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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 61/2023
[2024] NZSC 184

BETWEEN	DAMIEN SHANE KURU Appellant
AND	THE KING Respondent

Hearing:	4 March 2024
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ
Counsel:	C W J Stevenson, J H C Waugh and O H Fredrickson for Appellant F R J Sinclair and L C Hay for Respondent
Judgment:	20 December 2024

JUDGMENT OF THE COURT

A The appeal is allowed.

B The appellant's conviction is set aside.

C Order under ss 233(3)(a) and 241(2) of the Criminal Procedure Act 2011 that a judgment of acquittal be entered.

REASONS

SUMMARY OF REASONS
(Given by the Court)

[1] This is a summary of the reasons of the Court on the issues likely to have importance for other cases, but it must be read in conjunction with the full reasons.

Background

[2] Mr Ratana, a senior member of the Mongrel Mob, was shot and killed following a confrontation with members of the Black Power Whanganui chapter. After a jury trial, Mr Kuru was convicted as a party to the manslaughter of Mr Ratana under s 66(2) of the Crimes Act 1961.[1]

[3] Mr Ratana was staying with his girlfriend in an area considered to be Black Power territory. The Crown alleged that Mr Kuru, the president of the Black Power chapter, had ordered, sanctioned or authorised a plan for members of the chapter to damage Mr Ratana's property and to intimidate him, accompanied by firearms. The Crown did not allege that it was part of the plan to injure Mr Ratana or any other person.[2]

[4] At trial, the Crown relied in part on the evidence of Detective Inspector Scott, whom the Crown called to give expert evidence on gang behaviour. Detective Inspector Scott's evidence included the statements that the president "has the final authority over all chapter business and its members" and that, in his experience, "a (serious) organised gang crime against another gang would likely occur with the sanction of the president". Detective Inspector Scott also gave general evidence on

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1 See below at [22]–[28] per Winkelmann CJ, Ellen France and Williams JJ (the majority) and [72]–[75] and [80]–[96] per Glazebrook J.

2 See below at [26]–[27] of the majority's reasons and [118]–[124] per Glazebrook J.

gangs, and on the Mongrel Mob and Black Power in particular. His professional experience was mostly in the Gisborne area.[3]

[5] Mr Kuru appealed his conviction on three grounds, which are dealt with in the judgment in reverse order:[4]

(a) that the jury's verdict was unreasonable;

(b) that the evidence of Detective Inspector Scott caused a miscarriage of justice; and

(c) that the jury was misdirected regarding joint enterprise party liability under s 66(2) of the Crimes Act.

Directions on party liability

[6] The Court was unanimous that there was no misdirection on party liability: the Judge's directions in this case were in accordance with the directions held to be required in this Court's decision in *Burke v R.*[5]

Detective Inspector Scott's evidence

Evidence on gang hierarchies

[7] The Court was unanimous that Detective Inspector Scott's general evidence as to gang hierarchies would have been admissible as substantially helpful under s 25 of the Evidence Act 2006 if it had been appropriately limited and qualified.[6]

Evidence that crime against another gang would likely have been sanctioned by the president

[8] The Court was unanimous that Detective Inspector Scott's evidence that "a (serious) organised gang crime against another gang would likely occur with the

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3 For Detective Inspector Scott's evidence generally see below at [31]–[35] of the majority's reasons and [107]–[109] and [111]–[115] per Glazebrook J.
4 See below at [29] of the majority's reasons and [76]–[77] per Glazebrook J.
5 Below at [30] of the majority's reasons, [102]–[104] per Glazebrook J and [314] per Kós J.
6 Below at [64] of the majority's reasons, [197] per Glazebrook J and [317] per Kós J.

sanction of the president" was inadmissible.[7] This led to a miscarriage of justice, which meant that the appeal should be allowed on this ground.[8]

[9] The majority held that Detective Inspector Scott's evidence on this point was unfairly prejudicial and should have been excluded under s 8 of the Evidence Act. For the same reasons, the evidence was also not sufficiently reliable or probative to meet the substantial helpfulness test for the admissibility of expert evidence under s 25 of the Evidence Act.[9]

[10] The majority said that Detective Inspector Scott's evidence could be read as addressing the ultimate issue for the jury — did Mr Kuru know of and had he sanctioned the attack? In a case with only circumstantial evidence, there was a risk the evidence would usurp the jury's function. This was a risk that had to be weighed.[10]

[11] Against this background, the issues with the admissibility of this evidence were as follows. First, the evidence carried with it a high risk of unfair prejudice in that it invited impermissible reasoning: namely, presidents of gangs know about and sanction rival gang attacks; this was a rival gang attack by Black Power on the Mongrel Mob; Mr Kuru is a gang president; and therefore he must have known about and sanctioned this rival gang attack. The difficulty with such reasoning is that it was based only on the evidence of Detective Inspector Scott, who did not, but should have, qualified the evidence which invited this reasoning. Judicial direction could not adequately address the risk of impermissible reasoning when the unfair prejudice was coterminous with the evidence's probative value.[11] Secondly, the evidence was of limited probative value. Detective Inspector Scott did not record in his evidence his lack of familiarity with Whanganui Black Power.[12] As mentioned, he also failed to state important qualifications on his generally expressed opinion evidence (such as acknowledging variations in a president's role between gangs, regions and different factual scenarios). Expert opinion evidence is required to be balanced. Balanced expert evidence would

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7 Below at [58] and [65] of the majority's reasons, [196] per Glazebrook J and [315] per Kós J.
8 Below at [66] of the majority's reasons, [199]–[202] per Glazebrook J and [315] per Kós J.
9 Below at [58].
10 Below at [53].
11 Below at [54].
12 Below at [55].

have included such qualifications.[13] Finally, Detective Inspector Scott's evidence could be read as expressing the opinion that the shooting of Mr Ratana was a "(serious) organised gang crime against another gang", without any proper basis for that opinion.[14]

[12] Glazebrook J agreed that the evidence about the probability of a president authorising a serious attack was inadmissible. This is because it was evidence on the ultimate issue, and the jury already had, from common knowledge and from Detective Inspector Scott's evidence about gang hierarchies, sufficient information to come to a conclusion on that ultimate issue.[15] The opinion evidence on the ultimate issue was therefore unnecessary and should not have been admitted under s 25.[16] She agreed that the evidence should also have been excluded under s 8.[17]

[13] Kós J agreed that the part of Detective Inspector Scott's evidence relating to the likelihood of a gang president authorising a serious attack on another gang member was inadmissible because it failed the tests for relevance, non-undue prejudice and substantial helpfulness in ss 7, 8 and 25 of the Evidence Act.[18]

General evidence on gangs

[14] The majority made several observations regarding Detective Inspector Scott's general evidence on gangs. They said that expert evidence on gangs should be confined to evidence relevant to a matter at issue in the proceeding and should not contain broad-ranging discussion of contextual elements of gang life merely by way of background when that material is not relevant to a trial issue. Detective Inspector Scott's evidence was discursive and included argumentative material that had little relevance or probative value. Some of this discursive material — narrative-type evidence of the history, culture, criminality and violent activity of gangs — also carried an obvious prejudicial effect.[19]

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13 Below at [56].
14 Below at [57].
15 Below at [190]–[191].
16 Below at [196].
17 Below at [193]–[194] and [196].
18 Below at [315].
19 Below at [59]–[60].

[15] The majority offered guidance for future cases as to what Detective Inspector Scott should have done to render his evidence admissible under s 25:[20]

> (a) The Detective Inspector should have noted any limitations on his expertise — including that he had not studied or investigated the particular chapter of the gang and so could not comment on the operation of hierarchy within Mr Kuru's chapter of the Black Power gang.
>
> (b) He should have noted the limitations and qualifications that exist in relation to the applicability of the "traditional view" of gang hierarchy to any situation.
>
> (c) He should have identified with more particularity the material upon which he drew in reaching his opinion. By this we mean that the officer should have identified whether he was drawing on courses attended or published papers (identifying the courses or papers), and/or experience gained on the job.
>
> (d) While he could have included a description of the decision-making hierarchy in gangs, and in particular that the president has final authority over all chapter business and its members and that the sergeant-at-arms enforces the president's orders, he should not have extended his evidence, as he did, to include an assessment of whether the president was likely to have sanctioned the particular type of conduct that the Crown alleged.
>
> (e) He should not have given evidence that suggested the offending was serious *organised* gang crime when the level of organisation involved was the key trial issue.
>
> (f) His evidence should have been confined in scope, avoiding a general narrative on gangs and argumentative material.

[16] Glazebrook J agreed with this summary and also agreed with the majority that much of the general evidence given by Detective Inspector Scott was inadmissible as irrelevant and illegitimately prejudicial.[21]

[17] Kós J did not agree with the majority's more general comments on gang evidence.[22] The objections advanced by trial counsel had centred on the passages referred to above at [4]; that on-the-ground assessment was sound and there was no need here to go beyond it.[23]

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20 Below at [64].
21 Below at [195] and [197]–[198].
22 Below at [314].
23 Below at [317]–[319].

Unreasonable verdict

[18] The Court was unanimous that the jury's verdict convicting Mr Kuru was unreasonable. The reasoning for this finding is set out in the reasons of Glazebrook J, with whom the rest of the Court agreed.[24]

[19] The Court applied the test, set out in *R v Owen*, of whether the verdict was one which, "having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt".[25] In this case, there was a total absence of direct evidence against Mr Kuru. The remaining strands of circumstantial and other evidence were either equivocal or otherwise insufficient to establish guilt either individually or considered as a whole. While appellate courts must be careful not to usurp the function of the jury, here there was no plausible route to convict Mr Kuru beyond a reasonable doubt.[26]

Result

[20] The Court unanimously allows the appeal on the grounds of inadmissible evidence and unreasonable verdict.[27]

[21] The appellant's conviction for manslaughter is set aside and a judgment of acquittal entered. An acquittal was necessary for the same reasons that the jury's verdict was unreasonable: there was an absence of direct evidence, and the remaining evidence was either equivocal or otherwise insufficient to establish guilt.[28]

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24 Below at [67] of the majority's reasons, [282]–[312] per Glazebrook J and [314]–[315] per Kós J.
25 Below at [205] per Glazebrook J.
26 Below at [312] per Glazebrook J.
27 Below at [65]–[71] of the majority's reasons, [199]–[202] and [312]–[313] per Glazebrook J and [314]–[315] per Kós J.
28 Below at [67]–[68] of the majority's reasons and [312] per Glazebrook J.

WINKELMANN CJ, ELLEN FRANCE AND WILLIAMS JJ
(Given by Winkelmann CJ)

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Introduction

[22] Mr Ratana was a senior patched member of the Mongrel Mob, Mr Kuru the president of the Whanganui chapter of Black Power.[29] In 2018 Mr Ratana began visiting and staying over at a house in Pūriri Street, Whanganui. In gang terms, this house was in a part of Whanganui understood to be Black Power territory. Indeed, from driveway to driveway, the Crown submits that the house where Mr Ratana was visiting and staying was about 242 metres away from Mr Kuru's home, which was one of the main houses frequented by that branch of Black Power.

[23] Members of the local Black Power chapter began a campaign of intimidation in an effort to force Mr Ratana to leave the area. There were at least two incidents in this campaign before an attack on the house in Pūriri Street, and its occupants, on 21 August 2018. Mr Ratana was killed during the course of that attack, leading to the charges against Mr Kuru.

[24] On the fatal day, at least six Black Power gang members went to the house in Pūriri Street, sometime around 9.30 am, armed with poles, batons and firearms. They began hitting Mr Ratana's car, shouting out slogans, threatening Mr Ratana and verbally abusing those in the house. Mr Ratana walked out of the house, armed with

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[29] The reasons of Glazebrook J contain a more detailed factual narrative: below at [80]–[96]. A diagrammatic representation of relevant locations is provided in the appendix to this judgment.

a gun. One of the Black Power men then shot Mr Ratana, who died very shortly afterward at the scene.

[25] Although Mr Kuru was not among the gang members outside the Pūriri Street house on 21 August, he was charged and stood trial alongside Mr Runga, who had allegedly taken part in the attack.[30] Mr Kuru was charged under s 66(2) of the Crimes Act 1961 as a secondary party to Mr Ratana's murder or manslaughter. He was ultimately convicted of manslaughter and sentenced to five years and two months' imprisonment.[31]

[26] The Crown case against Mr Kuru was that he had formed an intention with at least one of the others involved in the attack that they would prosecute and assist each other with an unlawful purpose. As set out in the question trail given to the jury, the Crown framed the unlawful purpose as follows: "members of Black Power Wanganui would go to 144 Puriri Street to damage Mr Ratana's property and to threaten him, accompanied by firearms".[32]

[27] To succeed at trial on either charge, along with an offence-specific mens rea, the Crown had to satisfy the jury beyond reasonable doubt that Mr Kuru knew about the plan to go to Pūriri Street with firearms, and there to threaten Mr Ratana and damage his property. It had also to prove that Mr Kuru participated in or helped prosecute the plan by communicating by some means, to at least one of the others, his approval of, or agreement to, the plan. The Crown case against Mr Kuru in respect of each of these elements was entirely circumstantial — there was no direct evidence that Mr Kuru knew about the attack or its details; and there was no direct evidence that he authorised or approved of the attack, or that he had communicated that approval to any

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30 Charges against other gang members had been resolved, as set out in the reasons of Glazebrook J: below at [74].

31 *R v Kuru* [2022] NZHC 309 (Ellis J).

32 As Glazebrook J notes, the nature of the common purpose alleged by the Crown evolved over the course of the proceedings before trial: below at [118]–[119].

of the group who undertook the attack. The Crown case against Mr Kuru was based on the following key pillars:

(a) the fact that Mr Kuru was the president of Whanganui Black Power at this time. The Crown relied on evidence from Detective Inspector Scott, who was called to give expert evidence in connection with gangs, that the president of a gang would be likely to have sanctioned a serious organised attack on another gang;

(b) the evidence of what occurred at Pūriri Street — characterised by the Crown as a planned and coordinated attack against a rival gang member, led by the sergeant-at-arms of the chapter of Black Power, Mr Runga;

(c) the "launch" of the Pūriri Street attack from near Mr Kuru's house in Matipo Street, and the men's return to that general area afterward; and

(d) Mr Kuru's presence in Tiki Street (which runs between Matipo Street and Pūriri Street) during the attack and then outside his house after it.

[28] The defence case was that this was not a coordinated plan, nor a plan for a serious crime, and there was no evidence that Mr Kuru knew of it in advance or approved of it. First, the evidence suggested it was organised at the last moment when it became apparent that Mr Ratana was at the Pūriri Street house, and as a consequence it had all the hallmarks of a poorly put together operation — launched at a busy time of the day, between 9 and 10 am on a weekday, when there were likely to be witnesses. Secondly, it was not a plan for a serious crime, but was just part of ongoing low-level intimidation — one of the men had not even concealed his face. Given these circumstances, presidential sanction was not likely to have been required nor obtained. Thirdly, as to Mr Kuru's presence in Tiki Street, the defence relied on Mr Kuru's explanation to the police that he was on his way to a meeting at his son's school when he heard gunshots. It was common ground that travelling along Tiki Street was not the most direct route to the school. Moreover, it was early for the meeting and the evidence suggested that Mr Kuru was already in Tiki Street when the gunshots were

heard. The defence nevertheless invited the jury to conclude that Mr Kuru was out and about because of that appointment, and was attracted along Tiki Street by the sound of screaming and shouting, and the attack on the car, before he heard the gunshots. Finally, the defence said that the evidence did not suggest, let alone prove, that the attack was launched from Mr Kuru's house. While there was evidence of the group's presence in Matipo Street prior to the attack, there were other houses associated with Black Power members in that street. The evidence was not that it was launched from Mr Kuru's house or even outside it.

This appeal

[29] Mr Kuru appeals his conviction for manslaughter on three grounds:

(a) the jury's verdict was unreasonable;

(b) the evidence of Detective Inspector Scott caused a miscarriage of justice; and

(c) the jury was misdirected regarding party liability under s 66(2).

[30] We agree with the reasons of Glazebrook J below that there was no misdirection of the jury for the purposes of s 66(2), and for the reasons she gives.[33] We also agree with her that the appeal should however be allowed on the other two grounds: first, that the admission of Detective Inspector Scott's evidence caused a miscarriage of justice in the sense that it "created a real risk that the outcome of the trial was affected";[34] and second, that on the admissible evidence no reasonable jury could have been satisfied of Mr Kuru's guilt beyond reasonable doubt.[35] We set out our reasons for allowing the appeal on these two grounds below. Because the ground in relation to Detective Inspector Scott entails determining whether parts of his evidence were admissible, it is logical to address that ground first.

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33 Below at [102]–[104].
34 Criminal Procedure Act 2011, s 232(4)(a). See below at [202].
35 See below at [312].

Did the admission of Detective Inspector Scott's evidence cause a miscarriage of justice?

The evidence of Detective Inspector Scott

[31] Detective Inspector Scott is a senior police officer with numerous years' experience investigating gang-related activity and has led various gang-focused police initiatives. His brief of evidence prepared in advance of trial painted a broad-brush picture of gangs and how they operate, including discussion of their use of patches, slogans, violence and, importantly for the purposes of this appeal, decision-making structures within the gang. The headings "Patching and the Patch", "Gang Structures", "The Prospect", "Violence", "Black Power", "Mongrel Mob", "Intergang Conflict" and "Intergenerational Gangs" give a sense of the broad scope of the brief.

[32] In the High Court, Ellis J ruled on a challenge to the admissibility of one part of Detective Inspector Scott's evidence prior to trial.[36] His expertise was not the focus of that challenge — his expertise was not challenged then or at trial. Rather the challenge focused on one aspect of his evidence as to the role the president plays within a gang. The brief of evidence included the following discussion of the role of president as well as other roles:

> 39. The President is the figurehead of the gang or chapter, and is the chairman at meetings.
>
> 40. In some gangs the President can also be known as the 'Prez or Captain'.
>
> 41. He is a senior member who has developed into the recognised leader usually through a combination of personal strength, leadership skills and personality. He has the final authority over all chapter business and its members.
>
> 42. An organised gang crime against another gang would only occur with the sanction of the president.
>
> 43. The president's authorisation would be required due to the obvious risks and consequences that the particular gang would be exposed to which would likely include intense scrutiny by the Police and serious retaliation by the opposing gang.
>
> 44. Another consideration would be the risk of a number of their members being sentenced to periods of imprisonment depending on the particular crime committed.

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36 *R v Fantham-Baker* [2021] NZHC 2632.

> 45. It is not unusual for gangs to promote a public image of being a family or whānau group who claim that their particular gangs are community minded and not criminal organisations.
>
> 46. This stance is generally portrayed by the president and often after there has been a serious crime committed which has received negative publicity.
>
> **OTHER OFFICE HOLDERS**
>
> 47. There is usually a Vice President who is the second in command, a Treasurer who manages the finances, a Secretary who holds the minutes of the gang meetings and a Sergeant of Arms [sic] who enforces the President's orders.

The objection taken by the defence pre-trial was to paragraphs [39]–[43], but focusing in particular on the statement in [42], on the grounds that it effectively and improperly strayed into the ultimate issue to be decided at trial — namely, whether Mr Kuru did sanction the relevant events.

[33] Ellis J ruled that while there was no difficulty with paragraphs [39]–[41], the evidence at [42] and [43] did go too far by expressing, in substance, that the attack on Mr Ratana was organised gang crime and occurred with Mr Kuru's sanction.[37] However, she said that the Detective Inspector could lay the foundation for a submission by counsel to that effect by speaking in general terms about his own experience and knowledge of the role of president within gangs.[38] She suggested reframing the particular expression of opinion more contingently and by reference to his experience, also suggesting that he use language such as "in my experience it is unlikely that …".[39]

Evidence of Detective Inspector Scott at trial

[34] At trial the Detective Inspector read through his brief of evidence, including the material set out above. However, instead of the material set out at [42]–[44] of his brief, he gave the following evidence:

> In my experience a (serious) organised gang crime against another gang would likely occur with the sanction of the president. This is due to the obvious risks and consequences that the particular gang would be exposed to which would

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37 At [16] and [18].
38 At [17].
39 At [18].

> likely include intense scrutiny by the Police and serious retaliation by the opposing gang. Another consideration would be the risk of a number of their members being sentenced to periods of imprisonment depending on the particular crime committed.

[35] The Detective Inspector was not cross-examined in relation to his evidence. The evidence was a critical part of the Crown case against the defendants, but most particularly against Mr Kuru. Counsel for the Crown opened their closing address to the jury by describing the evidence as the lens through which all the other evidence had to be viewed, and discussion of that evidence occupied a significant portion of the Crown's case against Mr Kuru.

[36] The defence did not call their own expert in relation to gang culture and behaviour. This notwithstanding that they had earlier obtained and filed in support of a pre-trial application a brief of evidence from Dr Jarrod Gilbert. Dr Gilbert's PhD thesis was a study of New Zealand gangs. It was based on extensive research involving long-term ethnographic observation of gangs and extensive interviews of those in and around the gang scene, including gang members, police and undercover agents. Dr Gilbert has continued to study and publish in this field.

[37] Dr Gilbert's brief was narrower in focus than Detective Inspector Scott's, addressing the role of president and how tightly bound by rules gangs in fact are.

[38] Dr Gilbert said that he broadly agreed with Detective Inspector Scott's statement that the gang president has "the final authority over all chapter business and its members", which he described as part of the "traditional view" of gangs. However, this was subject to qualifications. He noted that gangs and gang chapters tend to have different internal cultures and ways of operating, and that different leaders will have different leadership styles. Similarly, events may occur quickly and with little or no planning and therefore without the knowledge of the president. He continued:

> 4.7 This is further complicated by the fact that while gangs have rules that guide behaviour, not all of these rules are evenly applied and often times they may be in conflict with one another.
>
> 4.8 Within a realm where 'might makes right', those with sufficient strength or mana can act in ways that may not always be ordinarily seen as within the rules.

> 4.9 In the multitude of instances that may stem from these types of examples, then, it is clear there will be numerous times when our traditional understandings may be confounding rather than illuminating.
>
> 4.10 Often during my fieldwork I would speak to gang presidents who were angry, stressed or disappointed by the activities of one of their boys. The gangs certainly have a level of discipline and structure but ultimately they are made up of rebellious and difficult-to-control men.

Relevant principles

[39] In order to be admissible, expert evidence must meet the requirements for admissibility laid out in the following sections of the Evidence Act 2006:

(a) s 7 (evidence that is not relevant is not admissible);

(b) s 8 (evidence will be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding); and

(c) s 25 (expert opinion evidence is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence or in ascertaining any fact of consequence to the determination of the proceeding).

[40] The relevant principles can be shortly stated. Sections 7 and 8 are provisions that apply to all evidence. Section 7 is concerned with relevance — does the evidence relate to an issue in the proceeding? As this Court said in *R v Bain*, s 8 is concerned with whether the connection between the evidence and proof is "worth the price to be paid by admitting it in evidence".[40]

[41] Section 25 governs the admissibility of *expert* opinion evidence. This provision operates in the following context. Courts normally only receive evidence of facts — witnesses are generally not permitted to go into the witness box and offer their opinion. Section 23 provides that a statement of an opinion is not admissible in a

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[40] *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [39] and [62] per Elias CJ and Blanchard J (with whom Wilson J generally agreed) citing Australian Law Reform Commission *Evidence (Interim)* (ALRC 26, 1985) vol 1 at [315].

proceeding, except as provided in ss 24 or 25. Section 24 allows a very limited exception for a witness to give a non-expert opinion where it is necessary to enable that witness to communicate, or the fact-finder to understand, what the witness saw, heard or otherwise perceived. Section 25, the provision with which we are concerned, allows opinion evidence given by an expert to be admitted if it meets the substantial helpfulness threshold mentioned above — a test for admissibility that applies in addition to the ss 7 and 8 thresholds.

[42] The distinction drawn between factual and opinion evidence for the purposes of admissibility pre-dates the Evidence Act. It reflected a concern to prevent both the function of the fact-finder from being usurped and court time being wasted by low-quality or superfluous evidence.[41] Although expert opinion evidence was an exception to the rule against the admissibility of opinion evidence, these underlying concerns still found expression in rules governing its admissibility. First, the expert had to be properly qualified to give evidence on the issue.[42] Secondly, the expert was not permitted to give evidence on the ultimate issue for the jury.[43] There was and is, as Glazebrook J observes, a risk that juries may place too much weight on expert evidence, thus exacerbating the risk of usurping the role of the fact-finder.[44] Thirdly, experts were not permitted to give evidence on matters that are common knowledge.[45]

[43] Following the enactment of the Evidence Act, that Act and in particular s 25 (along with ss 7 and 8) now govern the admissibility of expert opinion evidence. However, the concerns that shaped the approach to the admissibility of expert opinion evidence prior to its enactment remain relevant to the issue of admissibility. The evidence must meet the s 25 substantial helpfulness threshold so that low-quality or low-value evidence is not admitted. While s 25(2)(b) provides that expert opinion evidence is not inadmissible simply because it is about a matter of common

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41 For a discussion of the pre-Evidence Act 2006 law, see Law Commission *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at [2] and following.

42 At [4].

43 See, for example, *Joseph Crosfield and Sons Ltd v Techno-Chemical Laboratories Ltd* (1913) 29 TLR 378 (Ch) at 379 as cited in Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at 152, n 1001.

44 Below at [138] and [151]. See also, more generally, Glazebrook J's discussion of usurpation of the jury's role: below at [163]–[173].

45 See *Regina v Turner* [1975] QB 834 (CA) at 841, offering what *Mahoney on Evidence* describes as "the classic exposition" of the rationale for the rule: McDonald and Optican, above n 43, at 154.

knowledge, it remains the case that such evidence will not generally be admitted, as it is unlikely the fact-finder would obtain substantial help from such evidence.[46] Likewise, while s 25(2)(a) provides that expert opinion evidence is not inadmissible simply because it is about an ultimate issue to be determined by the fact-finder, the rule remains relevant to issues of admissibility. In *Pora v R* the Privy Council said that while the ultimate issue rule may have been modified by the Evidence Act, it had not been abolished and still had a part to play in the decision as to whether a particular species of expert evidence was admissible.[47] It continued:[48]

> It appears to the Board that, in general, an expert should only be called on to express an opinion on the "ultimate issue" where that is necessary in order that his evidence provide substantial help to the trier of fact.

[44] Whether the evidence will be substantially helpful therefore requires consideration of the relevance, reliability and probative value of the evidence.[49] As observed in *Cross on Evidence*:[50]

> In practice, relevance, reliability and probative value often overlap. This serves to reinforce the holistic nature of the inquiry required of a court when considering the admissibility of expert evidence in terms of substantial helpfulness.

[45] It is, as the Crown submits, the case that there is no bar to police giving expert evidence where the expertise is gained through practical experience. Such evidence may be useful as to the meaning of particular words or the significance of wearing clothing of a particular colour, where that is at issue in the proceeding. However, a police officer who gives such evidence must be properly qualified as an expert.[51] They must fully comply with the duties that apply to all expert witnesses — duties that were

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46 See *D (CA95/2014) v R* [2015] NZCA 171 at [28]. See also Donald L Mathieson (ed) *Cross on Evidence* (looseleaf ed, LexisNexis) at [EVA25.10(b)] where the authors observe that the common knowledge rule "continues to operate within the context of substantial helpfulness".

47 *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [26].

48 At [27].

49 *Mahomed v R* [2010] NZCA 419 at [35] as approved by the Privy Council in *Pora*, above n 47, at [41].

50 Mathieson, above n 46, at [EVA25.4].

51 We agree with the discussion of Glazebrook J on this issue: below at [139]–[141].

conveniently summarised in the case of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (*The Ikarian Reefer*) as follows:[52]

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. …
>
> 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
>
> …

[46] These are rules that were developed to manage the risks associated with the admission of expert opinion evidence, referred to earlier. *The Ikarian Reefer* was a commercial case, and the principles enunciated there can be seen to form the basis of the code of conduct for expert witnesses contained in sch 4 to the High Court Rules 2016. Nevertheless, they apply, with necessary modifications, in criminal cases.[53] Indeed Te Aka Matua o te Ture | the Law Commission has recommended that the Rules Committee | Te Komiti mō ngā Tikanga Kooti, the statutory body responsible for rules of court,[54] adopt such a code for use in criminal proceedings.[55]

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52 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* [1993] 2 Lloyd's Rep 68 (QB) [*The Ikarian Reefer*] at 81–82 (citations omitted).

53 Compare the principles set out in *R v Carter* (2005) 22 CRNZ 476 (CA) at [47].

54 The Rules Committee | Te Komiti mō ngā Tikanga Kooti is responsible for the rules of court of the District Court and the senior courts.

55 Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [11.12], [11.16] and [11.32].

[47] The application of the principles to the conduct of expert evidence given by police officers was discussed by the Privy Council in *Myers v The Queen* in the following terms:[56]

> [60] Compliance with these exacting standards can be difficult for a police officer who is effectively combining the duties of active investigator (if not of the current case) with those of independent expert. It is particularly important that such a witness should fully understand that once he is tendered as an expert he is not simply a part of the prosecution team, but has a separate duty to the court to give independent evidence, whichever side it may favour. In particular a police expert needs to be especially conscious of the duty to state fully any material which weighs *against* any proposition which he is advancing, as well as all the evidence on which he has based that proposition. When considering an application by the Crown to adduce the evidence of a police expert, it is incumbent on the judge to satisfy himself that these duties are recognised, and discharged.

[48] We note in particular the Privy Council's observation that compliance with these exacting standards can be difficult for a police officer combining ongoing service to the police with duties to the court. We emphasise, flowing out of this, the care that is needed by police officers providing such evidence to prepare and give their evidence impartially, attaching full weight to the duty to provide their opinion in a candid and balanced way.

Application to this case

[49] We accept, of course, that senior gang members have been known to organise offending by less senior members or prospects, while maintaining enough distance for plausible deniability.[57] This method of operation may not be a matter of common knowledge and, in appropriate cases, juries are likely to find expert evidence as to the operation of gang hierarchy relevant to this issue substantially helpful.

[50] We also accept that Detective Inspector Scott was properly qualified to give evidence regarding basic structures operating within gangs and the fact that gangs operate with their own rules — evidence on the "traditional view". He had extensive involvement in the policing of gangs over a lengthy period of time. We also accept that this experience was sufficient for him to give evidence about the basic leadership

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56 *Myers v The Queen* [2015] UKPC 40, [2016] AC 314 (emphasis in original).
57 See, for example, *Poutai v R* [2010] NZCA 182.

hierarchy within gangs and that this evidence would have been substantially helpful, as information not within the general knowledge of a jury. It was plainly relevant to an issue in the case, namely, whether Mr Kuru had joined the common purpose and knew of its essential details — the fact he was president was of course relevant to that.

[51] There were, as Mr Stevenson submitted, limitations to this experience. The information on which the Detective Inspector drew was gathered in the context of law enforcement and inevitably shaped by that. It was not the result of broad study, such as that undertaken by Dr Gilbert. However, these are matters that could have been cross-examined on and drawn out for the jury.

[52] Nevertheless, we accept the appellant's argument that, when measured against the framework of principles we have set out above, there were significant issues with the Detective Inspector's evidence that such a crime would likely have occurred with the sanction of the president.[58]

[53] We start from the position that this was the critical evidence in the case against Mr Kuru. It directly addressed the ultimate issue for the jury — did Mr Kuru know of and had he sanctioned the attack? The Crown after all had no direct evidence on these issues — it was a circumstantial case, and Detective Inspector Scott's evidence was by far the strongest thread. The risk that the evidence would usurp the role of the jury was therefore present and had to be weighed.

[54] A related point is that the evidence, because of the unqualified form in which it was given, carried a high risk of unfair prejudice in that it invited impermissible reasoning. We would describe the reasoning it invited in the same way as Cull J did in the Court of Appeal:[59]

> … Presidents of gangs know about and sanction rival gang attacks; this was a rival gang attack by Black Power on the Mongrel Mob; Mr Kuru is a gang President; and therefore, he must have known [about] and sanctioned this rival gang attack.

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58 See above at [34].

59 *Kuru v R* [2023] NZCA 150 (Collins, Muir and Cull JJ) [CA judgment] at [106] per Cull J dissenting.

The difficulty with this reasoning, as we come to next, is that it is based only on the evidence of the Detective Inspector, who did not, but should have, qualified the evidence which invited this reasoning. Of course, the jury could be directed in relation to the risk of such reasoning. But it is difficult to see such a direction being effective when, absent such qualification by the Detective Inspector, that unfair prejudice is coterminous with the probative force of this aspect of the evidence.

[55] There were also issues with the probative value of the evidence. First, the Detective Inspector did not acknowledge an important limitation on his expertise. He did not claim to have studied the Whanganui Black Power chapter, nor to have acquired knowledge through the investigation of that chapter over a period of time. Yet he did not record that fact in his evidence.

[56] Secondly, as noted above, the Detective Inspector failed to acknowledge important qualifications upon what was very generally expressed evidence. Or, to put it another way, his evidence was expressed in broad propositions (favourable to the Crown case) and lacked the balance that an expert witness should bring to their evidence. The Detective Inspector's evidence was, as Dr Gilbert said, about the "traditional view" of how gangs operate in terms of hierarchy and rule enforcement, leading to the critical conclusion regarding the president's role in sanctioning an attack on another gang. The Detective Inspector failed to acknowledge the possibility that there would be variations in a president's role between gangs, between regions, between presidents and between different factual scenarios. Nor did he acknowledge critical points made by Dr Gilbert that, although there may be rules, rules can be broken or variably applied and that, at times, events happen spontaneously. We expect that this was information available to the Detective Inspector from his own experience, and, if not, by the time of trial he had access to Dr Gilbert's brief. It is, in any case, a matter of common sense that there would be such variation. Balanced evidence would have included such a qualification.

[57] Finally, the Detective Inspector's evidence proceeds on the assumption that the events giving rise to the criminal charge amounted to "(serious) organised gang crime against another gang". The Detective Inspector's evidence could be read as expressing an opinion that the offending in question was in fact a "(serious) organised gang crime

against another gang" — and therefore as expressing an opinion on the evidence in a way which tended to support the Crown case, but with no proper basis for such an opinion.

[58] Against this background we do not see the Detective Inspector's evidence regarding the president's role in sanctioning such an attack as sufficiently reliable or probative to justify admission. To put the matter in s 8 terms, its admission did not justify the price paid for it. The evidence carried with it the risk of unfair prejudice in that it invited impermissible reasoning, and on the most critical issue the jury had to decide. The evidence had limited probative value given both the fact of, and the absence of acknowledgment of, limitations upon the Detective Inspector's own expertise and upon the very general propositions he expounded. For the same reasons, the evidence was not substantially helpful evidence for the purposes of s 25.

[59] We make some additional observations in relation to the Detective Inspector's evidence. First, the evidence includes material of an argumentative nature which seems to us to have little relevance or probative value and to create unfair prejudice. We do not propose to go through the evidence line-by-line but merely to give as an example the material set out above in the Detective Inspector's evidence, which we repeat here for ease of reference:

> 45. It is not unusual for gangs to promote a public image of being a family or whānau group who claim that their particular gangs are community minded and not criminal organisations.
>
> 46. This stance is generally portrayed by the president and often after there has been a serious crime committed which has received negative publicity.

[60] Secondly, the evidence was discursive in nature. Mr Stevenson filed multiple copies of briefs of the evidence given by the Detective Inspector in other proceedings, while drawing our attention to the fact that much of the material was repeated without amendment across the briefs. He also emphasised that the brief included extensive narrative-type evidence about the history of gangs, their culture, their use of violence and their criminal behaviour — material carrying obvious prejudicial effect. It is important to state that, in accordance with the principles of evidence set out above, expert evidence in relation to gangs should be confined to evidence relevant to a matter

at issue in the proceeding. Broad-ranging discussions of gangs, their culture (the wearing of gang patches, the chanting of slogans and routine use of violence) and their history should not be admitted simply by way of background when that material is not relevant to a trial issue, particularly given the risk of unfair prejudice such evidence carries with it.

[61] This takes us to our third observation — and connects to the point made by Mr Stevenson — that the Detective Inspector failed to make explicit, as he was required to do, the material on which he based his opinion (Mr Stevenson citing the passage in *Myers* set out above).[60] Mr Stevenson noted that some of the evidence in this case strayed into the category the Privy Council cautioned against when it said that "care must be taken that simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise".[61] When there is no indication as to the evidential basis for the evidence, counsel is at an unfair disadvantage, Mr Stevenson submits, if they cannot identify, let alone test, the evidential basis for the opinion. He adds that, since much of this evidence will be a narration of what the officer has been told by others (and therefore hearsay), particular concerns about reliability arise, meaning there is need for care in identifying the source of information used as a basis for the expert's opinion.

[62] We think it can certainly be inferred from the evidence regarding gang hierarchy that the Detective Inspector was drawing on his work experience over many years as the basis for that evidence. Having said that, we accept that the more generalised and discursive the evidence offered, the more significant the absence of a clear evidential basis for that evidence becomes. This is because of the higher likelihood that it will create unfair prejudice. We take that point no further.

[63] As to Mr Stevenson's arguments in relation to propensity evidence, the evidence does not meet the statutory definition of "propensity evidence" because it is not based on Mr Kuru's prior conduct.[62] We note however that the evidence does engage similar considerations to those underlying the special rules governing the

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60 See above at [47].
61 *Myers*, above n 56, at [58].
62 See the reasons of Glazebrook J below at [180]. See also Evidence Act, s 40(1)(a).

admissibility of propensity evidence about defendants; that is, that irrelevant and/or unfairly prejudicial evidence not be admitted. But these considerations are already reflected in our finding that the evidence was not admissible.

[64] Finally, because it may assist in future cases, it is appropriate to state that we consider that the evidence on gang hierarchy would have been admissible in the case against Mr Kuru under s 25 if limited and qualified in the following ways:

(a) The Detective Inspector should have noted any limitations on his expertise — including that he had not studied or investigated the particular chapter of the gang and so could not comment on the operation of hierarchy within Mr Kuru's chapter of the Black Power gang.

(b) He should have noted the limitations and qualifications that exist in relation to the applicability of the "traditional view" of gang hierarchy to any situation.

(c) He should have identified with more particularity the material upon which he drew in reaching his opinion. By this we mean that the officer should have identified whether he was drawing on courses attended or published papers (identifying the courses or papers), and/or experience gained on the job.

(d) While he could have included a description of the decision-making hierarchy in gangs, and in particular that the president has final authority over all chapter business and its members and that the sergeant-at-arms enforces the president's orders, he should not have extended his evidence, as he did, to include an assessment of whether the president was likely to have sanctioned the particular type of conduct that the Crown alleged.

(e) He should not have given evidence that suggested the offending was serious *organised* gang crime when the level of organisation involved was the key trial issue.

(f) His evidence should have been confined in scope, avoiding a general narrative on gangs and argumentative material.

[65] To conclude on this point, we have found that the evidence of Detective Inspector Scott that offending of the nature alleged by the Crown was likely to have been sanctioned by the president was not admissible. We note that no objection was taken to the admission of this evidence at trial. However, issues of admissibility of evidence involve a question of law. Whether its admission was objected to or not, its admission amounted to an error of law.

[66] That being our conclusion, it is necessary to address whether this has given rise to a miscarriage of justice, noting that the trial Judge took some care to direct in relation to the proper use of this evidence. The Judge gave the standard direction in relation to expert evidence and drew the jury's attention to the fact that the evidence assumed the attack was premeditated and organised, which was disputed by the defence. The direction did not, however, identify and address the risk of impermissible reasoning set out above.[63] And in any event the evidence was so central to the Crown case that we doubt any direction could have adequately addressed the risk that the erroneous admission of this evidence affected the outcome of the trial.[64]

Was the jury's verdict unreasonable?

[67] We agree with Glazebrook J's conclusion, and the analysis she sets out in support of that conclusion, that no reasonable jury could have been satisfied of Mr Kuru's guilt beyond reasonable doubt.[65] In particular we agree that the analysis should include the admissible portions of Detective Inspector Scott's evidence, which are as she sets out.[66] We would add that the evidence should have included a

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63 Above at [54].
64 Criminal Procedure Act, s 232(4)(a).
65 Below at [312].
66 Below at [282].

description of the limitations and qualifications that exist in relation to the applicability of the "traditional view" of gang hierarchy to any situation. And, of course, the analysis would exclude those portions that have been found to be inadmissible.

[68] In our view, Cull J accurately summarised the deficiency in the evidence against Mr Kuru in the two passages of the Court of Appeal judgment set out by Glazebrook J below at [262]–[263].[67] The jury could not reasonably have treated Detective Inspector Scott's expert evidence (expressed in admissible form) as making up for these very significant deficiencies in the evidence. That being the case, the appropriate orders for this Court to make are orders setting aside the conviction for manslaughter and directing that a judgment of acquittal be entered.

Result

[69] The appeal is allowed.

[70] The appellant's conviction for manslaughter is set aside.

[71] An order is made under ss 233(3)(a) and 241(2) of the Criminal Procedure Act 2011 that a judgment of acquittal be entered.

GLAZEBROOK J

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[67] See CA judgment, above n 59, at [94] and [95].

Introduction

[72] On 25 November 2021, the appellant, Mr Damien Kuru, was convicted of manslaughter after a jury trial before Ellis J. His appeal against that conviction was dismissed by the Court of Appeal on 5 May 2023.[68]

[73] The victim was Mr Ratana, a senior patched member of the Mongrel Mob. Mr Ratana had been staying with his partner, Ms Herewini, who was living at 144 Pūriri Street, Castlecliff, Whanganui. Castlecliff is considered Black Power territory. Tensions had been building over his presence in the area, culminating in a group of Black Power members going to Ms Herewini's house on 21 August 2018 with the aim of intimidating Mr Ratana into leaving Castlecliff. The group was armed with various weapons, and, in the course of the confrontation, Mr Ratana was shot and killed.

[74] Seven Black Power members were charged with murdering Mr Ratana. Before trial Mr Rogerson pleaded guilty as a party to murder. Three other defendants (Messrs Box, Fantham-Baker and Anthony Kuru)[69] pleaded guilty to manslaughter. Mr Newton had the charge against him dismissed pursuant to s 147 of the Criminal Procedure Act 2011.

[75] The trial proceeded against Mr Kuru, the president of the Black Power chapter, and Mr Runga, the sergeant-at-arms.[70] Mr Friesen, at the relevant time a patched member of Black Power, was granted immunity from prosecution and gave evidence for the Crown at their trial. Mr Kuru and Mr Runga were acquitted of murder but convicted of being parties to manslaughter.

[76] Mr Kuru's application for leave to appeal was granted by this Court on 10 August 2023.[71] His appeal is advanced on three grounds:[72]

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68 *Kuru v R* [2023] NZCA 150 (Collins, Muir and Cull JJ) [CA judgment] at [81] per Collins and Muir JJ (Cull J dissenting).

69 I understand that Mr Anthony Kuru is not related to the appellant, Mr Damien Kuru.

70 The trial Judge was satisfied (although this was contested at trial) that Mr Runga had been acting as the chapter's sergeant-at-arms at the time of the shooting: *R v Kuru* [2022] NZHC 309 (Ellis J) [HC sentencing notes] at [20].

71 *Kuru v R* [2023] NZSC 102 (Glazebrook, O'Regan and Kós JJ).

72 At [1].

(a) that the jury's verdict was unreasonable;

(b) that the evidence of Detective Inspector Scott caused a miscarriage of justice; and

(c) that the jury was misdirected regarding party liability.

[77] I deal with these issues in reverse order after setting out the events leading up to the shooting in more detail.[73]

[78] In summary, I conclude that the Judge did not misdirect the jury on party liability. I also conclude that part of the evidence of Detective Inspector Scott was not admissible. The inadmissible evidence created a real risk that the outcome of Mr Kuru's trial was affected.[74] Further, I consider that, having regard to the admissible evidence, the verdict of the jury was unreasonable.[75]

[79] This means that the appeal must be allowed, the conviction set aside and a judgment of acquittal entered.[76]

Background

[80] As indicated above, tension had been building with regard to the presence of Mr Ratana in Castlecliff. Black Power members had carried out "drive-bys" of Ms Herewini's home while shouting Black Power slogans. On 14 August 2018 Black Power members had thrown a crowbar at Mr Ratana's car. Mr Ratana responded by producing a firearm, causing the Black Power members to back down.

[81] The Crown case was that, on the morning of 21 August 2018 at about 8.50 am, Mr Runga went to visit Mr Friesen, who was staying with family in Matipo Street.[77]

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73 I discuss the evidence relating to Mr Kuru's alleged role when assessing whether the verdict of the jury was unreasonable.

74 Criminal Procedure Act 2011, ss 240(2), 232(2)(c) and 232(4)(a).

75 Sections 240(2) and 232(2)(a).

76 Sections 241(2), 233(2) and 233(3)(a).

77 This was based largely on the evidence of Mr Friesen. This evidence was generally challenged by Mr Runga but would most likely have to have been accepted by the jury in major part in order for Mr Runga to be convicted.

Matipo Street is a cul-de-sac, and the house where Mr Friesen was staying was near the street's dead end. Towards the middle of Matipo Street is an intersection with Tiki Street. Tiki Street leads to Pūriri Street, where Mr Ratana was staying with Ms Herewini. Mr Kuru's house was at 60 Matipo Street and was regarded as the Black Power chapter's headquarters.[78] According to the Crown's submissions, it is approximately 242 metres from 144 Pūriri Street.

[82] Another relevant location is Te Kura o Kokohuia, a nearby school. Mr Kuru had an appointment at the school at 10 am on the morning of the shooting. The school is located on Matipo Street, some 170 metres from 60 Matipo Street on the other side of the intersection with Tiki Street. The most direct route from 60 Matipo Street to Te Kura o Kokohuia would be directly along Matipo Street.

[83] A further important piece of context was that, on the morning of Mr Ratana's shooting, an eviction was taking place at 33 Matipo Street, on the other side of the Matipo/Tiki Street intersection from Mr Kuru's house. One member of the eviction group, a locksmith, Mr McKenzie, observed Black Power members walking from Matipo Street into Tiki Street prior to the shooting. Another member of the eviction party, the Court bailiff, Mr O'Neill, took a number of photographs of Black Power members walking from Tiki Street into Matipo Street following the shooting.

[84] A diagrammatic representation of the relevant locations is in the appendix to this judgment; it is not to scale and only designed to give a general orientation of the area.

[85] Mr Friesen's evidence at trial was that when Mr Runga came to visit him on the morning of the shooting, he said "that asshole [is] up the road" and asked "[s]hall we go and suss [him] out … ?" Mr Friesen said that Mr Runga showed him a sawn-off double-barrelled shotgun that was on the floor of the Nissan Primera he was driving. Mr Friesen wanted to drop his children at a family member's home and was told by Mr Runga to meet him and the other Black Power members later.

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78 HC sentencing notes, above n 70, at [9].

[86] Mr Runga and Mr Fantham-Baker, whose house was also in Matipo Street, then drove to Mr Runga's house in Rimu Street, Castlecliff. Present at Mr Runga's house were Mr Newton and Mr Box.[79] Mr Rogerson and Mr Anthony Kuru arrived at Mr Runga's address soon after.

[87] At about 9.20 am the Black Power group left Mr Runga's home in a Nissan Primera and a Holden Commodore. Those in the Nissan Primera initially drove to 144 Pūriri Street where the vehicle stopped. One member of the gang got out of the car and started directing abuse towards the occupants of Ms Herewini's house. The attempt to intimidate Mr Ratana was disrupted, however, when a bus stopped close to 144 Pūriri Street. This was between roughly 9.33 am and 9.34 am according to GPS data from the bus.[80]

[88] The two cars then briefly stopped at the intersection of Tiki and Matipo Street. A group of Black Power members, including Messrs Box, Fantham-Baker and Anthony Kuru, walked to 144 Pūriri Street. They were armed with poles, batons and a hammer and were yelling Black Power slogans as they neared the house. As the men approached, Ms Herewini was yelling at them to "[f …] off". Mr Rogerson drove the Holden Commodore to park in Pūriri Street near Ms Herewini's home. Mr Friesen also drove to the scene in a Hyundai Coupé.

[89] Mr Runga's role in the shooting was disputed at trial. It was alleged by the Crown that Mr Runga drove the Nissan Primera and also parked close to Ms Herewini's home. But it is unclear on the evidence, and unclear if the jury accepted, that Mr Runga drove the Nissan Primera to the scene and subsequently drove it back to Matipo Street to wait for the foot party to return. The trial Judge said in sentencing that the evidence at trial "gave rise to a real doubt about whether the Nissan Primera was at the scene at all".[81] An alternative possibility is that the jury was of the view that the Nissan Primera was left on Matipo Street and that Mr Runga

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79 The charges against Mr Newton were dismissed prior to trial under s 147 of the Criminal Procedure Act: *R v Newton* [2021] NZHC 2622 at [61]. This was primarily on the basis that there was insufficient evidence that he was present at 144 Pūriri Street at the time of the shooting: at [41] and [59]. Whether or not he was present at Mr Runga's house when the group assembled there was not discussed in the judgment.

80 A timeline of key events was produced as an exhibit at trial by the Crown.

81 HC sentencing notes, above n 70, at [21].

was part of the foot party,[82] although he did not appear in the photographs taken showing the foot party returning.[83]

[90] The Crown case was that Mr Runga still had possession of the sawn-off, double-barrelled shotgun he had earlier shown to Mr Friesen and took it with him to Pūriri Street, while Mr Rogerson took a full-length shotgun. The Crown alleged that Mr Rogerson's shotgun was loaded with conventional shotgun pellets and Mr Runga's gun was loaded with the slug that killed Mr Ratana. But the jury cannot have accepted that version of events, given that Mr Runga was acquitted of murder.

[91] These disputes about Mr Runga's involvement aside, the Crown case was that, when the Black Power members who walked to 144 Pūriri Street arrived, Mr Anthony Kuru yelled out to Mr Ratana: "You've got a week to get out of the Cliff or you're dead." The men on foot moved up the driveway and began to strike Mr Ratana's car with their weapons, still yelling.

[92] At about 9.35 am Mr Ratana came out of Ms Herewini's home. He was carrying a sawn-off loaded shotgun and wearing Mongrel Mob regalia. Most of the Black Power members took cover. One member of the Black Power group fired a shotgun that was loaded with a single lead slug. The slug hit Mr Ratana in the neck and instantly killed him. The weapon that fired the slug has never been recovered.[84] Mr Rogerson then fired two shots from his shotgun at the house, spraying it with pellets. Those shots were intended to provide cover to the members of the Black Power group who were on foot and needed to get away from the scene.

[93] Loud yelling and banging occurred at different points throughout the altercation. A witness on Kōwhai Street, about 50 to 100 metres from 144 Pūriri Street, heard multiple male voices yelling angrily and the sound of metal banging on wood

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82 The jury had been told that they had to be satisfied that Mr Runga was at 144 Pūriri Street in order to convict him: at [22].

83 See above at [83]. Although the trial Judge noted in her summing up that: "it is agreed [Mr Runga] is not one of the four men on foot and there is no sighting of him leaving by any other way".

84 As stated above, the Crown contended that Mr Runga fired the fatal slug: see above at [90].

before he heard the shots. A witness on Maire Street, about 700 metres away, heard yelling after the shots.[85]

[94] According to the notice of admissions of fact agreed by the parties, Mr Ratana died from the gunshot at approximately 9.35 am. A visitor to a neighbouring house on Pūriri Street stated at trial that she made an emergency call at around 9.38 am.[86] According to call records, and his testimony at trial, another witness who was driving up Pūriri Street made an emergency call at 9.39 am. Also according to call records, Ms Herewini made three emergency calls between around 9.40 and 9.42 am.[87] Ms Gibson, the solicitor who was part of the Matipo Street eviction party, said at trial that she made an emergency call at 9.41 am.

[95] After the shooting, the members of the Black Power group dispersed. Mr Friesen drove away in the Hyundai Coupé and Mr Rogerson drove away from the scene in the Holden Commodore. At around 9.37 am the Holden Commodore and the Hyundai Coupé were captured by CCTV travelling east on Pūriri Street, away from 144 Pūriri Street.[88] The Hyundai Coupé turned off Pūriri Street and travelled in a roughly southerly direction, away from Matipo Street. At around 9.50 am, the Holden Commodore parked in a carpark outside shops north of Pūriri Street and, at around 10.05 am, the Holden Commodore was captured travelling north, out of Whanganui.

[96] Messrs Box, Fantham-Baker and Anthony Kuru walked back to Matipo Street. They got into the Nissan Primera and left the area. Mr Runga had either driven the Nissan Primera back to Matipo Street and was waiting for the foot party (the Crown's theory), or he had walked back with the foot party to the Nissan Primera, which had been parked earlier on the other side of the street from 60 Matipo Street.[89] Around 9.39 am, according to the time recorded by his iPhone, the bailiff, Mr O'Neill, took photographs of the Black Power members walking from Tiki Street into

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85 This was a land surveyor who described hearing "yelling and screaming" following the shots. The surveyor was working on Maire Street (roughly east of 144 Pūriri Street and 60 Matipo Street).

86 No record of this call appeared in the call records produced at trial.

87 The first call does not appear to have connected and the second only lasted eight seconds.

88 That is, away from the Tiki Street intersection.

89 See above at [89].

Matipo Street.[90] The photographs also captured the Nissan Primera parked (at around 9.39 am) and in motion, moving towards the position of the photographer (at around 9.40 am).

Directions on party liability

The legislation

[97] Section 66(2) of the Crimes Act 1961 provides as follows:

> Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

The jury directions

[98] The common purpose alleged in this case (as defined in the question trail given to the jury) was to go to the house where Mr Ratana was staying to damage his property and to threaten him, accompanied by firearms. Mr Runga was said to have participated in prosecuting that unlawful purpose by being one of those who went to the address of the victim. Mr Kuru was said to have participated by "ordering, sanctioning, or authorising that plan". "Prosecute" was defined as "to continue with a course of action [here, going to 144 Pūriri Street to damage Mr Ratana's property and threaten him, accompanied by firearms] with a view to its completion".

[99] Assuming that the jury was satisfied about the existence of the common purpose, that the two men were part of the common purpose and that Mr Ratana's shooting occurred in the course of the prosecution of that common purpose, the question trail for both men then asked whether the jury was sure that the two men appreciated or foresaw that the victim would be murdered (meaning shot with murderous intent) as a probable consequence of the prosecution of the common purpose.[91] If that question (foresight of murder) was answered in the negative, the question trail then asked whether the jury was sure that Mr Kuru and/or Mr Runga

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90 See above at [83] and below at [232].

91 The trial Judge also directed the jury on the possibility of self-defence, but the jury must have rejected this: HC sentencing notes, above n 70, at [24]–[25].

foresaw as a probable consequence of the prosecution of the common purpose that there would be an unlawful shooting, in which case the relevant defendant would be guilty of manslaughter. "Probable consequence" was defined in the question trail as "something that might well happen".

Mr Kuru's submissions

[100] Mr Kuru submits that the Judge's directions were in error in two respects. It is submitted that, for a party to be liable for manslaughter under s 66(2), they must have foreseen death as a probable consequence of the common purpose. Secondly, it is submitted that the term "probable consequence" ought to follow its ordinary meaning. In his submission that requires, at least, that the consequence is foreseen to be more likely than not.

The Crown's submissions

[101] The Crown submits that the Court of Appeal was correct to hold that all that had to be foreseen was an unlawful act causing more than trivial harm.[92] The Crown submits that the directions overstated the mens rea for a party to manslaughter under s 66(2), but in a manner favouring Mr Kuru. The Crown also notes that there have been decades of judicial decisions favouring the "could well happen" meaning, without legislative intervention.

My assessment

[102] Since the hearing of the appeal, this Court has released its decision in *Burke v R*.[93] In *Burke* this Court held that foresight of death is not necessary for a conviction for manslaughter under s 66(2),[94] but that, in the circumstances of that case, a weapons direction was required.[95] In addition, the jury "had to be satisfied that

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92 CA judgment, above n 68, at [78] per Collins and Muir JJ. This was based on the majority's reasons in the Court of Appeal in *Burke v R* [2022] NZCA 279, (2022) 30 CRNZ 387 at [66(a)] per Brown and Moore JJ.

93 *Burke v R* [2024] NZSC 37, [2024] 1 NZLR 1.

94 At [172] per O'Regan, Williams and Kós JJ. Winkelmann CJ and Glazebrook J dissented on this point: at [244] per Winkelmann CJ and [316] per Glazebrook J.

95 At [142] per O'Regan, Williams and Kós JJ, [240] per Winkelmann CJ and [252] per Glazebrook J.

Mr Burke knew an assault *of the type that actually occurred* was a probable consequence of the prosecution of the common purpose".[96]

[103] This case is similar to *Burke*[97] and also required a weapons direction. There was no misdirection in this regard because the common purpose was defined as including the carrying of firearms (essentially the equivalent of a weapons direction). Again as in *Burke*, it was necessary for Mr Kuru to foresee the *type* of assault which actually occurred: an unlawful shooting.[98] The trial Judge's direction accorded with this.[99]

[104] In *Burke* this Court also rejected the submission that "could well happen" was not a suitable explanation of "probable consequence".[100] This means that the Judge's direction in this regard was also correct.

Detective Inspector Scott's evidence

[105] I now turn to the next substantive ground of appeal: the issue of the admissibility of the evidence given by Detective Inspector Scott, a police witness called by the Crown to give expert evidence on the behaviour of gangs.

[106] First, I outline the admissibility challenge to his evidence pre-trial. I then summarise the evidence given at trial (in relevant part) as well as the directions given by the Judge and discuss the evolving nature of the common plan alleged by the Crown. I then summarise the Court of Appeal decision and the submissions of the parties. After this, I discuss the criteria for admissibility of police expert evidence on gangs. Then, I discuss some overseas cases of particular relevance to the issues in this case. Finally, I assess whether Detective Inspector Scott's evidence was admissible and the consequences if it was not.

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96 At [142] per O'Regan, Williams and Kós JJ (emphasis added).

97 I note, however, that, unlike in *Burke*, it was not part of the plan to cause injury to the victim.

98 On the facts, the only relevant weapons were firearms.

99 Contrary to the submission of the Crown, the Court of Appeal in this case was not correct to hold that all that had to be foreseen was an unlawful act causing more than trivial harm: see above at [101].

100 *Burke v R*, above n 93, at [88]–[89] per O'Regan, Williams and Kós JJ and [251] per Glazebrook J. Winkelmann CJ dissented on this point: see at [230]–[238]. The phrase "might well happen", which was used in the question trail, has the same meaning as "could well happen".

Challenge to admissibility

[107] A challenge to the admissibility of Detective Inspector Scott's evidence was dealt with by the trial Judge prior to trial.[101] The Judge noted that the proposed evidence was largely generic about gangs in New Zealand but there was also some "more specific (but nonetheless general) evidence about the Mongrel Mob and Black Power".[102] Objection was taken to the following paragraphs of Detective Inspector Scott's proposed evidence:[103]

> 39. The President is the figurehead of the gang or chapter, and is the chairman at meetings.
>
> 40. In some gangs the President can also be known as the 'Prez or Captain'.
>
> 41. He is a senior member who has developed into the recognised leader usually through a combination of personal strength, leadership skills and personality. He has the final authority over all chapter business and its members.
>
> 42. An organised gang crime against another gang would only occur with the sanction of the president.
>
> 43. The president's authorisation would be required due to the obvious risks and consequences that the particular gang would be exposed to which would likely include intense scrutiny by the Police and serious retaliation by the opposing gang.

[108] The Judge noted that Detective Inspector Scott's expertise was not in issue. Nor was it contested that gang structures and obligations were relevant and that jurors were unlikely to be familiar with these.[104] This meant that the evidence on these matters was likely to be of substantial help to the jury.

[109] The Judge, however, agreed that paragraphs [42]–[43], and [42] in particular, went too far. She said:[105]

> [16] … Paragraph 42 would effectively suggest to the jury that DI Scott was expressing the expert view that:

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101 *R v Fantham-Baker* [2021] NZHC 2632 [Pre-trial admissibility ruling].

102 At [7].

103 The Crown had agreed that the two paragraphs following ([44] and [45]) would be omitted: at [7], n 3.

104 At [15]. The Judge encouraged the parties to explore the extent to which such information could be conveyed through a s 9 statement.

105 Footnote omitted and emphasis in original.

(a) the attack on Mr Ratana was an "organised gang crime"; and

(b) it occurred with the President's (Mr Kuru's) authority.

[17] The extent to which the confrontation in this case was planned or organised in any significant way will need to be established by reference to other evidence. If it was, there is plainly a *submission* to be made that in a Chapter with a relatively small membership, it is *unlikely* that there would be such a confrontation without the President's knowledge or authorisation. DI Scott can legitimately lay the foundation for that submission by speaking in general terms about his experience and knowledge of a President's role. But in my view he can go no further than that.

[18] There is, accordingly, no difficulty with paragraphs 39 to 41. But to the extent DI Scott wishes to opine on the matters in paragraphs 42 and 43, they need to be reframed in a more contingent way, and by reference to his experience ("in my experience it is unlikely that …."). Whether counsel for Mr Kuru will then need to call evidence in response from Dr Gilbert will remain a matter for them.

[110] Dr Gilbert, an acknowledged expert on gangs in New Zealand, had provided an opinion for Mr Kuru originally submitted with regard to a pre-trial application. He had broadly agreed with Detective Inspector Scott that the gang president has the "final authority over all chapter business and its members". Dr Gilbert likened the role of president to that of chairman of the board. He accepted the "usefulness" of the view that "unlawful activity would normally occur with at least the knowledge and probably the approval of the president" in understanding gang behaviour.[106] However he cautioned against an over-reliance on this view when examining specific incidents. He said:

4.3 The gangs and individual gang chapters tend to have different internal cultures and ways of operating. Some presidents will lead with an 'iron fist' or be so hugely charismatic that they take a lead on most if not all important matters and members rarely operate without the president's knowledge (or face the consequences formal or informal).

4.4 Other presidents will seek a far greater consensus and significant issues will be put to a vote (formal or otherwise), and the president will abide by the majority rule.

4.5 In some circumstances the internal politics of the gang may break down or become rather loose. In such cases there will be various factions within a chapter and the president may have little or no control over certain members or specific actions.

4.6 Similarly, events may occur quickly and with little or no planning and therefore with no knowledge of the president. Or the event may be

[106] Citing *Kuru v R* [2018] NZHC 3024 at [15].

> seen as outside the scope of the gang – the realm of an individual member, or members – and similarly occur without knowledge of the president.
>
> 4.7 This is further complicated by the fact that while gangs have rules that guide behaviour, not all of these rules are evenly applied and often times they may be in conflict with one another.
>
> 4.8 Within a realm where 'might makes right', those with sufficient strength or mana can act in ways that may not always be ordinarily seen as within the rules.
>
> 4.9 In the multitude of instances that may stem from these types of examples, then, it is clear there will be numerous times when our traditional understandings may be confounding rather than illuminating.
>
> 4.10 Often during my fieldwork I would speak to gang presidents who were angry, stressed or disappointed by the activities of one of their boys. The gangs certainly have a level of discipline and structure but ultimately they are made up of rebellious and difficult-to-control men.
>
> 4.11 Given this, it is extremely important to use the generalities as a guide, but make informed decisions on the basis of corroborating or conflicting facts and information. In many instances the generality alone will lead to conclusions that are demonstrably unsafe.

The evidence given at trial

[111] Detective Inspector Scott read a written statement at trial. He first qualified himself as an expert. At the time of trial he had been a member of the New Zealand Police | Ngā Pirihimana o Aotearoa for over three decades and occupied a senior position at Police National Headquarters. He had worked extensively in the investigation of gang-related activity and had experience with the Mongrel Mob and Black Power mostly in the Gisborne area. It does not appear that he ever worked in Whanganui. He had also attended relevant conferences and workshops (organised by the Royal New Zealand Police College) and had played a role in a national working group dealing with policies and structures in relation to gang policing.

[112] Relevantly for this appeal, Detective Inspector Scott's evidence included discussion of the rank structure of gangs, including the role of the president and the sergeant-at-arms. He said:

> The rank structure can differ from gang to gang but will generally have the following order. The President is the figurehead of the gang or chapter, and is the chairman at meetings. In some gangs the President can also be known as

> the 'Prez or Captain'. He is a senior member who has developed into the recognised leader usually through a combination of personal strength, leadership skills and personality. … There is usually a Vice President who is the second in command, a Treasurer who manages the finances, a Secretary who holds the minutes of the gang meetings and a Sergeant of Arms [sic] who enforces the President's orders.

[113] The most significant aspects of Detective Inspector Scott's evidence at trial (which he had modified slightly based on the pre-trial admissibility decision) were his comments that:

> He [the president] has the final authority over all chapter business and its members. In my experience a (serious) organised gang crime against another gang would likely occur with the sanction of the president. This is due to the obvious risks and consequences that the particular gang would be exposed to which would likely include intense scrutiny by the Police and serious retaliation by the opposing gang. Another consideration would be the risk of a number of their members being sentenced to periods of imprisonment depending on the particular crime committed.

[114] Detective Inspector Scott then gave more specific evidence in relation to Black Power, and its relationship with the Mongrel Mob:

> It is my experience that unless gangs are in an informal or formal relationship that often violence occurs when the two cross paths or there is a conflict which is required to be settled. Violence used in these situations is often extreme and can result in serious injury or death as one gang attempts to gain an ascendancy over the other. A variety of weapons are often present and can be used in such situations and it would be my opinion from experience that weapons would be present or available at the vast majority of gang confrontations. … The Mongrel Mob and Black Power have been rivals since their inception and I would describe them as natural enemies. There are numerous instances over many decades of extreme and ongoing violence between the two groups.

[115] There was no cross-examination of Detective Inspector Scott, and Dr Gilbert was not called to give evidence at trial.

Directions of the trial Judge

[116] The trial Judge gave a general direction that it was for the jury:

> … to decide how much weight or importance you give to [the] respective opinions [of experts] or, indeed, whether you accept them at all in the context of all the evidence you have heard during this trial.

[117] Specifically in relation to Detective Inspector Scott's evidence, the trial Judge commented that:[107]

> You might want to think about what I've just said particularly in relation to the gang expert, Detective Scott. His evidence is quite an important plank of the Crown case against Mr Kuru in particular. But when deciding what use you can make or weight you can place on it, you need to think about what Mr Keegan said about that too. Detective Scott was giving generalised evidence based on his [experience] as a police officer of working with—and as Mr Keegan would put it, against—gangs in New Zealand. He did not say anything specific about Black Power Wanganui, and he did not say anything specific about Mr Kuru or, indeed, Mr Runga. His evidence was not based on or specifically related to the facts of this case. You are the ones who know about those. So, *despite* Detective Scott's general expertise, you need to think about what weight his evidence can carry, the extent to which his generalised evidence can help you draw any specific conclusions about Mr Kuru's role in the events relevant to this case.

Alleged common plan and role of Mr Kuru

[118] It is worth noting at this point the evolving nature of the alleged plan in this case. At the time of an application for discharge under s 147 of the Criminal Procedure Act in 2019, the Crown case was that the plan on 21 August 2018 involved at least five Black Power members on foot and three in cars. The alleged plan was that the "men on foot would taunt and damage property at 144 Puriri Street in an attempt to draw out Mr Ratana and allow him to be shot".[108]

[119] By the time of trial, the plan as set out in the question trail was, as noted above, to go to the house where Mr Ratana was staying to damage his property and to threaten him, accompanied by firearms. Shooting Mr Ratana was no longer alleged to be part of the plan.

[120] In closing, the Crown submitted that the presence of Mr Ratana in Black Power territory would have been "top of the agenda" for the chapter, particularly after the incident on 14 August. The Crown said that it "seems to be something that's brewing and brooding over, over a course of probably about a week". The Crown's position

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107 Emphasis in original.

108 *R v Kuru* [2019] NZHC 2317 [Pre-trial discharge decision] at [8]. It is not clear exactly what the plan was alleged to be at the time of the pre-trial ruling on Detective Inspector Scott's evidence; Ellis J did not discuss the nature of the plan in her judgment on that issue: Pre-trial admissibility ruling, above n 101.

was that such a coordinated action by a large number of Black Power members on 21 August must have been sanctioned by Mr Kuru as president.[109]

[121] The trial Judge at sentencing did not accept that there had been prior planning. She said that the plan "was hastily formulated on the morning of the shooting".[110] This was consistent with the evidence at trial and the account from Mr Friesen and his mother of Mr Runga's visit to their home that morning. The Judge said that "[t]he fact that everything took place in broad daylight on a busy suburban street also does not suggest much of a plan."[111] She said that the plan was "to intimidate Mr Ratana in order to encourage him to leave the area and to confront him, provoking him if necessary to come outside by damaging his car and making threats".[112] Because it was known that Mr Ratana had a gun, some of the Black Power men also took guns with them.[113] It was not, however, alleged by the Crown that the plan was to kill Mr Ratana or to do him serious injury.

[122] The trial Judge also saw a much more limited role for Mr Kuru. The Judge found that "[t]here was no evidence of [his] direct involvement in either the formation of the plan or its execution."[114] She said that the Crown case was that, as the president of the chapter, he must have been aware of the plan and then, expressly or implicitly, have given it his blessing.

[123] The Judge was satisfied that Mr Kuru knew that Mr Ratana had effectively been living around the corner for a few weeks. She was also sure that Mr Kuru knew there had been "humiliating confrontations between him and some of [the chapter's] members".[115] The Judge doubted that Mr Kuru had advance notice of what was planned. She said that:

> [18] … the jury must have inferred from the arrival of the cars and the congregation of a group of armed gang members, more or less outside your house, and your actions in then following them down Matipo Street and partially up Tiki Street—that you found out pretty quickly what was going on.

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109 For more on the alleged role of Mr Kuru see below at [212]–[213].
110 HC sentencing notes, above n 70, at [12].
111 At [12].
112 At [13].
113 At [13].
114 At [18].
115 At [18].

> And the jury by their verdicts must have found that once you had that knowledge, and by dint of your presence and your innate authority, you effectively encouraged the other participants to execute their plan.

[124] The Judge rejected the Crown submission that Mr Kuru was "the more fundamental root cause of what happened".[116] She saw his involvement as "relatively limited":

> [19] … As I have already said, this was not in my view a sophisticated or well-thought-out plan and, as I have already said, I am inclined to accept that you were not part of its initiation. I certainly do not accept that this was any kind of strategised gang warfare which required your active involvement or prior oversight. Even on the Crown case it was not the object of the plan to physically harm, let alone kill, Mr Ratana. If it had been, then I might expect that the president would have been much more involved. But, like the others, when you saw what was happening you must have known that it might all go badly wrong, and that is not really much of a stretch given the wider context.

Court of Appeal decision

[125] The majority of the Court of Appeal found that the evidence of Detective Inspector Scott "went close to answering the ultimate question [of whether Mr Kuru knew of the plan to intimidate Mr Ratana] but did not actually do so", as it was "sufficiently generalised".[117] The majority also said that the "Crown Solicitor tested the boundaries by the way he commenced his closing address", but the directions of the trial Judge sufficiently "counterbalanced the robustness of the prosecutor's approach".[118] Despite "some prejudice arising" from the evidence, it was not excluded by s 8 of the Evidence Act 2006, and it was open to the jury to draw permissible inferences from it.[119]

[126] Cull J dissented. While she agreed with the majority that Detective Inspector Scott's evidence was admissible, she raised concerns with the use and effect of the evidence.[120] Cull J explained:

> [102] Despite the amendment and the Judge's caution that the Detective Inspector could go no further than speaking in general terms about his experience and knowledge of a President's role, the Detective Inspector's

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116 At [19].
117 CA judgment, above n 68, at [67] per Collins and Muir JJ.
118 At [68].
119 At [71].
120 At [83].

> evidence was the key piece of evidence to fill the gap in the Crown's case against Mr Kuru. …

[127] With the other, circumstantial, evidence not being sufficient on its own to convict Mr Kuru, Detective Inspector Scott's evidence provided the basis for the jury to accept the proposition that Mr Kuru "must have been involved in the shooting".[121] Given the paucity of other sufficient evidence to convict Mr Kuru, she said that "the risk of unfair prejudice associated with Detective Inspector Scott's evidence is significant".[122]

Mr Kuru's submissions

[128] Mr Kuru submits that Detective Inspector Scott's evidence, and the way the prosecution used it, caused a miscarriage of justice. In Mr Kuru's submission, Detective Inspector Scott went much further in his evidence than had been foreshadowed in the pre-trial hearing and provided, without any evidential basis, an opinion on the ultimate issue. Mr Kuru submits that, ordinarily, and quite rightly in his submission, the way a class of people "typically" behave in a situation is deemed logically irrelevant and misleading for juries. Propensity evidence of this nature is closely regulated under the Evidence Act.

[129] Mr Kuru emphasises the fact that Detective Inspector Scott has previously been called to give evidence for the Crown in multiple other cases. He submits that Detective Inspector Scott repeats material from across his written statements provided in different trials. These, according to Mr Kuru, are "boiler-plate documents" and are therefore unhelpful in particular cases. Attached to Mr Kuru's written submissions is an appendix which, he says, shows that (across 20 previous statements) multiple paragraphs from Detective Inspector Scott's brief have appeared "word-for-word" in previous statements.

[130] Further, it is submitted that Detective Inspector Scott's evidence wrongly became "the focus of the Crown's case".[123] Mr Kuru emphasises that the first four transcribed pages of the Crown's closing address were taken up by references to

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121 At [107] (emphasis omitted).
122 At [111].
123 Citing CA judgment, above n 68, at [102] per Cull J dissenting.

Detective Inspector Scott's evidence, and that the Crown told the jury that the entire case should be viewed through the "lens" of his evidence.

[131] In Mr Kuru's submission, the majority in the Court of Appeal failed to recognise the unique issues associated with police expert evidence on gangs. It is accepted by Mr Kuru that, in certain circumstances, police officers may properly qualify as experts, but he says that "care must be taken that simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise".[124] Further, compliance with the exacting standards of an expert witness "can be difficult for a police officer who is effectively combining the duties of active investigator (if not of the current case) with those of independent expert".[125]

[132] Mr Kuru points out that police officers obtain their expertise from their own experience and from publicly inaccessible education sessions delivered by other police officers, rather than in an academic environment. In addition, because interactions between police and gang members generally arise in an adversarial context, "police are unable to get close enough to gang members to gain a true sense of the gang scene".[126] Much police gang intelligence comes from questionable sources like paid informants or rumour-tinged street information.[127] This may amount to unreliable hearsay.[128]

[133] It is submitted finally that there are dangers in too much weight being placed on police expert evidence and therefore a risk of unfair prejudice. Jurors tend to weigh expert evidence more heavily than ordinary evidence because of its "mystic infallibility".[129] This is exacerbated when the expert witness is a police officer, who often carries an additional "cloak of authority".[130]

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124 Citing *Myers v The Queen* [2015] UKPC 40, [2016] AC 314 at [58].
125 Citing *Myers v The Queen*, above n 124, at [60].
126 Citing Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, Auckland, 2013) at 234.
127 Citing Gilbert, above n 126, at 235.
128 For further discussion of hearsay see below at [177]–[178].
129 *R v Melaragni* (1992) 73 CCC (3d) 348 (Ontario Court (General Division)) at 353.
130 Citing *Keil v New Zealand Police* [2017] NZCA 430 at [39].

The Crown's submissions

[134] The Crown submits that Detective Inspector Scott's evidence was admissible. In the Crown's submission there was no issue with expertise. With regard to the general issue of police officers serving as expert witnesses, the Crown submits that a person's status as a police officer does not bar them from giving expert evidence.[131] Nor can a risk of bias be inferred, even if the officer is attached to a branch of the police where the offending occurred.[132] An expert may draw on "on-the-job experience",[133] or that of others in their field.[134]

[135] The Crown accepts that an expert should not appear to comment directly on a defendant's state of mind but submits that experts may give evidence of gang organisation, hierarchy, and patterns of behaviour.[135] In this case, the evidence concerned usual features of the Black Power and Mongrel Mob gangs and usual — though not immutable — features of their structure and chain of command. It resembled the kind of evidence routinely admitted in allied jurisdictions.[136]

[136] This was not an "illegitimate crutch". The circumstances already pointed to Mr Kuru's involvement, and the expert evidence was an aid to the interpretation of that evidence. It is submitted that general evidence about the authority of a gang president, their place in the hierarchy, and the relationship between president and sergeant-at-arms would not have been self-evident to lay people and was of substantial help to the jury.[137]

[137] The Crown also submits that the evidence was not unfairly prejudicial. Detective Inspector Scott did not comment specifically about the events with which Mr Kuru was said to be involved, and his evidence in fact helped him to resist the murder charge. The defence portrayed it as militating against the idea that this was a

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131 Citing *Myers v The Queen*, above n 124, at [57]–[60].
132 Citing *R v Mills* 2019 ONCA 940, (2019) 151 OR (3d) 138 at [62]; and *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750 at [99].
133 Citing *R v Mills*, above n 132, at [52].
134 Citing *Myers v The Queen*, above n 124, at [63] and [67]; and *R v Hodges* [2003] EWCA Crim 290, [2003] 2 Cr App R 15 at [13] and [27].
135 Citing *R v Sekhon* 2014 SCC 15, [2014] 1 SCR 272 for this distinction.
136 Citing *R v Hawi (No 1)* [2011] NSWSC 1647, (2011) 220 A Crim R 452 at [46]–[48].
137 Citing *Thacker v R* [2019] NZCA 182; and Pre-trial admissibility ruling, above n 101, at [15].

planned assassination, rather than an attempt at intimidation that had gone wrong. Nor did the defence choose to cross-examine Detective Inspector Scott or call Dr Gilbert, which the Crown submits is because Detective Inspector Scott's evidence was unexceptional. In the Crown's submission, the trial Judge properly explained the limits of the evidence and the way the jury could legitimately use it.[138]

Police expert evidence on gangs

[138] I accept that there is a risk that juries may place too much weight on expert evidence.[139] This may be a particular risk with police expert witnesses.[140] The criteria for admissibility of police expert evidence and the responsibilities of such experts when called are the same as for any other expert witness, but I consider that particular care must be taken to ensure those legal requirements are met when police officers are called to give expert evidence on gangs because their expertise is gained from a law enforcement perspective.[141] I now turn to these requirements.

Qualification as an expert

[139] The definition of "expert" in s 4 of the Evidence Act expressly provides that an expert's "specialised knowledge or skill" may be based on "experience". This may include practical, on-the-job experience.[142] It is, however, necessary to scrutinise carefully the qualifications of police experts. As the Privy Council said in *Myers v The Queen*:[143]

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138 See above at [117].

139 For a recent discussion informed by empirical research see Jason M Chin, Hayley J Cullen and Beth Clarke "The Prejudices of Expert Evidence" (2022) 48 Mon LR 59. I also acknowledge the existence of contrary views (also informed by empirical research) questioning the orthodox position: Frederick Schauer and Barbara A Spellman "Is Expert Evidence Really Different?" (2013) 89 Notre Dame L Rev 1.

140 Lindsey M Cole "In the Aftermath of Ferguson: Jurors' Perceptions of the Police and Court Legitimacy Then and Now" in Cynthia Najdowski and Margaret Stevenson (eds) *Criminal Juries in the 21st Century: Psychological Science and the Law* (Oxford University Press, New York, 2018) 109 at 112–113. The relevant discussion focuses on police appearing as eyewitnesses, but it is likely that many of the same dangers would apply to police acting as expert witnesses more generally. I note, however, that Cole states that there is a lack of research on this issue: at 111.

141 See above at [131]–[132]; and see, for example, Tony Ward and Shahrzad Fouladvand "Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking" (2021) 6 Crim LR 442. Judges will need to assess in each particular case the extent to which, if at all, the issues identified in the literature and by Mr Kuru may arise.

142 See *Myers v The Queen*, above n 124, at [57]–[58]; and for a recent New Zealand example of such evidence being admitted see *Shivgotra v R* [2023] NZCA 567, (2023) 31 CRNZ 73 at [41]–[43].

143 *Myers v The Queen*, above n 124, at [58].

> … the officer must have made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact.

[140] I agree, and note in particular the reference to the need for a sufficient body of specialised knowledge. In terms of evidence related to gangs, this would usually require police officers to have engaged in specialist duties and training relating to gangs. Otherwise, there would be a risk that the evidence would amount to no more than an aggregation of anecdotes from isolated interactions in an often adversarial environment.

[141] The assessment as to whether a person qualifies as an expert must also take into account the particular issue before the Court. The Ontario Court of Appeal in *R v Abbey* (albeit in that case the expert was a sociologist) said that the question is:[144]

> … whether [the expert's] research and experiences had permitted him to develop a specialized knowledge about gang culture, and specifically gang symbology, that was sufficiently reliable to justify placing his opinion [on the possible meaning of a tattoo] before the jury.

Duties of an expert

[142] In civil cases experts must comply with the code of conduct (the code) set out in sch 4 of the High Court Rules 2016.[145] In their evidence, experts must state, among other things, their qualifications,[146] the facts and assumptions on which their opinions are based,[147] the reasons for their opinions[148] and any literature or other material used or relied on in support of their opinions.[149] Further, if an expert witness believes that their evidence, or any part of it, may be incomplete or inaccurate without some qualification, that qualification must be stated in their evidence.[150] The overriding requirement of the code is impartiality.[151]

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144 *R v Abbey* 2009 ONCA 624, (2009) 246 CCC (3d) 301 at [117].
145 Evidence Act 2006, s 26(1); and High Court Rules 2016, r 9.43.
146 High Court Rules, sch 4 cl 3(b).
147 Schedule 4 cl 3(d).
148 Schedule 4 cl 3(e).
149 Schedule 4 cl 3(f).
150 Schedule 4 cl 4.
151 Schedule 4 cls 1–2.

[143] The code itself does not apply to experts in criminal cases, but in *Lisiate v R* the Court of Appeal commented that similar principles to those expressed in the code applied in criminal proceedings.[152] This is because, as put by the Court of Appeal in an earlier decision:[153]

> … the obligations of an expert witness in a criminal case do not differ from those of an expert witness in a civil case, in the sense that, in both contexts, the witness must not … be an advocate for any party but must assist the Court impartially on matters within his or her area of expertise.

[144] In *Lisiate* the Court further commented that counsel should "refer expert witnesses in criminal cases to [the applicable principles the Court identified as being similar to the principles in civil cases] and … witnesses should state at the outset of their evidence that they understand and accept them".[154] I agree.

[145] There may be questions as to whether a person who is not impartial can be an expert as defined and/or provide expert evidence. Canadian authority suggests that an expert must show that they can meet their "duty to the court to provide evidence that is … impartial; … independent; and … unbiased".[155] It is possible, too, that clearly biased evidence may not meet the definition of "expert evidence" at all, as it would be based not on the expert's "specialised knowledge or skill" but on their personal feelings and prejudices.

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152 *Lisiate v R* [2013] NZCA 129, (2013) 26 CRNZ 292 at [53]. The Law Commission in its second review of the Evidence Act recommended amending s 26 of the Act to require expert witnesses in criminal cases to comply with a separate code of conduct specific to them: Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006* | *Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at R18, R19, [11.12] and [11.16]. The Law Commission recommended that the Rules Committee | Te Komiti mō ngā Tikanga Kooti consider amending the Criminal Procedure Rules 2012 to include this code. The Law Commission also recommended that the contents of the proposed criminal code "mirror" those of the existing civil code: at [11.17]. These recommendations were accepted by the Government in its response of 2 September 2019, although the response stated that compliance with the rules in the civil code was already largely occurring in practice: *Government Response to the Law Commission report: The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006* (2 September 2019) at 6. The Law Commission report and the Government's response are available at <www.lawcom.govt.nz>. As yet the recommended amendments have not been made.

153 *R v Hutton* [2008] NZCA 126 at [169].

154 *Lisiate v R*, above n 152, at [53]. These principles in any event mirror the common law requirements for expert witnesses that prevailed in New Zealand prior to the Evidence Act: *R v Carter* (2005) 22 CRNZ 476 (CA) at [47].

155 *R v Abbey* 2017 ONCA 640, (2018) 140 OR (3d) 40 at [48]. The Canadian criterion is, however, that an expert must be "properly qualified", which may be more restrictive than my definition.

[146] In New Zealand, however, it is likely that only in extreme cases would an expert and/or their evidence be totally disqualified because of a lack of impartiality. Concerns over impartiality would normally be dealt with under s 25 itself. The Court of Appeal has commented that impartiality is core to the substantial helpfulness test under s 25.[156]

[147] The Privy Council in *Myers* said that police experts owe the same duties to the court as any other expert but recognised that complying with these standards can be difficult for serving police officers and that a court must be satisfied that the duties have been understood and complied with.[157] The Privy Council also held that police witnesses must be especially careful to include any material that may run counter to or qualify their evidence:[158]

> [60] Compliance with these exacting standards can be difficult for a police officer who is effectively combining the duties of active investigator (if not of the current case) with those of independent expert. It is particularly important that such a witness should fully understand that once he is tendered as an expert he is not simply a part of the prosecution team, but has a separate duty to the court to give independent evidence, whichever side it may favour. In particular a police expert needs to be especially conscious of the duty to state fully any material which weighs against any proposition which he is advancing, as well as all the evidence on which he has based that proposition. When considering an application by the Crown to adduce the evidence of a police expert, it is incumbent on the judge to satisfy himself that these duties are recognised, and discharged.

[148] The Privy Council gave some advice on the presentation of evidence of police experts.[159] I consider this advice applicable to New Zealand and adopt it. The Board stated that, as part of an expert witness duty, a police officer giving the sort of evidence called in gang cases must make full disclosure of the nature of the material. The Privy Council said that an officer's duty includes at least the following:

(a) The officer must set out their qualifications to give expert evidence, by experience and training.

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156 *Horton v R* [2019] NZCA 239 at [37] and [43].
157 *Myers v The Queen*, above n 124, at [59]–[60].
158 Emphasis omitted.
159 At [68]. The Board was adopting and expanding on the advice given by the Court of Appeal for Bermuda in *Cox v R* [2012] CA (Bda) 15 Crim at [40].

(b) The officer must state not only their conclusions but also how they have come to them:

(i) The officer must state if their conclusions are based on the officer's own observations or contacts with particular individuals.

(ii) Equally, if the officer's conclusions are based on information provided by other officers, the officer must show how it is collected, exchanged and recorded (if the information is indeed recorded).

(iii) Finally, if these conclusions are based on informers, the officer must, at least, acknowledge that this is one source of the information, though of course the informant(s) need not be named.

(c) Regarding primary conclusions in relation to the defendant or other key persons, the officer must go beyond a mere general statement that they have sources of kinds A, B and C. Rather, the officer must say where the particular information has come from. An example might be observations of a defendant in the company of others known to be members of a gang.

[149] I also endorse the Privy Council's view that any facts adverse to a police expert's evidence must be clearly stated — the evidence must be balanced.[160] If not, either the evidence should not be admitted, or very strong directions should be given by the trial judge. Each expert witness before the court has an *individual* duty of impartiality, including the duty to state relevant qualifications to or limitations of their evidence. Defence counsel should not have to call their own experts to raise qualifications or limitations that ought to have been raised by the prosecution expert.

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160 *Myers v The Queen*, above n 124, at [60].

Relevance and substantial helpfulness

[150] Evidence given by police experts, like all other evidence, must be relevant to a proceeding to be admissible.[161] Evidence is "relevant in a proceeding" insofar as it has a "tendency to prove or disprove anything that is of consequence to the determination of the proceeding".[162] There is an added requirement for expert opinion evidence: the fact-finder must be "likely to obtain substantial help" from the evidence.[163] This requires a holistic consideration of the extent to which the evidence is relevant, its reliability and its probative value.[164]

[151] Expert evidence on matters within the common knowledge of jurors or going to the ultimate issue is not automatically excluded.[165] The Privy Council, however, held in *Pora v R* that: "in general, an expert should only be called on to express an opinion on the 'ultimate issue' where that is necessary in order that [their] evidence provide substantial help to the trier of fact".[166] The Privy Council's formulation was, I think, designed to indicate that courts must be careful to ensure that ultimate issue expert evidence is truly substantially helpful because of the concern that juries could place too much weight on it, thus risking subverting the jury's role as fact-finders.

[152] In line with this approach, I consider that judges faced with ultimate issue expert evidence should consider whether the jury could come to a reasonable verdict without it, relying on other admissible evidence or on matters of common knowledge.

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161 Evidence Act, s 7.

162 Section 7(3).

163 Section 25; and see Law Commission | Te Aka Matua o te Ture *Evidence: Evidence Code and Commentary* (NZLC R55, 1999) vol 2 at [C99].

164 Donald L Mathieson (ed) *Cross on Evidence* (looseleaf ed, LexisNexis) at [EVA25.4] citing *Mahomed v R* [2010] NZCA 419; *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [41]; and *Lundy v R* [2018] NZCA 410.

165 Evidence Act, s 25(2). *Adams on Criminal Law* takes the view that s 25(2)(a) reflects the position prior to the Act: see Mathew Downs (ed) *Adams on Criminal Law – Evidence* (looseleaf ed, Thomson Reuters) at [EA25.05]. *Adams* notes that more recent common law cases prior to the Act's enactment had recognised instances of experts being allowed to give evidence on the ultimate issue: see also *Adams on Criminal Law – Archived Evidence Commentary pre Evidence Act 2006* (online looseleaf ed, Thomson Reuters) at [EC14.02(7)]. Similarly, the authors of *Mahoney on Evidence* (citing pre-Evidence Act cases) take the view that the abolition of the ultimate issue rule as a determinative factor "is likely to make little practical difference": Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV25.05(1)] citing *R v Kaukasi* HC Auckland T014047, 9 August 2002; and *R v Eade* (2002) 19 CRNZ 470 (CA) at [19].

166 *Pora v R*, above n 164, at [27].

If so, it is very unlikely to be substantially helpful.[167] The same applies to ultimate issue evidence relating to mens rea (including a defendant's state of knowledge). A person's state of mind (including their level of knowledge) would usually be a matter of inference.[168] Juries would normally be able to draw such inferences based on other admissible evidence and/or common knowledge without the need for expert evidence.

[153] The requirements of relevance and substantial helpfulness are especially important with gang evidence because of the prejudicial nature of such evidence. The Privy Council in *Myers* said:[169]

> … the ambit of gang evidence will depend, in any particular case, on what legitimate role it may have in helping the jury to resolve one or more issues in the case. …
>
> [There have been cases where] a police officer has been permitted to give expert evidence about criminal behaviour. An example is evidence of the customary practices of drug users, in relation to such matters as packaging, methods and quantities of usage and supply, and prevailing price … Evidence of the practices, mores and associations of gangs, whether general or particular, is in a similar category. It has been received in several jurisdictions and there can in principle be no objection to it being given by a police officer, providing that the ordinary threshold requirements for expertise are established, and providing that the ordinary rules as to the giving of expert evidence are observed.

[154] The Privy Council noted that the two provisos in the last part of the above passage are of some importance. It warned that care must be taken to ensure that "simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise".[170] The Board gave as an example the Canadian case of *R v Sekhon* (discussed further below).[171] In that case there was evidence from the relevant police witness that he had never encountered a "blind" drug courier.[172] The Privy Council said that this:[173]

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167 The converse is not necessarily the case. There would still need to be consideration of whether such evidence meets the substantial helpfulness test in the particular circumstances. Ultimate issue expert evidence may also raise particular issues relating to unfair prejudice under s 8: see below at [159].

168 Except perhaps where, for example, the person themselves has indicated what they were intending or their state of knowledge.

169 *Myers v The Queen*, above n 124, at [56]–[57].

170 At [58].

171 *R v Sekhon*, above n 135; and see below at [166].

172 That is, a courier who is unaware of the fact that they are carrying drugs.

173 *Myers v The Queen*, above n 124, at [58].

> … was clearly not a balanced, tested or researched proposition as to the methods of drug importers, but simply his personal experience. It was not admissible and indeed proved nothing about the particular defendant on trial.

[155] The case of *Thacker v R* is an example of the need for gang evidence to relate to the particular issues at trial.[174] The issue in that case was whether evidence could be given that gang prospects must obey all instructions given by patched members of the gang even if this involves the commission of an offence.[175] Two preconditions were held to apply. The first was that there was a sufficient evidential basis to believe that the offence occurred in a gang context:

> [20] … the relevance of the evidence to be given by the Detective Inspector … obviously depends on whether the defendants' connection with the gang played a meaningful part in the events giving rise to the charge. The extent to which, if at all, the alleged offending constituted gang-related activity may therefore need to be examined more fully at trial before the Detective Inspector gives evidence.
>
> [21] Assuming the Crown is entitled to proceed on this basis we accept that the evidence of the detective regarding the [obligations of gang prospects] will also be substantially helpful to the jury. Lay persons are unlikely to be familiar with gang structures and obligations. In particular, they may not be aware that persons having the status of prospects must obey all instructions given by patched members of the gang even if this involves the commission of an offence. Furthermore, if the jury accepts the complainant's evidence as to what occurred, the evidence will assist the jury to understand why the defendants were prepared to engage in sexual activity even though they knew the complainant was not consenting.

[156] The second precondition, relating only to Mr Thacker, was that there was sufficient evidential foundation for Mr Thacker being a gang prospect:[176]

> [25] It will therefore be necessary for the trial Judge at the second trial to determine whether the evidence as a whole remains sufficiently reliable to establish that Mr Thacker was a prospect for the Tribesmen gang as the Crown alleges. If the evidence does not meet that threshold the Judge will need to direct the jury that they cannot take the Detective Inspector's evidence into account when they are considering the charge against Mr Thacker.
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> [26] If the evidence as a whole reaches the required reliability threshold, the evidence of Detective Inspector Scott will be admissible against Mr Thacker. In that event the Judge will still need to direct the jury that they

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174 *Thacker v R*, above n 137.

175 In this sense the evidence was akin to counter-intuitive evidence: see *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625.

176 The two other defendants were (respectively) a patched member and a prospect. The latter had admitted to being a prospect during an earlier interaction with police: *Thacker v R*, above n 137, at [6].

> can only take it into account if they accept he was a prospect for the Tribesmen gang at the time of the alleged offending.

[157] Another example of expert evidence having to relate to the particular issues at trial is *Poutai v R.*[177] In that case it was alleged that Mr Poutai, a prisoner and senior Black Power member, had ordered an attack on another inmate. This attack was carried out by members of Black Power and an affiliated gang. Evidence of Mr Poutai's gang association was held to be relevant to explain Mr Poutai's modus operandi and why others would follow his instructions.[178] It was significant in *Poutai* that there was also direct, independent evidence that Mr Poutai ordered the attack,[179] and that the trial Judge gave a direction which the Court of Appeal held met any risk of unfair prejudice.[180]

[158] I comment that the expert evidence in *Poutai* and *Thacker* was held to be relevant and substantially helpful because the evidence given was not within the pre-existing knowledge or experience of a jury.

Section 8

[159] Even where evidence is relevant, admissible and substantially helpful, the extent of its probative value must still be considered and weighed against its unfair prejudicial effect.[181] There is substantial overlap between the factors which may render police expert evidence irrelevant, unnecessary or unhelpful and those factors which will make it non-probative or unfairly prejudicial.

Ultimate issue: overseas authorities

[160] I now turn to discuss some helpful case law from Canada and the United States relating to police expert evidence that addresses the ultimate issue in the case. In the United States, ultimate issue evidence is admissible in federal courts (with an exception for evidence of whether a defendant had a mental state or condition where

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177 *Poutai v R* [2010] NZCA 182.
178 At [13].
179 At [18].
180 At [19].
181 Evidence Act, s 8.

that is an element of a crime or defence).[182] Such evidence is also admissible in most states.[183] It is also admissible in Canada.[184]

[161] The issue in the Ontario case of *R v Abbey* was the significance of a teardrop tattoo the accused had inscribed on his face a few months after a murder.[185] The Crown proposed to call evidence from a sociologist, who was an acknowledged expert on Canadian street gangs, that there were three possible meanings of the tattoo, including that the person had recently murdered a rival gang member.[186] The Crown had proposed that, as well as testifying to those three possible meanings, the expert would be asked a hypothetical question that "would include factual assumptions eliminating the two other possible meanings".[187]

[162] The Court said that it was necessary to ensure that a jury has all the relevant information available to come to a correct verdict, but at the same time to limit exposure to information that could invite a verdict based on prejudice.[188] This requires cautious delineation of the scope of the evidence (including any limitation to the language in which the opinion may be proffered) to avoid overreach.[189] In this case the Crown's proposed hypothetical question meant that there would have been a "straight and powerful line between the jury's acceptance of [the expert's] opinion and the conviction of the [accused]".[190]

[163] The close connection between the opinion and the ultimate issue meant that the evidence could "usurp the jury's fact-finding role on the ultimate issue in the trial".[191] The attempt to link the opinion evidence to the identity of the accused as the killer "misconceived the true nature of [the expert's] opinion".[192] The expert could not speak

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182 Federal Rules of Evidence (US), r 704.

183 Arthur Best *Wigmore on Evidence: 2021-1 Cumulative Supplement* (Wolters Kluwer, New York, 2021) at 1251–1254.

184 *R v Mohan* [1994] 2 SCR 9 at 24. The Court noted, however, that the concerns underlying the rule remain and the criteria of relevance and necessity are to be applied strictly to ultimate issue evidence: at 24. The Canadian test for the admission of expert evidence (though differing in form) largely equates in substance with the New Zealand requirements.

185 *R v Abbey*, above n 144.

186 At [29].

187 At [30].

188 At [60].

189 At [62].

190 At [65].

191 At [67].

192 At [68].

to the reason the accused had got the teardrop tattoo. He could only speak to the culture of the street gangs and the potential meanings that symbol might have for young men of that culture:[193]

> Properly understood, [the expert's] opinion provided context within which to assess other evidence that the jury would hear, thereby assisting the jury in making its own assessment as to the meaning, if any, to be given to the [accused's] teardrop tattoo.

[164] The Court warned that "[e]xpert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases."[194] Therefore, particular attention must be paid to the four criteria, expressed in *R v Mohan*, which control the admissibility of expert opinion evidence: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule and a properly qualified expert.[195] There is an element of judgement involved and, in many cases, the proffered evidence will fall somewhere between the essential and the unhelpful. In those cases, the "trial judge's assessment of the extent to which the evidence could assist the jury will be one of the factors to be weighed in deciding whether the benefits flowing from admission are sufficiently strong to overcome the costs associated with admission".[196] The hypothetical question was inadmissible. The Court said:

> [99] The difference between an opinion on why the [accused] put the teardrop tattoo on his face and an opinion on the meanings of that symbol in the street gang culture in which the [accused] lived is much more than semantical. The former speaks directly to the issue of the murderer's identity. That opinion, if heard, invites the jury to move directly from accepting [the expert's] evidence to a finding of guilt. The latter opinion speaks on a much more general level and provides context in which the evidence of other witnesses, who can speak more directly to the facts of the case, can be placed and assessed.

[165] The Court held that the evidence of the expert should have been limited to setting out the alternative possible meanings of the tattoo.[197] The evidence would then be a permissible first (though important) step in establishing the Crown's case, and

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193 At [68] (citations omitted).
194 At [71].
195 At [75] citing *R v Mohan*, above n 184.
196 *R v Abbey*, above n 144, at [95].
197 At [102].

would not allow the jury to move directly from accepting the expert's evidence to a conviction.[198]

[166] In *R v Sekhon* the issue at trial was whether Mr Sekhon knew that there was cocaine in the truck he was driving.[199] The impugned evidence was from a police officer who testified that he had never personally encountered a "blind" courier over the course of his investigations. All of the Judges agreed the evidence was inadmissible, but there was a difference of opinion on whether Mr Sekhon's conviction could nevertheless stand. The majority held that it could.[200]

[167] The majority held that, while the evidence was potentially "logically relevant", it was not "legally relevant"; the guilt or innocence of other accused persons that the police witness had encountered was not relevant to the guilt or innocence of the accused.[201] Nor was the evidence necessary, because determining whether Mr Sekhon knew about the drugs was not beyond the knowledge and experience of the Judge.[202] This was sufficient to justify the exclusion of the testimony.

[168] The minority in *Sekhon* agreed the evidence was inadmissible essentially for the same reasons as the majority.[203] The minority also held that the evidence merited heightened scrutiny as an opinion on the ultimate issue of mens rea.[204] The minority made the following, more general, comments about evidence potentially usurping the fact-finder's function:[205]

> [75] … this Court has repeatedly cautioned that expert evidence must not be allowed to usurp the role of the trier of fact. The trier of fact, whether a judge or a jury, is responsible for deciding the questions in issue at trial. Judges must be especially cautious where the testimony of police expert witnesses is concerned, as such evidence could amount to nothing more than the Crown's theory of the case cloaked with an aura of expertise. The courts have clearly recognized the risk that expert evidence could usurp the role of the trier of fact in the assessment of credibility, and even in the decision on the

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198 At [103].

199 *R v Sekhon*, above n 135.

200 At [51] and [54]–[57] per Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

201 At [49].

202 At [49]. Mr Sekhon had been convicted following a judge-alone trial.

203 At [80] per McLachlin CJ and LeBel J dissenting.

204 At [79].

205 The minority seems to have taken the view that the evidence was not even logically relevant, holding that the evidence "appeared relevant only because it depended on an improper inference": at [80].

> ultimate issue of guilt or innocence. I see no reason to believe that this danger is less real where the evidence is given by a state agent like a police officer rather than by a scientific expert.

[169] In *United States v Mejia*, the United States Court of Appeals for the Second Circuit made similar points:[206]

> … despite the utility of, and need for, expertise of this sort, its use must be limited to those issues where sociological knowledge is appropriate. An increasingly thinning line separates the legitimate use of an officer expert to translate esoteric terminology or to explicate an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence. If the officer expert strays beyond the bounds of appropriately ''expert'' matters, that officer becomes, rather than a sociologist describing the inner workings of a closed community, a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt. As the officer's purported expertise narrows from ''organized crime'' to ''this particular gang,'' from the meaning of ''capo'' to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them. The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt.

[170] In *Diaz v United States*, the United States Supreme Court considered the ultimate issue rule in the context of r 704(b) of the Federal Rules of Evidence, which disallows ultimate issue evidence concerning mens rea.[207] At issue was whether r 704(b) rendered inadmissible a statement from a Homeland Security Investigations Special Agent that most drug couriers know that they are carrying drugs. The defendant claimed that she did not know that there were drugs in her vehicle.

[171] The majority held that the impugned evidence was not "about" the defendant's mens rea. Rather, it was a statement about *most* drug couriers.[208] The majority considered that the Agent merely asserted that Ms Diaz "was part of a group of persons that *may or may not* have a particular mental state".[209]

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206 *United States v Mejia* 545 F 3d 179 (2d Cir 2008) at 190–191.
207 *Diaz v United States* 602 US ___ (2024).
208 At 7 per Roberts CJ, Thomas, Alito, Kavanaugh and Barrett JJ.
209 At 9 (emphasis in original).

[172] The minority dissenting Judges emphasised that the rule does not prohibit only "definitive" opinions as to mens rea, but "*any* opinion on the subject".[210] This includes probabilistic testimony of the type at issue. Underlying the dissent was the foundational importance of mens rea to the legal system and the fact that "deciding whether a criminal defendant acted with a culpable mental state is a job for the jury".[211] The minority said of the approach of the majority:[212]

> The government comes away with a powerful new tool in its pocket. Prosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what "most" people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like "most" people and convict. What authority exists for allowing that kind of charade in federal criminal trials is anybody's guess, but certainly it cannot be found in Rule 704.

[173] I prefer the approach of the minority where they treated the evidence as ultimate issue evidence relating to mens rea. I also agree with their comments on its admissibility in the circumstances of that case. This is essentially for the same reasons as the Supreme Court of Canada outlined in *Sekhon* (which concerned similar evidence), as approved by the Privy Council in *Myers*.[213]

Was the evidence admissible in this case?

[174] I will now examine the question of the admissibility of Detective Inspector Scott's evidence in light of the requirements set out above. Before doing so, I consider its conformity with the pre-trial ruling and the issues of hearsay and propensity.

Conformity with the pre-trial ruling

[175] Mr Kuru submits that Detective Inspector Scott's evidence went beyond that allowed by the pre-trial ruling. I accept there is a subtle difference between what the Judge contemplated and the evidence given, the latter being expressed in positive ("likely") rather than in negative terms ("unlikely") but I do not consider that this alone took it outside what was allowed under the pre-trial ruling.[214]

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210 At 7 per Gorsuch, Sotomayor and Kagan JJ (emphasis in original).
211 At 2–3.
212 At 1.
213 See above at [154].
214 Compare above at [109] and [113].

[176] I do, however, accept that, when the Judge said "in my view he can go no further than that" and required the evidence to be "reframed in a more contingent way", that necessitated a more careful approach than simply changing "only" to "likely".[215] As I discuss below at [182]–[184], there was a lack of qualification to this evidence and this was a major failure to meet the standards expected of an expert.

Hearsay and propensity evidence

[177] Mr Kuru submits that police gang evidence is often based on inadmissible hearsay. The Privy Council had this to say on that topic:[216]

> It is well established that an expert is entitled, in giving his evidence, to draw on the general body of knowledge and understanding in which he is expert, notwithstanding that some (or even all) of the material may have been assembled by other students of the subject.

[178] The Privy Council said, however, (and again I agree) that this does not mean that because the witness is an expert they are immune from all prohibitions of hearsay.[217] They are not immune:[218]

> The test of whether evidence based on hearsay material can be given is better seen to be whether it ceases to be the expounding of general study (whether by the witness or others) and becomes the assertion of a particular fact in issue in the case. The first is expert evidence, grounded on a body of learning or study; the second is not, even if it may be given by someone who is also an expert. The line between the two is case-specific, but it will usually be possible to discern it.

[179] I consider that those remarks apply also to expertise garnered by experience. In this case, at least in terms of the description of the roles of president and sergeant-at-arms, I do not consider Detective Inspector Scott's evidence contained inadmissible hearsay. It was rather evidence based on his experience and in any event to a large degree coincided with the evidence of Dr Gilbert, albeit Dr Gilbert's evidence noted qualifications and exceptions.

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215 See above at [107]–[109].
216 *Myers v The Queen*, above n 124, at [63].
217 At [64].
218 At [66]. I note that the applicable hearsay provisions in Bermuda are more restrictive than those in New Zealand, but the general thrust of the Board's comments is still applicable.

[180] Mr Kuru further submits that police evidence can constitute propensity evidence. I do not consider that evidence of the type given here falls within the definition of propensity evidence, as it was not "evidence of acts, omissions, events, or circumstances with which a person [in this case Mr Kuru] is alleged to have been involved".[219] The evidence related to the supposed actions and knowledge of other people. Nevertheless, I accept that some of the same considerations arise.[220]

Qualification as an expert

[181] Detective Inspector Scott's expertise was not challenged at trial. This is understandable, given the Evidence Act clearly contemplates that witnesses may qualify as experts based on experience as well as through academic study and research (which, I note, forms the basis of Dr Gilbert's expertise).[221] Detective Inspector Scott is clearly experienced in dealing with gangs and has also been involved in specialist training and operations, albeit from a police perspective.[222]

Duties of an expert

[182] Detective Inspector Scott said in his evidence that he was familiar with the code of conduct for expert witnesses and had complied with it. But, to comply with the principles of the code, his evidence should have traversed any qualifications or limitations to the evidence he gave with regard to the role of a president (like those contained in Dr Gilbert's report). It should not have been necessary for the defence to call its own expert or to cross-examine to ensure a balanced picture was before the jury.

[183] Detective Inspector Scott's evidence also did not set out the limits of his evidence: that is, that he could not say whether or not this was a serious organised gang crime in fact, and that he could not say whether the attack in fact occurred with the sanction of Mr Kuru.

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219 Evidence Act, s 40(1)(a).
220 See above at [63] of the reasons of the majority.
221 See above at [139].
222 I note that the directions given by the trial Judge made it clear that Detective Inspector Scott's evidence was coming from a police perspective: see above at [117].

[184] Detective Inspector Scott's evidence should not have been admitted without containing such qualifications. This applies to his evidence as a whole and not just to the ultimate issue evidence under challenge.[223]

Relevance and substantial helpfulness

[185] The challenge in the High Court to Detective Inspector Scott's evidence was limited to certain aspects of his proposed testimony. It did not seek exclusion of all of his evidence. Again, that is understandable. The offending in this case clearly took place in a gang context. As the Crown submits, most jurors will not be familiar with gang organisation and culture. Evidence on these matters may therefore be substantially helpful to them to the extent it is relevant to the case. Evidence on the role of a gang president and sergeant-at-arms (suitably qualified) was, for example, clearly relevant to the Crown case against Mr Kuru and Mr Runga.

[186] I do, however, agree with the Court of Appeal (both the majority and the minority) that the Crown used the evidence at trial in a manner that suggested it was evidence on the ultimate issue of Mr Kuru's knowledge of the plan in this case.[224] Indeed, the Crown placed primary reliance on it. Even without the Crown using the evidence in this way, I consider the evidence was still likely to have been understood by the jury as an opinion on the ultimate issue they had to decide,[225] and thus its admissibility must be carefully assessed in terms of ss 7, 8 and 25.[226]

[187] First, I note that, if the evidence was *not* an opinion on the ultimate issue of Mr Kuru's knowledge of the plan, it is difficult to see how it was relevant at all.

[188] Secondly, as I understand the position, Detective Inspector Scott's evidence was directed, when first formulated, to a plan to shoot Mr Ratana. However, the plan as alleged at trial did not involve any injury to Mr Ratana but only damage to his property.[227] There was also not the degree of organisation alleged by the Crown.[228]

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223 In this regard I agree with the comments of the majority above at [56].
224 See above at [125]–[127].
225 In line with the minority view in *Diaz*: see above at [173].
226 See above at [151] and [160]–[173].
227 See above at [118]–[119].
228 See above at [121]; and below at [305]–[306].

I doubt that a plan of this nature is what Detective Inspector Scott meant by "a (serious) organised gang crime against another gang". I note his characterisation of violence in confrontations between Black Power and the Mongrel Mob as being "extreme".[229] There was obviously a risk, given that firearms were present, that they would be used, but I accept Mr Kuru's submission that this did not elevate the confrontation much beyond what had earlier occurred between Mr Ratana and other Black Power members, where there had always been a possibility of escalation. On this basis alone, the challenged part of the evidence was not relevant or substantially helpful.[230]

[189] I consider, however, that there was a more fundamental problem with the challenged part of Detective Inspector Scott's trial evidence, even as modified by the pre-trial ruling. Detective Inspector Scott's evidence was, as the minority said in *Sekhon*, merely the "Crown's theory of the case cloaked with an aura of expertise".[231] The evidence bears some relationship to the impugned evidence in *Sekhon*, to the extent that it relied on Detective Inspector Scott's experience of other cases.[232]

[190] I see this case as analogous to *R v Abbey*.[233] In that case, the jury had been given the building blocks (the three possible meanings of the tattoo) and the proposed additional evidence relating to the ultimate issue was unnecessary. As in *Abbey*, the building blocks were already present in this case. The jury, having been told about the roles of president and sergeant-at-arms, could themselves have considered whether the inference should be drawn, on the basis of the evidence, that Mr Kuru knew about the plan. The description of the essential nature of the gang roles was sufficient. Jurors would also have sufficient common knowledge of other hierarchical organisations to be able to consider for themselves whether to draw the inference of knowledge which the Crown urged them to draw.

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229 See above at [114]. Incidentally, although it was not challenged before us, I have concerns about whether this part of the evidence was properly admitted, given it was the particular encounter with Mr Ratana that was at issue and the fact that the plan which the Crown asserted to exist did not involve any planned injury to any person.

230 I agree with the majority that there was a danger that the jury would have understood Detective Inspector Scott to be opining on the seriousness of the alleged offending in question: above at [57].

231 See above at [168].

232 As I have noted above, *Sekhon* was approved by the Privy Council in *Myers*: see above at [154].

233 See above at [161]–[165].

[191] As I note above, ultimate issue evidence will not be substantially helpful if the jury has the ability to come to its verdict on the basis of other admissible evidence and/or matters of common knowledge.[234] Like the hypothetical question in *R v Abbey*, Detective Inspector Scott's opinion on the likelihood of a president knowing about a contemplated gang attack on a rival gang member was not necessary and therefore not substantially helpful.

[192] In addition, much of the evidence given by Detective Inspector Scott was "boiler plate" and not related to the particular issues at trial. It was thus irrelevant and should not have been led.[235]

Section 8

[193] Further, there was a real danger that the jury would put undue weight on Detective Inspector Scott's evidence on the ultimate issue given his position as a senior police officer. This engages s 8 of the Evidence Act.[236] The fact that the defence used the evidence to resist the murder charge does not assist.[237] The defence submission at trial emphasising the haphazard timing of protective measures taken after the attack could still have been made without the impugned part of Detective Inspector Scott's evidence and with equal force.

[194] Further, in contrast to *Poutai* where there was other direct, incriminating evidence of the accused's role,[238] the rest of the Crown case against Mr Kuru consists of strands of overlapping circumstantial evidence, as discussed further below. This heightens the potential unfair prejudice caused by Detective Inspector Scott's evidence, and also reduces its substantial helpfulness.

[195] More generally, as well as being irrelevant, much of the general evidence given by Detective Inspector Scott was highly and illegitimately prejudicial.[239]

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234 See above at [151]–[152].

235 I agree with the majority that "[b]road-ranging discussions of gangs, their culture and their history should not be admitted simply by way of background": above at [60].

236 See above at [159].

237 See above at [137].

238 See above at [157].

239 In this regard I agree with the reasons of the majority above at [59].

Conclusion

[196] Applying the principles set out above, I do not consider that Detective Inspector Scott's evidence about the likelihood of a president knowing of "a (serious) organised gang crime against another gang" and the reasons given for this view were substantially helpful under s 25.[240] As such, I find that the evidence was not admissible. I also find that the evidence should have been excluded under s 8.

[197] I agree with the majority that appropriately limited and qualified evidence as to the role of the gang president (and I would add of a sergeant-at-arms) would be admissible.[241] I also agree with the majority that much of the other evidence given by Detective Inspector Scott was also inadmissible as irrelevant and illegitimately prejudicial.[242]

[198] I agree with the summary in the reasons of the majority.[243]

Should the appeal be allowed on this ground?

[199] I accept Mr Kuru's submission that Detective Inspector Scott's evidence became the focus of the Crown case. As Mr Kuru points out, the first four (transcribed) pages of the Crown's closing statement were taken up by discussion of Detective Inspector Scott's evidence, and the prosecutor referred to the evidence as the "lens" through which the jury should look at the case.[244] In addition, when urging the jury to conclude that Mr Kuru must have been involved in the attack, Detective Inspector Scott's evidence about the likelihood of a leader knowing about a plan to target a member of a rival gang was consistently referred to in order to back up that submission.[245] That his evidence was a focus of the Crown case is illustrated by the fact that the Judge in the summing up put Detective Inspector Scott's evidence as the second of the five strands relied on by the Crown.[246]

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240 I accept that there may possibly have been ways in which these reasons could have been reframed so that they were not related to the inadmissible opinion evidence, but that did not occur here.
241 See the reasons of the majority above at [64] and my reasons above at [182]–[185].
242 Above at [59]–[60].
243 Given above at [64].
244 See above at [130].
245 Detective Inspector Scott's evidence was also the point with which the Crown began its closing, and the first point it touched on when it summarised its conclusions at the end of its closing.
246 See below at [251].

[200] This means that a focus of the Crown case was on evidence that was inadmissible. There must therefore be a real risk that the jury relied on it in order to come to their verdict. As noted above, and as I discuss further below, the rest of the Crown case was circumstantial, with no direct evidence of Mr Kuru's involvement.

[201] I do not consider the trial Judge's directions removed the risk of improper reliance on Detective Inspector Scott's evidence. It is true that the trial Judge was alive to some of the concerns I have identified in this judgment.[247] She stressed to the jury that Detective Inspector Scott's evidence was "generalised" and said nothing specific about Mr Kuru, and that it was for the jury to decide on the facts of the case. I do not consider, however, that this direction was sufficient to remove a real risk that the jury improperly relied on Detective Inspector Scott's evidence. The degree to which the evidence was relied on by the Crown, and the otherwise circumstantial nature of the case, left such a risk open despite the direction.

[202] In these circumstances, I find that the admission of Detective Inspector Scott's evidence was an error that "created a real risk that the outcome of the trial was affected".[248] As such, the inclusion of the impugned evidence led to a miscarriage of justice, meaning that the appeal must be allowed on this ground.

Unreasonable verdict

[203] The final question is whether the verdict of the jury was unreasonable. I assess this on the basis of the admissible evidence (that is without the inadmissible parts of Detective Inspector Scott's evidence). If the verdict was unreasonable, then a verdict of acquittal must be entered because no reasonable jury could have been sure beyond reasonable doubt that Mr Kuru was guilty.

[204] I start with the legal test and then discuss the evidence relating to the role of Mr Kuru at trial and set out the issues as identified by the trial Judge in her summing up. After that, I provide summaries of the decision of the Court of Appeal and the

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247 See above at [117].
248 Criminal Procedure Act, s 232(4)(a).

parties' submissions. I then assess whether or not the verdict reached was unreasonable.

The law

[205] The test is straightforward: "A verdict will be … unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt".[249]

[206] This Court in *R v Owen* approved the following aspects of the Court of Appeal's earlier decision in *R v Munro*:[250]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) An appellant who invokes s 385(1)(a) [of the Crimes Act] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[207] In *Munro*, unlike in *Owen*,[251] the Court of Appeal held that the verdict was unreasonable following a detailed review of the evidence.[252] The detailed review was required because the challenge to the verdict was based on the evidence as a whole

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249 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [87] per Glazebrook, Chambers, Arnold and Wilson JJ as approved in *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [15].

250 *R v Owen*, above n 249, at [13].

251 In *Owen*, this Court held that the jury was entitled to accept the complainant's evidence and to conclude that, if the defendant had a belief in the complainant's consent, it was not on reasonable grounds: at [31].

252 *R v Munro*, above n 249, at [229] per Glazebrook, Chambers, Arnold and Wilson JJ and [236] per Hammond J. This was after the appellant had pointed to a sufficient foundation for the submission that the verdict may have been unreasonable: at [89] and [96].

rather than on particular points in the evidence.[253] The contest in that case was largely based on the evidence of three expert witnesses (two for the Crown and one for the defence), but there was also an eyewitness account and other supporting evidence.

[208] The Court recognised that there could be cases where, "despite any gaps or inconsistencies in the Crown case, a reasonable jury was entitled to reject contrary evidence and to consider guilt proved beyond reasonable doubt".[254] In the case before the Court, however, there were a number of aspects of the Crown case that were either unsupported by the evidence or for which "the evidence … was at least equally consistent with the defence case".[255] It was held that this was not a case where the jury was simply entitled to reject the evidence of one expert and accept that of another.[256] The Court held that, on the basis of all of the evidence, there was no "rational basis for the jury to have rejected the defence version of events as a reasonable possibility".[257]

[209] In Mr Kuru's case, there is little disagreement between the parties as to the movements of the relevant individuals on the day of the shooting. There are therefore very limited issues of credibility. I have not therefore have had to consider the type of issues that were before the High Court of Australia in *Pell v The Queen*.[258] The competing positions of the parties, both at Mr Kuru's trial and on appeal, were and remain based on differing inferences and conclusions that could be drawn from the evidence.

Evidence and submissions on the role of Mr Kuru

[210] As noted above, the plan alleged by the Crown at trial was to intimidate Mr Ratana in order to encourage him to leave the area. Damage to property was contemplated, but it was not alleged by the Crown that the plan was to kill Mr Ratana, or to do him serious injury. However, because it was known that Mr Ratana had a gun, some of the Black Power members took guns with them.

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253 At [233] per Glazebrook, Chambers, Arnold and Wilson JJ.
254 At [90].
255 At [194].
256 At [201].
257 At [229].
258 *Pell v The Queen* [2020] HCA 12, (2020) 268 CLR 123.

[211] There was no direct evidence linking Mr Kuru to the plan. The Crown at trial relied on his role as president and Mr Runga's role as sergeant-at-arms, as well as Mr Kuru's proximity and his actions and demeanour on the day of Mr Ratana's death and in the ensuing days.[259]

Role as leader

[212] The Crown submitted at trial that Mr Kuru was an active and strong president and had been behaving as such both prior to and after the shooting. He would have been aware of the incident on 14 August, after which Mr Ratana's presence in Castlecliff would have been "right at the top of business for that chapter". The Crown's position was that the attack on 21 August had taken coordination and planning. Almost half of the patched members of Whanganui Black Power were involved and this "makes it just implausible that their president wouldn't know what they were up to". The view that Mr Kuru knew about the plan was, in the Crown's submission, reinforced by the high position Mr Ratana held in the Mongrel Mob and the risks entailed in attacking him. In its summary of its case the Crown said:

> And then [Mr Kuru], he is the president of this Black Power Chapter and this is very much a Black Power Chapter operation. And we know from Detective Inspector Scott just about how the role of the president, how important that is, the final say on chapter business, the real significance of an attack on a rival gang, all the implications which when you hear about it all makes sense. If you go after a rival patched member, let alone a senior one, all sorts of complications, aftershocks, arise and of course the president would have to sanction that given who Mr Ratana was and given what they were doing to him.

[213] Mr Kuru's trial counsel, Mr Keegan, pointed out in closing that the Crown was asking the jury to infer that Mr Kuru ordered the attack but there was no direct evidence of his involvement. It was also submitted that it was significant that what was planned was an act of intimidation and not a murder plot (the defence conceded that Mr Kuru would have been much more likely to know about an assassination plot). The plan was hastily put together and similar to the previous actions taken against Mr Ratana. It was therefore quite possible that Mr Kuru was unaware of it.

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[259] The Crown, of course, also relied on the ultimate issue evidence of Detective Inspector Scott to support its submissions as to Mr Kuru's knowledge of the plan, but I have already found that this reliance was improper.

Mr Runga's role

[214] The Crown at trial submitted that Mr Kuru's relationship with Mr Runga was also key:

> And of course that relationship between [Mr Kuru] and Mr Runga is important because it's the relationship of the president with his sergeant-at-arms and … as is said by the evidence of Detective Inspector Scott: "Sergeant-at-arms enforces what the president wants." He enforces the orders. So that is significant that it's Mr Runga who's approaching patched members and rounding them up.

[215] The Crown said that Mr Runga was definitely not acting purely of his own accord. Mr Runga did not form a "faction" or engage in "rogue activity" in some kind of "coup" against Mr Kuru. If this were the case it would be implausible for the final "staging point" of the attack to be right outside Mr Kuru's house.

[216] In closing, Mr Kuru's trial counsel contended that Mr Kuru "did not have his sergeant-at-arms by his side". Trial counsel for Mr Runga had contended that another individual (then in prison) had been the sergeant-at-arms rather than Mr Runga.[260]

Proximity

[217] In opening, the Crown had contended that the assembly point for the cars and the foot party before going to 144 Pūriri Street was the gang headquarters at 60 Matipo Street, Mr Kuru's house. The evidence at trial did not back up this submission. The final assembly point before going to Pūriri Street was, as indicated above, the intersection of Tiki and Matipo Street.[261] Nevertheless, the Crown relied in closing on the proximity of the assembly to gang headquarters to support its submission that Mr Kuru must have known of the plan, saying that Matipo Street was the "last staging point before the attack [was] launched".

[218] In closing, Mr Kuru's trial counsel said that there was evidence of Black Power members assembling "anywhere but 60 Matipo Street", including a residence in Pūriri Street associated with another patched Black Power member, Mr Anthony Kuru's

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[260] Before us, counsel for Mr Kuru accepted that the presence of Mr Runga was "a relevant piece of circumstantial evidence" but did not accept that it went far enough to prove Mr Kuru's involvement.

[261] See above at [88].

residence in Harper Street and the address of Mr Runga in Rimu Street. The defence said:

> The reason why the assembly is not happening at 60 Matipo Street was because [Mr] Kuru was not involved in it. He's not involved in putting it together, he's not involved in overseeing its departure, it's not happening from his house. This is an event which has been hastily organised that morning and certainly not before because they would have had no knowledge that [Mr] Ratana was actually there that morning. It is cobbled together.

Mr Kuru leaves home

[219] It was common ground at trial that Mr Kuru had an appointment with the principal of Te Kura o Kokohuia (his son's school) at 10 am.

[220] The Crown submitted in closing that it was "a stroll of about three minutes [to Mr Kuru's son's school] and wouldn't have him leaving his house any sooner than 10 to 10". Mr Kuru's explanation for being on the street at around 9.35 am therefore did not hold water according to the Crown.

[221] Mr Kuru's trial counsel submitted that Mr Kuru left his house to go to the meeting with the principal and that getting to the meeting "a bit early" was "not significant".

Mr Kuru on Tiki Street

[222] It was also common ground that Mr Kuru was seen by two witnesses, Ms Burton and Mr Edwards, going down Tiki Street towards Matipo Street at around the time the shots were fired.

[223] Mr Edwards lived on Pūriri Street, with a view straight down Tiki Street. His evidence at trial was that, hearing gunfire, he looked out and saw a group of Black Power members outside 144 Pūriri Street. He claimed that he saw Mr Kuru, wearing his brown vest, as part of this group, and that he was one of the shooters. Mr Edwards, however, appeared to accept in cross-examination that he was mistaken about seeing Mr Kuru on Pūriri Street. Mr Edwards' police statement only recorded that he saw Mr Kuru walking casually down Tiki Street ahead of a group of three others.

[224] Ms Burton, who lived around 40 metres up Tiki Street, testified that, one or two seconds after she heard the third shot, she went out to retrieve her dog from her front verandah. She saw Mr Kuru on the footpath outside her house, walking from the direction of Pūriri Street. She recalled him saying "strange eh", or something similar. Though she was "pretty certain" that he said something more than this, because he spoke for "about five seconds". Ms Burton described Mr Kuru as "sauntering", "so calm" and "cool as a cucumber". Ms Burton did not connect Mr Kuru with the gunshots and agreed in cross-examination that she could not recall seeing anyone else on the street.

[225] The Crown position at trial appears to have been that Mr Kuru had gone up to Pūriri Street to supervise the intimidation. It was submitted that going up Tiki Street would have been "way off route" for attending the school appointment. The Crown recognised that Mr Edwards had been criticised by the defence as unreliable but submitted that:

> … there is a core of truth to what he says and to the extent it also fits in with the other evidence, you can accept what he says and because he knows these people he's more likely to see them and recall what they're up to.

[226] As to the evidence of Ms Burton, the Crown emphasised her description of Mr Kuru as calm and amused rather than confused. This, the Crown submitted, fitted with Mr Kuru having "sanctioned a shooting of Mr Ratana" and knowing what the shots were.[262]

[227] Mr Kuru's trial counsel submitted that Mr Edwards' evidence should be ignored. Counsel highlighted Mr Edwards' unexpected testimony that Mr Kuru was outside 144 Pūriri Street and was actually one of the men shooting. He also emphasised that Mr Edwards had retracted these claims during cross-examination. Counsel said:

> So this, ladies and gentlemen, is a witness Crown say that to some degree you can rely on. In a very short space of time, he went from telling you that [Mr] Kuru was firing a gun at [Mr] Ratana's house to not even being sure he saw anyone firing a gun at all.

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[262] This comment about Mr Kuru sanctioning a shooting seems to contradict the Crown's alleged plan which only involved intimidation.

[228] Counsel submitted that Mr Edwards' evidence in chief contradicted his own police statement and did not fit with the evidence of other witnesses. For example, Ms Herewini, who knew Mr Kuru, did not recall him being present at the scene. At best, Mr Edwards' original statement to the police could be relied on to place Mr Kuru on Tiki Street calmly walking back to his house.

[229] Trial counsel said that Mr Kuru's statement to Ms Burton was in fact "exculpatory". Mr Kuru seemed calm, exactly as he had appeared when speaking to Ms Burton on other occasions. It was submitted that Mr Kuru went up Tiki Street because he heard shots, as he had said in his police statement: "his detour up Tiki Street is not because he knows what is happening around the corner but because he doesn't". Further, counsel submitted, if Mr Kuru had known about the plan, he could simply have ordered the attack to occur later so his presence at the school meeting would have absolved him from involvement. In addition, if he had organised the meeting with the school principal as an alibi, then it was unclear why he would not simply stick to the alibi and attend the meeting, rather than diverting to go towards the source of the shooting.

Mr Kuru returns home

[230] As discussed above, an eviction was occurring further down Matipo Street. Present were Mr O'Neill (the bailiff), Ms Gibson (the solicitor) and Mr McKenzie (the locksmith).[263] They heard the noise of the shots on Pūriri Street and wondered what had happened. Shortly after the shots, the witnesses saw Mr Kuru coming out from Tiki Street. All three described Mr Kuru as moving quickly. According to Mr O'Neill, Mr Kuru looked behind him up Tiki Street. Ms Gibson did not recall seeing this.

[231] All three in the eviction party said they saw a group of men (the foot party) moving rapidly down Tiki Street, shortly after they had seen Mr Kuru. They described gaps ranging from 10 to 20 seconds between Mr Kuru and the other men. These men made their way towards a car (the Nissan Primera) parked outside 57 Matipo Street.

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263 See above at [83] and [94].

They did not interact with Mr Kuru but got in the car which then turned round and drove back towards the eviction party.[264]

[232] Once the foot party began appearing from Tiki Street, Mr O'Neill began taking the photographs discussed above.[265] There were gaps in this sequence as Mr O'Neill paused to talk to his companions. As the first of the foot party came into Matipo Street, a photograph captures Mr Kuru standing at the front of his property, facing away from the other four men. The Nissan Primera is directly ahead of Mr O'Neill's position, to Mr Kuru's left. Mr Kuru remains in approximately the same position when the fourth member of the following group is seen, but he is not visible when the car is later photographed coming out of the Matipo Street cul-de-sac.

[233] The Crown submission was that, after the shooting, the foot party retraced their steps towards the gang headquarters in Matipo Street, with Mr Kuru arriving back just before:

> What [the eviction party] are seeing is [Mr] Kuru now picking up the pace either fast walking, jogging or I think one witness even said moving so quickly he was trying to keep his trousers from coming down.
>
> That is [Mr] Kuru and I don't even think that's disputed anymore. So he's really heading quickly, trying to put as much distance between himself and the other men on foot, which at least when [Mr Edwards] saw them, they were still quite close together.

[234] The Crown pointed to Mr Kuru's proximity to the Nissan Primera parked outside the gang headquarters. The Crown submitted that Mr Kuru had not counted on meeting Ms Burton or on Mr O'Neill taking photographs. These photographs proved to be "very damning", as they showed:

> … him standing outside his address, watching at least four of the offenders running back. It shows that he knows what's going on and it shows that he remains there until that Primera [drives] away.

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264 This is a summary of the evidence, but the accounts of the three witnesses from the eviction party were not totally consistent either with each other or with two other witnesses, Mr Yandall and Mr Browne. For example, Mr McKenzie initially claimed that he saw Mr Kuru interact with the other men, but subsequently admitted that he might have been wrong.

265 See above at [96].

[235] Mr Kuru's trial counsel put a different interpretation on the evidence of Mr Kuru's return to Matipo Street, as against the Crown submission that (as he put it) "this is some sort of overseeing situation, some sort of welcome home or receiving them". Counsel referred to the O'Neill photographs showing one minute between the photograph of the men returning and the photograph of the Nissan Primera driving off:

> There is no time for anything involving [Mr] Kuru and in fact, ladies and gentlemen, there is no observed interaction between him and them. Not one witness, not the bailiff, not the lawyer, not the locksmith, not [Mr] Yandall, not [Mr] Browne [two additional witnesses of the return to Matipo Street] saw any interaction at all between [Mr] Kuru and those four men. Nothing. One minute and they're gone.

Meeting the next day

[236] Mr Kuru called a meeting of Black Power members the day after the shooting (held at the house of the gang's vice president). According to Mr Friesen, Mr Kuru was present at that meeting, along with the vice president, Mr Runga, two other gang members and potentially others.[266] On Mr Friesen's account, Mr Kuru led the meeting, demanding that he be told what had occurred and who was responsible, saying: "Whoever done that shit up the road needs to [f …] put their hand up." Mr Kuru became increasingly angry when no one responded and then left in a rage.

[237] The Crown argued in closing that Mr Kuru arranged this meeting to insulate himself from suspicion:

> Of course, when [Mr] Kuru goes to the meeting the next day, he plays the ignorance card. He's asking the others: "Who's involved in this? Who's done this thing?" as if he has no knowledge of who's been involved but, of course, we know from the O'Neill photos … he's there watching at least … two [Black Power members] wearing gang patches but all four of them patched members, he knows his club members, he's seen the people come back from the shooting but he's pretending at the club: "I don't know anything about this. This is terrible. What's gone on." Doesn't say: "Well, actually, I can tell you who four of them are because they ran past me as they got into the Primera." He was being very strategic, members of the jury, I suggest.

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[266] Mr Friesen recalled at least six gang members present at the meeting but acknowledged that there were potentially more. Three of the men present at the meeting had not been involved in the shooting to Mr Friesen's knowledge.

[238] In reply, Mr Kuru's trial counsel submitted that it was implausible for Mr Kuru to have gained a large degree of information about what was going on in the moments when he was captured by the O'Neill photographs:

> … my learned friend says that by his position [as captured in the photographs] with his back to [the other gang members captured] in this one minute in time that of course he would soak up, like some sponge, all of the information that he needed so that the next day when he was at the meeting he would know it all and he's performing some sort of ruse [in] contemplation that [Mr] Friesen will become an immunity witness and turn on them.

[239] Trial counsel conceded that Mr Kuru may well have seen who was there, but, while he might have formed the idea that something bad had happened, he did not know the details of what had occurred. The meeting was "absolutely inconsistent with somebody who is dealing with something that he contemplated happening". Counsel emphasised the silence and disobedience of the members at the meeting, and how this showed the *lack* of control Mr Kuru had over them. Further, at the meeting were three gang members who had not been involved in the attack.

Other events following the shooting

[240] On the day of the shooting, at 9.43 am, Mr Kuru called his partner. He texted and made further calls to her several times that morning, arranging for his family to leave Whanganui. At about 2 pm that afternoon, Mr Kuru went through a cordon set up by the police with his children and partner. He spoke with the officers and let them take his photograph. Both officers testified that he was worried about his children's safety and was leaving Whanganui in order to protect them. There is uncertainty whether Mr Kuru left with his family or joined them later. But it is clear that Mr Kuru was in Ōtaki by around 4.30 pm that afternoon. He was back in Castlecliff by midnight.

[241] Mr Kuru also exchanged several other text messages on the day of, and the day following, the shooting. First, after he had passed through the police cordon, he texted: "No. Apparently it was 1 of theirs" and "[t]he cops jzt told me" in response to texted questions asking if he was alright and if the man shot had been "one of ours".[267] Secondly, on the evening of the shooting, Mr Kuru called Mr Fantham-Baker.

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[267] It is not certain who sent these texts to Mr Kuru.

Mr Kuru then texted Mr Fantham-Baker, telling him to stay off the streets and that a meeting had been arranged with the leadership of the Waikato Mongrel Mob, and that Mr Kuru needed to guarantee that nobody was going to "cause any shit".[268]

[242] On 22 August (the day after the shooting) the police conducted a search of 60 Matipo Street to look for evidence "such as firearms, ammunition or weapons". Mr Kuru was present at the address, as were Mr Newton and two other men. Mr Kuru was happy for the police to conduct the search and said that they would not find anything.[269] No evidence was led at trial about anything found during this search.

[243] The police conducted another search of 60 Matipo Street on 27 August, six days after the shooting. At the time, hundreds of Mongrel Mob members were arriving in Whanganui for Mr Ratana's tangi. During this search, the police found some weapons (including knives) and ammunition (but no firearms).[270] There was also a flag with a Black Power symbol extruding from the chimney. None of the weapons were concealed in a sophisticated way. There was also a large wooden fence in a state of construction, which appeared to be a "makeshift barricade".

[244] The Crown in closing submitted that Mr Kuru's actions after the event accorded with his position as leader and were another indication that he must have known about the intimidation plan. After moving his family it was submitted he came back to deal with gang business: "organising, playing the role of president which he is throughout this whole period". The Crown generally presented his actions following the shooting as those of a president in command:[271]

> He's coming back to the pad and back to his area that night and he's talking about arrangements that have been made with Waikato Mongrel Mob

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[268] In one of the texts Mr Kuru also said "Im halfway home. Im going to Rimu 1st stop". The Crown pointed out in closing in connection to this text that a number of Black Power members lived in Rimu Street, and in particular Mr Runga. There were also texts with others about the proposed Mongrel Mob meeting.

[269] He also told an attending Detective Sergeant about wanting to arrange a meeting with the Mongrel Mob to resolve their differences.

[270] Police found a sheathed knife under the front seat of a car in the driveway. In a bedroom they found: "a quantity of shot in a tin", a machete, a hatchet under the mattress, knuckle dusters on the bed, two knives on a table under the front window and another knife on the top shelf of a cabinet. There was also a baseball bat behind the lounge door, another baseball bat in the kitchen, a hatchet in a different bedroom and three shotgun cartridges under the mattress in a further bedroom.

[271] Emphasis added.

> leadership to try and resolve things so he's very much the president on the 21st … he's communicated with his sergeant-of-arms, communicating with his other patched members, he's organising things. Why on earth *wouldn't* he be organising the most significant operation the Black Power Whanganui undertake certainly that day or in that month in response to Mr Ratana? And that activity continues right through up to the 27th of August. He has his patched members helping him fortify defence.

[245] The Crown drew particular attention to the Black Power flag which was flown at 60 Matipo Street, arguing that this was a "bold statement" (given the oncoming presence of large numbers of Mongrel Mob members) that contradicted the idea that Mr Kuru was too fearful of retaliation to order an attack.[272] The Crown also pointed to the weapons found in the second search, including shotgun shells which were "consistent with the waddings or the leftovers of at least two of the gun-shots at … 144 Puriri Street".

[246] The defence in closing pointed to Mr Kuru promptly calling his partner following the shooting, and "trying urgently to get hold of her". This, it was submitted, aligned with the events of the shooting being unexpected for Mr Kuru. Mr Kuru's actions in "frantically" telling Black Power members to leave the streets, organising a peace process and evacuating his family were "cobbled together" responses to an unexpected event.

[247] The defence also drew attention in closing to the differences between the results of these two searches, arguing that the preparations for a "siege" were "simply … a reaction to the bloody catastrophe he has been presented with as president by his own undisciplined brethren". Defence counsel in closing also drew attention to the fact that Mr Kuru did not change his clothes at any point but continued to wear the same distinctive clothing he always wore.

Mr Friesen's evidence

[248] Finally, I note the evidence of Mr Friesen. Mr Kuru points out in his appeal submissions that although "he gave unflinching evidence about his associates' involvement", Mr Friesen's evidence was consistent that Mr Kuru was not involved.

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[272] The defence responded to this argument based on the flag by asking in closing: "what else do you do when you build a fort?"

This consistency extended across the multiple, conflicting, statements Mr Friesen made to the police.

[249] Mr Kuru's trial counsel drew out this point in closing, emphasising just how significant it was for Mr Friesen not to have mentioned anything regarding the role of Mr Kuru. Mr Friesen was in the middle of things and had "absolutely turned forever in a day upon his brethren in Black Power irrevocably", he had "nothing to lose … no reason to hold back". Yet this "total insider", who was "embedded" in the affairs of the gang both before and after the shooting ("a treacherous sponge soaking up information"), said nothing about Mr Kuru's involvement on the multiple occasions he was grilled by the police.[273]

[250] It is worth noting that the Judge said in her sentencing remarks that, "despite their undoubted lack of veracity in their early interactions with Police" she found Mr Friesen and his mother to be "honest and generally reliable witnesses".[274]

Summing up

[251] The issues were framed in the following manner by the trial Judge in her summing up:[275]

> [166] So … question D1 [the first question in the question trail concerning Mr Kuru's involvement] is effectively whether you are sure that [Mr Kuru] was part of that shared understanding or purpose and whether he assisted in prosecuting it … The key point here is that to be part of the shared purpose and to authorise, order or sanction it, to answer yes to question D1 you would need first to be sure that Mr Kuru knew about the plan and about all of it—the plan to go to Puriri Street, the plan to threaten Mr Ratana, the plan to damage his property and the plan to take guns along. You will need to be sure that he participated or helped prosecute the plan by … authorising it or sanctioning it or ordering it.
>
> …
>
> [168] There is of course no direct evidence that Mr Kuru knew about any of this. And, similarly, as Mr Keegan [one of the trial counsel for Mr Kuru] said, there is no direct evidence of when he is supposed to have gained this knowledge or authorised a plan, *how* he conveyed his approval or *who* he

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273 I note here the Crown submission before us that Mr Friesen was too junior to know what had been arranged by the gang leadership: see below at [279].

274 HC sentencing notes, above n 70, at [20].

275 Emphasis in original.

> conveyed it to. So your answer will, again, depend on whether you can be sure that he did, as a matter of *inference*.
>
> [169] The Crown says that you can safely draw that inference from a number of strands of evidence. The Crown relies, in particular, on:
>
> > firstly, the accepted evidence that Mr Kuru was the president of Wanganui Black Power at this time;
> >
> > secondly, the expert evidence of Detective Scott about what being president means in terms of gang activity of this kind;
> >
> > thirdly, the evidence about what happened at Puriri Street, which the Crown characterises as a planned and coordinated attack against a rival gang, and also the consequences such an attack would likely have for Black Power Wanganui;
> >
> > fourthly, the evidence that the Crown says shows the "launch" of the Puriri Street mission near Mr Kuru's home on Matipo Street and the return of some of the men there afterwards; and
> >
> > fifthly, where Mr Kuru accepts that he was on Tiki Street and then outside his home at around the relevant times.
>
> [170] Now, you will immediately be able to see that some of these strands or planks of the Crown case that I've just mentioned are simply accepted facts: that Mr Kuru was the president; that he lived on Matipo Street; the photo showing four of the men returning there; and Mr Kuru's admitted presence that morning on Tiki Street and then outside his home shortly afterwards.
>
> [171] But you might think that those established facts alone, even when woven together, would not be enough to make you sure that he knew about the plan beforehand or that he ordered the attack. So in order to make the circumstantial rope strong enough to make you sure, you might need to look at some of those other [contested] threads too. …

[252] The Judge then went on to canvass in more detail some of the relevant disputed areas.[276] First, she outlined how Detective Inspector Scott's evidence was that, as president, Mr Kuru "would be likely to have known about and would need to have authorised an attack of this kind". She said that the jury needed to ask themselves what kind of attack this was. Was this "a premeditated, organised [and] coordinated attack on a rival gang" caused by Mr Ratana's provocative actions? Or, as the defence submitted, could the conclusion that this was an "authorised confrontation" not be drawn? The Judge noted that:[277]

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[276] I accept the Crown submission that this was "necessarily compressed" but I consider that the Judge captured the relevant points well.

[277] Emphasis in original.

> [173] … [Mr Keegan] referred to the time of day the confrontation occurred, not just broad daylight but a busy time of day when people were going to work or dropping their kids at school—lots of potential witnesses. He referred to the location—a residential area, a busy thoroughfare—and the fact that the man who appears to have been the main protagonist, Mr Anthony Kuru, the man who was shouting the ultimatums about getting out of Castlecliff, was not even wearing a face covering. And, of course, the men had only ascertained that Mr Ratana was even *there* a few minutes earlier. You might remember Remus Edwards' description, I think, of the men on foot leaving the scene—how they were falling over, stumbling in their panic to get away. Hardly a planned military-style operation, perhaps.

[253] The Judge highlighted Mr Keegan's submission that the jury should consider whether this was really different from the "previous random encounters between Mr Ratana and members of the Black Power group". Could this be a "haphazard event", "shit that just happened"? If this was the case then it would be less likely "that presidential sanction for it was either sought, required or given".

[254] The Judge then went on to talk about the "launch" from 60 Matipo Street. She acknowledged that "the evidence might suggest that there was a brief congregation of some kind in the general vicinity of 60 Matipo Street before the men headed off". But "as Mr Keegan said, there were other houses right there on Matipo that were associated with Black Power members including, notably, Mr Fantham-Baker and Mr Friesen, both of whom we know were part of the plan". There might also be other logical reasons for the attack to start and end on Matipo Street: "It's close to 144 Puriri Street but just around the corner out of sight". Mr Keegan also emphasised that "there is no evidence at all that Mr Kuru was even outside at that departure point, that he was part of any such congregation let alone waving them off".

[255] Regarding the return:

> [177] … Mr Kuru, of course, accepts that that is him in the photo standing by his fence as the men on foot came back. Even on the defence case he must have known or suspected that something had happened by then. But, said Mr Keegan, that is it really. You might think it was logical enough for the men on foot to return to Matipo Street. We know that was where the Nissan [Primera] was parked. The Commodore had of course gone off in the other direction. And Mr Keegan says that the bailiff's photos do not show any interaction between Mr Kuru and the returning men. He has his back to them in the photo, I think. There is no other reliable evidence suggesting there was any.

[256] Regarding Mr Kuru's walk up Tiki Street, the Judge said that Mr Keegan accepted that there were two possible inferences the jury could draw. Either Mr Kuru set out deliberately to observe what he had authorised, or he set out for his school appointment and was "distracted by what he heard coming from Puriri Street, the shouting and the banging on the car".

[257] Relevant here would be how far Mr Kuru got up Tiki Street:

> [179] … You will remember what Mr Keegan said about Mr Edwards' reliability on the point that he got as far as Puriri Street, [onto] Puriri Street even, and how that conflicted with what he had told police three years ago and the fact that it does not marry with what any other witness says. And then there is [Ms] Burton, whose evidence suggests he was outside her place pretty much at the time of the third shot. And you can use your common sense as well. If the president had sent off some men to confront a rival gang member, would he want to be close by or would he want to distance himself as much as possible. …

[258] The jury was also told to consider the events that happened afterwards. The Judge drew the jury's attention to Mr Kuru's various texts after the event, the proposed meeting with the Mongrel Mob, the fortification of 60 Matipo Street and the difference between what was found in the two searches. She pointed to Mr Keegan's submission that there would be a high personal cost to Mr Kuru and the gang if things went wrong. The Judge said:

> … the fact that all this activity was required to occur so quickly, almost in a frantic way, after the shooting, supports the defence contention, you might think, that there was never a proper plan and certainly not one that Mr Kuru had sanctioned.

[259] Finally, the Judge dealt with the evidence of the meeting after the shooting:

> [182] … If you believe Mr Friesen's evidence about that meeting, then on its face it supports Mr Kuru's lack of knowledge. Mr Keegan was dismissive of the Crown suggestion that it involved some kind of elaborate ruse by Mr Kuru[,] that he really did know what had happened but, with a prescient eye to Mr Friesen becoming a Crown witness [sometime] in the future, he engaged in an elaborate charade.

Court of Appeal decision

[260] The Court of Appeal majority held that the jury's verdict was not unreasonable. The majority first discussed the two rejected applications for discharge under s 147 of

the Criminal Procedure Act — one application was pre-trial,[278] the other at the conclusion of the Crown case.[279] The majority noted that there "is some overlap" between the tests under s 147 and the test for an unreasonable verdict.[280] The majority concluded that the jury's verdict was not unreasonable because the jury could reasonably have inferred:[281]

> (a) Mr Kuru would have had knowledge of major activities of members of the Black Power in Whanganui by virtue of the fact that he was president of the local chapter of Black Power.
>
> (b) Mr Kuru would have known about the ongoing confrontation between members of Black Power and Mr Ratana over him living in Black Power territory and that there had been an incident the previous week during which Mr Ratana caused members of Black Power to back off from their attempts to intimidate him.
>
> (c) Mr Kuru would have been likely to have seen Black Power members assemble in Matipo Street outside his house and realise they were planning on heading towards the house in Pūriri Street where Mr Ratana lived. He would also have anticipated that Black Power members were carrying weapons to counteract the possibility of Mr Ratana again producing a firearm.
>
> (d) The attack on Mr Ratana was planned and, to some degree, coordinated.
>
> (e) Mr Kuru was in Tiki Street before the shots were fired. His presence in Tiki Street involved him making an unnecessary detour from walking to his son's school.
>
> (f) He was in Tiki Street because he anticipated trouble and he was keeping a supervisory eye on the members of his chapter, albeit from a distance.
>
> (g) By being present in Tiki Street, Mr Kuru knowingly encouraged Black Power members to carry out the attack on Mr Ratana.
>
> (h) Mr Kuru's conduct during the Black Power meeting on 22 August during which he expressed anger over the shooting of Mr Ratana was an effort by him to deflect attention away from his conduct the previous day.

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278 Pre-trial discharge decision, above n 108.

279 The trial Judge made her ruling on 16 November 2021 and the reasons were issued later: *R v Kuru* [2023] NZHC 129.

280 CA judgment, above n 68, at [41] per Collins and Muir JJ.

281 At [47].

[261] In dissent, Cull J gave two reasons for finding the jury's verdict unreasonable besides the effect of Detective Inspector Scott's evidence. First, there was "no direct evidence that Mr Kuru knew of or participated in the common purpose or plan".[282]

[262] Secondly, she was of the view that "the strands of circumstantial evidence, when taken together, lacked probative value to the [criminal] standard".[283] She said:[284]

> [94] I depart therefore from the reasons of the majority at [47] as to why they concluded the jury's verdict was reasonable. The knowledge imputed to Mr Kuru of the activities of the local chapter of Black Power and the previous incident with Mr Ratana may well have likely been known to Mr Kuru but there is no evidence that Mr Kuru was involved in that incident, or that he co-ordinated the previous attack on Mr Ratana; his presence in Tiki Street could not have "knowingly encouraged" the others as there is no evidence he was seen by them; and the others did not assemble outside his house but nearby. The jury would have had to engage in speculative reasoning, with respect, that Mr Kuru "*would have been likely* to have seen" (emphasis added) the assembly in Matipo Street and "realise that they were planning on heading towards Mr Ratana's house"; that he "*would have also anticipated* [they] were carrying weapons" (emphasis added), that "he anticipated trouble" and "was keeping a supervisory eye on the members of his chapter", as the language itself suggests.

[263] In summary, she said that:[285]

> [95] … Mr Kuru was not present at the scene of the shooting; the defendants did not collect outside *his* house (at 60 Matipo Street) but outside a nearby defendant's house at 55 Matipo Street; the plan was hastily formulated on the morning of the attack; there was no evidence that he communicated with the other defendants before the event; no evidence that there were arrangements put in place with Mr Kuru's knowledge of the attack; no evidence that he knew or saw any weapons being taken; and nor was he with the other defendants, who admitted they had a common intention, before they departed for Pūriri Street. The evidence falls well short of proving that Mr Kuru knew of the plan, foresaw that an unlawful shooting was a probable consequence, and sanctioned the plan.

Submissions of Mr Kuru

[264] Mr Kuru submits that, in the absence of direct evidence, the Crown relied on several strands of circumstantial evidence:[286]

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282 At [86] per Cull J dissenting.
283 At [89].
284 Emphasis in original.
285 Emphasis in original.
286 Emphasis omitted.

(a) Assembly: On the morning of the attack, Black Power members allegedly assembled outside Mr Kuru's house at 60 Matipo Street.

(b) Observation point: From there, this group made their way towards Mr Ratana's residence. Mr Kuru was not part of the group, but allegedly followed from a distance to an "observational point".

(c) Return to Matipo Street: Shortly after the attack, Mr Kuru was observed on Matipo Street. The Crown alleged that he was following the co-offenders and oversaw their return.

(d) Role of the gang president: [Detective Inspector] Scott provided expert evidence that a serious organised gang crime against another gang "would likely occur with the sanction of the president".

[265] It is submitted that the evidence of various Crown witnesses favoured the initial assembly occurring at locations other than 60 Matipo Street.[287] The evidence of Messrs Friesen and McKenzie, and Ms Parker, supported a brief assembly on the corner of Tiki and Matipo Streets, but none of these witnesses saw Mr Kuru.

[266] It is also submitted that Mr Kuru's presence on Tiki Street was entirely explicable because of his meeting with the principal of Te Kura o Kokohuia at 10 am. Although the most direct route from Mr Kuru's house to the school is directly along Matipo Street, it is entirely plausible for him to have been diverted by the noise from the confrontation at 144 Pūriri Street. Several witnesses gave evidence about the loud noise before, during and after the attack. For example, Witness H testified that multiple male voices were yelling gang slogans as they walked along Pūriri Street. Ms Herewini yelled back at the Black Power members, telling them to "[f …] off" and "[f …] off [n … s]". The shouting continued as the men approached Mr Ratana's car and struck it loudly with poles and batons.[288]

[267] This noise was heard by witnesses on Kōwhai Street and Maire Street.[289] As Mr Kuru was "much closer", it is submitted that he would have without a doubt

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287 See above at [217]–[218].

288 See above at [88] and [91].

289 See above at [93]. Mr Kuru describes the witness on Maire Street as "over a kilometre away". The relevant witness agreed during cross-examination that he was "perhaps … a kilometre" from 144 Pūriri Street, but, when giving his location on the map in examination in chief, he put himself around the middle of Maire Street — which appears to be roughly 700 metres away. It is also relevant to note that the witness on Maire Street only described hearing the yelling *after* the shots.

heard the altercation brewing.[290] Given his role as gang president, it is submitted that it is entirely reasonable that he would have ventured towards the origin of the noise. As the Crown was unable to negate this possibility on the available evidence, Mr Kuru's presence on Tiki Street was not "proof" that he had prior knowledge of the attack.

[268] It is submitted that Ms Burton's testimony placed Mr Kuru outside her house in Tiki Street immediately after the third shot.[291] He was not with the foot party. Nor was he running. His comments to her were consistent with a genuine lack of knowledge. The evidence showed no interaction with the other gang members when he returned home.[292]

[269] In addition, it is said that there can be no suggestion that Mr Kuru was on Pūriri Street at any point. The scene witnesses confirmed this, including Ms Herewini, who said that Mr Kuru (whom she knows) was not present. Mr Friesen's testimony that Mr Kuru was not involved and about the meeting the following day is also, in Mr Kuru's submission, properly seen as "obstacle evidence" that created a reasonable doubt of guilt.[293]

[270] It is submitted that the first three strands of the Crown's case were totally unsupported by the evidence. Therefore, the jury must have relied on the fourth strand (Detective Inspector Scott's evidence) to conclude that Mr Kuru sanctioned the attack. This was not a permissible basis to find Mr Kuru guilty, particularly because his evidence on the ultimate issue was not admissible. As such the jury's verdict was unreasonable.

[271] It is also submitted that the evidence of Mr Kuru's actions after the attack, including evacuating his family, securing gang headquarters and his conduct at the meeting, strongly supported the view that he did not know of the plan beforehand. If Mr Kuru had known about the attack beforehand, he would have also known that there

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290 I note that the witness on Kōwhai Street described himself as between 50 and 100 metres away, compared to the distance of roughly 242 metres separating 60 Matipo Street and 144 Pūriri Street: see above at [93].

291 See above at [224].

292 See above at [231].

293 Citing *Pell v The Queen*, above n 258.

would likely be retaliation against his family. With this knowledge, he would have moved his family to a safe location prior to the attack.

Crown submissions

[272] The Crown submits that there was a clear pathway to a guilty verdict on manslaughter. Mr Ratana's presence in Castlecliff, a Black Power suburb, was provocative. It was commonly known that he carried a gun and had already used the weapon to disrupt an earlier intimidation attempt. It was reasonable to infer that Mr Kuru was aware of these matters because of his seniority in Black Power Whanganui, his proximity to Mr Ratana's residence, and his house being the gang's headquarters, as well as the role of Mr Runga as sergeant-at-arms.

[273] Interpreting the evidence along these lines, it is submitted that the jury could reasonably infer the existence of a plan to intimidate Mr Ratana where he was residing, and that Mr Kuru was party to that common unlawful purpose. If Mr Kuru and Mr Runga had agreed on this course of action, that would be sufficient. From the point of agreement, and in conformity with their roles, it could be left to Mr Runga to determine how and when the confrontation would occur. As a gang leader, Mr Kuru was unlikely to be in the thick of the fray, but it is submitted that he did put himself closely on the margins.

[274] The Crown also points to the fact that Mr Friesen gave evidence that, a few days before the shooting, Mr Runga foreshadowed the use of violence against Mr Ratana and showed other members his gun. This happened outside Mr Kuru's house. The Crown submits that this shows how readily the president and sergeant-at-arms could confer on the subject.[294]

[275] In the Crown's submission, Mr Kuru's conduct on the day of the shooting confirmed his involvement in the intimidation attempt. A foot party and the members in cars were seen near 60 Matipo Street just before going to 144 Pūriri Street. Mr Kuru tailed the members on foot. His cover story (that he was walking to an

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[294] I note, however, that there is no evidence that Mr Runga discussed the gun with Mr Kuru at this point or at any point.

appointment at Te Kura o Kokohuia) could easily be rejected, as he did not need to leave for the appointment so early. Further, the evidence of Mr Edwards and Ms Burton indicated that Mr Kuru was already on Tiki Street when the shots were fired (rather than walking up the street when he heard them).

[276] Mr Kuru was not surprised by the events which unfolded. He was unperturbed by the shots, as described by Ms Burton and Mr Edwards. It is submitted that Mr Kuru lost some poise as he turned into Matipo Street and made for his house. He was anxious to keep some distance between him and the gang members behind, not wanting to appear involved with this group because he knew he *was* involved with what they had done. In the Crown's submission, the apparent absence of any inquiry or interaction with the returning members was a significant feature of Mr Kuru's conduct. This implies that what had occurred accorded with what Mr Kuru expected.

[277] The Crown also emphasised the position of Mr Kuru relative to his property and the Nissan Primera in the O'Neill photographs.[295] Either Mr Runga was inside the Primera, awaiting the return of the four others, or he was one of the foot party, who were about to regroup and get into the Nissan Primera as Mr McKenzie described.[296] On either possibility, the end of the incident involves Mr Kuru's sergeant-at-arms and other members returning from a shooting and assembling in front of him.

[278] The Crown submits that Mr Kuru's anger the day after the shooting does not separate him from the common purpose of intimidating Mr Ratana. The confrontation was not the issue. Mr Kuru was untroubled immediately afterwards. Rather it was the killing of Mr Ratana that was a major problem. When Mr Kuru demanded to know who had "done that shit up the road", he wanted the killer to identify himself. Mr Kuru knew who had been involved in the intimidation as most had walked in front of him on their return to Matipo Street.

[279] The Crown draws attention to the evidence given by Mr Friesen that he had remained silent at the meeting because: "I'm not a senior member so I didn't want to get the ones [responsible] into trouble". He went on to say that the club was "always

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295 See above at [232].
296 See above at [231].

quite divided", and that Mr Runga and his generation were tighter than Mr Friesen and the younger generation. The Crown submits that this shows that decisions made about how to respond to Mr Ratana were made at a higher level, and that Mr Friesen, as a junior member, was expected merely to follow the orders given. [297]

[280] On the Crown's submission, Mr Kuru's leadership of the gang was evident once he knew of Mr Ratana's death. It was shown in his actions fortifying 60 Matipo Street, giving instructions to his members and attempting to manage the response from the Mongrel Mob. It would be strange, the Crown submits, if the consequences of the death were his business, but not the dangerous conflict which had caused it.

[281] Overall, it is submitted that there was a strong case for party liability. It was reasonable for the jury to conclude, based on the evidence of his actions, that Mr Kuru was part of the common unlawful purpose of intimidating Mr Ratana at his home. Indeed, it is submitted that Detective Inspector Scott's evidence on gang structures had limited work to do.

My assessment

[282] I must deal with this ground of appeal taking into account only the evidence that was admissible. This will include the evidence of Detective Inspector Scott as to the role of a president and that of sergeant-at-arms (assuming it was suitably qualified, see above at [182]–[184]). But it will not include his opinion on the likelihood that a president would have known about and sanctioned "a (serious) organised gang crime" against a rival gang member.[298]

[283] The Crown would have been entitled, on the basis of the parts of Detective Inspector Scott's evidence that were admissible (namely the evidence as to the role of the president and the sergeant-at-arms), to make the submission it did: that Mr Kuru must have known about the attack and been part of the plan. I comment, however, that, had the only evidence against Mr Kuru been Detective Inspector Scott's

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297 This is a new point raised on appeal.
298 See above at [111]–[115] and [196]–[197].

evidence about the role of the president and the sergeant-at-arms, no reasonable jury could have come to the conclusion (beyond a reasonable doubt) that he did know of and authorise the attack. This means that the evidence of his actions and the inferences the jury was asked to draw from Mr Kuru's actions before and after the shooting were vital. I must therefore analyse that other evidence to decide whether or not the verdicts were unreasonable.

[284] I do so under the headings I have used when discussing the evidence at trial and then make an overall assessment. In summary, I conclude that, without Detective Inspector Scott's evidence on the ultimate issue, the Crown case was in fact very weak.[299] It rested on circumstantial evidence from which the jury could draw two equally available inferences. To decide between them would require impermissible speculation. I agree with Cull J's comments reproduced above at [261]–[263].

Proximity

[285] The Crown submission that Mr Kuru's involvement can be inferred from the assembly near his house in Matipo Street does not stand scrutiny. I note the evidence of other meetings of Black Power members elsewhere in the area.[300] While I accept the evidence of a brief assembly on the corner of Tiki and Matipo Streets after the arrival of the bus had disrupted the first attempt, and that the foot party set out for 144 Pūriri Street from there, there is no evidence that Mr Kuru was present. In fact, there is positive evidence *against* this: none of the witnesses of the gathering claimed to have seen him.[301]

Mr Kuru leaves home

[286] The Crown relied on Mr Kuru being out on the street by 9.35 am. It accepts that Mr Kuru had an appointment at his son's school but says that the jury could eliminate that as a reason for his being on Matipo Street, as he would have been unreasonably early for his appointment.

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299 This is reflected in the trial Judge's assessment, set out above at [117], that Detective Inspector Scott's evidence was "quite an important plank of the Crown case".

300 See above at [218].

301 See above at [265].

[287] While I accept that, had he gone directly to the school, this would have taken only some five minutes (at most), I do not accept the submission that leaving some 15–20 minutes early to make the appointment could automatically lead to the conclusion that he must have left the house because he knew about the plan.[302] Some people like to be early for appointments. Some people like to leave leeway for unexpected delays (for example meeting a friend or neighbour on the way). Mr Kuru being early therefore is not in itself sufficient to reject, as a reasonable possibility, that his explanation may have been true.

[288] There is also the fact that it was common ground that it was a genuine school appointment that Mr Kuru had apparently booked. It is unclear why he would book a school appointment as an alibi, only to leave early and not attend the appointment. If Mr Kuru had planned the intimidation, and wanted to use the school appointment as cover, I accept his submission that he could simply have orchestrated the attack to occur while he was at the appointment.[303]

Mr Kuru on Tiki Street

[289] I note first that, while the Crown case was not dependent on Mr Kuru being present on Pūriri Street, there is no evidence, besides that of Mr Edwards, that he was there, or in the company of any of the foot party at any time before, or indeed immediately after, the shooting. The jury could not reasonably have relied on the statement by Mr Edwards in his examination in chief that he saw Mr Kuru with the group of Black Power members outside 144 Pūriri Street, given that he retracted his evidence in cross-examination and gave evidence at trial contrary to his earlier police statements.[304] Ms Herewini (who knew Mr Kuru) did not see him there, and Mr Friesen (whom the trial Judge found credible) stated that he was not part of the group.[305] Ms Burton also did not see him with the rest of the foot party,[306] and the

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302 This is assuming that I accept the Crown submission that he was out on the street by 9.35 am and did not need to leave his house any sooner than 9.50 am: see above at [220]. Defence counsel had submitted in closing that he had likely left home near to 9.40 am, but this timing does not seem to accord with the agreed statement of facts, which had 9.35 am as the time of the fatal shot: see above at [94].

303 See above at [229].

304 See above at [223].

305 See above at [248]–[250].

306 See above at [224].

eviction party described gaps of between 10 and 20 seconds between seeing Mr Kuru and those on foot.[307]

[290] Putting the claim that Mr Kuru was on Pūriri Street to one side, I now consider his presence on Tiki Street. The Crown makes the point that Tiki Street was not a direct route to the school and therefore that his appointment with the principal did not provide Mr Kuru with a reason for being outside Ms Burton's house, coming back down Tiki Street around the time of the third gunshot.

[291] Mr Kuru's statement to the police said that he was "on [his] way to a meeting at [his] son's school … when [he] heard the gun-shots". The implication from this statement is that he went up Tiki Street because he heard the shots. I also note Mr Kuru's submission before us that the noise preceding the shots could have drawn him up Tiki Street. There would also have been an interval between the fatal shot and the covering shots, although this was probably a matter of seconds.[308]

[292] While Mr Kuru's presence on Tiki Street is suspicious, particularly because he was seen by Ms Burton walking back towards Matipo Street at the time of the third shot, I consider that the jury could not discount as a reasonable possibility that he had been drawn up Tiki Street either by the yelling or by hearing the first shot.

[293] The Crown also relied on Mr Kuru's demeanour when talking to Ms Burton.[309] I consider this is at least as consistent with Mr Kuru knowing about the intimidation plan beforehand as it is with him not knowing. If he knew about the plan, he must have known that something had gone wrong, as firearms had been discharged (which had not been part of the plan). He would have been keen to distance himself from that when interacting with Ms Burton by appearing calm. If he did not know about the plan, then his demeanour and words appear consistent with those of an interested bystander. A third possibility is that he suspected that the shots may have had something to do with Mr Ratana, given that he likely knew where Mr Ratana was residing, but did not know the specific details of what had occurred or that any

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307 See above at [231].
308 Some witnesses said around five seconds. Another said 20 seconds.
309 See above at [224].

intimidation was intended that morning. On this hypothetical, it would not be surprising for Mr Kuru to be keen to distance himself from whatever had occurred.

[294] Ms Burton accepted in cross-examination that Mr Kuru might have said: "That doesn't sound good." Moreover, she was "pretty certain" that he in any event said more than "strange eh", as he spoke for "about five seconds".[310] Given the ambiguity of this evidence regarding what Mr Kuru actually said to Ms Burton, it is unreasonable to put too much weight on the particulars of what he did or did not say. Ms Burton also could not recall anyone else on the street along with Mr Kuru.[311]

Mr Kuru returns home

[295] The evidence of the eviction party indicates that Mr Kuru reached Matipo Street ahead of the foot party and that he sped up to some degree as he was nearing his house.[312] This behaviour is consistent with the views of both sides. His desire to distance himself from what had occurred accords equally, as noted above, with him both knowing or not knowing about the plan beforehand. The same applies to the lack of interaction between Mr Kuru and the returning foot party.

Meeting the next day

[296] It was alleged at trial that Mr Kuru's anger at the meeting was feigned and an elaborate front to hide his involvement.[313] This relies on Mr Kuru believing that someone at the meeting would later agree to give evidence about it.[314] While this is possible, I do not consider that the jury could legitimately have discounted, as a reasonable possibility, that this was simply a genuine meeting and that Mr Kuru's anger was also genuine. In light of these factors, a reasonable jury could not have accepted the Crown submission that the meeting was a ruse.

[297] The Crown submits before us that Mr Kuru's anger was rather directed at the fact that Mr Ratana had been killed. I accept that, if Mr Kuru knew of the plan before,

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310 See above at [224].
311 See above at [224].
312 See above at [230]–[231].
313 See above at [237].
314 It was not suggested to Mr Friesen that his giving evidence had been pre-arranged.

he would want to know who had fired the shot and could have been angry because the shooting of Mr Ratana was not part of the plan. But, equally, his wish to know who had fired the shot and his anger would be just as consistent with not knowing about the plan beforehand. Moreover, on the defence theory that Mr Kuru had not authorised the intimidation, it would still make perfect sense for him to focus the meeting (and his anger) on the killing itself. It was after all the shooting (rather than the bare fact of an unauthorised intimidation attempt) which had adverse consequences for the gang.

[298] I comment that the wording of Mr Kuru's query as described by Mr Friesen accorded more with Mr Kuru not knowing of the plan beforehand. The phrase "that shit up the road" seems more naturally to refer to the events at 144 Pūriri Street as a whole. Also supportive of the defence theory is the fact that three of the members invited to the meeting were not involved in the attack. The trial Judge in her summing up noted that "on its face [Mr Friesen's evidence about the meeting] supports Mr Kuru's lack of knowledge". I do not accept that the presence of these members who had not been involved supports the Crown's interpretation of the meeting. It would be plausible for Mr Kuru to invite uninvolved members if the entire meeting was a ruse but, if the meeting was to confront the shooter, it would have made more sense to invite only those he knew were involved. The presence of uninvolved members at the meeting is in fact more consistent with a genuine lack of knowledge.

Other events following the shooting

[299] Mr Kuru's actions after the shooting could also equally support the contention that he did not know about the plan beforehand as that he did know about it. In both cases his actions could be regarded as attempts to control the fallout from the shooting which, even on the Crown theory of the case, had not been part of the plan. A crisis (like the shooting of a high-ranking member of the Mongrel Mob) will necessitate a high level of involvement from the president, regardless of the level of knowledge they had before the event.[315]

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[315] The defence submission at trial was that the post-shooting response organised by Mr Kuru was "cobbled together": see above at [246].

Overall assessment

[300] I have considered the individual strands of circumstantial evidence relied on by the Crown and have concluded that individually they would not have enabled the jury to consider the charge proved beyond reasonable doubt. The evidence of Mr Kuru leaving early for his school appointment and his presence on Tiki Street would not on their own have sustained the inference (beyond reasonable doubt) that he left 60 Matipo Street not for his appointment with the principal but to oversee the plan. The other actions relied on by the Crown are just as consistent with him knowing as not knowing about the plan beforehand.

[301] I have, however, not yet considered the other two strands of the Crown case: Mr Kuru's role as president and Mr Runga's role as sergeant-at-arms, supported by the admissible portions of Detective Inspector Scott's evidence (assuming that evidence was suitably qualified).[316] The question is whether these factors would have been enough, combined with the otherwise insufficient circumstantial evidence considered as a whole (as it must be), to allow the jury legitimately to have been satisfied beyond reasonable doubt that Mr Kuru knew about and authorised the intimidation plan.

[302] It is important here to establish precisely what level of knowledge Mr Kuru needed to have to be guilty. The Judge said in her summing up that the Crown had to prove:[317]

> … that Mr Kuru knew about the plan and about all of it—the plan to go to Puriri Street, the plan to threaten Mr Ratana, the plan to damage his property and the plan to take guns along. You will need to be sure that he participated or helped prosecute the plan by … authorising it or sanctioning it or ordering it.

[303] The Crown submits before us that Mr Kuru did not need to know all the details of the plan. He did not need to know "for example, that damage to property would be an element or guns would be taken", although (on the Crown's theory that he had authorised the intimidation) he would have had reason to expect the mobilising of more members and that guns would be taken. It was enough, the Crown submits, for the jury to be sure that Mr Kuru must have known about the presence of Mr Ratana

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316 See above at [182]–[184].
317 See above at [251].

and the earlier failed intimidation attempts and authorised a further intimidation attempt which was "bigger than before", leaving the details to his sergeant-at-arms.

[304] I agree that Mr Kuru would have known about the presence of Mr Ratana and likely also the previous intimidation attempts.[318] I do not, however, accept the submission that it would have sufficed for Mr Kuru to have given a general approval for further action (if indeed this could be inferred from the evidence). In the circumstances of this case, I consider the Judge was right to require proof beyond reasonable doubt that Mr Kuru knew of and joined the particular plan. It was especially important that he knew of the part of the plan that involved taking firearms, as that is how Mr Ratana was killed.[319]

[305] It is also important to consider the precise nature of the alleged plan, especially considering the Crown allegations in that regard had changed in the course of the proceedings. The answer to the question of whether it was a planned shooting of Mr Ratana (as originally alleged), a planned intimidation or a hastily organised intimidation will have a direct effect on the likelihood that Mr Kuru knew about the plan.

[306] I do not know whether or not the jury accepted the Crown submission of coordinated planning over the course of about a week or the defence submission of a hastily put together plan on the morning of 21 August. The trial Judge's view was that the plan was hastily conceived on the morning of Mr Ratana's death.[320] This finding was based on her assessment of the evidence given at trial and was the foundation for the sentence imposed.[321] There was certainly a respectable basis on the evidence for concluding that the attack was poorly planned, and the Judge was in the best position to assess the evidence as a whole in that regard. I will therefore examine the case on the basis of the trial Judge's findings on that issue.

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318 The trial Judge in her sentencing notes was also satisfied that Mr Kuru would have had this knowledge: see above at [123].
319 See above at [102]–[103].
320 See above at [121].
321 Sentencing Act 2002, s 24.

[307] There is no evidence (as noted above) of any interaction between Mr Kuru and the other Black Power members on the morning of 21 August.[322] It would therefore have been pure speculation for the jury to decide that Mr Kuru must have nevertheless known about and authorised the plan conceived that morning, including the presence of firearms. This is particularly the case because the plan did not involve any intention to injure anyone but only damage to property. On this theory of the alleged plan, the circumstantial evidence and Mr Kuru's role as president and Mr Runga's role as sergeant-at-arms are insufficient to establish Mr Kuru's involvement beyond reasonable doubt. The more spontaneous and disorganised the plan is conceived of as being, the less weight the idea that Mr Kuru "must have known" about it can carry.

[308] In any event, even if the Crown theory of the genesis of the plan (as arising after the failed intimidation attempt of 14 August) had been accepted by the jury, I do not consider this would have changed the position. The fact that communication between Mr Runga and Mr Kuru may have been easy, and that there had been some discussion between Mr Runga and Mr Friesen outside 60 Matipo Street,[323] does not constitute evidence that there had been communication between Mr Kuru and Mr Runga. There was still no direct evidence of Mr Kuru's involvement and in particular of his knowledge that it involved firearms.

[309] I do not accept the Crown submission made at trial that this was a sophisticated plan, even if it had been conceived, contrary to the Judge's view, earlier than the morning of 21 August 2018. As I have said earlier, I accept the submission made on behalf of Mr Kuru that it was not much different from the earlier intimidation attempts.[324] I also consider it highly significant that the plan, as put forward by the Crown at trial, did not involve inflicting any injury on Mr Ratana.

[310] In these circumstances I do not consider that, even assuming the genesis of the plan was the incident of 14 August, a reasonable jury could have been satisfied to the requisite standard of Mr Kuru's guilt. Suspicion about his involvement, even strong suspicion, is not sufficient.

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322 See above at [285]–[289] and [295].
323 See above at [274].
324 See above at [213].

[311] Had injury to Mr Ratana been part of the plan, the suspicion that Mr Kuru must have known about it and that Mr Runga must have been acting on his instructions would have been much stronger. I do not need to decide whether, had that been the case, it would have been enough to allow the jury to be satisfied, on the basis of the strands of circumstantial evidence considered as a whole, of Mr Kuru's guilt beyond reasonable doubt.

Conclusion

[312] For all of the above reasons I consider that no reasonable jury could have been satisfied of Mr Kuru's guilt beyond reasonable doubt.[325] While appellate courts must be careful not to usurp the function of the jury as fact-finder, this is not a case where there was a plausible route for a reasonable jury to convict Mr Kuru beyond reasonable doubt. There was a total absence of direct evidence against him. The remaining strands of circumstantial and other evidence are either equivocal or otherwise insufficient to establish guilt either individually or considered as a whole. It is therefore not appropriate to order a retrial and a verdict of acquittal must be entered.

Result

[313] For these reasons I agree with the making of the formal orders set out above at [69]–[71].

KÓS J

[314] I agree with the reasons delivered by the Chief Justice, and to that extent with those delivered by Glazebrook J, save in one respect. That concerns the "additional observations" made as to the admissibility generally of Detective Inspector (DI) Scott's evidence on gang structures and behaviour.[326]

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[325] I do not of course know how the jury analysed the case. But it is likely that, in accordance with the urging of the Crown, they relied heavily on the evidence of Detective Inspector Scott as to the likelihood of a president knowing about an attack on a member of a rival gang, which I have now held to be inadmissible. I note that Cull J was also of this view: see above at [126]–[127]. She was also of the view that the evidence was otherwise insufficient to convict: see above at [261]–[263].

[326] Above at [59]–[64].

[315] I agree that DI Scott's evidence that "[i]n my experience a (serious) organised gang crime against another gang would likely occur with the sanction of the president" was impermissible in terms of the prior ruling given by the trial Judge,[327] and on any view impermissible for the reasons given by the Chief Justice at [52]–[58] above. That evidence lacked the essential qualification the Judge's ruling had demanded and invited illegitimate reasoning on a critical issue the jury had to determine.[328] That it was perhaps the strongest evidence on that issue made it worse. It thereby failed each of the relevance, non-undue prejudice and substantial helpfulness tests in ss 7, 8 and 25 of the Evidence Act 2006. I agree its admission likely caused a miscarriage of justice and that, without it, this is that rare case where a jury verdict must be found unreasonable.

[316] As to the other matters related by DI Scott, and the additional observations offered by the Chief Justice, I simply note the following.

[317] First, gangs galvanise public prejudice—not without substantial justification, but misconceptions abound. Gangs are complex and organisationally diverse.[329] As Dr Gilbert said in the brief of evidence referred to by the Chief Justice, gangs have a level of discipline and structure, but "ultimately they are made up of rebellious and difficult to control men". Jurors should not be assumed to have a working understanding of gang structures and behaviour—unlike those of social clubs, sports teams, school committees and church congregations. Suitably qualified and tailored expert evidence on gang structures and behaviour is likely to be substantially helpful to a jury and admissible for the purposes of ss 7, 8 and 25. In my view, that may include expert narrative on gang history and culture, including inter-gang conflict, so long as it is broadly relevant to matters in issue and intended to inform rather than cause prejudice.

[318] Secondly, DI Scott was qualified by experience to give such evidence. That was unchallenged. That he did so from a law enforcement background was a

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327 *R v Fantham-Baker* [2021] NZHC 2632 at [16]–[18].

328 See at [18].

329 Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, Auckland, 2013) at ch 9, referencing not only the organisational and behavioural differences between different patched gangs, but also contrasting the "LA style street gangs" that emerged in the 1990s.

potential bias perfectly obvious to jurors. That did not disqualify him, but meant he had a heightened duty to be scrupulously fair and balanced.[330]

[319] Thirdly, most of DI Scott's evidence was entirely uncontroversial. It elicited no cross-examination by any defence counsel.[331] The passage cited above at [59] of the reasons of the Chief Justice is objectionable for being argumentative, but it is also largely irrelevant and that reality mostly disposes of its prejudicial potential. It is also a rare departure from what otherwise amounted to relative neutrality. The objections advanced by trial counsel centred on the passage referred to above at [315].[332] In my view, that on-the-ground assessment was sound and there is no need here to go beyond it.

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330 *Myers v The Queen* [2015] UKPC 40, [2016] AC 314 at [60]. See also *R v Carter* (2005) 22 CRNZ 476 (CA) at [47]; and *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [199], n 202 per Winkelmann CJ and Williams J citing High Court Rules 2016, r 9.43(2)(b) and sch 4 cls 1–2 for the code of conduct for civil proceedings, which is now also applied in criminal proceedings as a matter of course.

331 Mr Stevenson did not appear at trial, but trial counsel were also eminently capable.

332 *R v Fantham-Baker*, above n 327, at [8] and [18].

APPENDIX

Below is a map showing the main locations relevant to the alleged offending. It is a diagrammatic representation only designed to give a general orientation of the area and is not to scale.