IN THE COURT OF APPEAL OF NEW ZEALAND

CA362/2014
[2015] NZCA 312

BETWEEN	KRISTOFER LEE JONES Appellant
AND	THE QUEEN Respondent

CA364/2014

BETWEEN	TONI MAREE MILLER Appellant
AND	THE QUEEN Respondent

CA369/2014

BETWEEN	TARIANA HINETEANAURANGI JONES Appellant
AND	THE QUEEN Respondent

Hearing:	29 June 2015
Court:	Wild, Keane and Kós JJ
Counsel:	C J Tennet for Appellant in CA362/2014 N Levy for Appellants in CA364/2014 and CA369/2014 S K Barr and F G Biggs for Respondent
Judgment:	20 July 2015 at 2.30 pm

JUDGMENT OF THE COURT

A The appeals against conviction are dismissed.

B The appeals against sentence by Kristofer Jones (CA362/2014) and Toni Miller (CA364/2014) are dismissed.

C The appeal by Tariana Jones (CA369/2014) against sentence is allowed. The sentence of 10 years imprisonment imposed concurrently for aggravated burglary is quashed. A sentence of nine years imprisonment is substituted.

REASONS OF THE COURT

(Given by Wild J)

Contents

Introduction

[1] These are appeals by three of five offenders jointly tried in the High Court at Wellington before MacKenzie J and a jury in March 2014.

[2] The appellants Tariana Jones and Kristofer Jones were each found guilty and convicted of murder and aggravated burglary. Each was sentenced to life imprisonment with a minimum period of imprisonment (MPI) of 17 years for murder. A concurrent sentence of 10 years imprisonment was imposed for aggravated burglary.[1]

[3] Toni Miller was found guilty and convicted of aggravated burglary and sentenced to eight years imprisonment. She was not charged with murder.

[4] None of the five accused gave evidence.

[5] All three appellants appeal against their convictions. The grounds are best summarised in tabular form:

	Kristofer Jones	**Toni Miller**	**Tariana Jones**
Failure to sever the trials	✓	✓	✓
Failure to give unreliability warning			✓
Lesser common purpose than sufficient for murder			✓
More serious purpose agreed only between the three men accused of murder			✓
Impermissible use by counsel for Kristofer Jones of the statements made by Toni Miller, Tariana Jones and		✓	✓

[1] *R v Jones* [2014] NZHC 1207 [Sentencing remarks].

Matthew McKinney			
Fresh evidence	✓		
Comment in Masterton District Court inadmissible	✓		
Prosecutorial misconduct	✓		
Misdirections (a) Failure to put defence case. (b) Misdirection on parties. (c) Failure to direct on flight. (d) Failure to direct on admissible statements	 ✓ ✓ ✓ ✓		

[6] Kristofer Jones appeals also against the 17 year MPI imposed with his life sentence for murder. And Tariana Jones and Toni Miller appeal against their respective sentences of 10 years and eight years imprisonment for aggravated burglary.

Facts

[7] On the evening of 11 January 2013 the appellants and others were at a gathering at Tariana Jones' home in Masterton. All of them except Toni Miller were drinking.

[8] A female friend (we will refer to her as A) had, several weeks earlier, told some of the group that she had been raped by the victim in this matter, Glen Jones.[2] Toni Miller and Tariana Jones instigated a plan to travel to Glen Jones' home in Featherston and beat him up. A group (comprising the appellants, along with Hayden Ranson and Matthew McKinney, who were tried in the High Court, and three other women, Macaela Coley, Kelly Pearce, and Cassandra Granich, who were not charged but gave evidence at trial) set off in two cars, arming themselves with a home-made bat and two wooden axe handles.

[9] After arriving in Featherston, they parked the two cars near Glen Jones' home. Macaela Coley and Kelly Pearce stayed in the cars. The appellants, together

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[2] In sentencing the appellants and their co-offenders, MacKenzie J was at pains to record that the results of the investigation into A's complaint against Glen Jones did not support her allegation that he had raped her. His death had meant the investigation could not be completed. The Judge also pointed out that A was in no way to blame for the attack on Glen Jones: she had specifically asked her friends to leave the matter to the police.

with Matthew McKinney, Hayden Ranson and Cassandra Granich walked toward Glen Jones' home. Toni Miller and Cassandra Granich stayed on the street outside the home, but Kristofer Jones, Tariana Jones, Matthew McKinney and Hayden Ranson went up to Glen Jones' home, carrying two of the weapons they had brought.

[10] Kristofer Jones knocked on the door. When the door opened, the group outside pushed their way in and set upon Glen Jones. In addition to being taken by surprise and defenceless, Glen Jones was partly disabled. We expand on this in [82](c) below. Glen Jones was struck around the head and body with the two weapons and also kicked and punched.

[11] Upon hearing the victim crying out, Toni Miller and Cassandra Granich ran back to the cars. The four who had gone into Glen Jones' home then left and also ran back to the two cars. They left him lying unconscious on the floor.

[12] Neighbours called emergency services. By the time ambulance officers arrived, Glen Jones was already clinically dead. Resuscitation efforts were unsuccessful and he died in Wellington Hospital as a result of the head injuries he had sustained.

Severance

[13] All three appellants appeal their convictions on the basis their trials should have been severed. Ms Levy submitted Toni Miller should have been tried alone and Tariana Jones should have been tried with Kristofer Jones and Hayden Ranson. That would have left Matthew McKinney to be tried alone — three separate trials.

[14] The basis for Ms Levy's severance submissions was the "significant quantity of highly prejudicial material in the video statements made by other accused", which was inadmissible against Toni Miller and Tariana Jones. Dealing with Toni Miller, Ms Levy submitted the only issue was whether she knew weapons were being taken to the confrontation in Featherston, making her a party to the aggravated burglary of Glen Jones' home. Ms Levy argued all the evidence of the violence that ensued at Featherston was irrelevant to that issue. The statement of Toni Miller's partner, Matthew McKinney, and the closing address of counsel for Kristofer Jones were, in

Ms Levy's submission, particularly prejudicial. We deal with counsel's remarks in [45] below.

[15] Turning to Tariana Jones, Ms Levy argued severance from Toni Miller's trial was required because Ms Miller had told the police Tariana Jones participated in the discussion with the men about what they were going to do, shortly before she and the men went into Glen Jones' home. She submitted severance from Matthew McKinney's trial was required because his statements to the police, demonstrating a willingness to use violence against Glen Jones, were similarly prejudicial.

[16] Mr Tennet submitted the Crown's evidence at trial against Kristofer Jones was lacking, which would have led to the jury giving some weight to the statements of his co-accused. He said the prejudicial effect of those statements could not be cured by judicial direction. He also submitted the Crown in closing failed to delineate adequately the evidence as to which of the accused was carrying a weapon.

[17] Applying the principles set out by this Court in *R v Fenton* and affirmed many times since, we do not accept the trials of the five accused should have been severed.[3] In summary, our reasons are these:

(a) All five accused were represented before and at trial by experienced counsel. Indeed, most, if not all, trial counsel were *very* experienced.

(b) No application for severance was made before trial. Given (a), this was obviously a deliberate strategic decision. Severance has potential downsides, not the least of which is that co-accused, once tried, become compellable witnesses in any remaining trial(s).

(c) Nor was there any application for severance during the trial, although that is a possibility — albeit only in exceptional circumstances.[4]

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[3] *R v Fenton* CA223/00, 14 September 2000 at [25]–[26]. Refer also, for example, to *R v Taylor* [2007] 2 NZLR 250 (CA); *R v Smith* [2008] NZCA 266 at [11] and [45]–[48]; *R v Rolston* [2008] NZCA 431; *Chahil v R* [2010] NZCA 244 at [17]; *R v Shadrock* [2011] NZCA 388, [2011] 3 NZLR 573 at [102].

[4] *R v Brown* (1987) 3 CRNZ 132 (CA).

(d) During the trial MacKenzie J reminded the jury several times that what one accused had told the police was not evidence against the other accused, for example, when the video statements of the accused were played in evidence. In summing up, the Judge gave a detailed direction about the admissibility of the accuseds' statements: each statement was evidence against the accused who had made the statement but not against any of the other accused.[5] Ms Levy accepted the Judge had done that and did not challenge the accuracy and adequacy of that direction, save for noting that the Judge had not directed the jury that Matthew McKinney's "demeanour" was inadmissible evidence. Earlier, in their closing addresses to the jury, counsel had also emphasised to the jury the inadmissibility against their particular accused of the statements of the other accused.

(e) None of the appellants has alleged their counsel at trial erred in not seeking severance. Consequently, none has provided a waiver enabling the Crown to ask trial counsel why they decided not to pursue severance.

[18] In all these circumstances, what this Court said in *R v Rolston* is exactly on point here:[6]

> There was no suggestion that there was any oversight by trial counsel in not seeking severance: it was a deliberate strategy. In those circumstances an appeal based on a failure to make a severance order which was never sought is not a compelling proposition.

[19] This first ground of appeal against conviction by Tariana Jones, Toni Miller, and Kristofer Jones fails.

Other grounds of appeals against conviction by Toni Miller (CA364/2014) and Tariana Jones (CA369/2014)

[20] We deal with these first, as Ms Levy addressed the Court first.

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5 *R v Jones* HC Wellington CRI-2013-035-53, 26 March 2014 [Summing-up] at [28]–[29].
6 *R v Rolston*, above n 3, at [73].

The Judge failed to give an unreliability warning

[21] In a criminal jury trial s 122(2)(c) of the Evidence Act 2006 provides that the Judge "must consider" whether to warn the jury of the need for caution in deciding whether to accept evidence, and if so the weight they give to it, whenever the evidence is given:

> (c) … by a witness who may have a motive to give false evidence that is prejudicial to a defendant.

[22] For Tariana Jones, Ms Levy submitted the evidence of Crown witnesses Kelly Pearce, Macaela Coley and Cassandra Granich may have been unreliable, because each had a motive to give false evidence prejudicial to Tariana Jones. She submitted s 122(2)(c) required a warning, and the Judge's failure to give one had resulted in a miscarriage of justice in respect of Tariana Jones.

[23] Having summed up to the jury and asked them to retire, MacKenzie J, in the usual way, inquired of counsel whether they had any matters arising out of his summing up. Mr Burston, the prosecutor, raised s 122, suggesting defence counsel be invited to indicate whether they sought a direction in respect of the three witnesses mentioned in [22] above. None of the defence counsel requested a s 122 warning. Against that background, this s 122 submission is a difficult one for Ms Levy to advance.

[24] Almost certainly, Mr Blathwayt, who, with Ms Sullivan, defended Tariana Jones, did not want the Judge to give a s 122 warning in relation to the three witnesses because he had invited the jury to accept substantial parts of their evidence. The most damaging statement Kelly Pearce made about Tariana Jones was her evidence that she had heard Ms Jones say after the attack that she was "glad she got a couple of boots in". Cross-examining Ms Pearce, Mr Blathwayt got her to accept that she had not, when initially interviewed on 13 January 2013, told the police of this "couple of boots in" comment. Later in his cross-examination, Mr Blathwayt put it to Ms Pearce that she had made up that part of her evidence in the course of retracing the group's movements with a detective on 30 January, in order to take the heat off herself.

[25] In his closing address to the jury, Mr Blathwayt emphasised Ms Pearce's failure to mention the "couple of boots in" comment when first interviewed by the police on 13 January and submitted Ms Pearce had "invented" the comment on 30 January "in order to protect her own back". But Mr Blathwayt relied on other parts of Ms Pearce's evidence, for example her evidence that she was not aware of any weapons being put into the car (she was in the same car as Tariana Jones) and that she did not see any weapons when they arrived at Featherston. MacKenzie J summarised those aspects of Tariana Jones' defence in this part of his summing-up:[7]

> Mr Blathwayt cautions you against placing reliance on the alleged statement that she was glad that she got a couple of boots in because that comes from Kelly Pearce only. He says that Kelly Pearce was clearly concerned at her own position and did not mention it when she was first interviewed and it came up only when she was being taken around the scene by police later.

[26] The position was the same with Cassandra Granich and Macaela Coley: in closing to the jury, Mr Blathwayt relied upon parts of their evidence, while criticising and challenging other parts.

[27] We have not overlooked the comments and points about s 122 made by the Supreme Court in its judgments last October in *CT (SC88/2013) v R*.[8] That case concerned charges of sexual indecencies allegedly committed about 40 years earlier, so was squarely focused on s 122(2)(e). In their concurring but separate judgment, Glazebrook and Arnold JJ emphasised that the obligation imposed on the Judge by s 122(2) is only to "consider" giving a warning, consistently with the word "may" in s 122(1).[9] Here, given that Mr Burston specifically raised s 122 with the Judge, it could hardly be suggested that the Judge might have overlooked the section and failed to consider whether to give a warning.

[28] This second ground of appeal against conviction, this time by Tariana Jones only, also fails.

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7 Summing-up, above n 5, at [99].
8 *CT (SC88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [50] and [63]–[72].
9 At [67].

The Judge failed to identify the possibility that Tariana Jones instigated a lesser common purpose than would be sufficient for murder

[29] Ms Levy accepted there was evidence identifying Tariana Jones as one of the instigators of the "planned visit" to Glen Jones' home in Featherston. In fact, the Crown cast Tariana Jones as the key instigator.

[30] Ms Levy submitted the Judge needed, but failed, to direct the jury that the instigator evidence did not in itself establish Tariana Jones had the requisite murderous intent at the time of the attack. She argued it was an available inference that Matthew McKinney, Kristofer Jones and Hayden Ranson may have agreed amongst themselves to do serious violence to Glen Jones, and that Tariana Jones had only participated in a limited common purpose, insufficient for murder or manslaughter.

[31] Ms Levy was also critical of the Judge for taking Tariana Jones as the "example" in working through the question trail with the jury. She was critical also of Mr Blathwayt for not addressing the jury on this "lesser common purpose" point, and categorised the defence run as "hopelessly optimistic".

[32] In summing up, the Judge did indeed take the jury carefully through the question trail relating to Tariana Jones. He explained he was doing this because she was named first in the indictment. When he came to deal in turn with the other accused, the Judge did not again go through the question trail, directing that it was the same as for Tariana Jones (in relation to Toni Miller, for count two only). That is a routine and sensible way of condensing a summing up and there can be no criticism of the Judge for following it.

[33] Further, Ms Levy accepts that questions 2.3 and 2.4 in the question trail for Tariana Jones adequately and accurately dealt with the intents (under s 66(1) and (2) of the Crimes Act 1961 respectively), one of which the jury had to be satisfied Tariana Jones had at the time of the attack on Glen Jones in order to find her guilty.

[34] There was evidence sufficient to find one or more of those intents proved to the requisite standard. A summary suffices:

(a) Witnesses who were at the gathering in Masterton described Tariana Jones as angry, as "rarking" or "amping" everyone there up, wanting them to go "to sort a rapist out down in Featherston".

(b) Tariana Jones stated to the police she was involved in a conversation to the effect "he [Glen Jones] should have, you know, needs a touch up for it sorta thing".

(c) Cassandra Granich said Tariana Jones put on her "stomping boots" before leaving for Featherston.

(d) Macaela Coley said Tariana Jones was one of the people in the other car that stopped to fetch bats. Tariana Jones told the police there was a bat and an axe handle, and said the bat was hers and "might have been in my car already".

(e) Cassandra Granich said Tariana Jones carried the bat to Glen Jones' flat, but under cross-examination accepted it may have been too dark for her to see that.

(f) Kelly Pearce and Cassandra Granich both said Tariana Jones had put her hood up after she left the car to walk to Glen Jones' flat.

(g) Kelly Pearce gave evidence that Tariana Jones had said after the attack that she was "glad she got a couple of boots in".

(h) Macaela Coley heard Tariana Jones saying something about blood on her boots and saw her wipe it off at the Caltex Rimutaka Service Station in Upper Hutt. Kelly Pearce also said the attackers had got out at the Caltex and washed their shoes. The forensic scientist called by the Crown said he had found an airborne bloodstain on Tariana Jones' boots.

[35] The Judge summarised the Crown case, including mentioning the main aspects of the evidence just summarised. But he also gave a detailed summary of the

defence case, explaining it placed Tariana Jones in the same position as Toni Miller, Cassandra Granich, Kelly Pearce and Macaela Coley. The nub was that Tariana Jones, although she had played a part in the events of the evening, was not the main instigator and had not been involved in the attack on Glen Jones inside his home. Thus, the essence of the suggested defence of a lesser common purpose was put to the jury.

[36] This third ground of appeal by Tariana Jones against conviction also fails.

The question trail should have covered the possibility that a more serious purpose was agreed between the men only

[37] This ground is a variation on the previous one. Ms Levy submitted it was possible Tariana Jones went to Featherston to watch, support or encourage prosecution of the lesser common purpose previously referred to, but found herself witnessing the three men carrying out the more serious purpose they had agreed between themselves. She submitted the question trail required a separate branch to evaluate this possibility.

[38] We do not accept this submission. The purpose of a question trail is to step the jury through the decisions they need to make in reaching their verdicts. The questions must — and in this case did — focus the jury on what they needed to be satisfied about before they could find Tariana Jones guilty. As we noted at [33] above, Ms Levy accepted questions 2.3 and 2.4 of the question trail adequately covered Tariana Jones' intent.

[39] MacKenzie J put squarely to the jury Tariana Jones' defence that she was no part of the plan and did not share the intent of the accused who murdered Glen Jones. The Judge said:[10]

> … [Mr Blathwayt] submits that there was no plan and no discussion about weapons and that the persons involved had no expectation of serious violence. He submits that Tariana Jones did not know the weapons were in her car and if she did she had no expectation that they would be used or taken to the flat. He submits that what occurred was wildly outside her expectation, and that she had entered only to get the others out. …

[10] Summing-up, above n 5, at [94].

[40] This fourth, but rather similar, ground of appeal by Tariana Jones against her conviction for murder fails.

Counsel for Kristofer Jones made an impermissible use of the statements made by Toni Miller, Tariana Jones and Matthew McKinney

[41] In his closing address to the jury, counsel for Kristofer Jones referred in some detail to the statements made by Tariana Jones, Toni Miller and Matthew McKinney. He concluded:

> It is, I suggest to you, reasonably clear on analysis that the three conspired and blamed Kris Jones as the bat carrier to protect someone, or more than one.

[42] In a chambers discussion on 20 March 2014 (before any of the closing addresses), counsel for Kristofer Jones had obtained the Judge's permission to do this.[11]

[43] Relying on the excellent analysis of ss 7, 17, 18 and 27 of the Evidence Act by Woolford J in *R v Leslie-Whitu*, Ms Levy submitted counsel ought not to have been permitted to launch a general attack on the statements of co-accused in this manner.[12] We agree. The statements were not admissible evidence in Kristofer Jones' trial, nor had Mr Paino sought to have them admitted under s 18(1). In any case, he would not have been able to rely on s 18(1), which imposes a requirement of reliability, to comment adversely on the comments of Tariana Jones and Toni Miller, when his "sole purpose" was to demonstrate "just how unreliable they are".

[44] However the issue for us is whether there was a resulting miscarriage of justice in respect of either Toni Miller or Tariana Jones or both. Ms Levy submitted

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[11] The transcript of the discussion records:
Mr Paino: So I can say that, in the case of my client, where two co-defendants have said that he had a bat, I can say that that evidence is unreliable because of the possible motivations of those saying it.
MacKenzie J: Yes. And I will direct them that it is inadmissible against your client, and I will explain that the reason, one of the reasons why it is inadmissible is because of its inability to be tested and its inherent unreliability. …
Mr Paino: So what I said and the way I said I am going to frame part of my final address is permissible?
MacKenzie J: Yes. …

[12] *Leslie-Whitu v R* HC Rotorua CRI-2009-263-163, 5 October 2011.

there was because the credibility of both those accused in the eyes of the jury was potentially damaged by counsel's attack.

[45] Our assessment is that no miscarriage of justice resulted. The statements to the police of Tariana Jones and Toni Miller were already in evidence, admissible against each of them individually. Each of those statements had already been the subject of adverse comment by the prosecutor in his closing address to the jury. For example, the prosecutor introduced his analysis of Tariana Jones' successive statements in the following way:

> So Tariana Jones' proven lies, her different stories, she gives five different versions of events you've heard and her story changes as she receives more information that she knows she can't get away from.

[46] And the prosecutor was equally critical of Toni Miller's three statements to the police. After going through them he said to the jury:

> You know from the start that Miller has lied about much that went on. The Crown says you're entitled to reject her account in interview as a pack of self-serving lies.

[47] In summing up the Judge dealt with this aspect in the following way:[13]

> [133] Mr Paino referred you to the co-defendants' statements and said that they had lied to maximise Kristofer Jones' role, and that the Crown has accepted part of those lies in the case against Kristofer Jones in alleging that he was one of those carrying the weapons.
>
> [134] I simply remind you again that you cannot take those statements into account in considering the position of Kristofer Jones and to the extent that you consider that the Crown case relies upon what is said by other defendants you could not accept that proposition.

[48] We assess there was no real risk of any additional prejudice in the further criticism levelled by counsel for Kristofer Jones at the statements made by Tariana Jones and Toni Miller, suggesting they and Matthew McKinney had "conspired" to blame Kristofer Jones as a principal offender. For that reason, we consider no risk of a miscarriage of justice resulted from counsel's criticism.

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[13] Summing-up, above n 5.

Other grounds of appeal against conviction by Kristofer Jones (CA362/2014)

Application to adduce fresh evidence

[49] Mr Tennet sought to adduce fresh evidence in support of several of the grounds on which Kristofer Jones appeals against his conviction.

[50] This evidence took the form of an affidavit affirmed by Matthew McKinney in prison on 9 June 2015. Mr McKinney has not appealed his convictions for murder and aggravated burglary. Essentially, his affidavit supports the account Kristofer Jones gave the police: he had not taken a weapon into Glen Jones' flat; although he had got into a fist fight with Glen Jones after going through the door, he had not struck any of the blows to Glen Jones' head.

[51] We decline to accept this evidence. It fails at the initial, credibility, threshold spelt out by the Privy Council in *Lundy v R* and by this Court in *Bain v R*.[14] We restrict ourselves to two examples of why we find this evidence not credible:

(a) In paragraph 8 of his affirmation Mr McKinney states "For myself I was not expecting [Glen Jones] to be there or us to attack him. That was not the idea and I didn't travel there to do that". This contradicts completely the statements Mr McKinney made to the police in his second DVD interview on 14 January 2013. Examples include:

> We were never spose to beat him up with sticks, they were just there to look good. We were only tryna give him a fright. We wanted to put the fear of god into this man. That was it. Maybe a broken leg.
>
> …
>
> The dude was just spose to get a touch up, maybe a broken leg or something. I remember saying no head shots, we don't wanna kill the cunt, just break his ribs, break his leg.
>
> …
>
> Wasn't spose to be any head shots, just wanted to break his fucken legs.

[14] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [118]; *Bain v R* [2004] 1 NZLR 638 (CA) at [22].

(b) In paragraph 14 of his affirmation Mr McKinney states:

> We went to the door of [Glen Jones'] house and Kris knocked on the door. He was not carrying anything. [Glen Jones] answered it and there was an altercation.

In his second DVD interview there was this exchange:

> Detective: Okay. When you say the boys got the bats, you're referring to Kris and to Hayden?
>
> McKinney: Yes.

[52] As this Court has previously noted, evidence from a convicted co-accused such as Matthew McKinney is to be treated with "real care", for somewhat obvious reasons.[15] As well as contradicting what he told the police at the time, Mr McKinney's affirmation is — as the Crown submits — "vague and evasive". It is perhaps more notable for what it does not state than for what it does affirm.

[53] We are also satisfied the evidence, even if credible, would have no effect on the safety of the verdict. The affidavit confirms Kristofer Jones joined in the assault on Glen Jones.

The Judge wrongly ruled admissible Kristofer Jones' comment in the Masterton District Court

[54] Mr Tennet submits a comment made by Kristofer Jones during an appearance in the Masterton District Court on 18 January 2013 was wrongly admitted in evidence and gave rise to a miscarriage of justice.

[55] As Kristofer Jones was leaving the dock he was overheard to comment "he was a rapist anyway, that's why he got the hiding". This comment was both filmed and recorded by the media present in Court. The presiding District Court Judge suppressed publication of the comment.

[56] The Crown applied pre-trial to admit the statement as evidence. Over the opposition of defence counsel, MacKenzie J granted the application and the evidence

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15 *R v Saggers* [2008] NZCA 364 at [18](c).

was adduced at trial in the form of a statement by a constable who had heard it in Court. After recording the grounds of opposition advanced by counsel for Kristofer Jones, MacKenzie J ruled:[16]

> The statement is admissible under s 27(1) unless excluded under ss 28, 29 or 30, or under the general exclusion in s 8. The statement was not inappropriately or unfairly obtained. It was voluntarily made. The defendant was represented by counsel. The purpose of the appearance was such that no advice from counsel about whether or not comment was desirable was required. There was no deficiency in process which might render the statement inadmissible. I rule that the statement is admissible.

[57] Mr Tennet submitted the Judge should have ruled the statement inadmissible because:

(a) Kristofer Jones was in custody and his rights under the New Zealand Bill of Rights Act 1990 had not been explained to him before he uttered the comment;

(b) policy reasons dictated that courts should be reluctant to admit "out of court outbursts"; and

(c) the comment was irrelevant and therefore inadmissible under s 8. Alternatively, any probative value it had was outweighed by its prejudicial effect.

[58] As MacKenzie J admitted the statement, Mr Tennet argued the Judge needed at least to direct on its use, including giving a lies direction. He argued that it was not adequate for the Judge, in summing up, merely to remind the jury what counsel for Kristofer Jones had said to them in closing: that the comment was "ill-advised" and the jury "should not give [it] undue weight [but] allow for that people can say stupid things".[17]

[59] We do not accept any of these submissions. Some of the grounds on which Mr Tennet submitted the statement was inadmissible are patently wrong or untenable, for instance (a) and (b). As to (c), Mr Tennet must have intended to refer

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16 *R v Jones* HC Wellington CRI-2013-035-53, 13 February 2014 (Minute of MacKenzie J) at [15].
17 Summing-up, above n 5, at [138].

to s 7, not s 8. We agree with the Judge's reasons for ruling the statement admissible and consider it was relevant, as demonstrating Kristofer Jones' hostility toward Glen Jones and his willingness to attempt to justify his involvement in the attack on Glen Jones. We do not accept the Judge needed to direct the jury on the use they made of this utterance, any more than he needed to direct on the other statements Kristofer Jones made about his involvement in the attack.

[60] But, more importantly, we do not consider admission of the statement risked justice miscarrying for Kristofer Jones. The statement added little to a number of similar statements Kristofer Jones made in text messages he sent following the attack, including:

> "The fucker raped a mate's mum"; "Fuckin rapist cunts"; "It was just meant to be a crack cos he raped my mate's mum".

And statements he made to the police, such as:

> "He opened the door … I said "You raped my mate's mum" and then that's when everyone just kinda piled in the door"; "I just thought that we're gonna go beat him up because of what he did to my mate's mum".

Two instances of prosecutorial misconduct

[61] Mr Tennet submitted two aspects of the prosecutor's closing address to the jury constituted prosecutorial misconduct:

(a) effectively putting a weapon in the hands of Kristofer Jones through the statements of his co-accused; and

(b) equating Kristofer Jones' flight after the attack with guilt.

[62] As to the first aspect, the prosecutor made clear: "The Crown case is that Kristofer Jones and Ranson had the wooden bat and the wooden axe handle. …". But the prosecutor did not rely on statements of Kristofer Jones' co-accused in putting that to the jury. In his DVD interview with the police, Kristofer Jones claimed "Hayden and Matt" had the "bats". One of Glen Jones' neighbours gave evidence that a tall, broad male, who the Crown submitted was McKinney, was not holding anything when he left the scene. As even Kristofer Jones himself had not

suggested Tariana Jones had one of the weapons, by a process of deduction, that meant that of the four who went into Glen Jones' house, Hayden Ranson must have had one weapon and Kristofer Jones must have had the other. In asking the jury so to find, the prosecutor went through all the evidentiary indications that Kristofer Jones was armed with one of the weapons: he was first through the door; he was the smallest of the three men there; he was angry and had it in for Glen Jones — "you raped my mate's mum". The prosecutor concluded this section of his closing address by telling the jury:

> Even if you are not sure that Kristofer Jones had either the wooden bat or the wooden axe handle when he entered the flat the Crown says from the evidence you can be sure that he knew that the weapons were there at the door.

[63] Turning to the second aspect, the prosecutor first referred to Kristofer Jones going on the run following the attack on Glen Jones in outlining "some of the key events providing the framework against which the case against each defendant can be analysed". He came back to this in dealing with the Crown case against Kristofer Jones:

> He goes on the run from the police and he text people that he didn't have a weapon. Kristofer Jones sent numerous text messages to his friends and supporters. You will read them. It's a matter for you but the Crown says that this was an over the top effort to say that he had no weapon, all of these texts that he's sending out. He knew that the police would catch up with him. He's building his defence. He knows the situation that he's in. He was there, started it, was there at the end, blood all over him.

[64] We reject Mr Tennet's submission that the prosecutor overstepped the mark in these aspects of his closing address. This was not more than the "firm, even forceful" advocacy and vigorous pursuit of a legitimate result mandated in the various authorities on the duties of a prosecutor, collected in the Supreme Court's judgment in *Stewart v R*.[18]

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[18] *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425 at [19]–[22].

The Judge misdirected the jury

(a) Failure to put defence case

[65] There were three aspects to this submission. First and foremost, Mr Tennet submitted MacKenzie J ought to have led the jury through the question trail for Kristofer Jones in the same way he did for Tariana Jones. We need not add to what we have said in [32] above, in responding to Ms Levy's converse complaint about the Judge taking Tariana Jones as the "example" in working through the question trail. The Judge explained to the jury carefully why he was not taking them through the Kristofer Jones question trail, making the point that the legal basis of the Crown case against Tariana Jones and Kristofer Jones was essentially the same: each was liable either as a principal or a party to Glen Jones' murder. But he emphasised that the evidence against each was different. Importantly, the Judge summarised, in some detail, Kristofer Jones' defence to the charges.

[66] Mr Tennet was also critical of the Judge for not correcting statements by the prosecutor in closing which:

(a) effectively put a weapon in Kristofer Jones' hands; and

(b) invited the jury to speculate as to what might have been found on Kristofer Jones' right shoe, which he had deliberately disposed of.

[67] We have dealt with (a) in [61] and [62] above. As to (b), the prosecutor told the jury:

> Kristofer Jones was wearing a pair of green and black Globe shoes the ones that you've seen and the left one when it was located had a smear of [Glen Jones'] blood on them forensically linking him to the scene. In the early hours of the Sunday morning he asked Granich to get rid of his shoes telling her to put them anywhere out the back and she did get rid of his shoes for him. We don't know what's would've been found on the other shoe, the right one, because he's deliberately had it disposed of.

[68] We see nothing wrong in any of that. It is not speculation, but legitimate comment based on the police and forensic evidence and that of Cassandra Granich.

(b) Misdirection on parties

[69] The submission here, as we understood it, was that the Judge erred in directing the jury that they could find Kristofer Jones guilty of murder either under s 66(1) or (2) of the Crimes Act, and constructing his question trail accordingly. Mr Tennet's point was that leaving the two options meant this Court could not be sure the jury were unanimous in arriving at their verdicts. This ground was directed solely at the murder count, although the Judge gave similar directions to the jury on count one — aggravated burglary.

[70] We do not accept this submission. We are satisfied MacKenzie J did not err in leaving the options or "pathways" available under s 66(1) and (2) to the jury in the manner he did, and consider the Judge adequately and accurately directed the jury as to principal and party liability. Where, as here, there was a single event, a Judge may leave the s 66(1) and (2) options to the jury because there is no risk of the jury not being unanimous as to the particular event which is the factual basis for the jury's verdict: *Ahsin v R*.[19]

[71] We note that, in his separate but concurring judgment in *Ahsin*, William Young J urged prosecutors, in closing in a case such as this arising from group violence, to put the Crown case on the strongest base available under s 66(1) and (2) upon which it could be presented to the jury. He considered that would simplify the Judge's task in summing up and avoid the jury being confused because the Crown case was "presented on the basis of closely overlapping alternatives associated with s 66(1) and s 66(2)".[20] But the Supreme Court delivered its judgments in *Ahsin* on 30 October 2014. The guidance William Young J's judgment affords was therefore not available to the Judge and counsel in this trial, which had taken place in March 2014.

(c) Failure to direct on flight

[72] We think Mr Tennet's premise for advancing this point was wrong. Contrary to Mr Tennet's submission, the Crown did not invite the jury to infer guilt from

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[19] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [187].
[20] At [242].

Kristofer Jones' flight. Mr Tennet accepted that flight following an offence can be admissible evidence of guilt. But, relying on this Court's judgment in *R v Ali,* Mr Tennet submitted inferences other than guilt may arise from flight and the Judge needed to direct the jury as to what they could properly draw from the evidence of flight.[21]

[73] Here, the Crown pointed to Kristofer Jones' post-attack conduct as allowing him an opportunity to dispose of his footwear and to send text messages "building his defence" that he had not wielded any weapon in the attack on Glen Jones. The gist of this is set out in the passage quoted in [63] above. Those were matters of fact, not inference.

[74] We see no risk of a miscarriage through the Judge not directing the jury that they should not infer guilt from Kristofer Jones' flight.

(d) Failure to direct on admissible statements

[75] Mr Tennet's point here was that the jury needed to be reminded there were effectively five separate trials and what one accused said was not evidence against the other accused. Mr Tennet's particular concern was the Crown's use of other accused's statements to "put a weapon in Kristofer Jones' hands".

[76] The Judge did direct the jury as to the use they could make of each accused's statements. He said:[22]

> But as I told you on several occasions when the defendants' video interviews were being played and their other statements read to you, what one defendant says in a statement is not admissible against any other defendant. So, if one defendant describes what another defendant did, you should ignore it when you are considering that other defendant. There are very good reasons for that.

[77] Later in his summing-up, the Judge gave the jury a further direction to the same effect. We set this out in [47] above in dealing with the appeal point based on the use made by Kristofer Jones' trial counsel of co-accused's statements.

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21 *R v Ali* [2007] NZCA 322, in particular, at [18]–[19].

22 Summing-up, above n 5, at [28]. The Judge went on to explain those "very good reasons" to the jury.

[78] We have dealt, in [62], with Mr Tennet's submission that the Crown misused statements by other accused to "put a weapon in Kristofer Jones' hands". We concluded the Crown did not do that.

[79] There is nothing in this point, and in particular no risk of a miscarriage of justice.

Appeals against sentence

The Judge's approach to sentencing on the murder charges

[80] After describing what had happened earlier on the evening of 11 January 2013, the Judge described the attack on Glen Jones in these terms:[23]

> [5] You subjected Mr Jones to a savage and brutal beating by hitting him with the weapons, and kicking him. The pathologist identified over 30 separate injuries, some quite minor but many of them very severe. These included the fatal injuries which fractured Mr Jones' skull and caused bruising and swelling of the brain, and a large loss of circulating blood volume, resulting in his death.
>
> [6] After your horrific and frenzied attack you left the flat and ran off. Mr Jones' injuries were so severe that when ambulance officers arrived, very shortly after you had left, Mr Jones was already clinically dead. Resuscitation efforts were unsuccessful.

[81] Dealing with the criminal responsibility of each of the four murderers, the Judge observed "it is not possible to say on the evidence at trial which of you four inflicted the fatal injuries".[24] He then held that each of the four, by their actions in entering the flat together, with the weapons, intending to cause serious injury which they knew was likely to result in death, was responsible for the murder of Glen Jones.

[82] In fixing a notional minimum period of imprisonment, the Judge identified five aggravating factors:

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23 Sentencing remarks, above n 1.
24 At [8].

(a) The murder involved unlawful entry into Glen Jones' flat, and a very serious intrusion at that:[25]

> Four of you burst into Mr Jones' flat in the middle of the night and immediately set upon him with weapons when he was completely defenceless and taken by surprise.

(b) The murder was committed with a high degree of brutality. Glen Jones was left dying and the four murderers made no attempt to obtain assistance for him.

(c) Glen Jones was a vulnerable victim. In addition to being taken by surprise and unable to defend himself, he had a degree of disability from a childhood illness that had "left him very weak in the right side of his body and he was uncoordinated and almost totally blind in his right eye".[26]

(d) The attack was premeditated and planned.

(e) It was a vigilante attack in which the group took the law into their own hands.

[83] The Judge found there were no mitigating features of the offending to be taken into account.

[84] Having regard to all of that the Judge fixed a notional minimum period of 20 years imprisonment "for the offender who actually inflicted the fatal injuries".[27]

[85] As he was unable to determine the extent to which each of the four was involved, either from the jury's verdict or from his own assessment of the evidence, the Judge considered some reduction from that 20 years starting point was appropriate to reflect the culpability of the four as secondary parties. Given the aggravating factors and the lack of any mitigating features, the Judge fixed the

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25 At [11].
26 At [13].
27 At [16].

required reduction at a 17 year minimum period of imprisonment. He then applied that assessment to each of the four prisoners in turn.

[86] Although MacKenzie J alluded to what the law "prescribes",[28] he did not specifically mention ss 103 or 104 of the Sentencing Act 2002 or the approach mandated by this Court in *R v Williams*, nor refer to any other sentencing decisions.[29] Some Judges, when sentencing, do this. But, as sentencing remarks are directed to the prisoner or prisoners standing in the dock, and need to be framed in a way they will understand, the Judge's approach was entirely appropriate. Nevertheless, the Judge's approach meticulously followed ss 103 and 104 and the two steps prescribed in *Williams*.[30]

The Judge's approach to sentencing on the aggravated burglary charges

[87] For the aggravated burglary charge, MacKenzie J adopted a starting point of 10 years imprisonment for the four prisoners who "participated to the extent of entering the premises".[31] He imposed that sentence concurrently with the murder sentences. The Judge fixed 10 years by analogy with *R v Mako*, which mandated 10 years for forced entry to a dwelling house at night by a number of offenders brandishing weapons and seeking violence, even if no serious injuries were inflicted.[32] Justice MacKenzie made the point that in this case serious injuries were inflicted.[33]

Toni Miller's sentence appeal

[88] The Judge made a separate assessment for Toni Miller because she had not entered Glen Jones' flat with the others. For her, he fixed a starting point of nine years imprisonment. That reflected his view that Toni Miller's level of culpability on the aggravated burglary charge was "not significantly less than" the other four accused.[34] Although Toni Miller had not entered Glen Jones' flat, she:

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28 At [16].
29 *R v Williams* [2005] 2 NZLR 506 (CA) at [45]–[68].
30 *R v Williams,* above n 29, at [52]–[53].
31 Sentencing remarks, above n 1, at [27].
32 *R v Mako* [2000] 2 NZLR 170 (CA) at [58].
33 Sentencing remarks, above n 1, at [27].
34 At [29].

(a) had been an instigator of the trip from Masterton to Featherston;

(b) knew the group was armed with weapons — she was the driver of one of the cars and had driven to Matthew McKinney's home where two of the weapons (the wooden axe handles) were collected;

(c) drove the car in which three of the four accused travelled to Featherston; and

(d) aided and encouraged the other four to go into Glen Jones' flat.

[89] While accepting the attack had gone further than Toni Miller "probably contemplated", the Judge pointed out that she was the one sober person among the five.[35] Yet, rather than trying to dissuade the others from going to Featherston, she had actively encouraged and facilitated the trip and the attack on Glen Jones. The Judge rejected counsel's submission that Toni Miller was not aware that weapons were taken.

[90] In summary, although he distinguished Toni Miller's position from that of the other four, the Judge assessed "your culpability … is more closely equated with that of your four co-offenders" than with the others who were present during the offending but who were not charged.[36]

[91] The Judge found there were no personal aggravating factors, but allowed a discount of one year to reflect the mitigating factors that Toni Miller had no previous convictions and had two young children. That led to the end sentence of eight years imprisonment imposed by the Judge.

[92] Ms Levy submitted the Judge erred in fixing his sentencing starting point by analogy with what this Court said in *Mako*. When *Mako* was decided the Crimes (Home Invasion) Amendment Act 1999 was in force, and the maximum penalty for aggravated burglary involving a home invasion was 19 years imprisonment. That home invasion legislation was repealed when the Sentencing Act came into force.

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35 At [30].
36 At [31].

[93] However, as Ms Levy very properly accepted, invasion of a home remained a seriously aggravating factor for a court sentencing for aggravated burglary. Although there is no longer the automatic three year uplift, this Court in *R v Fenton* rejected the argument that the repeal of the home invasion provisions had removed the basis for the 10 year starting point in cases of home invasion.[37] In *Tiori v R* this Court pointed out the different context in which *Mako* was decided, but, after considering the relevant case law since the entry into force of the Sentencing Act, confirmed that a home invasion element is a seriously aggravating factor, "justifying a significantly higher starting point than would otherwise be appropriate".[38]

[94] We do not accept Ms Levy's submission that six years was the correct sentencing starting point for Toni Miller, making the nine years adopted by the Judge manifestly excessive. Ms Levy accepts as appropriate the one year discount allowed by the Judge. Accordingly, we dismiss Toni Miller's appeal against sentence.

Tariana Jones' sentence appeal

[95] Although the appeal points filed on 17 March signalled an appeal against the sentence of 17 years imprisonment imposed for murder, the appeal ultimately advanced for Tariana Jones was only against the concurrent sentence of 10 years imprisonment imposed for aggravated burglary.

[96] Although allowing an appeal against this sentence may have no utility (given that it is concurrent with the 17 year MPI for murder), we consider the appeal against that sentence should be allowed.

[97] When sentencing Tariana Jones for murder, the Judge said this:[39]

> Your personal circumstances might also justify some reduction. In particular, you have only one relatively minor previous conviction for common assault in 2003. You have young children and responsibility for them, and prison will bear hardly on you and on them. None of those factors require a reduction below the minimum period of 17 years.

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37 *R v Fenton* [2008] NZCA 379 at [12]. See also *R v Royal* [2009] NZCA 65 at [10].
38 *Tiori v R* [2011] NZCA 355 at [12]–[16].
39 Sentencing remarks, above n 1, at [21].

[98] The Judge made no allowance for those factors in sentencing Tariana Jones for aggravated burglary. For the Crown, Mr Barr accepted that appeared to be an oversight. We think a reduction of one year — the same as the Judge allowed Toni Miller in respect of similar mitigating personal circumstances — was appropriate. Accordingly, we reduce the concurrent sentence imposed on Tariana Jones for aggravated burglary to nine years imprisonment.

Kristofer Jones' sentence appeal

[99] The Judge's approach was:

(a) to accept Kristofer Jones was a secondary participant (though the Judge made it clear he had reservations about that);

(b) to accept that he was not one of the instigators;

(c) to find there was nothing in Kristofer Jones' personal circumstances justifying any reduction in sentence;

(d) not to apply any sentencing uplift to reflect Kristofer Jones' 23 previous convictions, although some were for physical violence; and

(e) to adopt a minimum period of 17 years imprisonment, as "not manifestly unjust".

[100] Mr Tennet's submissions were very general. He submitted the notional starting point of 20 years imprisonment adopted by the Judge was manifestly excessive, and that "a 17 year level for the main offender would have been appropriate". In his oral submissions, he sought support for this by referring to this Court's decision in *Churchward v R*.[40] He contended the Judge had erred in his application of ss 103 and 104 of the Sentencing Act, only by submitting that s 104 was to be "shaded" and applied with commonsense to a prisoner such as Kristofer Jones who was being sentenced as a party. Consequently, Mr Tennet submitted "that

[40] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

on a principled basis a sentence of less than 17 years can – and should – be imposed".

[101] We reject those submissions. This Court's sentencing decisions in *Churchward v R* and *Skilling v R* provide some comparison, because both involved murders of defenceless victims in their own home.[41] In *Churchward*, where there were two murderers (one 17 years old, the other 14 years old), this Court accepted that a minimum period of 19 years would have been available had the appellant been an adult offender.[42] In *Skilling* the Court upheld the notional starting minimum period of 20 years.[43]

[102] We dismiss Mr Jones' appeal against sentence.

Result

[103] The appeals against conviction are dismissed.

[104] The appeals against sentence by Kristofer Jones (CA362/2014) and Toni Miller (CA364/2014) are dismissed.

[105] The appeal by Tariana Jones (CA369/2014) against sentence is allowed. The sentence of 10 years imprisonment imposed concurrently for aggravated burglary is quashed. A sentence of nine years imprisonment is substituted.

Solicitors:
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41 *Skilling v R* [2011] NZCA 462.
42 *Churchward v R,* above n 40, at [104].
43 *Skilling v R,* above n 41, at [5] and [9].