NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF WITNESS A'S NAME AND IDENTIFYING PARTICULARS REMAIN IN FORCE.

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IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA204/2020
[2024] NZCA 300

BETWEEN	DAVID WAYNE TAMIHERE Appellant
AND	THE KING Respondent

Hearing:	28–29 November 2023 (further submissions received 11 March 2024)
Court:	French, Miller and Collins JJ
Counsel:	M S Gibson and J E L Carruthers for Appellant F R J Sinclair and R K Thomson for Respondent
Judgment:	9 July 2024 at 10 am
Reissued:	10 July 2024

JUDGMENT OF THE COURT

A The application to adduce further evidence is granted.

B We find that the admission of the evidence of Robert Conchie Harris at Mr Tamihere's trial may have affected the jury's verdicts and accordingly amounted to a miscarriage of justice.

C Under the proviso to s 385(1) of the Crimes Act 1961, we are satisfied beyond reasonable doubt that Mr Tamihere murdered Urban Höglin and

Heidi Paakkonen. For that reason, the miscarriage does not justify setting the convictions aside.

D We accordingly decline to exercise the Court's jurisdiction under s 406(1)(a) of the Crimes Act 1961 to quash Mr Tamihere's convictions.

E We make an order prohibiting publication of this judgment, the media release, and any information therein, until the judgment is made publicly available at 12.00 pm on 11 July 2024.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] On 5 December 1990, David Wayne Tamihere was convicted in the High Court at Auckland of the murders of Sven Urban Höglin and Heidi Birgitta Paakkonen, tourists from Sweden who disappeared in bush country on the Coromandel Peninsula after last being seen in Thames on 7 April 1989. The Governor-General has referred the convictions to this Court to decide whether a miscarriage of justice may have occurred.[1] If it has, we will quash his convictions unless we find that the evidence proves his guilt beyond reasonable doubt.

[2] The Crown case against Mr Tamihere, who was living in the bush at the time, included the eyewitness evidence of two trampers, John Cassidy and Theodore Knauf. They identified Mr Tamihere as the man they encountered at a place called Crosbies Clearing with a young, blonde, European-looking woman, a description which would fit Ms Paakkonen, at around 3 pm on 8 April 1989. Witnesses saw Mr Höglin and Ms Paakkonen's car parked at the end of Tararu Creek Road,[2] which is the nearest place by car to Crosbies Clearing, on 9 April. Mr Tamihere admitted stealing their car from there and dumping or selling their possessions. The Crown case was otherwise circumstantial. Mr Tamihere has always maintained that he never met the couple and knows nothing of their disappearance.

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1 "Reference to the Court of Appeal of the Question of the Convictions of David Wayne Tamihere for Murder" (23 April 2020) *New Zealand Gazette* No 2020-ps1580 [Reference]; and Crimes Act 1961, s 406(a). The reference is annexed to this judgment.

2 This road was renamed as Victoria Street sometime between 2001 and 2005. We will refer to it as Tararu Creek Road as it was at the time of the events in question.

[3] Two events since the trial have led to the reference, the reason for which is that together they may raise doubts about the accuracy of the trampers' identifications.[3]

[4] The first is that, more than two years after he disappeared, Mr Höglin's skeletal remains were found in bush in Wentworth Valley, which is a considerable distance from Crosbies Clearing and the end of Tararu Creek Road. That evidence did not persuade this Court in 1992, when it heard an appeal against conviction, that the convictions were unsafe.[4] The second is that the Crown case included a prison informant's evidence that Mr Tamihere had disclosed that he had almost been "sprung" by "a couple" while he was in the bush with Ms Paakkonen. That account tended to corroborate the trampers' identifications. The prison inmate, Roberto Conchie Harris, was convicted on 1 September 2017 of perjury in connection with that evidence.[5]

[5] Mr Tamihere invites us to find that a miscarriage of justice has occurred. He says the Crown now advances its third theory of the case, which differs from both the one advanced at trial and the one advanced on appeal in 1992. He says this version "is as porous as any other" and the evidence falls substantially short of proving his guilt.

[6] The Crown contends that neither limb of the reference raises real doubt about the convictions and the Court can be sure of Mr Tamihere's guilt. It says that other evidence confirms the trampers' identifications were reliable and that the location of Mr Höglin's remains strengthens the case against Mr Tamihere. It has offered new evidence to show that Mr Tamihere lied at trial about his travels in the Coromandel in what can now be understood as an attempt to show he had not been in the vicinity of Mr Höglin's poorly concealed body.

[7] The reference invites us to review all the admissible evidence, including the new evidence, and decide for ourselves whether it proves Mr Tamihere's guilt beyond reasonable doubt. That means the inquiry is not limited to the trampers' identifications

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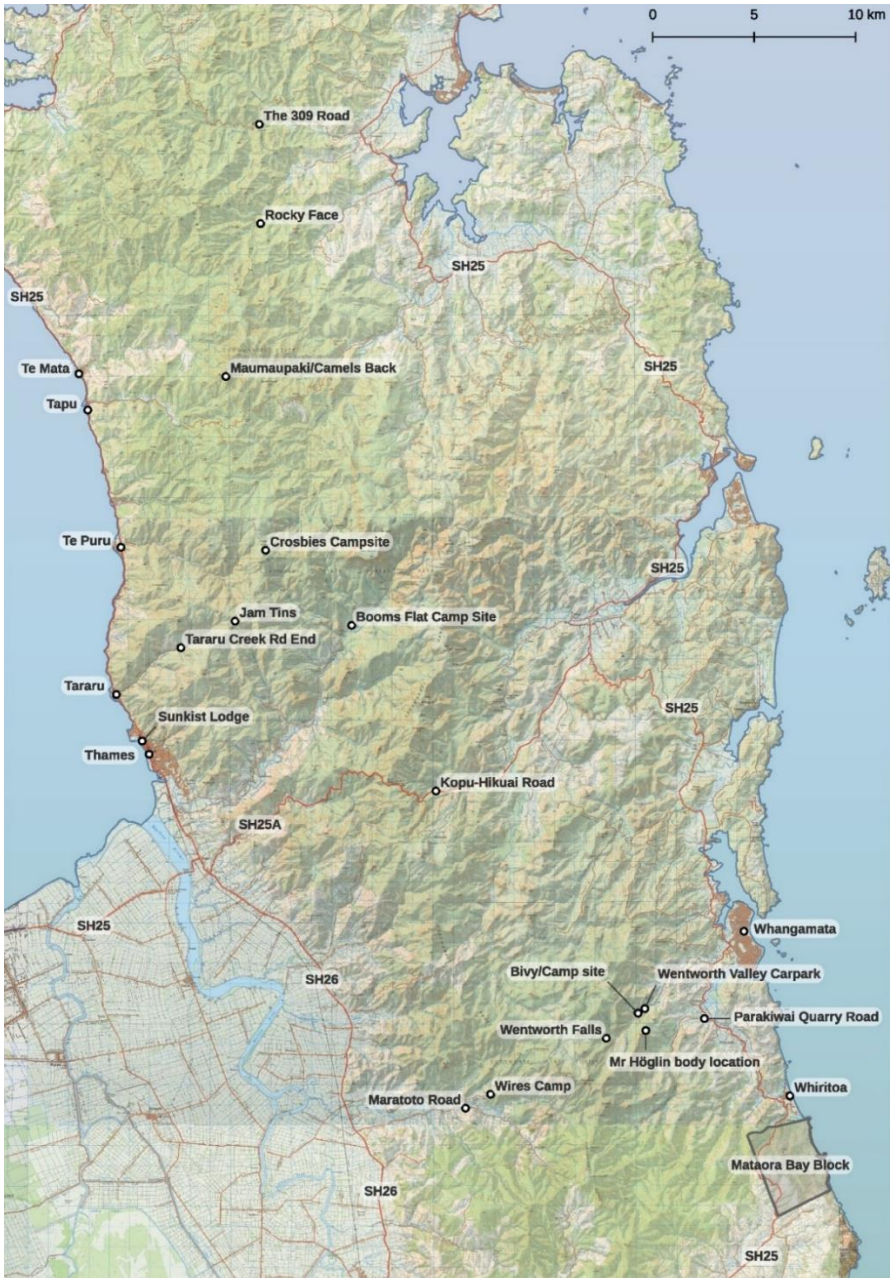
3 Reference, above n 1, at sch cl 6(a).
4 *R v Tamihere* CA428/90, 21 May 1992 [CA appeal judgment].
5 *Taylor v Witness C* [2017] NZHC 2610. See also *Harris v Taylor* [2018] NZCA 393.

and the implications of the location of Mr Höglin's body. We must also review circumstantial evidence which is said to link Mr Tamihere to Mr Höglin and Ms Paakkonen.

Important dates and places

[8] We begin with a short account of important known dates and places to orient the reader. Places are shown on the map below. It is a topographical map depicting the area within which Mr Tamihere said he ranged while living in the bush.



[9] This map was not among those produced at trial or on appeal. No single map used there showed the area of interest and all the relevant features or points of interest. We asked counsel to prepare this map after the hearing as an aid to readers coming to the case for the first time. It was prepared by the Crown because Mr Gibson, leading counsel for Mr Tamihere, declined to participate. He did not suggest that any of the locations are wrong, nor did he identify any that are omitted. Rather, his position was that he was unwilling to contribute to a map which was not used in evidence at trial. In our view, the map adequately serves its purpose of orienting the reader. There is no reason to doubt its accuracy. A few locations discussed in evidence are outside the area depicted on the map; to include all of them would increase the scale so much as to defeat the objective. To the extent that specific features or locations are in issue, we give details from the court record, or use maps which are in evidence, when we examine those matters later in this judgment.

[10] The narrative begins on 8 October 1986, when Mr Tamihere pleaded guilty in the High Court at Auckland to a charge of rape and was bailed to appear for sentence.[6] We mention the offence for two reasons. First, it is necessary to explain how he came to be living in the bush. He was on the run, seeking to escape an inevitable and lengthy term of imprisonment. His status as a fugitive accounts for behaviour which tends to identify him at various places and times in the bush. Second, we should record that his previous offending is not evidence of his guilt on the charges of murdering Mr Höglin and Ms Paakkonen. The Crown does not claim that his past behaviour evidences a propensity to commit offences of sexual violence or of violence generally. We add that there is no need to suppress publication of his offence history since it is already in the public domain and we are not asked to order a retrial should the reference result in his convictions being quashed.[7]

[11] On being bailed in 1986, Mr Tamihere fled to the Coromandel Peninsula. There he went bush, drifting in an area which he described at trial as roughly from the 309 Road (which transects the peninsula from Preece Point, just south of the town of

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6 Although he pleaded guilty to this charge, the charge on which he was eventually convicted and sentenced was one of unlawful sexual connection.

7 The jury were told that he was on the run for a serious offence the details of which were not relevant, and they were directed that they must set aside all previous knowledge of the case or those involved in it.

Coromandel in the northwest, to Kaimarama, just south of Whitianga in the northeast) to Mataora Bay to the southeast. His whānau have a block of land near Mataora Bay. These locations are labelled on the map above. The area in which he lived and travelled includes areas which can be traversed using tramping or hunting tracks or forestry roads. It also includes some very rugged country characterised by sharp changes in elevation and dense subalpine vegetation.

[12] Mr Tamihere claimed to spend long periods in the bush with occasional visits to town for supplies. When he visited Thames he stayed at a hostel, the Sunkist Lodge. Several people reported encounters with him in the bush during this period. He went by a pseudonym, "Pat Kelly", and spoke of living off the land. In his police statements and at trial, he described a way of life in which he set up bivouacs or "bivvies" where he could live in some comfort. These were typically hidden off tracks to protect his gear. His main pack weighed about 70 to 80 pounds, and he would move his belongings in relays between campsites or bivouacs.

[13] Mr Tamihere bivouacked at Mataora but he left there, fearing arrest, after he featured on a "Crimewatch" programme in October 1987. He established a bivouac near the start of the Wentworth Track southwest of Whangamatā, on the eastern side of the peninsula. A witness who encountered Mr Tamihere there in July 1988 described it as being right at the end of the Wentworth Valley Road, set back in the bush about 10 metres from a river across from the Wentworth Valley car park.[8] It is labelled "Bivy/Camp site" on the map. Adjacent to the car park is a walking track taken by anyone wanting to hike to the Wentworth Falls. The track, which is visible from the bivvy site, continues from the Falls to Wires Camp on the western side of the peninsula. Mr Höglin's remains would later be found less than a kilometre away from Mr Tamihere's Wentworth bivvy, as the crow flies. The location of his remains is marked on the map. Ms Paakkonen's remains were never found.

[14] Among the other places Mr Tamihere knew well is Crosbies Clearing, a site which can be accessed by a walking track from the end of Tararu Creek Road, just north of Thames. It is labelled as Crosbies Campsite on the map. The track between

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[8] This evidence is from 1989 and 1991 but it was not presented at trial. We have admitted it for this appeal: see below at [48].

the two places passes a junction known as Jam Tins, which is also labelled on the map. The distance by road from the location of Mr Höglin's remains to the end of Tararu Creek Road is about 73 km.

[15] Ms Paakkonen and Mr Höglin entered New Zealand at Auckland in December 1988 and purchased a white 1976 Subaru station wagon. The car had been fitted with bull-bars and had only one key, which operated the exterior door locks, the ignition and the steering wheel lock. The key was cracked but functional. They toured the South Island, going tramping in Nelson with a Canadian couple, and then returned north with the intention of reuniting with the Canadian couple in Auckland on or around 15 April 1989, before flying out of Auckland on 20 April and arriving back in Sweden, via the Cook Islands, on 7 May.

[16] On 6 April, the couple were in Thames. They were planning to go tramping and took advice about possible destinations and routes. On 7 April, they both had their hair cut at a salon in Thames. That was the last definite sighting of them. Witnesses reported seeing people resembling them at various places on the peninsula on 7 and 8 April. It is not known where they slept.

[17] On 8 April, a Saturday, two trampers, John Cassidy and Theodore Knauf, met a man and a young blonde woman at a campsite at Crosbies Clearing. They spent a little more than 10 minutes chatting to the man before going on their way. The woman sat mute throughout the encounter. The trampers later identified the man as Mr Tamihere. It is these identifications which are the subject of the reference. We examine the evidence about them in detail below at [59] and record our own findings at [213].

[18] A group of three visitors to a nearby property, as well as the property owner, noticed the Subaru parked at the end of Tararu Creek Road on Sunday 9 April, in the mid-afternoon. A camera was on the driver's seat. The rear of the car was tidily packed with gear which included two tramping packs, a rolled-up foam mattress, other packed containers and some maps. The car plays an important part in the case. Mr Tamihere later admitted stealing it from that place. Its location at the road end closest to Crosbies Clearing accordingly provides some circumstantial support for the

trampers' identifications of Mr Tamihere and, because it was the couple's car, the inference that the woman with him was Ms Paakkonen. And there is evidence that he gained entry to the car using the key which Mr Höglin habitually carried. We examine the evidence about that below at [127] and record our own findings at [242].

[19] On 10 April, Mr Tamihere checked into the Sunkist Lodge, where he had stayed on two previous occasions in the preceding month. As he had done previously, he used the name "Pat Kelly". He was driving the Subaru. On the following day, he used the car to take a group of tourists on a tour.

[20] On 12 April, Mr Tamihere drove to Auckland, where he sold Ms Paakkonen's and Mr Höglin's packs, fishing rod and binoculars. He left the car on a street. It was noticed on 14 April being driven erratically by a group of young men and was later found abandoned. No key was recovered.

[21] Mr Tamihere later returned to the Coromandel, fearing he had been identified in Auckland, but he was back in Auckland by 24 May. On that day he was recognised by a police officer, arrested and held in custody. He did not return home before police searched his property after later learning of his connection to the missing couple.

[22] On the same day, after a report from Swedish authorities that Mr Höglin and Ms Paakkonen had failed to return home, New Zealand Police | Ngā Pirihimana o Aotearoa began to investigate the couple's disappearance.

[23] A call for assistance from the public led police to a report of items, some of which had been dumped in plastic supermarket bags, at the end of Tararu Creek Road. Some of these were retrieved from 26 May. They included a baggage label in Ms Paakkonen's name, clothing labels bearing Mr Höglin's name, their tent bag and bags of female clothing, one of which contained a pair of unwashed underwear with a soiled panty liner in them. The underwear had been cut through the crotch using a sharp instrument, likely since the garment was last washed. Mr Tamihere later admitted dumping the bags. He also admitted cutting labels off clothing that he wanted to keep and discarding other items before driving off in the car.

[24] One of the tourists whom "Pat Kelly" toured around the Coromandel reported to police that he drove a white Subaru and stayed at the Sunkist Lodge. The police visited the Lodge and found that "Pat Kelly" had made a phone call to an Auckland address. On 10 July, police officers visited that property. It was Mr Tamihere's home. They saw Mr Höglin's jacket hanging on a chair. Mr Tamihere immediately became a person of interest. The house was searched. Police found a tent, a tomahawk, and a poncho. These things belonged to Mr Tamihere. They matched items which the two trampers noted when they met the man they later identified as Mr Tamihere at Crosbies Clearing. The poncho they observed was like the one worn by the young woman.

[25] On 29 July, a tramper found Ms Paakkonen's jacket near Jam Tins, between Tararu Creek Road and Crosbies Clearing. Police later found her wallet in the same area.[9] Some of its contents were strewn about. A plastic plate and cup belonging to the couple were found with a Woolworths shopping bag at Kauaeranga Junction, which is on the track to Crosbies Clearing.

[26] On 19 August, the proprietor of the Sunkist Lodge tidied the Lodge and found in a cupboard a supermarket bag containing toiletries belonging to Ms Paakkonen. Another bag found elsewhere in the hostel contained accessories for the car. The hostel records do not show that the couple had stayed there. Mr Tamihere admitted that he must have left the items, though he did not think he placed them in a cupboard.

[27] In December 1990, a member of the public, Clement Cornish, searched an abandoned shed at the end of Tararu Creek Road.[10] It contained a good deal of junk and debris. He found a Swedish-made tent belonging to the couple, bundled up in its fly in a back room. It had not been located in previous police searches of the shed. The fabric of the tent had been cut at the apex and its fabric straps or guy ropes had been cut off.

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9 The appellant describes the wallet in his submissions as being Mr Höglin's wallet, but the evidence at trial established it was Ms Paakkonen's.

10 He had been one of the four who saw the car at the end of Tararu Creek Road on the afternoon of 9 April. See below at [127].

[28] The couple also owned a small day pack, cooker and sleeping bags. These were not among the items found at the end of Tararu Creek Road, nor were they sold by Mr Tamihere with the other packs, nor were they found at his address.

[29] A depositions hearing was held in April and May 1990, and Mr Tamihere stood trial on 29 October 1990 in the High Court at Auckland. The Crown theory was that the couple were murdered in an area of dense bushland a few kilometres north of Thames, which would include the area between the location of their car at the end of Tararu Creek Road and Crosbies Clearing. The defence accepted that the couple must be dead but put the Crown to proof and maintained their disappearance may have been accidental.

[30] Messrs Cassidy and Knauf identified Mr Tamihere as the man they saw with the woman at Crosbies Clearing. Their identification evidence had been ruled admissible by this Court before trial.[11] We examine these decisions below at [103].

[31] Three prison inmates, including Mr Harris, gave evidence of admissions Mr Tamihere was said to have made. We examine that evidence below at [185]. A man named Duane Davenport, who was a boarder at Mr Tamihere's house, deposed that he saw Mr Tamihere's son wearing a watch which had been given to him by Mr Tamihere and which the Crown contended was similar to Mr Höglin's. Mr Tamihere gave evidence in his own defence.

[32] After deliberating for over two days, the jury found him guilty of murdering both victims. The jury were given a *Papadopoulos* direction, indicating they found it difficult to reach agreement and did so only after being urged to continue their deliberations.[12] Tompkins J sentenced Mr Tamihere to life imprisonment with a minimum period of imprisonment of 10 years. He was paroled in 2010.

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11 *R v Tamihere (No 3)* (1990) 7 CRNZ 221 (HC) [HC pre-trial ruling]; and *R v Tamihere* [1991] 1 NZLR 195 (CA) [CA pre-trial appeal].

12 *R v Papadopoulos* [1979] 1 NZLR 621 (CA). Tompkins J's direction was in the form suggested by this Court in *R v Accused (CA 87/88)* [1988] 2 NZLR 46 (CA) at 59, which has since been slightly modified by *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [108] per McGrath, Glazebrook and Arnold JJ. See also *Hastie v R* [2012] NZSC 58, [2013] 1 NZLR 297.

[33] Almost a year after the trial, on 10 October 1991, hunters found the skeletal remains of Mr Höglin below a ridge not far from Mr Tamihere's Wentworth Valley bivouac site. His clothing had been stabbed and cut, and two of his cervical vertebrae had been cut or shaved. His watch was found with his remains. We examine that evidence below at [166] and evaluate its implications at [232].

[34] Mr Tamihere's appeal against conviction was heard in this Court on 24 March 1992. The Court heard forensic evidence indicating that Mr Höglin had died near the place where his remains were found. The Crown's theory of the case changed a little. It contended that the location of the remains was consistent with its case at trial, relying on prison informant evidence indicating that Mr Tamihere had gone to considerable lengths to hide the bodies. It accepted that its theory about the watch had been wrong but contended that was not pivotal to its case at trial. We return below at [177] to the Court's reasons for dismissing the appeal.

[35] The Crown's theory of the case now is that Mr Tamihere met the couple around Wentworth Valley, possibly at the car park, that Mr Höglin was killed near to where his remains were found, and that Mr Tamihere drove the car with Ms Paakkonen to Tararu Creek Road and then took her to Crosbies Clearing. If so, she may have been killed somewhere in that area before Mr Tamihere took the car and went to Thames on 10 April, but where and how she died cannot be known. That she and Mr Höglin were murdered is not now in dispute. The Crown says the evidence points overwhelmingly to Mr Tamihere as the person responsible.

The Court's task under the reference

[36] Section 406 of the Crimes Act 1961 has been repealed but we will still apply it to this appeal.[13] It provided at the time of the reference:

> **406 Prerogative of mercy**
>
> (1) Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any court or to the sentence (other than a

[13] Criminal Cases Review Commission Act 2019, s 5 and sch 1 cl 4(1)–(2) provide that the reference may be determined as if s 406 had not been repealed. It was common ground before us that s 406 would apply to this appeal.

> sentence fixed by law) passed on any person, may at any time if he or she thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—
>
> (a) refer the question of the conviction or sentence to the Court of Appeal or, where the person's right of appeal against conviction under section 229 of the Criminal Procedure Act 2011 was to the District Court or the High Court, to the High Court, and the question so referred shall then be heard and determined by the court to which it is referred as in the case of an appeal by that person against conviction or sentence or both, as the case may require; or
>
> (b) if he or she desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly.
>
> (2) A reference under this section must be published in the *Gazette*.

[37] The reference in this case was made under s 406(1)(a). The Court's task is to consider the question of the convictions, hearing and determining them as if they were an appeal against conviction.

[38] The "question of the conviction or sentence" extends to the whole case and does not constrain the grounds of appeal, although the Court may decline to rehear grounds of appeal that have already been decided in the original appeal and for which there is nothing new to be said.[14] When significant new evidence has come to light, the Court may reconsider grounds which have already been determined.[15] As this Court explained in *R v Ellis*, the fundamental inquiry is whether, taken individually or collectively, the grounds of appeal demonstrate that there has been a miscarriage of justice that requires the convictions be set aside.[16]

[39] The full reference in this case is appended to this judgment. Its schedule recites that:

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14 *Watson v R* [2022] NZCA 204, [2022] 3 NZLR 1 at [27]–[32]; and *R v Palmer* CA202/05, 11 April 2006 at [45].

15 *R v Ellis* (1999) 17 CRNZ 411 (CA) [*Ellis* (CA)] at [13]. The Supreme Court made no comment on this approach: *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338 [*Ellis* (SC substantive judgment)] at [91].

16 *Ellis* (CA), above n 15, at [18].

2(3) The prosecution case was circumstantial. An important element was the evidence of the trampers identifying the applicant as the man they had seen with a woman resembling Ms Paakkonen at around 3.00pm on Saturday 8 April 1989 at Crosbies Clearing.

…

3(2) In October 1991, before the hearing of the appeal, Mr Höglin's remains were discovered in Wentworth Valley, on the eastern side of the Coromandel Peninsula and approximately 73 km by road from the end of Tararu Creek Road.

…

4 On 1 September 2017, Mr Harris was convicted of perjury in relation to 8 aspects of the evidence that he gave at the applicant's trial. One of the charges related to his testimony that the applicant had mentioned almost being "sprung" while in the bush with Ms Paakkonen.

[40] It then sets out the reason for the reference:[17]

> The reason for the reference is that the information referred to in clauses 3(2) and 4, taken together,—
>
> (a) may raise doubts about the reliability of an important aspect of the Crown case, namely the trampers' identification evidence referred to in clause 2(3); and
>
> (b) could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred.

[41] The reference accordingly asks the Court to reconsider the safety of the convictions in light of evidence which may affect the reliability of the identification evidence that formed an important part of the Crown case at trial. That evidence is new in the sense that the jury did not hear it. It came to light after the trial. Some of it—relating to Mr Höglin's remains—was examined in the 1992 appeal, and as will be seen, no new information about that matter has come to light since. The Court is asked to revisit its impact, along with that of Mr Harris's false evidence, on the trampers' identifications.

[42] When exercising its jurisdiction under s 406, the court may confine itself to the questions asked in the reference, where it thinks that is the just approach.[18] It depends

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17 Reference, above n 1, at sch cl 6.

18 *Ellis* (CA), above n 15, at [13] as cited in *Watson*, above n 14, at [54].

on the circumstances of the case and terms of the reference. In some of the decided cases the question was whether an error occurred. If there was no error, the court's inquiry would end there.

[43] In this case there is no doubt that an error occurred at trial. Mr Harris committed perjury. The Crown accepts that his claim that Mr Tamihere admitted encountering two people when he was with Ms Paakkonen must be treated as false. If satisfied that the error may have affected the result at trial, the Court must turn to the proviso in s 385 of the Crimes Act to decide whether the convictions are nonetheless safe. Section 385 has been repealed but it still applies to this proceeding.[19] It provided that:

> (1) … the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
>
> …
>
> (c) that on any ground there was a miscarriage of justice; …
>
> …
>
> and in any other case shall dismiss the appeal:
>
> provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[44] The leading authorities under s 385 establish that:

(a) A miscarriage of justice is an error which may have affected the result. The appellate court disregards errors or irregularities which plainly could not have done so.[20]

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19 Section 385 was replaced from 1 July 2013 by s 232 of the Criminal Procedure Act 2011. The proceedings against Mr Tamihere commenced before this date, so the appeal provisions of the Crimes Act apply: Criminal Procedure Act, s 397.

20 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [30].

(b) Errors cannot be saved by the proviso where they are so fundamental as to cause the trial to lose its character as a trial according to law.[21] Such a trial is unfair within the meaning of s 25(a) of the New Zealand Bill of Rights Act 1990.[22]

(c) The threshold for fundamental error is high because the proviso must be permitted to do the work for which it was designed.[23]

(d) The appellate court may take the jury's verdict into account, to the extent it is possible to say whether the error affected the verdict and provided the court recognises that it must reach its own decision.[24] In doing so the appellate court must take into account any disadvantage it faces when assessing the honesty and reliability of witnesses based solely on the transcript of their oral evidence.[25]

(e) Before it may apply the proviso, the appellate court must itself be satisfied of the defendant's guilt to the criminal standard, beyond reasonable doubt.[26]

[45] The wrongful admission of evidence does not ordinarily amount to incurable error. Such cases are usually decided under the proviso.[27] As the Supreme Court explained in *Lundy v R*:[28]

> [42] The authorities establish that when considering the significance of inadmissible evidence in the context of the trial, an appellate court may inquire into whether the evidence went to an issue on which the verdict turned, how strong was the Crown case otherwise, how cogent or prejudicial was the evidence and whether it was met by defence evidence, what impact the inadmissible evidence had on the conduct of the defence case, how counsel handled the evidence, and whether the trial judge's directions mitigated or

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21 *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 [*Lundy* (SC)] at [25]–[26].
22 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]–[78]; *Matenga*, above n 20, at [31]; and *Lundy* (SC), above n 21, at [27].
23 At [28] citing *Matenga*, above n , at [28].
24 *Lundy* (SC), above n 21, at [29].
25 *Matenga*, above n 20, at [32]; and *Weiss v The Queen* [2005] HCA 81, (2005) 224 CLR 300 at [40]–[41] as cited in *R v Haig* (2006) 22 CRNZ 814 (CA) at [59] per William Young P and Chambers J.
26 At [31]; *Lundy* (SC), above n 21, at [30]; and *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [57].
27 *Lundy* (SC), above n 21, at [37]–[42].
28 Footnotes omitted.

> cured the irregularity. As explained above, it may be possible to take into account what the actual jury did with the evidence, if that is ascertainable.

[46] Because the court's jurisdiction on a reference is the same as it is on an appeal, the usual rules apply to the admission of new evidence.[29] Evidence is screened for freshness, credibility and materiality to verdict.[30] These rules exist to secure the overall interests of justice.[31] But when dealing with a reference, the court recognises that it may be necessary to admit new evidence to decide the case on its true merits.[32] As Eichelbaum CJ explained for the Full Court in *Collie v R*:[33]

> The principles on which the Court should proceed in relation to a s 406(a) reference are as in the decisions of this Court in *R v Morgan* and *R v Dick*. The Court should be given information of the considerations which have caused the Governor-General in Council to make the reference. If as would invariably be the case the appellant wished to rely on the material placed before the Governor-General, an application for leave to adduce fresh evidence is required. The normal rule that fresh evidence will not be received unless it is shown that such evidence is new or fresh in the sense that it was not available at the trial is not always applied with rigidity if there is reason to think that to do so might lead to injustice, or the appearance of injustice. In this respect each case has to be decided on the merits.

[47] The record presented to us contains what Mr Carruthers, for Mr Tamihere, described as "a blizzard of material"; thousands of pages representing 30-odd years of twists and turns in the investigation, pre-trial, trial, appeal and other stages of the proceedings. That was inevitable because the reference requires that we evaluate things that happened after the trial. The material includes statements made in depositions or to the police, some of which were not led in evidence at the trial. We have considered all of this material so far as relevant, bearing in mind that some of it was not tested at trial. That was the approach taken in *Collie v R*, at which

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29 *Ellis* (CA), above n 15, at [18]. See s 119(3) of the Summary Proceedings Act 1957 and s 389 of the Crimes Act. These sections have been replaced by ss 334 and 335 of the Criminal Procedure Act respectively. See also *Watson v R* [2024] NZCA 170.

30 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 [*Lundy* (PC)] at [120] as cited in *Ellis v R* [2021] NZSC 77, (2021) 29 CRNZ 749 [*Ellis* (SC evidence judgment)] at [29]–[30]. The Supreme Court applied the *Lundy* test to proceedings commenced before that decision was delivered.

31 *Lundy* (PC), above n 30, at [119] as cited in *Ellis* (SC evidence judgment), above n 30, at [29]–[30].

32 *Ellis* (CA), above n 15, at [19]. See also *Haig*, above n 25, at [53] per William Young P and Chambers J, and the cases cited there.

33 *Collie v R* [1997] 3 NZLR 653 (CA) at 657 (citations omitted) citing *The Queen v Morgan* [1963] NZLR 593 (CA) and *R v Dick* [1973] 2 NZLR 669 (CA).

depositions were relied upon without requiring that they be formally admitted into evidence.[34]

[48] There is also new evidence which has been filed since the hearing of Mr Tamihere's conviction appeal in March 1992, all of it from the Crown. Most of it is not fresh, but it is cogent. Generally, it tends to show that Mr Tamihere was in the Wentworth area in early April 1989, and that he lied about that when interviewed by the police, claiming instead that he was much further north in what the Crown says was an attempt to divert attention from the area where he had left Mr Höglin's body. We admit the new evidence and examine it below.

[49] The law of evidence has changed since Mr Tamihere's trial. Notably, the general rule is that dock identifications are no longer permitted.[35] And when police obtain visual identification evidence of a defendant without following a formal identification process, that evidence is inadmissible unless there was good reason not to follow such process or the Crown proves beyond reasonable doubt that the circumstances in which the identification was made have produced a reliable identification.[36] A more cautious approach is also now taken to the admissibility of prison informant evidence.[37]

[50] The courts' practice is that admissibility issues are to be determined under the law of evidence that applied at the time of the trial.[38] It could hardly be in the interests of justice to hold that visual identification evidence was inadmissible on the ground that the police failed to follow rules which did not exist at the time. But a departure from current standards may be a relevant consideration which points to a miscarriage of justice, as the Supreme Court explained in *Ellis v R*:[39]

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34 *Collie*, above n 33, at 658. See also *Mallard v The Queen* [2005] HCA 68, (2005) 224 CLR 125 at [10] per Gummow, Hayne, Callinan and Heydon JJ as cited in *Watson*, above n 14, at [43]. We keep in mind what this Court said in *Ellis* (CA), above n 15, at [25]–[28] in regard to approaching untested material with care.

35 *Peato v R* [2009] NZCA 333, [2010] 1 NZLR 788 at [59]–[66]. See also *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [20], n 20 citing *R v Young* [2009] NZCA 453 at [29].

36 Evidence Act 2006, s 45(2).

37 *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [88] per Glazebrook, O'Regan and Ellen France JJ and [192] per Winkelmann CJ and Williams J.

38 See, for example, *Ellis* (SC substantive judgment), above n 15, at [86]; and Evidence Act, s 5(3)(b). See also s 206.

39 *Ellis* (SC substantive judgment), above n 15.

> [345] As is apparent, there is disagreement among the experts as to whether the interviews [of children] met the best practice standards of the day and/or current best practice standards. We do not intend to form a view on either. Answering the question "did the interviews meet the standard?" does not resolve the questions facing an appellate court, namely, "was the verdict unreasonable?" or "did a miscarriage of justice arise from the way the interviews were conducted?". It cannot be said that, if the standard is met, there is no risk of a miscarriage; nor can it be said that non-compliance with the standard will mean a miscarriage has occurred. An appellate court must consider the evidence of each complainant individually, in light of the other evidence before the jury and the conduct of the trial before making an individual assessment. Having said that, a departure from the best practice standards will still be a concern and will be a relevant consideration when addressing whether a miscarriage occurred.

[51] We adopt that approach in this case when considering whether a miscarriage of justice occurred and whether the Crown has proved Mr Tamihere's guilt. In particular, we take current practice into account when assessing the visual identification evidence and the informant evidence.

The parties' cases before us

[52] We heard the appeal on 28 and 29 November 2023. Mr Tamihere's case before us was that the Crown case at trial relied heavily on identifications that were made in circumstances that were far from ideal. There was reason to doubt the correctness of the trampers' identifications. The Crown also asked the jury to use evidence, now shown to have been fabricated, to support the identifications. Given what is now known about the reliance that juries place on prison informant evidence, there is every reason to think the jury obliged. Mr Davenport's evidence about the watch was contrived and false. The discovery of Mr Höglin's remains 73 km from Crosbies Clearing only adds to the unease. This Court was wrong on appeal to reason that the jury likely discounted the prison informant and watch evidence.

[53] The Crown's case was that neither limb of the reference raises real doubt about the reliability of the trampers' identifications. The Court may be satisfied, as it was in 1992, that no miscarriage of justice occurred. The discovery of Mr Höglin's remains is reconcilable with sightings of the Subaru and Mr Tamihere, and it strengthens the Crown case by exposing the reason for his lies about his whereabouts. Mr Harris's evidence was not a crucial part of the Crown case, nor was the watch. The identification evidence was strong when considered with the trampers' descriptions of

the equipment Mr Tamihere owned. If persuaded that a miscarriage occurred, the Court may nonetheless be sure of Mr Tamihere's guilt.

A miscarriage of justice

[54] The Crown accepts that there was an error at trial, in that Mr Harris gave evidence which must be presumed false, but it contends the error did not amount to a miscarriage of justice. For his part, Mr Tamihere maintains that there was a miscarriage but does not say that it amounted to fundamental error.

[55] We accept Mr Tamihere's argument on this point. Something has gone wrong, in that the jury heard evidence from Mr Harris which we now know was false. We accept, contrary to the inference this Court drew in 1992,[40] that it may have affected the jury's verdicts. As the Supreme Court said in *W (SC 38/2019) v R*, "studies indicate juries find this type of evidence persuasive in a similar way to primary confessions" despite warnings.[41] We explain below that in our opinion none of the prison informant evidence was relevantly reliable.[42] But, for the reasons given above at [45] the admission of Mr Harris's evidence was not a fundamental error. The proviso is available. We observe that the trial Judge drew attention to manifest inconsistencies in the prison informant evidence and warned the jury to treat it with care.

[56] That being so, the convictions must be set aside unless we are sure of Mr Tamihere's guilt. As we have explained, that is the question which the reference invites us to answer.[43] We accept Mr Carruthers's submission that when doing so we must revisit matters which the Court addressed in 1992, including the trampers' identifications and the implications of the location of Mr Höglin's remains.

[57] Because the admission of Mr Harris's evidence may have affected the jury's verdicts and the location of Mr Höglin's remains has altered the Crown's theory of the

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40 CA appeal judgment, above n 4, in particular at 15.

41 *W (SC 38/2019) v R*, above n 37, at [80] and [84]–[85] per Glazebrook, O'Regan and Ellen France JJ. The research does not all point one way, though: see at [81]–[82]. See also at [233] and [246] per Winkelmann CJ and Williams J.

42 Below at [191].

43 Above at [44](e).

case, we place no weight on the jury's verdicts when deciding whether the evidence establishes Mr Tamihere's guilt.

[58] As this is a circumstantial case, it is important to note that, as this Court explained in *R v Guo*, the individual strands of evidence themselves need not be proven beyond reasonable doubt.[44] The question whether guilt has been proved beyond reasonable doubt is answered by reference to the evidence as a whole.[45]

The identification evidence

[59] In this section of the judgment, we narrate both the evidence of the two trampers and the evidence of other witnesses who encountered Mr Tamihere in early April 1989.[46] We include evidence tending to identify items seen by the trampers and later seized from Mr Tamihere's home. We also address circumstantial evidence about the location of the car and Ms Paakkonen's belongings. All of it bears on the reliability of the trampers' identifications. Neither of them positively identified Ms Paakkonen. The Crown's case is that they correctly identified Mr Tamihere and the woman with him can only have been Ms Paakkonen. For that reason, their descriptions of the woman are also very important.

Sightings of Mr Tamihere in the bush before 8 April 1989

[60] The narrative begins in November or early December 1987, when Mr Cassidy encountered a man at Crosbies Clearing whom he much later identified as Mr Tamihere. Mr Cassidy was a very experienced tramper. He had been involved with some track clearing around that time and was checking to see if more work was required[47] when he met Mr Tamihere, who had a small blue or grey tent pitched. They were together for 20–30 minutes. Mr Tamihere was wearing a charcoal-coloured Swanndri and heavy boots which had thick rubber soles and were steel-capped.

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44 *R v Guo* [2009] NZCA 612, [2010] BCL 126 at [49] citing, among others, *Thomas v The Queen* [1972] NZLR 34 (CA).

45 *Guo*, above n 44, at [50].

46 Some of the narrative about the police investigation, the search and rescue operation, and the identification of Mr Tamihere is taken from the depositions and the pre-trial hearing before Tompkins J. Not all of this evidence was repeated at trial, the Court of Appeal having ruled the identification admissible. We have indicated where this is the case.

47 That evidence was given at a pre-trial hearing before Tompkins J on 3 September 1990.

Mr Tamihere gave a non-Māori name. He mentioned a book by Flight Lieutenant Brian Hildreth called *How to Survive in the Bush, on the Coast, in the Mountains of New Zealand* and said he had studied it and believed it contained errors, so he was going to check it during his five days in the bush. He said he had two sons and was taking three months off work, which he could do because he worked as a rigger on major construction projects like Marsden Point. Four other witnesses who met him in the bush or at the Sunkist deposed to him giving a similar account of his employment, and it corresponds with what he told police.

[61] Mr Cassidy testified that around three months later he visited the Moss Creek Hut in the Kauaeranga Valley, where Mr Tamihere had said he intended to go, and there he noted an entry in the hut logbook giving the same name that Mr Tamihere had used and mentioning that there were errors in Hildreth's book. The logbook was no longer available by the time of trial.

[62] Between 12 and 16 March 1989, Mr Tamihere stayed at the Sunkist Lodge in Thames. On 17 March, he hitchhiked south, heading for the Maratoto Valley. On 18 March, he encountered Neil Wallwork and Kevin Massey-Borman there and introduced himself as "Pat Kelly". While they spoke with him for around 15–20 minutes, Mr Massey-Borman noticed at his side he had a large, bone-handled hunting knife inside a brown sheath. Mr Wallwork also recalled a big knife attached to his belt.

[63] On 26 March, Colleen McClenaghan and Robin Patchett met a man near the Wentworth Falls.[48] He appeared out of the bush. They described him as Māori, in his 30s and with a moustache. Ms McClenaghan said he also had a full beard that was fairly short, while Mr Patchett thought he may have had a stubble beard but was not sure. He was wearing a camouflage-patterned jacket and trousers. Neither was a witness at trial. They recognised him as Mr Tamihere when they saw his photograph on a television documentary in 1991.

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[48] Ms McClenaghan thought it was 27 March but that it could have been 26 March. When compared with the evidence of Nicholas Whitten and Bruce Dittmer, as well as Mr Tamihere's Sunkist Lodge bookings, it probably was 26 March.

[64] Also on 26 March, Nicholas Whitten and Bruce Dittmer met a man whom they later identified as Mr Tamihere on the Maratoto side of the Wires Track. He was coming from the Wentworth direction. They described him as solidly built and about five foot 10 inches in height. Mr Whitten was not sure he would recognise the man again and was unsure about facial hair, except to say that the man did not have a prominent moustache and he thought the man had a few days' beard growth. Mr Dittmer recalled a prominent moustache and a bit of scruffy growth on the chin. The man told them he had been living off the land for about six weeks. He said he was writing a book on survival in the bush for a university project. Mr Dittmer picked Mr Tamihere out when shown a photo montage.

[65] Between 27 and 30 March, Mr Tamihere stayed at the Sunkist. On 31 March, he hitchhiked back to the Maratoto Valley.[49] The driver, Alix Tomlinson, noted he had a closely trimmed beard. She also identified him from a photo montage.

[66] Early in April, three mountain bikers met Mr Tamihere around Wentworth Falls. They were David Reid, David Thorp and Lynn Jones. There is some disagreement about the date; Mr Tamihere contends that it was 2 April, the Crown that it was likely 4 or 5 April. The bikers met Mr Tamihere at Wentworth Falls on what they believed was sometime between 3–5 April. They talked to him while they had lunch and he explained he had been living in the bush for a long time and was going down to Whangamatā to get supplies. They discussed bushcraft. He was wearing heavy work-type boots, rugby socks, island shorts, a headband, and was carrying a sheath knife and a fairly large green canvas pack. Mr Thorp recalled him having a moustache and a few days' growth of facial hair; the others could not recall whether he had facial hair. Mr Tamihere explained that he was in the habit of hiding his gear in the bush, and when they encountered him near the Wentworth Falls car park on their way out, he said he had hidden the large pack he had been carrying.

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[49] At trial, Mr Tamihere testified this ride was on 17 March. That does not align with his bookings at the Sunkist or the evidence of Alix Tomlinson that it was sometime in late March. We accept the Crown's submission that the only other possible date for this ride is 31 March.

The sighting of a man and woman at Crosbies Clearing on 8 April 1989

[67] The next alleged sighting of Mr Tamihere was by the trampers on 8 April 1989, at Crosbies Clearing, with the young blonde woman. Messrs Cassidy and Knauf did not identify the man as Mr Tamihere until much later, as we explain below from [94], and they were able to say of the woman only that she resembled a colour photograph they were shown of Ms Paakkonen.[50]

[68] Mr Cassidy and Mr Knauf, also an experienced tramper, were making a traverse of the Coromandel ranges from south to north. Because they were not sure how long the planned route would take, they made note of times and locations where they stopped.

[69] Near Crosbies Clearing they heard what they thought was a noise of someone chopping wood. They called out so as not to startle whoever it was. They found a man and a woman in a little clearing at the edge of the bush. She was sitting and he was clearing lumps off the ground for a tent site, using a small axe or machete. They stopped to talk, noting the time as 3.12 pm.

Descriptions of the man

[70] Mr Cassidy described the man as quite strong, swarthy looking and part Māori, virtually clean shaven with possibly a small bristly moustache or a day's beard growth. He wore blue denim shorts and heavy thick-soled boots with socks, and his upper garment was a long woollen bush-type shirt in a long check pattern, either blue and white or blue and black.

[71] Mr Knauf described the man as of swarthy appearance with olive skin, perhaps part-Māori, with two- or three-days' beard growth, of solid build and medium height, and with very prominent eyes. Mr Knauf did not recall a moustache. The man was wearing a three-quarter length Swanndri-type jacket which was sleeveless or had short sleeves, with denim shorts and work-type boots rather than tramping boots. He had a belt with a pouch on it for the tomahawk he was using to clear the site.

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50 See below at [72] and [75].

Descriptions of the woman

[72] Mr Cassidy recalled that the woman was sitting on a mound of dirt. It was raining lightly and she was wearing a poncho, a "cape type" garment that covered most of her body. It had a hood that was pulled over her head. She sat with her legs out in front of her and her hands in her lap. She was wearing beige-coloured boots which looked like Paraflex boots. She was European, with fair skin and blonde hair, almost shoulder length. He thought she might be a bit taller than average. He guessed her age as mid-20s. She looked as if she had applied makeup (meaning "eyeliner and powder and things of that sort") quite recently. He remembered that detail because he thought it made her look out of place.[51] He did not notice lipstick or fingernail polish. She was similar in features to a photograph of Ms Paakkonen but he thought her face was a little less rounded. He stated that it could have been Ms Paakkonen.

[73] Mr Cassidy was shown a poncho owned by Mr Tamihere which had been seized when his house was searched. It appeared to be the same colour as the one the woman was wearing and it was in similarly worn condition. He could not recall what he called "this compound stuff" or gusset round the neck, or a toggle, but he testified that it could very well have been the same garment. He thought a poncho was an uncommon garment to wear in the bush.

[74] The woman sat throughout the encounter, making no attempt to do anything. Her manner puzzled Mr Cassidy. She sat erect, appearing uncomfortable and giving the impression that she was posing. She did not look directly at him. He made a humorous remark, seeking a reaction from her. She responded with what he thought was a forced smile. He agreed with defence counsel that she might have been a city girl out of her element in the bush.

[75] Mr Knauf said that the woman sat watching on a stump or a mound throughout the encounter and did not speak despite Mr Cassidy's attempt to engage her. He perceived her as aloof and got the impression she would "just as rather see us depart". She was in her mid-20s, with a fine-boned face. Her hair colour matched the photograph of Ms Paakkonen but he could not say it was the same person.

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[51] That evidence was given at a pre-trial hearing before Tompkins J on 3 September 1990.

He observed that she was wearing makeup, lipstick and coloured fingernail varnish. He noted this because it was rare in his experience to see a woman wearing makeup in the bush. She was wearing boots and a poncho which covered most of her body. It was, he thought, three-quarter length, of a plasticky texture, and dark green in colour. It was similar to Mr Tamihere's poncho in colour, size, material and cut.

[76] The Crown also points to the finding of Ms Paakkonen's jacket and emptied wallet near Jam Tins as circumstantial evidence that she must have been the woman at Crosbies Clearing. It invites the inference that she had been in the vicinity about the time of her disappearance and had come to harm. If she no longer had her jacket, that might explain why she was wearing what appears to have been Mr Tamihere's poncho. There was also the cup and plate left with a Woolworths shopping bag at Kauaeranga Junction.[52] The defence sought to account for these items at trial by suggesting Ms Paakkonen may have got a bit hot and decided to leave her jacket, folding it and leaving it off the track, that she may have dropped her wallet while doing so, and that the couple may have stopped to eat and left the plate and cup behind. That could explain why hers were the only fingerprints on two pieces of paper from the wallet.

[77] In one respect the trampers' descriptions are positively inconsistent with what is known of Ms Paakkonen. She worked on a makeup counter at a store in Sweden but she was not known to wear makeup or fingernail polish in New Zealand, and there is no evidence that her belongings included cosmetics. None were found with the bag of her toiletries which Mr Tamihere took into Sunkist Lodge and left there.

[78] There is also an issue about the Paraflex-type boots they observed her wearing. When tramping in Nelson the couple had worn sneakers, which were said to be falling to pieces after the tramp. The Crown's stance at trial was that they did not own boots and the trampers' evidence about the woman's boots was a mere anomaly. We surmise that the prosecutor may have taken that stance because boots were reported by Peter and Anne Novis, two defence witnesses who reported a sighting of the couple

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[52] There is no doubt that these items were theirs. The bag contained a receipt which corresponded to a purchase they made at the Woolworths Rotorua supermarket, and the plate was of Swedish manufacture.

elsewhere on the peninsula, and the Crown contended that the woman they saw could not have been Ms Paakkonen.

[79] The couple may have bought boots after leaving Nelson. They evidently intended to return to the bush. At Thames they told a shopkeeper, Graham Manning, that they wanted to hike to Table Mountain. He warned them that was a serious trip which they could not make dressed as they were, and they assured him they had appropriate gear in the car. The hairdresser who cut Mr Höglin's hair in Thames, Paula Johnson, reported that he wore boots. If they bought boots, they probably paid cash because no credit card receipts for boots were found. They often used cash and had withdrawn cash to the value of $2,750 (some of that in USD) since 21 January 1989, when they returned to Nelson after tramping in that area. The remnants of soles were found with the remains of Mr Höglin but it is unclear from what kind of footwear they came. Police found a pair of size 7 Kiwiflex boots (which are similar in appearance to the Paraflex brand) at Mr Tamihere's home, but there is no evidence to show they belonged to Ms Paakkonen. The evidence does not record her shoe size.

[80] The defence also pointed to another apparent inconsistency with the Crown case, arguing that had she been held captive she could be expected to seek help from the two trampers. We regard the woman's behaviour as neutral. The Crown led evidence from a psychologist the substance of which was that a person who had been exposed to serious violence might well behave passively. It is likely that she had witnessed Mr Höglin's death and the trampers had warned of their approach, giving the man an opportunity to threaten her.

[81] The defence also relied on three other sightings of the car and couple elsewhere on the peninsula to contend that the woman was not Ms Paakkonen, as she could not have been at Crosbies Clearing on the afternoon of 8 April if these sightings were correct. Mr and Mrs Novis ran the Stony Bay campsite in the far north of the peninsula (not shown on the map above). They deposed that on 7 or 8 April a couple matching the descriptions of Ms Paakkonen and Mr Höglin stayed at the campsite, having arrived in the early afternoon and leaving there about 8 am on the following day. As Tompkins J pointed out to the jury during his summing up, the jury may have been

very doubtful of these sightings because they could not be reconciled with confirmed sightings of the couple and the car. The couple had their hair cut in Thames on the afternoon of 7 April and the evidence is that it would take around seven hours to travel between Thames and Stony Bay (three and a half hours to drive to Fletcher Bay then about the same time to walk into Stony Bay). So they cannot have arrived on 7 April. Nor can they have left after 8 am on 9 April, because the car was seen by several witnesses at the end of Tararu Creek Road in the early afternoon on that day. There is no reason to doubt the reliability of the latter sightings, which we discuss below at [127].

[82] Another defence witness, Stephen Waters, spoke of seeing a man and a woman with long, very fair hair with the car at Fletcher Bay on the late afternoon of 8 April. They had just arrived. He said at trial that he remembered the number plate and had given it to police when interviewed, though they had not noted it down. Ms Paakkonen had also had her hair cut to shoulder length on 7 April. He thought the couple left Fletcher Bay about 4.30 pm on 8 April. If so, they were not there long enough to visit Stony Bay, so they cannot have been the couple seen by Mr and Mrs Novis. Two other witnesses saw a Subaru with bull bars parked north of Coromandel town about 4.30 pm on 8 April and noted a blonde woman, but she was facing away from them and they saw her for only a few seconds as they drove past.

Descriptions of the gear

[83] The trampers observed that the man was clearing a site for a tent, and he erected it as they watched. It was a hoop tent, an uncommon style at the time. Mr Cassidy had never seen another like it. It was mainly blue in colour with shiny black collapsible hoops which threaded through slots of some sort. They supported the tent in a rounded shape. He and Mr Knauf remarked on the tent and the man invited them to look inside. Mr Knauf described it as a tunnel-type hooped tent with two or three hoops, large enough for two or three men, and predominantly blue in colour. The man said he had bought it at a shop in Auckland. There was a fly that went with it, but he did not recall the fly going over the tent.

[84] Both trampers said the tent they saw corresponded to a tent owned by Mr Tamihere. They gave their descriptions of the tent, and the poncho, before these items were recovered from his house.

[85] Mr Cassidy described the man using a small machete or small axe, as noted above at [69], while Mr Knauf described it as a tomahawk. He said the man wore a leather belt around his Swanndri and it had a pouch on it that presumably was for the tomahawk. He recalled this because it is unusual for someone to carry a tomahawk on their belt. The tomahawk was similar to the one found at Mr Tamihere's address. Mr Tamihere denied having a pouch but admitted wearing a tomahawk on his belt, through a loop made of string.

[86] The trampers noted one large and one small pack and assumed they belonged to the man and the woman respectively.[53] Mr Cassidy thought the larger pack was blue, the smaller one was olive green or khaki. He did not recall whether it had an external frame. Mr Knauf described the larger pack as an external frame pack of a dark colour, probably green, and about 55 litres capacity. The other pack was much smaller, about 25 or 30 litres, and was an internal frame type. He could not recall the colour. We return to the topic of the packs below at [226].

Other circumstantial evidence linking Ms Paakkonen to the Crosbies Clearing area

[87] In conversation with Mr Cassidy, the man said he and the woman had come from Tararu and he got the impression that they were heading back there the next day. Mr Knauf's evidence was that the man said they had come up the Tararu Track and they were going back that way. He said he may have been told that they had left their car at the end of the Tararu Creek Road.

[88] The car's location at the end of Tararu Creek Road tends to show that at least one of its owners was in the area around the time of their disappearance. So is the plate, cup and bag found at Kauaeranga Junction. Ms Paakkonen's wallet and jacket,

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[53] In their first written statements on 31 May 1989, neither was able to recall what the packs looked like.

found near Jam Tins, are evidence tending to show that she was in the area around that time.

The failure of anyone else to come forward

[89] Media coverage of the couple's disappearance and the search for them was extensive. The police appealed for any sightings of the couple but also the couple the trampers had seen at Crosbies Clearing. It was common ground at trial that there had been what Tompkins J described as a very large amount of publicity. Counsel referred us to a newspaper article describing the couple at Crosbies Clearing. The probative value of this point depends on the likelihood that another couple would learn of the publicity, appreciate that they were the people being spoken of, and choose to come forward to help the inquiry. It was suggested at trial that they might choose not to come forward if, for example, they had been growing cannabis in the bush. But nothing about the trampers' accounts suggests that is why the couple were there. In our view, another couple likely would have learned of the publicity and come forward. The failure of anyone else to do so accordingly supplies modest support for the trampers' identifications.

The trampers' identifications of the man as Mr Tamihere

[90] Police began to investigate the disappearance of Mr Höglin and Ms Paakkonen on 24 May. The investigation shifted to Thames, their last known location, on 26 May following a report of items found at the end of Tararu Creek Road. Police were alerted to this material by Edward Corbett, who sometime in mid-April had found there, hanging on a fence, a label from Ms Paakkonen's baggage with her name on it. He also noted bags containing rubbish. He had looked through some of these bags about a week later and noticed they contained clothing.

[91] Messrs Cassidy and Knauf were search advisors for the local Thames Search and Rescue volunteer organisation. In that capacity both men were notified on 27 May of a proposed search starting the next day. Mr Cassidy acted as field search controller.

[92] On 31 May, Messrs Cassidy and Knauf told police that they had encountered a couple at Crosbies Clearing on 8 April. Nothing was known of Mr Tamihere's

involvement at the time. Before they made their statements, Mr Knauf had been shown photographs of Mr Höglin and Ms Paakkonen through his involvement in the search efforts, and Mr Cassidy had at least been given a description of Ms Paakkonen, but neither identified her. Rather, Mr Cassidy remembered the couple he saw at Crosbies Clearing and thought that couple may have seen the missing tourists. Mr Cassidy made a statement, with which Mr Knauf agreed, describing the couple they had seen.

[93] As explained above at [24], routine police inquiries led to the guest register at the Sunkist and from there to Mr Tamihere's home in Auckland. He had been arrested on 24 May on an outstanding warrant relating to his failure to appear for sentence on the rape charge.[54] Mr Höglin's jacket was seen when officers visited his wife at home on 10 July. The house was searched. On 12 July, while still in custody, he was charged with the theft of the car and belongings.

[94] On the morning of 12 July, Messrs Cassidy and Knauf were shown a photo montage that included Mr Tamihere (with a beard). It appears each was visited by police at their places of work before 9 am. Neither identified him. At 11.05 am on the same morning, Mr Tamihere arrived at the District Court at Auckland for his first court appearance. Unusually, he was taken into court through the public entrance, where the press photographed and filmed him. These images were widely published, beginning with television news that evening. Mr Cassidy saw one of the photographs in the *New Zealand Herald* on 13 July.

[95] The circumstances of the first court appearance were explored in the pre-trial hearing and at trial. An inference might be drawn that the montage was shown to the trampers at that time because media would be at court for the first appearance and police wanted to attempt a formal identification process before Mr Tamihere's involvement was publicised, but it appears that it was coincidental.[55] The officers who took Mr Tamihere to court explained that they had made arrangements to have him

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54 See above at [10]–[11].

55 It appears Detective Inspector John Hughes was first told at about midnight on 11 July that media would be present, and there is no evidence that he arranged for the montage to be shown to the trampers the following morning. The evidence rather is that the montage arrived in Thames the night before and police took the first opportunity to show it to the trampers.

show them where he had left the car and a pack before going to court and that is why he did not arrive with the usual muster of remand prisoners being transported by van into the court building via the internal sally port. They chose to enter through the public entrance because that was the quickest way to get him to his court appearance, which had been scheduled for 10 am. The officers who accompanied him said they had not considered the possibility of keeping his identity secret until a parade could be arranged. They did not know that the montage had been shown to the two trampers and were not told until later that neither tramper had made an identification.

[96] Mr Cassidy liaised closely with the police in his capacity as field search controller among members of the search and rescue team who were shown a folder of photographs that had been taken from Mr Tamihere's home. This must have happened after 20 July, when the photographs were brought to Thames. They included one of Mr Tamihere in a bush setting without a beard. Mr Cassidy recognised him as the man he had encountered at Crosbies Clearing on 8 April. It is not clear when Mr Cassidy saw these photographs, but it was undoubtedly after press photographs of Mr Tamihere had been published. Mr Knauf was shown the photographs on 15 July but could not be sure it was the same man.[56]

[97] Mr Tamihere was scheduled to appear again in court at Thames on 26 July. The police arranged for Messrs Cassidy and Knauf to attend, at the request of Detective Inspector John Hughes. A decision had been made not to attempt a formal identification procedure, on the ground that any identification made by Messrs Cassidy and Knauf would be tainted by photographs they had been shown during the search and rescue effort and in newspapers. The two men observed Mr Tamihere as he was escorted across the road to the rear court door. Having done so, both men went into court and watched the hearing. At that time Mr Tamihere wore a beard.

[98] Mr Knauf identified Mr Tamihere as the man he had seen on 8 April at Crosbies Clearing. He recognised the man's appearance, skin colouring and features; his build, the rounding of his shoulders and his height; and the way he walked.

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[56] There is a conflict in the evidence about this date. 15 July is the date given in a police job sheet, and Mr Knauf saw the photographs in the Thames main operation room. But there is also evidence that the photographs, which had been seized on 11 July, were not brought to Thames until 20 July. Nothing appears to turn on this.

Mr Knauf noted the man's quite prominent eyes. He made the identification as the Mr Tamihere walked into the court building.

[99] Mr Cassidy also recognised Mr Tamihere as the man he had seen at Crosbies Clearing, relying on his walk, his appearance, his colouring and his hair. He noted that Mr Tamihere had a beard, which he had not seen before. He also made the identification as Mr Tamihere entered the court building.

[100] On 10 August 1989, Messrs Cassidy and Knauf were shown two of Mr Tamihere's tents. They recognised one of them as similar to the hooped tent they had seen on 8 April.

[101] On 30 November 1989, Mr Cassidy made a statement identifying Mr Tamihere as the man he had met in the bush in November or early December 1987.[57] He testified to having told police in July 1989, before the Thames court appearance, about this earlier encounter.

[102] Both trampers identified Mr Tamihere in the dock at trial as the man they had met on 8 April 1989, and they were questioned about the circumstances in which they made the identification. We have referred above to their evidence describing the man.[58]

The pre-trial ruling

[103] The Crown moved under s 344A of the Crimes Act for a pre-trial ruling that the identification evidence of the two trampers was admissible.[59] As noted earlier, the Judge heard evidence from the two men and a number of police witnesses.[60]

[104] The Judge noted that the two men had been involved in the search and rescue operation and the police had realised after Mr Tamihere's address was searched that it

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57 See above at [60]–[61] for the narrative of Mr Cassidy's trial evidence regarding this encounter.
58 Above at [70]–[71].
59 HC pre-trial ruling, above n 11, at 222.
60 The police witnesses at the pre-trial hearing who gave evidence on the identification process were Detective Inspector Hughes, Detective Sergeant Colin Sanderson, Detective Constable Steven Breach and Detective Robert Mills.

was important to check whether they could identify him as the man they saw at Crosbies Clearing.[61] Neither recognised him in the photo montage but that was not conclusive because the photographs of Mr Tamihere showed him with the beard he had when arrested.[62]

[105] The Judge described Mr Tamihere's first court appearance as "an unfortunate departure from normal procedure", under which prisoners are taken to court in vans from which they emerge inside the court building.[63] Mr Cassidy and Mr Knauf saw some of the resulting photographs before they identified Mr Tamihere.

[106] The Judge next noted that two of the photographs taken from Mr Tamihere's house were images of him clean-shaven.[64] These were placed in a folder along with other photographs of Mr Tamihere. The other images included police photographs taken in 1986. It was from one of the photographs in the folder that Mr Cassidy first identified Mr Tamihere. Tompkins J noted that the two men had been invited to attend court at Thames to see whether they could identify Mr Tamihere as the man they had seen at Crosbies.[65] Both identified him, Mr Knauf saying he was 90 per cent sure.

[107] The Judge discussed appellate authorities on identification from a single photograph.[66] They established that such an identification may have considerable probative value but it can also be positively dangerous and unsafe.[67] This Court had stated that the practice of making an identification from a single photograph should be used only in exceptional cases where an alternative procedure such as an identification parade is not possible.[68]

[108] Applying these principles, Tompkins J ruled the identification evidence inadmissible.[69] He recognised that the evidence was important.[70] He found

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61 HC pre-trial ruling, above n 11, at 223.
62 At 223–224.
63 At 224.
64 At 224.
65 At 225.
66 At 225–226 citing *R v Russell* [1977] 2 NZLR 20 (CA) at 27–28 and *R v Ormsby* [1985] 1 NZLR 311 (CA) at 312–313.
67 *R v Russell*, above n 66, at 27.
68 At 28; and *R v Ormsby*, above n 66, at 312–313.
69 HC pre-trial ruling, above n 11, at 228.
70 At 226.

Messrs Cassidy and Knauf were "convincing witnesses … [who] impressed as persons of integrity and accuracy. They were meticulous".[71] But "a convincing witness may still be mistaken".[72]

[109] The Judge criticised the failure of the police to arrange an identification parade as soon as they knew the identification of the man at Crosbies would be crucial.[73] He plainly found it unsatisfactory that, the two men having failed to identify Mr Tamihere in a photo montage, the police then caused Mr Tamihere to make a public appearance outside the Auckland District Court on 12 July 1989. That appearance was relied on by Detective Inspector Hughes as reason not to hold an identification parade, since any identification would be tainted. In the Judge's view, a parade would have been less objectionable than the procedure actually followed.[74] The identifications made at Thames breached police procedures on informal identifications, which require that nothing be done to suggest which person is the suspect.

The pre-trial appeal

[110] The Crown's appeal from the ruling was heard on 10 October 1990. Cooke P delivered the judgment of the Court of Appeal.[75] He noted the danger of identification from a single photograph:[76]

> … which, [Mr Cassidy] says, came back to him at quite a late stage, after his earlier identifications … of having seen and talked with the accused on another occasion at Crosbies, namely in late 1987. The Judge held that the remainder of the evidence of the trampers relating to the sighting of two persons at Crosbies and their opinion that the young woman was similar to a photograph of Heidi Paakkonen remained admissible.
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> A danger in a witness identifying the accused on being shown a single photograph, or on seeing him in a situation where it is plain that he is the suspect or the person charged, is that the witness may tend, perhaps subconsciously, to think that the accused must indeed be the person implicated in the crime whom he saw at the material time. A mere general resemblance may then convince the witness of the correctness of his or her identification. Yet, if invited to select one from a group of persons of somewhat similar appearance or in a situation where there is nothing to point to a particular individual as being the person thought by the police to have committed the

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71 At 226.
72 At 227 citing *Regina v Turnbull* [1977] 1 QB 224 (CA).
73 HC pre-trial ruling, above n 11, at 227.
74 At 228.
75 CA pre-trial appeal, above n 11.
76 At 197–198.

> crime, the witness may not be able to make an identification or may prove to be mistaken. The single photograph, or a realisation that the person now observed is suspected of or charged with having committed the crime, may create a displacement effect in the mind of the witness.
>
> Such considerations have led the Courts to disapprove of the showing by the police of only one or only a few photographs to a potential witness in order to obtain identification evidence, and also of purely courtroom identifications and the like. If the risk of unfairness to the accused is serious, the evidence is likely to be excluded. The desirability of a properly conducted identification parade, providing a true test of the ability of the witness to pick out the person who has previously been seen in incriminating circumstances, has been repeatedly stressed. Also, a distinction has been drawn between the detection process, when the police may not yet even have a suspect and when the use of single photographs may be unobjectionable, and the stage at which the police are gathering evidence for a prosecution. As the present case illustrates, a hard-and-fast line cannot always be drawn between these stages; but broadly it can be said that the showing of a single photograph to a witness in an attempt to strengthen the prosecution's identification evidence, or the use of any other procedure likely to influence the witness in the direction of a particular identification, are especially likely to be regarded as tainting the evidence and requiring exclusion.
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> The exclusion of evidence of single photograph or other slanted procedures for identification has customarily been put on the ground that the prejudicial effect of the evidence exceeds its probative value …

[111] Cooke P turned to the circumstances of the identification, noting the descriptions the trampers had given before being shown any photographs.[77] He noted that the police had used a photo montage but the images it contained of Mr Tamihere showed him with a beard. An identification parade ought to have been held at that time, and the failure to do so had not been properly explained.[78]

[112] However, the Court was not prepared to find that the police had acted improperly by causing Mr Tamihere to be photographed at court on 12 July 1989.[79] The investigation was incomplete and the police may well have thought that publicity would result in more information coming to light. It was also reasonable to circulate photographs of Mr Tamihere in the Coromandel district, as they had done.

[113] But in the event, neither witness identified Mr Tamihere from anything they saw in published photographs.[80] It seemed clear that the image which Mr Cassidy

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77 At 198–199.
78 At 199.
79 At 199.
80 At 199.

relied on was a colour photograph of Mr Tamihere, clean-shaven, with landscape in the background.[81] It was not clear exactly which of the photographs in the folder Mr Cassidy relied on. That could be explored at trial if the defence wanted to do so. What mattered, in the Court's view, was that Mr Cassidy had not previously seen Mr Tamihere without a beard. The fact that he was presented with no photographs of other men to view alongside it was not sufficient to exclude the identification evidence.

[114] The Court admitted the evidence of Mr Knauf about the identification he had made, for the first time, following Mr Tamihere's 26 July appearance at Thames.[82] It also admitted Mr Cassidy's evidence. Their evidence contained much to indicate reliability in matters of detail.[83] The Court noted Tompkins J's positive view of them.[84] In the Court's view, the Judge gave insufficient weight to the quality of the identification evidence, which is always an important consideration. For those reasons the identification evidence was ruled admissible.

Treatment of the identification evidence at trial

[115] During his summing up at trial, Tompkins J warned the jury about the reliability of the identification evidence:

> So the issue is clearly one of identification, and on that I am required to give you a very clear direction. It is this. I must warn you of the special need for caution before you find that the accused was the man at Crosbies on that Saturday afternoon in reliance on the correctness of the visual identification of him by Messrs Cassidy and Knauf. The reason why a judge always gives a jury that warning where there is an issue of visual identification is because experience has taught us that there is a possibility that where there are, as here, two identification witnesses, that both of them [may be] mistaken, and you must be alert to the possibility that a mistaken witness may yet still be a convincing witness.
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> Now in deciding whether the evidence of identification should be accepted there are a number of factors to which you can properly have regard, and I will just list them shortly. How you assess the truthfulness of the witness. I don't think that's at issue here. I don't think anybody would question that Mr Cassidy and Mr Knauf are honestly telling you what they believe to be the case. The second one is how you judge the witness's intelligence and reliability, his capacity for observation and accurate recollection. That's not a

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81 At 200.
82 At 202.
83 At 201–202.
84 At 201.

> question of honesty, that's a question of reliability. The third sort of factor is the opportunity that the witness has to observe the person being identified, for what length of time and how far away, from what angle, in what light, all the sorts of things that you can understand go to an identification. Whether the witness already knew the person being observed and was thus familiar with his or her features. When you think about it that's obvious, if you get a glimpse of somebody and you know that person, you are much more confident that you can identify. Whether the witness had any particular reason for remembering the occasion and the person observed. I don't need to elaborate on that. The time that elapsed between the observation and the identification. If somebody asks you about something that occurred yesterday and you saw somebody at some place, it is a lot easier for you to recall and identify that person than if the events happened a couple of months ago, particularly the events of a sort of unexceptional type of event. The manner in which the identification itself was made - an important issue in this case. Now there may be other factors. I have just referred to those that commonly arise in identification cases.

[116] The Judge went on to detail the identification evidence and the parties' submissions. He made several comments on the evidence:

> Now, just some comments about that identification. I have four to make to you. First, the general description of the man fits the accused pretty well. [The Crown] puts it to you that it fits the accused "like a T". Secondly, neither man described a moustache with any clarity, and, from the bit I've just read, Mr Cassidy said there may have been a wee one, Mr Knauf said quite definitely he didn't notice a moustache. Yet many other persons within a few days of the 8th of April said the accused had a large moustache, a bushy moustache, and [the defence] puts it to you surely it would have stuck. The third comment is Mr Knauf's comments about the eyes. You will remember a number of witnesses drew attention, when they were talking about the accused, to how they were struck with his eyes. And finally, the identification of the tent, and the poncho, and the tomahawk lends weight, doesn't really do any more than that, but it lends weight to the identification.

[117] He also told the jury that the process the police had followed was unsatisfactory and stated that police actions had deprived them of "very helpful evidence" in the form of an identification parade:

> There are some unsatisfactory elements about this identification issue and the first one I want to refer to is the absence of an identification parade. That is the correct method of proving identity when identity is at issue. There can be occasions which make it impossible. In this case there could have been an identification parade as soon as the accused became a prime suspect, not only of the murder but of the person at Crosbies on 8th April, that is on the 11th July before there had been an appearance in the court. He didn't have to go to court the next morning. It would have been possible to have a properly organised identification parade before there had been any press publicity the next day on 12 July. Had this been done you may not be very concerned with the identification issue, it might have been proved, or disproved. You don't have the benefit of that very helpful evidence. After the court appearance,

> television broadcast, press photographs, Detective Inspector Hughes was quite right, really the two witnesses, as he put it, were tainted in the sense that they had seen so much that an identification parade may not have been worth much. Well maybe it wouldn't have been, but if the identification parade had still been held and the accused was not identified, that may have been a valuable piece of evidence.

[118] Tompkins J noted that dock identifications, which had been made at trial, are generally unsatisfactory, before concluding with a warning that the jury must take special care with the evidence. He went so far as to direct that they must be "certain" that the identifications were correct:

> Well on this question of identification remember my warning, remember the special need for care. You must be certain that the identification by Mr Cassidy and Mr Knauf was correct before you act on it. If after you consider all the identification evidence and the submissions that are made to you, you are certain that the identification is correct, that is strong evidence supporting the case for the Crown. If you are unsure that the identification is correct after you have considered all the evidence, then you should completely disregard the Crosbies sighting when you are deciding whether the Crown case has been proved.
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> You are entitled to consider the alternative, don't forget, namely, the quite remarkable coincidence that Mr Cassidy and Mr Knauf could have come across a man bearing a striking resemblance to the accused who was accustomed to camping at Crosbies, the accused is with a woman similar to Heidi, when despite a very large amount of publicity no such persons have come forward. And the person seen there has a tent similar to the accused's. The woman is wearing a similar poncho, and the tomahawk is there. You are entitled to take into account what a coincidence that would be. You have got to consider whether it is an acceptable coincidence. Remember also [the defence's] submission to you because there are a lot of areas, a lot of things we don't know about in this case, there may be another killer. He mentioned, and we all know, the violent crime that accompanies cannabis growing. As a possibility, it might explain that coincidence.

Our assessment of the admission and treatment of the identification evidence at trial

[119] The reference does not ask us to revisit the admissibility of the identification evidence and Mr Tamihere did not argue that the evidence was inadmissible. (He did contend that the Judge failed to say, as would now be required, that mistaken identifications often cause miscarriages of justice.)[85] The ultimate issue is whether the identifications were reliable. When answering that question, we will form our own

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[85] Citing *Fukofuka v R* [2013] NZSC 77, [2014] 1 NZLR 1 at [26]–[34]. This Court rejected this argument in 1992: CA appeal judgment, above n 4, at 10. Because we attach no weight to the jury's verdicts, we need not revisit it.

view of the evidence, putting the jury's verdicts aside. But it is necessary to explain how the identifications came about, and the circumstances do raise obvious concerns about their reliability. This Court also noted the evidence of Mr Harris when allowing the Crown's pre-trial appeal in 1990. We should also say something about the omission to offer an identification parade.

[120] Then, as now, the law recognised that visual identification evidence may be credible but mistaken, and the risk is so serious that juries should be warned about it whenever the case against a defendant depends on such identification. Legislation required that juries be warned of the special need for caution before finding the accused guilty in reliance on the correctness of such identification.[86] There was no legislative provision for formal identification processes, such as is now found in s 45 of the Evidence Act 2006, but this Court had held that dock identifications were of little value if not supported by other evidence and an identification parade should be used if the accused person was willing to participate.[87] That statement notwithstanding, it appears it was not normal practice to hold identification parades at the time of Mr Tamihere's arrest.[88] The failure to hold a parade did not render inadmissible a subsequent identification which had been made at court when the defendant appeared on another matter, nor did it justify setting aside a verdict if there was other evidence to support it. There was other reliable evidence to support the trampers' identifications in this case. Tompkins J drew the jury's attention to some of it in the passage quoted above at [118] and we have surveyed it above from [83].

[121] For these reasons, we consider that the Court was correct to rule the identifications admissible under the rules of evidence applicable at the time, leaving the assessment of their reliability to the jury.

[122] There remains the question why the police did not hold an identification parade. We think it appropriate to address squarely the lingering question of police

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86 Section 344D of the Crimes Act, inserted on 11 December 1982 by s 2 of the Crimes Amendment Act 1982. Mr Tamihere said at trial that he would have participated in an identification parade.

87 *R v Hristov* (1985) 8 CRNZ 158 (CA) at 163.

88 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV45.05(1).

impropriety associated with it. This Court accepted pre-trial that the omission was "regrettable and not adequately explained".[89]

[123] We have surveyed the evidence that was subsequently led at trial about the omission. That evidence, which we have discussed above, went into the circumstances in some detail.[90] It included the evidence of two officers who had not given evidence at the pre-trial hearing. One of them, Detective Sergeant Derek Read, had taken the trampers' first written statements in May and had been involved in taking Mr Tamihere to his Auckland court appearance. He was asked in cross-examination whether it would have been appropriate to hold a parade, but it was not put to him that the public appearance was arranged to ensure a parade would be pointless. He said he did not think about it. He made the decision to go through the public entrance because it was the most expedient way to get Mr Tamihere into the courtroom from the police parking bay opposite the building. He was not challenged on that evidence.

[124] In our view, the evidence shows only that the opportunity to hold a parade was effectively lost after Mr Tamihere was photographed at court on 12 July 1989 and his appearance widely publicised from that evening. Perhaps the police ought to have taken steps to delay publication of his image while a parade was arranged, as Tompkins J suggested to the jury in the passage quoted above at [117]. But the omission would not render the identifications inadmissible.

[125] However, the departure from good practice may warrant enhanced scrutiny of the evidence. Tompkins J chose to take that approach. He told the jury that the police had departed from best practice and he allowed them to take the resulting absence of potentially valuable evidence into account.[91] Juries are normally told that they must reach their verdicts on the evidence they have and should refrain from speculating about what other investigations may have shown.[92] He also directed the jury that they had to be "certain", not merely sure, that the trampers' identifications were correct.[93]

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89 CA pre-trial appeal, above n 11, at 199.

90 See, for example, above at [95] and [109].

91 See above at [117].

92 The juror's oath requires jurors to give their verdict "according to the evidence presented in court": Jury Rules 1990, sch 1 form 2. On "red herring" directions, now see *Wilson v R* [2018] NZCA 489 at [22] and [25].

93 Contrast *R v Harmer* CA324/02, 26 June 2003 at [122] citing *Walters v The Queen* [1969] 2 AC

[126] We discuss our findings about the trampers' identifications of Mr Tamihere below at [213].

The car

[127] We have explained that the car's location at the end of Tararu Creek Road on 9 April supplies circumstantial evidence that its owners were in the vicinity of Crosbies Clearing around that time.[94] It was seen by four witnesses: the owner of an adjoining farm, Mr Corbett,[95] and a group of three people who were interested in buying a nearby property. They were Jennifer Gladwin, Harry Goodwin and Mr Cornish.[96] Mr Corbett went to talk to them as they were about to leave and they wandered over to look at the car, which had a "for sale" sign in the rear side window. Mr Goodwin was interested in buying it. There was some difference among the witnesses about when they saw the car. One saw it when they arrived about 12.30 pm, one thought they arrived at 2 pm and saw it then, while another noticed it when they left at about 2 pm. The fourth, Mr Corbett, thought the other three left later, at about 3 or 4 pm, and he noticed the car at that time. He had not seen it previously because it was parked behind some trees. It was gone when he returned the following day.

[128] We have also explained that the car assumes importance for another reason. Mr Tamihere admitted stealing it from Tararu Creek Road on 10 April, claiming that he came upon the car and entered it by unlocking it using a piece of wire inserted through the partly opened driver's window. He said that he found a key in the glovebox, meaning the couple must have had a second key cut at some point. The Crown says that he unlocked it using a key, which he must have taken from Mr Höglin, who habitually carried it, or Ms Paakkonen.

[129] This issue was the subject of much investigation, and evidence at trial, as the Crown sought to show that he lied about how he entered the car and could not have

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26 (PC) at 30 and *Rex v Kritz* [1950] 1 KB 82 (Crim App) at 89. See also *R v Summers* [1952] 1 All ER 1059 (Crim App) at 1060. Now see *R v Wanhalla* [2007] 2 NZLR 573 (CA).

94 See above at [81].

95 Mr Corbett was the witness who later noticed the baggage label and bags of what he took to be rubbish. See above at [90] and below at [159].

96 Mr Cornish was the witness who some eight months later found the couple's tent in a shed attached to the shed when he returned for a picnic with Ms Gladwin and Mr Goodwin. See above at [27] and below at [159].

done so in the manner alleged. We have explained that the Crown's theory at that time was that the couple had left the car parked there and encountered Mr Tamihere in the bush. It now contends that Mr Tamihere had taken the car earlier, after killing Mr Höglin at Wentworth, and left it at the end of Tararu Creek Road himself. But it remains no less important, from the Crown's perspective, to show that Mr Tamihere lied about how he got into the car there. If he did not enter through the window and find a spare key, then he must have taken a key from the couple. That is a direct physical connection to them, and one for which there is no innocent explanation.

[130] The witnesses who saw the car parked at Tararu Creek Road on 9 April noted that packs, which must have been the couple's, and other gear were neatly stowed in the car but a camera was sitting in plain sight on the passenger seat. All except Mr Corbett, who was not asked, recalled that the windows were closed but could not exclude the possibility that one had been left ajar for ventilation.

[131] Mr Tamihere was first interviewed on 11 July 1989. He initially denied stealing the car, claiming that he found a jacket, binoculars and two packs (all items he had sold or left at his home) elsewhere. He gave a detailed account of having borrowed another car from a friend to travel around the peninsula with the people who accompanied him on 11 April, and of finding at a bush location called Booms Flat (shown on the map) the gear belonging to the Swedish couple that police had seized from his home.

[132] During a lunch break he was told by Detective Inspector Hughes that the police knew about the car.[97] When the interview resumed at 2.15 pm, he was cautioned again and then he admitted stealing it. He said that he was walking up the road towards Crosbies Clearing at the time. To begin with he only wanted to steal food from the car. When asked why he did not simply break a window if that was his purpose, he said that "it would look strange if [he] smashed the window and they wouldn't miss a little bit of food and that". He used a piece of No 8 fencing wire which was curled up

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[97] Depositions record that during the break he and Detective Inspector Hughes had talked about sport and family and he said he was willing to tell the truth about his involvement, but at trial he responded affirmatively when it was put to him that he changed his story on realising the police "had [him] cold on the car". He also said that Detective Inspector Hughes had told him it would be pretty easy to prove it was him with the car.

by the fence to get in through the window, which was open "[a]bout half an inch, quarter of an inch." He said the bit of wire was three feet long, not much longer. When asked how he did it, he explained that he put the wire in through the window and just kept fiddling around with the toggle switch (a piece of hard plastic which is located next to the door handle and pivots horizontally around a centre pin to work the lock) until he "managed to get it over". He did not say that he shaped the wire into a tool. He then said that having opened the door, he looked in the glovebox and found a set of car keys, so he opened the boot and had a look.

[133] On 26 July 1989 the police took Mr Tamihere to Tararu Creek Road, where he was asked to explain what he had done with items taken from the car. There police showed him two pieces of wire that he found nearby. He said those pieces were not right; the wire he used was No 8 fencing wire and longer than two feet six inches. He said he had thrown it into the bush afterwards. (Police were not able to find it, but neither did a defence expert find pieces of wire that he threw into the bush in a later attempt to repeat Mr Tamihere's actions.) Again, he did not say that he shaped the wire into a tool. He also did not mention that his wire was twisted, unlike the two pieces of wire that the police showed him.

[134] Police also showed him the car on the same day, at a storage unit in Thames, and asked him to explain again how he had gotten into it. He said that he pushed the wire in through the window with one hand and wiggled the lock while holding the door handle up with the other hand. He indicated that he used what witnesses described as an upward motion, or a motion at 45 degrees toward the front of the car with the wire to release the lock. Witnesses reported him saying the window had been open about one inch, just under.

[135] A series of experts attempted to repeat what Mr Tamihere had done, beginning on 31 July 1989. Bruce Hing, an automotive surveyor, and Graham Doggett, a Subaru national service manager, were unable to unlock the door with No 8 wire, both single and doubled, on that day. They first used a single strand of wire, following what police understood to be Mr Tamihere's method, making a hook at the end of the wire to better engage the toggle switch. They also tried using wire doubled so that one end formed a U-shape curved end to better work the lock. They inserted the wire from the top of

the window, above and slightly forward of the lock because that was where the gap in the partly opened window was largest. However, they found it very difficult to make contact with the toggle switch. It was also very difficult to see the switch from that position; to see it clearly, they had to look through the front windscreen from the front of the car. Their attempts failed. They attributed this to the fact that the wire inserted from above would bend laterally when pressure was applied to pivot the toggle switch horizontally toward the rear of the car. Mr Doggett also failed when he attempted to work the lock from the front of the window in an attempt to reduce bending pressure on the wire. Their attempts together took about an hour.

[136] There was forensic evidence from a Department of Scientific and Industrial Research (DSIR) forensic biologist, Lisa Melia, who inspected the car on the same day, that 2.9kg of force was needed to flip the toggle switch.[98] A piece of wire would bend before doing so, in her opinion. Ms Melia observed, before the attempts made by Messrs Hing and Doggett, that there were no scratches on the lock or the upholstery or lock surrounds consistent with attempts to open the door using wire.[99]

[137] We record that during the attempts made on 31 July, and most but not all of the later expert attempts, the lock surround was protected by tape to prevent scratching. Ms Melia inspected the lock just before giving evidence at trial and noted scratches consistent with the use of pointed, not bent, wire. However, it does not follow from the absence of scratches on 31 July 1989 that no previous attempt had been made to unlock the car using wire. A wire tool with a curved end, such as one later fashioned at trial by Mr Tamihere, would not have left scratches.

[138] The next attempts were made on 31 August 1989 by Barry Axon, a forensic scientist with DSIR. Ms Melia was present. She did not tell him what had happened on the previous attempts. Mr Axon used a doubled-over piece of wire and inserted it through the top and front of the side window. Initially he could not get the wire to contact the toggle switch. He had to remove the wire several times so he could shape

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98 This test was carried out by removing the door, placing it in a horizontal position and suspending weights from the lock.

99 She noted such scratches when she inspected the car just before giving evidence at trial, but there was evidence that during one of the experts' attempts the lock surround was not protected by tape.

it to do so. He was asked to make the attempt with his right hand while lifting the outside door handle with his left, as Mr Tamihere had described to police, and found it uncomfortable and difficult to control the wire. He was unable to exert any controlled pressure on the lock.

[139] However, Mr Axon succeeded in working the toggle switch through the front of the window by using two hands while watching through the front windscreen. He agreed in cross-examination that he might have been working at an angle of as much as 45 degrees. The exercise took about half an hour.

[140] Rory Shanahan, a defence expert and former senior DSIR forensic scientist, inspected the car on 22 August 1990. He had the benefit of the evidence of Messrs Doggett, Hing and Axon, all of which had been recorded at depositions in April and May 1990. He did not attempt to work the lock on that day. But on 8 November 1990, during the trial, he spoke to Mr Tamihere at court. Mr Tamihere, who had also seen the depositions, now gave a different account of how he had worked the lock. He said that he had bent the No 8 wire back on itself then twisted it about five to six inches about the loop. He drew a sketch of this tool but unfortunately Mr Shanahan did not retain it. Mr Tamihere said had used it from the front while looking through the front windscreen, not from the top.

[141] On the same day, Mr Shanahan went to the car, which had been brought to the basement of the High Court (it was an exhibit), and he attempted unsuccessfully to unlock it using the method described by Mr Tamihere. It appears he spent about an hour in the attempt, with the window open one inch (25 mm). He reported his failure to defence counsel and Mr Tamihere.

[142] Mr Shanahan suggested that Mr Tamihere be asked to come down and show how he had done it. Arrangements were made to do so on 13 November 1990 in the presence of defence counsel, prison officers and a court official. Crown counsel and experts were not present. Mr Tamihere was handcuffed to a prison officer, which hampered his movements, and the Registrar, who had custody of the car during trial, insisted that he not be allowed to use the tool he made to try to unlock the car because

that might amount to tampering with an exhibit. Defence counsel protested this at the time, but it does not appear they took it up with the Judge on returning to court.

[143] To make the tool, Mr Tamihere bent the wire back on itself and twisted it using the shaft of Mr Shanahan's hammer through the loop. He said he had used his tomahawk for this task when he entered the car. He had to complete the task by hand when using the hammer at court because the loop would not come off the handle, which was thicker than the shaft. He also said that he had flattened the wire using the head of the tomahawk when he took the car. He attempted to replicate this using the hammer on the basement floor, with difficulty given that he was still handcuffed to the prison officer. It appears that he had not previously told Mr Shanahan about using the tomahawk or flattening the head.

[144] Mr Shanahan took two points from the demonstration: he had not put enough twists into the wire he had created himself (which suggests Mr Tamihere's sketch had not shown a heavily twisted wire), and he had not flattened the loop.

[145] On the following day, with the Court's permission, Mr Shanahan used Mr Tamihere's wire and was able to work the toggle switch. He had to make many adjustments to shape the wire to get leverage. These involved bending the wire so it was pressed against the steering wheel, allowing more rearward force to be applied to the toggle switch. It was easier to work the switch by exploiting a fault in the lock mechanism. If someone failed to lock the car completely from the outside using the key, the toggle switch would remain partly raised when the key was removed. With the switch in that partly raised position he was able to unlock the car using the wire in his right hand while looking through the windscreen. The entire process took an hour. He had been able to quicken the process by opening and closing the door to adjust the wire.

[146] Mr Shanahan then made his own tool using an old tomahawk. He put "many" twists into the wire and flattened the loop before turning the loop back on itself to form a hook. After what he described as "many times of pulling the wire in and out of the car to adjust the hook for its optimum position" he "finally unlocked the car door". This process of making the tool, adjusting it and using it to unlock the door took about

17 minutes. He was then able to use his tool and Mr Tamihere's to work the lock repeatedly, taking respectively 16 and 25 seconds on average when the switch was partly raised. The gap he used in the window was 19 mm.

[147] Mr Tamihere gave evidence about how he had entered the car. His evidence was heard before that of Mr Shanahan, but he knew of Mr Shanahan's findings when he gave it. He deposed that he picked up a piece of No 8 wire, doubled it over, twisted it and put it through the driver's window, which was open a quarter of an inch or half an inch. He looked through the windscreen to position the wire against the tumbler (meaning the toggle switch). He grabbed the door handle and pulled the wire at the same time to release the lock. The entire process of making the tool and unlocking the car took at most five minutes. He said that he used his tomahawk handle to twist the wire and flattened the hook on a Waratah (a steel fence post). He then threw the wire into the bush.

[148] In cross-examination Mr Tamihere accepted he had not told the police about how he fashioned the wire into a tool. (It is because they understood he had used a "piece of wire" that the initial attempts were made with a single strand.) He said he assumed they would already know how it would be done. He maintained that he had consistently said the wire was about six feet in length before being doubled over, not three feet as the police originally recorded him saying. He believed that police witnesses had kept back information when recounting to the jury how he had described the technique he used. He did not accept that he had initially told Mr Shanahan he used a single strand of wire either. He accepted that he knew after depositions that Crown experts had been unable to unlock the car but said he had not realised until he saw photographs of their efforts at trial that they had gone about it the wrong way.

[149] We discuss our findings about this evidence below at [218].

Mr Tamihere's dealings with the couple's property

[150] Mr Tamihere's dealings with the couple's property, including the car, are significant for several reasons. He admitted most of these dealings after realising the police could prove he took the car and sold some items while leaving others at his home. The Crown says his explanation for searching the car in a leisurely manner,

cutting labels from items and dumping others he did not want, is not credible; there was every reason for someone who had happened upon the car, as Mr Tamihere claimed he did, to think the owners, who had left their packs and camera in it, would return soon. It says that it defies coincidence that someone else cut the used female underwear and the tent found in a shed at the scene. It observes that he did take Ms Paakkonen's bag of toiletries, which included women's underwear, tampons and panty liners, into the Sunkist. It says that he spent money in Thames which he must have stolen from the couple or the car.

Mr Tamihere's behaviour in connection with the car

[151] On Mr Tamihere's account, he had been heading back into the bush and was walking up Tararu Creek Road when he came across the car. He broke into it to steal food, but having gained entry and finding a key, he took the opportunity to search the car, dumping what he did not want, then stole the car and decided to leave the Coromandel altogether and return to Auckland.

[152] His evidence was that the search of the car and dumping of stuff took at most 15 to 20 minutes, which included the five minutes it took to unlock the car. In his first police statement he said, as noted above at [132], that he unlocked the car using the wire, instead of simply smashing a window, because "it would look strange if [he] smashed the window and they wouldn't miss a little bit of food and that".

[153] Mr Tamihere's behaviour suggests he was confident the owners would not soon return to the car. He accounted for this by saying the car's exhaust was warm, so he knew it had arrived recently and he formed the opinion that the owners had probably gone off further into the bush. He was tested in cross-examination, with Crown counsel suggesting that if the exhaust was warm the car must have passed him as he walked up the road, which took more than an hour, and that if it was afternoon when he arrived at the end of Tararu Creek Road, as he claimed, then he might expect the owners to arrive at any time. He denied that the car passed him. He admitted noticing the packs in the car but maintained that the owners would have taken those only if they were heading into the bush for an extended stay. He said he assumed they had probably gone out for a single night, carrying a small bag.

[154] Mr Tamihere admitted that he took the car to Thames, stayed at the Sunkist, and used the car to tour the peninsula. He said he felt confident driving a "hot" car in the area because the police do not attach priority to stolen cars and it likely would be three days before they made inquiries about it.

[155] The Crown contends that Mr Tamihere's account is false. We have noted its claim that he cannot have thought the car had arrived recently and it is unlikely that anyone looking at it, with packs stowed in the rear, would suppose the owners had gone away for an overnight stay. It characterises as implausible his claim that he made an abrupt and inexplicable decision to abandon his fugitive life in the bush, to which he was allegedly returning as he walked up Tararu Creek Road, to return in the car to Auckland, which he had not visited since 1986 and where he risked arrest. It says his decision to remain in Thames with the car for a couple of days and tour the peninsula also shows that he knew the owners would not return to complain about the theft.

[156] We discuss our findings on this issue below at [242].

The items kept or sold by Mr Tamihere

[157] In his first statement Mr Tamihere admitted taking from the car the two packs, a large pair of binoculars and a collapsible fishing rod. He sold these items at an Auckland shop called Harmony House on 12 April. He also admitted taking and keeping a jacket, leggings and a small pair of binoculars.

[158] We have noted that items he left at the Sunkist included a bag of female toiletries and a bag containing car accessories for the Subaru.[100] He said he left the couple's passports and documents in the car.

The items recovered from Tararu Creek Road

[159] The items recovered by police from the end of Tararu Creek Road began with the luggage label bearing Ms Paakkonen's name, which was found there by the landowner, Mr Corbett, in April 1989. Subsequent searches of the area around where the car had been parked found a tent bag; several bags of female clothing, one of which

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[100] Above at [26].

included the cut underwear; two labels bearing the name "Höglin"; and some rubbish and other miscellaneous items. As noted earlier, the couple's tent was found months later in the shed and it too had been cut.[101] We have noted that it was not found when the shed was searched. It ought to have been and there is nothing to explain why police searches did not find it.[102] The shed in which it was found by Mr Cornish was full of rubbish, but the tent was not hidden. However, Mr Cornish was not challenged on his evidence that he looked in the shed of his own volition. There is no reason to suppose that anyone else put it there. We draw the inference that the tent was removed from its bag, which was among the items dumped by Mr Tamihere, and he then cut it and left it in the shed.

[160] The evidence of Ms Melia was that a number of items had been cut or nicked: the jacket, the tent, a bikini, a pair of women's underwear, a panty liner and a pair of shorts. The tent straps had been cut with a large heavy-duty instrument which was reasonably sharp. In cross-examination, she accepted that the women's underwear and tent straps might have been cut with a pocketknife or scissors.

[161] Mr Tamihere admitted that he dumped some gear, mostly women's clothes. There were three or four bags of clothing. He admitted ripping or cutting a couple of labels off a man's coat, and he admitted at trial that he did so using his knife. He denied that he did so because the labels were named. He denied cutting anything else, including the tent and the women's underwear.

Mr Tamihere's access to cash in Thames

[162] Mr Höglin and Ms Paakkonen had cashed traveller's cheques and made credit card withdrawals to the value of $850 (some of that in USD) since 15 March 1989. This included $150 taken out at Waihi on 5 April. They were in the habit of paying cash, though it is a natural inference that they may not have done so when making larger purchases.

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101 Above at [27]. The tent bag found at Tararu Creek Road appeared to be the same fabric and type of construction as a tent bag associated with a control tent identical to the couple's tent.

102 Mr Carruthers drew our attention to a statement made by a police officer after the trial to the effect that its appearance is still a mystery, and to Tompkins J's statement in summing up that "[t]here is no explanation as to how that tent came to be in the shed".

[163] No money was found with Ms Paakkonen's wallet near Jam Tins, apart from an Australian $2 coin and a New Zealand one cent piece. Mr Tamihere denied taking any money from the wallet.

[164] Mr Tamihere had cash when he returned to Thames with the car. He paid for his accommodation at the Sunkist, petrol and a toll call, and bought beer at a pub. He accounted for the cash by saying that he sold possum skins to other hunters, but he admitted at trial that he had not done so on his final trip and said instead that he had brought money with him from Auckland.

[165] We discuss our findings about Mr Tamihere's dealings with the couple's property below at [249].

The discovery of Mr Höglin's remains

[166] Two hunters found Mr Höglin's remains on 10 October 1991, near the end of a four-wheel drive track from Parakiwai Quarry Road, which is accessible from State Highway 25 south of Whangamatā.[103] The location is marked on the map shown above. As noted earlier, it is a little under one kilometre as the crow flies from Mr Tamihere's Wentworth bivvy.[104] The hunters were walking down an old cattle track when one of them noticed the skeleton.

[167] The exact cause of death could not be established but it is clear that Mr Höglin had been attacked with a weapon, almost certainly a sharp knife. His sweatshirt and T-shirt had several stab cuts, notably to the left shoulder and neck band. This was thought to be consistent with three stabbing cuts made by a right-handed attacker who was facing Mr Höglin.[105] Cuts had been made to two of his cervical vertebrae. These may not have passed through the clothing. Pathologists disagreed about whether the vertebrae cuts transected vital arteries, veins or the spinal cord, causing death.

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[103] The identity of the remains was confirmed by comparison of dental records. A gold ring inscribed with Ms Paakkonen's name was also found under the skeleton's right armpit.

[104] Above at [13].

[105] There was no evidence brought to say if Mr Tamihere was left- or right-handed.

[168] Expert evidence suggested that Mr Höglin likely died at or very near the place where his remains were found and he was then dragged by his feet to his final resting place.[106] The arrangement of his outstretched arms and legs, and his concertinaed clothing, indicated that he had been pulled along the ground by his legs. No attempt had been made to bury him, but his body was not visible from the nearby track. Branches which covered the remains may have been placed there or they may have fallen over time.

[169] Mr Tamihere's knives were tested for blood after his arrest. Traces may survive cleaning. None was found. Nor was any blood found in the car, tending to show that Mr Höglin was not transported in it after he was killed. (It would have been difficult to do so in any event as the back of the car, including the rear seats, was full of gear.) There were bloodstains on other items, including the couple's tent, but they were not extensive and could not be linked to any given person.

[170] As noted above at [31], the Crown had led evidence at trial that Mr Tamihere's son had a digital watch similar to Mr Höglin's, but his watch was found with his remains. This issue was addressed in the conviction appeal, to which we now turn.

The 1992 appeal against conviction

Submissions on appeal

[171] Mr Tamihere's appeal was heard by a full court. His argument began with the discovery of Mr Höglin's body, pointing out it did not fit the Crown's theory at trial that the couple had been killed around Crosbies Clearing and noting that it could not be reconciled with the prison informant evidence. One of the informants, known as Witness A, had claimed Mr Tamihere hinted he had buried the bodies by the edge of a bluff and killed the couple by breaking their necks.[107] Another, Mr Harris, had said

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106 This conclusion was reached by two expert witnesses, Dr Harry Harding (a forensic scientist based in Adelaide) and Dr Robert Winchester (a DSIR forensic scientist). They agreed that Mr Höglin had been stabbed several times through the neck area of his clothing. Dr Winchester agreed with Dr Harding that cuts to his garments (sweatshirt, T-shirt, shorts and underpants) were recent, meaning the garment was not subjected to much normal wearing, or any washing, after they were made. They considered that very shortly after these cuts were made, Mr Höglin's body was placed where it was found.

107 We discuss the matter of Witness A's permanent name suppression below at [263].

Mr Tamihere admitted dumping the bodies at sea after killing Mr Höglin by beating his head in. It was now clear that neither of these accounts could be true. Counsel argued that the watch was the most damning Crown evidence against Mr Tamihere because it meant he must have been in physical contact with the couple. Counsel also argued that directions to the jury were inadequate for various reasons, none of which the Court accepted and which we need not traverse given the approach we are taking to the reference.[108]

[172] The Crown responded by laying out in some detail what it said had been its case at trial. It denied that it had conducted its case on the basis that the couple were killed near Crosbies Clearing. It was defence counsel at trial who had told the jury that the key issue was whether Ms Paakkonen was the woman at Crosbies Clearing, going so far as to accept that if it was her then the jury would find Mr Tamihere guilty. It contended that the trampers accurately identified Mr Tamihere and the woman with him can only have been Ms Paakkonen. Counsel argued that discovery of the body was consistent with the Crown case at trial because Mr Tamihere frequented the Wentworth Valley and Mr Höglin might have been killed then taken there using the Subaru, which was four-wheel drive. He must have been killed separately, which would explain why Ms Paakkonen was alone with Mr Tamihere on 8 April.

[173] The Crown emphasised the circumstantial evidence linking Mr Tamihere to the couple's belongings and linking Ms Paakkonen to the Crosbies Clearing area, and pointed to his blatant and confident use of their car. Counsel contended that Mr Tamihere lied about his method of entry to the car.

[174] Counsel contended that the prosecutor had not said the prison informant evidence was necessarily correct; it was obviously inconsistent and the Crown used it to make the point that Mr Tamihere had talked about being involved and was closely following developments. There was every reason to think he had made these statements; he had drawn maps and two of the informants had no opportunity to speak to one another before making their statements.

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[108] See above at [54]–[57].

[175] The Crown accepted that the watch was not consistent with its case at trial but argued that it had been little emphasised in the evidence and addresses to the jury. Nor was there clear evidence that it was the same type of watch. The one seen by Mr Davenport was never produced at trial. It was legitimate to inquire where the watch was that Mr Tamihere's son had shown to Mr Davenport shortly after Mr Tamihere's return from the bush.

[176] Finally, the Crown relied on Mr Tamihere's admitted lies to police and contended that he had lied in a calculated way throughout the trial.

Appeal judgment

[177] The Full Court delivered its judgment on 21 May 1992.[109] After recounting the background, Casey J, for the Court, stated that the trampers' identifications were crucial to the case against Mr Tamihere, according to which the couple were at the end of Tararu Creek Road at the latest by the morning of 8 April.[110] The evidence of their identifications were discussed at some length, the Court stating that it found their recollection of the poncho an important piece of evidence.[111] The discovery of such a garment and the hooped tent at his house, both of which matched the trampers' descriptions, would be "a most extraordinary coincidence".[112] In conjunction with the trampers' descriptions of the man, the belt and tomahawk, and the woman's resemblance to Ms Paakkonen, the odds against the couple being Mr Tamihere and Ms Paakkonen were "so high as to put that possibility beyond rational consideration".[113] The Court plainly found the identifications proved beyond reasonable doubt.

[178] The Court found that the Crown had never tied itself to particular places of murder or disposal.[114] Its case was largely circumstantial and from the nature of such evidence it was impossible to reconstruct the last hours of the couple's lives with anything approaching certainty.[115]

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109 CA appeal judgment, above n 4.
110 At 4.
111 At 10 and 18.
112 At 20.
113 At 20.
114 At 12.
115 At 19.

[179] The Court found that the discovery of the remains confirmed the couple had been murdered.[116] It accepted the Crown's submission that Mr Tamihere had the necessary knowledge and the appropriate vehicle—presumably the Subaru—to take Mr Höglin's body to the place where the remains were found.[117] We observe that this was the argument made by Crown counsel on appeal. Neither counsel seems to have pointed to the evidence that Mr Höglin likely had been killed near where his body was found.[118]

[180] The Court did not dwell on the evidence about the car. It summarised the claims made at trial briefly and recognised that the car key was, apart from the watch, the only direct connection between Mr Tamihere and the couple, but held that "the possibility that the couple had a second key cut cannot be dismissed".[119] We have examined the evidence about that in some detail,[120] and we return to the point below at [243].

[181] The Court recognised that the watch also supplied a direct connection to the couple, but the connection was tenuous and the Crown left the matter with the jury on the basis that the watch had not been produced.[121] There was little to suggest it was Mr Höglin's watch. The Court doubted the jury had placed much weight on it.

[182] The Court recognised that the remains disproved accounts that Mr Tamihere is said to have given to the prison informant witnesses, but it accepted that the Crown had not contended the accounts were true.[122] They plainly were not consistent with one another, and the trial Judge had warned the jury about that, saying that if the accounts were of any weight they could be treated as part of the total pool of circumstantial evidence.[123] In other words, the trial Judge warned the jury not to place much weight on them. The Court stated that it would be surprised if the jury gave much credence to any of the details the prison informants recounted.

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116 At 19.
117 At 13.
118 See above at [168] and n 106. As noted above at [172], Crown counsel submitted to the contrary that Mr Höglin may have been killed then taken to Wentworth Valley in the Subaru.
119 CA appeal judgment, above n 4, at 13.
120 Above at [127].
121 CA appeal judgment, above n 4, at 13–14.
122 At 14.
123 At 15.

[183] The ultimate question was whether the new evidence, when considered with the directions given at trial, might reasonably have led the jury to return a different verdict.[124] The Court was satisfied that the answer must have been "no".

[184] We pause at this point to recall that we have already accepted something went wrong, in that the jury heard evidence from Mr Harris which must be presumed false and may have relied on it, so the proviso to s 385 is engaged.[125] The question for us is a subsequent and quite different one: does the evidence establish Mr Tamihere's guilt beyond reasonable doubt? For that reason, we have scrutinised the evidence as a whole more closely than the Court found necessary on the appeal.

The prison informant evidence

[185] We deal with the informant evidence at this point because, as we have explained, Mr Harris was convicted of perjury in 2017, long after Mr Tamihere's appeal was heard in 1992, and his evidence corroborated that of the two trampers in that he claimed Mr Tamihere admitted to having been sprung by "a couple" in the bush. It is that detail which has led to his evidence forming part of the Governor-General's reference.[126]

[186] Mr Tamihere undoubtedly did speak to other prison inmates about his involvement in the murders. He claimed that he fed them different accounts, all false, to find out which of them was talking to the police. He drew detailed maps of the bush country and gave them to Witness A, with whom he appears to have formed a friendship.

[187] Mr Harris and Witness A both offered accounts in which Mr Tamihere admitted to sexually violating both victims and talked about how he killed them and disposed of their bodies. Steven Kapa, another prison informant, added little to these accounts, saying that Mr Tamihere had admitted cutting up the bodies, which the police would never find.

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124 At 19.
125 Above at [43] and [54]–[57].
126 Reference, above n 1, at sch cls 2(5), 4 and 6.

[188] Mr Harris deposed that Mr Tamihere admitted to tying Mr Höglin up and committing a graphic sexual assault on Ms Paakkonen, then killed Mr Höglin by beating his head with a lump of wood. It was during this time that he was "sprung" by the "couple" (the inference being that they were the trampers). He weighted Mr Höglin's body and dumped it at sea, using an aluminium dinghy. He then sexually assaulted Ms Paakkonen over several days, in a tent he had stolen from a farmer's shed, before strangling her in the tent. He then dumped Ms Paakkonen's body at sea too. He kept the couple's car for a few days in the Thames area, using it to show some tourists around. He then returned to Auckland, dumped the car and disposed of some of the couple's belongings. Police spotted Ms Paakkonen's jacket and a watch he had given to his son. He had met a Danish girl called Mette in the Thames area.[127]

[189] Witness A deposed that Mr Tamihere said he and some mates met the couple near Crosbies Clearing and walked there with them. They attacked the couple, sexually assaulting both of them and tying Mr Höglin to a tree. The couple were killed at a different place, Mr Tamihere hinting it was done by breaking their necks and the bodies were left by the edge of a bluff to avoid them being found. He said that he used a key to start the car, that he booked into a backpackers and showed some people around the peninsula the next day. He drove to Auckland with a woman and gave some of the couple's property to his son, selling other items. He later said that he was worried that police might find his own belongings mixed up in the area where he had left the girl's track top and wallet, and he was worried about his fingerprints being found on items left nearby. He later sketched the area around Crosbies Clearing and pointed to where he said he assaulted the couple.

[190] We have noted that on appeal the Crown contended that the prison informant evidence was led to show that Mr Tamihere claimed to have been involved and took a very close interest in the case. We think the Crown did rely on the evidence as admissions of guilt by Mr Tamihere; the prosecutor accepted the witnesses were wrong in some details but contended that the jury could be confident they were not lying. While the evidence was inconsistent and some of it was plainly improbable, such as his account of dumping the bodies at sea, there were details in each of the

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[127] There was evidence that Mr Tamihere had written to a Danish girl called Mette from the Sunkist on 28 March 1989.

accounts which were consistent with the Crown case and for that reason might be thought credible to that extent.

[191] Before us, the Crown did not rely on any of the prison informant evidence, though counsel did suggest we might accept aspects of Witness A's evidence if we saw fit. We take the view that it is not reliable, and we put all of it to one side when evaluating the evidence below. We take that approach because the discovery of Mr Höglin's remains is not consistent with the accounts given by any of the prison informants about how the couple came to be killed.[128] We record that we do not find that the prison informants, other than Mr Harris, were lying. Their evidence tends rather to support Mr Tamihere's claim that he deliberately fed them false information. Why he would choose to do that, and risk them giving evidence against him, we cannot know.

Lies about Mr Tamihere's whereabouts in the bush

[192] We have explained that Mr Tamihere admitted at trial that he initially lied about stealing the car and was accused there of lying about other matters. We discuss those alleged lies below at [207]. The alleged lies with which we are concerned in this section of our reasons rest on the new Crown evidence which post-dates the 1992 appeal. We explained above at [48] that the evidence was filed for purposes of the hearing before us. The Crown wishes to show that he lied about his travels in the bush to disguise the fact that he had recently been in the Wentworth Valley area, where Mr Höglin's body lay.

[193] Mr Tamihere's accounts of his movements evolved substantially during his statements to the police and his evidence at trial. On 11 July 1989 he told police that he had spent two to three weeks up near Coromandel town (which is further north than the area shown on the map above), had come south and came out (meaning out of the bush) at Tapu, then walked south down the Thames–Coromandel coastal road (labelled on the map as State Highway 25) to Tararu.

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[128] As noted in CA appeal judgment, above n 4, at 14.

[194] On 12 July, Mr Tamihere said that he had travelled up to the 309 Road (although labelled on the map above, Mr Tamihere would have reached the road closer to the eastern side of the peninsula at Kaimarama). He then walked out at Tapu to get seafood before walking south down the coast road, then coming up Tararu Creek Road and finding the car.

[195] On 24 July, Mr Tamihere said that immediately before stealing the car he had been in the bush for about a week, entering at the Waiotahi Track from Thames and going to Crosbies Clearing then to the 309 Road via Maumaupaki, before coming back down and leaving the bush at Te Mata and walking south to Thames on the Thames–Coromandel road.

[196] At trial, the defence was faced with evidence from Crown witnesses placing Mr Tamihere in the Wentworth Valley area in March and early April. Two witnesses met him heading west on the Wires Track at about 1 pm on 26 March.[129] (We interpolate that two other witnesses who did not give evidence at trial, Mr Patchett and Ms McClenaghan, also met him on 26 March at Wentworth Falls on his way west out of the valley.) He stayed at the Sunkist on 27–30 March, leaving on 31 March. On that day Ms Tomlinson gave him a lift to the camping ground on Wires Road and the three mountain bikers met him at Wentworth Falls sometime between 3–5 April. There was no evidence about his movements between then and the disappearance of Mr Höglin and Ms Paakkonen.

[197] Mr Tamihere gave evidence that he had hitchhiked from Thames to the Maratoto Valley, then found a track that went along the Tairua River and returned to the Wires Camp, where he picked up his gear. He crossed to the Wentworth Valley on 2 April, meeting the mountain bikers there. From there he hiked north up to the Kōpū–Hikuai Road, where he hitched a ride, then stayed at Booms Flat. From there he continued to Crosbies Clearing, where he stayed on 4 April. He then travelled north across the Tapu–Coroglen Road to Maumaupaki, then to Rocky Face, where he turned around and retraced his steps to just north of Maumaupaki then headed toward the coast, emerging at Te Mata by 8 April. He then spent two days walking down the

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129 See above at [64].

coast, then walked up Tararu Creek Road, where he found the car. Overall, the journey from Thames to the car took nine days.

[198] The Crown sought before us to show that the account of his movements that Mr Tamihere gave at trial was false. Senior Constable Brian Connors, a search and rescue specialist, re-enacted most of the journey.[130] He was accompanied by at least one other police officer. They were all experienced and very fit, and they carried light modern gear and supplies. They made the journey in winter, but he did not think that would much affect the daylight hours available for tramping. They did not do the entire journey on consecutive days, nor did they walk all of the forestry track and public road sections (because those times on those routes could be estimated reliably).

[199] Senior Constable Connors found that the first leg of the journey, from the Wires Camp to Wentworth and then to the top of the main range could be achieved in a day, though it would be a rushed journey for someone carrying a 60-pound pack. The second day took about seven hours. It would be achievable for someone carrying a heavy pack. So would the third day, which according to Mr Tamihere took him to Crosbies Clearing. The fourth day would be difficult because the route from Crosbies Clearing to Maumaupaki which Mr Tamihere described would take him along a second-class track traversing some very difficult terrain. The same is true of the fifth and sixth days, when Mr Tamihere said he had reached Rocky Face then retraced his steps to just north of Maumaupaki. On the seventh day Mr Tamihere said that he dropped down off the track into the Te Mata river valley.[131] Senior Constable Connors described this route as unrealistic; "it is extremely bluffy and dangerous country". His police party chose a more realistic route via the Te Mata Hut which linked with old tracks but was still very steep and difficult. He agreed that it would not be difficult, having reached Te Mata on day seven, to reach the end of Tararu Creek Road on day nine.

[200] Overall, the Senior Constable's opinion was that the journey from Wires Camp to Boom Flat (47.5 km) could be made in two days by a person who was travelling light, but it is improbable for a person carrying a 60-pound pack. The same is true of

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130 This evidence was not presented at trial. We have admitted it for this appeal: see above at [48].
131 Mr Tamihere called Te Mata "Tamatrix".

the four days from Crosbies Clearing to Rocky Face, returning to Maumaupaki and then to Te Mata (38 km). He doubted whether the overall trip is possible in nine days. It would be extremely fatiguing with a heavy pack, requiring great exertion and determination. He added that allowances would have to be made for food preparation and finding water, and he noted that Mr Tamihere made no mention of walking in the hours of darkness.

[201] For the Crown, Ms Thomson emphasised that while the accounts Mr Tamihere gave before trial varied, they generally claimed that he went north up to the 309 Road then eventually came out at Te Mata and walked south down the Thames–Coromandel coastal road.[132] He did not say he went south of Thames. At trial he gave a very different account because he had to meet the evidence that he had been in the Wentworth Valley early in April. He tried to reconcile this new account with his police interviews so far as possible.[133] He did so by saying he went only so far north as Rocky Face, rather than all the way to the 309 Road. There can be no doubt that he lied, if only because he had told the police that he went north after leaving the Sunkist on both 17 and 31 March. He had no reason to lie about his actual destination in the Wentworth Valley, apart from the fact that Mr Höglin's body was lying there.

[202] Ms Thomson also argued that the account of his travels that Mr Tamihere gave at trial was plainly false. His journey would have been a remarkable feat of endurance. If the mountain bikers saw him on 3–5 April, not 2 April as he claimed, he would have had to complete it in even less time than the nine days he claimed to take. Such a journey would be a marked departure from his usual behaviour, in which he leap-frogged his heavy gear around from bivvy to bivvy. He offered no explanation for suddenly being in such a rush. Nor is there any reason why, at the end of this arduous journey, he would veer away from Thames and the Sunkist, where he had stayed very recently on two occasions, to return to the bush. Presumably he would have needed to reprovision.

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132 See above at [193]–[197].

133 He acknowledged that he had put a map of the peninsula up on his cell wall and used it to note the locations given by the witnesses who met him.

[203] Mr Carruthers responded that whereas Mr Tamihere was aged 35 at the time and made the journey in April, Senior Constable Connors was in his mid-50s and made it in July, following the wettest start to the year which the region has experienced. The Senior Constable could not rule out Mr Tamihere's journey.

[204] We discuss our findings on this evidence below at [238].

Evaluation

[205] We turn to our own evaluation of the evidence. Much of it is circumstantial. When evaluating the evidence we bear in mind that, as noted, the criminal standard of proof applies to the case as a whole, and not the individual items of evidence.[134] Rather, each such item must be assessed both on its own and in the context of the case as a whole.[135] It is the cumulative strength of the evidence that matters.

[206] We begin with the subject of lies, to explain the approach that we take to them where they arise under each of the subject headings that follow.

Lies

[207] The law at the time of trial was that a proven lie is evidence that the witness lacks veracity and may justify the fact-finder in discounting part or all of the witness's evidence.[136] Occasionally a defendant's lie might add to the Crown case where it evidenced consciousness of guilt.[137] It might have that effect where the jury found that the defendant could not offer an explanation consistent with innocence.[138] It was necessary to bear in mind that witnesses may be mistaken and they may also lie for reasons consistent with innocence.[139] The Evidence Act takes a more liberal approach; a defendant's lie may be treated as circumstantial evidence of guilt and a warning under s 124(3) need only be given to the jury if the judge thinks they may place too much weight on a lie.[140]

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134 *Guo*, above n 44, at [49]. See below at n 192.
135 At [50]. See also *Milner v R* [2014] NZCA 366 at [15].
136 *R v Toia* [1982] 1 NZLR 555 (CA) at 559.
137 *The Queen v Dehar* [1969] NZLR 763 (CA) at 765; *R v Collings* [1976] 2 NZLR 104 (CA) at 116–117; and *R v Bills* [1981] 1 NZLR 760 (CA) at 767.
138 *Toia*, above n 136, at 559; and *Bills*, above n 137, at 767.
139 *Dehar*, above n 137, at 765–766; and *Toia*, above n 136, at 559.
140 Or if the defendant asks for such a warning: Evidence Act, s 124(3). See *McLaughlin v R* [2015]

[208] It is debatable whether we ought to follow the former law when evaluating Mr Tamihere's lies. Following *Ellis*, our approach has been that admissibility must be determined under the law as it stood at the time but modern law may be relied upon when evaluating whether there has been a miscarriage of justice and whether guilt is proved beyond reasonable doubt.[141] The ability to consider modern practice benefits Mr Tamihere when it comes to topics such as visual identification evidence and prison informant evidence. But when it comes to the use that may be made of lies, modern law is more favourable to the Crown.

[209] The guiding principle is that the appellate court must adopt the approach best suited to answering these questions accurately. We hold accordingly that we may treat proved lies as circumstantial evidence of guilt in this case. But having said that, we think there is little distinction between the two approaches in practice and nothing turns on it in this case. A lie is most likely to be probative of guilt where the jury finds that the defendant lied because there is no other explanation consistent with innocence. As we go on to explain, the lies with which we are concerned fall into that category.

[210] When assessing alleged lies we remind ourselves of the warning provided for in s 124(3) of the Evidence Act. We also bear in mind that we did not have the advantage of seeing and hearing Mr Tamihere give his evidence.[142]

[211] The Crown contended at trial that Mr Tamihere had lied in a number of specific particulars, in addition to his denial that he had met the couple. The lies included:

(a) his initial denial to police that he had stolen the car and his claim that he had used a different one to tour the Coromandel on 11 April;[143]

(b) his initial claim that he found at Booms Flat the items of the couple's property that were seized from his house;[144]

NZCA 339 at [43].

141 Above at [50]–[51], referring to *Ellis* (SC substantive judgment), above n 15, at [345].

142 Above at [44](d). This means the appellate court may not find it possible to be sure of guilt and if so must allow the appeal: *Matenga*, above n 20, at [32]; and *Weiss*, above n 25, at [40]–[41] as cited in *Haig*, above n 25, at [59] per William Young P and Chambers J.

143 Above at [131].

144 Above at [131].

(c) his subsequent claim that he came across the car when walking up Tararu Creek Road and entered it to get food and clothing for his intended journey back into the bush;[145]

(d) his claim that he felt the car's exhaust and it was warm, which would mean the car passed him as he walked up Tararu Creek Road;[146]

(e) his claim that he unlocked the car rather than simply smash a window;[147]

(f) his claim that he unlocked the car using not a key but a piece of wire, and his evolving accounts of how he fashioned the wire into a tool and used it to work the toggle switch, taking only five minutes to unlock the car;[148]

(g) his claim that he took the car and returned to Auckland because he had decided to visit home and was unconcerned about the risk of being arrested there;

(h) his claim that he dumped the car at the Auckland Railway Station, despite evidence that he visited a second-hand shop on Blockhouse Bay Road to sell property from the car before he visited Harmony House;

(i) his explanation for remaining in Thames and touring the peninsula before returning to Auckland, instead of leaving the district at once to avoid being apprehended for stealing the car, and identified as a wanted man, when the owners returned from the bush;[149] and

(j) his claim that the cash he spent in Thames after taking the car was his own.[150]

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145 Above at [132].
146 Above at [153].
147 Above at [132] and [152].
148 Above at [132]–[133], [142]–[143] and [147]–[148].
149 Above at [154].
150 Above at [164].

[212] If these were lies, they obviously go to his veracity. Some of them may go beyond veracity to support a chain of reasoning leading to a finding of guilt. Into that category fall his claims about coming across the car when he was returning to the bush, how he unlocked it, why he took the car and returned to Auckland despite the risk of arrest, and why he remained in Thames for a couple of days before going to Auckland. His account at trial of his journey in the bush also falls into the same category. In each of these cases it may be said that there is no alternative explanation consistent with Mr Tamihere being unaware of what had happened to the couple.

The trampers' identifications of Mr Tamihere

[213] The reference poses the question whether the false evidence of Mr Harris affects the "reliability" of the trampers' identifications of Mr Tamihere. As we indicated above at [41], his evidence strictly does not affect the reliability of their identifications at all. He said nothing about the circumstances of the identifications, or the reliability of the witnesses, or the details they observed, or the circumstantial evidence supporting or detracting from the identifications. Rather, he gave evidence which was independent of the two eyewitnesses and tended to corroborate their accounts, specifically by reporting Mr Tamihere's admission that he had nearly been "sprung" by "a couple" when he was with Ms Paakkonen in the bush. For this reason, we have interpreted the reference as a request that we assess the identification evidence on its merits, putting aside the evidence of Mr Harris. And because we have accepted that Mr Harris's evidence caused a miscarriage of justice, we must be satisfied beyond reasonable doubt of Mr Tamihere's guilt.[151] We must reach that conclusion on the whole of the evidence, including the identifications.

[214] We remind ourselves of the need for caution, recognising that miscarriages of justice involving the conviction of innocent people can, and have, occurred because one or more witnesses made a mistaken identification, and that mistaken witnesses may be sincere and convincing.[152] We also recognise that the identification of inanimate objects is in issue in this case. The Crown says that the poncho, the hooped tent and the tomahawk, all seen by the trampers, are the same items that the police

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151 See above at [55]–[56].

152 See above at [120]. For reasons explained below at [222], we exercise the same caution in relation to the trampers' evidence that the woman resembled a photograph of Ms Paakkonen.

found at Mr Tamihere's house. It is necessary to bear in mind that witnesses may also make mistakes when identifying an object and that a miscarriage of justice may result.[153]

[215] The two trampers both positively identified Mr Tamihere, Mr Cassidy first doing so by reference to a photograph and both men on later observing him being escorted into court at Thames. The latter identifications suffer from the weakness which has long been attributed to dock identifications; the person being identified has already been singled out by the police as the person charged.[154]

[216] We have noted that the trial Judge found both trampers to be reliable and careful witnesses.[155] They had given descriptions of Mr Tamihere which generally matched those given by other witnesses, including Mr Knauf's reference to prominent eyes. Most of the items which the trampers described with the man—namely, the hooped tent, poncho, and tomahawk—accurately matched items found at Mr Tamihere's house. The trampers did not say these were the identical items, but all of them were distinctive and fitted the trampers' descriptions.[156] Finding all of those items at his home would be a most remarkable coincidence if the man was not Mr Tamihere. This evidence strongly supports the identifications.

[217] The boots they described him wearing—work boots, rather than tramping boots—also matched descriptions of Mr Tamihere's boots given by other witnesses who encountered him in the bush, as well as his own account that he wore heavy thick-soled boots there.[157]

[218] Neither of the trampers noted a prominent moustache, but as noted above at [70]–[71], both thought the man had some facial hair and Mr Cassidy thought he

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153 This Court has held that judges may need to give a direction to juries where the identification of an object is central to the case against the defendant and there are real issues about its reliability: *R v Watson* CA384/99, 8 May 2000 at [29]. Section 126 of the Evidence Act does not apply to the identification of inanimate objects but a warning may still be required: *R v Morgan* [2008] NZCA 537 at [15]–[16].

154 See, for example, *Peato v R*, above n 35, at [59].

155 Above at [108].

156 See above at [73] and [75] (the poncho), [83]–[84] (the hooped tent) and [85] (the tomahawk). We evaluate the trampers' descriptions of the two packs below at [226].

157 See, for example, above at [66].

also may have had a small bristly moustache. Mr Tamihere later said in evidence that he may have had 10 days of growth at that time.

[219] We have already mentioned what some of the other witnesses had to say about Mr Tamihere's facial hair around that time.[158] It is apparent from the witness accounts that Mr Tamihere frequently altered his facial hair by growing a beard and shaving. Descriptions also vary:

(a) Reinier (Rudy) Smolders, the Sunkist owner, recalled that Mr Tamihere had a droopy moustache and a two- to three-day beard on 7 March 1989 and then shaved the beard off, leaving the moustache.

(b) John Morrison, a guest at the Sunkist, reported that Mr Tamihere was clean-shaven and well-groomed, with short hair, on 15 March.

(c) Dean Kessell, who gave him a lift on 17 March, reported a moustache which stopped at the edge of his lips and no beard, but possibly a day or so's growth.

(d) Messrs Wallwork and Massey-Borman, who met him when they accompanied a group of scouts to the Maratoto Block,[159] reported that on 18 March they saw him with a bushy moustache but otherwise clean-shaven.

(e) Douglas Morrison, a farmer who ran a property in Wires Road, recalled Mr Tamihere having some facial hair in late March.

(f) Ms McClenaghan recalled a moustache and short beard when she saw him on 26 March. Her partner, Mr Patchett, also remembered a moustache but was less confident about him having a stubble beard.[160]

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158 See above at [63]–[66].
159 See above at [62].
160 As noted above at [63], these witnesses came forward after trial.

(g) Mr Dittmer recalled a prominent moustache and three- or four-days' beard growth on 26 March.[161] His companion, Mr Whitten, recalled a few days' growth but said Mr Tamihere did not have a prominent moustache.

(h) Ms Tomlinson, who gave him a lift on 31 March, recalled a closely trimmed beard.[162] She was not able to say whether it amounted to a few days' growth.

(i) One of the mountain bikers, Mr Thorp, recalled a moustache and a few days' beard growth sometime between 3–5 April.[163] The other two bikers could not recall.

(j) The two trampers described a few days' beard growth on 8 April but differed on whether the man they saw had a moustache.

(k) Two of the tourists he took around the peninsula on 10 April observed a big moustache that came down to the corners of his mouth. The third did not say anything about facial hair.

(l) On 28 April, Liam O'Shaughnessy, a guest at the Sunkist who spent some time talking to Mr Tamihere, saw him clean-shaven, with very short hair.

(m) Between 1 September 1986 and 2 July 1989, hotelier Lynn Spargo saw Mr Tamihere come in four times wearing a beard but perhaps only a week's growth, and no moustache that she could recall.

(n) Sometime between March and April 1989, bar staffer Suzanne Broadbent saw Mr Tamihere with some growth under his chin but not a long beard. She could not recall whether he had a moustache or not.

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161 See above at [64].
162 See above at [65].
163 See above at [66].

(o) The Sunkist manager, Wayne Stafford, said that Mr Tamihere always had a moustache.

[220] When arrested on 24 May 1989, some seven weeks after the sighting on 8 April, Mr Tamihere was wearing a beard and a moustache. Neither was long, but they were heavier than the stubble he wore when arrested in 1986. Tompkins J thought that beard growth since the trampers saw him might explain their failure to identify him from the photograph taken on arrest and included in the montage.[164] The photograph from which Mr Cassidy identified him showed Mr Tamihere with a moustache which extended below his lips on both sides but otherwise clean-shaven.

[221] At trial, defence counsel contended that Mr Tamihere must have had a bushy moustache on 8 April and the trampers would have noted it, but so far as we can tell neither counsel focused on the evidence about it.[165] We observe that witnesses who noted a moustache, as opposed to a beard, were more likely to have done so when Mr Tamihere had shaved his beard, as he regularly did, or had only a few days' beard growth. He also trimmed or removed the moustache sometimes. His own evidence was that he never shaved while in the bush; instead, he would shave as soon as he came back. Shaving the beard might reasonably account for the tourists' observations of a prominent moustache on 10 April. The presence of a light beard or a few days' growth might reasonably explain why the trampers did not describe a moustache, as opposed to facial hair.

[222] We accept that if Mr Tamihere was the man the trampers met, the woman could only have been Ms Paakkonen. The corollary is that any inconsistencies between what is known of Ms Paakkonen's appearance and their descriptions of the woman must detract from the reliability of their identifications of Mr Tamihere.[166]

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164 HC pre-trial ruling, above n 11, at 223–224.

165 The prosecutor's opening and closing addresses were transcribed but defence counsel's were not. They were summarised in the Judge's summing up.

166 The trampers' evidence that the woman resembled Ms Paakkonen is not visual identification evidence insofar as that term is defined in the Evidence Act: *Higgins v R* [2017] NZCA 486 at [12]; and *R v Turaki* [2009] NZCA 310 at [58].

[223] The two trampers did not identify Ms Paakkonen when shown a photograph of her, but their descriptions were consistent with that image.[167] The car and her jacket and wallet are strong circumstantial evidence that she was in the area about the time of her disappearance and came to harm there. The jacket and wallet are items she would have carried with her and she would not have chosen to discard them. The loss of her jacket could also explain why she was wearing what appeared to have been Mr Tamihere's poncho in the light drizzle at Crosbies Clearing. We have noted that we regard the woman's behaviour as neutral.[168]

[224] The principal weakness of the inference that the woman was Ms Paakkonen is the makeup and fingernail polish. As Mr Carruthers pointed out, both trampers were quite confident about this detail, though their descriptions of the makeup differed.[169] If they were correct, the woman probably was not Ms Paakkonen. She was not known to wear or possess cosmetics in New Zealand. No such items were found with her possessions at Tararu Creek Road or the Sunkist. And if she was not the woman, then they were also mistaken about Mr Tamihere. Provided it was Ms Paakkonen, there are two possibilities. Either she somehow came into possession of these items and chose or was made to wear them that day, or the trampers were mistaken in this respect. There is no evidence for the first of these possibilities. The evidence points rather to the conclusion that the trampers were mistaken.

[225] Mr Tamihere contends that the woman's boots, which the trampers confidently noted, also point to mistaken identifications. We have explained that Mr Höglin and Ms Paakkonen had not brought boots to New Zealand and there are no credit card receipts for a purchase here.[170] But the hairdresser who cut Mr Höglin's hair reported that he wore tramping boots, and we consider that evidence reliable. She had an extended opportunity to observe him at close quarters. If he had bought boots, then Ms Paakkonen would have done so too. The couple must have had footwear which they thought, following their experience in Nelson, would be suitable for the planned

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167 See above at [72] and [75].
168 Above at [80].
169 See above at [72] and [75].
170 See above at [78]–[79].

Table Mountain trip. They had taken out enough cash after their tramp in Nelson to buy boots.[171] We find it likely that they had done so.

[226] We mentioned above at [86] the trampers' descriptions of the two packs they saw at Crosbies Clearing. Mr Tamihere contended before us that these descriptions were inconsistent with Mr Höglin's and Ms Paakkonen's packs. However, the trampers never stated that the packs they saw corresponded with those packs.[172] The Crown's case is that the packs seen by the trampers were two of Mr Tamihere's own packs that were never recovered and shown to the trampers. A number of witnesses saw him travel with one large pack and one smaller bag, and at trial he confirmed he had both on his last journey in the bush. The trampers' descriptions at trial are not inconsistent with what is known about those packs.

[227] Finally, there is the failure of any other couple to come forward. We have found that this supplies modest support for the trampers' identifications.[173]

[228] Drawing the threads together, the circumstances in which the trampers identified Mr Tamihere at Thames and in court at trial were not apt to produce reliable identifications. Neither was Mr Cassidy's earlier identification from a single photograph. On the other hand, their previous descriptions were accurate and generally consistent with other witnesses' descriptions of Mr Tamihere, including his facial hair. They were firm in their evidence. But if that was all there was to the visual identification evidence, we would find their identifications of Mr Tamihere insufficient in themselves to prove guilt.

[229] However, several pieces of evidence offer support for the identifications:

(a) their descriptions of items the man was wearing, namely his boots (consistent with his own descriptions as well as those of other

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171 See above at [79]. The Crown produced a newspaper advertisement, dated 6 April 1978, that priced Paraflex and Kiwiflex boots at around $30 a pair.

172 Mr Höglin's and Ms Paakkonen's packs were of a green fabric attached to an external bare aluminium frame. After being shown these packs, Mr Cassidy thought the packs he saw at Crosbies Clearing were a similar colour but he did not recall external frames. Mr Knauf did recall an external frame on the larger pack but was unable to say that pack was the same as Mr Höglin's and Ms Paakkonen's packs.

173 Above at [89].

witnesses) and the tomahawk worn on his belt (similar to the one found at his house);

(b) the poncho, hooped tent and tomahawk, each of which the trampers identified as similar to items found at Mr Tamihere's house;

(c) the extraordinary coincidence of Mr Tamihere later being found to own all of these items;

(d) the circumstantial evidence that Ms Paakkonen was in the area (namely the car, her jacket and her wallet) and her possessions had been taken from her;

(e) the evidence that the woman was wearing what appeared to be the poncho, which she likely would not have needed during the light rain that started to fall had she a jacket of her own; and

(f) the failure of any other couple to come forward.

[230] The evidence tending to show the woman was Ms Paakkonen is circumstantial. It comprises the woman's resemblance to a photograph, the presence nearby of the car, wallet and jacket, and the fact that the woman was wearing what appeared to be Mr Tamihere's poncho. We think it likely, notwithstanding the Crown's concession to the contrary at trial, that Ms Paakkonen owned boots. But in one important respect—the makeup and fingernail polish she was wearing—their descriptions are not consistent with what is known of Ms Paakkonen.

[231] Standing back, we are satisfied that Mr Tamihere's identity as the man the trampers met at Crosbies Clearing is proved beyond reasonable doubt. We agree with the Court's conclusion in 1992 that it would be a most extraordinary coincidence if the items found at his house were not those the trampers described seeing with the man at Crosbies Clearing. The hooped tent, poncho and the man's carrying of the tomahawk were each distinctive, but the most compelling feature of this evidence is that all these items were found in the one place. We also find that the trampers' descriptions of

Mr Tamihere at the time were accurate, including their recollection of his facial hair. His beard growth since 8 April likely explains their initial failure to identify him from the montage, as the trial Judge thought. We accept their evidence that the woman resembled the photograph of Ms Paakkonen, and we find they were not mistaken about the boots. We find that the trampers likely were mistaken about one detail, her makeup and fingernail polish. We accept that is a significant detail which they both noted because in their experience women do not wear makeup in the bush.[174] But the identification evidence, combined with the circumstantial evidence, is convincing. It is sufficient to prove Mr Tamihere's identity to the criminal standard.

The discovery of Mr Höglin's remains

[232] We turn to the implications of the finding of Mr Höglin's remains in the Wentworth Valley for the Crown case.

[233] The discovery confirms that he and Ms Paakkonen were murdered. We have explained that he was killed near to where his remains were found.[175] It follows that he must have walked there, either from Wentworth or the nearby end of Parakiwai Quarry Road. That is evidence tending to show that the couple had changed their plan to go to Table Mountain and drove instead to the Wentworth area.

[234] Mr Höglin's injuries indicate that he was attacked when standing facing his attacker.[176] The knife wounds to the neck show his attacker meant to kill him. That raises the question of motive. At trial the defence suggested that the couple may have been killed because they encountered someone engaged in an unlawful activity in the bush, such as cannabis growing. Had that been so, one would expect that Ms Paakkonen would be killed at the same place and time. But no trace of her was found. That fact, along with the presence of his watch and gold ring, also tends to exclude robbery as a motive. It suggests rather that the killer's motives differed as between them.

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174 See above at [72] and [75].
175 Above at [168].
176 See above at [167].

[235] A desire to subject Ms Paakkonen to sexual violence is the only apparent motive that would account for the fact that they did not die at the same place and time. If that was the motive, one would expect that Mr Höglin was killed to facilitate that objective and Ms Paakkonen was then abducted and taken somewhere else.

[236] The location of Mr Höglin's remains and the evidence that he was killed at that place also tend to show that Mr Tamihere's account of finding and stealing the car cannot be correct. It will be recalled that his case was that the car had been driven to Tararu Creek Road and likely left there while its occupants went for a short tramp, leaving their packs in the car.[177] It is unlikely that Mr Höglin was taken from the Tararu Creek area to Wentworth, with or without Ms Paakkonen, and killed there. That would suppose that Mr Höglin's death and the couple's loss of their car, which happened at latest by 9 April, were not connected. It would introduce another vehicle and another actor or actors who coincidentally met the couple between 7 and 9 April and took Mr Höglin, and perhaps Ms Paakkonen, in another vehicle to Wentworth, leaving their car at the end of Tararu Creek Road, where Mr Tamihere independently happened upon it and stole it. We find that highly implausible. We think it likely that the couple were already dead when Mr Tamihere dumped their possessions and drove their car from Tararu Creek Road to Thames.

[237] The evidence, particularly that of the mountain bikers, shows that Mr Tamihere had located himself in the Wentworth area, southeast of Thames, in early April.[178] That created the opportunity for Mr Höglin and Ms Paakkonen to meet him there.

[238] That brings us to Mr Tamihere's account of his travels in the bush in early April. We find that he did not make the journey he recounted at trial. He altered the account he had given the police to accommodate the Crown's evidence, given at depositions, that various witnesses met him in the Wentworth area in late March and early April.[179] Hence the story of an extraordinary march through rugged country over a period of nine days. The journey was entirely out of character with his usual behaviour in the bush. It must have been completed in fewer than nine days, because

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177 See above at [153].
178 See above at [63]–[66].
179 See above at [193]–[197].

the mountain bikers encountered him after 2 April. The journey was near-impossible, even for a strong and very fit man as Mr Tamihere must have been.[180] That fact likely accounts for Mr Tamihere abandoning at trial his initial claim that the cash in his possession came from possum trapping during his travels; he could not possibly have had enough time to engage in that activity as well. Had he made the journey, he must have reprovisioned somewhere, likely at Thames, before returning to the bush. He could not know as he walked up Tararu Creek Road to return to the bush that he would find food and clothing by breaking into a car there.

[239] We accept that the only explanation for the lie is that Mr Tamihere wanted to disguise his presence in the Wentworth Valley area. The lie is probative of his knowledge that the police might find something there that was relevant to the disappearance for which he was under investigation. The only such evidence that has been found is Mr Höglin's remains. The lie accordingly lends some support to the Crown case.

[240] We return to the watch which was found with Mr Höglin's remains. Mr Carruthers argued that it was a significant feature of the trial because it was relied upon to establish that Mr Tamihere had a connection not just to the car but to the couple themselves. In 1992, this Court accepted the Crown's contention that the watch had been little emphasised at trial and the connection between the watch described by Mr Davenport, which was never produced or shown to be the same as Mr Höglin's, was tenuous and unlikely to have carried much weight with the jury.[181] We accept Mr Carruthers's submission that it cannot be known what use the jury made of it, and we think the Crown did rely on it to point to a direct connection. The trial Judge told the jury that the Crown's case was that it was Mr Höglin's watch. The prosecutor invited the jury to draw that inference, saying that if it was not Mr Höglin's then "whose is it?".

[241] This point would not amount to a miscarriage of justice in itself. The Crown could not, and did not, claim the connection was strong. There was evidence that the watch was of a type sold in New Zealand. The jury were also told that they had to

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180 See above at [198]–[200].

181 CA appeal judgment, above n 4, at 12–14 and 19. See above at [181].

accept Mr Tamihere had adopted the hearsay evidence of Mr Davenport before they could rely on it at all. And we have already accepted a miscarriage of justice resulted from Mr Harris's evidence.[182] The question we are now considering is whether the remaining evidence proves Mr Tamihere's guilt. The significance of the watch, for that purpose, is that it tends to exclude robbery as a motive for Mr Höglin's death.

Did Mr Tamihere use a key to unlock the car at Tararu Creek Road?

[242] We begin with Mr Tamihere's claim that he entered the car because he believed its owners were not in the vicinity.[183] We find that this was a lie. As the Crown contended at trial, the car must have passed him going up Tararu Creek Road if its exhaust was still warm when he got there.[184] His claim that he believed the owners had gone for some time, perhaps an overnight tramp, is not credible either; their packs were still in the car and they would have had to take sleeping bags and a tent. He had no reason to think they owned another pack of sufficient size to carry all they would need.[185] Nor have we accepted his claim that he merely wanted to get food for his return to the bush and assumed he would be able to do so by stealing provisions without returning to Thames.[186] We also reject his claim that he went to the trouble of unlocking the car with wire, instead of simply smashing a window, out of solicitude for the owners, from whom he only wanted to steal some food. That is not consistent with his treatment of their property, which we discuss below from [249].

[243] It is possible, but unlikely, that the couple had a second key cut for the car. We have noted that the key that came with it was cracked.[187] The previous owner, Per Eric Andersson, who was also a tourist, explained the crack was "in the length of the key in the middle" and "along the shaft in the middle". He warned the couple to take care of it and not "use it like a tool or something". But he had not thought the risk of breakage sufficient to get a second key himself and he also conveyed to them that normal use was no problem. If they shared that view, there was no reason to get

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182 Above at [55].
183 See above at [153].
184 See above at [153] and [211](d).
185 They did have a day pack which, like their sleeping bags and cooking utensils, were never found; the Crown contended that Mr Tamihere had kept these items.
186 See above at [238].
187 Above at [15].

a second key for a car they planned to on-sell in a few months' time. In the meantime, they would have to keep the second key on them or in the car, somewhat reducing the utility of having a spare to guard against the risk of loss. Ronald Lewis and Sharon Stray, the Canadian couple whom Mr Höglin and Ms Paakkonen tramped with in the Nelson area, reported them having only one key for the car. Mr Tamihere claimed that the key he used had what was described as a Hiroshima keyring, which Mr Andersson and Mr Lewis did not recognise,[188] but Mr Tamihere made that claim after learning that police had recovered such a keyring among the couple's possessions found in the car.

[244] We have noted that in 1992 this Court accepted that the couple might have had had a second key cut and it left the evidence there, choosing not to make findings about how Mr Tamihere got into the car.[189] The Court evidently took that approach because it found the trampers' identifications were proved conclusively. Once that was accepted, the Court found, the rest of the Crown's circumstantial case fell into place.[190] The Crown had not gone into the details of the evidence about the alleged wire tool or its use in its 1992 submissions either. On our approach, it is necessary to examine the evidence about the car closely. If there was a spare key in the glovebox, it remains the position that Mr Tamihere must have used a key to get into the car unless the driver's window was partly open and he unlocked it using the technique he described in evidence.

[245] We have surveyed the evidence about that above, at some length.[191] Our conclusion begins with the factual finding that the windows were closed. The three witnesses who gave that evidence could not preclude the possibility that a window was slightly opened, but given they were all agreed, that must be considered unlikely. Nor is it likely that the couple, who were careful with their property, would have left a window open if they were leaving the car for some time, with their property visible, in a place where someone might exploit its isolation to break into it. There is evidence

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188 At depositions, Ms Stray did not recall there being a keyring. She was shown the Hiroshima keyring at trial and thought it looked familiar. She said that it could have been on the same ring as the set of keys. In summing up, Tompkins J described Ms Stray as uncertain on this issue.

189 CA appeal judgment, above n 4, at 13. See above at [180].

190 At 20.

191 Above at [128]–[148].

that they locked their vehicle, with the windows closed, before heading off on their tramp in Nelson. They would not have left their camera lying in a visible location either.

[246] If the window was open to the extent described by Mr Tamihere, then the lock could be worked from the inside using the technique developed by some of the experts who gave evidence at trial. And once the necessary tool was made and perfected and the user had practised the technique, it could be done quickly.

[247] It does not follow that there is a reasonable possibility that Mr Tamihere entered the car in that way. We find that he also lied about how he did so. He adjusted his account after learning how the experts had eventually done it. These were not minor adjustments to the technique he originally described to the police. That technique did not work. At trial he described a very different technique, using a different wire tool from a different point relative to the toggle switch. The making of the twisted wire tool and the many adjustments necessary to get it to work so that sufficient pressure could be placed on the toggle switch also took much more time than he claimed to have spent. He claimed to have thrown the tool into the bush, but the police did not find it, though we accept there is a reasonable possibility they might fail to find a thrown object.

[248] We find that Mr Tamihere entered the car using a key. The evidence supporting that finding is compelling. It is important because it establishes a direct connection to the couple, who must have carried a key when they locked and left the car. It was Mr Höglin's habit to keep the key in his pocket or pack. No key was found in his pocket or pack, nor in the immediate vicinity of his body. We need not find the fact that Mr Tamihere used a key proved beyond reasonable doubt,[192] but in our view, the proof reaches that standard.

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[192] Because, in our view, it is not one of the rare facts that, if left unproved, necessarily results in reasonable doubt: *Milner v R* [2015] NZSC 38, (2015) 27 CRNZ 412 at [7]–[8]. See also *Thomas*, above n 44, at 41 per Turner J; and *Dehar*, above n 137, at 765.

Mr Tamihere's dealings with the couple's property

[249] Mr Tamihere's decision to take the car and go to Auckland is striking. He had spent nearly three years in hiding and established a life in the bush, and on his account, he was heading back into the bush when he found the car. He knew he risked arrest in Auckland. He had not decided to give himself up. His behaviour suggests that he had a reason to leave the Coromandel which mattered more to him than the risk of arrest on the outstanding warrant. He sought to explain this by saying that he needed money, but he had money to spend when he took the car to Thames. We do not accept that he decided to return to Auckland on the spur of the moment when he found the car. He could have stolen a car at any time. Nor do we accept his claim that he was unconcerned about the risk of arrest in Auckland. He soon returned briefly to the Coromandel because he feared he had been recognised in a post office.

[250] We have described above the items left at the end of Tararu Creek Road and the Sunkist.[193] Mr Tamihere admitted dumping the items, except the couple's tent, and cutting labels from clothing he wanted to keep but not cutting other items, notably the female underwear and the tent. Mr Tamihere must have left the tent in the shed at the time. It had been removed from its bag, which was among the items he dumped. We also find that he cut the tent and removed the straps, which he must have used in some way because they were not left at the scene.

[251] We also find that he cut Ms Paakkonen's used underwear. At trial he denied that, suggesting it was unlikely that he would have cut the underwear from her during a sexual assault in the bush and then dumped them at Tararu Creek Road with her other clothing. That may well be so. The more likely explanation for the presence of the underwear in the bag is that Ms Paakkonen had put it with other used items for later washing. But Mr Tamihere did rummage through the bags and we find that he was the person who did the cutting. It would be stretching coincidence too far to suggest that someone else also rummaged through the items he dumped and cut some of them. The defence suggestion at trial that Ms Paakkonen had cut her underwear to remind herself to discard it later is highly implausible.

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193 Above at [158]–[161].

[252] It is hard to know what to make of Mr Tamihere's treatment of the property he cut and discarded. He must have had a use for the tent straps. Beyond that, it is not possible to say why he treated their property in this way.

[253] Mr Tamihere also left a bag of Ms Paakkonen's underwear and feminine hygiene items at the Sunkist, but it is possible that he was merely discarding more items that he had found in the car and did not want. He discarded car accessories at the same time.

[254] We find that Mr Tamihere also stole from the couple the cash that he spent in Thames. Ms Paakkonen's wallet had been opened and any notes it contained taken. But it is also possible that Mr Tamihere found the money in the car. That being so, this evidence does not necessarily establish another direct connection to the couple.

[255] Mr Tamihere's behaviour in Thames was brazen on any view of it. On his own account he had stolen a car and was freely using it, although the owners could be expected to emerge from the bush and go to the police within a short time after he stole it. Mr Carruthers contended he would not have been so brazen had he also committed murder. We find the contrary inference from his behaviour far more likely; he behaved as if he had plenty of time because he knew what had happened to the owners.

Overall assessment

[256] We begin by recognising that, as Mr Carruthers emphasised, the Crown is now on its third theory of the case. We do not find that remarkable. At trial much was unknown. It was necessary to rely on circumstantial evidence to prove that Mr Höglin and Ms Paakkonen were dead, that they did not die by accident, and that it was Mr Tamihere who murdered them. As this Court remarked in 1992, precisely what happened to Mr Höglin and Ms Paakkonen cannot be known.[194] It is to be expected that the Crown's theory would evolve if and when new evidence emerged, as happened with the discovery of Mr Höglin's body. The real point which we understood Mr Carruthers to be making was that significant shifts in the Crown's case illustrate vividly that too much was, and remains, unknown. Hence the contention that the

[194] CA appeal judgment, above n 4, at 19.

Crown's present theory of the case, for which the Crown says only that it is "a logical sequence" of events, is as porous as any other.

[257] We accept that it remains impossible to know the couple's precise movements after they were seen in Thames on 7 April and why they were killed. But we do not accept that it is impossible to prove beyond reasonable doubt that Mr Tamihere killed them.

[258] We are satisfied that the trampers' visual identifications of Mr Tamihere were correct, and the woman with him must have been Ms Paakkonen.[195]

[259] We are also satisfied that Mr Tamihere entered the car using a key which he took from the couple.[196] It was Mr Tamihere who cut the items found at the end of Tararu Creek Road, including the couple's tent and Ms Paakkonen's used underwear.[197] We consider his behaviour there, and afterwards in Thames, very significant. It evidences an understanding that he was free to do what he wanted with their property, at his leisure.[198]

[260] We have considered the evidence about Mr Höglin's remains and the possible motives for murder—a confrontation in the bush, robbery, or sexual assault—which were suggested at trial or before us.[199] We find that the evidence points to a sequence of events in which the couple drove to Wentworth on 7 or 8 April and met their attacker there, Mr Höglin was killed, and Ms Paakkonen was abducted and killed somewhere else. Their car was driven to Tararu Creek Road, where it was seen on 9 April. The finding of Ms Paakkonen's possessions near Jam Tins is strong evidence that she was in that area and came to harm there. Having regard to the manner of Mr Höglin's death and the evidence that she was not killed at the same time and place, the most likely motive for his death was a desire to abduct Ms Paakkonen for the purpose of sexual assault.

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195 Above at [231].
196 Above at [248].
197 Above at [250]–[251].
198 See above at [255].
199 See above at [234]–[235].

[261] We also have admissions, reluctantly made by Mr Tamihere when presented with evidence against him, about his movements and his dealings with the couple's property.[200] He also lied, adapting his account as he thought suited his interests whenever he was confronted with new information. The prosecutor at trial accurately described his lies as "complex and considered". Some of the lies are probative of guilty knowledge about what became of the couple.[201]

[262] The evidence overall satisfies us beyond reasonable doubt that it was Mr Tamihere who murdered Mr Höglin and Ms Paakkonen. In our view, the case against him is very strong. It does not rest wholly on the trampers' identifications. Rather, it derives its strength from the combination of visual identification and circumstantial evidence from a number of sources, including his use of the couple's key to gain access to their car and his treatment of their property. It also rests in part on his admissions when confronted with evidence he could not explain away, and his proven lies.

Suppression

[263] On 20 November 1990, Tompkins J suppressed the name and identifying particulars of the prison informants who gave evidence in this case. While Mr Harris and Mr Kapa have since lost name suppression,[202] Witness A has not. The Crown advises that Witness A is now deceased and it submits that the rationale for name suppression (to protect him from retribution in the prison community) has ended. We agree,[203] but we doubt we have jurisdiction to revoke the order under s 208(1)(c) of the Criminal Procedure Act.[204] The High Court may revoke the order under s 208.

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200 See above at [151]–[164] and [192]–[197].

201 See above at [212].

202 Name suppression for Mr Harris lapsed on 26 April 2018: *Taylor v Witness C* [2018] NZHC 810. Name suppression for Mr Kapa lapsed the following day: see *Taylor v The Queen: Re Witness B (Name Suppression: Revocation)* [2018] NZHC 581, [2018] NZAR 398.

203 For the reasons given in *Taylor v The Queen: Re Witness B (Name Suppression: Revocation)*, above n 202, at [15]–[22]. In particular, the circumstances of this case, including the miscarriage of justice caused by another prison informant's evidence, are exceptional enough to warrant that the suppression order be revoked: *R v Burns (No 2)* [2002] 1 NZLR 410 (CA) at [7].

204 *Fawcett v R* [2023] NZCA 183 at [41]; and *Dallison v R* [2023] NZCA 282 at [41]. The order continues as if it were made under the Criminal Procedure Act: *Taylor v C* [2017] NZCA 372 at [23].

Decision

[264] The application to adduce further evidence is granted.

[265] We find that the admission of the evidence of Robert Conchie Harris at Mr Tamihere's trial may have affected the jury's verdicts and accordingly amounted to a miscarriage of justice.

[266] Under the proviso to s 385(1) of the Crimes Act, we are satisfied beyond reasonable doubt that Mr Tamihere murdered Mr Höglin and Ms Paakkonen. For that reason, the miscarriage does not justify setting the convictions aside.

[267] We accordingly decline to exercise the Court's jurisdiction under s 406(1)(a) of the Crimes Act to quash Mr Tamihere's convictions.

[268] We make an order prohibiting publication of this judgment, the media release, and any information therein, until the judgment is made publicly available at 12.00 pm on 11 July 2024.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

Annexure

Reference to the Court of Appeal of the Question of the Convictions of David Wayne Tamihere for Murder

PATSY REDDY, Governor-General

Order in Council

At Wellington this 20th day of April 2020

Present:
RT HON JACINDA ARDERN, Presiding in Council

Her Excellency the Governor-General, acting under section 406(1)(a) of the Crimes Act 1961 and on the advice and with the consent of the Executive Council, refers to the Court of Appeal the question of the convictions of David Wayne Tamihere for murder, entered in the High Court at Auckland on 5 December 1990.

The background to and reason for the reference appear in the Schedule.

Schedule

1 Interpretation

In this schedule,—

applicant means David Wayne Tamihere

Crosbies Clearing means a clearing about 3 hours' walk from the end of Tararu Creek Road, near Thames

trampers means John Thomas Cassidy and Theodore Melvin Knauf.

Background

2 Trial

(1) On 5 December 1990, the applicant was convicted in the High Court at Auckland of the murders of Sven Urban Höglin and Heidi Birgitta Paakkonen, Swedish tourists who had disappeared in April 1989 while travelling in New Zealand.

(2) At the time of the applicant's trial, neither body had been found.

(3) The prosecution case was circumstantial. An important element was the evidence of the trampers identifying the applicant as the man they had seen with a woman resembling Ms Paakkonen at around 3.00pm on Saturday 8 April 1989 at Crosbies Clearing.

(4) Other evidence at the trial also connected the Swedish couple and the applicant to areas close to Crosbies Clearing, including—

(a) evidence that the couple had their hair cut in Thames around lunchtime on Friday 7 April 1989; and

(b) evidence from witnesses who had seen the couple's car parked at the end of Tararu Creek Road in the early afternoon of Sunday 9 April 1989; and

(c) evidence that in the days after the couple's disappearance, beginning on Monday 10 April 1989, the applicant used their car in Thames, the Coromandel, and Auckland; and

(d) evidence that clothing and other possessions belonging to the couple had been found strewn in the scrub and bush at the end of Tararu Creek Road; and

(e) evidence that Ms Paakkonen's jacket and wallet, and eating utensils belonging to the couple, had been found in 2 places along the track between the end of Tararu Creek Road and Crosbies Clearing.

(5) Among the other evidence called by the Crown was that of 3 prison inmates who said that the applicant had confessed to the murders to them in prison. Evidence from one of the inmates, Roberto Conchie Harris, supported the trampers' identification evidence. Mr Harris testified that the applicant had told him about almost being "sprung" by "a couple" while alone with Ms Paakkonen in the bush.

3 Appeal

(1) The applicant appealed against his convictions.

(2) In October 1991, before the hearing of the appeal, Mr Höglin's remains were discovered in Wentworth Valley, on the eastern side of the Coromandel Peninsula and approximately 73 km by road from the end of Tararu Creek Road.

(3) The applicant's grounds of appeal were amended in light of the discovery of Mr Höglin's remains. One of the amended grounds of appeal was that the location of the remains was inconsistent with the Crown case, which had, the applicant submitted, proceeded on the basis that the couple were murdered and disposed of in the area of bushland near Crosbies Clearing.

(4) On 21 May 1992, the Court of Appeal dismissed the appeal. In relation to the location of Mr Höglin's remains, the court was satisfied that the Crown had not tied itself to places of murder and disposal and that the applicant had the knowledge and means to move the body to where the remains were found.

4 Perjury proceedings

On 1 September 2017, Mr Harris was convicted of perjury in relation to 8 aspects of the evidence that he gave at the applicant's trial. One of the charges related to his testimony that the applicant had mentioned almost being "sprung" while in the bush with Ms Paakkonen.

5 Application for exercise of Royal prerogative of mercy

(1) On 28 June 2018, the applicant applied to the Governor-General for the exercise of the Royal prerogative of mercy in respect of his murder convictions.

(2) The applicant submitted, among other matters, that Mr Harris' perjury convictions, when considered with the discovery of Mr Höglin's remains, had so undermined the Crown case as to render his convictions unsafe. In particular, the applicant submitted that—

(a) The discovery of Mr Höglin's remains in Wentworth Valley cast doubt on the trampers' identification evidence because it was implausible that the applicant could have both disposed of the remains there and been at Crosbies Clearing with Ms Paakkonen on the afternoon of Saturday, 8 April 1989; and

(b) The reliability of that identification was further undermined as it was no longer supported by Mr Harris' false evidence that the applicant had mentioned being "sprung".

Reason for reference

6 Reason

The reason for the reference is that the information referred to in clauses 3(2) and 4, taken together,—

(a) may raise doubts about the reliability of an important aspect of the Crown case, namely the trampers' identification evidence referred to in clause 2(3); and

(b) could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred.

MICHAEL WEBSTER, Clerk of the Executive Council.