IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA254/2016
[2018] NZCA 243

BETWEEN	MARTIN VICTOR LYTTELTON Appellant
AND	THE QUEEN Respondent

Hearing: 17 May 2018

Court: Miller, Ellis & Woolford JJ

Counsel: Appellant in person
JEL Carruthers for Respondent

Judgment: 6 July 2018 at 11.30 am

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is granted.

B The application for recusal is declined.

C The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] Martin Lyttelton was convicted after trial before Asher J and a jury of the attempted murder of his former business partner Richard Ord, of causing Mr Ord's partner Colleen Fenton grievous bodily harm with intent to injure, and of the aggravated burglary of their home by entering it armed and with intent to commit a

crime. The Judge sentenced him to seven years' imprisonment.[1] He now appeals both conviction and sentence.

[2] At trial Mr Lyttelton represented himself with the assistance of counsel appointed by the Court, Mr Gibson.[2] Speaking generally, it was not in dispute that he had done the acts complained of. His defence rested on his state of mind. He was in the grip of a severe depressive illness which may have been brought on by setbacks in litigation with Mr Ord, and he was also affected by prescription medications and alcohol he had taken in a suicide attempt around one and a half days prior. He maintained that he was so impaired that he did not, indeed could not, form the specific intent required for each charge; further, some of his acts were done automatically as Mr Ord grappled with him. He also contended that he actually intended to commit suicide in Mr Ord's presence.

[3] The acts concerned happened on 10 April 2008 and the trial was not held until March 2016. In the meantime Mr Lyttelton had pleaded guilty and been sentenced by Wylie J to five years and 11 months' imprisonment.[3] That sentence naturally included an allowance for his guilty pleas. This Court allowed him to withdraw the pleas and set aside the convictions and ordered a retrial.[4] That was done because the Court found that despite clear legal advice he had failed to appreciate that he could not plead guilty and then dispute guilt at a sentencing hearing, and on the material before the Court at that time it could not be said that he had no defence.[5]

Recusal

[4] Shortly before the hearing Mr Lyttelton asked that Miller J recuse himself because he delivered this Court's judgment on the first appeal. Mr Lyttelton submitted that Asher J was led into error by some of this Court's reasoning: for example, this Court considered insanity and automatism were not available defences on the facts and Asher J did not leave them to the jury. Miller J had subsequently declined to

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1 *R v Lyttelton* [2016] NZHC 1041 [Asher J sentencing].
2 Mr Gibson was acting in what would now be called a standby capacity: see *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392.
3 *R v Lyttelton* HC Auckland CRI-2008-044-9465, 31 March 2010.
4 *Lyttelton v R* [2014] NZCA 638 [First Court of Appeal judgment].
5 At [70]–[72] and [80]–[87].

provide Mr Lyttelton with a transcript of the hearing, which would have shown that he indicated he intended to call expert toxicology evidence at the trial. Mr Lyttelton was able to, and did, call such evidence at trial, but he submitted that Asher J attached no weight to it. Lastly, this Court described the drug levels in his blood as therapeutic but failed to find that therapeutic levels of Zopiclone may render a person incapable.

[5] We declined the application after hearing from Mr Lyttelton and Mr Carruthers (for the Crown), who opposed it. Absent proper grounds for recusal a judge has a duty to sit. Here Mr Lyttelton invoked reasonable apprehension of bias. The standard is that of the objective and informed observer.[6] It is settled law that prior involvement in the same appeal, still less a different one, does not in itself justify recusal.[7] Nor is recusal ordinarily justified if the appellant wishes to argue that a previous decision of the judge was wrong.[8]

[6] Mr Lyttelton pointed to nothing about the last appeal that suggests apparent bias might affect this one. At the last hearing the Court did not have a full evidential record, since he had pleaded guilty. It relied on the limited facts and expert evidence in the case on appeal then before it. It accepted Mr Lyttelton's account of his misunderstanding about the effect of a guilty plea.[9] It assessed the defences because there could be no miscarriage of justice if none was viable.[10] It identified no evidential foundation for the defences of insanity or automatism.[11] (Mr Lyttelton had accepted in argument that no expert considered him insane, and none of the experts suggested automatism.) The Court found that Mr Lyttelton had an available defence, lack of specific intent. It did not consider that defence strong having regard to a factual narrative that the experienced counsel who had advised him to plead guilty had fairly characterised as "purposeful". But it accepted that a jury may have been left unsure, and so sent him for trial.[12]

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6 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3]–[4].
7 *Jessop v R* [2007] NZSC 96 at [6]–[7].
8 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) at 480; and *A (SC106/2015) v R* [2016] NZSC 31 at [18]–[21].
9 First Court of Appeal judgment, above n 4, at [70]–[72].
10 At [80].
11 At [56] and [81].
12 At [82]–[87].

[7] It is to state the obvious to say that, a trial having been ordered, Mr Lyttelton could place before the jury any defence available to him in law and adduce any evidence, whether factual or expert, that was relevant and admissible. We did not understand him to argue otherwise. Rather, he argued that Asher J failed to appreciate that such was the point and effect of the Court's judgment. We will assess that claim on its merits. It does not supply grounds for recusal.

The Crown narrative

[8] The Crown adopted the narrative given by Asher J at sentencing. The Judge recorded that much of it was not in dispute or necessarily entailed acceptance of the evidence of Mr Ord, whom the Judge also found a truthful and accurate witness.[13]

[9] Asher J explained that about 2000 a successful business relationship with Mr Ord began to sour badly, leading to extensive litigation. By early 2008 Mr Lyttelton had become depressed and preoccupied with the dispute and believed that Mr Ord had ruined his life. At the time of the offences he was suffering from a major depressive illness. The Judge then recorded the sequence of events:

> [10] Two days before the events in question, which took place on 10 April 2008, you purchased a .410 single action shotgun, two boxes of ammunition and a skinning knife. The shotgun, which could take only a single shotgun cartridge, had to be broken open, then the cartridge had to be manually inserted, it then had to be shut, and finally manually cocked. Only then when these steps had been taken could it be fired.
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> [11] The knife had a blade of approximately 10 centimetres. It was a wide strong blade and came to a very sharp point at the end. Needless to say both the gun and the knife were well able to inflict a fatal wound.
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> [12] On the same day after you had purchased these items you met a friend for coffee. You told your friend that you were feeling suicidal. The friend took you to a doctor who prescribed an antidepressant, Paroxetine, and Zopiclone sleeping pills. The sleeping pills were not to be taken with alcohol. That night you went home. You wrote a suicide note. You then consumed 14 Zopiclone and six Paroxetine tablets. You also consumed a considerable quantity of wine. You went to bed expecting to die. This was a genuine suicide attempt.
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> [13] The following morning your wife tried to wake you. You were later visited by the same friend who had been with you the day before. Unsurprisingly given what you had consumed, you were groggy and unable to converse or function. You largely slept through that day and the next night.

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13 Asher J sentencing, above n 1, at [8].

You finally came to when you were woken by your wife at about 7 am on Thursday, 10 April 2008.

[14] At about 9.15 am that morning you left home taking in your car the shotgun, the full box of cartridges and the skinning knife. You told your wife that you were going to clear the mail and do some errands. It was your evidence at the trial, which I accept, that you went to the Auckland Domain, apparently intending to commit suicide there. You went down to a private part of the domain, but once you were there you changed your mind. It was at this fateful point that the events immediately leading to the offending began. You decided to drive to Mr Ord's residence in Browns Bay on the North Shore. You drove to his home. You found the front door and garage to be open. Mr Ord and his partner Ms Fenton were upstairs at the time.

[15] You proceeded to take the shotgun, six cartridges and the knife you had just purchased. You entered the house. Having done so you proceeded to walk slowly up the stairs holding the shotgun. At this stage, given the events that followed, the shotgun was clearly loaded and able to be fired, although I am not certain whether it would have been cocked at that point. Ms Fenton became aware that someone had entered the house, and looking down into the stairwell. She could see you coming up. You did not see her. She quietly and immediately explained to Mr Ord that you were there and they both went into the office, which was above the stairs on that higher floor, and shut the door. The office contained a computer and was used by them for office work. Ms Fenton was positioned near the door handle holding the door to resist entry. Mr Ord was also near the door but further into the room, and rang 111.

[16] When you got to the top of the stairs it seems that you walked around through some rooms before deciding that Mr Ord must be inside the office. There is opaque glass for part of the wall and shadowy shapes can be seen on the inside of the room from the outside hallway. You proceeded to try and open the door by turning the door handle but found that there was resistance and you could not do so.

[17] At this point you took the shotgun and fired a shot from it through the door. The shotgun had either been cocked at an earlier time, or was cocked immediately before you fired that shot. The shot punched a considerable hole through the door in a position some inches below the door handle. It hit Ms Fenton, blowing a major hole in her thigh and significantly damaging her femoral artery. She fell to the floor, bleeding profusely. You then, standing by the door in the hallway, proceeded to reload the shotgun. It is clear from what followed that you successfully reloaded the shotgun and cocked it.

[18] In the meantime Mr Ord decided that he would not stand there and wait for you, and he opened the door and you fell together and a struggle commenced. You stumbled into the room. There was grappling to control the gun. A shot went off hitting the wall. You and Mr Ord proceeded to wrestle and came out of the room and into the area above the stairs, and then partly smashing through the balustrade, fell or tumbled down the stairs into the front entrance area. Mr Ord throughout managed to keep a grip on the gun. The position arose whereby you were being held by him against the doorframe and wall, and he was directly behind you pinning you there. You both had a grip on the gun. You were both at a physical impasse.

> [19] At that point, you reached down into your right trouser pocket letting go of the gun. You pulled out the skinning knife. Using a stabbing movement going around your front, stabbing backwards, you directed three or four stab thrusts towards Mr Ord's stomach area. The thrusts missed Mr Ord but he described them going closely past his side. The struggle then turned into a struggle to control the knife. Mr Ord suffered a number of cuts to his hands. Eventually you stopped struggling as Mr Ord held you and you relinquished the knife. During the struggle and the following conversations you told Mr Ord that he had ruined your life. When the fight ended and you stopped struggling you said you had to leave now.

The defence narrative

[10] Immediately after the Crown opening, Mr Lyttelton explained to the jury in a brief opening statement that there was very little dispute about the series of events that occurred at the Ord house on the morning of 10 April. Rather, the dispute between the Crown and defence centred on Mr Lyttelton's intention. He said that he went to the house to commit suicide in front of Mr Ord and was not acting rationally or with intent to hurt Ms Fenton. His opening address at the commencement of the defence case also focused on his state of mind.

[11] Mr Lyttelton nonetheless takes issue with the evidence of what happened in the office. The differences focus on the inferences about intent and mental state that might be taken from conduct. In closing at trial, and before us, he contended that he was firing at the door handle but missed, striking the door in a different place, and that Mr Ord then opened the door and Mr Lyttelton had fallen into the room, where Mr Ord attacked him from behind. Everything that followed was an instinctive response to Mr Ord's attack.

Grounds of appeal

[12] Mr Lyttelton's grounds of appeal and submissions were somewhat discursive and repetitive. We summarise them as follows:

(a) the Judge failed to identify and put to the jury defences of automatism and insanity;

(b) the Judge also failed to explain that Mr Lyttelton may have lacked the requisite intent, which required that the jury be told about the legal definitions of intent, mens rea and actus reus;

(c) the Judge failed to explain that intoxication can preclude intent;

(d) the Judge failed to sum up the defence case adequately;

(e) Mr Ord committed perjury in his evidence and the Crown and police knowingly aided and abetted him in this offence;

(f) the Crown led the Judge and jury into error by calling the evidence of Dr Peter Dean;

(g) the Crown and the ESR misled the Judge and jury regarding the direction of the shot into the home office; and

(h) the verdicts were unreasonable.

[13] With respect to sentence, Mr Lyttelton complains that he was entitled to a disputed-facts hearing under s 24 of the Sentencing Act 2002, but was denied it, that the sentence was in error as a result, and that the sentence, which has now been served, was excessive.

The evidence at trial

[14] The jury heard from all three people who were in the home office at the time: Mr Ord, Ms Fenton and Mr Lyttelton. A number of witnesses were called whose evidence was principally relevant to Mr Lyttelton's mental state:

(a) police officers who attended the scene and the police doctor who examined Mr Lyttelton;

(b) Dr Peter Dean, a clinical psychiatrist who expressed an opinion about Mr Lyttelton's mental state and the effect of drugs upon him;

(c) Dr Helen Poulsen, an ESR scientist who gave evidence that a blood sample taken on arrest disclosed therapeutic levels of Zopiclone and no measurable levels of Paroxetine;

(d) Dr Ian Goodwin, a clinical psychiatrist who had examined Mr Lyttelton in 2008 and continued to treat him afterward;

(e) Dr David Menkes, an academic psychiatrist who gave evidence about the impact of alcohol, Zopiclone and Paroxetine; and

(f) Mr Lyttelton's wife and daughter.

[15] Of the experts, Dr Goodwin and Dr Menkes were called for the defence. Mr Lyttelton was also permitted to adduce the reports of Professor Mullen and Dr Greg McCormick, who had assessed him before his first trial. Neither was available to give oral evidence.

Mental state defences: submissions

[16] Before considering how the various mental state defences were dealt with at trial, we summarise the positions of each side about them. Mr Lyttelton founded his argument on a close and intelligent reading of the authorities, notably *Police v Bannin* which contains a valuable discussion of automatism, insanity and intent.[14] Reduced to its essentials, his argument may be summarised as:

(a) The prosecution must prove mens rea, which requires both that the act be willed and that the accused act with any ulterior or specific intent required by the particular offence.

(b) Section 20 of the Crimes Act 1961 preserves common law defences including automatism, which may be defined as unconscious involuntary action.[15] Automatism may be caused by conditions external to the accused, such as intoxication, or a blow to the head, or

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14 *Police v Bannin* [1991] 2 NZLR 237 (HC).
15 *The Queen v Cottle* [1958] NZLR 999 (CA) at 1007 per Gresson P.

by internal conditions that amount to a disease of the mind.[16] In this respect it differs from insanity, which must be attributed to a disease of the mind having some internal cause.[17] It is for the prosecution to disprove automatism, but only if there is an evidential foundation for it.[18]

(c) Where an accused who acted in a state of automatism was sane, he is entitled to a complete acquittal. Where he was not sane (that is his automatism was triggered by a disease of the mind), the usual consequences of a verdict of not guilty by reason of insanity will prevail.[19]

(d) A person is insane if affected by a disease of the mind so as to be incapable of knowing that an intentional act was morally wrong by commonly accepted standards.[20] The burden of proving insanity lies on the defence.[21]

(e) These defences ought to be explained to the jury and addressed in the following order: automatism (both sane and insane), intent, insanity. When considering automatism, the jury must be directed to establish whether (if they find that the defendant did not commit the actus reus voluntarily) the automatic state was the product of a disease of the mind, and if it was then an insanity verdict follows.[22] Insanity as a discrete defence comes last because it need not be considered unless the Crown has proved that the acts were intentional.[23]

[17] Mr Lyttelton maintained that both automatism and insanity ought to have been left to the jury on the evidence. In addition, he submitted that Asher J failed to direct

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16 *Bannin*, above n 14, at 248–249; *Cottle*, above n 15, at 1011 per Gresson P; and *R v Falconer* (1990) 171 CLR 30 at 85 per Gaudron J.
17 *Cottle*, above n 15, at 1011 per Gresson P.
18 At 1014 per Gresson P; and *Falconer*, above n 16 at 81–83 per Gaudron J.
19 *Cottle*, above n 15, at 1013 per Gresson P.
20 Crimes Act 1961, s 23(2).
21 Section 23(1); and *Cottle*, above n 15, at 1014 per Gresson P.
22 *Falconer*, above n 16, at 77 per Toohey J.
23 *Cottle*, above n 15, at 1014–1015 per Gresson P; and *Falconer*, above n 16, at 77 per Toohey J.

the jury that he must be acquitted if through a combination of mental illness, drugs and Mr Ord's assault he did not in fact act in a willed manner and with the specific intent required for each of the charges.

[18] The Crown's case, at trial and before us, was that there was no evidential foundation sufficient to leave automatism or insanity to the jury. Asher J correctly directed the jury that they must acquit on each charge if the Crown failed to show the necessary specific intent and directed them that they might take into account mental illness, drug consumption and what happened at the scene when considering intent. His directions favoured the defence because he refused the Crown's request that he instruct the jury that a drugged or drunken intent is still an intent.

Treatment of mental state defences at the trial

[19] It is convenient to begin with the 6 November 2015 judgment of Brewer J on a discharge application brought by Mr Lyttelton, who invoked this Court's judgment and submitted that he must be discharged because the Crown had no evidence to rebut the reasonable possibility that he lacked the necessary criminal intention. He relied upon the reports of Dr McCormick and Professor Mullen and drew the Judge's attention to the judgment of Fisher J in *Bannin*.[24] He submitted that the Crown could not exclude incapacity resulting from a disease of the mind and intoxication.

[20] The Crown's short response was that on a retrial "everything and anything is in contest". The premises on which Professor Mullen and Dr McCormick formed their opinions were in dispute. The application was declined, Brewer J reasoning that whether or not Mr Lyttelton had the necessary criminal intent was a matter for the jury.[25]

[21] As noted, the reports of Dr McCormick and Professor Mullen were admitted for the trial. Both experts based their assessments largely on Mr Lyttelton's own account. Dr McCormick examined Mr Lyttelton on 16 April 2008. He concluded that Mr Lyttelton was then suffering from a major depressive episode and opined that his

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24 *Bannin*, above n 14.
25 *Lyttelton v R* [2015] NZHC 2745 at [12].

actions at the time of his described offending were consistent with an intention to kill himself, and not another person.

[22] Professor Mullen examined Mr Lyttelton in September 2009. He assumed that Mr Lyttelton had taken all of the Zopiclone (sleeping tablets) and all of the Paroxetine (antidepressants) he had been prescribed. (In fact Mr Lyttelton had taken all 14 Zopiclone tablets but only six Paroxetine from a prescription of 90 tablets.) Professor Mullen considered that at the time Mr Lyttelton was suffering from a severe depressive illness the effects of which were compounded by the overdose. The severe depressive illness amounted to a disease of the mind. Because he was in a psychotic state when interviewed, there was an increased chance that at the time of the attacks he was also suffering from delusional misunderstandings. His intentions at the time of the attack were the product of disordered beliefs and deformed understanding of his situation consequent on the depressive illness. He would have been deprived of the capacity to form coherent or considered intentions, or formulate a rational course of conduct. However, he was not insane. The combination of a severe depressive and recent overdose would have seriously impaired his capacity to understand the nature and wrongfulness of his actions, but not to such a degree as to render him incapable of such understanding.

[23] It will be seen that neither expert considered that Mr Lyttelton was insane or suggested he was incapable of forming an intent. Rather, he formed an abnormal intent under the influence of illness and drugs.

[24] In pre-trial discussions it was established that the Crown intended to call one psychiatric expert, Dr Dean, while Mr Lyttelton intended to call Dr Goodwin and Dr Menkes. Briefs were exchanged in accordance with the usual procedure for expert witnesses. None of the expert witnesses considered that Mr Lyttelton was insane or suggested he was incapable of forming an intent. Mr Lyttelton confirmed at a pretrial hearing that he did not pursue insanity and "other routes" and the defence came down to whether he had the requisite intent.

[25] The penultimate Crown witness, Dr Dean, considered that Mr Lyttelton was extremely unlikely to have been suffering from psychosis at the time and was aware

of the nature and quality and wrongfulness of his acts. He considered it extremely unlikely that the defence of insanity was available. In cross-examination Mr Lyttelton then asked the following question:

> … you've been definitive about whether section 23 applies or not as to insanity, but not the comment "I'm going home now", still call into question temporary insanity?

[26] The Court stopped Mr Lyttelton, and there followed an in-chambers discussion. The prosecutor, Mr McColgan submitted that insanity was "off the table". Asher J pointed out that a reference to temporary insanity was contrary to the way in which Mr Lyttelton had run his case and clarified that he was not seeking to advance the defence of insanity. He urged Mr Lyttelton to focus in his evidence on whether he had the intent required by each of the charges; that is, the intent to go into the house to commit a crime, the intent to hurt someone when he fired the gun, and the intent to murder Mr Ord. The defence case proceeded on that basis.

[27] In his opening address to the jury Mr Lyttelton repeated that there was little dispute about what happened at the Ord house. His defence was that he was labouring under a major depressive illness and was intent only on suicide. His judgement was completely clouded by mental illness and was the residual effects of the overdose.

[28] Dr Goodwin's evidence was that Mr Lyttelton was not suffering from psychosis when examined and understood the nature, quality and wrongfulness of his actions. He also accepted under cross-examination that Mr Lyttelton would have been capable of forming an intent to harm others, and that automatism was not available on the evidence. When cross-examined by the Crown Dr Menkes excluded automatism and accepted there was no evidence to suggest Mr Lyttelton could not have formed an intent.

[29] After the evidence closed, the Judge discussed his proposed question trail with the parties. Apprehending from his questions of defence witnesses that Mr Lyttelton now sought to advance automatism, Mr McColgan submitted that both Dr Goodwin and Dr Menkes had positively excluded it, while Dr Dean had not done so because counsel had not realised when questioning him that Mr Lyttelton might be pursuing it. The Crown accepted, however, that the defence did say that a combination of

depression and drugs rendered Mr Lyttelton incapable of forming the requisite intent. For his part, Mr Lyttelton said that he had spoken about automatic behaviour but had not called it automatism. He acknowledged that he had not adduced independent medical evidence on automatism.

[30] The Judge issued a minute, in which he recorded that:

> [2] Two issues have arisen. The first is the question of whether Mr Lyttelton is raising the defence of automatism. The Court of Appeal in its decision had observed that the defence of sane automatism was not a viable defence. None of the experts have said that in a medical sense automatism could be said to apply to Mr Lyttelton's actions at the time of the incident (although Dr McCormack recorded that Mr Lyttelton had described things as happening in a blur with Mr Lyttelton acting in "an automatic way"), and Professor Mullen had observed that "at the time of the attack Mr Lyttelton would have been deprived of the capacity to form coherent or considered intentions".
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> [3] The two experts called by Mr Lyttelton at the trial, Dr Goodwin and Dr Menkes both specifically stated that the defence of automatism was not available.
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> [4] Mr Gibson and Mr Lyttelton in discussions this morning made it clear that they are not asking for the seldom used defence of automatism to be put to the jury. It is, however, going to be part of Mr Lyttelton's submission to the jury that he was acting in an automatic way after the struggle with Mr Ord commenced. The Crown accepts that he may legitimately make that submission and refer to those parts of the evidence that he says supports that position.

[31] The closing addresses focused on intent. Mr McColgan rehearsed the facts and contended that Mr Lyttelton's actions were manifestly intentional. The defence account pointed to bad decision making but did not preclude intent. He emphasised expert evidence that Mr Lyttelton was impaired but capable of forming intent despite the drugs, the effects of which were spent or mild. He pointed out that Professor Mullin had based his opinion on the assumption that Mr Lyttelton had taken all the anti-depressants prescribed, not the six tablets actually taken.

[32] Mr Lyttelton delivered a brief address. He repeated that there was little dispute about the facts. He asked the jury to carefully read Professor Mullen's report and urged them to accept that he was so severely compromised in his mental functioning that he was incapable of understanding how reckless it was to shoot through the door. His actions after Mr Ord attacked him were automatic, unintentional and instinctive.

His intention in going to the property was to commit suicide. He believed he was "goal-directed at suicide".

The summing up

[33] Asher J summed up on 16 March 2016. He explained that intent was the key issue in the case and gave an inferences direction in which he stressed that while the jury would look at what was done in the house they must also consider what Mr Lyttelton said about those actions and what was in his mind, as well as the evidence of the psychiatrists. Referring to the fact that Mr Lyttelton had chosen to give evidence, the Judge explained that he had denied any intent to kill or harm or do anything unlawful, and if they accepted that or were unsure about it they must acquit.

[34] Before going through the question trails and identifying the intent required for each charge, the Judge discussed intent generally as follows:

> [44] Now I am shortly going to come to the question trails, but before I do, as you know, at the heart of this case is the issue of what intention Mr Lyttelton had when he went to the house and when he carried out his various actions in the house. You have got to go through those intents in relation to the three charges, but you know roughly what they are, because they have already been the subject of submission to you. It is Mr Lyttelton's case that a combination of his depressive illness and the drugs he had taken had rendered him incapable of forming the necessary intent. It is the Crown's case that he plainly did have that necessary intent demonstrated by, as Mr McColgan has said, his actions.
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> [45] Mr Lyttelton has pointed to his depressive illness and his consumption of drugs, his suicide attempt in the days before and his evidence about what he did before he went to the house — going to the domain with suicide in his mind. He has also relied on the words at the house, what he said, and his actions — the shooting at the door handle and so on, I will not go through them all.
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> [46] The law does recognise that a person can be in a position where they can be incapable of forming the requisite intent because of particular external or internal factors. It is for you to assess whether the Crown has proved the necessary intent from the actions and words of Mr Lyttelton, and in doing so you must take into account what Mr McColgan has said about the words and actions and what he has also said about the expert evidence of Professor Mullen, Dr McCormack, Dr Dean and Dr Goodwin and Dr Menkes. You will balance that against what Mr Lyttelton has actually said his intent was, and what he has said about the experts' evidence and how he says it supports his case and how he says his lack of intent is supported by his actions on the previous days and on the morning leading up to going to the house.

[35] The Judge then directed the jury that: for aggravated burglary the Crown must satisfy them beyond reasonable doubt that when he entered the house Mr Lyttelton intended to commit the crimes of assault or murder or unlawful discharge of a firearm or kidnapping; for attempted murder, the Crown must satisfy them beyond reasonable doubt that Mr Lyttelton intended to kill Mr Ord; and for causing grievous bodily harm with intent to injure, the Crown must satisfy them beyond reasonable doubt that Mr Lyttelton intended to injure a person when he fired the gun through the door.

[36] After the jury retired, Mr McColgan made a determined effort to have the Judge add a standard intoxication direction. The matter had been discussed before closing addresses were delivered and we infer from the record that the Judge had accepted that to do so might be to undercut Mr Lyttelton's defence. Mr McColgan's concern was that the jury might think it permissible to reason that because Mr Lyttelton was intoxicated he had no intent. The Judge refused, reasoning that intoxication can diminish intent and expressing a concern that giving a further direction might be to place undue weight on the point with the jury:

> [1] This morning I had a general discussion about evidential directions that might be given to the jury. I raised the question of whether I should give an intoxication direction, adapted so as to refer to the presence of a depressive illness and the residual effect of the drugs that Mr Lyttelton had taken…
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> [2] We discussed a more limited type of direction that I might give explaining that it was Mr Lyttelton's case that a combination of his depressive illness and the drugs he had taken had rendered him incapable of forming the necessary intent. I discussed the words of that direction.
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> [3] Mr McColgan, after I had read out what I proposed saying, did not express any concerns or opposition to what I had said I would say. I have now summed up to the jury and in that summing up I have made comments to the effect I indicated I would make, although they have been made somewhat longer as I have tried to make them more specific to the facts.
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> [4] Following my summing up Mr McColgan has expressed his concern that I have not given an orthodox intoxication direction in relation to Mr Lyttelton's illness and his use of drugs. He submits that the jury may be left with an impression that is unfair to the Crown case. He has asked me to call the jury back and give them an orthodox intoxication direction, adapted for the illness and the use of drugs.
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> [5] Mr Gibson opposes this step. He submits that it is unnecessary as it has been clear that the Crown's case is that although there was a depressive illness and there had been use of drugs, and some residual Zoplicone in his system and possibly other drugs, the necessary intent was nevertheless formed. For the reasons he gave earlier this morning he submitted thee should

> not be any intoxication direction. He was concerned about the effect that any direction might have on the jury, in particular the references to a disease of the mind and the use of drugs not being a defence. Mr Lyttelton supports that objection.
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> [6] I decline Mr McColgan's request to so further direction the jury. The Crown case has been very clear throughout that despite the illness and use of drugs the requisite intent existed. It has never been suggested by Mr Lyttelton or Mr Gibson to the jury that the illness or the use of drugs established could themselves constitute a defence. It has not been suggested that there could not be a sufficient intent even if there was some use of drugs or illness. Indeed the whole thrust of the evidence of most of the psychiatrists has been that there was an ability to form an intent despite those factors.
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> [7] Thus, I do not consider it necessary in doing fairness to the Crown case to recall the jury on the point. I am also very concerned that if I do so, it might appear as if I was in some way trying to give an indication to the jury that the use of drugs and the illness were not matters of particular significance for the defence.

Mental state directions were inadequate

[37] Asher J reduced the essential question for the jury to one of fact on each charge: did Mr Lyttelton act with the specific intent required by the charge. He identified what that intent was. He directed that Mr Lyttelton was not guilty if he lacked that intent, or was incapable, for any reason including mental illness and intoxication.

[38] Mr Lyttelton argued that because automatism and intent are questions for the jury, a trial judge must explain the law to them. That is not correct. A judge ought to isolate the factual issues for decision and instruct the jury, based on his or her analysis of the law, what verdict may or must result from a given finding. To that end the judge should direct the jury on all matters of fact on law that they might reasonably take into account when deliberating.[26]

[39] So, for example, it was not necessary to explain to the jury that mens rea may require both willed action or volition and a specific intent. All of the charges required a specific intent. (There were no included charges.) If the Crown failed to prove specific intent, the jury were to find Mr Lyttelton not guilty. No purpose could be served by explaining that volition must be proved too, there being no possibility that Mr Lyttelton had acted involuntarily but with specific intent.

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[26] *R v Tavete* [1988] 1 NZLR 428 (CA) at 431.

[40] Nor was it necessary to discuss automatism. The Judge put it in issue by telling the jury that in law Mr Lyttelton could have been rendered incapable of intent by external and internal factors, and he explained Mr Lyttleton's defence rested on his mental state, his consumption of drugs and evidence of his actions before and at Mr Ord's residence. This effectively meant that any question of automatism was subsumed into a broader defence of a lack of intent.

[41] The Judge also simplified the jury's task by directing that if Mr Lyttelton was incapable, or lacked the necessary intent, from any combination of these causes he must be acquitted. That this was the Judge's aim is shown by his refusal to give an intoxication direction when asked by the Crown. In this way he avoided having to direct them to distinguish between intoxication and mental illness with a view to excluding intoxication unless it had resulted in incapacity.[27] Simplicity was achieved at the Crown's expense, because the resulting direction was favourable to the defence; it allowed the jury to rely on voluntary intoxication as a factor detracting from intent.

[42] Finally, it was not necessary to explain intent beyond saying, as the Judge did, that Mr Lyttelton must be shown to have acted for a particular object or purpose or, in the case of the offence against Ms Fenton, with recklessness as to whether he injured anyone.

[43] These conclusions dispose of Mr Lyttelton's arguments regarding directions on automatism, intoxication and intent.

Insanity ought to have been left to the jury

[44] Mr Lyttelton now wishes to invoke the defence of insanity, in the alternative to automatism and lack of intent. He contends that there was an evidential foundation for the defence and that Asher J accordingly erred by failing to leave it to the jury. He points out that it is not fatal that Mr Lyttelton himself did not invoke it at trial.[28]

[45] We are satisfied that the Judge was right to exclude the defence. It was not in dispute that Mr Lyttelton laboured under a mental illness, depression, but the

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27 *R v Kamipeli* [1975] 2 NZLR 610 (CA) at 619.
28 *Tavete*, above n 26, at 431.

connection between illness and incapacity for moral reasoning could not be established in circumstances where all the expert witnesses excluded it.

Defence case was not summarised

[46] As noted, Mr Lyttelton submitted that Asher J failed to identify and summarise his defence. We have already dealt with this so far as it concerns automatism and insanity, and we have held that the Judge's directions about the intent required were appropriate. That largely disposes of this ground of appeal. Mr Lyttelton also submitted, however, that Asher J failed to direct the jury that he must be acquitted if through mental illness, intoxication and Mr Ord's assault he did not form the necessary intent. The Judge thereby failed in his duty to summarise the defence case.

[47] A trial judge must ensure that the nature of the defence is explained by summarising the nature of the defence and the evidence.[29] The focus must be on the real matters on which the defence is based. How much detail is required depends on the circumstances. A judge may rely on closing addresses to the extent appropriate.[30]

[48] We are not persuaded that Asher J erred by summing up as he did. We have cited his directions at [34] above. He very clearly identified the nature of the defence and explained that it rested on Mr Lyttelton's mental state and combination of illness, drugs and what happened before and at the house. Contrary to Mr Lyttelton's submission before us, he plainly did direct the jury that they must acquit if through mental illness, intoxication and Mr Ord's assault he lacked the necessary intent. He reminded the jury that when considering state of mind they must take into account Mr Lyttelton's own evidence and that of the five experts. The summing up was brief, but the directions on intent were sufficient. It needs to be borne in mind that, contrary to the case now advanced, the narrative facts were not in dispute, and nor had Mr Lyttelton advanced automatism or insanity.

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29 *R v Shipton* [2007] 2 NZLR 218 (CA) at [33] and [37].
30 *Hutchins v R* [2016] NZCA 173 at [47]–[52].

Perjury by Mr Ord

[49] Mr Lyttelton retains a poor opinion of Mr Ord, whose character he sought to put in issue at trial. He was refused permission to go into their earlier civil disputes but permitted to say that he believed Mr Ord had behaved dishonestly and done many people a great deal of harm. He now maintains that Mr Ord's evidence was perjury, aided and abetted by the Crown, which had prepared a brief of evidence that differed from Mr Ord's previous statements. He put this claim at the forefront of his submissions in this Court.

[50] We say at once that it is neither necessary nor appropriate to accuse Mr Ord of the criminal offence of perjury. It would suffice for Mr Lyttelton's purposes to show that no reasonable jury would have accepted Mr Ord's evidence.

[51] That said, we turn to the merits. We have noted that the narrative was not in dispute at trial, but there were different perspectives on what happened at the house. By way of illustration, it was Mr Lyttelton's case that when Mr Ord opened the office door he fell through it and was seized from behind by Mr Ord, thereafter acting reflexively. Mr Ord's account was that as Mr Lyttelton raised the gun, which had been pointing down, the door opened and Mr Lytteleton tumbled into the room because Mr Ord grabbed him.

[52] We make three general points about this ground of appeal:

(a) A witness routinely departs from prepared witness statements when giving evidence. This does not in itself indicate that the evidence is false. It creates an opportunity to test the witness in cross-examination, as Mr Lyttelton did.

(b) The credibility and reliability of Mr Ord's evidence were jury questions.

(c) It is not easy to satisfy an appellate court that the jury ought to have rejected the evidence in the circumstances. The test of an unreasonable

verdict is whether, on all of the evidence, a jury acting reasonably ought to have entertained a reasonable doubt as to guilt.[31]

[53] On the merits, Mr Lyttelton fails by a substantial margin to make out this ground of appeal. His arguments depend on the proposition that discrepancies, even trifling ones, when describing events that were substantially undisputed, must dictate that Mr Ord's evidence should be rejected. That is plainly incorrect. We also reject the related argument that the Crown has misconducted itself. We record that after the closing addresses at trial Mr Lyttelton acknowledged that the Crown had treated him fairly. We agree with that opinion. It is our assessment that the Crown cooperated fully and lent such assistance as it could to ensure the trial was fair.

The evidence of Dr Dean was misleading

[54] Mr Lyttelton contended that the prosecutor knowingly led the Judge and the jury into error. He did not clearly explain this submission in his written submissions, but it appears that he took issue with Dr Dean's evidence that:

(a) it was highly unlikely that Paroxetine was present in a significant quantity and the effects of that drug and alcohol were likely spent;

(b) a therapeutic dose of Zopiclone would make Mr Lyttelton sleepy and might cause disinhibition and contribute to depersonalisation or a sense of detachment; and

(c) depersonalisation does not affect the capacity to form intent.

[55] The premise of this submission is that Dr Dean's evidence is demonstrably wrong. We do not agree. His opinion was based on professional expertise and published documents about the effects of the drugs. It was properly admitted in evidence for the jury to evaluate along with the evidence of Dr Menkes. Nor does it matter that Dr Dean was referred to a police summary of facts, among other

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[31] *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [86]; and *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

documents, when he formulated his opinion. The factual premises for his opinion could be tested at trial.

[56] We record that in his submissions Mr Lyttelton did not take issue with Dr Dean's evidence that, contrary to Professor Mullin's opinion, it is extremely unlikely that Mr Lyttelton suffered any kind of psychosis at the time of the offending. Dr Dean was asked to interpret the terms used by Professor Mullen. He considered that when Professor Mullen opined that Mr Lyttelton would have been deprived of the capacity to form "coherent or considered intentions or formulate a rational course of conduct", the Professor was likely saying that in his depressive state Mr Lyttelton made poor choices. That was so because Professor Mullin appeared to consider that Mr Lyttelton was capable of forming an intent and Mr Lyttelton's own account to Professor Mullin suggested that he had intent, albeit to commit suicide rather than murder.

The shot that wounded Ms Fenton was aimed at the door handle

[57] It is Mr Lyttelton's case that when he fired at the door, which was locked against him, he was aiming generally at the handle but missed, with the result that Ms Fenton was hit. He went to considerably lengths to argue that ESR could have verified his account had it tested the angle at which the shot struck the door.

[58] Mr Lyttelton was not accused of shooting Ms Fenton intentionally. The Crown did not suggest that he knew exactly where the occupant or occupants of the room were. He would have faced a different charge had it been otherwise. The Crown case was simply that by firing at the door he acted with reckless disregard for the person or people whom he knew to be in the room. It is no defence that his immediate objective in firing at the door may have been to get into the room. For these reasons, Asher J stated that this issue was immaterial.[32] We agree.

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[32] *R v Lyttelton* [2016] NZHC 1042 at [17].

The verdicts were otherwise unreasonable

[59] Mr Lyttelton contends that the defence evidence on each charge ought to have been preferred, and that had it been the Crown must have failed to make out the intent required for each charge. So, for instance, he argues that:

(a) The defence evidence showed that: he lacked the intent for aggravated burglary because he had gone to the house to commit suicide, which is not a crime; he had shot into the room to gain entry and not with intent to harm anyone and because of his mental state lacked the foresight of harm needed for recklessness; and he lacked intent to murder.

(b) Dr Menkes' evidence was to the effect that the drugs, which are associated with disinhibition and aggression, may still have been present in Mr Lyttelton's brain in significant quantities.

(c) The defence evidence, coupled with the reports of Dr McCormick and Professor Mullin, established that he was suffering both a disease of the mind and intoxication. We understand the submission to be that this evidence established automatism or absence of specific intent or insanity.

This amounts to a submission that the verdicts were unreasonable.

[60] We do not accept that the defence evidence must have been preferred by a properly directed jury. In our opinion, the defence evidence was not sufficient to displace a very strong Crown case founded on the inferences that follow naturally from a largely undisputed narrative. Dr Menkes's evidence fell well short of showing that Mr Lyttelton lacked specific intent. It tended to explain, on the contrary, why Mr Lyttelton may have formed and acted on the intent to kill; he was capable but somewhat disinhibited. It is unsurprising that the jury evidently reached the same conclusion. We have already held that there was insufficient evidence to leave insanity to the jury.

Other grounds of appeal against conviction

[61] Mr Lyttelton argued that Asher J made serious errors throughout the trial. He rehearsed a great deal of case law about the offences and defences and the obligations of a trial judge and the prosecutor and the police. We have dealt with the substance of the alleged errors so far as they might provide grounds for appeal. We do not otherwise find it necessary to discuss this material.

[62] He also complained about failures of disclosure by the police. He believes that things went wrong with the original summary of facts, on which he was first sentenced on 31 March 2010. He argues that it continued to taint the trial and even the sentence. He complains that before trial he sought disclosure of who had prepared and reviewed the summary of facts, information which was relevant to his argument that Mr Ord committed perjury with the knowing assistance of the police. Similarly, he sought disclosure of police and ESR case files to show that evidence about the angle of the shot was wrong. We do not accept these complaints. The summary of facts was relied on at the first sentencing, but not thereafter. It was not in evidence at trial. If discrepancies between that summary and the evidence at trial affected the evidence of any expert witness who had relied on the summary when preparing his evidence, that could have been brought out in cross-examination. We have explained that the angle of the shot was immaterial.

Conclusions on conviction appeal

[63] We have considered all of Mr Lyttelton's grounds of appeal and submissions and discussed those that have any substance in the circumstances of this case. None has been made out. The conviction appeal fails.

The sentencing process

[64] As noted, Mr Lyttelton's sentence appeal focused on the absence of a sentencing hearing. He undoubtedly sought such a hearing, saying that he disputed facts about Ms Fenton's location in the room and Mr Ord's evidence at trial and the effect of the drugs. Of course these issues had been canvassed at trial. Asher J

declined to adjourn sentencing for such a hearing.[33] He delivered a judgment in which he recorded that Mr Lyttelton:

> [4] In his very detailed submissions he takes issue with a large number of factual matters. Some of these reflect the defence that he put forward at the trial, and some of them are matters of detail. I do not propose setting out all of the disputed factual matters that he raises. In general terms it can be said that he now invites me to conclude that at least in part Mr Ord perjured himself when he gave evidence at the trial on how the facts unfolded once he had entered the home. He also submits that the original Police summary of facts was misleading, that the Crown has misled the Court in its sentencing submissions, and that relevant facts have been suppressed by the Police…

[65] The Judge accepted that there may be occasions on which a disputed facts hearing is required after trial, but this was not one of them:

> [8] I am plainly bound by some facts essential to the jury verdicts under s 24(1)(b). I am bound by the jury verdict to accept that Mr Lyttelton intended to kill Mr Ord. I am bound by the jury verdict to find that Mr Lyttelton intended to injure Ms Fenton or another person and caused grievous bodily harm when he fired the shotgun. I am bound to find that Mr Lyttelton deliberately entered Mr Ord's home to commit an offence.
>
> [9] The facts of what transpired were not complex. As I will set out in my sentencing notes, Mr Lyttelton entered the home with a shotgun, cartridges and a knife, and fired the shotgun hitting Ms Fenton. There was then an extensive struggle between Mr Lyttelton and Mr Ord. Eventually Mr Lyttelton ceased to struggle, and following that the Police arrived and he was arrested. The only three witnesses were Ms Fenton, Mr Ord and Mr Lyttelton. I heard from them all.
>
> [10] Under s 24(1)(a) I may accept as proved any fact that was disclosed by the evidence at the trial. I am well able to reach definite conclusions bearing in mind the onus and standard of proof, from the evidence that I have heard. There may be cases where following a trial a Judge may still need to follow a disputed fact procedure because of areas of factual uncertainty not specifically addressed at the trial. Some possible examples of this were set out by Williams J in *R v Allison (No 35)*. However in most cases the trial Judge, having heard the evidence, is well able to reach conclusions on the facts under s 24(1) without hearing more. The parties on sentencing can make submissions to the Judge on the facts, or invite the Judge to interpret them one way or another, but normally the Judge will not be assisted by any further evidence because the Judge has heard the relevant evidence.
>
> [11] I am satisfied that I have heard the relevant evidence in relation to what happened, and I can assess Mr Lyttelton's culpability for his offending on that evidence. Mr Lyttelton's disputed facts are ones that I am well able to resolve.
>
> (Footnotes omitted.)

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33 At [20]. This judgment was delivered alongside Asher J sentencing, above n 1.

[66] He illustrated his conclusion by saying that he had heard the evidence of Mr Ord and Mr Lyttelton and was satisfied that Mr Ord's evidence was truthful and preferable to Mr Lyttelton's on those occasions where they were in conflict, and that Mr Lyttelton contested minor matters of detail, such as the angle of the gunshot, that were not material. Further, Mr Lyttelton's account was not easy to reconcile with the verdicts.[34]

[67] At sentencing on 18 May 2016, Asher J made it clear that he was sentencing Mr Lyttelton afresh.[35] He would refer to Wylie J's sentencing in the interests of consistency, but he would reach his own conclusions. Before reciting the facts he recorded that he preferred the evidence of Mr Ord to that of Mr Lyttelton where they were in conflict. He considered himself bound to do so by the jury verdicts, but it was also his opinion that Mr Ord was truthful and accurate.[36]

[68] Having set out his view of the facts, which we have quoted at [9] above, the Judge rejected, as both incorrect and inconsistent with the verdicts, Mr Lyttelton's submission that he did not intend to kill Mr Ord.[37] However, he did not find premeditation a significant aggravating factor, accepting rather that the decision to kill Mr Ord was not made until after Mr Lyttelton left home on the morning of 10 April.[38] Aggravating factors were the actual violence, the use of weapons, the home invasion and the persistence of the attack.[39]

[69] The Judge adopted a starting point of eight years' imprisonment for attempted murder and five for causing grievous bodily harm, a total of 13 years, but adjusted that to 11 years for totality. He added nothing for the aggravated burglary because he had already treated home invasion as an aggravating factor.[40] He deducted 30 per cent for illness and the effect of drugs, and a further five per cent for previous good character.

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34 At [14]–[17].
35 Asher J sentencing, above n 1, at [4].
36 At [8].
37 At [36].
38 At [31].
39 At [37].
40 At [38]–[43].

He allowed nothing for remorse; Mr Lyttelton regretted the harm he had done but he had not accepted fault and continued to justify himself.[41]

[70] The end sentence was seven years' imprisonment. Asher J observed that it was 13 months more than the sentence imposed by Wylie J, but explained that he had had the advantage of hearing the evidence and seeing the people involved.[42]

Grounds of appeal against sentence

[71] On appeal, Mr Lyttelton submitted that:

(a) Under s 24 of the Sentencing Act those facts essential to a guilty verdict must be taken as proved at sentencing, but it cannot be assumed that other facts given in evidence at trial were proved (or negated) beyond reasonable doubt. They must be proved to that standard for sentencing purposes if the offender does not accept them.

(b) Mr Lyttelton had put aggravating and mitigating facts in dispute, and accordingly was entitled to a disputed-facts hearing.

(c) The disputed facts included: Mr Ord's perjury, evidence as to automatism and insanity (the Judge having failed to put these defences at trial), Dr Menkes' evidence as to the effect of the drugs, ESR errors in processing his blood sample and the office door, and the misleading evidence of Dr Dean.

(d) In addition, Asher J must have relied on the sentencing notes of Wylie J, which were in error because, among other reasons, Wylie J relied on the police summary of facts.

(e) For these reasons the sentence should be set aside and the case remitted to the High Court for a proper sentencing hearing.

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41 At [45]–[47] and [49].
42 At [51]–[52].

Was Mr Lyttelton entitled to a disputed facts hearing?

[72] Section 24 provides:

> **24 Proof of facts**
>
> (1) In determining a sentence or other disposition of the case, a court—
>
> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
>
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
>
> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—
>
> (a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:
>
> (b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:
>
> (c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:
>
> (d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:
>
> (e) either party may cross-examine any witness called by the other party.
>
> (3) For the purposes of this section,—
>
> **aggravating fact** means any fact that—
>
> (a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and
>
> (b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case
>
> **mitigating fact** means any fact that—

(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

[73] The approach to be taken to s 24 where an offender is to be sentenced after having been found guilty at trial has been settled by previous judgments of this Court.[43] Briefly:

(a) Judges have a fact-finding role at sentencing. They must accept all facts, express or implied, that are essential for the verdict,[44] and may not adopt any view of the facts that is clearly inconsistent with it.[45] Subject to that, they may accept as proved any fact that was disclosed by evidence at the trial and may form their own view of the facts.[46]

(b) It is incumbent on a party to raise with the judge any fact that the party wishes to dispute at sentencing, and such facts must be clearly identified.[47]

(c) A disputed fact having been identified, the judge must indicate the weight likely to be attached to it and its significance for sentencing purposes.[48] If the judge considers the fact immaterial to sentence, it is not relevant for purposes of s 24(2).

(d) Where a fact is relevant and a party wishes the court to rely upon it, the parties may adduce evidence of its existence unless the court is satisfied that sufficient evidence was adduced at trial.[49] Evidence is sufficient where it proved the fact to the standard required under s 24(2)(c) or s 24(2)(d).[50]

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43 We refer to the list in Geoff Hall *Hall's Sentencing* (online looseleaf ed, LexisNexis) at [SA24.10].
44 Sentencing Act 2002, s 24(1)(b).
45 *Gathergood v R* [2010] NZCA 350 at [17].
46 *R v Accused (CA125/87)* [1988] 1 NZLR 422 (CA) at 426–427.
47 *Archer v R* [2017] NZCA 52 at [15]. See also *Curtis v Police* (1993) 10 CRNZ 28 (HC) at 33.
48 Sentencing Act, s 24(2)(a).
49 *Archer*, above n 47, at [12]–[13].
50 *R v Bryant* [1980] 1 NZLR 264 (CA) at 270–271; and *R v Booth* CA109/05, 18 July 2005 at [41].

(e) Where an aggravating or mitigating fact is relevant, a party wishes to rely on it and the judge considers that it has not been proved to the required standard, a disputed facts hearing must be held.

(f) At such hearing the prosecutor must prove a disputed aggravating fact, or negate a mitigating one relating to the offence or the offender's part in it. The standard of proof is beyond reasonable doubt. The offender must prove any other disputed mitigating fact on the balance of probabilities.[51]

(g) Disputed-fact hearings are seldom required after trial.[52] Normally sentencing proceeds on facts disclosed in evidence there, with the judge giving such weight as seems fit to other facts advanced, but not tested and proved, in mitigation. However, it is possible that important and disputed aggravating or mitigating facts were not sufficiently established at trial, and where that happens a disputed-facts hearing may be required.[53]

[74] It follows that, contrary to his submissions, Mr Lyttelton was not entitled under s 24 to a disputed-facts hearing merely because he disputed facts that he thought material to sentence. Several prerequisites stood in his way. A party must rely on the facts as aggravating or mitigating, as the case may be, and the Judge must accept that they were relevant to sentence. The Judge need not order a disputed-facts hearing for facts disclosed by evidence at the trial and proved there, in his or her opinion, to the required standard. And the Judge could not take a view of the facts that was clearly inconsistent with the verdicts.

[75] In this case, Mr Lyttelton put a large number of disputed facts in issue. However, evidence of those facts was disclosed at trial. Asher J was satisfied that sufficient evidence had been adduced to prove them and, in some cases, that they were

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See also Hall, above n 43, at [SA24.7].

51 Sentencing Act, ss 24(2)(c) and 24(2)(d).

52 *R v Aram* [2007] NZCA 328 at [71].

53 See for example *Gilfedder v R* [2013] NZCA 426 at [81]–[87]; *Mata v R* [2012] NZCA 593 at [12]–[19]; and *Saggers v R* [2012] NZCA 591 at [23]–[26]. See also *Broekman v R* [2012] NZCA 213 at [14]–[15]; and *Archer*, above n 47, at [16]–[23].

immaterial to sentence. Further, the disputed facts traversed the narrative established at trial and the central issue of intent. To permit evidence of them would have been to revisit guilt, which is necessarily incompatible with the verdicts. For these reasons, the Judge was right to refuse a disputed-facts hearing.

[76] We find untenable the allegation that the sentencing was tainted because Asher J relied on Wylie J's sentencing and so indirectly adopted the police summary of facts. Asher J made it clear that he was sentencing independently of Wylie J, having heard the evidence.[54]

[77] The sentence appeal fails.

[78] For completeness, Mr Lyttelton filed a detailed affidavit dated 7 March 2018 in support of his appeal. Much of that affidavit was essentially submission, but it also annexed various documents Mr Lyttelton relied on for his appeal. No formal application to adduce further evidence was filed, and though none of that evidence was fresh, in the interests of justice we grant the implicit application to adduce further evidence on appeal. We have taken that material into account.

Result

[79] The application to adduce further evidence on appeal is granted.

[80] The application for recusal is declined.

[81] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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54 Asher J sentencing, above n 1, at [4].