IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA668/2016
[2018] NZCA 277

BETWEEN	QUINTON PAUL WINDERS Appellant
AND	THE QUEEN Respondent

Hearing: 13 March 2018

Court: Asher, Clifford and Gilbert JJ

Counsel: P J Morgan QC and J P Temm for Appellant
A Markham and A J Gordon for Respondent

Judgment: 31 July 2018 at 2.30 pm

JUDGMENT OF THE COURT

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] Following a jury trial in the High Court at Rotorua, Quinton Winders was found guilty of the murder of George Taiaroa. Mr Winders was convicted and sentenced by Toogood J to life imprisonment with a minimum period of imprisonment of 17 years.[1] Mr Winders appeals against both his conviction and sentence.

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1 *R v Winders* [2016] NZHC 2964 [Sentencing decision].

[2] The conviction appeal is advanced on three grounds. The first relates to the evidence of two (of three) witnesses who were called to support the Crown's contention that Mr Winders has a propensity to react disproportionately to comparatively innocuous events by shooting at or near people. The admissibility of the evidence of all three propensity witnesses covering four separate incidents was confirmed in a pre-trial ruling,[2] and upheld on appeal to this Court.[3] The correctness of these rulings is not challenged in the present appeal. Instead, it is argued that two of the propensity witnesses gave materially different evidence at trial about two of the incidents from that anticipated at the time of the pre-trial rulings such that the unfairly prejudicial effect of this evidence outweighed its probative value and the jury should have been instructed to disregard it.

[3] The second ground of appeal concerns evidence of statements made by Mr Winders following his arrest on 4 April 2013. In his pre-trial ruling, Toogood J held that Mr Winders' detention was unlawful and in breach of his rights under s 22 of the New Zealand Bill of Rights Act 1990.[4] However, the Judge found the evidence had not been improperly obtained because there was no causal link between the breach and the obtaining of the evidence.[5] Even if the evidence had been improperly obtained, the Judge ruled that it still would have been admissible applying the balancing test in s 30 of the Evidence Act 2006.[6] This ruling was also confirmed on appeal to this Court pre-trial.[7] Nevertheless, Mr Morgan QC for Mr Winders invites us to reconsider the correctness of this ruling, arguing that it was wrong and has led to a miscarriage of justice.

[4] The third ground of appeal arises out of the way Toogood J dealt with a concern expressed by two jurors during the course of the trial about the manner in which the jury foreperson was carrying out her role. The Judge dealt with the issue informally, considering that it was a minor issue of jury dynamics. It is contended on

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2 *R v Winders* [2016] NZHC 1056 [Results judgment]; and *R v Winders* [2016] NZHC 1147 [Reasons judgment].
3 *Winders v R* [2016] NZCA 350 [CA judgment].
4 Reasons judgment, above n 2, at [111].
5 At [129].
6 At [136].
7 CA judgment, above n 3, at [54]–[58].

appeal that the Judge should have discussed the matter with counsel and given them an opportunity to make submissions about how it should be dealt with.

[5] Two issues are raised on the sentence appeal. The Judge found that s 104(1)(b) of the Sentencing Act 2002 was engaged because the murder involved calculated planning and accordingly a minimum period of at least 17 years' imprisonment was required.[8] This finding is challenged on appeal. The second issue is whether a reduction in the minimum period of imprisonment ought to have been allowed to take account of the breach of Mr Winders' rights under the New Zealand Bill of Rights Act when he was unlawfully detained for questioning.

[6] We commence by summarising the main features of the Crown and defence cases in order to provide the context for the assessment of these appeal grounds.

Crown case

[7] On 19 March 2013, Mr Taiaroa was operating a "stop/go" sign at a single lane bridge near Atiamuri when he was fatally shot in the head at close range with a .22 calibre rifle by the driver of a blue-coloured Jeep Cherokee. The Crown's case that the killer was Mr Winders was based on circumstantial evidence.

[8] Mr Winders was the owner of a blue Jeep Cherokee. He collected the Jeep from a panel beater's shop in Stratford at about 9.30 am on the day of the murder. He was captured on CCTV at 1.30 pm in a Post Shop in Taumarunui registering the vehicle. Other CCTV footage taken at about 1.40 pm in Taumarunui showed a Jeep Cherokee fitting the description of Mr Winders' vehicle heading in the direction of Atiamuri. There was sufficient time from this sighting for Mr Winders to drive to the scene and commit the murder which occurred just prior to 3.15 pm.

[9] A witness identified Mr Winders from a photo montage 24 days later as being the driver of a blue Jeep Cherokee who tailgated her and then overtook dangerously on the day of the murder while she was travelling south on Tirohanga Road, approximately 10 km from the scene. Other witnesses reported seeing

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[8] Sentencing decision, above n 1, at [24].

a Jeep Cherokee speeding along unsealed forestry roads near Benneydale, an area familiar to Mr Winders. Some witnesses reported that the number plates were missing from the Jeep. The Crown case was that Mr Winders removed the plates at some stage after leaving Taumarunui.

[10] On the day of the murder, Mr Winders was due to carry out fencing work on a farm in Benneydale owned by his friend, Kieron O'Dwyer. Mr Winders told Mr O'Dwyer that he did not attend because his Jeep had a flat battery and he could not drive it. This was a lie. Mr Winders later gave a different explanation to Mr O'Dwyer, telling him that when he heard about the murder on the radio after driving through Taumarunui and learned that police were looking for a blue Jeep Cherokee and a .22 rifle, he panicked and drove home. However, there was no media report that a .22 rifle was involved.

[11] While searching Mr O'Dwyer's farm, police located a green gun case off a track in the bush containing a box of .22 ammunition that did not belong to Mr O'Dwyer. The Crown suggested that this belonged to Mr Winders relying on evidence that he used a gun bag which may have been green.

[12] Between 19 March and 4 April 2013, Mr Winders changed the appearance of his Jeep by removing the tow bar, spare wheel, mud-flaps and the "Jeep" insignia and by adding a red reflector strip. The tow bar and spare wheel were later located by police hidden in bushes on a property adjacent to Mr Winders' farm.

[13] When Mr Winders' house was searched on 4 April 2013, his two .22 rifles were missing. Mr Winders claimed that they had been stolen in 2009 and he had reported the theft to the police. However, there was no record of this. From the serial numbers held on record, police were able to identify the particular factory in Canada where one of Mr Winders' rifles had been manufactured. Subsequent testing of two other rifles manufactured in this factory with serial numbers close to that of Mr Winders' rifle produced bullet markings that matched the markings on a bullet fragment removed from Mr Taiaroa's head.

[14] Mr Winders lied when he was interviewed by the police following his arrest on 4 April 2013. He initially stated that after picking up the Jeep from the panel beater and refuelling, he drove back to his farm because the vehicle was not insured and he did not want to drive it. He later said that he may have gone from Taumarunui towards Te Kuiti to look at a fencing contract for a person associated with Lake Valley Farms but he only had a look because someone else had the contract. He said that the Jeep did not have a tow bar and the Jeep parts recovered from the adjacent farm were not his, although other items found in that location were. In explanation, he said that these items had been stolen from his property.

[15] Although Mr Taiaroa was not known personally to Mr Winders, their paths had crossed a week earlier. On 12 March 2013, Mr Winders was a passenger in a vehicle being driven by his father. They were towing a stock trailer having delivered cattle from Mr Winders' father's property in Rotorua to Mr Winders' farm. As they were heading north on State Highway One north of Taupo in the direction of Rotorua they encountered roadworks where Mr Taiaroa was operating a stop/go sign (this was on a separate section of roadway approximately eight km away from where the murder occurred). Mr Taiaroa was late signalling their vehicle to stop and, as a result, they had to reverse to allow ongoing traffic to pass. The trailer collided with the vehicle behind causing it minor damage which cost $989.58 to repair.

[16] When questioned by the police, Mr Winders disputed that they had caused this damage and suggested that Mr Taiaroa may have known the driver of the damaged vehicle. He said there was an "oddness about it". The police later located a note beside the phone at Mr Winders' parents' house recording instructions to respond to anyone who called about the incident to say that the caller "must have the wrong name because we like don't know anything about it. We did have a trailer but that went missing a while back. Sorry, we can't help you." There was no dispute that this note had been written by Mr Winders.

[17] The Crown also called evidence to show that Mr Winders and his father made a similar journey the day before the murder, on 18 March 2013, and may have encountered Mr Taiaroa then.

Defence case

[18] The sole issue was whether the Crown could prove beyond reasonable doubt that it was Mr Winders who shot Mr Taiaroa. As Mr Morgan described it to us, the heart of the defence case was that it was inconceivable that Mr Winders would have driven from Stratford via Taumarunui to Atiamuri, a round trip of about seven hours, to murder a man he did not know over a trivial incident that had occurred a week before. Further, it was unlikely that Mr Winders would have known the particular location where Mr Taiaroa was working that day.

[19] Mr Winders chose not to give evidence. Mr Temm, who appeared for Mr Winders at trial, mounted a comprehensive challenge to all aspects of the Crown case, including by highlighting inconsistencies in the evidence given by the witnesses who saw the Jeep Cherokee — some described it as being green in colour and no one identified the vehicle they saw as having a black bonnet or a black and pinstriped left-front panel, both of which were distinctive features of Mr Winders' vehicle. Some witnesses also described the driver as having a darker skin colour than Mr Winders.

[20] Mr Temm challenged the reliability of the evidence given by the witness who identified Mr Winders as the driver, given that she did not know Mr Winders and would have seen him only fleetingly. Further, her description of the Jeep did not entirely match Mr Winders' vehicle.

[21] Because of the way the guns were assembled in the Canadian factory, Mr Temm demonstrated that the proximity of the serial numbers did not necessarily reflect the order in which the gun barrels were manufactured. This potentially undermined the strength of the evidence regarding the markings on the bullet.

[22] Mr Temm suggested that Mr Winders' statements to the police on 4 April 2013 about his movements on 19 March may have been confused and inaccurate because, at that time, he did not realise the significance of the questions he was being asked and he was ill-prepared to answer them.

Conviction appeal

First ground — propensity evidence

[23] Leighton Gleeson gave evidence of an incident that occurred while he and his father were spotlighting for possums from a road beside his friend's farm, which adjoined Mr Winders' property. Mr Gleeson could not fix the date of this incident other than to say that it would have been prior to April 2009 and happened around 10 or 11 pm. Mr Gleeson spotted a possum in a tree and fired one shot at it. About a minute later he heard four or five gunshots coming from the direction of Mr Winders' house. Mr Gleeson described these as "warning shots" and said he did not believe they were aimed at him. He got back into his vehicle and drove off down the road. Mr Gleeson asked Mr Winders about the incident when he saw him a few days later. Mr Winders replied that he did not know it was him.

[24] Mr Morgan submits that this evidence was materially different to what was anticipated Mr Gleeson would say when the propensity ruling was made pre-trial. In particular, he submits that, prior to the trial, the evidence Mr Gleeson was expected to give was that Mr Winders fired "effectively, at them".

[25] We disagree. The anticipated evidence from Mr Gleeson was summarised by Toogood J in his ruling.[9] Relevantly, the Judge stated:

> [27] Mr Gleeson's father was spotlighting and [Mr Gleeson] fired one shot at a possum in the pine trees, in a direction away from Mr Winders' house. About a minute later, there were four or five shots fired from behind the pair, from the direction of Mr Winders' house, and up into the same area of pine trees. The shots sounded to Mr Gleeson as though they had come from a .22 rifle. Mr Gleeson regarded the shots as a warning to "cut it out", so they got back into the vehicle and drove away.
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> [28] A couple of days later, Mr Gleeson spoke to Mr Winders about the shots. When asked Mr Winders, "What did you do that for?" Mr Winders replied, "Oh, I just didn't know that it was you." Mr Gleeson was satisfied with that answer and the issue never came up again.

[26] The evidence Mr Gleeson was expected to give for the purposes of the pre-trial ruling was in all material respects the same as the evidence he gave at trial.

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9 Reasons judgment, above n 2, at [25]–[28].

Mr Gleeson never departed from his evidence that these were warning shots and were not fired at them. There is therefore no proper basis to revisit the pre-trial ruling.

[27] Bryan Kuriger owns a farm neighbouring Mr Winders' property. He gave evidence about an incident that occurred around 9.30 or 10.30 pm one evening in 2011. He and a friend were spotlighting from the road near Mr Winders' property. After stopping, Mr Kuriger heard a crack he thought may have been made by a deer. When he turned and shone the spotlight in that direction he heard a gunshot which he felt confident came from a .22 rifle. He said that the bullet passed over their vehicle "pretty close". They immediately drove off. Mr Kuriger did not see who had fired the shot and he never raised the issue with Mr Winders.

[28] Mr Kuriger also described a second occasion, about a year later, when a similar incident occurred while he was pursuing a stag up a fence line on his property. He noticed goats running and then heard two shots "whistle up the gully" towards him from the direction of Mr Winders' property. Mr Kuriger thought that these shots were also fired from a .22 rifle as warning shots but said that he did not see who fired the shots and he never spoke to Mr Winders about it.

[29] Mr Morgan submits that Mr Kuriger's evidence about the second incident also materially differed from that expected for the purposes of the pre-trial ruling. This is because Mr Kuriger had not previously mentioned seeing the goats running shortly before hearing the two shots. Mr Morgan argues that this raises the possibility that the goats were disturbed by an unknown hunter who fired the shots. He says it is not certain that it was Mr Winders who fired the shots, that they were aimed at Mr Kuriger or even whether they were intended as a warning.

[30] We acknowledge these points. However, Mr Kuriger consistently stated, both before and at the trial, he did not see who fired the shots and he never raised the topic with Mr Winders. At no stage did Mr Kuriger suggest that the shots had been aimed at him. His consistent evidence was that the shots were fired up the gully *towards him* from the direction of Mr Winders' property, not that they had been fired *at him*. Again, we see no justification for revisiting the pre-trial ruling confirmed by this Court.

[31] In any event, we do not consider that any risk of a miscarriage of justice has resulted from the introduction of this evidence. We accept Ms Markham's submission for the Crown that this evidence was not accorded disproportionate weight at the trial and the Judge's directions concerning it were careful and appropriate.

[32] Ms Gordon, who led the prosecution at trial, made only brief mention of the propensity evidence in the course of her lengthy opening address. She signalled that the jury would hear from three witnesses who "had shots fired in their direction to scare them off" while hunting near Mr Winders' property. Ms Gordon cautioned that the Judge would "give you some very firm directions about how you can use that evidence" but that the Crown would seek to demonstrate through this evidence that Mr Winders had "a tendency to over-react to the behaviour of others" and had done so "in the past … by shooting towards people".

[33] Prior to the propensity evidence being called, the Judge directed the jury as to its relevance and the reasoning process they would have to follow before placing any weight on it in considering whether the Crown had proved that Mr Winders shot Mr Taiaroa. Mr Morgan responsibly accepts that no criticism can be made of these directions. We consider they were entirely appropriate.

[34] The Crown did not place significant weight on the propensity evidence in closing, describing it as a "small factor". Ms Gordon summarised the position in these terms:

> But the Crown doesn't suggest, ladies and gentlemen, that this evidence is hugely significant to the overall Crown case. It's one small factor that you might want to take in to account. If you are not satisfied that the defendant has that propensity, either because you're not satisfied that he is the person who fired the shots on those four occasions or you just simply think that it is normal behaviour in the Ohura community, then just put that evidence to one side, but what the Crown says to you is that even if you get to that point and you say, "No, we're not going to consider that evidence, we don't think it helps us" it does not mean that the Crown case is any weaker. The strength of the Crown case, the combined strands of the Crown case, are enough without that evidence, the Crown says to you, to clearly show Mr Winders' guilt.

[35] The Judge's summing up on the propensity evidence was also careful and balanced. Little emphasis was given to the propensity evidence challenged in this

appeal, being Mr Gleeson's evidence and the second incident described by Mr Kuriger. Their evidence was addressed by the Judge as follows:

> [162] The Crown's position that actually shooting at or near people in and around your farm is unusual behaviour, even in the back country of Taranaki. A warning shot over the head to Mr Gleeson, maybe, but firing close to Mr Ford and his nephew and the other young man who was there, that is a different proposition you might think.
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> [163] So you need to think very carefully about the evidence of those witnesses. I am not going to go through it in any detail, but are you satisfied that Mr Winders fired those shots? There is at least one example Mr Temm referred to where Mr Kuriger said well he heard some shots being fired and some goats running. Well you may think that on that evidence it does not prove very much.
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> [165] But, of course, Mr Temm says that Mr Winders just is not the sort of person. He might have admitted chasing some poachers off his land or he may have said sorry to Mr Gleeson, "I did not realise it was you," but that is an entirely different proposition from saying he is the sort of person who would drive all that distance and kill somebody he did not even know. The Crown's propensity evidence, he says, just does not prove anything.
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> [166] Look at what you know about Mr Winders and his work ethic, a hard worker, a quiet man who kept to himself, well educated, done well at school and university, no criminal convictions, no evidence of any misdemeanours or offences committed with firearms. A man who retreats from conflict. Did not want to go to the pub because he just felt anxious. And you have got Mr Jane and Mr Law actually shooting his goats and he steams up to them, albeit with a firearm in his car, and confronts them and you may think Mr Temm said in the circumstances where he knew that they had done it, but he left them to it, did not pursue it. Well that is a matter for you, but you do need to be clear that Mr Winders did fire those shots, that it does prove that he had a tendency to overeact using firearms and that it helps you to prove the Crown's case that he was the offender.

[36] We reject Mr Morgan's submission that the Judge ought to have directed the jury to disregard Mr Gleeson's evidence and Mr Kuriger's evidence about the second incident. We are far from persuaded that a miscarriage of justice has resulted from the admission of this evidence or the directions that were given concerning it. This ground of appeal fails.

Second ground — police interview

[37] Mr Winders was suspected of the murder of Mr Taiaroa and was under surveillance by the police when he was found to be driving at 120 – 130 km/h between

Putaruru and Rotorua in the very early hours of 4 April 2013. Mr Winders increased his speed to approximately 150 km/h as the police vehicle moved to overtake him. On 4 April 2013, members of the Armed Offenders Squad were deployed to arrest Mr Winders, ostensibly for reckless driving the previous night. However, Toogood J was satisfied that the sole reason for the arrest was to confine Mr Winders for the purpose of questioning him about the murder.[10] The Judge accordingly found that the arrest and subsequent detention were arbitrary and in breach of Mr Winders' right not to be arbitrarily arrested or detained under s 22 of the New Zealand Bill of Rights Act.[11]

[38] The Judge rejected a separate submission that Mr Winders was not sufficiently informed of the purpose of his detention (to question him about the murder) and of his right to consult and instruct a lawyer without delay before answering any questions.[12] Accordingly, the Judge found that there had been no breach of s 23 of the New Zealand Bill of Rights Act and he was satisfied that the interview was conducted fairly and in accordance with the Chief Justice's *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)*.[13]

[39] Despite the s 22 breach, the Judge found that the evidence had not been improperly obtained because there was no causal link between the unlawful detention and the evidence Mr Winders gave in the interview.[14] This was because Mr Winders showed no reluctance to speak to the police officer about Mr Taiaroa's death and confirmed on a number of occasions that he was happy to help with their inquiries.[15] Further, even if the evidence had been improperly obtained, the Judge considered that it would still have been admissible applying the balancing test in s 30 of the Evidence Act.[16]

[40] These conclusions were confirmed on appeal to this Court pre-trial.[17]

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10 Reasons judgment, above n 2, at [105].
11 At [111].
12 At [112]–[121].
13 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.
14 Reasons judgment, above n 2, at [129].
15 At [128]–[130].
16 At [136].
17 CA judgment, above n 3, at [53]–[58].

[41] Mr Morgan submits that there has been a miscarriage of justice due to the admission of the record of this interview into evidence. Although Mr Winders made no confession, he made statements during the interview which the Crown relied on at the trial to show that he lied about his movements on the day of the murder. Mr Morgan recognises that the Court will not generally depart from its earlier judgment but he invites us to do so in this case contending that the decision was wrong and has led to a miscarriage of justice.

[42] Mr Winders did not give evidence at the trial. There has plainly been no change of circumstance relating to the police interview and no new evidence has come to light since this Court's earlier judgment was delivered that could have any bearing on the admissibility of the interview. Nor has there been any relevant change in the law since the judgment was delivered. In short, there has been no change in the factual or legal landscape from that considered by this Court when it confirmed the pre-trial ruling that the interview was admissible. Mr Morgan is simply asking this Court to find that it erred in its earlier decision and to conclude that there has been a miscarriage of justice because the trial was conducted (in this respect) in accordance with that judgment. Mr Morgan is in effect asking this Court to reverse its earlier judgment and direct a retrial on the basis that the interview is not admissible.

[43] For reasons we will develop further below, we have concluded that in the absence of some material change in the facts or the law the present attempt to relitigate in this Court the same issue that has already been determined by this Court must be resisted as amounting to an abuse of process. This is so even though the doctrine of issue estoppel does not apply because this is a criminal case.[18] Our conclusion does not leave Mr Winders without potential recourse. If he wishes to test the correctness of this Court's decision that the interview was admissible at his trial, he can seek leave to appeal to the Supreme Court. That is the appropriate course.

[44] Section 101 of the Criminal Procedure Act 2011, which is in materially the same terms as s 344A of the Crimes Act 1961, provides for the determination of disputes about the admissibility of evidence pre-trial. Toogood J's decision that the

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[18] *R v Davis* [1982] 1 NZLR 584 (CA) at 589.

interview would be admissible at Mr Winders' trial was made under this section. Section 101(6) provides that no order made under that section affects the discretion of the Court at the trial to allow or exclude any evidence in accordance with any rule of law.

[45] Despite the breadth of the provision, it has long been accepted that pre-trial rulings should not generally be revisited unless fresh evidence has become available or there has been a development in the law. This was confirmed by Casey J in giving the judgment of this Court in *R v Gallagher*:[19]

> We would add that this decision on the applicability of s 344A in a retrial situation is not to be seen as an open sesame for taking such a step as a matter of course. The right of appeal given by s 379A is a clear indication that any earlier ruling under s 344A is prima facie to be taken as resolving the question. In general, we see a new application being warranted only if the interests of justice require it in cases where fresh evidence has become available, or (as in *Narayan*) where there has been a later development in the law.

[46] A decision made under s 101 of the Criminal Procedure Act as to the admissibility of evidence in a jury trial for a category 3 or 4 offence may be appealed with leave under s 217(2)(b). Section 221 provides that the first appeal court must determine a first appeal by confirming the decision appealed against, varying it, or setting it aside and making any other order it considers appropriate. There is nothing to indicate that a decision made by this Court pursuant to s 221 has any different status to any other appellate decision. It is binding on the High Court and must be followed absent some material change of circumstances from those upon which it is founded.

[47] The court's jurisdiction in dealing with an appeal against conviction is set out in s 232. Relevantly, the court must allow the appeal where a miscarriage of justice has occurred for any reason. Miscarriage of justice is defined to include any error that has resulted in an unfair trial.[20] The enquiry on such an appeal is focused on the question of miscarriage and requires consideration of the full context of the trial. It is therefore entirely open for an appellant to contend (as here in relation to the propensity evidence) that there was a material change at trial from that envisaged for the purposes

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[19] *R v Gallagher* [1993] 1 NZLR 659 (CA) at 661. See also *R v Hines* [1997] 3 NZLR 529 (CA) at 536; *R v Howse* [2003] 3 NZLR 767 (CA) at [15] and *M (CA 245/2015) v R* [2015] NZCA 413 at [15].

[20] Criminal Procedure Act 2011, s 232(4)(b).

of a pre-trial ruling such that a miscarriage of justice has occurred despite the correctness of that ruling having been confirmed in a pre-trial appeal.

[48] However, if there has been no relevant change in the evidence or the law, we do not consider that an appellant can challenge before this Court on an appeal against conviction the correctness of its earlier decision on the same issue. This Court's decision in *R v Coombs* illustrates the general principle.[21] Mr Coombs appealed against his conviction on drug charges. This Court rejected his contention that the jury's verdict was unreasonable and unsupported by the evidence. However, his appeal was allowed on another ground and a retrial ordered. After he was convicted at the retrial, Mr Coombs again appealed contending that the evidence was insufficient to support the verdict. There was no material difference in the evidence given at the two trials. This Court held that Mr Coombs could not relitigate the issue of the sufficiency of the evidence. Somers J, who gave the judgment of the Court, concluded that this would be an abuse of process:[22]

> There is no material or significant difference in the two cases. It follows from that identity of case that Coombs cannot be allowed to litigate the issue of sufficiency of evidence again — it would be an abuse of the process ...

[49] This Court recently addressed in *Campbell v R* the question as to whether an appellant can relitigate on a conviction appeal the same issue determined by the Court in an appeal against a pre-trial ruling on the admissibility of evidence.[23] The facts in *Campbell* are on all fours with the present case. Mr Campbell appealed against a pre-trial ruling that his statement to the police was admissible. The appeal was dismissed pre-trial. Mr Campbell was convicted. He appealed against his conviction again contending that his statement was wrongly admitted. The Court was therefore in the same position as here. In giving the judgment of this Court declining the appeal, Winkelmann J stated:

> [24] We do not consider that this is one of those cases where, in the context of a conviction appeal, the Court should revisit a decision on the same issue made pre-trial. Mr Campbell properly concedes that nothing that emerged at trial is material to the reconsideration he seeks. He is simply asking us to take

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21 *R v Coombs* [1985] 1 NZLR 318 (CA).
22 At 320.
23 *Campbell v R* [2015] NZCA 452.

> a different view of facts to that taken by the Court in the earlier decision because he says the earlier Court was wrong.
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> [25] Having said that, we have now heard full argument on the appeal grounds, and so propose to consider them, although only briefly because of the view we take. This should not be seen as an indication that the Court will adopt a similar approach in future. With the benefit of hindsight we consider we should have heard argument on the preliminary issue of whether this Court should revisit its own decision in this case, before hearing full argument on the relevant appeal grounds. It may well be that approach is adopted by the Court in future in appropriate cases.

[50] If we were to accept Mr Morgan's submissions on this issue, there would be two decisions from this Court applying the same law to the same facts but producing irreconcilable outcomes — one concluding that the evidence is admissible and the other concluding it is not. A second trial would be necessitated simply because of the inability of this Court to provide a consistent answer on the admissibility of the same piece of evidence. The High Court would then be left in the invidious position of conducting the retrial faced with conflicting decisions from this Court, both notionally binding, as to the admissibility of this evidence. The administration of justice would be brought into disrepute if trials were conducted in accordance with pre-trial determinations of an appellate court and then, after the trial, the same appellate court reversed its decision with the result that the parties and victims were required to endure a further trial. Public reliance on a credible and predictable system of justice would inevitably be damaged.

[51] We do not overlook two Supreme Court decisions declining leave for leapfrog appeals on the basis that the Court of Appeal should consider the matter first, even though it had already determined a pre-trial appeal arising out of the issues sought to be raised in the conviction appeal. We do not see these decisions as being contrary to our conclusion as to the proper course in the present case.

[52] In the first of these, *Ngan v R*,[24] the applicant was involved in a car accident and airlifted to hospital. Police officers who attended the scene took possession of various items of personal property for safekeeping. These included high denomination currency notes that were strewn around the crash site, a sunglasses case and a wallet. Believing it would contain money, the police opened the sunglasses case and found

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[24] *Ngan v R* [2006] NZSC 41.

methamphetamine. The wallet contained a newspaper clipping reporting judicial comment on Mr Ngan's drug habit. The Crown conceded in the High Court that the search of the sunglasses case was unlawful. The defence conceded that the police were entitled to examine the wallet. The High Court determined that the evidence of the finding of the methamphetamine was admissible. On appeal pre-trial, the Court of Appeal found it unnecessary to determine the lawfulness of the search of the sunglasses case because the presence of the cash coupled with the discovery of the newspaper clipping would have supported an application for a search warrant under s 18 of the Misuse of Drugs Act 1975. The Court concluded that the discovery of the methamphetamine was therefore inevitable.

[53] Following conviction, Mr Ngan sought leave to appeal directly to the Supreme Court on the grounds that the searches of the sunglasses case and the wallet were unreasonable and a miscarriage of justice had occurred by reason of the admission of that evidence. He contended that a leapfrog appeal was appropriate because any appeal to the Court of Appeal would merely replicate its pre-trial conclusion.

[54] The Supreme Court rejected that argument noting that the reasonableness of the search of the wallet was conceded in the High Court and the Court of Appeal did not address the reasonableness of the search of the sunglasses case.[25] Further, the Court of Appeal's attention was not drawn to relevant overseas jurisprudence,[26] and it had not considered whether a miscarriage of justice may have occurred.[27] For these reasons, the proposed appeal would not necessarily lead to a replication of the Court of Appeal's earlier judgment.[28]

[55] The other potentially relevant leave decision is *Peters v R*.[29] That case was not concerned with an admissibility issue, rather whether severance should have been ordered. Again, the Supreme Court declined a leapfrog appeal because of the important distinction between a pre-trial decision declining severance and an appeal

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25 At [9].
26 At [9].
27 At [11].
28 At [10].
29 *Peters v R* [2006] NZSC 75.

against conviction asserting a miscarriage of justice had occurred as a result of the two accused being tried together. The Court stated:[30]

> The Court of Appeal's ruling on the pre-trial appeal appears orthodox on the question of severance. But, more importantly, now that the trial has occurred, the question arising upon an appeal against conviction is whether there has in fact been a miscarriage of justice because the two accused were tried together. That requires scrutiny of the trial record to see whether the alleged prejudice to Mr Peters from his co-accused's statement was alleviated by the manner in which the trial proceeded, taking into account particularly the trial Judge's directions to the jury. It involves looking at the whole course of the trial, which obviously was not something which could be considered by the Court of Appeal in giving its pre-trial ruling. The inquiry is therefore a distinctly different one from that previously undertaken by the Court of Appeal, which will in no way be bound by its earlier ruling concerning severance.

[56] The present appeal as to the admissibility of the interview is clearly distinguishable from the proposed appeals considered by the Supreme Court in *Ngan* and *Peters*. Because there has been no relevant change in the evidence or the law, if this Court were now to entertain this aspect of Mr Winders' appeal it would simply be replicating the exercise it has already undertaken. In our view that is neither permissible nor appropriate.

[57] In summary, we are not persuaded that there is any proper basis for this Court to depart from its earlier judgment because there has been no material change in the evidence nor any relevant development in the law since that judgment was delivered. It is not open to this Court to conclude that there has been a miscarriage of justice arising out of the admission of the interview into evidence having already determined that it was admissible. The issue having already been determined by this Court, any further challenge can only be advanced in the Supreme Court. This ground of appeal must accordingly fail.

Third ground 3 — jury issue

[58] Early in the trial, two jurors raised a concern with the court crier about the way the foreperson was performing her function. The third ground of appeal concerns the way Toogood J dealt with this issue. The complaint is that the Judge ought to have

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30 At [4].

informed counsel about the concern and given them an opportunity to make submissions on how it should be addressed.

[59] The Judge was assiduous in preparing written records of rulings and directions together with minutes and bench notes covering all material matters that arose in dealing with the case. The record discloses that he prepared written records of seven rulings and five jury directions as well as 29 minutes and three bench notes. However, the Judge did not consider it necessary to make any contemporaneous record of this particular issue.

[60] To assist this Court in dealing with this ground of appeal, Toogood J provided a report commissioned pursuant to r 17 of the Court of Appeal (Criminal) Rules 2001. It is convenient to set out the key parts of that report, the accuracy of which is not challenged:

> [3] I remember this incident. I did not make a bench note because it seemed to me at that stage to be a relatively minor matter of jury dynamics in a high profile and difficult case and a personality issue, rather than an issue going to the fairness of Mr Winders's trial. It was not raised with me by counsel in the courtroom (so there is no log note and no recorded exchange between counsel and me) but I think counsel saw me about it in my chambers.
>
> [4] I received information in my chambers from the court crier about concerns that had been raised with him by two female jurors informally, not in writing, about the foreperson. My recollection is that he told me they referred to her bossy manner and concerns that she appeared reluctant to take on board the views of others during informal discussions. As I recall it, the matter was brought to me around the middle of the second week of the trial. …
>
> …
>
> [8] Before instructing the court crier about a response to the two jurors, I considered whether I should discuss the informal approach with counsel. Because there was little substance to the issue as it had been brought to me, and because I did not consider it appropriate to indicate to counsel mid-trial that two jurors were dissatisfied by the foreperson's handling of her role in the jury room, I decided not to do so.
>
> [9] I considered whether I should speak to the jurors myself rather than rely on [the court crier's] report. I decided that it would be improper for the trial Judge to speak to two jurors in that manner and that, in any event, it would escalate the issue to a level which made a full inquiry necessary. Given the stage at which the issue was raised by the two jurors and the minor nature of their concerns, I concluded that it would not be appropriate, regarding a matter which I considered could most easily be dealt with by the jurors themselves,

to make any comment to the foreperson or the jury as a whole which would have the possible effect of damaging intra-jury relationships.

[10] I asked [the court crier] to tell the two jurors, discretely and not in the presence of any other juror, that:

(a) he had passed on their comments to me;

(b) I suggested they should raise their concerns directly with the foreperson in a non-confrontational manner, simply reminding her of the instruction I had given the jury about keeping an open mind throughout and about the decision being a collective one; and

(c) they should continue to monitor the foreperson's conduct. If they continued to have concerns about the manner in which she was carrying out her role which they did not think they could address with her directly, they should prepare a written communication for me.

[11] I heard nothing more about the issue in the course of the trial up to and including delivery of the verdict.

…

[13] During the rest of the trial I made a point of observing the members of the jury from time to time for any signs of inattention or distress, as is my usual practice. I did not see anything in the behaviour of the foreperson or any other juror to indicate that any juror was not paying attention to the evidence, or that there was any tension among the jurors. On the contrary, and as I mentioned in my direction to the jury on 16 August 2017, I observed during the view of the scene of Mr Taiaroa's death and related scenes the close interest taken by all jurors. The extent to which they engaged with each other in what seemed to be animated conversation was evident to me.

[14] I did not receive any report about how the two jurors responded to my advice through the court crier but, since I heard nothing more, I assumed that the issue had been resolved to their satisfaction.

[61] The record shows that the jury retired at 1.16 pm on Wednesday 7 September 2016 after 22 days of hearing. Their verdict was delivered at 3.50 pm on Monday 12 September 2016.

[62] Mr Morgan submits that a miscarriage of justice has occurred because trial counsel was not informed about the detail of what the two jurors had said to the court crier and did not have an opportunity to make submissions to the Judge about how the matter should be handled. Counsel submits that Mr Winders had a right to know what had occurred and a right to be heard on it. Mr Morgan relies on this Court's decision in *R v N*, although he acknowledges that this deals with jury communications

after they have retired to consider their verdict.[31] He submits that the procedure set out in that case should have been followed here.

[63] We consider that the present case is more comparable to the issue that arose in *Hunter v R*, where a concern was raised during trial about the impartiality of a juror.[32] This Court found that there is no duty on the presiding judge to conduct an enquiry, for example by speaking to jurors or to the foreperson, and the presiding judge has a broad discretion as to how the issue should be dealt with depending on the circumstances.[33]

[64] We are satisfied that the Judge dealt with this matter appropriately and there is no risk that a miscarriage of justice has resulted from the way he handled it. There was no reason to believe that any juror was incapable of performing, or continuing to perform their duty as a juror.[34] There were simply no grounds upon which the foreperson, let alone the whole jury, could have been discharged, a possible course suggested in argument before us. It is clear from Toogood J's report of his observations of the jury members and from the time they took in considering their verdict that they applied themselves conscientiously to the solemn task they had undertaken to perform.

[65] This ground of appeal also fails. The conviction appeal must accordingly be dismissed, all other grounds of appeal referred to in the notice of appeal having been abandoned.

Sentence appeal

First ground — s 104

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31 *R v N (CA373/04)* (2005) 21 CRNZ 621 (CA).
32 *Hunter v R* [2012] NZCA 147.
33 At [13].
34 Juries Act 1981, s 22(2)(a).

[66] Section 104 of the Sentencing Act requires the court to make an order imposing a minimum period of imprisonment of at least 17 years in the circumstances specified, unless it is satisfied that it would be manifestly unjust to do so. The specified circumstances include, in terms of s 104(1)(b), if the murder involved calculated or lengthy planning. Toogood J was satisfied that although Mr Winders' planning may not have been lengthy, it was calculated. He summarised the reasons for this conclusion in the following passages of his sentencing decision:[35]

> [5] The jury's verdict means that, at approximately 3.15 pm on Tuesday, 19 March 2013, at Atiamuri, you were guilty of the cold-blooded and calculated killing of Mr George Taiaroa, a virtual stranger, by shooting him in the head at point-blank range with a .22 calibre rifle. It was an entirely unprovoked attack on an unsuspecting man.
>
> [6] The facts leading to that conclusion which I find to be proved beyond reasonable doubt are these:
>
> (a) On 12 March 2013, you were a passenger in your father's Landrover which was involved in a minor collision near roadworks at Atiamuri. Mr Taiaroa was in position as the operator of a Stop/Go sign at the roadworks. As a result of Mr Taiaroa having signalled late to your father that he should stop his vehicle to make way for oncoming traffic, your father was required to stop and reverse his vehicle. The trailer it was towing collided with the vehicle behind.
>
> (b) Your father was liable to meet the $989.58 repair costs of the other vehicle and was apprehensive that he might not be insured for the loss. A note written by you after the accident satisfies me that you were concerned about your parents having to pay for the repairs. You considered Mr Taiaroa to be responsible for the collision in the sense that, had he been doing his job properly, your father would not have been required to reverse his vehicle and the collision would not have occurred.
>
> (c) When you collected your blue Jeep Cherokee from a panelbeater in Stratford on the morning of 19 March 2013, you went to your home in Ohura Road, Pohokura, where you collected a .22 rifle and ammunition. You then drove a distance of over 200 kilometres from your home, passing through Taumarunui, to a bridge on Tram Road, Atiamuri, with the intention of encountering Mr Taiaroa.
>
> …
>
> (e) Between the time you left Taumarunui at around 1.40 pm and the time you encountered Mr Taiaroa that afternoon, you

[35] Sentencing decision, above n 1.

removed the number plates from your vehicle for the purpose of reducing the risk that it might be identified by any witness.

(f) At the Tram Road site, you stopped your vehicle near to where Mr Taiaroa was standing with his sign indicating you were required to stop. You beckoned Mr Taiaroa to your vehicle and then, without warning and at a distance of less than half a metre, shot Mr Taiaroa through the forehead, causing serious head injuries from which he died a short time later.

(g) Having fired the fatal shot, you then sped across the Tram Road Bridge and turned right onto Tirohanga Road from where you drove at high speed through the Pureora Forest to a farm near Benneydale owned by a friend, Mr Kieron O'Dwyer, who had engaged you to do some fencing work on the farm that day.

…

[24] … Your actions were calculated. At some point after you left Taumarunui, you removed the number plates from your vehicle to limit the risk of detection. At one stage you drove very slowly behind a tractor to avoid identification. You had your loaded rifle close to hand and you summoned Mr Taiaroa over to your vehicle in order to get a close shot that would inevitably kill him. I have no doubt also that you had planned your escape route through the Pureora Forest to the O'Dwyer farm at Benneydale.

[67] Mr Morgan accepts that the Judge was entitled to make these factual findings and they are not challenged. The question is whether they justify the Judge's conclusion that the murder involved calculated planning.

[68] The issue as to whether a murder involved calculated planning is obviously a matter of fact and degree. The planning need not be competent or sophisticated but must be present to a heightened degree.[36] The facts of the present case have some similarities to those in *R v Parrish*.[37] There, the appellant was seen to be cleaning and operating the loading mechanism on his rifle in Kerikeri around lunchtime on the day of the murder. He then drove to his wife's unit in Auckland, arriving around 6.25 pm. He entered the unit with the rifle and shot her at close range before driving to his brother's house in another part of Auckland where he confessed to the murder. This Court confirmed the trial Judge's assessment that these facts were sufficient to engage the "calculated planning" criterion under s 104.

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36 *Desai v R* [2012] NZCA 534 at [59].
37 *R v Parrish* (2003) 21 CRNZ 571 (CA).

[69] We are satisfied that Toogood J was correct to conclude that s 104 was engaged. The planning included Mr Winders determining where Mr Taiaroa would be working that day. After collecting his vehicle from the panel beater at 9.30 am, Mr Winders returned home to collect his rifle before driving over 200 km from Stratford via Taumarunui to Atiamuri to carry out the murder at approximately 3.15 pm. The means of carrying out the murder at that location were carefully planned as was the intended escape route and the various means by which Mr Winders would minimise the risk of detection.

Second ground — breach of the New Zealand Bill of Rights Act

[70] In *R v Shaheed*, this Court discussed the difficulties in providing any form of redress that truly vindicates a serious breach of the New Zealand Bill of Rights Act leading to evidence being unfairly obtained other than by excluding that evidence.[38] A reduction in penalty may be appropriate in cases where there has been a breach of the Bill of Rights Act because of undue delay.[39] However, the Supreme Court has so far declined to make any general pronouncement on the appropriateness of a sentence reduction as a remedy for other breaches of the New Zealand Bill of Rights Act.[40] Nevertheless, the Crown accepts that a sentence reduction could be an appropriate remedy for other breaches of the New Zealand Bill of Rights Act so long as this is in accordance with ordinary sentencing principles, consistent with the approach taken by the Supreme Court of Canada in *R v Nasogaluak*.[41] We proceed on that basis noting that the Court is obliged under s 8(h) of the Sentencing Act to take into account any particular circumstances of the offender that mean that a sentence that would otherwise be appropriate would, in the particular instance, be disproportionately severe.

[71] Mr Morgan submits that the following factors ought to have been taken into account in setting the minimum period of imprisonment. Mr Winders was arrested on a pretence as part of a planned police operation to take him into custody for the purpose of questioning him about Mr Taiaroa's death. He was physically assaulted during the

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38 *R v Shaheed* [2002] 2 NZLR 377 (CA) at [153]–[155].
39 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 at [18]; and *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505.
40 *Beckham v R*, above n 39, at [154].
41 *R v Nasogaluak* 2010 SCC 6, [2010] 1 SCR 206 at [55].

arrest and unlawfully searched. He was then arbitrarily detained for over an hour before the evidential interview commenced. Mr Morgan submits that these were serious breaches of guaranteed fundamental rights and warranted an appropriately tailored reduction in sentence, particularly given that there is no other useful remedy.

[72] While accepting the force of Mr Morgan's submissions, the problem he faces is that the Court is obliged to give effect to the legislative policy behind s 104 of the Sentencing Act and may not depart from the minimum mandatory period of imprisonment of 17 years unless its imposition would be manifestly unjust. This Court made clear in *R v Williams* that the 17-year minimum may only be departed from if the Court concludes that the case falls outside the scope of the legislative policy.[42] The Court emphasised that such a conclusion will only be available in exceptional cases where the circumstances of the offence and the offending are such that the case falls outside the band of culpability of a qualifying murder.[43]

[73] We are satisfied that the high threshold dictated by the "manifestly unjust" requirement was not reached in all the circumstances of this case. Mr Winders' arrest and unlawful detention for a limited period undoubtedly involved serious breaches of his rights but there is no evidence that the consequences involved any serious injustice to him. Nor is there any evidence that he suffered any physical injury or psychological harm. We agree with Toogood J that a minimum period of imprisonment of 17 years was required because of the operation of s 104 of the Sentencing Act.

[74] The appeal against sentence must accordingly be dismissed.

Result

[75] The appeal against conviction is dismissed.

[76] The appeal against sentence is dismissed.

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42 *R v Williams* [2005] 2 NZLR 506 (CA).
43 At [67].

Solicitors:
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