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IN THE COURT OF APPEAL OF NEW ZEALAND

CA687/2014
[2015] NZCA 306

BETWEEN	JASON WILLIAM BAKER Appellant
AND	THE QUEEN Respondent

CA710/2014

BETWEEN	THE QUEEN Appellant
AND	SHAUN ROBERT MURRAY INNES Respondent

CA712/2014

BETWEEN	SHAUN ROBERT MURRAY INNES Appellant
AND	THE QUEEN Respondent

Hearing:	30 June 2015
Court:	Randerson, Stevens and White JJ
Counsel:	T Aickin for Mr Baker J H M Eaton QC for Mr Innes M J Lillico and M L Wong for the Crown
Judgment:	14 July 2015 at 2:30 pm

JUDGMENT OF THE COURT

A The appeal against conviction and sentence by the appellant Mr Baker is dismissed.

B The appeal against conviction by the appellant Mr Innes is allowed.

C Mr Innes' convictions for murder and aggravated wounding are set aside and a retrial is ordered.

D Any question of bail for Mr Innes is to be dealt with in the District Court.

E The appeal by the Solicitor-General against the sentence for Mr Innes is dismissed in consequence.

F Order prohibiting publication of this judgment (including the result) in news media or on the Internet or other publicly available database until final disposition of retrial. Publication in a law report or law digest is permitted.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] After a jury trial before Dunningham J the appellants, Mr Baker and Mr Innes, were each found guilty of murder and aggravated wounding. Mr Baker was later sentenced on the charge of murder to life imprisonment with a minimum period of imprisonment of 17 years.[1] Mr Innes was sentenced on the murder charge to 10 years with no minimum period of imprisonment. Concurrent terms of 5 years and 3 years respectively were imposed on the aggravated wounding charge.

[2] This judgment deals with three appeals: Mr Baker's appeal against conviction and sentence; Mr Innes' appeal against conviction; and the Solicitor-General's appeal against the sentence imposed on Mr Innes.

Background

[3] On 13 September 2013 Mr Baker and Mr Innes travelled to a residential address in Rangiora in Mr Baker's motor vehicle arriving at about 9 pm. Mr Baker had a hunting knife with him in the vehicle. The victims, Mr Tony Lochhead and his brother Peter Lochhead, occupied one of four adjoining flats at the address. There was a confrontation in the course of which both victims were stabbed. Mr Tony Lochhead died at the scene. Peter Lochhead survived but received a serious wound piercing his cheek. The Crown alleged that Mr Baker was the principal offender responsible for stabbing the victims. Mr Innes was charged as a secondary offender, the Crown relying on party liability under s 66(2) of the Crimes Act 1961.

[4] The Crown case was that Mr Baker and Mr Innes were drug users. Mr Baker was out of cash and needed to go on an "earn" (obtaining money to buy drugs). He knew Mr Tony Lochhead, who was a drug dealer. The Crown contended that Mr Baker and his associate Mr Innes agreed to go to Tony Lochhead's address and to

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1 *R v Innes* [2014] NZHC 2780.

carry out a robbery to obtain drugs, guns and cash. Since Mr Baker and Tony Lochhead had fallen out previously, Mr Baker knew he would not be welcome at the address. Accordingly, the plan was that Mr Innes would knock on the door of the Lochheads' flat and lure the occupants out of the house while Mr Baker hid in bushes in the driveway armed with a knife.

[5] When they arrived at the address, Mr Innes knocked on the door of the Lochheads' flat. Both victims were inside. Mr Innes was invited into the lounge. According to Peter Lochhead's evidence at trial, neither he nor his brother knew Mr Innes. He was in the flat for only a short time during which he walked around mumbling incoherently. He then left and the Lochhead brothers followed him outside onto the driveway. Peter Lochhead said he watched while Tony chased after Mr Innes down the driveway. Mr Innes left and did not return.

[6] As Mr Innes was leaving, Mr Baker emerged from the bushes and confronted the Lochhead brothers. The Lochheads retreated into the flat followed by Mr Baker. Peter Lochhead's evidence was that Mr Baker came to the door and demanded "our drugs and money". He said "I'm going to stab both of yous" and that he was there "to fill us full of holes". A struggle ensued at the glass ranch slider at the front of the apartment. During the course of this, Mr Baker stabbed Tony Lochhead in the upper chest. This single blow resulted in Tony Lochhead's death. Mr Baker was also responsible for the serious stabbing wound to Peter Lochhead's cheek as earlier described. There were three slug guns in the flat but there was no evidence these were demanded by Mr Baker nor featured in the incident. Peter Lochhead eventually managed to knock the knife out of Mr Baker's hand by using a wooden stick.

[7] After Mr Innes left the address his image was captured on CCTV at about 9.15 pm at a nearby service station. He hitchhiked back to his home in Christchurch where he made certain incriminating statements to his friend Ms Stella Norman. She later gave a written statement to the police. Mr Innes was arrested and charged. Mr Baker eluded the police for some time but was also eventually arrested and charged.

[8] For the murder charge against Mr Baker, the Crown relied on two forms of murderous intent: s 167(a) and (b) of the Crimes Act. In addition, the Crown relied on s 168(1)(a) alleging that Mr Baker was guilty of murder by meaning to cause grievous bodily injury for the purpose of facilitating a robbery. The common intention initially alleged for the purpose of party liability under s 66(2) was that the appellants intended to carry out a robbery at the Rangiora address. By the time of the closing addresses, the Crown contended that the common intention was either to burgle or rob.

[9] At trial, Mr Baker accepted he had killed Tony Lochhead but argued that the verdict should be manslaughter rather than murder. His defence was that he was influenced by alcohol and drugs. Given that fact and the flurry of activity involved in the physical exchange with the Lochheads, the Crown had not proved beyond reasonable doubt that he intended grievous bodily injury or death. The principal defence advanced for Mr Innes at trial was that, by fleeing from the Lochheads' address, he had withdrawn from participation in the enterprise. In consequence, the jury should find him not guilty of murder, manslaughter or aggravated wounding. Mr Baker alone was responsible for the death and injury caused.

Mr Baker's conviction appeal

[10] For Mr Baker, Ms Aickin advanced two grounds in support of his conviction appeal:

(a) The Judge erred in treating the witness Stella Norman as hostile.

(b) The Judge erred in failing to direct the jury with sufficient clarity that the evidence of Stella Norman was not admissible against Mr Baker.

[11] Mr Baker's sentence appeal was advanced on the grounds that the minimum period of imprisonment of 17 years was manifestly excessive, particularly in comparison to the sentence imposed on Mr Innes.

Stella Norman's evidence

[12] Stella Norman was a key Crown witness in the case against Mr Innes. It is common ground that her evidence was inadmissible against Mr Baker.[2] During Ms Norman's evidence, Dunningham J declared Ms Norman to be a hostile witness.[3] She was then cross-examined by the prosecutor on a statement she had made to the police on 15 September 2013, two days after the incident at Rangiora.

[13] In that statement Ms Norman described statements Mr Innes had made to her after the incident. She said Mr Innes had told her that he and Mr Baker had been drinking alcohol and taking drugs that day. Mr Baker and Mr Innes drove to Rangiora where Mr Baker had tried doing a couple of burglaries but these had been unsuccessful. She then said:

> I think from there Jason [Baker] has asked Shaun [Innes] to go and knock on that door. Jason told Shaun that they were going to go to a place and rob it for guns, drugs and cash. Shaun didn't know the place or the people but Jason said that he had dealt with them before. Jason said that they were dealers, as in drug dealers. Jason is a Morphine addict so you don't go and rip off pot dealers when you're looking for Morphine.
>
> They went to a place and Shaun knocked on the door. I think Shaun said that the guy at the house came out. Shaun said he lost his nerve about what was going to happen and he has taken off.
>
> Shaun said that there were two older men at the house. He told me they were about 50 years old.
>
> Shaun went to the door by himself. He said he didn't know exactly where Jason was when he went to knock on the door.
>
> Shaun said that he knew that Jason had a big hunting knife. Shaun said that he'd seen a knife in the car. I asked him if he'd touched it and he said no. I asked him what it was and he said it was a big hunting knife. Shaun never got back in the car after this all happened at this house so he saw it when they were driving out to Rangiora or sometime before they got to the house.
>
> After he knocked on the door Shaun said he took off and ran to a garage and got some food. Shaun said that if anything had happened he'd have been seen on a camera somewhere, sort of like an alibi. He said he doesn't know what happened because he didn't stay. He said he didn't know if Jason actually took anything from the house or not.
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> Shaun said that he was scared that Jason would find him especially as he'd run off.

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2 Evidence Act 2006, s 27(1).

3 *R v Innes* [2014] NZHC 2295 [Hostility ruling].

> Afterwards Shaun was picked up on the side of the road by the cops and they were looking for blood but he wasn't actually there. He said they looked at his shoes, jeans and hands.
>
> The cops left him saying that he didn't fit the description and that he wasn't covered in blood.

[14] Later in her statement, Ms Norman added:

> When Shaun came back to my place he came in and said to me, "Jason's shanked two of them up". My first thought was, "Oh Jesus, and you've come here".
>
> I asked Shaun how he knew that and he started staying that he wasn't there. I asked him if he was bloody sure about that because how else would he know.
>
> Shaun never said to me that he saw Jason shank the guy, just that it happened.
>
> It sounded to me like before Jason shanked the guy, but after Shaun knocked on the door, he's done a runner because he thought that Jason was going to take him down to the river and stab him.

[15] At trial, Ms Norman began her evidence at approximately 3.30 pm on the fifth day of trial. In her evidence-in-chief she said that Mr Innes had been staying at her address. They had spent most of 13 September 2013 together. Towards the end of the day Mr Innes had left in his double-cab ute to take her dog for a ride. The next time she saw Mr Innes was about midnight that night. He told her that Mr Baker was a "loose unit" and he wanted to get away from him. Mr Baker was "off his face" and he was doing out of character things. There had been an "altercation". She said that someone had been stabbed but denied that Mr Innes had used that word. All Mr Innes had told her was that he had taken off and that Mr Baker was going crazy. He had been stopped by a police patrol unit at the side of the road looking for someone in relation to a stabbing. She said Mr Innes was "quite white and freaking me out". They had a long conversation. Mr Innes said he did not want to be "any part of Jason's shit". When asked what else he talked about she said she couldn't remember because she had a lot of things going on in her life and was "addled with drugs". In response to a question about how she knew there had been a stabbing, she reiterated it was because the police were looking for someone with blood all over them when they picked up Mr Innes.

[16] Ms Norman was then further questioned about the altercation and where it had happened. She said it must have been at Rangiora. Mr Innes had said that Mr Baker had started doing some "random" things like robbing empty places and that the two of them had been drinking a lot of alcohol. When asked further about the altercation, Ms Norman said that Mr Innes had told her he had been told to knock on the door by Mr Baker. Someone had come out and there had been a fight. He then ran away because he did not want to have anything to do with it.

[17] Ms Norman's reasons why the appellants had gone to the address changed throughout her evidence from scoring some drugs from people Mr Baker knew were drug dealers, to approaching a "random" house. At one point she said Mr Innes was made to knock on the door under duress and she continued to indicate support for Mr Innes by stating, for example, that he knew it was wrong from the start and did not want to be a part of it. She was then asked by the prosecutor a further time what Mr Innes had told her about what had happened:

> Q. What did he say happened when they got there?
>
> A. That, um, someone went to the door and knocked on the door.
>
> Q. Who knocked on the door?
>
> A. Unsure.
>
> Q. You're unsure?
>
> A. Yes.
>
> Q. Okay.
>
> A. But, um, they, they came out and obviously took on a bit more than they could chew.
>
> Q. Okay, who took on a bit more than they could chew?
>
> A. Well whoever fought back. I never wanted to be involved with this. Shaun was a friend of mine. I was helping him and, um –
>
> Q. In relation to your evidence today, do you want to give evidence?
>
> A. How do you mean?
>
> Q. Well do you want to be here and give evidence?
>
> A. Well if it's going to help Shaun, yeah, yep.

The Judge's ruling

[18] By this stage, it was about 4 pm. The prosecutor asked the Judge to declare Ms Norman to be a hostile witness under s 94 of the Evidence Act 2006 which provides:

> In any proceeding, the party who calls a witness may, if the Judge determines that the witness is hostile and gives permission, cross-examine the witness to the extent authorised by the Judge.

[19] In her determination, the Judge noted that the term "hostile" in relation to a witness, means a witness who:[4]

> (a) exhibits, or appears to exhibit, a lack of veracity when giving evidence unfavourable to the party who called the witness on a matter about which the witness may reasonably be supposed to have knowledge; or
>
> (b) gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness; or
>
> (c) refuses to answer questions or deliberately withholds evidence.

[20] The Judge noted that the primary ground relied upon by the prosecutor was ground (b) of this definition. She recorded the prosecutor's argument in these terms:[5]

> [4] In support of that application, Ms Currie points out a range of matters on which there are some critical changes, she says, between the witness's evidence to the police recorded in a witness statement and the evidence she is giving on the stand today. One of those is that her previous statement of evidence said that Shaun and Jason were going to a place and to rob it for guns, drugs and cash. Here, on the stand today, she simply said "they were going there to score drugs". In her witness statement, she said that Shaun had said, why they had targeted this particular property because they were dealers, as in, drug dealers. Today, her evidence is that they simply randomly picked on this place.
>
> [5] Her witness statement said that when Mr Innes came to her place on the night in question, he expressly said "Jason's shanked two of them up". Now her evidence is, she does not recall that specific statement, however, she does say that [Shaun] said there had been a stabbing. His evidence is that he learnt that from when the police stopped him and interviewed him on the return trip back from Rangiora and he also learnt that there had been a

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4 Evidence Act, s 4.

5 Hostility ruling, above n 3.

> death from listening to the television news the following night. Ms Currie says that that is a difference in evidence.
>
> [6] Another difference is that Ms Stella Norman gave details of the drug use of Mr Innes, now she says that she has no knowledge of his drug use or of him taking drugs. Coupled with that, Ms Currie points to Ms Norman's express statement to the Court, when she appeared uncomfortable giving evidence, that she wanted to be "helpful to Shaun".
>
> [7] It was also pointed out that her evidence changed on some matters as the evidence progressed, so that, for example, she explained that Shaun went to knock on the door of the White Street flat, but then later, when that issue was revisited, she said she did not know who had gone to knock on the door, or which one it was.

[21] The Judge went on to refer to the submissions made on behalf of the appellants to the effect that there were no material differences between Ms Norman's evidence in Court and her earlier statement to the police; her statement that she wished to help Mr Innes was consistent with what she had told the police earlier; she had not displayed hostility and the court should be cautious about declaring a witness hostile merely because the witness had not come up to brief.

[22] Dunningham J expressed her conclusions in these terms:[6]

> [14] So turning now to my decision. I do consider that Ms Norman has made some material alterations to the evidence she has given today that make it inconsistent with her earlier statement. I also am satisfied that she has done this, not merely because she cannot recall her earlier evidence, but because she wishes, or is demonstrating an intention to be unhelpful to the party who has called her as a witness.
>
> [15] I take particular regard of the fact that even within her evidence given in Court today, she changed evidence that initially pointed to Mr Innes's involvement, such as acknowledging that he said he knocked on the door, to then withdrawing that statement and saying she did not know who knocked on the door. That, coupled with her express explanation that she wants to help Shaun Innes, means I am satisfied having watched the witness that she does intend to be unhelpful to the party that is calling her as a witness.
>
> [16] Under s 94, I can permit the witness to be cross-examined, simply to the extent I authorise. The only areas where I am going to permit cross-examination of this witness are on her earlier evidence as to the purpose of Mr Baker and Mr Innes going to the White Street address; her statements about how Mr Innes came to have knowledge of the stabbing, that obviously includes his statement to her that "Jason's shanked two of them up"; it will also include knowledge of who lived there and how Mr Baker

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6 Hostility ruling, above n 3.

> was equipped to undertake the intended activities. So that is the scope of the cross-examination that I will allow.

Discussion

[23] Advancing this aspect of Mr Baker's appeal, Ms Aickin (who was not trial counsel) reiterated the arguments that had been advanced on behalf of the appellants at trial. She said a more accurate description of the evidence given by Ms Norman in Court before the hostility ruling was that it was helpful to the Crown's case against Mr Baker but less helpful for the Crown's case against Mr Innes. This was, she said, not inconsistent with the original statement Ms Norman gave to the police. It was further submitted that the Crown must have anticipated that the witness would not come up to brief given her admission to being a drug user. She also noted that the statement she made to the police was in answer to leading questions.

[24] We accept the submission made by Mr Lillico on behalf of the Crown that there is no proper basis to challenge the Judge's determination that Ms Norman should be declared a hostile witness. It is abundantly clear from her evidence up to the point when the declaration of hostility was sought that Ms Norman's evidence was materially inconsistent with her statement to the police. In particular:

(a) She told the police that Mr Baker had told Mr Innes that they were going to a place to rob it for guns, drugs and cash. In evidence she said Mr Baker was only going to the address to score drugs (which could, of course, have been by purchase).

(b) She had told the police that Mr Innes did not know the place or the people there but Mr Baker had dealt with them before and they were drug dealers. In contrast, in evidence she said Mr Innes had told her that the house had been picked at random.

(c) While Ms Norman had told the police that Mr Baker had "shanked two of them up", she described what had happened in evidence as merely an altercation.

[25] We observe that the first two inconsistencies were highly material to the Crown's case that the appellants had formed a common intention to go to the address in order to carry out a robbery for guns, drugs and cash and that Mr Baker was aware of the address before they went to Rangiora. As well, the third of these discrepancies was critical to establishing Mr Innes' knowledge as to what had happened during the attack at the address.

[26] We also accept the Crown's submission that Ms Norman had, while giving evidence up to the time she was declared to be a hostile witness, exhibited an intention to be unhelpful to the Crown not only by declining to give evidence in the more damaging terms contained in her police statement but also by her declaration that she was doing what she could to help Mr Innes. In addition, her evidence at trial was itself inconsistent in the way described by the Judge.[7]

[27] We are satisfied that Ms Norman had plainly demonstrated she was a hostile witness within subpara (b) of the definition.[8] The Judge properly exercised her discretion under s 94 of the Evidence Act to declare Ms Norman a hostile witness and to permit cross-examination on the topics identified in her ruling. In a challenge to the exercise of a discretion such as this, an appellate court must recognise the advantage a trial judge has in assessing both the nature and content of the line of questions and answers as well as the demeanour and manner of the witness.[9]

[28] What happened after the Judge declared Ms Norman a hostile witness is instructive. The prosecutor led evidence from Ms Norman in accordance with the Judge's directions. Ms Norman agreed that Mr Innes had said to her "Jason's shanked two of them up"; Mr Innes said Mr Baker had told him that he had dealt with the people at the Rangiora address previously; they were drug dealers and they (Mr Baker and Mr Innes) were going to rob the address for guns, drugs and cash; Mr Innes said he had been told by Mr Baker that he was to knock on the door; he did that, both of the victims came out and that he (Mr Innes) had fled. Mr Innes had said

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7 Set out above at [20] and [22].
8 Set out above at [19].
9 *R v Key* [2010] NZCA 115 at [49]; *R v O'Brien* [2001] 2 NZLR 154 (CA) at [28].

Mr Baker had a hunting knife and that he (Mr Innes) had seen it in the car that night; it was down beside Mr Baker's legs in the car.[10]

[29] In cross-examination, Ms Norman said that when Mr Innes had arrived home, he was upset and said the police had stopped him on the way home and had told him that a couple of people had been stabbed. Mr Innes had said he did not want to be a part of it, that he thought if he did not go with that, "it was gonna be him who was gonna get stabbed". She confirmed that Mr Innes had told her that as soon as he saw there were people in the house and that it was not empty, he ran off.

[30] The evidence given after the Judge declared Ms Norman hostile illustrates the stark contrast between the incriminating nature of the evidence she gave in her police statement and the much less damaging evidence she was prepared to give prior to the time the declaration was made.

[31] Finally, there is no merit in the submission that the Crown should have known that Ms Norman was not going to come up to brief such that she should not have been called. Ms Norman's evidence was of significant probative value. There is no evidence that the prosecutor was aware prior to trial that Ms Norman was likely to be a hostile witness.[11]

Admissibility of Ms Norman's evidence against Mr Baker

[32] Ms Aickin submitted that the Judge had not directed the jury sufficiently clearly or firmly that Ms Norman's evidence was not admissible against Mr Baker. It was submitted this was particularly important because some of Ms Norman's evidence appeared to be her own view of matters rather than a direct reporting of what Mr Innes had said. Further, Ms Norman's evidence generally should be regarded as unreliable.

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[10] In re-examination, Ms Norman clarified that Mr Innes had said that the knife was "in between them". She thought this must have been a reference to the knife being placed in the console in the car.

[11] *Rameka v R* [2011] NZCA 75: (2011) 26 CRNZ 1 and *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [40].

[33] We are unable to accept this submission. The Judge gave a very specific and clear direction to the jury immediately prior to the commencement of Ms Norman's evidence. She said:[12]

> [3] Now there is one other technicality I need to tell you about with this witness's evidence. Most of the evidence that you have heard in this case is admissible against both defendants and then it is up to you to decide if it is relevant. However, when you hear statements made by one defendant, they are not admissible against the co-defendant.
>
> [4] Now the evidence that you will hear is likely to include evidence of statements made by Mr Innes about the events on the night in question. That evidence is admissible when you consider the charges against Mr Innes. It is not admissible when you consider the charges against Mr Baker.
>
> [5] Now to put that another way, what Mr Innes is reported to have said about what Mr Baker did must be disregarded when you are considering the charges against Mr Baker. It is only relevant when you are considering the charges against, Mr Innes.
>
> [6] Now I will revisit this issue when I sum up, but it is just that I thought it important to raise it now, so that you listen to the evidence bearing that direction in mind.

[34] Then, in her summing-up, after referring to the fact that neither appellant had given evidence, Dunningham J said:

> [37] However, as I have told you before, any statement made by Mr Innes is only relevant to the charges he faces, it cannot be used to support the charges that Mr Baker faces. So, by way of example, if you accepted Ms Norman's evidence that Shaun Innes saw a knife in the car, that is relevant to Mr Innes's state of knowledge about the knife. It cannot be used against Mr Baker.

[35] We are satisfied that the directions the Judge gave were more than sufficient to address the admissibility point. For completeness, we add that the Judge gave a very full and robust direction to the jury about Ms Norman's reliability under s 122 of the Evidence Act. She was obliged to do so because Ms Norman had volunteered her involvement with drugs; she had admitted convictions for dishonesty; she had made it clear she was motivated to assist her friend Mr Innes and she admitted to stealing a police officer's cell phone during the course of the trial. The Judge said that Ms Norman was "in the extraordinary position of being shown up to be dishonest in the most stark way that I expect many in this Court will have ever seen".

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[12] *R v Innes* HC Christchurch CRI-2013-009-8919, 19 September 2014.

The jury were directed to approach her evidence with more scepticism than might otherwise be the case and with greater caution than usual because of her demonstrated dishonesty. No complaint is made about the Judge's directions on this topic.

[36] It follows that no error has been demonstrated by the Judge that might have given rise to a miscarriage of justice. Mr Baker's conviction appeal must be dismissed accordingly.

Mr Baker's sentence appeal

The Judge's approach

[37] Dunningham J set out the facts as we have outlined at [4] to [6] above. She accepted that Mr Innes had left the address before the stabbing had occurred but was satisfied that both appellants went to the address with the common intention of robbing the Lochheads. Mr Innes had played his part by enticing the victims out of the flat so they could be confronted by Mr Baker.

[38] Addressing Mr Baker's personal circumstances the Judge noted that Mr Baker was 40 years old; he had heavy and persistent drug addictions; he had a number of previous convictions dating back to 2005 (although we note none of these were for any form of serious violence); Mr Baker had been remorseful to a degree but that this had not been demonstrated in a meaningful way to the family of the victims. The pre-sentence report writer concluded that his risk of reoffending was high.

[39] It is common ground that s 104(c) and (d) of the Sentencing Act 2002 were both engaged for sentencing purposes. These involve the unlawful entry into or unlawful presence in a dwelling place and the fact that the murder was committed in the course of another serious offence, namely aggravated robbery.

[40] Applying the decision of this Court in *R v Williams* the Judge first considered whether, but for the operation of s 104, a minimum period of imprisonment in excess

of the statutory minimum of 10 years was appropriate.[13] After reference to comparable authority,[14] the Judge determined that a minimum period of 14 years would be required. However, noting that when s 104 is engaged the 17 year minimum period of imprisonment is not to be departed from unless it would be manifestly unjust, the Judge found there were no circumstances that would justify a minimum period below the 17 years mandated by s 104. The mere fact that the sentence mandated by s 104 would be sterner than the minimum period of imprisonment that would otherwise apply was not sufficient to justify departure from the 17 year minimum. Nor was the fact that the finding of murder was likely to have been made in terms of s 168 of the Crimes Act.[15]

Mr Baker's sentence appeal — discussion

[41] On this aspect of Mr Baker's appeal Ms Aickin submitted there was no evidence at trial that Mr Baker knew he had inflicted a fatal wound on Mr Tony Lochhead before fleeing the scene; there was no evidence as to any premeditation of murder or agreement that the appellants would deal with any resistance with violence; the altercation was of very short duration; the evidence of significant drug use at the time of the offending was likely to have affected the level of premeditation; death arose from a single knife blow; it was reasonable to conclude that the jury found Mr Baker guilty in terms of s 168 of the Crimes Act rather than s 167; Mr Baker had a lack of prior convictions for violence and had expressed remorse to some degree. Counsel referred to a number of authorities by way of comparison in support of a submission that a minimum period of imprisonment of 14 or 15 years would have been appropriate.[16]

[42] We accept the Crown's submission that there was no error in the Judge's approach to sentencing. In this case, s 104 was engaged in two of the circumstances specified in that provision. Contrary to the submission made on Mr Baker's behalf, we are satisfied there was a significant degree of premeditation. Mr Baker planned

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13 *R v Williams* [2005] 2 NZLR 506 (CA).

14 *R v Nicholson* [2014] NZHC 334; *R v Watene* HC Wellington CRI-2007-485-127, 11 December 2007; *R v Williams* HC Auckland CRI-2008-092-13286, 13 May 2010; *Pahau v R* [2011] NZCA 147.

15 Citing the decision of this Court in *Kee v R* [2011] NZCA 229.

16 *R v Churchis* [2014] NZHC 2257; *R v Harrison* [2014] NZHC 2705; *R v Williams*, above n 14.

to visit the victims' address for the express purpose of obtaining drugs, cash and guns; he secured the assistance of Mr Innes in order to lure the victims out of the property; he armed himself with a knife and was clearly prepared to use it should there be any resistance; and, when this in fact occurred, Mr Baker threatened the victims, telling them he was going to stab them all over and fill them full of holes.

[43] According to the facts as found by the Judge at sentencing, there was a significant degree of persistence in Mr Baker's attempts to enter the property by forcing his way into the apartment using the knife he had taken with him to the scene to stab the victims in order to overcome their resistance. This resulted in the death of one man and a serious cheek wound to the other. It may be said there was an element of fortuity in that a single blow with the knife to the upper chest resulted in the death of Mr Tony Lochhead. However, Mr Baker must be taken to have appreciated that a blow with a knife to a vulnerable part of the body carried with it a significant risk that it would cause serious injury or death to the victim. The fact that Mr Baker had consumed drugs may not be taken into account in mitigation.[17]

[44] We agree with the Judge that, for sentencing purposes, it does not matter whether the jury may have concluded that Mr Baker was guilty of murder under s 168 of the Crimes Act rather than s 167(a) or (b). This Court confirmed in *Kee v R* that:[18]

> Section 104(1)(d) does not differentiate between the various grounds upon which murder might be established. It applies equally to all of the possible grounds under ss 167 and 168 of the Crimes Act. It is no answer, therefore, to submit that the killing was reckless rather than intentional or that only grievous bodily harm was intended and that the offending only amounted to murder because it was committed in the course of other serious offence. The whole point of s 104(1)(d) is to trigger the 17 year minimum where a murder is committed in the course of a serious offence.

[45] The principles relevant to s 104 are well-settled and do not require any detailed elaboration. It is sufficient to quote the following passage from the judgment of this Court in *R v Williams*:[19]

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17 Sentencing Act 2002, s 9(3).
18 *Kee v R*, above n 15, at [21].
19 *R v Williams*, above n 13, at [67]. See also *R v Gottermeyer* [2014] NZCA 205.

> … a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.

[46] There is nothing in the present case that would justify a departure from the statutory minimum of 17 years imprisonment. We accept the Crown's submission that the murder was committed in the course of another serious offence and that the offending involved unlawful entry into, or presence in, the Lochheads' home in circumstances comparable to those in *Pahau v R.*[20] In *Pahau,* this Court upheld a 17 year minimum term in the case of a 21 year old man who had stabbed the victim to death as he tried to climb into his house.

[47] The High Court authorities relied upon by Ms Aickin do not materially assist. In *R v Churchis*, a minimum period of 11 and a half years imprisonment was imposed for the murder of a vulnerable man.[21] The offender was only 17 years of age at the time which was plainly a material factor in the case that distinguishes it from the present. *R v Harrison* was concerned with an entirely different regime (the three strikes legislation).[22] We are informed it is subject to appeal. In *R v Williams,* s 104(d) was engaged.[23] The High Court, by a "very small margin",[24] imposed a 14 year minimum period of imprisonment on a 25 year old man who had murdered a 14 year old boy by striking him with a hammer during a robbery. We were informed that the Solicitor-General appealed against this sentence but the sentencing appeal did not proceed because the conviction was set aside.[25]

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20 *Pahau v R*, above n 14.
21 *R v Churchis*, above n 16.
22 *R v Harrison*, above n 16.
23 *R v Williams*, above n 14.
24 At [79].
25 *Williams v R* [2011] NZCA 245.

[48] These cases are no more than illustrative of the operation of the principles established by this Court in *R v Williams*, which we have referred to at [45] above.[26] They do not persuade us that the sentencing Judge was in error in this case for the reasons we have given. We record that Ms Aickin also raised an issue of disparity in relation to the sentence imposed on Mr Innes. However, since we have decided to allow the appeal by Mr Innes against his conviction, any issue of disparity is no longer live.

Mr Innes' conviction appeal

[49] In a comprehensive submission, Mr Eaton QC raised a substantial number of issues in support of Mr Innes' appeal against conviction. However, it is only necessary for us to refer in detail to two of them:

(a) The Judge erred in failing to direct the jury that they had to be sure that Mr Innes knew Mr Baker had a knife; and

(b) The Judge erred in failing to give adequate directions in relation to the defence of withdrawal.

[50] Setting the context for his submissions, Mr Eaton emphasised the shift in the Crown case on common intention to which we have already alluded. In opening, the prosecutor put the case squarely on the footing that the common intention alleged by the Crown was to carry out a robbery at the Lochheads' address. In closing, the Crown said the common intention was to carry out either a burglary or a robbery. Presumably, this was intended to cover the possibility that no one would be present at the address, in which case the plan to steal drugs, cash and guns would only require an unlawful entry to the property with no requirement for any actual or threatened violence.

[51] Mr Lillico accepted that this change introduced definitional complexities that were unnecessary in the circumstances that occurred, which plainly involved a robbery. As Mr Lillico suggested, the Crown could more simply have alleged that the common intention was to obtain drugs, guns and cash from the address without

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[26] *R v Williams*, above n 13.

consent of the owners and to use force or the threat of force if necessary to achieve that purpose.

[52] For the Crown to secure a murder conviction against Mr Innes as a secondary party under s 66(2), it was necessary to prove beyond reasonable doubt that:

(a) Mr Baker killed Tony Lochhead by stabbing him with a knife.

(b) When he did so, Mr Baker:

(i) Intended to kill Tony Lochhead; or

(ii) Meant to cause Tony Lochhead injury likely to cause his death, Mr Baker being reckless as to whether death ensued.

(c) Alternatively, when Mr Baker stabbed Tony Lochhead with the knife, he meant to cause grievous bodily injury to Tony Lochhead for the purpose of facilitating a robbery and Tony Lochhead's death ensued from such injury.[27]

(d) Mr Innes formed a common intention with Mr Baker to commit a robbery at the address and they each agreed to assist each other therein.

(e) Mr Innes knew it was a probable consequence of the prosecution of the common intention that in order to facilitate the commission of the robbery, Mr Baker would intentionally inflict grievous bodily injury.[28]

[53] In order to prove the last of these points, it was always an essential part of the Crown case to prove that Mr Baker had a knife in his possession and that Mr Innes knew that. If the jury accepted Ms Norman's evidence then there was a sound evidential basis for the jury to accept the Crown had proved those things.

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[27] We have simplified the elements to remove the unnecessary reference to burglary.

[28] In the sense that this could well happen: *Ahsin v R* [2014] NZSC 153; [2015] 1 NZLR 493 at [98]–[101].

[54] Mr Eaton's first point was that it was necessary for the Judge to direct the jury that they must be sure that Mr Baker had a weapon in his possession and that Mr Innes knew that. This was so for these reasons:

(a) The only basis suggested by the Crown for the jury to conclude Mr Innes appreciated that a killing or at least the infliction of grievous bodily injury was a probable consequence of the execution of the common intention of robbery was his knowledge that Mr Baker had possession of a knife. It was not a case, for example, where a group intent on carrying out a serious assault on someone might inflict really serious injury by some other means not involving a weapon (such as by kicking, punching or stomping).

(b) The alternative intention of burglary did not in itself give rise to an inference that really serious harm was intended since that crime does not require proof of violence or the threat of violence.

(c) In order to prove the necessary knowledge of the knife on Mr Innes' part, the Crown had to rely on the evidence of Ms Norman who, it is accepted, was a witness requiring a very firm warning as to reliability.

[55] Mr Eaton referred us to the analysis of William Young P (as he then was) in *R v Vaihu*.[29] This was a case of group violence where the Crown relied primarily on s 66(2). In relation to the common intention required for s 66(2) purposes, William Young P drew attention to the differing levels of violence that might be alleged as the common intention of the group (fighting in a public place, assault, assault with weapons or an intention to inflict really serious injury). The point was made that the level at which the offence alleged to be intended was pitched would have consequences in at least two ways. William Young P said that:[30]

> … the reality [is] that the closer the correspondence between the common intention and the offence alleged:
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> (a) The harder it may be to link particular defendants to the common intention; but

[29] *R v Vaihu* [2009] NZCA 111 at [85]–[95] per William Young P's separate concurring judgment.
[30] At [90].

> (b) In relation to those who share the common intention, the easier it will be to infer knowledge that the actual offence was a probable consequence of implementing the common intention.

[56] William Young P went on to state that it was not practicable to leave to the jury a continuum of possible common intentions and that it would be for the Crown to identify the common intention relied upon.[31] In the particular case, he would have been inclined to sum up on the basis that only those defendants who could be proved to have been aware of the presence of weapons could be found guilty.[32]

[57] Since *Vaihu*, the Supreme Court has considered the same issue in *R v Edmonds.*[33] *Edmonds* was a sequel to this Court's decision in *Pahau v R* in the sense that it involved one of the other participants in the group involved in the attack on the victim.[34] Mr Edmonds was convicted of manslaughter. He appealed on the sole ground that the trial Judge was required to, but did not, direct the jury that they could only find him guilty of manslaughter if sure that he knew that the killer (Mr Pahau) was carrying the specific weapon used as a knife. Mr Edmonds had been found guilty of manslaughter on the basis of party liability under s 66(2).

[58] The judgment of the Supreme Court was delivered by William Young J. The Court canvassed the approach to party liability in other jurisdictions including, in particular, in the English cases. The Court noted that the approach adopted in English cases represents a response to the potential for over-criminalisation of secondary parties in group violence cases.[35] This response had "involved limiting common purpose principles so as to exclude liability where the risk which crystallised was fundamentally greater than, and different to that envisaged by the alleged party".[36] This approach was rejected, the Court stating:[37]

> The approach of New Zealand courts to common purpose liability must be firmly based on the wording of s 66(2). That section recognises only one relevant level of risk, which is the probability of the offence in issue being committed. If the level of risk recognised by the secondary party is at that

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31 At [91].
32 At [95].
33 *R v Edmonds* [2011] NZSC 159, [2012] 2 NZLR 445.
34 *Pahau v R*, above n 14.
35 *R v Edmonds,* above n 33, at [28].
36 At [44].
37 At [47].

> standard, it cannot matter that the actual level of risk was greater than was recognised. It follows that there can be no stand-alone legal requirement that common purpose liability depends on the party's knowledge that one or more members of his or her group were armed or, if so, with what weapons. As well, given the wording of s 66(2), there is no scope for a liability test which rests on concepts of fundamental difference associated with the level of danger recognised by the party. All that is necessary is that the level of appreciated risk meets the s 66(2) standard.

[59] The Supreme Court went on to say nevertheless:[38]

> … that there are circumstances in which a knowledge-of-the-weapon direction may be required as part of the judge's discussion of the evidence, in particular in relation to:
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> (a) establishing the extent of the common purpose;
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> (b) deciding whether the party recognised that the commission of the offence was a probable consequence of the commission of the common purpose; and
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> (c) determining whether the offence committed by the principal was in the course of the implementing of the common purpose.

[60] The Supreme Court affirmed what William Young P had said in *Vaihu* including that the common purpose left to the jury is largely for the prosecutor to define including a decision as to where to pitch the alleged common purpose in terms of criminality.[39]

[61] The Supreme Court's ultimate conclusion was that whether there is a requirement for a direction about knowledge of the weapon in a s 66(2) case depended very much on the particular circumstances of the case and the particular charge alleged.[40] The Court explained the relationship between knowledge of the presence of a weapon and proof that a defendant was a party to a common purpose that extended to the use of those weapons in these terms:[41]

> (a) In some cases, evidence that the alleged party was either carrying a weapon or knew that other members of the group were armed may be the only evidence that the alleged party either (a) shared the common purpose alleged or (b) appreciated that the ultimate offence was a probable consequence of its implementation.

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38 At [48].
39 At [49].
40 At [52].
41 At [50].

> (b) In other cases, the common purpose may be best assessed by reference to the results the defendants intended to bring about. Thus the evidence may show that the defendant was a party to a common purpose to inflict serious and potentially life threatening violence in whatever way was convenient, including, say, kicks to the head. In such a case, the alleged party could still be found guilty of murder even if the fatal injury was inflicted not by kicking but rather with a tyre lever which, unbeknown to that party, one of the other members of the group had brought to the fracas.

[62] The Court concluded that there was no requirement for a weapons direction in Mr Edmonds' case. An important factor in this conclusion was Mr Edmonds had pleaded guilty to a charge of participation in an organised criminal group with the specific purpose of inflicting serious violence. This necessarily involved an acknowledgement on Mr Edmonds' part that he and two or more of his co-defendants had the objective of killing or putting the deceased and his companions at serious risk of death, or seriously injuring or putting them at serious risk of serious injury.[42] It followed that, when addressing Mr Edmonds' culpability under s 66(2) for the death of the deceased, the jury was inevitably going to accept that he had been part of the common purpose alleged by the Crown.[43]

[63] We conclude for the reasons identified at [54] above that the present case clearly called for a direction to the effect that the Crown had to prove beyond reasonable doubt (i.e. the jury had to be sure) that Mr Innes knew Mr Baker was in possession of a knife. In short, this was a case where Mr Innes' liability as a party under s 66(2) would stand or fall on whether he had that knowledge.

[64] The question therefore becomes whether the Judge gave a sufficient direction to that effect. In her summing-up, the Judge referred to the knife in the context of directing the jury as to whether Mr Innes knew that a probable consequence of the robbery or burglary was that Mr Baker would cause serious bodily harm to either or both of the Lochheads during the course of the robbery or burglary. She said:

> [113] The next question is whether Mr Innes knew that a probable consequence of the robbery or burglary was that Mr Baker would cause serious bodily harm to Mr Tony Lochhead or Mr Peter Lochhead during the course of the robbery or burglary. *For example, by using a knife*. Now the Crown case relies on the fact that Mr Baker had a knife on him and Mr Innes

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42 Crimes Act 1961, ss 4, 98A(1) and 2(c).

43 At [9].

> knew about the knife and it is a logical inference that it would be taken on the job. Indeed that is what occurred. And why the plan was executed in the way it was, with Mr Baker hiding in the bushes. Mr Innes' actions in running away was consistent with him knowing that.
>
> [114] The defence says there is no evidence that Innes knew that a knife was there or that Mr Baker would attack with a knife. Without that he could not reasonably know that serious bodily injury was a probable consequence.
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> [115] The defence says further, you cannot be sure that the use of the knife was not something embarked on by Mr Baker alone and as part of some subsequent plan which Mr Innes could not reasonably have anticipated.
>
> (Emphasis added)

[65] Mr Lillico submitted that this was a sufficient direction about Mr Innes' knowledge of the knife. He submitted that the jury could not have been under any misunderstanding as to the significance of Mr Innes' knowledge of the knife. We are unable to accept that submission. We agree that the jury would have been aware that Mr Innes' knowledge of the knife was an important issue. However, the circumstances of this case required the Judge to be explicit in directing the jury that they must be sure that Mr Innes knew that Mr Baker had the knife. No such direction was given.

[66] Importantly, the very elaborate question trails prepared by the Judge did not flag this as an issue. There were two question trails, one relating to the case against Mr Baker and the other to Mr Innes. There were several references in Mr Baker's question trail to the jury having to be sure that he killed Tony Lochhead by stabbing him with a knife.[44] The question trail for Mr Innes stated that the questions in Mr Baker's question trail had to be answered first and that the jury did not need to consider the issues relating to Mr Innes unless they concluded that Mr Baker was guilty of murder, manslaughter and/or aggravated wounding. But there was only one reference in Mr Innes' question trail to the use of a knife. Question four stated:

> Are you sure that Mr Innes knew that a probable consequence of the robbery or burglary was that Mr Baker would cause serious bodily harm to Mr T Lochhead or Mr P Lochhead during the course of the robbery or burglary (for example by using a knife)?

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[44] Reference was made variously to Mr Baker stabbing Tony Lochhead with "a" knife and "the" knife.

[67] The use of the expression "for example by using a knife" echoes the language used by the Judge in her direction to the jury in summing up. It left open the possibility that the jury could consider whether Mr Innes knew that a probable consequence of the common intention was that Mr Baker would cause serious bodily harm to the Lochhead brothers by some means other than the knife. Given that there was no evidence to support Mr Innes' conviction unless he knew Mr Baker had a knife, this could well have led the jury into error. The direction did not clearly bring home to the jury that they had to be sure about Mr Innes' knowledge of the knife. In the context of this case, it ought to have been expressly stated in the question trail for Mr Innes and in the Judge's summing-up as a factual matter the Crown was required to prove beyond reasonable doubt.

[68] We are satisfied in the context of this trial that this was a material error giving rise to a miscarriage of justice in the sense that it created a real risk that the outcome of the trial was affected in terms of s 232(2)(c) and (4)(a) of the Criminal Procedure Act 2011.

The withdrawal issue

[69] It is common ground that if there is an evidential basis for a defence of withdrawal, it is for the Crown to exclude this as a reasonable possibility. As noted, trial counsel for Mr Innes (not Mr Eaton) focused his closing address almost entirely on a submission to the jury that Mr Innes had withdrawn from any plan to carry out a burglary or robbery at the Lochheads' address prior to the attack by Mr Baker on the Lochheads. There was an arguable evidential basis for this submission since it is now common ground that after Mr Innes had entered the property and the Lochheads came outside, he left the property before Mr Baker's attack.

[70] In her summing-up, the Judge directed the jury on the withdrawal issue in accordance with the High Court's decision in *R v Pink*.[45] In *Pink*, Hammond J determined that four conditions had to be met before a withdrawal defence would be available to a defendant:[46]

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45 *R v Pink* [2001] 2 NZLR 860 (HC).
46 At [22].

(a) There must be notice of withdrawal, whether by words or actions.

(b) The withdrawal must be unequivocal.

(c) The withdrawal must be communicated to the principal offender.

(d) The withdrawal may only be effected by taking all reasonable steps to undo the effect of the party's previous actions.

[71] This approach had been subsequently approved by this Court on several occasions.[47] Since the appellants' trial, the Supreme Court has revisited the withdrawal issue in *Ahsin v R*.[48] In particular, a majority of the Supreme Court held after a review of authorities in other jurisdictions that *Pink* no longer correctly states the law in New Zealand.[49] The majority held that there are two requirements of the common law defence of withdrawal in New Zealand.[50] First, there must be conduct, whether words or actions, that demonstrates clearly to others withdrawal from the offending. Secondly, the withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime.

[72] If the trial Judge determines there is an evidential basis for both requirements of the defence to exist, then the jury should be directed that the defendant will only be liable as a party if it is proved beyond reasonable doubt by the Crown that he or she had not withdrawn from involvement. If there is a reasonable possibility that the defendant had withdrawn from the offending, he or she had a defence to criminal liability under s 66.[51]

[73] The majority then stated:

> [140] Although the way the trial judge frames the questions for the jury must always reflect the circumstances and issues in the particular case, it will often be helpful to direct the jury to consider whether it was reasonably possible that:

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47 *R v Ngawaka* CA111/04, 6 October 2004 at [14]–[15]; *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299 at [68]; and *R v Vaituliao* [2007] NZCA 525 at [60].

48 *Ahsin v R*, above n 28.

49 Ibid, at [134], n 97.

50 At [134].

51 At [139].

(a) the defendant demonstrated clearly, by words or actions, to the principal offender that he or she was withdrawing from the offending before the offence was committed?

(b) the defendant took steps to undo the effect of his or her previous involvement or to prevent the crime?

(c) the steps taken by the defendant for those purposes amounted to everything that was reasonable and proportionate, having regard to the nature and extent of the defendant's previous involvement?

(d) the steps taken by the defendant were timely, in the sense that the defendant acted at a time when it was reasonably possible that he or she may be able either to undo the effect of his or her prior involvement or to prevent the crime?

[74] The majority added that the directions on the legal requirements should be made in a way that ties them to the particular facts of the case and is tailored to reflect the cases for and against each defendant.[52] For example, the judge should describe the actions raised by the defence as constituting steps of withdrawal. Similarly, where the only alleged involvement is by words, the judge should indicate that the defence only requires words that dissuaded or discouraged the principal offender.

[75] Ms Ahsin's liability arose from her actions in driving the other offenders to the victim, stopping the vehicle alongside him in order to facilitate an assault, then driving the participants away. On the facts, the majority held in the case of Ms Ahsin that the withdrawal defence was not available to her. Although her words and conduct were capable of bearing different meanings, it was reasonably possible that a jury could conclude that they demonstrated an intention to withdraw from the offending. But there was no evidential foundation for the second requirement of the defence since the evidence, considered objectively, did not show that Ms Ahsin's actions amounted to taking all reasonable steps to undo her earlier crucial assistance (driving the car involved) or to prevent the crime. The words she uttered were never likely to undo the effects of the assistance she had given; it was impractical to undo the assistance she had given and her actions could not properly be held by a jury to amount to a timely withdrawal of assistance since what she had done was crucial in facilitating the murder by the principal offender; the appellant had put the principal

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52 At [142].

offender in a position to launch the intended attack immediately and that was what happened.

[76] On one view, the Supreme Court's decision in *Ahsin* has diminished the prospects of a successful defence of withdrawal. Apart from the need for clear evidence that the defendant has withdrawn, the Supreme Court has emphasised in particular the steps necessary to undo the effect of his or her previous participation or to prevent the crime. Much will depend on the nature and extent of the defendant's previous participation and whether the steps taken are timely and effective.

[77] Obviously, the Judge did not have the benefit of the *Ahsin* decision at the time of trial. She directed the jury that the Crown had to prove beyond reasonable doubt that Mr Innes did not withdraw from the common intention. Specifically, the question trail said:

> Are you sure that Mr Innes DID NOT communicate notice of unequivocal withdrawal of his assistance from the common intention, by words or actions, to Mr Baker, and taken all reasonable steps to undo his previous actions?

[78] Viewed in the light of *Ahsin*, the directions given were inadequate. But the short point in the present case is that the defence of withdrawal could never have been available on the facts of this case. Mr Eaton acknowledged that although Mr Innes left the property, there was no evidence that he said or did anything else that might have been construed as undoing his previous involvement. Mr Innes' role involved being a party to the common plan and luring the Lochheads out of their flat so that Mr Baker could confront them to carry out his purpose. All he did was to leave the property. In all probability, Mr Baker noticed that. But it was never part of the plan that Mr Innes would do anything more than lure the Lochheads outside. Moreover, there is no evidence that he said anything to Mr Baker to discourage him from proceeding with the attack such as urging him to leave or desist. Nor did Mr Innes take any steps to warn the Lochheads of the pending attack. He simply left Mr Baker to his own devices.

[79] We are satisfied in the circumstances that if there were any misdirection on the withdrawal issue, no risk of a miscarriage of justice arose in consequence.

Other issues in Mr Innes' appeal

[80] Given our conclusion that a miscarriage of justice has arisen in this case, it is not strictly necessary for us to give detailed consideration to the other issues Mr Eaton raised on behalf of Mr Innes. However, we briefly mention them:

(a) There were some inconsistencies and infelicities in the Judge's summing-up and the question trail. For example, the expression "serious bodily harm" is used in various places. The relevant statutory term in s 168(1)(a) is "grievous bodily injury" which means really serious bodily harm.[53] That sense is not captured by the term serious bodily harm and could, at least potentially, have led the jury to believe that something less than really serious harm was sufficient for the purpose of murder under s 168(1)(a).

(b) The Judge directed the jury in her summing-up that they must reach a unanimous verdict but in the question trails stated that the jury "must try to reach a unanimous answer to all of the questions". Given the crucial importance of a unanimous verdict in the first instance, this was a misdirection that could have given rise to a miscarriage.

(c) The Judge deviated from the wording of s 168(1)(a) by using the phrase "in the course of" instead of "facilitating" in her summing-up when directing that the appellant must cause grievous bodily injury for the purpose of facilitating the commission of the offence to be liable under s 168(1)(a). We note that these two phrases are not interchangeable: "in the course of" can be interpreted as merely temporal while "facilitating" implies a causal connection between the

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[53] *Ah You v R* [2013] NZCA 12 at [12], [27] and [42]; *R v Fotu* [1995] 3 NZLR 129 (CA) at 132 and *Vincent v R* [2015] NZCA 201 at [48]. We note that "grievous bodily injury" has the same meaning as "grievous bodily harm": see the definition of "to injure" in s 2 of the Crimes Act and Andrew P Simester and Warren J Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, 2012) at [16.4.5]).

intention to cause grievous bodily injury and the commission of one of the circumstances specified in s 168(2).[54]

(d) The jury question trail was unnecessarily complex. It would have been better to have captured it in a single question trail. As well, it is generally unnecessary to state the elements of the charges separately. It is usually best to incorporate these as simply as possible by reference to the factual questions the jury must answer.

(e) Finally, we mention the issue of manslaughter. In Mr Innes' case, if the jury had not been satisfied that he knew about the knife in Mr Baker's possession, there was a live issue about whether Mr Innes might have been guilty of manslaughter rather than murder. Although manslaughter was left to the jury, the Judge understandably did not emphasise it in her summing-up given that it was not advanced by Mr Innes as a potential verdict in his case. This may become a live issue in the retrial we intend to order.

Mr Innes' conviction appeal — result

[81] Mr Innes' conviction appeal must be allowed. Since his knowledge about the knife was crucial for both charges, it will be necessary to quash both convictions and order a re-trial on both.

The Solicitor-General's appeal against sentence

[82] In view of our conclusion that Mr Baker's conviction appeal must be allowed, it is unnecessary for us to consider the Solicitor-General's appeal against sentence. We simply observe that the Solicitor-General's appeal raised important issues that would have required very careful consideration if we had upheld Mr Innes' conviction. Should Mr Innes be convicted after his retrial, the appropriate

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[54] Compare *Re R (A Child)* [2003] EWCA Civ 182, [2003] Fam 129 (CA) at [22] where it was held that the natural and ordinary meaning of the expression "in the course of" is "during" or "at a time when" with the definition of "facilitate" in *Keen v R* [2015] NZCA 221 at [16]: "to make easy or easier". See also *R v Slade* [2005] 2 NZLR 526 (CA) at [39] and *R v Kinghorn* [2014] NZCA 169 at [26].

sentence will of course be a matter for the trial Judge in the light of all the facts and circumstances applicable at the time.

Disposition

[83] For the reasons given:

(a) The appeal against conviction and sentence by the appellant Mr Baker is dismissed.

(b) The appeal against conviction by the appellant Mr Innes is allowed.

(c) Mr Innes' convictions for murder and aggravated wounding are set aside and a retrial is ordered.

(d) Any question of bail for Mr Innes is to be dealt with in the District Court.

(e) The appeal by the Solicitor-General against the sentence for Mr Innes is dismissed in consequence.

(f) We make an order prohibiting publication of this judgment (including the result) in news media or on the Internet or other publicly available database until final disposition of retrial. Publication in a law report or law digest is permitted.

Postscript

[84] The Crown included in its submissions in this case a comprehensive discussion about the approach to be adopted for conviction appeals under s 232 of the Criminal Procedure Act. We are very grateful for the Crown's submissions but, in the circumstances of the case, we have decided that we should leave it until another day to express our views on that provision. It is sufficient to conclude that the error we have identified in this case has plainly given rise to a miscarriage of justice in accordance with the new statutory test under the Criminal Procedure Act.

Solicitors:
Crown Law Office, Wellington for the Crown