of *Taueki*. On that basis a starting point of nine to 11 years could be called for before consideration of the individual involvement of Mr Reuben and Mr Betham. The Judge's assessment in respect of Mr Reuben's involvement was:[4]

> [62] Mr Reuben, you were present throughout the attack on [the victim]. I do not accept that the original intention was for you to be just a lookout. You were right beside Mr Tihi as you both waited at the door to a nearby cell for [the victim] to return to his cell. You were right with Mr Tihi as he walked towards [the victim's] cell wrapping cloth around one hand as he did so. The door to [the victim's] cell was left open after Mr Tihi went in.

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3 *R v Taueki* [2005] 3 NZLR 372 (CA).

4 Sentencing notes, above n 1.

> Within seconds, you launched yourself into the cell in a way that showed you were there to support Mr Tihi in what was meant to be a pre-emptive strike against him which would leave him defenceless.

[14] Nation J observed that Mr Reuben's involvement could not be treated as less serious just because there was no evidence he had actually struck the victim himself. By his presence he had provided support, encouragement and back-up if needed and his mere presence in the cell would have made it more difficult for the victim to defend himself or to escape. The Judge found that Mr Reuben must have seen the damage done to the victim's face and the way he bled. He was close by as the injuries were inflicted.

[15] After reviewing comparable cases involving sentences for manslaughter, the Judge adopted a starting point of nine years imprisonment. He was not willing to allow Mr Reuben a discount for youth given that the offence had been committed while Mr Reuben was serving a prison sentence and represented a continuing escalation in terms of the seriousness of his offending. Overall, the probation officer had assessed Mr Reuben as posing a very high likelihood of reoffending and a high risk of harm.

[16] Nation J also declined to give Mr Reuben any credit for his offer to participate in a restorative justice meeting with the victim's family. He did so in the absence of any demonstration by Mr Reuben of real empathy on Mr Reuben's part for what the victim's family had suffered or remorse for his involvement. In that respect, the Judge noted that Mr Reuben had declined to comment on the issue of remorse when it was raised by the probation officer prior to sentence.

[17] A discount of 15 per cent was allowed by the Judge for Mr Reuben's offer to plead guilty to manslaughter. He had first appeared on a charge of murder in April 2015. His offer to plead guilty to manslaughter was made in February 2016 after the pathology and ESR[5] evidence was provided. The Judge declined counsel's submission that Mr Reuben should receive a full 25 per cent discount for the offer to plead guilty to manslaughter:[6]

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5 Institute of Environmental Science and Research.

6 Sentencing notes, above n 1.

> [75] I do not however consider that you made that offer to plead guilty at the first available opportunity. You knew without waiting for ESR evidence or the pathologist's report that you had been a party to a planned serious assault on [the victim], that he had suffered serious injuries in that assault and that he had died. On that basis, you knew you were guilty of manslaughter from the time you were first charged. The evidence as to your guilt, at least as to manslaughter, was strong given the CCTV footage which showed that you were in [the victim's] cell throughout the time he was attacked.

[18] The final sentence imposed on Mr Reuben was seven years and eight months imprisonment. On the issue of a minimum period of imprisonment the Judge said:

> [80] I do not accept that the brutal assault which [the victim] was subjected to can be considered normal within the prison environment. In this case, the purposes of deterrence, denunciation and protection of the community, including prisoners, require a minimum period of imprisonment for you Mr Reuben which I will fix at four years.

Mr Reuben's grounds of appeal

[19] Mr Rapley submitted that the sentence imposed on Mr Reuben was manifestly excessive for four reasons:

(a) The starting point of nine years imprisonment was too high.

(b) There ought to have been a credit for his youth.

(c) He ought to have received a greater credit for his offer to plead guilty to manslaughter.

(d) In the circumstances of the case, a minimum period of imprisonment was not appropriate.

Starting point

[20] Mr Rapley relied on this Court's decision in *R v Jamieson* for the proposition that the principles of sentencing require that account be taken of the degree of culpability of the offender.[7] In *Jamieson* the Court did not disturb the nine-year starting point for manslaughter adopted by the sentencing Judge for the principal offender. In respect of the secondary offenders, the Judge had adopted a starting

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7 *R v Jamieson* [2009] NZCA 555.

point of six years imprisonment. On a Solicitor-General's appeal the starting point was increased to seven years in relation to the secondary offenders. The fact that this was a Crown appeal was specifically recognised.

[21] We do not regard the *Jamieson* case as a suitable comparator. First, the attack on the victim was regarded as spontaneous rather than premeditated as in the present case. Secondly, it did not take place within a prison environment. Thirdly, but for the fact that this was a Solicitor-General's appeal, it is likely a higher starting point would have been adopted.

[22] We accept Mr Lillico's submission for the Crown that the more recent decision of this Court in *Lake v R* is a better comparator.[8] Two men, Mr Nuku and Mr Lake, were charged with wounding with intent to cause grievous bodily harm. The offending took place in a prison and the victim was another inmate. Although there was significant violence involved, the sentencing Judge adopted a starting point of seven and a half years for Mr Nuku, noting he did not carry out the most violent elements of the offending. A starting point of eight and a half years was adopted for Mr Lake. Both sentences were increased by six months because the assault took place in prison.

[23] Mr Lake appealed against his sentence. This Court considered the starting point of eight and a half years was well within range. In respect of the six-month uplift, the Court said:[9]

> The appropriateness of such an uplift is well-established, and there are no features here that make its imposition inappropriate. Ms Maxwell queried whether an incident between inmates which carried no risk of greater escalation nor inherently threatened prison safety merited separate recognition. We consider it does. Good order and discipline within the difficult prison environment is essential. Activities that threaten that, such as intra-inmate violence, will normally deserve marking out, whether it be by a higher placement on the available range or by uplift. Six months here was appropriate and not excessive.

[24] Although the Crown accepts there was no evidence Mr Reuben struck the victim, it is clear from the Judge's findings that his presence in the cell along with

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8 *Lake v R* [2017] NZCA 39.
9 At [7] (footnote omitted).

Mr Betham enabled Mr Tihi to carry out the attack in the way the Judge described. Since the victim died, it is obvious that the offending was more serious than that involved in the Nuku/Lake attack.

[25] We accept Mr Lillico's submission that the fact that the offending took place in prison is a significant aggravating factor for the reasons this Court described in *Lake*. Good order and discipline within the difficult prison environment is essential. As well, the victim was placed in a position where he was unable to escape from the cell and was vulnerable in that respect.

[26] In the light of the pathologist's evidence about the cause of death, we are doubtful whether the Judge had a sufficient foundation for his conclusion that the victim's head was slammed forcibly into a solid object. We note too that the Judge referred again to this matter later in his sentencing notes. The Judge acknowledged he could not be sure that the injuries sustained by the victim resulted from Mr Tihi stomping on his head but considered it made little difference whether the injuries were caused in that manner or by forcing the victim's head into a solid object using his hand or a fist.

[27] We are not persuaded that any ambivalence as to the precise method by which the injuries were inflicted is material to the starting point or to the sentence more generally. The pathologist's evidence establishes without doubt that at least seven heavy blows to the victim's head were sustained during the attack on him by Mr Tihi. As the Judge said, Mr Reuben must have been aware that very serious injuries were being inflicted on the victim since Mr Reuben was in the cell for at least a minute while the attack was being carried out. As the trial Judge, Nation J was well placed to conclude that this was an "unrelenting and very violent" attack.[10]

[28] Mr Rapley raised a related criticism about the Judge's statement that the attack involved serious violence "where serious injury, if not death, was a foreseeable outcome and I am sure an intended outcome".[11] We do not read this remark by the Judge as suggesting that Mr Reuben foresaw death. Rather, the Judge

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10 Sentencing notes, above n 1, at [59].
11 At [56].

was intending to exclude death as a foreseeable consequence. Obviously, if death had been a foreseeable consequence, Mr Reuben would have been found guilty of murder.

[29] We conclude that the starting point of nine years imprisonment in the case of Mr Reuben was not only available but justified in the circumstances. However, we do not consider it was lenient as Mr Lillico submitted.

Discount for youth

[30] Mr Rapley submitted it was not within the Judge's legitimate discretion to decline to give Mr Reuben a discount for his youth. Mr Reuben was 20 years of age at the time of the offending. He had an extensive criminal history both in the Youth Court and in the District Court. However, his past offending was largely for driving and dishonesty offences. Although he had three previous notifications for assault in the Youth Court, he had no convictions for violence until the subject offending. While accepting there is no presumption that a discount will be given for youth, Mr Rapley submitted there ought to have been such a discount in the present case, particularly when a minimum period of imprisonment was also imposed.

[31] On this issue, Mr Lillico submitted for the Crown that the factors identified by this Court in *Churchward v R* were not significantly engaged in the present case.[12] He emphasised that the offending was not impulsive and spontaneous and pointed to Mr Reuben's long criminal history. At the time of the offending, he was serving a sentence of three years and two months imprisonment for other offending and had previously served a sentence of nine months imprisonment. He submitted the Judge had rightly taken into account the probation officer's assessment that Mr Reuben posed a very high likelihood of reoffending and a high risk of harm.

[32] Both counsel also referred us to this Court's decision in *Huata v R*, where two gang members aged 20 and 22 pleaded guilty to a charge of wounding with intent to cause grievous bodily harm and attempting to dissuade a witness.[13] There was a gang context and the offending was such as to require a strong deterrent sentence.

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12 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].
13 *Huata v R* [2013] NZCA 470.

This Court declined to intervene with the discretion exercised by the Judge not to allow a discrete discount for the appellants' youth. The Court took into account that there was a higher degree of premeditation and that the sentence could be regarded as lenient since the sentencing Judge had declined to impose a minimum period of imprisonment.

[33] We are persuaded that some allowance for Mr Reuben's youth ought to have been allowed. An important factor in our consideration is that the Judge imposed a minimum period of imprisonment. For reasons we discuss below, we consider the Judge was right to impose a minimum period of imprisonment, but the fact that he did so means Mr Reuben will necessarily have a longer period of imprisonment before he may be considered for parole. The fact remains that he was still a young man at the time of the offending and he had not previously had any convictions for violent offending. The notations in the Youth Court resulted in periods of supervision and we do not regard these as material for sentencing purposes. While the offending took place in prison and was serious, this is reflected in the starting point of nine years imprisonment the Judge imposed.

[34] In all the circumstances, we consider a discount of 10 per cent for Mr Reuben's youth was appropriate.

Credit for Mr Reuben's offer to plead guilty to manslaughter

[35] Mr Rapley submitted that the Judge should have allowed a discount of 20 per cent for Mr Reuben's offer to plead guilty to manslaughter rather than the discount he allowed of 15 per cent. The offer to plead guilty to manslaughter was made in February 2016, some five months before the trial started in June of that year. The offer was made as soon as the Crown had provided disclosure of relevant ESR pathology evidence. Importantly, there were no valid grounds to distinguish Mr Betham's case where a discount of 20 per cent had been given. His offer to plead guilty to manslaughter had come at the same time as Mr Reuben's offer.

[36] Although the Crown submitted before us that the offer was not made at the earliest reasonable opportunity, Mr Lillico nevertheless accepted that the discount for Mr Reuben's offer should have been 20 per cent in light of the stage it was made.

However, his submission was that the final sentence was appropriate and within the available range even allowing for a discount of 20 per cent. That was because it was submitted the starting point was insufficient in any event.

[37] Since we have declined to accept the Crown's submission that the starting point could have been greater, the rationale for the Crown's argument on the discount for Mr Reuben's guilty plea falls away. We agree with the Crown there was no valid basis to differentiate between the discount offered to Mr Betham. Accordingly, we accept that a discount of 20 per cent should have been allowed.

The minimum period of imprisonment

[38] The two main points made by Mr Rapley on this issue were first that a minimum period of imprisonment was not imposed on Mr Betham. Secondly, that the combination of no discount for youth while imposing a minimum period of imprisonment resulted in an unduly harsh sentence for Mr Reuben.

[39] We agree with the Crown's position that a minimum period of imprisonment was appropriate in Mr Reuben's case. As this Court said in *R v Taueki* it can be expected that minimum periods of imprisonment will not be rare or even uncommon in cases of serious violence.[14] This was a planned and premeditated attack in a prison setting involving multiple offenders and serious violence. In our view, the Judge was right to impose a minimum period of imprisonment of a little under 50 per cent of the finite sentence. There was a valid basis to distinguish Mr Betham's case since he had a lesser role in the offending, primarily as a lookout. And, since we have accepted that some discount should be allowed for Mr Reuben's youth, Mr Rapley's second point is no longer viable.

Result of Mr Reuben's sentence appeal

[40] Using rounded figures, we allow for a 10 per cent discount for Mr Reuben's youth from the starting point of nine years imprisonment. This results in eight years and one month before allowing any discount for Mr Reuben's offer to plead guilty to manslaughter. Allowing 20 per cent on that account from the period of eight years

[14] *R v Taueki*, above n 3, at [57].

and one month results in a final sentence of six years and six months imprisonment. We consider it is appropriate to impose a minimum period of imprisonment of 50 per cent, or three years and three months.

[41] On this basis:

(a) The sentence appeal by Mr Reuben (CA454/2016) is allowed.

(b) His sentence in the High Court is quashed.

(c) In substitution, Mr Reuben is sentenced to six years and six months imprisonment with a minimum period of imprisonment of three years and three months.

Mr Tihi's conviction appeal

[42] Prior to trial, Nation J ruled that three letters sent by Mr Tihi to members of his family after the assault could be admitted at trial.[15] Mr Tihi's appeal against conviction was advanced on two bases. First, the letters ought not to have been admitted because any probative value they had was outweighed by a risk of unfair prejudice. Secondly, there was a breach of s 32 of the Evidence Act because the prosecutor had in her closing address invited the jury to infer that Mr Tihi was guilty because he had not suggested in the letters that the victim's death was unexpected or unwanted. Mr Shamy submitted that the Judge was required to direct the jury that it must not draw an inference from a failure of that kind but the Judge had not done so.

[43] The relevant letters are now reproduced:

1. DOG LIFE 4EVER

Aye Nigel

> Hay my bro did you get my letter my bro fuk I think I am get charg for a fukn assault in jail my bro. Me and 2 other people put this person in hospital my bro me and 2 orther people my bro. So we got told my the jail pig that we killd him. When he was in hospital my bro. So he died in the hospital. I just got told 2day I think me and the 2 orther of bros. We will be look at 10 years or life my bro for it. I

[15] *R v Betham* [2016] NZHC 1423 [Evidence judgment].

can't get life or PD my bro. I don't on the orther 2 x bro will one of the bro he can't get the some one is me my bro 10 years or more. Fuk Dog Life and PD my bro.

Aye do you on Amba or not my bro so write back OK my bro.

Love you my brother
2 Fukn Deuth my bro

So I just sent Dad and Mum a letter to. I told them what up fuk my bro the pig found him lying in his cell on the floor bleeding. I think he was bleeding to death my Bro fuk my bro I do not want to do my bro. I am still in TP Pound my bro. So can you come back for me places my bro. I what you here someone to talk to my bro. Just you m bro because you're my brother. So I'll wait for your letter oh my bro. So just waiting for Dad and Mum letter and see what they say about it. Sorry bro I'll write when I get your letter or not my bro write to you soon OK my bro.

…

2. Hey Dad & Mum. I have somethink to tell you so I think I am get charges for a fukn assault. We put him in ChCh Hospital. The pig found him lying on the floor of his cell and bleeding from his face Mum and the fuk jail pigs sad that we killd him. Fuk Mum it so bad Mum I seen him from my cell and I'm next door to that person so there are 3 of us going to get charg for killing him fuck that I'll be look at life in jail or fukn PD to Mum. So fukn jail for life Mum. Fuk it. I'll be store in here and I love you all and miss hope. I am going to do my time and hope they will let me go home if they let me Mum and tell mole and Dad and Nigel Justine and Oill to that I love you all. So we will see what I get. OK Mum and I hope you sent me Amba adderss places. So I'll write to you soon. OK Mum.

Love you all
Miss you
Dad, Mum, Mia, Nigel, Justine, Oili

Love your son
Akuhatu
PS It was my birthday, Happy Birthday to me.

…

3. Hey Dad & Mum

So what are you upz fuk I'm in the fukn pround TP. Pround 3 of us got moved from east wing so I think I'll be look at a big one. Not get out in 2017. Can't get out in 2020 or 2021 so will see what I'll get OK. So I am all are Mum so I'm just write to tell you what going on OK. So I'll see you when I get out if I get out. So did you get my letters Mum.

> So I'll write back and tell you wat going on OK. Write to you soon.
>
> Love you all.

Were the letters admissible?

[44] It is not in dispute that evidence may be offered by the prosecution in a criminal proceeding of a statement made by a defendant. Any such statement is admissible against that defendant but not against co-defendants.[16] However, evidence offered under this provision is not admissible if it is excluded under ss 28, 29 or 30.[17] There is no suggestion here of unreliability or oppression and Nation J's finding in his pre-trial ruling that the letters were not unlawfully obtained has not been challenged.

[45] Nevertheless, the Crown accepts that ss 7 and 8 of the Evidence Act are to be considered and that was the focus of the argument before us. In terms of s 7, all relevant evidence is generally admissible.[18] Evidence is relevant if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[19] As the Supreme Court held in *Wi v R*, the s 7 relevance test establishes only a minimal threshold for admissibility.[20]

[46] The distinction between the legal determination of relevance under s 7 and the weight accorded to relevant evidence is well established. The fact that evidence may carry little weight in itself does not mean it has no probative force or that it is not material to the ultimate issue of guilt.[21] The question whether evidence is accepted as tending to prove or disprove the matter in issue is generally a matter for the jury.[22]

[47] The general provision in s 7 that all relevant evidence is admissible does not apply where the evidence is inadmissible or excluded under the Evidence Act or any

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16 Evidence Act 2006, s 27(1).
17 Section 27(2).
18 Section 7(1).
19 Section 7(3).
20 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].
21 At [24].
22 *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1 at [53].

other Act.[23] Of particular relevance here is the general exclusion under s 8. Relevantly, a Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding.[24] In considering this issue, the Judge must take into account the right of the defendant to an effective defence.[25]

[48] Mr Shamy submitted that any probative value of the letters was weak since much of the material contained in them referred to matters reported by the prison guards rather than matters observed by Mr Tihi or the other offenders. As well, some of the matters mentioned in the letters could be interpreted as giving rise to other available inferences.

[49] The Crown accepted that the evidence in the letters was not decisive but nevertheless tended to prove matters relevant to the Crown case. We agree with the Crown's assessment. First, the first two letters point to an acceptance by Mr Tihi that he and two other people were responsible for putting the victim in hospital. Secondly, the references to the likelihood of a sentence of life imprisonment or preventive detention may be seen as tending to reflect Mr Tihi's view of how serious the attack was. The fact that other inferences from the letters may have been available is ultimately a jury issue.

[50] Other than the alleged breach of s 32, Mr Shamy did not point to any unfair prejudice as a result of the admission of these letters. In the circumstances, we are satisfied the letters were admissible.

Section 32 of the Evidence Act 2006

[51] Section 32 of the Evidence Act provides:

> **32 Fact-finder not to be invited to infer guilt from defendant's silence before trial**
>
> (1) This section applies to a criminal proceeding in which it appears that the defendant failed—

[23] Evidence Act, s 7(1).
[24] Section 8(1)(a).
[25] Section 8(2).

(a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or

(b) to disclose a defence before trial.

(2) If subsection (1) applies,—

(a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and

(b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.

(3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

[52] Mr Shamy drew our attention to a statement by the prosecutor in closing which he submitted amounted to an invitation to the jury to draw an inference of guilt on the part of the defendant through his failure in his letters to disclose a defence before trial in terms of s 32(1)(b). The impugned passage from the Crown closing arose in the context of the prosecutor's reliance on the letters Mr Tihi had written to his family after the assault had occurred. We now set out the relevant passage from the Crown's closing:

> Now, my submission is that the inferences to be taken from those letter is that in his mind, to him, his involvement was such and his offending was so serious that it could result in the sort of sentence appropriate for murder. And I'd suggest to you that this is consistent with him approaching that what he'd done could amount to murder, and I'd suggest that that interpretation is reinforced by the fact that he doesn't suggest that [the victim's] death was unexpected or unwanted, or that the sentence, he suggests he might get would be unfair, and I'd suggest that if in fact he hadn't been responsible for striking those blows and hadn't had the requisite for intention then you would expect him to be making excuses for himself to these people, they are his closest family members, you would expect them to be the ones that he tries to justify or excuse himself to.

[53] It was put to us by Mr Shamy that the reference by the prosecutor to the failure of Mr Tihi to make excuses for himself in the letters may have reflected observations made by the Judge during his pre-trial ruling on the admissibility of the letters. In that ruling, the Judge said:[26]

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[26] Evidence judgment, above n 15, at [29].

> His comments become more relevant and are more probative as to his state of mind when they are seen in the context of there being no suggestions in those letters that [the victim's] death had come as a surprise or as a shock and had never been what Mr Tihi or anyone else intended or foresaw.

[54] While the Judge had made these observations in his pre-trial ruling he did not refer to them again in his summing-up. The Judge's only reference to the letters in his summing-up was to the following effect:

> [67] Mr Tihi also made statements, which the Crown says you may take as admissions, in the letters which he sent to his brother and to his parents. The Crown says that in those letters Mr Tihi acknowledges that he had put [the victim] in hospital, that he had left him lying on the floor of his cell bleeding and that he knew and accepted he had been involved in a very serious assault which was going to have serious consequences for him in terms of sentence. You heard the careful submissions that Mr Shamy made in this regard when he submitted strongly that you cannot draw such inferences from those letters, given what Mr Tihi said in them and the circumstances in which they may have been written. It is for you to decide whether the letters include the sorts of admissions and whether they have the significance which the Crown attach to them.

[55] Mr Tihi admitted his involvement in the unlawful killing of the victim but denied murderous intent. So the trial issue was whether Mr Tihi had that intent. Mr Shamy submitted that the prosecutor's remark effectively invited the jury to draw an inference of guilt from Mr Tihi's failure to make any suggestion in the letters that he lacked an intention to kill the victim. This was said to amount to a failure by Mr Tihi to disclose his defence before trial in terms of s 32(1)(b). If there was a breach then it was submitted the Judge should have given a jury direction in terms of s 32(2)(b).

Section 32 — discussion

[56] As this Court confirmed in *McNaughton v R*, the dominant purpose of s 32 is to protect a defendant from any adverse comment or prejudice where he or she exercises the right to silence.[27] The Court construed the word "silence" as applying not only to circumstances in which the defendant makes no statement at all but also where a statement is made that does not disclose the defence advanced at trial. The Court went on to say:

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[27] *McNaughton v R* [2013] NZCA 657 at [15].

> [16] The wording of s 32 reflects a tension recognised by the common law between two conflicting interests. One is the legitimate interest of a prosecutor to challenge the defendant's veracity for failing to raise a defence when an opportunity previously arose. The other is a defendant's interest in protection from an illegitimate invitation by the prosecutor to the fact-finder to go further and draw an inference, usually based on the same omission, that the defendant is guilty. In *E (CA727/09) v R* this Court observed that the distinction would test the skills of a philosopher. As Mr Lithgow noted, it will rarely be that advancing the first interest by challenging the defendant's veracity will not necessarily undermine the second interest. Nevertheless, in *Smith* the Court recognised the validity of the distinction. Thus a prosecutor wishing to pursue the first interest must walk a fine and uncertain line if he or she is not to offend the second.
>
> (Footnotes omitted.)

[57] In *McNaughton* the Court found the prosecutor had breached s 32 by making a strong attack on the appellant's veracity through his failure to raise self-defence when speaking to a number of people after the relevant events had occurred. There had been a breach of s 32 because of the "sheer scale, content and repetition" by the prosecutor linking the appellant's silence on self-defence, the victim's possession of an object and his threat to disarm the appellant.[28] This, the Court found, ran the real risk of leaving the jury with the impression that the appellant's failure to raise the defence was evidence of his guilt. This risk was compounded by the prosecutor's references to the formal defence of self-defence. Although the Judge had given a standard lies direction, the Court considered that this was not sufficient to constitute the direction to the jury required by s 32(2)(b).

[58] Mr Lillico accepted that a prosecutor's suggestion that a defendant had failed to disclose a lack of intent to kill could amount to a breach of s 32. However, he emphasised there was no "unadorned invitation" to the jury to infer guilt from Mr Tihi's failure in this respect. Counsel submitted that Mr Tihi's right to silence was not undermined by the prosecutor's remarks. They were made in the context of the prosecutor's submission that Mr Tihi's letters showed his acceptance of responsibility for the attack. The prosecutor was effectively asking the jury to draw an inference about murderous intent from the statements in Mr Tihi's letters that were consistent with his taking responsibility for the offending. Further, by inference, that Mr Tihi had been involved in serious offending warranting a lengthy

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[28] At [27].

sentence consistent with that likely to be imposed for murder. There was, counsel submitted, nothing standing in the way of that inference such as an indication that Mr Tihi did not think the victim would die. In summary, Mr Lillico submitted it could not be objectionable to point out to a jury that a defendant has said one thing in a statement (for example taking responsibility for putting someone in hospital) but had not said anything to undermine that.

[59] Mr Lillico also submitted that the fact that Nation J did not direct the jury in terms of s 32(2)(b) was of no consequence since there was no risk of the jury inferring guilt from silence about a defence. Rather, the risk was the jury might infer guilt from Mr Tihi's lies during his interview with the police where, amongst other things, he denied knowing that the victim had died and denied knowing anything about how the victim was assaulted. Nation J dealt with this through a lies direction. There was no similar risk arising from what the letters did not say because the prosecutor's observations were made only in passing and only in contradistinction to the positive meanings the statements could be given.

[60] In our view, the prosecutor overstepped the fine line between a legitimate challenge to Mr Tihi's veracity and inviting the jury to draw an inference of his guilt from a failure to make any suggestion in his letters to his family suggesting a lack of intention to kill the victim. However, we accept Mr Lillico's submission that there was no material risk of a miscarriage arising from this or from the failure by the Judge to give a direction in terms of s 32(2)(b). We agree that the impugned observation by the prosecutor was made only in passing and as part of explaining the positive inferences from the letters the Crown relied upon to support its case. This may be contrasted with the prosecutor's approach in *McNaughton* we have set out at [56] above. Nothing of that kind occurred here. We also note that Mr Shamy, an experienced counsel, did not raise the issue with the Judge.

[61] We also note that, in his closing address, Mr Shamy submitted strongly to the jury that there was nothing in the letters that could be construed as an admission of murder. He suggested that the letters indicated Mr Tihi was panicking. Specifically in relation to the last letter, counsel submitted to the jury:

> Now for some reason, my friend [the prosecutor], with all due to respect to her, seems to think that because he doesn't say in those letters, and again, look at the way they're written and who he's writing to, because he doesn't say, hey Mum, Dad, I'm not guilty of murder, I didn't intend him to die that somehow that is relevant. How is that relevant? This is a 22 year old who is panicking. So something is not there, the Crown rely on it. That is inappropriate, with all respect to my friend. You must rely on the evidence. You have to find on the evidence that is in front of you, that is the evidence, you can't speculate.

[62] Our own impression of the letters taken as a whole is that they are open to at least two inferences. First, those relied upon by the Crown. Secondly, the inference that, while Mr Tihi was accepting responsibility for the victim's death, he was surprised by the fatal consequences that followed from the assault and was panicking about the potential outcomes. Moreover, as Mr Shamy submitted, in some important respects, Mr Tihi was simply reporting what he had been told in terms of the consequences of the assault and the potential for serious sentences. If the jury had drawn inferences of the kind urged by defence counsel, then the letters could be viewed as helpful to the defence in supporting a submission Mr Tihi lacked a murderous intent.

[63] Mr Shamy accepted that the ultimate question was whether a miscarriage of justice had occurred in the sense that an error created a real risk that the outcome of the trial was affected.[29] We are not satisfied there was any real risk of that nature. Any risk of miscarriage arising from any irregularity under s 32 was likely to have been overwhelmed by the obvious inference of murderous intent from the violent and repeated attacks to the victim's head. As well, Mr Tihi's admitted lies on the fundamental issues identified by the Crown plainly did not assist his case.

Result of Mr Tihi's conviction appeal

[64] For the reasons given, the appeal is dismissed.

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[29] Criminal Procedure Act 2011, s 232(4)(a); *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [27].