IN THE COURT OF APPEAL OF NEW ZEALAND

CA391/2015
[2016] NZCA 264

BETWEEN	STEVEN RAY CHURCHIS Appellant
AND	THE QUEEN Respondent

Hearing: 26 May 2016

Court: Stevens, Woodhouse and Wylie JJ

Counsel: W C Pyke for Appellant
M A Corlett for Respondent

Judgment: 17 June 2016 at 11.30 am

JUDGMENT OF THE COURT

A The application to extend the time to appeal is granted.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] Mr Churchis was found guilty by a jury in the High Court at Auckland of one charge of murder. He had earlier pleaded guilty to one charge of wounding with intent to injure. He was sentenced by Venning J to life imprisonment with a

minimum period of imprisonment of 11 and a half years.[1] He appeals only against his conviction for murder.

[2] Mr Churchis' appeal was brought out of time. The delay is explained and the Crown does not oppose an extension of time. We therefore grant an extension of time within which to bring his appeal.

[3] The conviction is challenged on the basis that a miscarriage of justice occurred because Venning J failed to direct the jury adequately about the requirements of murder under s 167(b) of the Crimes Act 1961. It is submitted the directions:

(a) were framed too generally in terms of an "assault" and failed to direct the jury about how it might use evidence of blows struck by Mr Churchis after the likely fatal blow had been delivered;

(b) failed to direct the jury that the evidence of the pathologist, Dr Stables, was that a subdural haematoma around the brain was the primary injury and that, as a result of this evidence, it was necessary for the jury to determine which blow(s) led to that primary injury and assess Mr Churchis' state of mind at the time he struck the blow(s); and

(c) failed to direct the jury that Dr Stables' opinion was it was "most likely a fall" to the ground that caused the brain injuries and to remind the jury of trial counsel's argument about these matters when summing up.

[4] These criticisms may conveniently be summarised as being that the Judge failed to direct:

(a) that the jury had to identify a particular blow or blows that caused Mr Linder's death;

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1 *R v Churchis* [2014] NZHC 2257.

(b) that the particular blow that likely caused Mr Linder's death was a kick that knocked him to the ground; and

(c) that the jury had to identify Mr Churchis' state of mind at the time that particular blow was inflicted.

[5] The Crown accepts that, although the other blows undoubtedly contributed to Mr Linder's death, the blow that knocked him to the ground was likely to be the primary cause. However, Mr Corlett for the Crown submits it was not necessary for the Judge to direct the jury about the blow that caused death and Mr Churchis' state of mind at that particular time because there was no evidential basis for suggesting Mr Churchis' state of mind varied in any way during the attack. Whether there was such an evidential basis that the state of mind or purpose of Mr Churchis varied in a significant way during what the Judge described as "the assault" is therefore the key issue on appeal.

Background

[6] Mr Churchis and five associates were in Albert Park, Auckland, along with a Mr Walker, the complainant of the wounding charge. All were drinking and some had been smoking synthetic cannabis. After a while, Mr Churchis threw a bottle at Mr Walker, punched him and then tried to choke him. Mr Walker managed to get away and was taken to hospital suffering bruising, cuts and nasal fractures. This gave rise to the charge of wounding with intent to injure.

[7] Mr Churchis, along with his associates Messrs Dalton and Spiers, continued to roam the city. They met a Ms Peipi in the Burger King on Queen Street. Closed-circuit television (CCTV) footage showed Mr Churchis and the others entering Mills Lane around 12.23 am. Mr Churchis and Ms Peipi turned back to go to Burger King and the other two, Messrs Dalton and Spiers, continued to the end of the lane, out of sight of CCTV. At the end of the lane Messrs Dalton and Spiers came across Mr Linder, a homeless man who had previously suffered a brain injury, defecating in a corner. They exchanged words, in which Mr Linder asked the two to leave him alone and give him some time to finish going to the toilet. As they had

hoped to sleep there, Messrs Dalton and Spiers asked him to leave the lane and take his faeces with him.

[8] At approximately 12.32 am Mr Churchis and Ms Peipi returned to Mills Lane and headed towards Mr Linder. Mr Churchis believed Mr Linder had wronged him on a previous occasion and confronted him. Mr Churchis became angry and assaulted Mr Linder. On the account he gave in his police interview Mr Churchis kicked Mr Linder in the head, threw three or four hooks, and elbowed him in the eye. Mr Linder then fell over. Mr Churchis punched him three or four more times whilst on the ground. He was stopped by Mr Spiers. During the interview Mr Churchis said that if Mr Spiers had not been there he probably would have killed Mr Linder.

[9] Different accounts of the assault were given by witnesses. Mr Dalton said that Mr Churchis kicked Mr Linder in the chest and that knocked him to the ground. Mr Churchis then kicked Mr Linder in the head while he was on the ground and stomped on his face and forehead up to 10 times. Mr Dalton said it was he who got Mr Churchis to stop. Mr Spiers said that Mr Churchis threw a punch at Mr Linder's jaw that knocked him off his feet and his head fell back onto the wall. Mr Churchis punched Mr Linder 10–11 times in the face and stomped on his head half a dozen times. In re-examination, Mr Spiers said Mr Churchis kicked Mr Linder in the chest and then started punching him and stomping on his face, although he was unclear about when Mr Linder fell down. Mr Spiers said it was Ms Peipi who got Mr Churchis to stop.

[10] Following the assault, Mr Churchis and his associates left Mr Linder unconscious in Mills Lane. Mr Churchis returned the next morning to find Mr Linder breathing but still unconscious. He did not call an ambulance. Mr Spiers poured a bottle of urine on him (allegedly at Mr Churchis' request).

[11] Mr Linder was eventually found by a member of the public and taken to hospital. A brain scan showed evidence of a severe subdural haematoma, other bruising to brain tissue, and a number of facial fractures. Mr Linder's prognosis was poor and a decision was made to treat him conservatively. Mr Linder died of

pneumonia three days later. The pneumonia was a direct complication of the head injuries inflicted.

High Court trial

The Crown case

[12] The Crown case was that the attack by Mr Churchis caused Mr Linder's death. In closing the prosecutor contended the description of the attack given by Mr Churchis in his police interview was likely to be the most accurate account of the attack. The prosecutor referred to the difference over whether there was stomping and said it did not actually matter for the purposes of the jury's deliberations because on either account it was a "sustained and brutal attack". The prosecutor also rejected any suggestion that the pneumonia was caused by the introduction of the urine to Mr Linder's mouth, rather than by the brain injuries.

[13] The prosecutor also rejected the claim Mr Churchis had acted in self-defence. Counsel submitted the alternatives were: either Mr Churchis intended to kill Mr Linder or he intended to cause bodily injury known to him to be likely to cause death and he was reckless to whether death would ensue or not.

The defence case

[14] Defence counsel, Mr Winter, put the defence that a single kick to the chest was the most likely cause of the brain injury that led to Mr Linder's death. A "one-punch" scenario was advanced on the basis it was "bad luck" that Mr Linder had hit his head on the concrete. Mr Winter also relied on the introduction of the urine as an intervening act, despite the evidence of Dr Stables that urine was highly unlikely to have caused pneumonia. He also strongly advanced the case that Mr Churchis acted in defence of another.

The Judge's directions

[15] The directions of Venning J were framed around an issues sheet distributed to the jury. The first issue dealt with causation, the second with self-defence, and the

third with whether Mr Churchis had murderous intent.[2] The question on causation was whether the assault on Mr Linder directly or indirectly killed him. The Judge referred to the competing submissions and emphasised that the issue was whether the injuries inflicted by Mr Churchis' assault were a substantial and operative cause of the pneumonia which ultimately caused Mr Linder's death.

[16] The second issue was self-defence (or defence of another). In referring to the reasonableness of the force used, Venning J directed the jury to consider the extent of the assault and referred the jury to the sources of evidence on the assault, including the interview of Mr Churchis and the medical evidence of Dr Stables. Because it is relevant to the question on appeal, we set out the direction in full:

> [70] This will require you to consider the extent of the assault, how long it continued, what was involved, did it continue after Mr Linder was on the ground. The evidence of the assault really comes from four sources — Mr Dalton, Mr Spiers, the defendant in his interview and the medical evidence of the injuries. Mr Dalton and Mr Spiers described a kick to Mr Linder's chest, which had him fall to the ground and then the defendant himself in the latter part of his interview described a kick to Mr Linder's head, and a number of hooks or punches to the head before Mr Linder fell. Dr Stables gave detailed evidence of the injuries he observed, both external and internal. So those are the sources of the evidence about the extent of the assault and it is a matter for you to determine members of the jury.

[17] The third issue was murderous intent. The provisions of both s 167(a) and (b) of the Crimes Act were discussed and the Judge directed that the issue of intention required the jury to determine Mr Churchis' state of mind at the time he assaulted Mr Linder. This included consideration of what Mr Churchis said and did before, during and immediately after the incident and an assessment of what inferences jurors could draw from that evidence about his state of mind.

[18] As to the assault itself, the Judge did not discuss the specifics except to say (when dealing with inferences) "in addition to determining the extent of the defendant's assault on Mr Linder, you will also have to determine the defendant's state of mind at the time". The Judge later emphasised the need to determine Mr Churchis' state of mind "at the time he assaulted Mr Linder". Importantly, the questions in the issues sheet concerning intention were all framed around

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[2] Under either s 167(a) or (b) of the Crimes Act 1961.

Mr Churchis' intention "at the time the defendant assaulted Mr Linder". For example, question four stated:

> Are you sure that at the time the defendant assaulted Mr Linder the defendant (knowing of that risk) consciously ran the risk that Mr Linder would die as a result of his actions?

Jury questions during deliberation

[19] After deliberating for a few hours the jury returned with two questions. The first is relevant to the appeal and asked in relation to question four: "Please could it be clarified just what 'at the time' [of the assault] means … ." The Judge gave the following answer:

> At the time really means what it says, at the moment he assaulted Mr Linder. So you have to consider the position as at that time. It is not what the position was immediately before or immediately after but it's at the time of the assault.

Submissions on appeal

[20] Mr Pyke for Mr Churchis relies on the statement of Dr Stables that the cause of death was a subdural haematoma that was most likely the result of an accelerated fall to the ground. He submits it was inappropriate in light of this opinion for the Judge to refer to "the assault" in the round. The Judge ought to have directed the jury to consider the state of mind of Mr Churchis at the time of the first blow and have given directions as to the appropriate use the jury could make of the evidence of other blows after the first. This submission assumes (presumably relying on Mr Dalton's account of a kick to the chest) Mr Linder fell upon being struck by this blow.[3]

[21] Mr Pyke cites a line of authority commencing with a decision of this Court in *R v Ramsay*.[4] That case involved an attack by the appellant on a female victim in which the operative cause of death was uncertain. The victim's body was found after three weeks. She had been subjected to considerable violence and suffered severe head injuries. Death was due to asphyxia caused either by deep unconsciousness

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[3] As already noted above at [8]–[9], both the account of Mr Churchis and the evidence of Mr Spiers differed from the account of Mr Dalton.

[4] *R v Ramsay* [1967] NZLR 1005 (CA).

resulting from a blow to the back of the head or by a gag placed in the victim's mouth. The Crown case for murder was put on the alternatives under s 167(a), (b) and (d) of the Crimes Act. The complaint on appeal was that the trial Judge ought to have directed the jury to have regard to the discrete acts of the accused that were said to have contributed to death to evaluate whether any particular act caused death and to then determine the associated mens rea. The Court relevantly held that, to the extent that the Crown case rested on s 167(b) (or (d)), the jury should have been directed to identify the act causing the death:[5]

> This was a necessary task for them … . Then they should have been told that after identifying the act causing death, they must determine whether that act was performed with one of the states of mind required by paras (b) or (d). Though these paragraphs provide subjective tests, those tests are, of course, to be applied against the background of all surrounding circumstances properly proved.

[22] Mr Pyke also relies on *R v Dixon*.[6] The appellant, aged 16, assaulted a night-watchman as a result of which the deceased fell to the ground whereupon the appellant further assaulted him by kicking him. The appellant's attitude after the attack was accepted as being one of callous indifference. The pathologist described severe head injuries, including a depressed fracture above the left ear, which was thought likely to be the blow that caused death. It was accepted at trial that the appellant had struck the blows that led to death and that when doing so he intended to cause bodily injury to the deceased. The Crown case was presented on the basis of the alternatives under s 167(a) and (b) of the Crimes Act.

[23] This Court emphasised that the passage from *Ramsay*, cited above, made it clear that the "state of mind prescribed by s 167(b) must be shown by the prosecution to have existed at the time when the act causing death was committed".[7] The Court added:[8]

> In the present case there was indeed an issue as to whether or not the death of Mr Hishon was caused by multiple blows from the appellant or was caused by one blow from the appellant's boot which happened to have landed on a particularly fragile part of the skull above the left ear, by chance rather than by design … . The pathologist considered it the likely cause of

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5 At 1015.
6 *R v Dixon* [1979] 1 NZLR 641 (CA).
7 At 645.
8 Ibid.

> death but was unable to exclude the possibility of other injuries. He was also unable to say whether the same blow delivered elsewhere on this skull would be likely to cause death … . In those circumstances we agree with Mr Tompkins that it was necessary for the jury to understand that they would have to consider what act or acts by the appellant caused Mr Hishon's death in order to reach a decision as to his state of mind at the relevant time.

[24] Relying on the above authorities, Mr Pyke submits Mr Churchis' intention when delivering the blow(s) prior to Mr Linder falling to the ground ought to have been the central inquiry, as that was the blow(s) that probably caused the head injury that ultimately led to death. He submits the jury was in no position to second-guess the opinion of the pathologist on this topic. The trial Judge ought to have put the case to the jury on the basis that they had to be sure about the intention of Mr Churchis under the alternatives under s 167(a) or (b) at the time he struck the blow(s) that likely led to death.

[25] Mr Pyke emphasised the angry state of mind of Mr Churchis during the incident and his violent continuation of the assault after Mr Linder had fallen to the ground, submitting this could well have influenced the jury's assessment of his intention. The jury needed to be told what use they could make of this evidence in assessing Mr Churchis' intention when striking the deceased while he was on his feet. The directions and questions in the issue sheet made no distinction between different stages of the assault, but instead ran together the events that took place during the assault.

[26] Finally, Mr Pyke submits the Judge ought to have reminded the jury of the evidence reviewed by Mr Winter in his closing address. This was, in reality, the best defence. Mr Pyke submits the jury was concerned about the question of intention and timing as illustrated by the fact it raised a question with the Judge about question four on the issues sheet (referred to at [18] above).

Our analysis

The assault in Mills Lane

[27] There is no dispute about the basic facts. The assault took approximately three minutes. It involved a flurry of continuous uninterrupted blows, consisting of a

combination of kicks, punches and it seems some stomps, directed mostly at Mr Linder's head. The blow that knocked Mr Linder to the ground was but one of those blows. Mr Churchis said it was an elbow to the eye socket after a kick and several punches. Mr Dalton said it was the first kick. Mr Spiers' evidence was unclear on this point.

[28] Mr Corlett accepts the blow that led to Mr Linder's fall, whether the first blow or a later blow, a kick, a punch or an elbow, was likely the cause of death. The evidence was that Mr Linder died of pneumonia, caused by his inability to protect his airways and clear his lungs. That in turn was caused by his deep state of unconsciousness, which was the result of his brain injuries. The primary brain injury was a large subdural haematoma thought to be the result of an accelerated fall, but the other blows likely contributed to the subdural haematoma and Mr Linder's degree of unconsciousness.

Legal principles

[29] The cases cited by Mr Pyke were considered by this Court in *R v McKeown*.[9] There, the appellant entered the home of a disabled elderly woman and assaulted her by striking, binding and gagging her with tape. The cause of death was asphyxia, the deceased having swallowed blood from a severe head wound and probably a bleeding nose and some vomit. The appellant argued the Judge had failed to direct the jury properly by describing the various acts as one unlawful act. Thus the Judge had violated the principles outlined in the line of cases relied on by Mr Pyke.

[30] Speaking for the Court, Cooke J referred to the proposition now relied on by Mr Churchis:[10]

> If the episode during or after which death occurred has included a number of acts of violence by the accused, it may be essential to direct the jury to identify the act or acts of the accused which caused or substantially contributed to cause the death; and to ask them to determine whether any such causative act was performed with one of the states of mind required by s 167 for a murder conviction. That is the net effect, so far as the cases are relevant here, of *R v Ramsay* … ; *R v Dixon* … ; and *R v McKinnon* … .

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9 *R v McKeown* [1984] 1 NZLR 630 (CA).
10 At 632–633 (citations omitted).

[31] But this Court distinguished this line of cases stating:[11]

> … the need for a direction on identifying the act or acts must necessarily vary according to the circumstances of the particular case. In the instant case the undisputed evidence indicated a series of acts of violence by the accused, virtually continuous and within a very short space of time. His victim's hands were tied behind her back. A heavy blow on the head caused bleeding. Her eyes and most of her nose and mouth ware tightly taped, although by intent or chance a small aperture for breath was uncovered — at least when the body was found. Further blows were struck. There was no dispute about those facts. The sequence might have varied slightly, but not the basic facts. *There is no evidential basis for suggesting that during that brief episode of violence — correctly described by the Judge as the attack — the state of mind or purpose of the accused varied in any significant way*. In that respect this case is distinguishable from the three already cited.

[32] This Court in *McKeown* held that no good purpose would have been served by the Judge instructing the jury to segregate the acts done in the course of the attack. To have done so would have been "artificial" on the facts of the case.[12]

[33] The principle in *McKeown* was approved by this Court in *R v Peters* where it was held:[13]

> Where there is more than one possibility for the act causing death, a jury needs to be directed that they must be unanimous as to the causative act, before going on to determine the mens rea in relation to that act (*Chignell, Ramsay*). This is not necessary where the acts can be seen as part of one course of action (such as the "attack" in *McKeown*) or as part of a unified plan (*Thabo Meli*). In those situations, the mens rea is likely to be the same for any of the acts that may have caused death.

[34] Finally, we refer to the decision of the Full Court in *R v Warren*.[14] There the appellant fired a series of four shots that killed the victim. The first shot was to the chest and was non-fatal, the second ricocheted into the victim's skull and probably caused death, the third was non-fatal and the fourth would have been fatal if the victim had been still alive. The latter two shots were fired while the victim was lying on the ground. The appellant argued the Judge erred by failing to direct the

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11 *McKeown*, above n 9, at 633 (emphasis added).
12 Ibid.
13 *R v Peters* [2007] NZCA 180 at [44].
14 *R v Warren* CA315/00, 20 November 2000.

jury on the need to identify the act which caused death and whether the appellant had the requisite state of mind at that time.

[35] Speaking for the Court, Richardson P took a practical approach. Given the quick succession of shots, it was not possible for the jury to conclude that death resulted from shot two or from shot four. He referred to *Ramsay* and *Dixon* (but not *McKeown*) and noted the Court in *Ramsay* emphasised two further points:[15]

> … one, that to ascertain that knowledge one should look at the act as an individual act, though not in isolation from the surrounding facts, including, naturally, prior conduct of the accused; and the other that the course of conduct sometimes reveals a persistent intention sufficiently plainly to enable one to say without doubt that every part of that conduct was directed by that intention.

[36] The Court in *Warren* held it was unreal to regard the shots as separate incidents and, given the short time frame between shots, it would be wholly artificial to ignore the subsequent shots when considering the appellant's knowledge and state of mind in firing the second shot.[16]

[37] Returning then to the cases relied on by Mr Pyke, a careful reading confirms that need for a direction segregating the alleged acts occurring during an ongoing course of conduct arose because in each case there was an evidential foundation or narrative supporting a submission that the accused's intention was not the same throughout.

[38] For example, in *Ramsay*, the series of acts included blows to the head and, after the female victim slumped unconscious, putting a newspaper gag in her mouth and stowing her in the boot of a car.[17] As to the latter actions, the accused said: "I never realised there was any risk to her at all".[18] This was to be compared with the accused's state of mind at the time the blows were struck. Such a sequence of events gave rise to the need to identify the act causing death and the accused's intention at that time.

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15 At [18].
16 At [19].
17 *Ramsay*, above n 4.
18 At 1011.

[39] In *Dixon* there was evidence of a psychiatrist on the question of whether the appellant had the ability to foresee the consequences of his acts and suggesting the appellant had an "impaired capacity" at some stage.[19] The events leading to the victim's death involved a series of different actions by the appellant. But the psychiatrist's evidence indicated a varying state of mind of the appellant during parts of the attack. It was this evidence that gave rise to the need for a more tailored direction than that given by the trial judge.[20]

This case

[40] Applying the above principles to the present facts, we are satisfied there is no evidential basis for suggesting that the state of mind or purpose of Mr Churchis varied in any significant way during the assault on Mr Linder in Mills Lane. It was thus not necessary for the Judge to direct the jury in the manner suggested by Mr Pyke. There was ample evidence for the jury reasonably to conclude Mr Churchis lost his temper before the first blow and continued to hit Mr Linder with the same state of mind until told to stop.

[41] Mr Pyke accepted that Mr Churchis' angry state and violence continued after Mr Linder had fallen to the ground. We consider the anger and aggression was manifest when the first blow was struck. For example, in the police interview conducted by Detective Sergeant Ekins (E), Mr Churchis (C) commented on how he first attacked Mr Linder and his then state of mind:

> E … what did you do to him.
>
> C Well, when he walked towards the bro, I'd already stood in front of him. And as he came in, (sigh) I head-kicked him.
>
> E (nodding)
>
> C And I connected straight with the side (indicates) of his head.
>
> E (nodding)
>
> C Didn't fall over, Didn't, you know wasn't out or anything.
>
> E (nodding)
>
> C … he was still conscious. And then, I just, started swinging. I hit him on the left side, I hit him on the right side, I hit him straight. And then after I think maybe, the 4th, 5th punch, he ended up,

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19 *Dixon*, above n 6, at 646.

20 At 646–647.

(gestures) dazed … and he fell. And when he fell, I just (indicates) … I kept hitting him.

E Okay what what were you hitting him with DJ?

C (indicates)

E Your fists?

C (nodding) Just (indicates) …

E Okay how how many times do you think you hit him on, when he was on the floor?

C A couple … three, four … If Alex [Spiers] hadn'ta been there, I probably woulda I probably woulda killed him.

E Mm. S-- …

C I had that much anger inside of me.

E Okay.

C Alex was the one that said bro, stop.

E (nodding)

C And I did.

[42] Later in the interview Mr Churchis elaborated on the kick:

E So what would you call, the kick that you threw?

C Round-house.

E So it was a round-house kick?

C (nodding)

E Alright. And …

C But …

E …have you have you studied martial arts?

C (nodding) curve it off the right, snap the hip, straight to the head.

E Okay.

C Not so that I can kill people.

[43] When giving evidence at the trial, Detective Sergeant Ekins clarified that he believed Mr Churchis said "those alone can kill people" rather than "not so that I can kill people".[21]

[44] As to whether Mr Churchis' state of mind varied during the assault, we have reviewed the full transcript of the police interview. In it Mr Churchis spoke of how he "couldn't stop hitting [Mr Linder]". He referred to "all the anger, all the hate …

[21] This interpretation was not challenged in cross-examination.

they were all there but just, everything. [It] wasn't fair on him, but he wore it". Mr Churchis explained how he had never had anger come on so fast and so hard as that night, and if Mr Spiers had not been there, he probably would have killed Mr Linder. According to his own account, one of those later blows was an elbow to Mr Linder's eye socket that knocked him to the ground.

[45] We conclude from this evidence that Mr Churchis' state of mind during the whole period of the assault could not be reasonably expected to vary in any significant way. There was therefore no need for the Judge to specifically direct the jury to consider Mr Churchis' state of mind at the time of the blow that knocked Mr Linder to the ground. There was no foundation or narrative for segregating the acts of violence inflicted on Mr Linder. To have attempted to do so would have been artificial on the facts of this case.

[46] With respect to Mr Pyke's submission that the Judge failed adequately to draw the attention of the jury to the "one-punch" theory and to Dr Stable's evidence, we consider such criticism is unwarranted. In the summing up the Judge correctly isolated the questions for determination by the jury. As part of the directions on self-defence the Judge gave the direction on the "extent of the assault" and the nature of it as set out at [16] above. This direction included a reference to the four sources of evidence on this issue, Messrs Dalton and Spiers, the police interview of Mr Churchis, and Dr Stables. This included noting Dr Stables gave "detailed evidence of the injuries he observed, both external and internal."[22]

[47] We are satisfied no further elaboration of Dr Stables evidence was required. This is particularly so, given that the jury had only heard his evidence, including the defence cross-examination, the previous day.

[48] It was no doubt for the same reason that the Judge used general language in referring to the issues concerning the question of intention. Each of the questions referred to the intention "at the time the defendant assaulted Mr Linder". This was entirely appropriate in the circumstances of this case.

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[22] This was the third reference to Dr Stables' evidence following the initial summary (in the context of expert evidence) and mention of his evidence in the context of causation.

[49] The Judge's summary of the defence case was fully compliant with the requirements of this Court in *R v Shipton*.[23] The competing contentions on each side were fairly set out. Given that the jury was being asked to determine the extent and nature of the assault, any further elaboration was not required.

[50] Finally, Mr Pyke criticised the Judge's answer to the first of the jury questions. The jury was focussing on question four and sought clarification of the meaning of "at the time" in that question. The Judge's answer, set out at [19] above, properly referred to the relevant time for determining Mr Churchis' intention. No further elaboration was sought or required. We note in this context that Mr Winter, who is an experienced trial counsel, did not invite further elaboration from the Judge.[24]

[51] Even if the jury was just focussing solely on the blow that felled Mr Linder, be it a kick to the head/chest or an elbow to the eye socket, the Judge's answer emphasised the need to determine Mr Churchis' intention at that time. Each and every blow inflicted on Mr Linder was encompassed by the phrase "at the time of the assault". As Mr Corlett rightly submitted, what happened before and after that point would have been evidence available to inform the jury's determination at the critical moment.

[52] For the above reasons we are satisfied that neither the Judge's directions, nor the answer to the first question, can be faulted. This was a case which fell to be determined by the application of the legal principle in *McKeown* (summarised at [31] above) to the facts.[25] Given the short time frame between the blows inflicted by Mr Churchis, it would be artificial to regard the blow or blows before Mr Linder fell to the ground as separate incidents. In the same way, any subsequent blows after Mr Linder had fallen to the ground could have been considered by the jury when determining Mr Churchis' state of mind "at the time of the assault".

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23 *R v Shipton* [2007] 2 NZLR 218 (CA) at [34]–[37].

24 Mr Pyke also confirmed Mr Winter had not asked for further directions or clarification at the end of the Judge's summing-up.

25 *McKeown*, above n 9.

Result

[53] The application to extend the time to appeal is granted.

[54] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent