NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF THE NAME AND IDENTIFYING PARTICULARS OF THE WITNESS REFERRED TO AS MR SMITH AND HIS EVIDENCE REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA276/2016
[2017] NZCA 552

BETWEEN	LEONARD GUS NATTRASS-BERGQUIST Appellant
AND	THE QUEEN Respondent

CA407/2016

BETWEEN	BEAUEN DANIEL GEORGE WALLACE-LORETZ Appellant
AND	THE QUEEN Respondent

Hearing:	1 August 2017
Court:	Cooper, Brewer and Peters JJ
Counsel:	M S Gibson for Mr Nattrass-Berguist J S Kovacevich and V J Feyen for Mr Wallace-Loretz K S Grau for Respondent
Judgment:	4 December 2017 at 11.30 am

JUDGMENT OF THE COURT

A The application for an extension of time in which to file the notice of appeal is granted in CA407/2016.

B The appeals against conviction are dismissed.

REASONS OF THE COURT

(Given by Peters J)

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Introduction

[1] Following a trial before Toogood J and a jury in April 2016, the appellants, Mr Nattrass-Bergquist and Mr Wallace-Loretz, were each convicted of the murder of Ihaia Gillman-Harris, aggravated robbery and unlawfully taking a motor vehicle.

[2] The Judge sentenced both appellants to life imprisonment on the murder charge and imposed minimum periods of imprisonment of 10 years, nine months in the case of Mr Nattrass-Bergquist and 11 years in the case of Mr Wallace-Loretz.[1] The Judge imposed concurrent sentences on the other charges.

[3] The appellants now appeal against conviction. They allege that a miscarriage of justice has occurred for several reasons. The following grounds are common to both appeals:

(a) the Judge materially misdirected and/or failed to direct adequately on the issue of lies;

(b) the appellants were denied their rights to know the charges against them, and, wrongly, the Crown was permitted to add new charges at trial. By these matters, provisions of the Criminal Procedure Act 2011 (CPA) were not complied with and their rights under s 24 New Zealand Bill of Rights Act 1990 (NZBORA) were breached; and

(c) there were deficiencies in the sheet the Judge prepared to assist the jury's deliberations.

[4] Mr Nattrass-Bergquist additionally submits that a miscarriage of justice occurred because the Judge erred in declining to allow defence counsel to adduce evidence of Mr Gillman-Harris's conviction in 1996 for unlawful sexual connection with a male over 16.

[5] Mr Wallace-Loretz filed his notice of appeal nearly two months out of time. In light of him providing an explanation for the delay, and in the absence of opposition from the Crown, we grant his application for an extension of time in which to file his notice of appeal.

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1 *R v Nattrass-Bergquist* [2016] NZHC 1089.

Background

Crown case

[6] The Crown case was that Mr Gillman-Harris died as a result of head injuries that either or both of the appellants inflicted between 8.15 am and 8.35 am on 27 December 2014.

[7] The Crown alleged that at some time after 2 am on 27 December 2014, Mr Gillman-Harris, aged 54, collected the appellants, then aged 17, and their friend in his car from Pakuranga Mall. Mr Gillman-Harris had a sexual interest in the appellants. Mr Gillman-Harris proceeded to drive the appellants and their friend around Auckland for several hours, during which the appellants developed a plan to rob Mr Gillman-Harris and to inflict injury if it proved necessary to do so. The plan was formed and evidenced by a series of text messages the appellants sent, largely to one another, between 5 am and 6.40 am. The appellants' friend got out of the car at about that time.

[8] To execute the plan, the appellants contrived to retrieve a bat that Mr Wallace-Loretz had left at the Mall before Mr Gillman-Harris picked them up. They also led Mr Gillman-Harris to believe that one or both would participate in a sexual encounter with him for a sum of money. Shortly after 8 am, Mr Gillman-Harris withdrew $400 from an ATM and rented a motel room, both in anticipation of this encounter.

[9] In accordance with their plan, one or both of the appellants assaulted Mr Gillman-Harris, probably with the bat, shortly after entering the motel room. Mr Gillman-Harris sustained four, possibly five, blows to the head, which ultimately caused his death, as well as blows to the body. Also as planned, the appellants stole the cash along with Mr Gillman-Harris's credit card and cell phone, all of which were in the motel room. The location of the stolen items was relevant because the Crown alleged that the appellants not only had the form of murderous intent specified in either s 167(a) or (b) of the Crimes Act 1961 but also the form of intent specified in s 168(1)(a), that is, they caused death while meaning to cause grievous bodily harm

for the purpose of committing robbery or facilitating flight or avoiding detection upon commission of the same.

[10] The appellants then drove away in Mr Gillman-Harris's car. Although emergency services were alerted, Mr Gillman-Harris died later that day, having suffered a cardiac arrest. The appellants presented themselves to the police after learning of his death.

Defence case

[11] The appellants admitted that there had been an altercation in the motel room. However, they disputed that they had caused Mr Gillman-Harris's death and, if that were proved, they disputed that the assault was "unlawful". They claimed that the assault had been carried out in self-defence, within the meaning of s 48 of the Crimes Act, which provides:

> **48 Self-defence and defence of another**
>
> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

[12] Mr Wallace-Loretz did not give evidence at trial, but in his evidence at trial Mr Nattrass-Bergquist said that he believed the three were going to the motel room to sleep. He was shocked when, once inside the room, Mr Gillman-Harris started to play a pornographic movie on his laptop. For reasons he explained, Mr Nattrass-Bergquist found this offensive and he stopped the movie. Analysis of the computer was consistent with this evidence.

[13] Mr Gillman-Harris, a much larger man than either appellant, then commenced a sexual assault on Mr Nattrass-Bergquist by pinning him to the bed and touching his genitals.

[14] Mr Nattrass-Bergquist said that Mr Wallace-Loretz came into the room, saw the pair struggling on the bed, and tried to remove Mr Gillman-Harris from Mr Nattrass-Bergquist. A tussle between the three ensued. Mr Gillman-Harris again pinned Mr Nattrass-Bergquist down until Mr Wallace-Loretz hit Mr Gillman-Harris

twice on the head with a bottle of spirits that Mr Gillman-Harris had brought into the motel room. As a result of the blows to the head, Mr Gillman-Harris fell. He apologised to the appellants and told them to leave. Terrified of Mr Gillman-Harris, the appellants drove away in his car. Mr Nattrass-Bergquist claimed they later found the cash in a bag under the driver's seat of Mr Gillman-Harris's car.

[15] The appellants thus contended that Mr Wallace-Loretz struck Mr Gillman-Harris in defence of Mr Nattrass-Bergquist and that the force used was reasonable in the circumstances as Mr Wallace-Loretz believed them to be. Mr Nattrass-Bergquist said the appellants did not plan to rob, injure or kill Mr Gillman-Harris. In support of this, he referred to evidence that Mr Gillman-Harris had tried, unsuccessfully, to obtain a room at another motel before he withdrew the cash. The text messages on which the Crown relied were said to be statements of youthful bravado and not to be taken seriously. References in the texts to a "bat" were in fact references to a bottle. No bat had been retrieved from the Mall, let alone taken into the motel room. Rather, Mr Wallace-Loretz had hit Mr Gillman-Harris with the bottle of spirits as described above.

First ground of appeal — lies direction

Submissions

[16] Mr Gibson submitted for Mr Nattrass-Bergquist that the Judge was required to warn the jury of the matters referred to in s 124(3)(b) and (c) of the Evidence Act 2006 because there was the potential for the jury to interpret aspects of Mr Nattrass-Bergquist's evidence as a lie and, from there and without more, to conclude that he was guilty. Mr Gibson submitted that the Judge did not warn the jury of all the requisite matters and that a miscarriage of justice arose as a result.

[17] In his written submissions on appeal, Mr Gibson submitted that the jury may not have accepted Mr Nattrass-Bergquist's evidence of the circumstances in which he believed himself to be in the motel or may not have accepted that Mr Gillman-Harris apologised to the appellants.[2] In separate written submissions and in his oral

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[2] Although Mr Gibson also referred to evidence from Mr Nattrass-Bergquist that Mr Gillman-Harris told the appellants to take his car, Mr Nattrass-Bergquist did no more than say it was possible that Mr Gillman-Harris had done so.

submissions, Mr Gibson also submitted that it was open to the jury to accept Mr Nattrass-Bergquist's general narrative of self-defence even if they accepted the submission to them in closing from the Crown prosecutor, Mr Johnstone, that Mr Nattrass-Bergquist had lied on collateral matters, such as references to a bat in the text messages being references to a bottle, the number of blows struck to Mr Gillman-Harris's head, whether the blows were struck with a bat or bottle, and whether the appellants took the stolen items from the motel room or the car.

[18] Mr Gibson submitted that, because of these matters, it was essential that the Judge directed the jury correctly on the issue of lies, but the Judge did not do so.

[19] The relevant part of the Judge's summing-up is as follows:

> [199] Now, in responding to that circumstantial evidence and in drawing inferences and conclusions from what happened in the motel, you will want to give central importance to [Mr Nattrass-Bergquist's] evidence. And the proposition that is put to you, which is right, is that you have to be sure he's lying to you. You have to be sure that he was not telling the truth before you can convict either of these young men of murder. Because when a witness gives evidence … and you're trying to determine their truth and credibility, you may or may not accept what they say … . You may take some parts of a witness's evidence as true and you might reject others, that's a proper thing. …
>
> [200] But when a defendant gives evidence it's a different proposition because if you accept what [Mr Nattrass-Bergquist's] said — if you think it's true — then that really puts self-defence right at the forefront doesn't it? It means that there was no plan. It means that Mr Gillman-Harris over-reacted and it means that [Mr Wallace-Loretz] came to his aid. It doesn't answer the question about reasonable force but it certainly answers all the questions about the fundamentals of the Crown's case as to how this was a planned and executed event. So if you accept what he says, if you believe what he said then that takes you a very long way down the track to acquittal, certainly of him — certainly of him.
>
> [201] Another possibility, of course, is that you're not sure whether you believe him. He might be telling the truth. He doesn't have to prove it but he might be telling the truth — it's reasonably possible. If that's your view then, again, the Crown has not discharged the burden of proving beyond reasonable doubt its allegations that this is just all made up. *It's only if you come to the conclusion that [Mr Nattrass-Bergquist] has lied to you in his evidence that you can say the Crown's case is looking a lot stronger. Because if a defendant lies to you in the course of giving their evidence — on the central issue — and you reject that, then you're entitled to conclude that there is real strength in the Crown's case; if there is other evidence which supports it.* And the Crown says, "Of course, there's other evidence, you've got the texts and all of that, what happened". So you need to approach it in that way because you will have to come to views. … And I stress that if you're left in any doubt about

> whether his account is true then that is against the Crown because the Crown will not have satisfied you beyond reasonable doubt that this was just a made up story.
>
> (Emphasis added.)

[20] Mr Gibson submitted that, read as a whole, these passages represented a "significant departure" from the direction required by s 124(3) of the Evidence Act. Mr Gibson emphasised particularly the statement by the Judge in [201] that the Crown case was "looking a lot stronger" if the jury concluded that Mr Nattrass-Bergquist had lied in giving evidence and the Judge's failure to warn the jury that they should not necessarily conclude that Mr Nattrass-Bergquist was guilty just because they considered he had lied to them.

[21] The relevant parts of s 124 of the Evidence Act are as follows:

> **124 Judicial warnings about lies**
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> (1) This section applies if evidence offered in a criminal proceeding suggests that a defendant has lied either before or during the proceeding.
>
> (2) If evidence of a defendant's lie is offered in a criminal proceeding tried with a jury, the Judge is not obliged to give a specific direction as to what inference the jury may draw from that evidence.
>
> (3) Despite subsection (2), if, in a criminal proceeding tried with a jury, the Judge is of the opinion that the jury may place undue weight on evidence of a defendant's lie, or if the defendant so requests, the Judge must warn the jury that—
>
> (a) the jury must be satisfied before using the evidence that the defendant did lie; and
>
> (b) people lie for various reasons; and
>
> (c) the jury should not necessarily conclude that, just because the defendant lied, the defendant is guilty of the offence for which the defendant is being tried.

[22] Section 124(3) requires a Judge to warn the jury of the matters listed if a defendant so requests or if the Judge considers the jury may place undue weight on evidence of a defendant's lie. Although Mr Gibson did not at the trial request the Judge to warn the jury, he submitted to us that the Judge was required to do so, given his statement to the jury that the Crown case was looking a lot stronger if the jury

concluded that Mr Nattrass-Bergquist had lied. Mr Gibson submitted that such a warning would have struck a balance between the jury treating a lie as circumstantial evidence of guilt and the "human tendency" to conclude that a defendant is guilty because he or she has lied.

[23] Mr Gibson also submitted that the Judge's remarks were deficient because he did not identify the possible lie or lies to which he was referring and therefore the direction was not tied to the facts of the case.

[24] In support of these submissions, Mr Gibson referred us to decisions of this Court in *McLaughlin v R* and *R v Khairati*.[3] In *McLaughlin*, the prosecutor had emphasised to the jury that Mr McLaughlin admitted lying to the police as to his whereabouts on the relevant day. This Court said that the failure to warn the jury in terms of s 124(3)(c) had the potential to give rise to a miscarriage of justice. In *Khairati*, this Court was critical of the Judge's direction on lies because the Judge did not identify the particular lies in issue or connect the lies relied upon to the facts of the case.

[25] In response to these submissions, counsel for the Crown, Ms Grau, submitted that a lies direction is not required if a defendant is said to have lied in giving an exculpatory explanation in evidence at trial. Ms Grau submitted that is what occurred in the present case when, in his closing remarks, Mr Johnstone submitted to the jury on several occasions that they should reject Mr Nattrass-Bergquist's evidence to them. Given this, the position was different from a case in which, at trial, the Crown relies on evidence of an "out of court" lie, for instance if a defendant tells the police a lie at the outset and then changes his or her evidence at trial, such as in *McLaughlin*. In the latter case, a direction on the matters in s 124(3) may well be required. There was no "out of court" statement in this trial, by either appellant.

[26] Ms Grau also submitted that the Judge's direction made it clear that the jury needed to be satisfied Mr Nattrass-Bergquist's account was untrue before they placed any weight on it; any doubt on that score was to be resolved in Mr Nattrass-Bergquist's favour; and, even if the jury were satisfied that Mr Nattrass-Bergquist had lied, they

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3 *McLaughlin v R* [2015] NZCA 339; and *R v Khairati* [2017] NZCA 31.

could not rely on that alone to determine that he was guilty of murder. These are all matters that a Judge would address if giving a standard lies direction under s 124(3).

[27] Further, Ms Grau submitted that the Judge's direction did not give rise to a miscarriage of justice, that is, it was not an error that created a real risk that the outcome of the trial was affected. She also submitted that a "conventional" lies direction risked undermining the defence case as it would suggest that Mr Nattrass-Bergquist had lied in his evidence to the jury.

Discussion

[28] For the following reasons, we do not accept Mr Gibson's submission that the directions the Judge gave in [199]–[201] of his summing-up were inadequate.

[29] First, as Ms Grau submitted, a Judge is not usually required to direct a jury as to the matters in s 124(3) if the Crown contends that a defendant has lied in giving an exculpatory explanation in evidence at trial. This appears from *R v O (CA342/06)*, and also *R v Guo*, in which this Court confirmed that such a direction is not required in those circumstances.[4] The statement by this Court in *Guo* that a direction might have been given in relation to a "collateral" lie attributed to the appellant is not relevant here and does not detract from the general principle to which we have referred.[5]

[30] Secondly, we do not consider the Judge made any errors in his summing-up. In [199]–[201] the Judge was referring to Mr Nattrass-Bergquist's evidence as to what had occurred in the motel room, which was the evidence relied upon to raise the issue of self-defence. That is the "central issue" to which the Judge was referring in [201]. The Judge commenced [199] by informing the jury that they would wish to give "central importance" to Mr Nattrass-Bergquist's evidence about what had occurred. In [200] he went on to say that if the jury accepted Mr Nattrass-Bergquist's evidence, self-defence would be at the "forefront" and it takes Mr Nattrass-Bergquist "a very long way down the track to acquittal". The Judge went on to say in [201] that if the jury thinks it is reasonably possible that Mr Nattrass-Bergquist is telling the truth then

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4 *R v O (CA342/06)* [2007] NZCA 87; and *R v Guo* [2009] NZCA 612.
5 *Guo*, above n 4, at [68].

the Crown has not discharged its burden of proving its allegations that the claim of self-defence was fictitious. These directions were correct because what occurred in the motel room was critical.

[31] In saying that the Crown case became a lot stronger if the jury considered Mr Nattrass-Bergquist had lied to them on the "central issue", in large part the Judge was stating the obvious. That is because there was no evidence other than Mr Nattrass-Bergquist's to support a narrative of self-defence.

[32] To the extent the Judge was also referring to the possibility the jury might draw an inference unfavourable to the appellants from a conclusion that Mr Nattrass-Bergquist had lied to them on this issue, we accept Ms Grau's submission that the Judge then warned the jury of the matter in terms of s 124(3)(c). That is, the Judge warned the jury that they should not necessarily conclude guilt on the basis of finding that Mr Nattrass-Bergquist had lied on this issue, because the Judge went on to say in [201] that there would need to be other evidence to support the Crown case, hence the Judge's reference to the text messages and to "all of ... what happened". We accept that the Judge did not say to the jury that "people lie for various reasons", as required by s 124(3)(b). That part of the direction is particularly apposite if the Crown is seeking to rely on an "out of court" lie. Nothing turns on its omission in this case.

[33] Thirdly, although we accept Mr Gibson's submission that it is conceivable the jury might have disbelieved parts of Mr Nattrass-Bergquist's evidence as identified in [17] but still accepted, or been in doubt as to whether, Mr Wallace-Loretz was acting in self-defence, we do not consider the Judge erred in omitting to draw this possibility to the jury's attention. Both defence counsel urged the jury to accept Mr Nattrass-Bergquist's evidence in their closing remarks. As Ms Grau submitted, in the absence of a request by defence counsel, a suggestion by the Judge that Mr Nattrass-Bergquist may have lied in any respect would have risked undermining the defence case.

[34] For these reasons, we do not accept Mr Gibson's submissions on this ground of appeal.

Second ground of appeal — exclusion of evidence of Mr Gillman-Harris's prior conviction

[35] Following Mr Nattrass-Bergquist's evidence, Mr Gibson adduced evidence from a witness to whom we refer as Mr Smith. Mr Smith had only made himself known to Mr Gibson after the trial had begun, following television coverage of the trial several days earlier.

[36] Mr Smith's evidence was that he had become acquainted with Mr Gillman-Harris in 2002, when Mr Smith was 16 years of age. Mr Gillman-Harris would have been in his early forties. Mr Smith's evidence was that he woke one night at Mr Gillman-Harris's apartment to find that Mr Gillman-Harris was touching his leg. When Mr Smith asked what he was doing, Mr Gillman-Harris offered to pay him $400 if he could perform oral sex on Mr Smith. Mr Smith refused and reported the matter to the police, who declined to take any action.

[37] Mr Smith's evidence, on which he was not cross-examined, was thus consistent with Mr Nattrass-Bergquist's evidence of Mr Gillman-Harris making an unsolicited sexual advance.

[38] Following Mr Smith's evidence, Mr Gibson sought to adduce evidence of Mr Gillman-Harris's prior conviction.

[39] The summary of facts in respect of the prior conviction, which was provided to the Judge, stated that the complainant, aged 22 and only recently acquainted with Mr Gillman-Harris, woke to find Mr Gillman-Harris, aged 34 at the time, sucking his penis. The complainant told him not to, Mr Gillman-Harris desisted, the complainant reported the matter to the police, and the conviction for unlawful sexual connection with a male over 16 followed.

[40] At trial, Mr Gibson submitted that the prior conviction established that Mr Gillman-Harris had a propensity "towards molesting young boys" and so was consistent with Mr Nattrass-Bergquist's evidence of an uninvited sexual approach. Counsel also submitted that the evidence of the conviction responded to Crown evidence that Mr Gillman-Harris was a gentle and non-confrontational person.

Although the summary of facts relating to the prior conviction did not suggest that Mr Gillman-Harris had become violent in the manner alleged by Mr Nattrass-Bergquist, Mr Gibson submitted that violence and aggression were inherent in any unlawful sexual connection.

[41] The Crown opposed the introduction of the prior conviction on the ground that its probative value would be outweighed by its unfairly prejudicial effect, so that the Judge was required to exclude the evidence under s 8(1)(a) of the Evidence Act. Evidence of the conviction would do no more than confirm Mr Gillman-Harris's sexual interest in young men, a matter that was not in dispute. As the summary of facts did not suggest that Mr Gillman-Harris had become violent when his advances were rejected, in contrast to Mr Nattrass-Bergquist's evidence about what happened on this occasion, the evidence was of minimal, if any, probative value.

[42] Following these submissions, the Judge ruled that evidence of the prior conviction was inadmissible as it was not relevant to a fact in issue, that is whether Mr Gillman-Harris had become physically violent to Mr Nattrass-Bergquist when his sexual advance was refused.

Submissions

[43] On appeal, Mr Gibson submitted that the Judge erred in his ruling because evidence of the prior conviction would have assisted the jury in assessing Mr Nattrass-Bergquist's evidence that the appellants were acting in self-defence. Mr Gibson submitted that the conviction, combined with Mr Smith's evidence, made it more likely that Mr Nattrass-Bergquist's account was true. Counsel also submitted that the test for relevance under s 7 of the Evidence Act is not exacting and there was no unfair prejudicial effect on the proceeding, as s 8 of the Evidence Act requires if relevant evidence is to be excluded.[6]

[44] Ms Grau submitted that the Judge was correct to exclude evidence of the prior conviction. She submitted that it could be relevant only if it increased the likelihood that Mr Gillman-Harris had responded violently to a refusal of his sexual advance.

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6 Citing *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

Ms Grau submitted that, in fact, both the prior conviction evidence and Mr-Smith's evidence supported the Crown case that Mr Gillman-Harris was not a violent person because he accepted both refusals without dispute. Ms Grau also submitted that the prior conviction would have been unfairly prejudicial to the Crown because it would have invited prejudice without probative value.

[45] If she were wrong in that, Ms Grau submitted that the exclusion of the evidence could not be said to have created a real risk of a miscarriage of justice. That is because the jury had heard unchallenged evidence from Mr Smith of very similar conduct and had still rejected Mr Nattrass-Bergquist's evidence of self-defence.

Discussion

[46] We accept Ms Grau's submission that the Judge did not err in excluding evidence of the prior conviction. Mr Smith's evidence was of a touching by Mr Gillman-Harris as he slept, coupled with an offer to pay $400 in return for oral sex. There was no suggestion that Mr Gillman-Harris persisted in the face of Mr Smith's refusal, or became angry or violent as a consequence of it. The same is true in respect of the further incident with a different young man that resulted in Mr Gillman-Harris's conviction. Mr Gillman-Harris desisted when told to do so, and there was no angry or violent response.

[47] Both of these incidents were very different to what was alleged in the present trial. The evidence of the previous conviction would not have advanced the defence case that Mr Gillman-Harris had responded violently when his sexual advance was refused. Indeed, it suggested that Mr Gillman-Harris would accept rejection of a proffered sexual advance without adverse reaction.

[48] For these reasons, we do not accept Mr Gibson's submission that a miscarriage of justice arose because the Judge excluded evidence of the prior conviction.

Third ground of appeal — validity of charging documents and other matters arising from the Crown's reliance at trial on the forms of murderous intent specified in ss 167(a) and (b) and 168(1)(a) of the Crimes Act

[49] Ms Feyen, who appeared with Mr Kovacevich for Mr Wallace-Loretz on appeal, submitted to us that the trial was a nullity because the charging document, charge notice and charge list (the charging documents) did not comply with provisions of the CPA and/or the Criminal Procedure Rules 2012. Alternatively, she submitted that a miscarriage of justice arose because the manner in which the Crown proceeded at trial had the effect of adding new charges against Mr Wallace-Loretz, breaching s 24(a) of the NZBORA as Mr Wallace-Loretz was denied his right to know the charge against him.

[50] The factual background to these submissions is that at trial, commencing with Mr Johnstone's opening remarks to the jury, the Crown relied on the forms of murderous intent specified in s 167(a) and (b) of the Crimes Act as well as on that specified in s 168(1)(a). The Crown did so despite the fact that none of the charging documents had previously specified the s 167 forms of intent, but only s 168(1)(a). It is this omission which gives rise to Ms Feyen's submission that the charging documents were a nullity.

[51] The relevant parts of ss 167 and 168 provide:

> **167 Murder defined**
>
> Culpable homicide is murder in each of the following cases:
>
> (a) if the offender means to cause the death of the person killed:
>
> (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
>
> …
>
> **168 Further definition of murder**
>
> (1) Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:

> (a) if he or she means to cause grievous bodily injury for the purpose of facilitating the commission of [robbery[7]], or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof … and death ensues from such injury:

Charging document

[52] A criminal proceeding is commenced by filing a charging document in the District Court.[8] Amongst other things, the document must contain "sufficient particulars to fully and fairly inform the defendant of the substance of the offence" alleged to have been committed,[9] and those particulars must include a reference to "a provision of an enactment creating the offence" alleged to have been committed.[10]

[53] In this case, the charging document in respect of the murder charge against the appellants referred to s 172 of the Crimes Act, which provides:

> **172 Punishment of murder**
>
> (1) Every one who commits murder is liable to imprisonment for life.
>
> (2) Subsection (1) is subject to section 102 of the Sentencing Act 2002.

[54] Ms Feyen submitted to us that s 172 does not create the offence of murder and that accordingly the charging document did not meet the requirements of s 17(4) and (5) of the CPA. It was therefore a nullity.

[55] In response, Ms Grau submitted that the reference to s 172 of the Crimes Act in the charging document was correct, as s 172 is the only provision in the Crimes Act that relates to the "complete offence" of murder. In support of this submission, Ms Grau drew our attention to sch 1 to the CPA, which refers to s 172 for the purpose of identifying the offence of murder.

[56] There is no provision in the Crimes Act that provides in express language that it is an offence to commit murder. Section 160 defines culpable and non-culpable

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7 See Crimes Act 1961, s 168(2)(k) (footnote added).
8 Criminal Procedure Act, s 14(1).
9 Section 17(4).
10 Section 17(5)(a).

homicide, and ss 167 and 168 define murder. Section 172 provides that every one who commits murder is liable to imprisonment for life.

[57] It is correct that s 172 specifies a maximum penalty, but it is also the only provision that uses the phrase "commits murder". In our opinion, s 172 is the provision that comes closest to creating the offence of "committing murder". The other provisions to which we have referred define murder; s 172 deals with carrying it out. Put another way, if ss 167 and 168 were removed from the Crimes Act, murder would still be an offence but the common law would have to provide the definitions. If s 172 were removed, then murder would not be an offence.

[58] We add that the Crimes Act creates other offences in a similar way. For instance, s 128 defines sexual violation. Section 128B(1) provides:

> **128B Sexual violation**
>
> (1) Every one who commits sexual violation is liable to imprisonment for a term not exceeding 20 years.

[59] Likewise, even though no provision expressly states that it is an offence to wound with intent to cause grievous bodily harm, the fact that to do so is an offence is apparent from s 188(1), which provides:

> **188 Wounding with intent**
>
> (1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to cause grievous bodily harm to any one, wounds, maims, disfigures, or causes grievous bodily harm to any person.

[60] Thus, the legislature has created other offences in the Crimes Act in the same way it has created the offence of murder — by specifying a maximum penalty for a particular combination of actus reus and mens rea. There is therefore nothing in Ms Feyen's point on this issue.

Charge notice and charge list

[61] The Crown later assumed responsibility for the prosecution. That required the Crown to file a notice specifying particular information, including "details of each

charge" to which the notice related.[11] The notice in respect of the murder charge referred to ss 168(1)(a) and 172 of the Crimes Act. The charge list provided to the jury at the commencement of the trial also referred to these two provisions.

[62] Ms Feyen made the same "nullity" submission based on s 17(4) and (5) of the CPA in respect of these documents, which we reject for the same reasons.

Trial

[63] We turn now to Ms Feyen's remaining submissions as to the consequences of the Crown's reliance at trial on the s 167 forms of intent.

[64] The Crown's intention to rely on the s 167 forms of intent was clear from Mr Johnstone's opening to the jury on 4 April 2016, when he said:

> Now, murderous intent can be shown in a variety of different ways. There are, I suggest to [you], potentially three ways that might be relevant to this case. The first way, plain enough of course, is if somebody intends — flat out — to kill the other person — obvious enough. …
>
> …
>
> There's another type of intention which qualifies as a murderous intention and that is — or it would be in this case — if the person you're thinking about, Mr Nattrass-Bergquist, Mr Wallace-Loretz, meant to cause Mr Gillman-Harris a bodily injury that he knew was likely to cause death and was reckless about whether or not Mr Gillman-Harris would die. …
>
> And now the third type has to do with the plan to rob. I won't get involved in, sort of, the old-fashioned legal terms about what this really comes from; but the basics of it is, if there is a contemplation or a plan involved to commit a particular type of offence — and here robbery qualifies — if for that purpose there is an intention to cause really serious bodily injury so as to help with the robbery, that qualifies; or indeed so as to help with getting away from or avoiding detection for a robbery. …

[65] Defence counsel, now counsel on appeal, made no objection to this part of the opening, nor indeed to the following statement in Mr Johnstone's closing remarks on 18 April 2016:

> … what is clear is that these blows killed him and they were delivered with one at least of the three necessary murderous intents. An intention actually to cause Mr Gillman-Harris's death, or with an intention to cause bodily injury

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[11] Criminal Procedure Act, s 189; and Criminal Procedure Rules 2012, r 4.11(2)(b).

> in circumstances where the assailant knew they were likely to cause death and were reckless about whether or not Mr Gillman-Harris would die. Or thirdly and perhaps most likely with an intention to cause really serious bodily injury for the purpose of facilitating the robbery or facilitating escape from or the avoidance of detection for the robbery that they planned …

[66] As it turned out, counsel did not object until 19 April 2016, after they had made their own closing remarks and were discussing with the Judge that part of the issues sheet that concerned murderous intent. In the course of that discussion, counsel objected to the Judge including directions and questions that addressed the s 167 forms of intent. Counsel submitted that the Judge should direct the jury to disregard Mr Johnstone's remarks as to those forms of intent and sum up only on the form of murderous intent specified in s 168(1)(a). Mr Johnstone opposed these submissions given the basis on which the Crown had run its case.

[67] In support of his submissions to the Judge, Mr Kovacevich referred to the Crown's failure to refer to the s 167 forms of intent in any of the charging documents, contending this was in breach of the CPA and that the Crown was bound to proceed on s 168(1)(a) only. The Judge rejected this submission for many of the same reasons we have.

[68] Mr Kovacevich also submitted that, if the Crown were to rely on the s 167 forms of intent, there would be a breach of ss 24(a) and 25(e) of the NZBORA. These relevantly provide:

> **24 Rights of persons charged**
>
> Everyone who is charged with an offence—
>
> (a) shall be informed promptly and in detail of the nature and cause of the charge; and
>
> …
>
> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (e) the right to be present at the trial and to present a defence:

[69] The Judge did not accept this argument. His view was that the appellants were and always had been charged with murder, and that the Crown case as to murderous intent was clear from its opening.

[70] Mr Kovacevich then submitted that the effect of the Crown opening had been to "ambush" defence counsel. The Judge rejected this submission on the basis that defence counsel would have objected immediately if genuinely surprised by the Crown opening.

[71] The Judge pressed both defence counsel repeatedly to say how they would have conducted their case differently if they had appreciated from the outset that the Crown intended to rely on the s 167 forms of intent, as well as s 168(1)(a).

[72] In response, Mr Kovacevich said he would have "changed" his case, that his client's instructions may well have changed and he would have changed his "entire closing", particularly to address the issue of recklessness in the context of s 167(b). Aside from this, however, Mr Kovacevich did not state any particular respect in which he submitted Mr Wallace-Loretz had been prejudiced.

[73] The Judge did not consider it likely that the defence case would have been conducted differently, given the reliance on self-defence. The Judge also considered that any closing remarks by Mr Kovacevich on recklessness would have been inconsistent with that defence.

[74] The Judge asked Mr Kovacevich to identify a witness he would have cross-examined, cross-examined differently or called to give evidence had he fully appreciated the Crown's position from the outset. Mr Kovacevich did not do so.

[75] Mr Gibson submitted to the Judge that Mr Nattrass-Bergquist would not have put all his "eggs in the basket of self-defence" had he appreciated at the outset that the Crown was relying on all three forms of intent. Mr Gibson also submitted that he would have closed to the jury on the basis that the nature of the force used in the assault by the appellants was relevant not only to self-defence but to whether there was murderous intent. Ultimately, Mr Gibson advised the Judge that he would be content

"with a firm direction about the perils of recklessness" and a direction that s 167(b) would be proved only if the jury were satisfied the offender knew that the intended "bodily injury" would be "likely" to cause death. No issue is taken on appeal with what the Judge said to the jury on either matter.

[76] Following this discussion with counsel, the Judge declined to confine the Crown case as had been proposed. Although the Judge failed to give his reasons in writing as he said he would do, his reasons are clear from the transcript of the discussion with which we have been provided. They were that counsel were required to object to the Crown opening at the outset if genuinely surprised or embarrassed by the Crown's intention to rely on all three forms of murderous intent, and counsel's failure to identify how they would have conducted their case differently had they known prior to, or appreciated at an early stage of the trial, that the Crown intended to rely on the different forms of murderous intent.

(a) Submissions

[77] On appeal, Ms Feyen submitted that, by relying on the s 167 forms of intent, the Crown, wrongly, introduced additional charges at trial, breached s 24(a) of the NZBORA and caused Mr Wallace-Loretz "significant prejudice" in several respects. These were that Mr Wallace-Loretz was not aware of the essential elements of all of the charges against him; was not afforded the opportunity to meet or answer the elements of the s 167 forms of intent; was denied a fair trial by documentary and procedural errors; and that "defence strategy, tactics and conduct would have been carried out differently" had defence counsel known from the outset what the Crown intended.

[78] Ms Feyen also submitted that this Court could not exclude the risk that the guilty verdict on the murder charge was founded on one of the s 167 forms of intent.

[79] Ms Grau's submissions in response were as follows. First, throughout, the appellants faced a single charge of murder, regardless of whether one or more forms of murderous intent were alleged. Secondly, the Crown's reliance on the s 167 forms of intent could not have affected the manner in which defence counsel conducted their case, or caused them any prejudice or disadvantage, and there is no real risk that the

outcome of the trial was affected. The appellants would have been acquitted had the jury accepted Mr Nattrass-Bergquist's evidence of self-defence or if that evidence had raised a reasonable doubt in their minds.

[80] Ms Grau also submitted that, whatever conclusion defence counsel may have drawn from the reference to s 168(1)(a) in the charge notice and list, counsel could not have been in any doubt as to the Crown case following Mr Johnstone's opening to the jury.

(b) Discussion

[81] We do not accept Ms Feyen's submission that the effect of the Crown's reliance on the s 167 forms of intent was to add new charges or breach the appellants' rights under s 24(a) of the NZBORA. As Ms Grau submitted, each appellant faced one charge of murder. The Crown's reliance on alternative forms of murderous intent did not alter the nature of the charge or increase the number of charges.

[82] As to the respects in which Ms Feyen submitted Mr Wallace-Loretz was prejudiced, we do not accept that Mr Wallace-Loretz was unaware of the essential elements of all of the charges against him or that he did not have an opportunity or the ability to answer the elements of the s 167 forms of intent.

[83] The essential elements of the murder charge were causing death with the requisite mens rea. The fact the Crown intended to rely on the s 167(a) and (b) intents as well as s 168(1)(a) was made clear at the outset of the trial.

[84] Nor, for reasons we have given, do we accept that Mr Wallace-Loretz was denied a fair trial due to procedural and documentary errors, which we understand to be a reference to Ms Feyen's submission regarding the charging documents.

[85] Nor has counsel identified how the defence case for Mr Wallace-Loretz would have changed or been conducted differently had counsel appreciated the ramifications of the Crown opening at the outset. Like the Judge, we are not persuaded that defence counsel would have proceeded differently in any material respect.

[86] As Ms Feyen submitted, it is conceivable that the jury determined that the appellants were guilty of murder because they had one of the s 167 forms of intent. However, we also accept Ms Grau's submission that in this case the Crown's best prospect of a guilty verdict on the murder charge was under s 168(1)(a). Whereas s 167(a) requires an intention to kill and s 167(b) requires knowledge that death is a likely consequence of the bodily injury inflicted, s 168(1)(a) requires the Crown to prove an intention to cause grievous bodily injury for a purpose specified in the provision. The requirements of s 168 are less onerous for the Crown, subject of course to proving the specified purpose.

[87] For these reasons, we do not consider the appellants were prejudiced by the manner in which the Crown proceeded at trial or that there was a risk of a miscarriage of justice as a result.

Fourth ground of appeal — the issues sheet

Submissions

[88] The appellants raise three principal objections to the part of the issues sheet addressing the murder charge against them. The first concerns the use of the word "murder" in subheadings in the document. The second concerns the adequacy or otherwise of the treatment of self-defence. The third is a contention that the issues sheet led the jury to an "inevitable verdict of guilty" such that there was a miscarriage of justice.

[89] Ms Grau submitted that there was no merit in the appellants' objections to the issues sheet. She submitted that it was necessary to use the word "murder" in headings to distinguish between that charge and manslaughter, which the jury were required to consider in the absence of a guilty verdict on murder; that self-defence was adequately addressed; and that the issues sheet did not inevitably lead to a verdict of guilty but rather required the jury to answer the particular questions posed of them.

Discussion

[90] The Judge provided the jury with three documents. The first was a summary of directions. The second and third were issues sheets in respect of each appellant.

[91] The summary comprised directions on, amongst other things, liability as a party, self-defence, the elements of the various offences and murderous intent.

[92] The issues sheets comprised, on a charge-by-charge basis, a series of questions that the jury needed to address to reach their verdicts.

[93] Insofar as concerns the murder charge, each issues sheet included three "scenarios". Murder scenario one addressed the "common intention" form of party liability contained in s 66(2) of the Crimes Act on the basis that the jury were sure one or both of the appellants had inflicted the fatal injuries but, if one, that the jury might not be able to say which one. Murder scenario two addressed the particular appellant's liability as a principal party under s 66(1)(a) on the basis that the jury were able to determine it was that appellant who had inflicted the fatal injuries. Murder scenario three addressed the particular appellant's liability as a secondary party under ss 66(1)(b)–(d), on the basis the jury were sure the other appellant was the principal party.

[94] We do not consider there was any prejudice to the appellants by the use of the word "murder" in the headings for the scenarios. Mr Kovacevich made this objection to the Judge before the final form of the issues sheet was finalised. As Ms Grau submitted, the Judge's response was that the use of the word was appropriate given that the appellants were charged with that offence. We agree.

[95] As to the objection raised about the treatment of self-defence, the relevant part of the summary of directions said:

> **Self-defence — making an assault not an unlawful act**
>
> Section 48 of the Crimes Act 1961 says:
>
> > Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

> For either defendant to be found guilty of murder or manslaughter, the Crown must prove, first, that Mr Gillman-Harris's head injuries were caused by an assault or assaults by either or both of the defendants and, second, that such injuries were an operating and substantial cause of Mr Gillman-Harris's death.
>
> **If you are sure that such injuries (that is, those that were inflicted by the assault) were an operating and substantial cause of Mr Gillman-Harris's death, it is for the Crown to prove beyond reasonable doubt that any defendant who assaulted him did not act in justifiable defence of himself or the other defendant.**
>
> That means that you must decide first what the defendant believed the circumstances to be, from his point of view. The second question is whether you are sure, bearing in mind the defendant's belief about the circumstances, the defendant was not acting in defence of himself or the other defendant at the time of the assault. If it is reasonably possible that the defendant was acting in defence of himself or the other defendant, you must decide whether, given the defendant's belief, the Crown has proved the force used was greater than was reasonable in those circumstances.
>
> If you are sure that a defendant assaulted Mr Gillman-Harris, but not in self-defence, or in self-defence but with excessive force, that will mean that the assault was unlawful. You will then need to consider whether the Crown has proved all of the elements of murder.

[96] From this it would have been clear to the jury that the first issue for their consideration was whether the Crown had proved that the assault by one or both of the appellants had caused Mr Gillman-Harris's death and, if so, that self-defence would be the second issue for consideration. In turn, this would require the jury to determine the three questions that the Judge set out in the summary, in the order listed.

[97] Consistently with these directions, the first question in each murder scenario in the issues sheet went to causation. The second question in scenario one and the second and third questions in scenarios two and three went to whether the Crown had disproved self-defence.

[98] The relevant question in scenario one was:[12]

> ***Question 2***
>
> **Are you sure that in assaulting Mr Gillman-Harris NEITHER Mr Nattrass-Bergquist NOR Mr Wallace-Loretz assaulted him for the purpose of defending himself or the other defendant against a sexual attack initiated by Mr Gillman-Harris?**

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[12] This is taken from the jury issues sheet for Mr Nattrass-Bergquist. A similar question was provided in the jury issues sheet for Mr Wallace-Loretz.

[99] The relevant questions in scenarios two and three were:[13]

MURDER SCENARIO TWO …

…

Question 5

Are you sure that in assaulting Mr Gillman-Harris Mr Nattrass-Bergquist did not assault him for the purpose of defending himself or Mr Wallace-Loretz?

…

If your answer to Question 5 is "Yes", you must go on to answer Question 7. Do not answer Question 6.

If your answer to Question 5 is "No", you must go on to answer Question 6.

Question 6
[Do not answer Question 6 if you answered "Yes" to Question 5]

Before you answer Question 6, you must decide what were the circumstances as Mr Nattrass-Bergquist actually believed them to be at the time he assaulted Mr Gillman-Harris. Because you will have to keep your conclusions in mind when you answer Question 6, you will find it helpful to write them down on a separate sheet.

Are you sure that the force used by Mr Nattrass-Bergquist in assaulting Mr Gillman-Harris was greater, in the circumstances as you have decided Mr Nattrass-Bergquist actually believed them to be, than was reasonable to defend himself or Mr Wallace-Loretz?

…

MURDER SCENARIO THREE …

…

Question 9

Are you sure that at the time of assaulting Mr Gillman-Harris, Mr Wallace-Loretz did not assault him for the purpose of defending himself or Mr Nattrass-Bergquist?

…

If your answer to Question 9 is "Yes", you are not required to answer Question 10. Go on to answer Question 11.

If your answer to Question 9 is "No", go on to answer Question 10.

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[13] These are taken from the jury issues sheet for Mr Nattrass-Bergquist. Similar questions were provided in the jury issues sheet for Mr Wallace-Loretz.

> ***Question 10***
> **[Do not answer Question 10 if you answered "Yes" to Question 9]**
>
> Before you answer Question 10, you must decide what were the circumstances as Mr Wallace-Loretz actually believed them to be at the time he assaulted Mr Gillman-Harris? Because you will have to keep your conclusions in mind when you answer Question [10], you will find it helpful to write them down on a separate sheet.
>
> **Are you sure that the force used by Mr Wallace-Loretz in assaulting Mr Gillman-Harris was greater than was reasonable to defend himself or Mr Nattrass-Bergquist in the circumstances as you have decided Mr Wallace-Loretz actually believed them to be?**

[100] Although it would have been preferable for the issue of self-defence to be dealt with the same way in each scenario, the differences are not of any consequence. The important point is that the summary correctly directed the jury as to the matters they were required to consider in answering these questions.

[101] In his written submissions on appeal, Mr Kovacevich submitted that putting the issue of self-defence as a "double negative" was both prejudicial to the appellants and confusing to the jury. We do not accept this submission. It is necessary to frame a question as to self-defence in this way because the onus is on the Crown to disprove the defence. Putting the issue in any other way risks confusing the jury as to where the onus lies.

[102] Mr Gibson's objections to the treatment of self-defence in the issues sheet were that the questions were posed in a manner that had the "potential to complicate and compromise" the defence, focused on the assault rather than "promoting the defence of self-defence", and did not direct the jury to determine the circumstances as the assailant believed them to be at the relevant time. Mr Gibson referred us to a different direction given in another case, which Mr Gibson submitted was a "model" of its type and was to be contrasted with the Judge's direction.

[103] None of these objections has merit. The questions to the jury in the issues sheet, read with the explanatory section of the summary, were accurate. The references to "assault" in the questions were apt because the fact of an assault, by one or both appellants, was common ground. The issue was whether that assault was unlawful. As to the third point, the Judge directed the jury in the summary that the first matter

they had to consider in the context of self-defence was the prevailing circumstances as the assailant — whichever appellant that should be — believed them to be. Moreover, questions six and 10 repeated this direction in scenarios two and three.

[104] The final objection, raised by Mr Kovacevich, was that the issues sheet inevitably led to a verdict of guilty. This was Mr Kovacevich's overarching submission as regards the various objections taken to the issues sheet. As appears from our reasons above, we do not accept this submission. The issues sheet for each scenario stated to the jury that they were to return a verdict of not guilty on the murder charge if they were not satisfied as to causation, or if they were not so satisfied that the Crown had failed to disprove self-defence.

[105] For these reasons, we do not accept counsel's submissions that a miscarriage arose because of deficiencies in the issues sheet.

Result

[106] Mr Wallace-Loretz's application for an extension of time in which to file his notice of appeal is granted.

[107] The appeals against conviction are dismissed.

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