ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESSES MR AND MRS C PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES MR A, MR AND MRS B AND ANOTHER WITNESS REMAINS IN FORCE

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA723/2015
[2018] NZCA 259

BETWEEN	NEIL RAYMOND SWAIN Appellant
AND	THE QUEEN Respondent

Hearing:	14 May 2018 (further submissions received 7 June 2018)
Court:	Asher, Venning and Mander JJ
Counsel:	A M Simperingham, H B Vaughn and S D Taylor for Appellant M J Lillico and Z R Johnston for Respondent
Judgment:	19 July 2018 at 11 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal against conviction is dismissed.

C The appeal against sentence is dismissed.

D Order prohibiting publication of names, addresses, occupations or identifying particulars of witnesses Mr and Mrs C pursuant to s 202 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Venning J)

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[1] Whetu Hansen was last seen alive at Neil Swain's property on 24 November 2013. It is accepted Mr Hansen has been killed. His body has never been found. Mr Swain was convicted of Mr Hansen's murder following a jury trial. Brown J sentenced him to life imprisonment with a minimum period of imprisonment (MPI) of 14 years.[1]

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1 *R v Swain* [2015] NZHC 3241.

[2] Mr Swain appeals against conviction and sentence.

Background

[3] The evidence at trial disclosed that Mr Hansen and Mr Swain were well-known to each other. They shared a common interest in Ford vehicles. Mr Swain had a number of cars and car parts on his property at Linton. Mr Hansen stored some of his cars at Mr Swain's property.

[4] On 24 November 2013 Mr Hansen drove to Mr Swain's address in his Falcon ute. The forensic evidence was that Mr Hansen was killed by multiple gunshot wounds inflicted while he was seated in the driver's seat of his ute at Mr Swain's property. His body was then dragged out through the driver's door and placed in the tray of the ute where it remained for a number of days before being disposed of.

[5] Mr Swain went to his friend Mr C's house in Ashhurst on the night of 24 November 2013. Mr C said Mr Swain confessed to him that he had killed Mr Hansen and asked for his help. Mr C said Mr Swain told him that Mr Hansen had stolen from him and that he, Mr Swain, had shot Mr Hansen five times, the first shot while Mr Swain was standing and the last four shots while he was in the ute. He showed Mr C four bullet cartridges. Mr Swain asked Mr C to help him dispose of the body. Mr C had worked in a mortuary and on an earlier occasion had given Mr Swain a body bag. Mr C told Mr Swain the body would fit in a 44-gallon drum. Various locations as to where the body might be dumped were discussed.

[6] Mr C later reported Mr Swain's admissions to a police officer.

[7] On 3 December 2013 Mr Swain went to see another friend, Mr A, who owned a welding and engineering business in Palmerston North. At Mr Swain's request Mr A took the top off a 44-gallon drum and cut holes in the side of it. Mr Swain returned the following morning and had Mr A weld the lid of the drum down. Mr A could see what appeared to be heavy industrial plastic inside the drum. Mr Swain came back in the afternoon and said something to the effect of "That nigger won't be stealing off me anymore" and referred to dumping the drum in the Whanganui River.

[8] Mr Swain later gave different accounts of Mr Hansen's death to other parties, including Mr and Mrs B and his former partner, Lynaire McKay. He told Mr and Mrs B that Mr Hansen arrived at his property wounded. He said Mr Hansen had refused an ambulance and had left with another person. He told Ms McKay Mr Hansen was fatally wounded when he came to his property, but refused an ambulance and died in Mr Swain's arms.

[9] The police searched Mr Swain's property on 5 December 2013. They found Mr Hansen's ute in a shed and observed bloodstains and other signs that a dead body had been left on the tray of the ute. The pattern of bloodstaining was consistent with Mr Hansen having been fatally wounded in the driver's seat and then dragged along the shed floor to the tray of the ute. There was a smell of decay in the shed. Maggots or fly larvae about four to six days into their developmental life were present, which suggested the body had been on the tray of the ute for some time.

[10] In the course of searching Mr Swain's property, the police also located ammunition, explosives and a quantity of cyanide.

[11] On 9 December 2013 Mr Swain voluntarily attended the Palmerston North Police Station. He told the police the explosives were not his but declined to speak further. He was arrested for Mr Hansen's murder in May 2014.

[12] Prior to trial Mr Swain pleaded guilty to a number of charges including possession of a firearm, explosives and cyanide.

The trial

[13] The Crown case against Mr Swain was a circumstantial one. It relied in particular on the admission Mr Swain had made to Mr C, the steps that Mr Swain had admittedly taken to dispose of Mr Hansen's body and the forensic evidence that Mr Hansen had been killed at Mr Swain's property.

[14] Mr Swain was represented by co-counsel, Mr Winter and Mr Antunovic. Mr Swain gave evidence at trial. His case was that Mr Hansen had come to his property during the afternoon of 24 November looking for a windscreen for his car.

He helped Mr Hansen find a windscreen then left him to it as he, Mr Swain, was going to see a friend, Ms McQueen. Mr Swain took his dog with him.

[15] Mr Swain said that as he was leaving the property he saw two people draw up in a Japanese car. He knew the name of one, but not the other. He said one lived in Whanganui and one over Foxton way. After about three quarters of an hour he returned to his property. There was no sign of Mr Hansen although his ute was still there. The other two people were just leaving in their car. He said they told him Mr Hansen had gone to get another car.

[16] Mr Swain said that after having something to eat he shifted Mr Hansen's ute and at that stage noticed blood on his hands. When he checked the ute again he found Mr Hansen's body in the tray under the tonneau cover, together with a gun. Mr Swain said he did not call the police because he did not think the police would believe him. He was not on the best of terms with them because of a previous incident. Some years earlier he had planted an explosive device in the Sydenham Police Station. As a result, he became known as "Bomber" Swain.

[17] Mr Swain accepted he had spoken to Mr C on the night of 24 November. He said he did so because Mr C had supplied Mr Swain with the gun and he in turn had sold it to Mr Hansen. They discussed how to dispose of the body. Mr Swain accepted that he put Mr Hansen's body in the 44-gallon drum but said that after Mr A had welded the lid, he left the drum "around the Foxton area" at the home of one of the two men who had been at his property on 24 November. He assumed the two in the car were the ones that "did it" and, as he was annoyed at the trouble they had caused him, he left the drum with the body where one of them lived. He denied putting the drum in the Whanganui River. He would not disclose the address where he left it. Nor was Mr Swain willing to disclose the name of the person who had been to his home at the time of Mr Hansen's disappearance.

The appeal

[18] Mr Swain's appeal against conviction was wide-ranging. In oral submissions, his counsel Mr Simperingham focused on the following points:

(a) trial counsel incompetence;

(b) the Judge's failure to give appropriate trial directions; and

(c) the interruptions during Mr C's evidence caused by the AVL facilities.

[19] In support of the appeal against sentence Mr Taylor for Mr Swain submitted the trial Judge erred in uplifting the MPI because of Mr Swain's previous criminal convictions.

[20] Mr Swain made several affidavits in support of the appeal and was cross-examined. Both trial counsel, Mr Antunovic and Mr Winter, gave affidavit evidence. Mr Winter was also cross-examined. Mr Antunovic was not required for cross-examination.

Miscarriage

[21] The appeal against conviction is advanced on the basis that a miscarriage of justice has occurred.[2] "Miscarriage of justice" is defined in s 232(4) of the Criminal Procedure Act 2011 as:

> … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial …

[22] A real risk arises if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong.[3] Irregularities which "plainly could not, either singularly or collectively, have affected the result of the trial" are not miscarriages of justice for this purpose.[4]

[23] To establish that an unfair trial has resulted, the error, irregularity or occurrence must be of sufficient seriousness to warrant the verdict being set aside without further

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2 Criminal Procedure Act 2011, s 232(2)(c).

3 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110]; and *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [29].

4 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [30]. See also *Wiley v R*, above n 3, at [28].

inquiry.[5] If it is of sufficient seriousness it will be unnecessary to consider whether the error, irregularity or occurrence may have affected the outcome of the trial.[6] Trial counsel error on a fundamental matter will result in an unfair trial.[7] However, not every error, irregularity or occurrence will result in an unfair trial.[8] The assessment is to be made in relation to the trial overall.[9]

The trial counsel issue

[24] Although Mr Swain raised numerous points in his affidavits, Mr Simperingham focused his submissions on the following challenges under the general heading of 'trial counsel incompetence':

(a) resources;

(b) the cyanide issue;

(c) closing address;

(d) failure to adequately cross-examine Ms McKay and Mr and Mrs B;

(e) failure to follow Mr Swain's instructions re Mr Whakarau;

(f) failure to investigate or call potential witnesses;

(g) failure to adequately cross-examine Mr C;

(h) mode of evidence issues; and

(i) failure to pursue a mistrial application.

[25] We proceed to analyse those issues.

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5 *Wiley v R*, above n 3, at [41].
6 At [37].
7 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [65].
8 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78].
9 *Wiley v R*, above n 3, at [35].

Resources

[26] Mr Simperingham submitted that counsel had not applied sufficient resources to Mr Swain's defence. Two counsel were not enough. He suggested counsel should also have engaged private investigators to follow the numerous "leads" Mr Swain had identified. The "leads" related to persons who might have had a reason to harm or kill Mr Hansen.

[27] There is a fundamental disconnect between the theme of this submission advanced on behalf of Mr Swain with the position that he took at trial (and which he still maintains on appeal). On Mr Swain's evidence he recognised the two people in the car who were at his property with the deceased on the day he was killed, knows the name of one of them and where they live, yet he refuses to name them or provide their addresses to enable his counsel or the police to investigate their involvement. Instead, Mr Swain suggests that a number of other people may have had a motive to kill Mr Hansen and says his counsel was incompetent because they did not pursue those "leads".

[28] Both Mr Winter and Mr Antunovic are experienced criminal barristers. Their evidence, including Mr Winter's cross-examination, confirms that they prepared properly for trial. As noted, Mr Swain gave evidence. Both counsel met with Mr Swain on numerous occasions. A full brief running to some 20 pages was prepared for Mr Swain. Mr Swain discussed the brief with counsel and made several amendments to it. He then initialled each page and signed the brief. We reject Mr Swain's evidence that he did not agree with what was in the brief he signed. The very full brief formed the basis of Mr Swain's defence.

[29] We are satisfied counsel would have employed a private investigator (or sought legal aid for one) if there was a proper purpose and something to be gained by doing so. However, for the reasons that follow, the "leads" that Mr Swain suggested should have been followed up were of little value or relevance. Mr Swain had the best "lead" under his own control, namely the two people in the Japanese car at his property on the day Mr Hansen was killed, but was unwilling to enable counsel to pursue it.

[30] There is a related point regarding preparation for trial. Mr Swain also criticised defence counsel's approach to disclosure. It is apparent that the first trial date scheduled was vacated in July 2015 because of late disclosure by the police. Defence counsel sought and obtained an adjournment on that basis. The defence obtained summaries of intercepted conversations. Mr Swain was provided with access to a computer to review electronic disclosure. That led to a further exhibit being produced at trial regarding text records. We are satisfied the defence were properly prepared for trial and obtained all relevant disclosure. We note that Mr Simperingham did not pursue the argument that counsel should have sought the appointment of an amicus to review some redacted material relating to Mr C.

The cyanide issue

[31] Mr Swain next criticised counsel for the way they dealt with the cyanide issue. Prior to trial Mr Swain had pleaded guilty to possession of cyanide, possession of weapons and ammunition and other "peripheral" charges. Mr Swain said that he did not want to plead guilty and was pressured, or "badgered" into pleading guilty to these charges. Mr Winter, however, said that Mr Swain ultimately accepted counsel's advice to plead guilty. Having observed Mr Swain give evidence we are satisfied that he is not a man who could have his will easily overborne. He is a mature man with considerable life experiences. He was able to express himself firmly and forcefully. We find that although Mr Swain may have questioned the wisdom of pleading guilty to those charges, ultimately he accepted counsel's advice that it was an appropriate course to take. Mr Swain effectively conceded as much in cross-examination before us. Tactically it was a sensible matter to take that issue away from the jury's consideration.

[32] Mr Swain also criticised counsel for failing to pursue a submission to the jury that, if he had wanted to murder Mr Hansen, he had the cyanide available and would have used it to kill Mr Hansen rather than shooting him. Mr Winter could not recall the suggestion being raised. Even if it had been raised the sensible advice would have been not to pursue such a proposition in the defence closing. The proposition only needs to be stated to highlight the difficulties that such an approach would have caused the defence. It would have invited the jury to find that, while Mr Swain was capable

of murdering Mr Hansen, he would have done it in a cleaner way. This was more likely to prejudice Mr Swain than to help him. Counsel are not required to raise every detail the defendant may wish to cover in a closing address.[10] Counsel must tailor their address to the circumstances of the case and the evidential issues raised.[11] Counsel satisfied that requirement in the present case.

Closing address

[33] Mr Swain next criticised another aspect of Mr Winter's closing address to the jury. He submitted that Mr Winter told the jury that Mr Swain would be willing to be convicted of murder. What counsel said was:

> [120] … And it's really important also, in my submission members of the jury, to remember the context that these two people operated within. It's not the sort of rules that most of us operate by. They operate and live in a different world.
>
> [121] Neil Swain has told you he would rather be convicted of murder himself than name those who are responsible for Whetu Hansen's death. That was the effect of his evidence on Friday. That he would rather be convicted of murder himself than name those that are responsible for Whetu Hansen's death.
>
> [122] Now I accept that in any normal sort of society that would make no sense at all. But in theirs, in my submission, it makes perfect sense. And when Neil Swain explains that position by saying "I don't want to be the next victim thank you". That statement rings true. Neil Swain moves at least some of the time in circles where nark is a very dangerous label. And he was at pains to tell you on Friday that he has never done that. …

[34] What Mr Winter put to the jury in closing was Mr Swain's evidence. The defence had to explain why Mr Swain would not tell the police or counsel who the people in the Japanese car were even though he knew where both lived and knew the name of one of them. The only explanation could be that Mr Swain's life was at risk if he disclosed the information. Counsel dealt with this difficult issue appropriately by facing up to it and seeking to explain Mr Swain's position in a way the jury would understand.

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10 *Ross v R* [2017] NZCA 587 at [46].
11 *E (CA113/2009) (No 2) v R* [2010] NZCA 280 at [27].

Cross-examination of Ms McKay and Mr and Mrs B

[35] Ms McKay was Mr Swain's former partner. The evidence that she and Mr and Mrs B gave was largely exculpatory for Mr Swain, at least to the extent that they confirmed he told them he was not responsible for Mr Hansen's death. Mr and Mrs B said Mr Swain stayed with them for a few nights. He told them the deceased had turned up at his property injured but had refused an ambulance and left with another person. Ms McKay's evidence was to similar effect. She said Mr Swain told her that Mr Hansen was fatally wounded when he came to his property, but refused an ambulance and died in Mr Swain's arms.

[36] Mr Swain now says counsel should have cross-examined Ms McKay and Mr B to attack their credibility based on various intercepted phone calls. After Mr Swain was remanded in custody, Mr and Mrs B assisted Ms McKay with overseeing Mr Swain's property. In one call Mr B indicated he knew nothing about what happened to Mr Hansen. In another call Ms McKay and Mr and Mrs B discussed selling property belonging to Mr Swain. Mr Swain also referred to Ms McKay reportedly wanting someone to burn the property down for the insurance money.

[37] Although Mr Swain raises a number of points about Mr and Mrs B and Ms McKay's evidence on this appeal, Mr Swain's written instructions to counsel prior to trial were that what Mr and Mrs B said was "generally correct". That was after Mr Swain had an opportunity to hear the intercepts. Mr Swain did not provide written instructions regarding the issue he now seeks to raise. It would, in any event, have been entirely counterproductive. It was a reasonable approach for defence counsel not to seek to attack Mr and Mrs B. The defence had obtained helpful evidence in cross-examination including that Mr Swain had denied any responsibility for Mr Hansen's death. Ms McKay also accepted that Mr Swain had told her that he had not killed Mr Hansen. There were risks in particular involved in an attack on Ms McKay. She may have responded adversely to direct challenges given the volatile nature of her relationship with Mr Swain and the fact they were separated at the time.

Jason Whakarau

[38] Mr Swain says that Jason Whakarau in particular had a reason to kill Mr Hansen. A number of years earlier Mr Whakarau had been shot in the leg by Mr Hansen. Mr Swain says counsel should have called Mr Whakarau and pursued a submission to the jury that Mr Whakarau could have killed Mr Hansen.

[39] Mr Swain seeks to rely on statements from Aroha Smith, Wayne Lepper and Michael Davis to support his argument that Mr Whakarau may have killed Mr Hansen. Neither Ms Smith nor Mr Lepper have provided signed statements.

[40] Ms Smith was interviewed by Senior Constable Strachan. She told the Senior Constable that she had been told by a cousin that Mr Whakarau killed Mr Hansen. That is inadmissible hearsay. Mr Lepper was apparently a good friend of Mr Hansen. He told police he had heard "rumours" that Mr Whakarau had murdered Mr Hansen. That evidence is inadmissible hearsay as well.

[41] Of more potential relevance is the evidence of Mr Davis, who ran a dairy just down the road from Mr Swain's property. Mr Davis was a prison officer. He said Mr Whakarau had come into the dairy on either the weekend of 23/24 November or 30/1 December 2013. He recognised him. He said he saw Mr Whakarau drive off in a Jaguar car.

[42] Mr Whakarau was listed as a Crown witness until shortly before the trial. The defence had the opportunity to have him called. Mr Winter said that on two occasions he sought instructions from Mr Swain regarding the possibility that Mr Whakarau was involved in the murder, but Mr Swain instructed him that Mr Whakarau was not involved. Mr Winter says that ultimately it was agreed Mr Whakarau would not be called.

[43] Mr Swain disputed that Mr Whakarau was not called on his instructions. There is a direct conflict between Mr Swain and Mr Winter on this point.

[44] We accept Mr Winter's evidence and reject Mr Swain's evidence on the issue. We note Mr Whakarau was mentioned in the brief of evidence Mr Swain signed.

There was no suggestion in that brief that Mr Whakarau was in any way involved in the murder. Mr Swain made several amendments to that brief but none in relation to this aspect of it. Further, in one of the intercepted conversations involving Mr Swain, when reference was made to the police looking to speak to Mr Whakarau, Mr Swain was recorded as saying "what the fuck would Jason Whakarau, fuck I thought he was down north somewhere".

[45] A number of facts were admitted by agreement under s 9 of the Evidence Act 2006, including the following passage read out to the Court:

> Jason Whakarau, or known as Jason Phillips, is known to both the defendant and Whetu Hansen. It is not suggested that Mr Whakarau was directly involved in the death of Mr Whetu Hansen, although Mr Whakarau was in the Manawatu area on the 24th of November 2013. On 14 December 2003 at Ashhurst, Mr Hansen discharged a firearm at Mr Whakarau and [sic] wounding him in the leg. Mr Hansen was charged in relation to the incident but the charges were later withdrawn because Mr Whakarau refused to give evidence at trial.

Mr Swain said he was unaware of the s 9 admissions but it is clear he took great interest in his trial and was involved with counsel throughout. He did not raise any issue with counsel at the time that the s 9 admissions were read into evidence. We are sure Mr Swain would have taken objection if the s 9 admission was not in accordance with his instructions. We do not accept that Mr Winter would have permitted that to be recorded as an agreed fact without Mr Swain's instructions. We accept Mr Winter's evidence that Mr Swain instructed defence counsel that Mr Whakarau was not involved in Mr Hansen's murder and that it was agreed he would not be called.

[46] We are satisfied that no issue arises from the failure to call Mr Whakarau and/or Mr Davis. Apart from Mr Davis' evidence, which could support an argument that Mr Whakarau could have been in the general area on 24 November, there is no direct evidence linking Mr Whakarau to Mr Hansen's death. Mr Swain does not suggest he was one of the two men on the property. He makes no mention of the Jaguar car Mr Davis said Mr Whakarau was in. The Whakarau evidence has to be considered against the background that on Mr Swain's own account he knew the two people most likely to have murdered Mr Hansen, who it would seem did not include Mr Whakarau, but refused to disclose their identity.

Failure to call or pursue other witnesses

[47] Mr Simperingham suggested there were a number of other witnesses, considered in turn below, who should have been spoken to by the defence and possibly called.

[48] There are two aspects to the issue of further witnesses. First, to the extent the evidence of these witnesses is sought to be adduced as fresh evidence on this appeal, it does not satisfy the criteria for admission. Fresh evidence for an appeal must be set out in affidavit form.[12] With the exception of Jerry Sua, that requirement has not been complied with. In the absence of that formality there is no basis for the Court to conclude the proposed witnesses would even be available. Mr Swain has sought to introduce the witness statements by attaching unsigned statements or police job sheets attributing statements to the proposed witnesses. That is not an acceptable practice.

[49] Next, even if the requirements for admissibility were met, the statements do not advance Mr Swain's case. There can be no suggestion of an unfair trial through counsel failing to pursue the witnesses when their evidence could not have affected the outcome of the trial. That is apparent from the following discussion of the witnesses Mr Swain proposed should have been interviewed and called.

Jerry Sua

[50] Mr Sua was a friend of Mr Hansen. Mr Sua has provided an affidavit of 13 September 2017 in support of this appeal. His evidence is that he knew three people who wanted Mr Hansen dead but he was not willing to name them. Yet he also says: "If Mr Swain did not kill Mr Hansen, I do not know who did". His evidence is not helpful to Mr Swain.

Peter Akins

[51] Mr Akins was a prison guard in Whanganui Prison at a time when Mr Hansen was imprisoned there. He told Constable Francis on 17 December 2013 that he had found a satellite phone in Mr Hansen's cell which was confiscated and which led to

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[12] Court of Appeal (Criminal) Rules 2001, r 12B; and *Clutterbuck v R* [2017] NZCA 361 at [26].

Mr Hansen being relocated to Waikeria Prison. Mr Akins believed Mr Hansen was then stabbed in Waikeria Prison and that Mr Hansen would one day seek retribution, we infer against him, Mr Akins. Mr Simperingham submitted that trial counsel could have contacted Mr Akins to discuss the matter in an attempt to gather "additional information" that would possibly have led to some helpful evidence. That is entirely speculative.

Shayden Britton

[52] Mr Swain's evidence is that he told trial counsel Mr Britton had the potential to provide helpful defence evidence. Mr Simperingham suggested Mr Britton could give evidence on how many vehicles were in the driveway at Mr Swain's property on the afternoon of 24 November 2013. This could have corroborated Mr Swain's evidence that he had left the property.

[53] Defence counsel were aware of Mr Britton's evidence but, after discussion with Mr Swain they could not see how the evidence of Mr Britton would have advanced Mr Swain's defence. At most Mr Britton says he saw Mr Hansen at the house where the police say he was murdered. Mr Britton had no idea who Mr Swain was. He admitted he had lied to police on previous accounts. He has refused to make or sign a formal statement.

Coreen Prouse (nee) Reuben

[54] Ms Prouse was Mr Hansen's first cousin. She told the police that Mr Hansen had told her at a relative's funeral in 2013 that threats had been made against him from someone in Palmerston North and someone in Whanganui. Mr Hansen apparently brushed them off. The notes of the discussion with Ms Prouse were unsigned. The statement is, like a number of the above statements, inadmissible hearsay.

Jacob Mamea, Jason and Lance Lovejoy

[55] Mr Lance Lovejoy gave a statement to a police officer to the effect that Jacob Mamea was hired by another person to kill Mr Hansen over a drug debt. Mr Lovejoy did not sign the statement. Jason Lovejoy, Mr Lance Lovejoy's son, said

he believed he was followed because of the statement that Mr Lance Lovejoy had made against Mr Mamea. No attempt has been made by Mr Swain's appeal team to obtain affidavit evidence from these proposed witnesses.

Nikki Cunningham, Meriana Love and Monica Dick

[56] Mr Swain asserts that he understood Ms Cunningham would say that the only person she knew who wanted to kill Mr Hansen was Mr Sua. Ms Love and Ms Dick apparently made a 111 call concerning Mr Hansen's death.

[57] We consider there is force in Mr Lillico's submission for the Crown that Mr Swain's criticisms of trial counsel for failing to pursue the various "leads" or to call people as witnesses suffer from the following difficulties:

(a) It is contrary to Mr Swain's refusal to name the people who, on Mr Swain's own case, were most likely to have been involved in the murder.

(b) Mr Swain has not asserted that any of the people were at his property the day that Mr Hansen was killed. There is no other independent forensic evidence that supports the suggestion that anyone other than Mr Swain killed the deceased. No evidence has been offered to challenge the conclusions of the forensic evidence led at trial.

(c) The evidence is not cogent. A number of the expressed motives are vague. The fresh evidence is in a number of instances hearsay. With the exception of Mr Sua's affidavit, which does not assist Mr Swain, no attempts have been made by counsel on this appeal to convert the material into an evidential form which would be of assistance to this appeal.

[58] We reject the criticism of defence counsel for failing to investigate a parade of witnesses who supposedly might have been able to give evidence about persons who might have had a motive to harm Mr Hansen. The evidence is either inadmissible,

lacks cogency, or both. We decline Mr Swain's application to adduce this evidence on appeal.

Nathan Anderson

[59] After trial Mr Winter found a note from Nathan Anderson on his file. He accepted Mr Swain must have given him the note prior to trial. The note was:

> Raymond [Hessell] offered me money on more than one occasion to take care of Whetu [Hansen] or to find out [where] he was. [Hessell] was extremely angry with [Hansen] over a deal with a Mustang. From what [Hessell] told me it was [Hansen] had [sic] ripped him off on [some] deal to do with the car.

[60] Mr Swain says he was given the note while he and Mr Anderson were both in prison. Mr Winter accepted that he overlooked speaking to Mr Anderson.

[61] Mr Swain made no reference to Mr Hessell in his extended brief of evidence prepared for trial. There is no suggestion Mr Anderson took the matter any further. Nor is there any suggestion that Mr Hessell was one of the two people in the Japanese car. Again no steps have been taken to obtain any further evidence from Mr Anderson for the purposes of the appeal. Mr Winter's oversight in relation to the note has had no impact on the fairness of the trial. Mr Anderson's evidence, like that of the other proposed witnesses, would not have advanced Mr Swain's defence in any material way. The fact he was not called does not establish a miscarriage of justice.

Cross-examination of Mr C

[62] Mr C was an important witness for the Crown. On the Crown case he was the first person Mr Swain spoke to after Mr Hansen's death. Mr C gave evidence that Mr Swain admitted to him that he had killed Mr Hansen. Mr Simperingham submitted that the defence cross-examination of Mr C and the challenge to his evidence overall was inadequate.

[63] Mr Simperingham first submitted that counsel failed to properly pursue the issue of Mr C's computer. He submitted the computer was a significant piece of evidence. Mr Swain considered the computer would hold evidence of Mr C's criminal activities which would have severely damaged his credibility. Mr Swain says that he

had seen Mr C use his computer to show him how to do illegal things and Mr C emailed him links to websites to purchase illegal things such as weapons. The police did not seize Mr C's computer. Mr Simperingham accepted that Detective Wilson was questioned about Mr C's computer but submitted the cross-examination was not taken far enough.

[64] We consider the criticism of counsel on this issue is overstated, as is the significance of what an analysis of Mr C's computer might have disclosed. Defence counsel had Detective Wilson accept that he was not aware of the contents of the computer ever being analysed and Mr C admitted purchasing and selling firearms.

[65] Mr Simperingham next argued that a Graeme McGrath and Ronald and David Alden could have given evidence about Mr C's dealings with a Toyota Hilux Surf and other items of equipment which would have further damaged Mr C's credibility.

[66] David Alden could have given evidence that in 2013 he loaned his Hilux to Mr C who had re-registered and changed the plate without authority and had then sold the Hilux to Mr McGrath in May 2014.

[67] Mr Simperingham suggested that the evidence would have shown Mr C capable of lying while giving evidence. Mr Antunovic did cross-examine Mr C about the Hilux. It was put to him that he had seized the opportunity to take the Hilux and to make more dishonest financial gain from it. Mr C denied it, but Mr Antunovic extracted from Mr C that he had sold the Hilux on after he had been given it by a man who went to prison.

[68] The significance of these issues was the impact on Mr C's credibility. But Mr C's credibility was challenged very effectively by Mr Antunovic's cross-examination. Mr C was directly cross-examined by Mr Antunovic regarding his previous convictions on two occasions. Mr Antunovic established Mr C had convictions for dishonesty, theft and fraud between 1977 and 1979, for unlawful possession of firearms and assaulting a child during the 1980s, for failing to advise a change in circumstances entitling him to ACC payments he was otherwise not entitled

to in the 1990s and 22 charges of obtaining by deception in 2003. Mr Antunovic effectively obtained Mr C's acceptance of those convictions, including for dishonesty, before making the point that the big fraud he was "committing this decade" was his evidence in the case before the jury.

[69] The cross-examination of Mr C must be considered as a whole. Counsel's cross-examination of Mr C effectively challenged his credibility and reliability. The cross-examination laid the groundwork for a strong submission attacking Mr C's credibility. As this Court has said, an appeal is not an occasion for a minute dissection of whether aspects of the cross-examination could have been dealt with differently or better.[13] We are satisfied counsel properly cross-examined Mr C on relevant aspects sufficiently to put his credibility and reliability in issue before the jury.

Mode of evidence application

[70] Mr Swain next criticised defence counsel for agreeing to the Crown application for alternative modes of giving evidence in relation to Mr and Mrs C in particular. Mr C's evidence was ultimately taken by way of AVL link from hospital. Mr C was critically ill at the time. It is inevitable that the application would have been granted for him in the circumstances. Mrs C also gave evidence by way of AVL. Her application would also have been granted. There is no presumption either way, for or against the use of alternative means of giving evidence. The considerations under s 103 of the Evidence Act are broad enough to have supported the decision to permit evidence to be given by an alternative means in this case for both Mrs C and Ms McKay.

[71] Ms McKay gave evidence from behind a screen. Given she was Mr Swain's estranged partner it is extremely likely her application would have been granted as well, even if opposed.

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13 *Michaels v R* [2014] NZCA 258 at [49].

Mistrial application

[72] Mr Simperingham next submitted trial counsel erred by failing to apply for a mistrial when evidence was led of Mr Swain's previous convictions.

[73] It was part of the defence tactic to lead evidence regarding Mr Swain's criminal conviction for bombing the Sydenham Police Station. A reason had to be provided to explain to the jury why Mr Swain had not contacted the police when, on his evidence, he first found Mr Hansen's body at his property. The evidence was led from one of the first police witnesses. Later, while reading his brief of evidence, Detective Wilson also gave evidence of the conviction. Unfortunately the Detective's evidence went further. He said he:

> [B]ecame aware that [Mr Swain] had serious violence convictions, in particular convictions for the bombing of the Sydenham Police Station, kidnapping Crown witnesses at gunpoint and burning their respective properties.

The Detective also later referred to an extensive criminal history for "extreme violence" and the use of weapons.

[74] Mr Simperingham submitted that defence counsel should have applied for a mistrial. Mr Winter was cross-examined on the point. Mr Winter accepted that it was an oversight on his part not to prevent Detective Wilson from reading that section of his brief. But by the stage the evidence was given there was nothing that could be done. He said consideration was given at the time as to whether to apply for a mistrial but at that stage both he and Mr Antunovic felt that substantial inroads had been made into the Crown case and the decision was made not to apply for a mistrial.

[75] The Judge dealt with the matter in his summing-up:

> [11] So please approach your task in a fair and rational way. I ask you to put aside any feelings of prejudice or sympathy. The evidence may have left you with impressions, whether good or bad, about either the defendant or witnesses you've seen, or indeed even the deceased. It's only natural that from time to time you will have experienced emotional responses to what you've seen and heard. But, when you sit down to deliberate in the jury room, please put those emotions out of your mind.
>
> [12] Usually in criminal trials there is not evidence of a defendant's criminal history. However this case is different. The defence have

> acknowledged Mr Swain's prior convictions, at least in part to explain his nickname Bomber. Now although it may seem obvious, it's important that you do not take those convictions into account in deciding whether Mr Swain is guilty or not guilty of the present charge. He's entitled to be tried only on the evidence adduced in this Court, not by reference to his previous record. So my direction to you is to ignore the evidence you heard about his prior convictions.

[76] Mr Simperingham filed a further memorandum after the appeal, attaching sentencing notes relating to Mr Swain's historical convictions. He submits that the matter was compounded because Mr Swain did not have convictions for some of the offences referred to by Detective Wilson. However, as Mr Lillico pointed out, the previous offences Mr Swain was convicted of and sentenced for at the same time as the Sydenham Police Station incident involved charges of burglary, wilful damage, aggravated burglary, arson, aggravated injury by rendering witnesses incapable of resistance, and possession of a weapon.

[77] An assessment of the impact of the disclosure of prejudicial material about a defendant must always be contextual.[14] The present case had a number of unusual features. The principal parties all had a background of significant criminal activity: Mr Swain, Mr Hansen, and Mr C all had criminal convictions. The defence were open about Mr Swain's conviction for planting an explosive device at a police station. There were numerous references throughout the evidence to dishonesty, drugs, gangs and violence. The jury would have been well-aware that Mr Swain moved in those circles. The reason he gave for not telling the police who the people in the Japanese car were was because he feared for his safety and was not a "nark".

[78] This was a lengthy trial that ran from 27 October until 17 November 2015, so into a fourth week. By the time Detective Wilson gave his evidence towards the conclusion of the Crown case the jury had heard a substantial amount of evidence about criminal activity. The convictions referred to would not have stood out as particularly significant to the jury by that time. Even if an application for a mistrial had been made following Detective Wilson's evidence, we do not consider the trial Judge would have acceded to such an application. A direction was sufficient.

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14 *Edmonds v R* [2015] NZCA 152 at [24].

Conclusion

[79] In summary, in relation to trial counsel competence, none of the issues raised by Mr Simperingham on Mr Swain's behalf either individually or collectively lead us to conclude that there has been a miscarriage of justice in this case.

Directions

[80] Mr Simperingham next criticised the Judge for failing to give directions under ss 122 and 123 of the Evidence Act. He submitted a direction as to reliability under s 122 should have been given, and a direction as to mode of evidence under s 123 was required.

[81] Section 122 provides that if, in a Judge's opinion, any admissible evidence may nevertheless be unreliable the Judge may warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it. Even if a judge decides to give such a direction it is not necessary to use a particular form of words in giving the warning.[15]

[82] Some Judges might have given an express and tailored direction regarding Mr C's evidence. The issue is whether Brown J's failure to do so has led to a miscarriage. We do not consider it has. The challenge to Mr C's evidence was clearly before the jury. Mr Winter said in closing:

> … when informant turned to witness Mr [C]'s mind turned to what is in it for me. And there is no doubt about that. And he certainly wanted to make sure that he wasn't gonna be charged with anything. And no there hasn't apparently been any Solicitor-General's immunity but he said himself he was told "I didn't have to worry about that". Well that's turned out to be true hasn't it?

And later:

> It's my submission that Mr [C]'s evidence takes on many of the characteristics of what rugby watchers know as a rolling maul. He takes bits out, he adds bits in. He takes away and adds because he has to keep it moving forward.

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15 Evidence Act 2006, s 122(4).

And later:

> So Mr [C]'s evidence, in my submission to you members of the jury, is a moveable feast, and a dangerous one. But the worst aspect of it all must surely be that he is a liar. He's a liar about small details, and he's a liar about big details.

[83] When addressing the jury about the defence case, the Judge repeated the points that the defence had made concerning the unreliability of Mr C's evidence. The Judge discussed Mr Winter's attack on Mr C:

> He was the subject of a vigorous attack, described as having confidence bordering on arrogance and being a liar. Metaphors used to describe his evidence were a rolling maul and a moveable feast. Mr Winter focused on a number of aspects of his evidence which were said to be unsatisfactory including the claimed damage to Mr Hansen's watch, the denial that Mr [C] was in possession of Mr Hansen's cell phones on the night of 24 November when they were polling as Ashhurst, the advice to Mr Swain to dispose of the shell cases by throwing them into the river. Mr Winter was also critical of the way in which it was said that Mr [C] responded to statements made by Mr Swain during their taped prison visits, in particular by changing the subject when Mr Swain made a statement that was favourable to himself.

[84] The jury would have been in no doubt that Mr C's credibility was a central issue for them. By repeating defence submissions the Judge underlined the point. We do not consider the failure to provide a more tailored s 122 direction has led to a miscarriage of justice in this case. As this Court said in *Williams v R*, where the competing contentions of the prosecution and defence have been made clear to the jury a direction under s 122 may be unnecessary.[16]

[85] The Judge did fail to give a direction as to mode of evidence, which was required by s 123. In failing to do so, the Judge was in error. However, again we are satisfied that in the circumstances of this case the failure would not have affected the outcome of the trial. There was no miscarriage.

[86] Given Mr C's medical condition the reason for the AVL connection for his evidence would have been apparent to the jury.

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16 *Williams v R* [2017] NZCA 176 at [47]–[48].

[87] This is not a case of a complainant of sexual violation or an alleged victim of violence giving evidence by CCTV or behind a screen. In such a case the direction about the use of CCTV or a screen has some real force and significance. In the present case the jury would have been well-aware that Mr C was not capable of attending Court to give evidence. It would not have been at all surprised at his evidence being given by AVL. Mrs C and Ms McKay's evidence, although also given by alternative means, was not of the same moment as Mr C's evidence. In their case the failure to give a direction could only have prejudiced Mr Swain if the jury had ignored all the Judge's other directions about the case. The Judge gave clear directions as to prejudice and sympathy.[17]

[88] Further, in the context of this case and the nature of the evidence before the jury, including the way Mr C in particular responded forcefully to cross-examination, there is no risk that the jury may have taken anything against Mr Swain because the witnesses gave their evidence by alternative means.

The difficulties with the AVL connection

[89] Mr Simperingham noted that there were issues with the AVL facilities, particularly during the evidence of Mr C. The connection cut out on occasions during the course of Mr C's evidence-in-chief and cross-examination. Mr Simperingham identified two examples in particular. First, where Mr Antunovic was pressing Mr C about possession of Mr Hansen's phone, and second, where Mr Antunovic was questioning Mr C about his dealing in firearms.

[90] The defence argument was that Mr Swain had left Mr Hansen's cell phones with Mr C and that explained why the phones were polling from the Ashhurst area on the night of 24 November. Mr C suggested Mr Swain had other dodgy mates in Ashhurst and that explained why Mr Hansen's phone was polling there on the night of 24 November. Mr Simperingham submitted that before the failure of the AVL link Mr Antunovic had spent a number of minutes of cross-examination building up to the climax to make the point before the jury that Mr C had lied in order to help himself to

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[17] See for example the passage reproduced above at [75].

escape possible prosecution. He submitted that when the AVL link cut out it meant the full impact of the line of cross-examination was diminished.

[91] The next point Mr Simperingham relied on related to the guns Mr C had sold to Mr Swain. During the cross-examination of Mr C on the sale of guns there were a number of failures of the link. Mr Simperingham submitted that following the AVL failure, the issues that had been built to were abandoned and not returned to. There were other examples of the AVL failings.

[92] Mr C's evidence started after a lunch adjournment. He gave evidence that afternoon, the next day and then his evidence was completed on the morning of the following day. There were a number of breaks in the AVL connection which interrupted his evidence. While there were difficulties with the links during Mr C's evidence, the breaks were on the whole very brief.

[93] In respect of both issues that Mr Simperingham raised, the progress Mr Antunovic had made was not affected by the interruption. In relation to the first issue Mr Simperingham referred to, counsel had made the point that Mr Hansen's phone was polling at Ashhurst late on 24 November and into 25 November, long after Mr C said Mr Swain had left his house. Mr Antunovic had also latched on to Mr C's slip in referring to "other" dodgy mates in Ashhurst. The point would not have been lost on the jury. Mr Antunovic was able to complete the cross-examination on the point when the link was restored.

[94] In relation to Mr C's dealings with firearms Mr Antunovic had seemingly gone onto another topic before the interruption. By that stage Mr C had conceded that he might have told police he had sold Mr Swain some three pump-action shotguns. Mr C had also accepted that he had refused to answer counsel's previous questions about this because he had forgotten selling the shotguns to Mr Swain. He did not want to be prosecuted. Mr C admitted selling six shotguns to Mr Swain. Mr C also accepted that he had previously fitted silencers and had sold .22 rifles to Mr Swain. Mr Antunovic had put to Mr C that he had been involved in providing the .22 rifle that had been found on the back of the ute with Mr Hansen's body.

[95] Although the link was lost at times, when the link was re-established counsel was able to conclude cross-examination. The cross-examination of Mr C was concluded on the final morning without interruption.

[96] Having reviewed the transcript of Mr C's evidence in its entirety we are satisfied that the interruptions did not affect the cross-examination or the impact that Mr Antunovic's cross-examination of Mr C would have made before the jury. While the technical issues with the AVL links were unfortunate, they were not such as to have led to miscarriage.

The sentence appeal

[97] The sentence appeal is pursued on the sole ground there should have been no uplift to the MPI for Mr Swain's prior offending.

[98] In arriving at the MPI of 14 years, the Judge noted that the Crown contended for a MPI of 14 to 16 years as appropriate taking into account the other charges[18] and Mr Swain's previous convictions.[19]

[99] Brown J considered the circumstances of the killing, namely the shooting of Mr Hansen in the cab of his ute a number of times, justified a MPI of at least 11 years.[20] The Judge then took into account Mr Swain's subsequent conduct and added one further year for that.[21] Next, the Judge added a further year to reflect previous serious convictions and finally added an uplift of one further year to take into account the additional seven convictions.[22]

[100] Mr Taylor accepted the 11-year starting point and acknowledged there needed to be an uplift for the additional offences and the way that Mr Swain had acted after

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18 In addition to the sentence for murder Mr Swain was for sentence on seven other charges:
(a) unlawful possession of a pistol;
(b) four charges of unlawful possession of explosives;
(c) possession of a hazardous substance, namely cyanide; and
(d) storage of a hazardous substance, namely cyanide, in breach of the Hazardous Substances and New Organisms Act 1996.

19 *R v Swain*, above n 1, at [18].

20 At [20].

21 At [25].

22 At [31].

the killing, but challenged the uplift of one year for previous convictions. He submitted that the convictions were historic and did not support an uplift of one year.

[101] This Court has said on a number of occasions that, in an appeal against sentence, the focus should be on whether the end sentence was available to the sentencing court rather than how it was calculated.[23]

[102] In this case, given the circumstances of the killing, the way Mr Swain treated Mr Hansen's body after he had killed him, the efforts he went to after the killing to disguise his involvement, his continued refusal to say where he disposed of the body, and the additional charges, a MPI of 14 years was readily available to the Judge, even without having regard to the previous convictions. With the multiple gunshots, and the abuse of the body during attempts to dispose of it and to cover up the killing, this was a callous murder. The additional charges added to that culpability, including as they did possession of explosives, a rifle and ammunition and cyanide. When regard is had to those factors, a MPI of more than 14 years would have been open to the Judge.[24]

Result

[103] The application to adduce further evidence is declined.

[104] The appeal against conviction is dismissed.

[105] The appeal against sentence is dismissed.

[106] To protect their identities we make an order prohibiting publication of the names, addresses, occupations or identifying particulars of witnesses Mr and Mrs C pursuant to s 202 of the Criminal Procedure Act 2011.

Solicitors:
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Crown Law Office, Wellington for Respondent

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23 See for example *Ripia v R* [2011] NZCA 101 at [15].
24 Sentencing Act 2002, s 86.