IN THE COURT OF APPEAL OF NEW ZEALAND

CA264/2015
[2016] NZCA 329

BETWEEN	SHIVNEEL SHAHIL KUMAR Appellant
AND	THE QUEEN Respondent

CA310/2015

BETWEEN	BRYNE PERMAL Appellant
AND	THE QUEEN Respondent

Hearing:	12 May 2016
Court:	Harrison, Simon France and Woolford JJ
Counsel:	R M Mansfield for Appellant (CA264/2015) P L Borich and I A Jayanandan for Appellant (CA310/2015) M D Downs and Z R Johnston for Respondent
Judgment:	14 July 2016 at 10 am

JUDGMENT OF THE COURT

A The appeals against conviction are dismissed.

B The appeals against the minimum periods of imprisonment are dismissed.

REASONS OF THE COURT

(Given by Harrison J)

Contents

Introduction

[1] Shivneel Kumar and Bryne Permal were found guilty of murdering Shalvin Prasad following a trial before Venning J and a jury in the High Court at Auckland. Both were convicted and sentenced to life imprisonment with a minimum period of 17 years' imprisonment.[1] Both appeal against their convictions and minimum periods of imprisonment.

[2] Mr Prasad's badly burned body was found on the roadside one summer morning. He had earlier been doused with petrol and set alight while he was still alive. Messrs Kumar and Permal were the last people seen with Mr Prasad in the hours preceding his death. The three men were associates.

[3] The Crown ran alternative cases of murder. One was that Messrs Kumar and Permal deliberately killed Mr Prasad by setting him alight knowing he was then alive (the execution case). The other was that before setting Mr Prasad alight they had assaulted him with such severity they believed he was dead and were disposing of his body by burning (the one transaction case). As Mr Downs for the Crown observed, both alternatives alleged premeditated murder. There was only one difference: on the one transaction case Messrs Kumar and Permal intended to kill Mr Prasad by the unlawful act of an assault but their intention was actually effected by the subsequent act of burning.

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1 *R v Kumar and Permal* [2015] NZHC 954.

[4] Messrs Kumar and Permal appeal against their convictions on the common grounds that the Crown could not prove its one transaction case on a correct application of the leading authorities; that Venning J erred in directing the jury there was a sufficient evidential basis to find them guilty of murder on the one transaction case; and that the Judge's directions on the one transaction case were wrong or inadequate. Mr Kumar appeals on the additional ground that the Judge erred in a specific direction about the absence of evidence; Mr Permal appeals on the additional ground that the Judge's directions on his defence of withdrawal from participation with Mr Kumar in Mr Prasad's death were inadequate.

[5] While not challenging their life sentences, Messrs Kumar and Permal both say the minimum period of imprisonment was excessive.

Background

[6] The Crown's case was circumstantial. There were no independent witnesses. Mr Kumar made a limited statement to the police denying all knowledge of or participation in the circumstances leading to Mr Prasad's death. His counsel, Mr Mansfield, accepted at trial that Mr Kumar had lied to the police.

[7] Mr Permal made a lengthy and contradictory statement. He attempted to exculpate himself by incriminating Mr Kumar. Mr Permal said that when they met on the evening before Mr Prasad's death Mr Kumar admitted he had earlier strangled Mr Prasad. Afterwards, he said, he drove Mr Kumar to a service station where he (Mr Permal) bought the petrol used to set Mr Prasad alight and together they travelled to the place where what Mr Permal believed was Mr Prasad's dead body lay on the roadside. He said he told Mr Kumar that he refused to assist in burning Mr Prasad's body.

[8] Both statements were admissible as evidence against their makers but not against the other defendant. Neither man gave evidence at trial but each called expert evidence.

[9] The undisputed facts as particularised by Mr Downs for the Crown are critical and bear full recitation, with reference where appropriate to inferences which the Crown says are available from certain events.

[10] Mr Prasad was in fulltime paid employment and had savings. At all material times Mr Kumar was unemployed. In 2009 Mr Prasad loaned Mr Kumar $7,500 which he did not repay. Eventually Mr Prasad's parents obtained judgment against Mr Kumar for $9,490. In September 2012 they attempted unsuccessfully to serve bankruptcy proceedings on him.

[11] According to text messages exchanged between them in December 2012, Mr Kumar communicated to Mr Permal that "we both need this pay day". On 25 January 2013 Mr Kumar texted Mr Prasad to advise that he had the "big" amount "arranged" and suggested a meeting that evening. Mr Prasad's parents intervened and refused to allow their son to meet Mr Kumar when he visited their house. Mr Prasad arranged directly with Mr Kumar to meet the following evening, 26 January 2013. Mr Prasad waited for Mr Kumar at the designated time and place but Mr Kumar failed to appear.

[12] At 9.20 pm on 29 January Messrs Kumar and Permal met. About 30 minutes later Mr Kumar arranged to meet Mr Prasad who had sneaked out of his parents' house at about 11 pm while they were sleeping. A text message sent by Mr Prasad recorded his expectation of repayment. What transpired at the meeting and whether Mr Permal attended is unknown. But the Crown says subsequent text messages suggest that Mr Kumar persuaded Mr Prasad to withdraw all his savings from a bank account on the promise of an unarticulated benefit.

[13] On 30 January Messrs Kumar and Prasad met in Papatoetoe before travelling together to the ASB Bank in Manukau. While inside the bank Mr Prasad sent Mr Kumar a text message advising on progress in withdrawing $30,000 from his account; Mr Kumar castigated him for sending the message. The Crown says the evidence suggests that Mr Prasad believed his funds withdrawal was a temporary measure.

[14] Messrs Kumar and Prasad arranged to meet after a soccer game that evening. Mr Prasad left home by lying to his father. His expectation was that he would be home by 10 pm because he was on a restricted driver's licence. He apparently expected to meet both Messrs Kumar and Permal.

[15] These material events occurred on 30 and 31 January:

(1) At 9 pm on 30 January Messrs Kumar and Prasad met at Frucor, Mr Permal's workplace. At 9.20 pm Mr Prasad got into Mr Kumar's motor vehicle. Mr Kumar then drove Mr Prasad south towards Drury. Mr Permal followed in his mother's motor vehicle. This was the last time Mr Prasad was seen alive.

(2) At 9.52 pm Mr Prasad sent his father a text message (transmitted by a mobile phone tower in Drury) to say that he would be home by 10.30 pm.

(3) At around 10.30 pm Messrs Kumar and Permal drove to a service station in Papakura in Mr Permal's mother's vehicle. Papakura is about four kilometres north of Drury. Using a $100 note, Mr Permal purchased 15 litres of petrol which he pumped into two stolen cans. CCTV footage showed Mr Permal placing the cans in the front passenger's foot well of the vehicle rather than in the boot.

(4) At 11.27 pm CCTV footage showed Messrs Kumar and Permal in the same car at a different service station in Takanini, about 11 kilometres north of Drury. With a $50 note they bought petrol for Mr Permal's mother's car, cigarettes and a lighter. When at one of the two service stations Mr Kumar handed Mr Prasad's cell phone (with the SIM card removed) to an unsuspecting bystander who was pumping petrol into a car.

(5) At 4.12 am on 31 January a factory reset was performed on Mr Prasad's phone. The Crown says the apparent intention was to

prevent anyone else from accessing his text messages. Shortly afterwards Mr Kumar sent a text message to Mr Prasad, suggesting that Mr Prasad had met with a girl rather than meeting him and Mr Permal as arranged.

(6) At about 6.15 am a member of the public walking her dog in McRobbie Road, Kingseat (west of Drury) found Mr Prasad's body on a bank in an area described as "smouldering". The fire had originated on the roadside below the body's location. According to expert evidence called at trial, the fire might have taken one to two minutes from the time of ignition to reach Mr Prasad's body.

(7) At 9.40 am Mr Kumar deposited $500 in $100 notes into his mother's bank account to which he had access. By 3 pm $14,000 had been deposited into Mr Kumar's parents' bank account. He also used other funds to buy a stereo, new car tyres, more petrol and other items. By the end of the day he had spent nearly $21,000.

(8) Sometime later on 31 January Mr Kumar apparently learned the police were interested in speaking with him. He attempted unsuccessfully to book a flight to South Africa due to depart that evening. He told the travel agent that money was no object.

[16] On 1 February Mr Permal deposited $4,100 to his bank account while Mr Kumar's spending continued. They also vacuumed out Mr Kumar's motor vehicle at a car wash and together got tattoos at an establishment in Newmarket. By then the two had spent or otherwise disposed of $24,937 in two days. On the Crown case, these deposits and payments were all derived from the $30,000 which Mr Prasad had withdrawn from his ASB account.

[17] The police obtained a warrant to intercept communications by Messrs Kumar and Permal. On 11 February they intercepted a telephone discussion between the two men. By then they were aware that they were under suspicion of causing Mr Prasad's death. They discussed how they would react to police inquiries. Among

other things Mr Kumar advised Mr Permal to "remember our excuse", reminded him "there is no proof we burnt it" and encouraged him not to reveal where he worked. Mr Prasad's car had been left at Mr Permal's workplace.

[18] The police phoned Mr Kumar during the conversation. They told him they had found Mr Prasad's mobile phone. When the police call had finished Mr Permal reacted with expressions of concern that they had not successfully disposed of Mr Prasad's phone. Mr Kumar observed to Mr Permal that he would admit knowing Mr Prasad if spoken to by the police. He also expressed his unhappiness about Mr Prasad's text message sent to him from the ASB Bank confirming withdrawal of the money before they met on 30 January. Mr Permal concluded the discussion by noting that Mr Kumar was "the last person that saw him" and suggesting he should not tell the police they had met in the afternoon.

[19] On 14 February Mr Kumar was interviewed by police officers. In determining an appeal against a pre-trial ruling on the admissibility of evidence in this proceeding the Supreme Court summarised in *R v Kumar* what Mr Kumar told the interviewing officers as follows:[2]

> [11] After they arrived at the police station, the detectives organised some food for Mr Kumar. Having confirmed that he wished to be interviewed in English, the detectives commenced Mr Kumar's video interview at 12.49 pm, with Detective Batey acting as the lead interviewer. Mr Kumar said that he and Mr Prasad had met around 10.30 am on 30 January and that he had told Mr Prasad that he and Mr Permal intended to go to the city that evening. Mr Prasad had turned down Mr Kumar's invitation to join them. Mr Kumar said that he and Mr Permal had met up around 9 pm that evening and gone into the city around 11 pm, where they had gone to several clubs. They left the city around 3.30 am on 31 January and stopped at a fast food outlet. Mr Kumar said that he had not seen Mr Prasad since their meeting the previous morning and that he had no knowledge of the $30,000 withdrawn from Mr Prasad's bank account, although he later said that he knew of the withdrawal but had not seen the money. When confronted with the text data and CCTV footage which showed his contact with Mr Prasad at around 9 pm on 30 January, Mr Kumar denied killing Mr Prasad.
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> [12] Towards the end of the interview, the detectives read from parts of the transcript of an audio recording of a conversation between Mr Kumar and Mr Permal in Mr Kumar's car a few days earlier. Mr Kumar said that he wished to listen to the full recording with his lawyer and asked for a lawyer. At that point, shortly after 4 pm, the detectives terminated the interview and arrested Mr Kumar for Mr Prasad's murder.

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2 *R v Kumar* [2015] NZSC 124.

[20] The Crown's uncontested pathology evidence was that Mr Prasad was alive when he was set alight and that his death was caused by thermal injuries. The Crown could not, however, exclude the possibility that he was unconscious. On that premise the defence case was that Mr Prasad may possibly have been in such a deeply unconscious state when he was set alight that another party may have reasonably believed he was then dead.

Crown case

[21] As noted, the Crown's case rested on two alternative factual bases differentiated only by whether Messrs Kumar and Permal intended to kill Mr Prasad by setting him on fire or whether that action was the last step in carrying out a plan to kill him. Mr Downs correctly noted that neither Mr Kumar nor Mr Permal asserts an error in the Judge's summing-up on the execution case alternative or an insufficiency of evidence to support the jury's verdicts on it. That does not, of course, affect the validity of their appeals based on the alternative one transaction case because an inference is available that the jury's verdicts were based upon its acceptance.[3]

[22] On the Crown's one transaction case Messrs Kumar and Permal were guilty of murder under s 167(a) of the Crimes Act 1961 because they caused Mr Prasad's death with the necessary intent to kill him. Its essential elements were that Messrs Kumar and Permal conceived a plan to persuade Mr Prasad, who was naïve and vulnerable to Mr Kumar, to withdraw $30,000 in cash from his bank account; that they were prepared to use force and if necessary kill Mr Prasad to get his money; that while carrying out their plan they assaulted him so severely they mistakenly believed they had killed him; and that they did in fact kill him by the subsequent act of burning him alive.

[23] Mr Kumar was said to be the instigator and driving force behind the plan: he recruited Mr Permal to assist wherever and however necessary to overcome Mr Prasad's anticipated resistance.

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[3] Messrs Kumar and Permal were the beneficiaries of a generous direction from Venning J to the jury that unanimity was required on which of the alternative cases was accepted. Unanimity is not required where the Crown advances an alternative case of murder based on the same facts: *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 293 at [195].

Conviction

Legal principles

[24] The first ground of appeal advanced by Messrs Mansfield and Borich for Messrs Kumar and Permal respectively was that the Crown could not prove its one transaction case according to the prerequisites to criminal liability imposed by the leading authorities.

[25] Counsel referred extensively to the leading authorities on the one transaction deriving from *Thabo Meli v R*, a decision on appeal from the High Court of Basutoland (a British colony renamed Lesotho upon independence in 1966).[4] Its facts require narration because they set the legal framework for the appellants' argument on appeal. Four men had been convicted of murder following a trial before a Judge sitting without a jury. The Judge found that the men formed a plan to lure the victim to a rural location. There they would kill him and fake the cause of death as an accident. In execution of this plan one man rendered the victim unconscious by striking him over the head with a heavy object. The defendants then rolled him over a low cliff believing that he was dead. The defendants dressed up the scene to portray an accident. The victim was in fact alive but died later from exposure while lying in the open. On the evidence led at trial, the Judge was satisfied that the defendants' murderous plan extended to committing all the steps actually taken by them.

[26] On appeal to the Board the defendants sought to draw a conceptual distinction between two different acts committed with two different states of mind. The first act was accompanied by an intention to kill but was not effected; the second act caused the victim's death but was not accompanied by an intention to kill, the defendants acting in the belief that the victim was already dead. Thus the fatal act was inflicted without the requisite murderous intention.

[27] In summarily rejecting this argument of divisible liability, the Board stated that:[5]

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4 *Thabo Meli v R* [1954] 1 WLR 228 (PC).
5 At 230.

> … [the defendants] set out to do all these acts in order to achieve their plan and as part of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law.

[28] While not questioning *Thabo Meli*'s authority, Mr Mansfield emphasised that the trial Court in that case had the benefit of a complete and consistent narrative of a cohesive plan extending to commission of the final and fatal act. He did not suggest that Venning J's directions on the one transaction case were wrong. His submission was rather that the *Thabo Meli* principle did not allow a one transaction case without direct evidence of the murderous plan and all the steps taken in its implementation. The Crown's case did not satisfy that threshold.

[29] Mr Borich developed an argument to the same effect. He focussed on the absence of clear evidence of a preconceived plan and of the events occurring to render Mr Prasad unconscious, submitting by comparison to *Thabo Meli* that the break in time, distance and events and their discontinuous sequence was fatal to the Crown's one transaction case. In his submission, the authorities require clear evidence of a preconceived plan which was absent here. He relied both on *Thabo Meli* and this Court's later decision in *R v Ramsay.*[6]

[30] However, in *Ramsay* the issue was which of a series of violent events caused death, including sequential blows to the victim's head, gagging her and stowing her in a car boot. The defendant was charged with causing death with an intention to kill,[7] or alternatively he was reckless about the consequence of his unlawful acts.[8] His evidence was that his states of mind varied between these acts; he never believed his victim was at risk from the gagging. The trial Judge directed the jury that in accordance with *Thabo Meli* it was immaterial whether the gagging was with murderous intent providing it was satisfied that the defendant's earlier violence was inflicted with that intent. This Court found that the trial Judge erred by failing to direct the jury to satisfy itself on which act or acts did in fact cause death.[9] As this Court recently explained in *Churchis v R*, a direction segregating the acts allegedly

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6 *R v Ramsay* [1967] NZLR 1005 (CA).
7 Crimes Act 1961, s 167(a).
8 Section 167(b).
9 *R v Ramsay*, above n 6, at 1015.

causative of death was necessary as there was an evidential foundation for a submission that the defendant's intention was not the same throughout.[10]

[31] *Ramsay* distinguished *Thabo Meli* on two grounds. One confined it to a charge of causing death with an intention to kill because it was inappropriate to apply the same reasoning to a charge of causing death recklessly where the issue was knowledge of the intended consequences.[11] The other noted that the Crown's case did not assert the defendant acted according to a preconceived plan.[12] Mr Downs submitted that *Ramsay* was wrong in both respects, referring us to powerful scholarly criticism of the judgment,[13] including Professor Yeo's apt observation:[14]

> It is one thing to say that a particular rule will apply if there was a plan and quite another to say that the rule cannot otherwise apply.

[32] In our judgement it was unnecessary to the result in *Ramsay* for the Court to distinguish *Thabo Meli* on either ground. We do not read *Thabo Meli* as obliging the Crown to prove an antecedent plan which when formed extended to and incorporated commission of the fatal act. It just so happened that in *Thabo Meli* direct evidence of a unified or cohesive plan was available from two accomplices.[15] But its relevance was as evidence of the defendants' originating and continuous murderous intention, not as a discrete component of liability. *Thabo Meli* recognises the artificiality in cases where there is a series of events starting with the unlawful act and ending with the act causing death of dividing those events into standalone moments if on the evidence the guilty mind remained constant throughout. That was the very point made elsewhere in *Ramsay*:[16]

> *Thabo Meli*'s case … [is] authority for the proposition that where an intention to kill is established and it is impossible to divide up a course of conduct into separate acts, a crime is not necessarily reduced from murder to a lesser crime, merely because an accused is under some misapprehension for a time concerning the particular result which one of the acts in the series might have.

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10 *Churchis v R* [2016] NZCA 264 at [37]–[39].
11 *R v Ramsay*, above n 6, at 1014–1015.
12 At 1014.
13 Francis Adams "Homicide and the Supposed Corpse" (1968) 1 Otago L Rev 278; Stanley Yeo "Causation, Fault and the Concurrence Principle" (2002) 10 Otago L Rev 213.
14 Yeo, above n 13, at 222.
15 *Thabo Meli v R*, above n 4, at 229.
16 *R v Ramsay*, above n 6, at 1014–1015.

…

> [I]t seems to us that … it may sometimes be useful to view conduct as a whole to ascertain whether there was a *dominating intention running throughout a series of acts* which can fairly be taken as the intention actuating the fatal act …
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> (Our emphasis.)

[33] Without doubt, proof of an antecedent plan incorporating the final act enhances the Crown case; but its absence is not fatal.[17] The criminal law does not impose this degree of abstract refinement. Indeed the English Court of Appeal has disavowed a requirement to prove a preconceived plan. [18] The principles approved in *Thabo Meli* stand without it.

[34] *Thabo Meli* has been cited in other decisions of this Court. In *R v Chignall and Walker* the question was whether the victim was killed at one of two locations and the cause of death was in doubt.[19] *Thabo Meli* was noted as authority for treating a number of successive acts as one murderous transaction animated by the same intent.[20] In *R v Peters and Southon* the issue was not the time, place or cause of death but how death occurred where the Crown advanced alternative cases of murder against two defendants.[21] The Court referred to *Thabo Meli* as authority that a direction on jury unanimity as to the act causing death was not necessary where the various acts are part of a unified plan and the murderous intent is likely to be the same for each causative act.[22] We do not read this latter reference to a "unified plan" as requiring proof in a one transaction case of an antecedent design incorporating all its actual components.

[35] *Thabo Meli*'s authority is beyond question: parties cannot avoid criminal liability simply because they believe mistakenly that they have achieved their objective by one act but in fact achieve it by a later and different act if both acts can be treated as logically successive or connected within the one continuous course of conduct attributable to or motivated by the same murderous intent. Depending upon

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17 *Royall v R* [1991] CLR 378 at 393 per Mason CJ.
18 *R v Church* [1966] 1 QB 59 (CA).
19 *R v Chignall and Walker* [1991] 2 NZLR 257 (CA).
20 At 265.
21 *R v Peters and Southon* [2007] NZCA 180.
22 At [44].

the circumstances, the two acts are treated as one irrespective of ostensible temporal or physical separation. *Thabo Meli* represents an extended and principled application of the criminal law's concurrence requirement.[23] Indeed, in *R v Cooper* the Supreme Court of Canada affirmed that the authority does not depart from the basic premise that the mental element of a crime must overlap with the unlawful conduct:[24]

> The Judicial Committee of the Privy Council concluded that the entire episode was one continuing transaction that could not be subdivided … At some point, the requisite *mens rea* coincided with the continuing series of wrongful acts that constituted the transaction.

[36] We note that the one transaction principle is also supportable on a causation-based approach when the first act committed with murderous intent is treated as the substantial or operating cause of the second or sequential act causing death.[25] It is a variant of the "but for" approach. However, it is unnecessary for us to say more because the Crown's case was not advanced on a causation footing, although the Judge briefly referred to it when directing the jury.[26]

[37] The effect of the appellants' argument is that the Crown's one transaction case should not have gone before the jury because the evidence was not squarely within *Thabo Meli*'s factual scope. They sought to confine *Thabo Meli*'s application within a narrow factual framework. However, the decision is not a statutory code; it is an authoritative statement of principle which justifies the Crown's one transaction case. In particular we do not accept that proof of an antecedent plan by Messrs Kumar and Permal to set fire to Mr Prasad if necessary and to dispose of his corpse is a prerequisite to their criminal liability. Nor do we accept that the Crown was required to prove by direct evidence the time, place and nature of commission of the first unlawful act and its temporal relationship with the second act. The Crown's case was equally provable by the orthodox means of leading indirect or circumstantial evidence from which the necessary inferences of guilt were available to the jury.

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23 Contrast A P Simester and W J Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 136, where the authors describe the decision as "a genuine exception to the concurrence requirement".

24 *R v Cooper* [1993] 1 SCR 146 at 158.

25 *R v Church,* above n 18, at 70–71; *Royall v R*, above n 17, at 393.

26 See [60] of this judgment.

Insufficient evidence

[38] The second ground advanced by Messrs Mansfield and Borich was that there was no evidential basis for Venning J's direction to the jury on the one transaction case that Messrs Kumar and Permal were guilty of murder if they had committed an unlawful act on Mr Prasad preceding his death and that, if so, the act was committed with the requisite murderous intent.

[39] Mr Kumar's defence was built around an assumption that Mr Prasad was rendered deeply unconscious before he was set alight. Mr Mansfield emphasised a total absence of evidence as to where, when, how and by whose hand Mr Prasad was rendered unconscious. The motive relied on by the Crown — that Messrs Kumar and Permal wanted to obtain the $30,000 previously withdrawn by Mr Prasad — was said to be an insufficient foundation from which a jury could safely be asked to infer a murderous intent. Counsel submitted that the Judge erred by not withdrawing the one transaction case from the jury because of this evidential insufficiency.

[40] In Mr Mansfield's submission inferences were equally available from the evidence that (1) Mr Prasad became or was knocked unconscious either by an unlawful act or accidentally as a result of a disagreement or a fight at some time and some other place from where he was burned; (2) Mr Kumar believed he was dead; and (3) Mr Kumar then panicked and sought to dispose of what he believed was a dead body at a time when he could not have had murderous intent unless it had existed at the time of the earlier unlawful act.

[41] Mr Borich proceeded on a different factual premise based upon Mr Permal's statement to the police that Mr Kumar told him he had already killed Mr Prasad by strangulation. In contrast to Mr Kumar, Mr Permal had at least an evidential basis for his positive assertion of a reasonable belief. Mr Borich also referred to what he said was an absence of a proper factual narrative for the Crown case.

[42] Before addressing its merits, we note that the principled basis for this ground of appeal changed once the Judge allowed the one transaction case to go to the jury and verdicts were reached. The challenge must be determined within the different legal framework of whether the jury's verdicts were unreasonable. In view of the

possibility assumed in Messrs Kumar and Permal's favour that the jury found them guilty on the one transaction case, the question is whether the verdicts are unsupportable on the evidence.

[43] Counsels' submissions can best be addressed by reference to the issues identified by the Judge for the jury's consideration. The first discrete issue was whether there was a sufficient evidential basis for the jury to find that Mr Kumar acting alone or jointly with Mr Permal assaulted Mr Prasad after they left Frucor at 9.20 pm on 30 January 2013. In his closing at trial and in written submissions on appeal Mr Mansfield suggested that the Crown could not eliminate the reasonable possibility that Mr Prasad's assumed state of deep unconsciousness when burned alive was caused by an accident.

[44] However, before us Mr Mansfield accepted that the accident hypothesis was unlikely and that the evidence more likely supported a finding that Mr Kumar was responsible, whether acting alone or jointly with Mr Permal, for the act which rendered Mr Prasad unconscious. This concession was appropriate. Mr Mansfield's accident hypothesis was not only speculative but was also divorced from the reality of the surrounding circumstances. The conclusion was inescapable that Mr Prasad's deeply unconscious condition, if it existed, was brought about by Mr Kumar and/or Mr Permal.

[45] We refer particularly to the facts that Messrs Kumar and Permal were the only individuals seen with Mr Prasad in the period leading to his death. They planned the meeting with him that evening. Mr Kumar had apparently persuaded him to withdraw his savings from his bank account. The two men had a motive to rob him; that is, to use violence to deprive him of his funds. They succeeded in obtaining his money. In summing up the Judge noted Mr Mansfield's concession that Mr Kumar was involved "boots and all" in Mr Prasad's death at McRobbie Road. A jury might treat with scepticism a proposition that Mr Kumar would set fire out of panic to a man for whose unconscious condition he had no responsibility. The only inference logically available to the jury was that Mr Kumar and/or Mr Permal were responsible for Mr Prasad's condition, if indeed he was deeply unconscious.

[46] We note that the Judge framed this first issue on the premise most favourable to Messrs Kumar and Permal that they may have reasonably believed Mr Prasad was unconscious when he was set alight. However, this assertion required an inversion of the orthodox process of inferential reasoning. As Mr Downs pointed out, the thesis for Mr Kumar's defence was built on a factual premise for which there was no evidence. Without some plausible evidence to the contrary, the possibility that Mr Prasad may have been deeply unconscious when he was set alight gives rise to the obvious inference that Mr Kumar intended to kill him. Moreover, Mr Mansfield did not refer to any evidence of what was said to be Mr Kumar's reasonable belief that Mr Prasad was then dead. He invited jury speculation instead. This evidential vacuum is independently fatal to Mr Mansfield's argument.

[47] The second discrete issue was whether the jury had a sufficient evidential basis for finding that the unlawful act was committed with murderous intent. The defence thesis that Mr Prasad was so deeply unconscious that a third party might reasonably believe he was dead was a necessary response to the Crown's execution case. But the defence was forced to rely on the same factual thesis in response to the one transaction case, begging the problematic question of what act or acts caused Mr Prasad's deeply unconscious condition.

[48] Mr Mansfield accepted there was evidence of Messrs Kumar and Permal's motive for robbing Mr Prasad. His submission at trial and on appeal supported by Mr Borich was that there was no evidence of the necessary further intention to kill him to achieve their common purpose.

[49] We are satisfied that Dr Garavan's evidence provided the jury with an available answer. In his opinion a person could be rendered unconscious by starving the brain of blood or oxygen. He was unable to find any discernible signs of external violence or of blunt force trauma. The only other available mechanisms for starving the brain of blood or oxygen were forcible compression to the neck or blocking the nose and mouth. In Dr Garavan's opinion it would have required an extended period of time to suffocate Mr Prasad to the point of causing the deep level of unconsciousness postulated by Messrs Mansfield and Borich. The jury was entitled

to accept Dr Garavan's opinion. The inevitable consequence was a finding of murderous intent by the person or persons responsible for the suffocation.

[50] Corroborative evidence of this murderous intent was available from related events. First, Messrs Kumar and Permal purchased a large quantity of petrol for the apparent purpose of burning Mr Prasad's body while he was immobilised — on the Crown case, either in the boot of Mr Permal's mother's car or in Mr Kumar's vehicle. Second, one or both of them set Mr Prasad alight — an act which would consign him to a certain but not immediate death of extraordinary pain if he was still alive — without first ascertaining that he was in fact dead. Third, the conduct of both men on succeeding days was consistent with a total indifference to Mr Prasad's death. Fourth, both men lied to the police, as their counsel conceded at trial, and no issue was taken before us with the Judge's direction that the jury was entitled to take those lies into account when determining guilt.

[51] We add a further factor which might have been obvious to the jury: the inference that Mr Prasad was so deeply unconscious that Mr Kumar and/or Mr Permal reasonably believed he was dead is of itself compelling evidence of their states of mind when inflicting the harm which brought about that belief.

[52] We have referred to the factual premise for Mr Permal's defence based upon his statement to the police. It was plainly open to the jury to reject his exculpatory account, given its contradictory and internally inconsistent nature. He was deeply implicated because he purchased the petrol used to ignite Mr Prasad. He admitted he was present when Mr Prasad was set alight by Mr Kumar. On this evidence alone there was a sufficient factual foundation for the jury to find he participated with Mr Kumar in causing Mr Prasad's death.

[53] In conclusion, we are satisfied there was a sufficient evidential foundation for the jury's finding that on the Crown's one transaction case Messrs Kumar and Permal had assaulted Mr Prasad with murderous intent before setting him alight. Indeed, that finding was inevitable. The argument that the jury's verdicts were unreasonable because they were unsupportable on the evidence must fail.

Series or sequence of events

[54] Messrs Mansfield and Borich submitted that the Judge erred in this direction to the jury:

> [71] … The question for you … is, are you sure that the killing of Mr Prasad by burning him to death was part of the same transaction or sequence of events as the initial assault which rendered him unconscious… If your answer is no, and it is not the same transaction or sequences of events, there is effectively a break in the chain of causation [such that not guilty verdicts should be entered].
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> [72] The fact that there may have been a significant interval of time between the two events does not excuse the accused from liability. The issue is the connection between the two or more events, in this case the initial assault and the subsequent burning. The subsequent burning must be seen by you as directly related to the earlier initial assault in some way, such as for instance, disposing of evidence or a body.

[55] Counsel submitted that the Judge's direction was not only incorrect but incomplete. Mr Borich's primary point was that the Judge inadequately directed on the requirement to prove one singular transaction or a course of conduct with a continuously guilty state of mind. The Judge, he said, not only ignored the delays pointing to a break in the chain of causation but directed the jury to disregard them instead of directing that they pointed towards an acquittal. Mr Mansfield went to similar effect in emphasising a real and significant break between the two transactions which as a matter of logic required separate treatment.

[56] Counsels' arguments reduce to a complaint that the Judge's direction failed to highlight the alleged delay of at least 30 minutes between rendering Mr Prasad unconscious and killing him. However, we are satisfied that the Judge correctly directed the jury that it must be sure Mr Prasad's killing was part of the same transaction or sequence of events as the initial assault rendering him unconscious. He had earlier directed on the requisite states of mind at the times of commission of each act. He was right to point out that a significant interval of time between the two would not of itself excuse Messrs Kumar and Permal from criminal liability. He was right also to advise the jury that it should focus on whether there was a direct relationship between the assault and the killing.

[57] As Mr Mansfield conditionally accepted, an appreciable time difference between the two acts did not absolve either participant from liability, especially where the second act was designed to conceal the commission of the first.[27] The issue is not determined by counting the number of minutes separating the two acts. Nor is it determined by the physical distance between what is said to be the place where the unlawful act was committed and the place of death. The issue, we repeat, is determined by an inquiry into whether the two material acts were sufficiently related to form part of the one continuous transaction such that both can be treated as motivated by the same murderous state of mind.

[58] The Judge's direction satisfied the principled rationale for the one transaction theory. As he pointed out, a party is not excused from liability because he kills somebody in one way when he meant to effect his intention in another way. Where there is no immediate concurrence between the act which is causative of death and the accompanying intention, the question is always whether the unlawful act inflicted with murderous intent and the later act which results in death are so connected or linked that they can be viewed as one transaction. It is artificial to superimpose upon that inquiry a condition directed at the actual time difference or physical separation between the relevant events.

[59] Mr Borich complained about the Judge's reference to linkage between the initial assault and the subsequent burning if it was for the purpose of disposing of evidence or a body. However, the Judge's observation plainly referred to Mr Mansfield's closing submission to the jury that Mr Kumar did not intend to kill Mr Prasad when he was set alight because he thought he was disposing of a dead body. Apart from the fact that this submission was made without any evidence of what Mr Kumar may have believed, the Judge was simply reinforcing for the jury that it must be satisfied Mr Kumar's act of disposing the body by burning was directly related to the earlier unlawful act.

[60] We add that the Judge may have erred in one respect. But this error favoured Messrs Kumar and Permal. Even though the causation-based approach was not advanced by the Crown, the trial Judge referred to "a break in the chain of causation"

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[27] *R v Le Brun* [1992] QB 61 (CA) at 68.

requiring not guilty verdicts if the jury did not find that the two acts were part of the same transaction or sequence of events.[28] Mr Borich emphasised evidence of a causal break. However, as we have pointed out, the *Thabo Meli* principle does not depend on proof of a preconceived plan incorporating causally connected but separate acts.

[61] This ground of appeal asserting a misdirection by the Judge must fail.

Absence of evidence from Mr Kumar

[62] Mr Mansfield challenges the Judge's direction to the jury as follows:

> [128] During the course of his closing address, Mr Mansfield for Mr Kumar, suggested that Mr Prasad could have been rendered deeply unconscious as a result of an accident or by blunt force trauma and that Mr Kumar might reasonably have believed him to be already dead. If that was so, then Mr Kumar could not be guilty of either murder or manslaughter, as he did not intend to kill Mr Prasad at the time the fire was ignited — he thought he was disposing of a dead body.
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> [129] There is no direct evidence as to how Mr Prasad could have come to be in such a deeply unconscious state, by accident, or by blunt force trauma, as submitted by Mr Mansfield. In determining the weight you give to that submission on behalf of Mr Kumar, that the deep unconsciousness was caused by an accident or blunt force trauma (which must have occurred while he was with Mr Kumar) you are entitled to take into account the absence of any evidential foundation that could have been provided by the accused Mr Kumar about that and about the state of Mr Prasad when the petrol was poured over him and the fire was ignited.
>
> [130] I am not suggesting you should draw any adverse inference against Mr Kumar because he has exercised his right to silence. I am simply making the observation in relation to the submission that Mr Prasad was rendered deeply unconscious by accident or by some form of blunt force trauma. I also remind you that the accused does not have to prove his innocence and the fact he did not give evidence does not add to the case against him. It's a matter for you but you must decide the case as I say on the basis of the evidence before you, including the expert evidence referred to by both counsel, and remembering the onus is on the Crown to prove its case beyond reasonable doubt. If you consider there is a gap in the Crown case and the Crown has failed to prove its case beyond reasonable doubt then of course the proper verdicts are not guilty.

[63] Mr Mansfield's argument took in many strands. His essential complaint appears to be that the direction minimised his submission to the jury that Mr Prasad's

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[28] See [36] of this judgment.

alleged deeply unconscious state could have been caused by an accident or blunt force trauma for which Mr Kumar was not responsible. In Mr Mansfield's submission, the direction was not required and might have led the jury to focus on Mr Kumar's decision not to give evidence.

[64] This argument lost some force following Mr Mansfield's concession before us that Mr Prasad's deeply unconscious condition was more likely the result of an act or acts for which Messrs Kumar and Permal were responsible. Also, we note Mr Mansfield's express advice to the Judge at the end of his summing-up that he did not take issue with the contents of his direction on this point. The Judge was entitled to refer the jury to the absence of any evidential foundation for Mr Mansfield's submission.

[65] Venning J could have gone further and made the same observation about Mr Mansfield's submission that Mr Kumar reasonably believed Mr Prasad was dead when he was burned alive. As we have previously noted, without evidence from Mr Kumar about what he saw, thought or did, or independent evidence on the subject, it was purely speculative to suggest that an accident may have caused what was said to be Mr Kumar's deep condition of unconsciousness. Mr Downs highlighted the extent to which Mr Mansfield's closing was built on speculation, exemplified by this passage from his address:

> Now the point of this is that there could have been a fall, an accident, which has resulted in a loss of consciousness. The individuals are panicking believing that Mr Prasad is dead, have placed them in the boot of the car as the Crown promotes or, even before he is placed in the car he is left in a certain position on the ground where his tongue is blocking his airway or he can't breathe. Rather than recover, as a doctor thought might happen with that level of assault, Mr Prasad's condition has got much worse despite a lack of understanding from Mr Kumar and Mr Permal. And certainly if he was placed in the boot of a motor vehicle in those circumstances with his head forced up against the side or in some other position, then that may also affect his ability to breath resulting in him being deeply unconscious or in a coma-like state akin to having been passed away.
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> … It's perfectly logical that if that Mr Prasad had been struck or if he had fallen and hit his head on an object, perhaps due to a fight or a scuffle or fooling around, to the point where he became unconscious, and he wasn't immediately attended to so his airways were blocked, the level of unconsciousness would have got worse to the point where he could pass simply from that.

[66] The Judge's comments were orthodox in a situation where Mr Kumar sought to explain away circumstantial evidence without testifying[29] and without an evidential foundation,[30] classically illustrating when a judge may comment on a defendant's failure to give evidence which is permitted under s 33 of the Evidence Act 2006.[31] Mr Mansfield was given notice of the Judge's intention to direct the jury in this way. Indeed, the defence thesis at trial rendered such a direction inevitable. The Judge made clear that he was not inviting the jury to draw an adverse inference from Mr Kumar's election. We are satisfied that his direction did not have that effect. It was balanced and fair.

[67] Mr Mansfield also suggested that if the Judge was correct in giving this direction then, as a matter of balance, he should also have expressly warned the jury not to speculate or to seek to fill in gaps in the Crown case, in particular the absence of evidence that Mr Prasad was rendered unconscious by suffocation. However, the Judge had expressly warned the jury against speculation. And, moreover, there was no evidential hiatus in the Crown case: Dr Garavan's evidence, which was available for the jury's acceptance, was consistent with a conclusion that if Mr Prasad was indeed deeply unconscious when he was set alight then the likely cause was suffocation.

[68] Mr Mansfield's address did not highlight an evidential gap in the Crown case. It was seeking rather to postulate a theory without an evidential foundation. We cannot see any injustice arising from the Judge's direction.

Mr Permal's withdrawal

[69] Mr Borich submitted that the Judge directed the jury inadequately on Mr Permal's defence of his withdrawal from an early agreement to participate in a murderous attack on Mr Prasad. In Mr Borich's submission, based upon Mr Permal's statement to the police, the Judge failed to tailor his direction to the facts of the case in greater detail. In particular, the Judge should have emphasised Mr Permal's refusals to assist beyond the point of purchasing the petrol; that is, his

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29 *R v Bain* [2008] NZCA 585 at [44(c)].
30 *R v McRae* (1993) 10 CRNZ 61 (CA) at 64.
31 *Mahomed v R* [2010] NZCA 419 at [74].

refusal to pass the petrol to Mr Kumar or to participate in the subsequent acts carried out by Mr Kumar. He said also the Judge should have directed the jury to see the question of withdrawal from Mr Permal's subjective viewpoint rather than on a purely objective approach; that is, the threshold must be lowered to reflect Mr Permal's mistaken belief that Mr Prasad was dead before the fatal ignition.

[70] Venning J's full direction to the jury on withdrawal was as follows:

> [84] That requires you to go on and consider Issue 4 which is the issue of withdrawal. A person who otherwise would be guilty as a party to an offence by a principal offender by aiding and giving them assistance or encouragement, can avoid liability as a party if they effectively withdraw before the offence is committed or complete. But there are a number of requirements and that is what this Issue 4 is directed at. There are a number of requirements for withdrawal. So what you need to consider at this stage is, is it reasonably possible that Mr Permal demonstrated clearly by words and actions to Mr Kumar that he was withdrawing from the offending before Mr Prasad was killed. He says in his statement for instance, he told Mr Kumar, "you're doing it, I don't won't to be part of it" so he's communicated to him he is not wanting to be part of it. And is it reasonably possible Mr Permal took steps to undo the effect of his previous assistance, which in this case is buying the petrol or to prevent the killing? Mr Permal says in his interview that he didn't get out of the car. It is for you. Is that enough. Matter for you. And the next issue for you is it reasonably possible the steps he did take amounted to everything that was reasonable and proportionate having regard to the nature and extent of his previous involvement in the matter. And is it reasonably possible that the steps taken by Mr Permal were timely in the sense that he acted at a time when it was reasonably possible that he may have been able to prevent or able to either undo the effect of his earlier involvement or to prevent the crime? On his statement he communicated his lack of willingness to assist Mr Kumar before the petrol was taken from the car by Mr Kumar.

[71] The defence of withdrawal requires the existence of a joint criminal enterprise whether under s 66(1) or s 66(2) of the Crimes Act. Where one party seeks to raise the defence, he must show both his election to bring his participation to an end and its communication to the other party. Acts of withdrawal cannot have any legal effect where the unlawful act has already been committed with the necessary murderous intent.[32] A defendant relying on a withdrawal has an evidentiary burden of raising sufficient evidence to establish its reasonable possibility.[33]

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32 *Ahsin v R*, above n 3, at [116]–[117].
33 At [120].

[72] Mr Downs submitted that Mr Permal could not rely on a withdrawal defence. That was because the originating unlawful act had been committed when he allegedly refused to participate further. However, on the Crown's one transaction case the offending extended on a continuum to incorporate the later act of setting Mr Prasad alight. The crime was not completed when Mr Permal purported to withdraw. The defence was arguably available.

[73] Nevertheless, assuming the defence was open to Mr Permal, the Judge's direction cannot be faulted. He identified with clarity both requirements for its application: first, Mr Permal's clear demonstration by words and actions to Mr Kumar that he was withdrawing from the offending before Mr Kumar killed Mr Prasad and, second, reasonable and sufficient steps taken by Mr Permal to undo or revoke the effect of his previous assistance whether by participating in the unlawful attack on Mr Prasad or buying the petrol.[34] Contrary to Mr Borich's submission, the inquiry is not directed towards Mr Permal's subjective state of mind. The ultimate question is whether the withdrawing party has done all that is reasonably possible to communicate his election effectively to the other party for the purpose of deterring or discouraging the latter from taking further unlawful steps.

[74] Mr Borich's complaint appears to be that the Judge did not say enough. In our view the Judge could have said more. But it would have only been adverse to Mr Permal's defence. The Judge could have directed the jury to take particular care when considering a self-exculpatory account given by a man who on his counsel's concession had lied to the police. He could have pointed out also that in the circumstances withdrawal would only be effective if Mr Permal had taken active steps to prevent Mr Kumar from setting fire to Mr Prasad's body. Mr Permal was by then deeply implicated in Mr Kumar's criminality. He had purchased the petrol with knowledge of its intended use. Sitting nearby in a car and disclaiming any intention to be part of further violence was insufficient. Inactivity without more is not capable of undoing what has been done if the matters have gone too far.[35]

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[34] At [134]–[138].
[35] At [138].

[75] Finally, the Judge could have pointed out that Mr Permal's conduct in the succeeding days, in particular using for his own purposes some of the money stolen from Mr Prasad, was inconsistent with any purported withdrawal from participation in Mr Prasad's murder. Mr Permal's enjoyment of the proceeds of his crime was an available foundation for a conclusion that he had never withdrawn.

[76] We are not satisfied that the Judge erred in the withdrawal direction.

Conclusion

[77] The cause of Mr Prasad's death was not contested. He died because one or both of Messrs Kumar and Permal set him alight. That fact was in itself compelling evidence of the parties' continuing intention to kill him which originated in the unlawful act of rendering him deeply unconscious. The circumstantial nature of the Crown's case did not detract from its inherent strength. There was a sound and largely undisputed factual foundation for the inferences necessary for the jury to reach guilty verdicts on the one transaction theory.

[78] Both appeals against conviction must fail.

Sentence

[79] Messrs Kumar and Permal accept their sentences of life imprisonment. But each appeals against the minimum period imposed of 17 years. Venning J imposed the sentences on the probability that the offending fell within the one transaction case. In his opinion it was more likely that Mr Prasad was deeply unconscious when Messrs Kumar and Permal poured petrol over and set fire to him. For sentencing purposes he also accepted the reasonable possibility that both men believed Mr Prasad was dead at that time.

[80] Both Messrs Kumar and Permal assert that Venning J erred in finding that the offending satisfied the mandatory provisions of s 104 of the Sentencing Act 2002, directing imposition of a minimum period of 17 years' imprisonment or more. The Judge relied on the cumulative grounds that the murder was committed in an

attempt to avoid the detection for another offence,[36] was committed in the course of another serious offence,[37] and the exceptional circumstances arising from the callousness in burning Mr Prasad alive even though Messrs Kumar and Permal believed he was dead.[38] He declined to separate the mental and physical elements of events because that division would not reflect the overall culpability of the offending.

[81] The Judge measured his finding that s 104 was engaged by enquiring whether a minimum period of 17 years' imprisonment would be manifestly unjust if that mandatory provision did not apply. He found a number of aggravating features. In particular he identified the "severe, deliberate and sustained assault" on Mr Prasad to render him so deeply unconscious; the significance of the harm caused; the effect of a murder of this kind; the joint nature of the enterprise with a plan to rob Mr Prasad of the $30,000 they had persuaded him to withdraw from his bank account; the method of disposal of Mr Prasad's body; and the inhumanity displayed by their actions that night and the spending spree which followed.[39] In his judgement the sentencing purposes of accountability, responsibility, denunciation and deterrence required a sentence very close to or at 17 years' imprisonment.

[82] Messrs Kumar and Permal were aged 18 and 19 respectively when they offended. Venning J declined to distinguish their cases for sentencing purposes or to allow a discount against the 17-year starting point on account of age and lack of previous convictions. He was satisfied that Mr Kumar was the principal offender. He carefully planned and created the circumstances leading to Mr Prasad's death. The Judge placed weight on the facts that Mr Kumar was in denial, gave new and unsustainable accounts about Mr Prasad's death to the probation officer, sought to minimise his own responsibility and was without remorse. There was no suggestion of youthful impetuosity.

[83] The Judge applied the same reasoning to Mr Permal's sentence. He saw no reason to distinguish his case from Mr Kumar. He was satisfied that while

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36 Sentencing Act 2002, s 104(1)(a)
37 Section 104(1)(d).
38 Section 104(1)(i).
39 *R v Kumar and Permal*, above n 1, at [15].

Mr Kumar was the instigator Mr Permal was a full participant. He was actively involved in the days after the event in assisting Mr Kumar to cover up their wrongdoing. It was irrelevant that he received less financial benefit from the offending than Mr Kumar.

[84] In Mr Mansfield's submission, supported by Ms Jayanandan for Mr Permal, the offending did not reach the statutory threshold under s 104 of the Sentencing Act. Instead the Judge should have adopted a starting point of 13 years, reduced by one year for youth and lack of prior convictions.

[85] In our judgement a combination of the individual factors justified the imposition of a 17-year minimum term. In particular, the murder was committed with a high level of cruelty or callousness, satisfying the threshold provided by s 104(1)(e). Two features of this case set it apart. One is the indifference shown by Messrs Kumar and Permal to the inevitability that Mr Prasad would burn to death as a consequence of being set alight if he was still alive. The other is the extreme pain Mr Prasad would suffer if he regained consciousness before dying — they took no steps whatsoever to verify that Mr Prasad was dead before killing him.

[86] We refer also to the significant degree of planning and premeditation, both of the crime itself and of the means of killing Mr Prasad. Messrs Kumar and Permal purchased petrol for the specific purpose of setting Mr Prasad alight. To that extent, it was an act of cold-blooded cruelty and callousness. On the scale of culpability, the circumstances disclose offending of a level of brutality that must trigger the legislative criteria for imposing a minimum term of 17 years' imprisonment.

[87] This leaves only the issue of whether Venning J should have allowed a discount for age and lack of previous convictions. We are not satisfied that he erred. The Judge was well placed to find there was nothing about the offending which might be attributed to the impetuosity or immaturity of youth. The crime was carefully planned and motivated by financial greed. Messrs Kumar and Permal set out to rob a vulnerable associate of his life's savings. Both were fully cognisant of their conduct and its consequences. They cannot expect a discount for their age.

Result

[88] The appeals against conviction are dismissed.

[89] The appeals against the minimum periods of imprisonment are dismissed.

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