IN THE SUPREME COURT
I TE KŌTI MANA NUI

SC 59/2023

BETWEEN	**MOETU KAITAI**
	Appellant
AND	**THE KING**
	Respondent

SUBMISSIONS FOR THE APPELLANT
2 APRIL 2024

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MAY IT PLEASE THE COURT

I Anatomy of an accident

1. On 10 May 2020 Kelvin Kana was killed by a gunshot to the abdomen from a firearm held by the appellant. The defence at trial was that the shooting was an accident caused by Mr Kana grabbing at the firearm causing it to discharge and making it either an involuntary or, alternatively, an unintentional act.

2. The appellant appealed to the Court of Appeal on the basis Muir J's directions lacked proper explanation as to how the concept of accident related to causation and murderous intent. The Court of Appeal dismissed these complaints saying little would have been served by elaborating on the legal complexities of causation and murderous intent. The Court added that: "in our assessment, the concept of an accident would have been well understood by the jury and in the circumstances of this case (as opposed to others cited to us by Ms Epati) did not require further elaboration".[1]

3. In New Zealand law there have been scarce opportunities to elaborate on how accidents, mens rea, and actus reus may interact in the criminal context. However, a wealth of international jurisprudence points out how accident "is used in everyday parlance" is different to "the nuances that characterize the use of that term in the legal context".[2] Critically, the cases make it clear that where accident is available on the evidence, it must be explicitly linked to the concept of volition and intent.[3] As to the latter, it is insufficient to deal with the general issue of intent without instructing

[1] *R v Kaitai* [2022] NZHC 2438 at [45]: Supreme Court Casebook page 33.
[2] *R v Barton* [2019] 2 SCR 579 at [186]: App Auth V1, page 112
[3] Ibid.

specifically on how accident operates to *negate* intent.[4] This is because "accident is... 'the flipside' to mens rea".[5]

4. It is imperative that juries understand that the same facts, potentially giving rise to an accident, can be relevant in different ways to actus reus and mens rea. A failure to understand how accident is relevant in different ways can undermine a jury's decision. It is also critical that juries understand the differences between murder and manslaughter and how this might be affected by the finding of an accident.

5. The appellant argues the Court of Appeal erred in concluding this was not a case where tailored and careful directions on accident, involuntariness and lack of intent should have been provided. In particular, Muir J telling the jury that possible accidental discharge of the firearm was simply "an issue relevant" to (rather than "negated") murderous intent was a misdirection. A new trial should be ordered.

II A fatal shooting

6. On 9 May Ms Kaitai had been punched to the ground by a male in a garage at 3 Moa Place, Tokoroa.

7. The next day Ms Kaitai returned to the garage at 3 Moa Place, where Mr Kana was playing darts with Jerry-Lee Lewis and Carlos Mihaere. Ms Kaitai was carrying a shotgun in her bag. It was placed under Ms Kaitai's coat or bag on top of a bar table in the garage.

8. An argument ensued between Mr Kana and Ms Kaitai after Mr Kana approached her at the bar table in the corner of the garage. The trial judge, Muir J, considered that Mr Kana was "'in [the appellant's]

[4] *McKenna v R* 2015 NBCA 32 at [27]: App Auth V1, page 154.
[5] *R v Roe* 2009 BCCA 193 at [20]: App Auth V1, page 246.

face" and argumentative.[6] Ms Kaitai demanded that Mr Kana get away from her but he continued to physically confront her.

9. Ms Kaitai reached for the firearm and loaded it. She pointed it at Mr Kana telling him again to "get away from, get away from me".[7] However, the fray continued.

10. There were conflicting accounts of what happened next. At trial Jerry-Lee Lewis said that Mr Kana grabbed the firearm while it was pointed away from him in a vertical position by the appellant and pulled it down towards Mr Kana, "wrestling" with Ms Kaitai for a brief period before it discharged.

11. Mr Lewis' police video interview contended, in contrast, that Ms Kaitai voluntarily brought the weapon down to a position perpendicular to her body and aimed it at the deceased. The deceased grabbed the weapon just before it discharged.

12. Carlos Mihaere also gave evidence at trial that just before the gun fired, he heard swearing and arguing and turned to see the appellant and Mr Kana "tug-of-waring over" the gun.[8] He ducked for cover and did not see the moment of discharge. This was contrasted to his police interview where he did not mention seeing any "tug-of-war" with the gun and only turned to see after the shot was fired.

13. Crown and defence firearms experts could not exclude the possibility of an unintentional discharge, where the force of a person pulling on the end of the barrel could apply pressure to the trigger finger and discharge the firearm. ESR evidence confirmed blood on the grip of the firearm matched that of Mr Kana.

14. Soon after the death, in a police interview, Ms Kaitai said she had tried to push Mr Kana away but he had punched her. She then said:

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[6] *R v Kaitai,* above n 1 at [6]: Supreme Court Casebook, page 25.
[7] Court of Appeal Evidence Casebook, page 46 at lines 6-7 and 72 at lines 5-11.
[8] Court of Appeal Evidence Casebook, page 111 at lines 24-25.

"I didn't mean it." She also said: "I didn't intend, it wasn't my intentions to do that." When asked about taking the firearm to the address, she said "I didn't mean to hurt nobody".[9] In the final part of the interview the officer put to Ms Kaitai that she was seen loading the gun, walking towards the deceased and shot him, the appellant responded "no, no, no, no, no, I'll never do that, no".[10]

III The accident on trial

A The possibility of accident was central at trial

15. Throughout the trial both sides adverted to the possibility of an accident as being important to proceedings.

16. In the Crown's opening, Mr Macklin in the High Court said: "you'll be asked to consider whether you are sure that [Ms Kaitai] meant to pull the trigger that day."[11] The Crown noted that it would call an armourer to give evidence on whether the firearm was prone to discharging accidentally.[12] The Crown reminded the jury that "the time that's relevant to you is when [Ms Kaitai] pulls the trigger."[13]

17. It was clear the Crown recognised that mens rea would be central. Mr Macklin went on to say: "It's really going to come down to that question of intent and whether [Ms Kaitai] intentionally pulled the trigger and whether she intended to cause that very serious bodily injury that any person would have known would be caused if you shot someone at close range."[14] Mr Macklin noted that he had tried to break down the charges into "the simplest of concepts" and on Charge 4 (murder) he added: "I suspect that that's going to require

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[9] Court of Appeal Additional Materials Casebook, page 28 at lines 23.
[10] Court of Appeal Additional Materials Casebook, page 32 at lines 25-32.
[11] Opening of Counsel before Muir J, 15 August 2022, at [3]: Court of Appeal Casebook (CAC) page 82.
[12] CAC page 92, at [32].
[13] CAC page 98, at [50].
[14] CAC page 99, at [51].

you to determine both, best you can, what happened in the garage and what Ms Kaitai meant when she discharged that firearm."[15]

18. Ms Tahana for the defence made clear in her opening that the issues that would need to be decided in respect of the charge of murder was whether Mr Kana's death resulted "from an unlawful act", whether Ms Kaitai was acting in self-defence, and then whether there was "murderous intent".[16]

19. The Crown in its closing acknowledged that accident and intention remained key issues, going so far as to concede that there must be a verdict of manslaughter if the jury could not exclude the possibility of accident.[17] Mr Macklin said: "the fact of the matter is, and you'll see this when you get to the question trail, the questions for you are about her intent when she pulls the trigger."[18] There was then extensive discussion of involuntary and/or unintentional discharge during Mr Jenkins' closing address for the defence.[19]

B A brief summing-up on intention

20. It is striking, then, that Justice Muir's summing-up on intention and accident is relatively compressed. In relation to intention, Justice Muir held that the decision at this stage was whether Ms Kaitai was guilty of manslaughter or murder.[20] The Crown relied on murderous intent in s 167(b) of the Crimes Act 1961, or "reckless homicide".[21] This required an intention by Ms Kaitai to cause Mr Kana bodily

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[15] CAC page 99, at [52].

[16] CAC page 102, at [65].

[17] Closing address of the Crown, CAC page 187, at [78] said: "I note for you and **I concede** this for the Crown, there will only be an intentional body injury if your unlawful act was recklessly pulling the trigger. So, do you remember way back at the start when you picked your unlawful act, if that was pulling the trigger, then you're going to ask these questions. But if it wasn't pulling the trigger, **if something else set the gun off** but it was caused in part because her finger is on the trigger – that careless handling of the firearm – **then there's no intention to cause a bodily injury.** Alright, because that's where the rubber meets the road in terms of murder/manslaughter" (emphasis added).

[18] Crown Closing Before Muir J, 24 August 2022, CAC page 168, at [19].

[19] Closing Address of M Jenkins for the Defence, 24 August 2022, e.g. CAC pages 203, 213 ("inadvertent"), CAC pages 216, 223.

[20] Summing Up of Muir J, 25 August 2022, at [127]: CAC page 256.

[21] At [128].

injury, knowledge by Ms Kaitai that there was a real risk that her actions would cause Mr Kana's death, and the conscious running of the risk that Mr Kana would die as a result.[22] Justice Muir, after noting that murder does not require premeditation, elaborated a little on what bodily injury would be required, how actual knowledge would be inferred at the time of the shooting, what "likely to cause death" means (namely, knowledge of a real and substantial risk that actions would cause death), and what consciously running a risk entails.[23]

21. In just one paragraph, Muir J then said the jury would "need to go back" to the question of an unintentional act: "whether you regard it as a reasonable possibility that the gun discharged as a result of Mr Kana pulling the barrel towards him while Ms Kaitaia [sic] had her finger on the trigger".[24] In the single sentence addressing the impact of accident on intention, Muir J said:[25]

> Even if you were to decide that, viewed in the context of everything that preceded activation of the trigger, Ms Kaitai had committed an unlawful act causing death, if you nevertheless thought it was a reasonable possibility that the gun went off as a result of Mr Kana pulling the barrel towards him, then that would clearly be *an issue relevant* to whether, at the time the gun discharged, *Ms Kaitai intended to cause bodily injury which she knew was likely to cause death*.

22. Muir J summarised the Crown and defence arguments quickly, and then, acknowledging that "the matter is … quite dense", called a break.[26] Compressing the analysis on these matters to a single paragraph, after these matters were given such emphasis by the Crown and defence earlier in the trial, could do nothing other than to

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[22] Above n 20, at [129].
[23] CAC page 257, at [130]–[135] (emphasis added).
[24] CAC page 258, at [136].
[25] At [136] (emphasis added).
[26] CAC page 259, at [140].

suggest that the matters were not worthy of detailed, deliberate attention from the jury.

C The wider summing-up

23. It is worth referring to Justice Muir's earlier discussion of an unlawful act to give a full account of what was said about accident. He noted that there was a need for an act by Ms Kaitai that was a substantial and operative cause of Mr Kana's death.[27] After recounting the armourer's evidence (which could not discount that a person pulling on the end of the barrel of the gun could result in the trigger being pulled inadvertently),[28] Justice Muir explained the Crown and the defence cases on accident. He structured the explanation of the defence case in a way that underscored that the alleged accident followed a series of deliberate acts.[29] He then said:[30]

> If the Crown has not excluded as a reasonable possibility that Mr Kana grabbed the end of the gun, pulled it, that Ms Katai's whole hand did not follow the pulling motion and this put pressure on the trigger and caused it to fire, does this necessarily mean to say that the Crown has failed beyond reasonable doubt to prove Ms Kaitai did something which was a substantial and operative cause of death? That's the question.

24. Examples were given by Muir J of intervening acts that were admittedly extreme: "if the person [after someone loads and points a gun and puts their finger on a trigger] … is then hit by a bolt of lightening [sic] or someone else then takes the opportunity to discharge a gun … you would be likely to find the chain of causation broken."[31]

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[27] CAC page 248, at [88].
[28] CAC pages 248-249, at [90]–[91].
[29] CAC page 250, at [95] (emphasis added): "Mr Jenkins says that *notwithstanding* Ms Kaitai *willingly* picked up the shotgun, *willingly* put a cartridge in the barrel, *willingly* closed the breach and put her finger through the trigger guard, there is an intervening act – Mr Kana pulling the gun initially down but ultimately toward shim – which has caused the trigger to release."
[30] CAC page 250, at [96].
[31] CAC pages 250-251, at [97].

25. Despite the nuanced factual analysis required to settle what caused the gun to discharge, Muir J then said that his "advice" to the jury was "to be careful about too refined an analysis of the 'act' causing death".[32]

26. He again reiterated that if the jury was not persuaded by the Crown to the requisite standard - that the activation of the trigger was **not** caused by Mr Kana - the jury "might wish to consider" all of the preceding voluntary acts of Ms Kaitai, including one which was the subject of dispute.[33] In case the jury might interpret this as leading, Muir J added: "I intend in no way to lead you to any particular conclusion just by referencing some of the issues you might wish to consider …"[34]

27. Muir J observed that the Crown relied on s 53 of the Arms Act 1983 as the unlawful act, which says an offence is committed by a person "who causes bodily injury to or the death of any person by carelessly using a firearm …"[35] He then turned to self-defence and addressed the defence of self-defence as put forward by counsel for Ms Kaitai,[36] including the importance of her having been punched to the ground by a male in the same room the night before without any intervention.[37]

28. Muir J did, as is customary, give a summary of the Crown and defence cases in closing. His Honour noted that the Crown had said there were two paths, a "recklessness pathway" (where Ms Kaitai intentionally shot Mr Kana) which led to murder, or the path of carelessness (where Ms Kaitai presented the firearm at Mr Kana who

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[32] CAC page 251, at [98].

[33] At [98]: "... you might also wish to consider, to the extent you think it is relevant, the fact that the gun had already been uplifted by Ms Kaitai from the table, loaded, the safety switch at some stage disengaged, the gun pointed at Mr Kana before being lifted over Ms Kaitai's shoulder and then returned to face Mr Kana (that is, of course, if it ended up in that position by Ms Kaitai's free action rather than being pulled there from a vertical position by Mr Kana, which is a key issue for you)."

[34] Ibid.

[35] CAC page 251, at [102].

[36] CAC pages 252-256, at [104]–[125].

[37] CAC page 253, at [111].

wrestled with it) which was manslaughter.[38] The Crown had earlier said that the jury must "pick a path".[39]

29. The defence case, in contrast, relied on Mr Lewis' evidence in Court, rather than his video interview.[40] That evidence was that Mr Kana pulled the gun down from a vertical position down to it pointing at his abdomen; and, there was "a struggle" over the gun: "some pulling, some toing and froing."[41] Mr Mihaere had also referred to some brief struggling or wrestling.[42] Methamphetamine use may have impaired Mr Kana's judgment when grabbing at the firearm, according to the defence.[43] The defence said, relevant to the question of what intention Ms Kaitai had, that there was evidence she was upset and full of regret soon after the incident.[44] Justice Muir recounted the defence case that the "discharge was accidental and not a willed act by Ms Kaitai."[45] After going through the defence case on self-defence, Justice Muir returned to intention but said nothing about the possible accident's impact on intention:[46]

> [205] Finally, on the subject of intent, the defence submits the Crown has not made you sure that Ms Kaitai consciously appreciated that there was a real risk that shooting him could cause his death. The defence says her only intention was for Mr Kana to leave. The subsequent events happened quickly, in a matter of seconds and the defence says that to suggest she consciously appreciated this risk flies completely in the face of the description of her demeanour after the shooting.
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> [206] That, Mr Foreman and members of the jury, is a summary of the two cases you heard today.

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[38] CAC pages 265, at [167].
[39] At [168].
[40] CAC pages 268-269, at [183].
[41] CAC page 269, at [186].
[42] CAC pages 269-270, at [187].
[43] CAC page 271, at [192].
[44] CAC page 272, at [195].
[45] CAC pages 272-273, at [198].
[46] CAC page 274, at [205]–[206].

30. After some closing procedural comments, the jury retired for their deliberations. The question trail on intent made no specific reference to accident, or the gun being fired involuntarily – and the effect of involuntary discharge on mens rea.

D Jury questions on intent and manslaughter

31. After just over two hours, the jurors asked a question. It was: "Can we please have the outline of Murderous Intent provided by the judge in his sumation [sic]." The Judge provided [126]–[139] of his summing-up as a stand-alone document. This included the single paragraph on how, when considering intention, the jury would "need to go back at this point" to the question of an unintentional act, and the comment that if the gun had gone off involuntarily "that would clearly be an *issue relevant* to whether, at the time the gun discharged, Ms Kaitai *intended to cause bodily injury* which she knew was likely to cause death …"

32. The second jury question came an hour and a half later and was: "If a manslaughter charge is decided, how do we report / announce that to the court?" Justice Muir wrote: "If the verdict is not guilty [after you are asked about the murder charge] you will then be asked whether you find the defendant guilty or not guilty of manslaughter, in respect of which you will then give your verdict on the (included) manslaughter charge".

33. Shortly after that answer, a verdict of guilty was returned on the murder charge.

E The Court of Appeal decision and Supreme Court leave judgment

34. The Court of Appeal considered several grounds of appeal. The Court found the defence on causing death by unlawful act was fairly presented when the summing up was read as a whole.[47] The defence

[47] *Kaitai v R* [2023] NZCA 184 at [28]: Supreme Court Casebook page 13.

of "involuntary/accidental discharge" was fairly captured, said French J for the Court.[48] The defence was repeated by the Judge as he took the jury through the question trail and in the summary of the cases. Further, "little would have been served by confusing the jury with the legal complexities of causation".[49]

35. The Court of Appeal then considered the argument that more was needed to elaborate on the relevance of unintentional discharge to murderous intent. The Court provided three sentences of reasoning. It reiterated that it did not consider the causation direction was unbalanced and "therefore reject[ed] the premise of the submission that more was required because of the way the Judge had directed on causation".[50] The Court of Appeal added that: "in our assessment, the concept of an accident would have been well understood by the jury and in the circumstances of this case (as opposed to others cited to us by Ms Epati) did not require further elaboration".[51] Justice French also said that more detailed instructions were "unnecessary and potentially confusing".[52] A further appeal ground on Justice Muir's comments on Ms Kaitai's right to silence was also rejected. Accordingly, the appeal was dismissed.

36. The Supreme Court granted leave to appeal in part. The approved question was "whether the Court of Appeal was correct to dismiss the appeal against conviction, so far as it was based on defences of accident, involuntariness and lack of intent." The Court noted that the "primary defence" in the court below had been "one of involuntary actus reus (accident) and lack of intent to injure".[53]

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[48] At [32].
[49] At [33].
[50] At [44].
[51] At [45].
[52] Ibid.
[53] *Kaitai v R* [2023] NZSC 169, at [2].

IV Limited engagement in New Zealand criminal law with accidents – but overseas case law provides a fuller overview

A In New Zealand law there have been scare opportunities to elaborate on how accidents, mens rea, and actus reus may interact

37. There are strikingly few New Zealand reported decisions where judges have offered an extended discussion of how an accident – for example, an accidental shooting or inadvertent discharge of a firearm – might affect the actus reus and/or mens rea elements of an offence. We do, however, have the benefit of extensive appellate discussion in comparable jurisdictions, especially Canada and Australia.

38. A full bench of the Court of Appeal considered a defence of accidental discharge of a firearm in *R v Wickliffe*.[54] Dean Wickliffe had been found guilty and unsuccessfully appealed his conviction. A Governor-General's reference was then made following fresh evidence, a police job sheet recording a conversation with a key witness which appeared to support Mr Wickliffe's defence of accidental discharge. Mr Wickliffe argued that there had been a "reflex, unintended pressing of the trigger by him when he was jolted back against a wall or door frame."[55]

39. President Cooke for the Court found that the verdict was unsafe if based on the view that Mr Wickliffe deliberately shot the deceased and that what had happened fell within s 167(a) or (b) or s 168(1)(a) of the Crimes Act 1961.[56] The Court considered whether there was an alternative foundation for a murder conviction under s 167(d) of the Crimes Act 1961 ('unlawful object' murder). There was some difficulty in discerning the basis on which the jury returned its verdict. The Court found there was a strong basis for a verdict to be returned under s 167(d). Mr Wickliffe had entered a jeweller's shop

[54] *R v Wickliffe* [1987] 1 NZLR 55 (CA): App Auth page 251.
[55] At 60.
[56] At 59.

to conduct an armed robbery, was carrying a pistol that was loaded, had pointed the pistol in the direction of several individuals, and had his finger on the trigger.[57] But the Court could not rule out some reasonable doubt in the minds of the jury and so did not allow the verdict to stand. The Court substituted a verdict of guilty of manslaughter.[58]

40. *R v Paterson* concerned a defence of accidental stabbing.[59] Two arguments were raised at trial: that Mr Paterson had only intended to scare Mr Fey when threatening to kill him with a butterfly knife, not to stab him; and that when a bartender intervened, the victim inadvertently pushed the knife into the bartender.[60] Justice White for the Court of Appeal dismissed the appeal against conviction and sentence.

41. The case is most notable because the Court of Appeal quotes lengthy, considered directions given by Judge Neave to the jury on how the possibility of an accident might have affected both the actus reus and the mens rea of the offence. On causation the Judge said: "If it's at all possible that it was just a pure accident then of course Mr Paterson won't have caused the wounding …"[61] In relation to mens rea, the Judge said: "if it's effectively the situation that Mr Davey's walked on to the knife or Mr Fey has somehow pushed the knife and it's accidentally managed to wound Mr Davey and it isn't being used to try and stab Mr Fey either because that's not what Mr Paterson was trying to do at all or that intention if it did exist had stopped. Then again Mr Paterson won't be guilty …"[62]

42. When the jury asked the Judge about how it should consider the intention possibly being lost and then returning again, Judge Neave

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[57] At 60–61.
[58] At 62.
[59] *Paterson v R* [2014] NZCA 235, [2014] NZAR 855: App Auth V2, page 264.
[60] At [6].
[61] As cited at [9].
[62] Cited at [10].

said: "The focus must be on what is Mr Paterson's state of mind at the time that Mr Davey is stabbed. If he has lost his intention and, even if it comes back later and doesn't have it at the time of the stabbing then the necessary intention hasn't been proved … It's a question for you to determine whether you are satisfied beyond reasonable doubt that at the time of the stabbing Mr Paterson has an intention to stab Mr Fey."[63]

B *Overseas case law and academic commentary has explored in more detail how judges should approach accidents in criminal law, especially in relation to mens rea and actus reus*

(i) Canada

43. There is a wealth of Canadian case law on accidents, mens rea, and actus reus, including in factual circumstances similar to the present: cases involving accidental discharge of a firearm causing death.

44. In *R v Barton*, the Supreme Court of Canada considered the principles governing accidents in a case involving alleging sexual violence.[64] The argument by the defence was that accidental wounds arose on the deceased's vaginal wall during consensual sexual activities. Justice Moldaver for the Court noted a difference between how accident "is used in everyday parlance" and "the nuances that characterize the use of that term in the legal context".[65]

45. An accident can affect the actus reus and mens rea of an offence. In relation to mens rea, "it is obviously essential to consider what the relevant mens rea requirement is in the first place."[66] Mens rea may entail intention to bring about *consequences*, awareness of particular *circumstances*, or objective fault, and an accident may influence these different aspects of mens rea in different ways. Where mens

[63] At [12].
[64] *R v Barton,* at n 1.
[65] At [186].
[66] At [187].

rea requires proof of subjective intent to bring about a consequence, a claim of accident could "negate the mens rea required for conviction."[67] Justice Moldaver noted that "to avoid confusion" trial judges should "focus on the questions of voluntariness and/or negation of mens rea", rather than to concentrate on the concept of an accident.

46. There are multiple further judgments from Canadian provincial appellate courts on accidents, mens rea, and actus reus. Most relevantly, *R v Roe* concerned an alleged accident resulting in the death of a man involving a knife at a petrol station.[68] Justice Newbury for the Court of Appeal for British Columbia held: "… accident is in fact the 'flip side' of mens rea. If an act is done accidentally, it is unintentional and the intent for murder – either the intent to kill or the intent to cause serious bodily harm – may be negated."[69] Her Honour added: "The case-law makes it clear that the concept of accident should be 'linked' to mens rea for the jury where accident is advanced by an accused."[70] An error was made in the case before Justice Newbury: "the trial judge failed to 'crystallize' the question of whether accident negated intention or *mens rea*, and failed to summarize for the jury the evidence relating to that question".[71] The Court of Appeal also underscored the fundamental significance of jury's questions and found errors in answering the jury's questions.[72]

47. An earlier Supreme Court of Canada case, *R v Hughes*, upheld the Court of Appeal of British Columbia's conclusion that it was open to the jury to find that a pistol had gone off by accident – and that

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[67] *R v Barton,* above n 64, at [189].
[68] *R v Roe,* above n 5.
[69] At [20].
[70] Ibid, citing *R v Stevenson* (1990) 58 CCC 464 and *R v Sutherland* (1993) 84 CCC (3d) 484.
[71] At [22].
[72] At [23]–[24].

the trial judge ought to have given directions on manslaughter.[73] In particular: "The learned trial judge ought to have told the jury that they might and ought to find a verdict of manslaughter if they thought the pistol was not discharged by the voluntary act of Hughes, and that Hughes did not anticipate and ought not to have anticipated that his conduct might bring about a struggle in which somebody's death might be caused."[74]

48. The Ontario Court of Appeal applied *R v Hughes* in another case involving accidental discharge of a gun, *R v Tennant*.[75] The Court found: "the learned trial Judge ought not only to have instructed the jury with respect to the meaning of 'accident' as a defence but, after relating the evidence to the specific issues of such defence, should have instructed the jury as to the legal consequences which flowed form [sic] their findings."[76]

49. The Court of Appeal of New Brunswick engaged with these questions in *O'Brien v R*.[77] The reasons given by Ryan JA said simply: "If the shooting were in fact accidental, this would gainsay or rebut an intent to kill."[78] Ryan JA found that the trial judge had confused aspects of self-defence and accident, and concluded: "At no time did the trial judge tell the jury that if the defence of accident prevailed, that is the Crown did not disprove accident beyond a reasonable doubt, that the jury could convict Mr O'Brien of manslaughter."[79] Ryan JA noted that the jury had asked a specific question about murder and manslaughter.[80]

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[73] *R v Hughes* [1942] SCR 517: App Auth V2, page 284.
[74] At [23].
[75] *R v Tennant* [1975] 23 CCC (2d) 80: App Auth V2, page 291.
[76] At [25]. Note, however, the different drafting of criminal codes in Canada and New Zealand, noted in this case at [43].
[77] *O'Brien v R* [2003] NBCA 25: App Auth V2, page 308.
[78] At [39].
[79] At [48].
[80] At [48].

50. In *McKenna v R*, the Court of Appeal of New Brunswick considered an alleged accident similar to the one in this case, involving the pulling down of the barrel of a loaded firearm.[81] The unlawful act alleged was careless use of a firearm, as in this case; the appellant had been convicted of second-degree murder.[82] There is some discussion in the judgment of the directions on acquittal and manslaughter. In a passage of central relevance to this case, it was observed:[83]

> Briefly put, the message which had to be conveyed was that an accident is the unintentional and unexpected occurrence that produces hurt or loss, and the defence of accident in this case related to the absence of intent required for a finding of murder.
>
> … the failure of the trial judge to properly link the concept of accident to *mens rea* in this case constitutes a misdirection which, by itself, calls for a new trial … When the defence of accident is available, it *must* be linked to the concept of intent; it is insufficient to deal with the general issue of intent without instructing specifically on how accident operates to negate intent.

51. Deschenes JA adopted the statement from *R v Sutherland* of when a direction on accident constitutes a misdirection: "While the trial judge stated on a number of occasions that the appellant never intended to kill the victim, it was an accident, he did not at any time instruct the jury that as a matter of law the defence of accident negates or relates to the absence of intent."[84] Deschenes JA also took issue with the directions on manslaughter.[85]

52. Other cases have commented on the relationship between actus reus and accident. In *Primeau v R*, the Quebec Court of Appeal considered the absence of an instruction on how accident may have affected the actus reus in a first-degree murder case involving the

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[81] *R v McKenna,* above n 4, at [2].
[82] That is, murder that is not planned and deliberate: see s 231(2) of the Canadian Criminal Code.
[83] *R v McKenna,* above n 4, at [26]–[27].
[84] At [29], citing *R v Sutherland* [1993] SJ No 442 (CA) at [41].
[85] At [31].

alleged accidental discharge of a firearm.[86] The trial judge had instructed on the impact of accident on intention, but said nothing about the actus reus of murder or manslaughter.

53. Healy JA said it was straightforward that "[a]ccidents are, by definition, not intentional. An accident is not the result of a deliberate choice to engage in specific conduct or to cause a specific result".[87] But Healy JA went on to say: "accident is not only a defence to an element of mens rea. Accident is also a defence to the actus reus of an offence."[88] This is because "[a]ccidents are, by definition, not voluntary".[89] Healy JA noted: "An accident that occurs in the absence of any other unlawful act precludes any criminal liability."[90] But the situation was more complicated where accidents are caused by previously committed offences or "accidents … occur during the commission of an unlawful act".[91] The facts in *Primeau* involved an accident occurring during the commission of an unlawful act. An instruction on actus reus and accident, said Healy JA, would have resulted in "a clear understanding between the possible verdicts of murder or unlawful-act manslaughter".[92]

54. Although it appeared that the jury had rejected that an accident had negated intention, "instructions concerning all matters of defence supported by the evidence would have given the jury a more complete basis on which the jury could evaluate the evidence and the verdicts that were open".[93] Healy JA added: "The effect on the jury of an instruction concerning accident and the actus reus is impossible to assess but it is sufficient for this Court to order a new trial".[94]

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[86] *Primeau v R* [2017] QCCA 1394: App Auth V2, page 384.
[87] At [24].
[88] Ibid (citations omitted).
[89] At [25].
[90] At [27].
[91] Ibid.
[92] At [30].
[93] At [33].
[94] Ibid.

55. The recent decision of the Court of King's Bench of Alberta in *R v Sikora* discussed accident in relation to both actus reus and mens rea, applying *Primeau*.[95] It was claimed that the trigger of a firearm had been pulled accidentally after two individuals had entered a house.[96] Justice de Wit said accident with respect to actus reus "focuses on whether the actions of the accused are in fact voluntary", adding that "[i]n cases involving the discharge of a firearm, the involuntary act usually involves the pulling of the trigger."[97] But there was no evidence of involuntariness in this case. The Judge therefore went on to say: "the defence of accident can also be raised with respect to the mens rea of an offence and in this case the mens rea of murder."[98] Ultimately, in part because of some special circumstances of the case (including the accused's detailed special knowledge of firearms), the Judge found that the mens rea required for murder had been proven beyond reasonable doubt.

(ii) Australia

56. There is also considerable case law in Australia on accident. In *Stevens v R*, the High Court of Australia considered whether and how directions ought to be given in a case arising under s 23(1) of the Queensland Criminal Code, which indicates that a person is not criminally responsible for "an event that occurs by accident".[99] A majority of the High Court (McHugh, Kirby and Callinan JJ, with Gleeson CJ and Heydon J dissenting) found that the trial judge ought to have given such directions. What was alleged was an involuntary discharge of a firearm. The trial judge had given directions on intent, but no specific direction on accident and actus reus.

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[95] *R v Sikora* [2023] ABKB 226: App Auth V2, page 393.
[96] At [14].
[97] At [19].
[98] At [21].
[99] *Stevens v R* [2005] HCA 65, (2007) 227 CLR 319: App Auth V2, page 432.

57. Justice Kirby noted that the defence of accident is relevant to both actus reus and mens rea.[100] Justice McHugh also found an error in relation to directions on manslaughter.[101] Justice Callinan elaborated on the direction that would have been appropriate. This included mention of how accident has "a particular meaning … in the criminal law of this State".[102] Justice Callinan's model direction noted that there was evidence before the jury raising the possibility of accident.[103] It listed that evidence. Justice Callinan then underscored that the accused was not obliged to prove these matters and that the onus was on the prosecution to prove beyond reasonable doubt that the death was not an accident.[104]

58. A very differently constituted High Court of Australia also considered accident in a Queensland criminal context (which does contain very different legislative provisions to New Zealand's) in *Kaporonowski v R*.[105] The case concerned whether the defence of accident (resulting in lack of criminal responsibility) was available. In *Griffiths v R*, a majority of the High Court (Brennan, Dawson, and Gaudron JJ) – again considering accident under the Queensland Criminal Code – found that the trial miscarried because of a failure to acknowledge the burden on the Crown to disprove accident.[106] In issue in *Murray v R*, also concerning an accident and the Queensland Criminal Code, was whether jury directions on burden of proof were adequate in a case about an accident; it was found that more could have been said about burden of proof and a new trial was ordered.[107]

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[100] At [83].
[101] At [32].
[102] At [160].
[103] Ibid.
[104] Ibid.
[105] *Kaporonowski v R* [1973] HCA 35, (1973) 133 CLR 209: App Auth V2, page 475.
[106] *Griffiths v R* [1994] HCA 55, (1994) 69 ALJR 77: App Auth, page 497.
[107] *Murray v R* [2002] HCA 26, (2002) 211 CLR 193. See also discussion of accident by Kirby J at [94]–[101]. Relevant to the summing up in this case and its reference to the selection of alternatively pathways, Gummow and Hayne JJ found that the discussion of choosing one version of events over another was erroneous, because it was for the prosecution to prove elements of the offence beyond reasonable doubt: see [57]. It is noteworthy that Gummow and Hayne JJ write: "In deciding what is the relevant act, it is important to avoid an overly refined analysis". (They say that it is harder to determine a coincidence of actus reus and mens rea if the act is defined too precisely.) Compare [98] of Muir J's

In *Hill v Western Australia*, the Supreme Court of Western Australia considered the defence of accident under s 23B of the Western Australian Criminal Code, and the distinction between causation and accident (in a case involving an alleged assault and a brain infection); the appeal was dismissed after some discussion of the authorities.[108]

(iii) England and Wales

59. There appears to be more limited discussion of accident, actus reus, and mens rea in the law of England and Wales. The oft-cited case on the golden thread that runs through English criminal law, *Woolmington v Director of Public Prosecutions*, concerns accidental discharge of a firearm and murder.[109] The appellant claimed that a gun discharged while he was demonstrating to his wife how he would commit suicide; this led to his wife's death. The trial judge had directed that there was a presumption of murder once it had been shown that a person had died through the act of another, though the judge then went on to say that the Crown had to satisfy the jury that the woman had died at the accused's hands beyond reasonable doubt.[110]

60. Viscount Sankey LC explained that the golden thread through the web of English criminal law was the duty of the prosecution to prove the prisoner's guilt, subject to recognised and statutory exceptions.[111] Viscount Sankey LC went on to say that where it becomes apparent that an act is "unintentional", the prisoner is entitled to an acquittal.[112] The appeal was allowed and the conviction quashed because of the error in the judge's direction.

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summing up in this case: "In this case my advice is to be careful about too refined an analysis of the 'act' causing death."

[108] *Hill v Western Australia* [2015] WASCA 17, (2005) 222 ALR 40: App Auth V3, page 544.
[109] *Woolmington v Director of Public Prosecutions (DPP)* [1935] AC 462: App Auth V3, page 555.
[110] At 465.
[111] At 481.
[112] At 482.

61. In *R v Lamb*, the Court of Appeal of England and Wales considered accidental discharge. A revolver was pointed at a friend in jest and a bullet was apparently fired inadvertently.[113] The defendant claimed that the bullets were not in a position to be fired if the trigger was pulled. No mention had been made of accident by the trial judge.[114] The trial judge had taken the view that the pointing of the revolver and the pulling of the trigger were unlawful acts, and did not want to involve the jury in "the niceties" of the question of what constituted assault.[115] "The general effect of the summing-up was … to withdraw from the jury the defence [of accident] put forward on behalf of the defendant," said Sachs LJ.[116] The verdict could not stand. The conviction was quashed.[117]

(iv) Commentary

62. Questions of responsibility, causation, and will are the subject of voluminous philosophical and other academic commentary. For present purposes, most relevantly: Jerome Hall, in his classical discussion of mens rea and moral culpability, recounts how Hale's work contrasts intention with accident.[118] In a similar vein, the late Justice Simon France writes: "it is the mental ingredient of an offence that distinguishes between accident and crime, between murder and misadventure, between the innocent taking of property and theft. In all these comparisons, the act in each part is the same – it is the mental state that characterises them, and it is the mental element that delimits when the criminal law will be involved."[119]

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[113] *R v Lamb* [1967] 2 QB 981 (CA): App Auth V3, page577.

[114] At 987.

[115] At 987.

[116] At 990.

[117] At 990–991.

[118] Jerome Hall, *General Principles of Criminal Law* (Bobbs-Merrill Co, Indianapolis, 1947) at 148 (in Chapter Five, 'Mens Rea and Moral Culpability'): App Auth V3, page 630.

[119] Simon France, 'The Mental Element' (1990) 20 VUWLR Monograph 3, 43 at 43: App Auth V3, page 662.

V The application of the correct approach to this appeal reveals clear error, justifying a retrial

A Some principles clearly emerge from the case law and commentary

63. The threads of the international jurisprudence can be drawn together to inform the correct approach in this case, and future ones. Seven principles can be simply stated. These should be selected and adjusted depending on the context.

64. First, a judge must assess whether there is a credible narrative of accident to be left to the jury.[120] In this, there must be an "air of reality" in the defence,[121] and a jury cannot be asked to engage in "groundless speculation".[122] An accident is a "mishap or untoward event not expected or designed".[123]

65. Secondly, New Zealand does not have legislative provisions akin to those in Australia with express mention of accident. Accident is accordingly not to be regarded as a separate defence, but rather as an event raised in proceedings that is relevant to both actus reus and mens rea.

66. Thirdly, the occurrence of an accident can affect actus reus and/or mens rea. A judge must consider, where there is evidence of accident to be left to a jury, whether the accident alleged to have occurred is relevant to one or both of these aspects of an offence.

67. Fourthly, where relevant a judge *must* direct that because accidents are not voluntary, they negate the actus reus of an offence. An accident involves an involuntary act. A judge must relate the

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[120] See *R v Anderson* [1965] 1 NZLR 29 at 37–38: App Auth V3, page 588, applying *Mancini v Director of Public Prosecutions* [1942] AC 1, 12.

[121] *R v McKenna*, above n 4, at [12].

[122] *Barca v R* (1975) 133 CLR 82 at 105: App Auth V3, page 599; cited in *Stevens*, above n 99, at [25] per Gleeson CJ and Heydon J (dissenting) and at [160] per Callinan J (in the majority).

[123] *Barton*, above n 64, at [186], citing Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (LexisNexis, Markham, 2015) 653.

accident to the actus reus, and ask the jury to consider whether the Crown has disproved the possibility that the accident has negated the actus reus. The finding that an accident has occurred will also affect the jury's consideration of causation, since it may break the chain of causation.

68. Fifthly, where relevant a judge must direct that because accidents are by definition not intentional, they negate the mens rea of an offence. An accident involves unintended consequences. A judge *must* explain clearly the mens rea elements that the Crown seeks to prove and *tether* the concept of accident to them.

68.1 A judge should explain that if an accident has not been disproven, it will exclude the possibility of an intention being formed, if intention is the mens rea requirement. If the mens rea requirement is more complex, the judge may have to pay close attention to how that mens rea requirement may be negated or excluded by the occurrence of an accident.

68.2 The judge should clearly direct what implications the occurrence of an accident may have for murder, manslaughter, or other verdicts.

69. Sixthly, the judge should direct the jury that the mens rea and actus reus have to coincide for an offence to be complete. The jury is to consider whether the mental element of the offence existed at the time that the conduct required for the offence was carried out.

70. Seventhly, in some cases an accident may be caused by an unlawful act or may interrupt an unlawful act. The judge should be clear to the jury what the occurrence of an accident may mean for that prior unlawful act.

B *Errors were plainly made in this case*

71. When summing up on accident and intention, Justice Muir said he had to return to the claim of an unintentional act and – speaking to the jury – he said, "in that context, whether you regard it as a

reasonable possibility that the gun discharged as a result of Mr Kana pulling the barrel towards him while Ms Kaitaia [sic] had her finger on the trigger".[124] Even if the jury took the view that Ms Kaitai had committed an unlawful act causing death, Justice Muir went on: "if you nevertheless thought it was a reasonable possibility that the gun went off as a result of Mr Kana pulling the barrel towards him, then that would clearly be an issue relevant to whether, at the time the gun discharged, Ms Kaitai intended to cause bodily injury which she knew was likely to cause death".[125]

72. There are two manifest errors in this paragraph, the only passage in which Justice Muir addresses accident and mens rea. First, Justice Muir suggests that it is for the jury to consider whether it is a reasonable possibility that an accident occurred. That is not the correct position. It was for the Crown to disprove beyond a reasonable doubt that the gun discharged as a result of Mr Kana pulling the barrel towards him.

73. Second, Justice Muir did not explain what the existence of an accident meant for the required mental element of the offence. His Honour said the existence of an accident "would clearly be an issue *relevant* to whether, at the time the gun discharged, Ms Kaitai intended to cause bodily injury which she knew was likely to cause death". To say that the existence of an accident was "relevant" to the mental element of the offence was profoundly inadequate and incomplete. The jury required guidance on *how* the accident was relevant. This need not have been overly lengthy. But the jury should have been told that accident negated an intent to injure and knowledge of the risk of death. They should have also been told of the Crown's concession that it was manslaughter if the jury could not exclude the reasonable possibility the gun discharged as a result of Mr Kana wrestling the gun from Ms Kaitai. This was a critical

[124] CAC page 258 at [136] of the summing up.
[125] At [136].

concession which rested solely on whether accident could be excluded.

74. These errors are not mitigated or excused by reference to the wider summing up; indeed, the wider summing up compounds these errors and involves further errors. The judge invited the jury to return to his analysis of an unlawful act. In that earlier passage of his summing up, Muir J asked the jury "to be careful about too refined an analysis of the 'act' causing death", effectively dissuading the jury from examining the different factual scenarios put by Crown and defence.[126]

75. But it was for the Crown to prove beyond reasonable doubt that the gun did end up in a 'presenting' position. It was for the Crown to exclude the reasonable possibility that Mr Kana had wrestled it there. On that point, there was conflicting evidence which needed to be resolved. Muir J would later say, when recounting the Crown case, that "the Crown says you need to pick a path, a division of the roads".[127] But, as noted by Gummow and Hayne JJ in *Murray*, it was for the Crown to prove one of these paths beyond a reasonable doubt, not for the jury to accept one of them.[128]

76. Some level of refinement of analysis is necessary in murder cases, where the consequences of criminal liability are life-changing. An explanation of how the occurrence of an accident, if accepted, could change whether Ms Kaitai had the required mental state would have made the job of the jury easier, not harder. Without such explanation the jury was simply told that the existence of accident was *relevant*, but was not told *how* it was relevant. The jury also ought to have been told clearly what its possible findings on an unlawful act and murderous intention would mean for murder and manslaughter. Both

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[126] CAC page 251 at [98] of the summing up.
[127] CAC page 265, at [168].
[128] *Murray v R,* above n 107, at [57].

murderous intention and manslaughter were evidently matters that the jury were focused on, as made clear by the jury questions.[129]

77. The Court of Appeal claimed that "the concept of an accident would have been well understood by the jury".[130] But even if there is a common understanding of the general concept of 'accident', as Callinan J notes in *Stevens*, accident has a particular legal meaning (which also differs across jurisdictions).[131] It is not always simple to understand how accident may affect both the conduct and mental element of an offence. The Court of Appeal considered that "in the circumstances of this case (as opposed to others cited to us by Ms Epati) [the concept of accident] did not require further elaboration".[132] However, the particular circumstances of this case did require particular care. The unlawful act as submitted by the Crown involved complex reasoning; the Crown relied on recklessness, a far from easy concept to grasp and apply; and the accident at the heart of the case could affect both the unlawful act and recklessness in subtle, but meaningful, ways. Muir J also **declined** to include the following direction (which was taken from a previous murder trial of *Hati*) in the question trail for the appellant:[133]

> Ms Kaitai will not be liable for the death of Mr Kana if the immediate cause of death was not the result of voluntary and informed act by Mr Kana.

78. By not including this type of direction, the jury were not properly directed on the legal meaning of accident when it came to involuntary acts.

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[129] See above at paragraphs 31 to 32.
[130] Supreme Court Casebook, page 19 at [45] of its judgment.
[131] *Stevens v R,* above n 99, at [160].
[132] At [45].
[133] Benchnote of Muir J, CRI-2020-063-1416, CAC 129-130, at [54].

79. Moreover, the present case is in many ways factually similar to other Canadian cases where detailed instructions were rightly considered to be required. Hence the Court of Appeal was wrong to find that more detailed instructions were unnecessary. And for reasons already given, such instructions had the potential to clarify, rather than to confuse.

80. It would be unsafe to assert that the jury rejected the defence of accident and that there is therefore no prospect that the jury would have accepted the existence of the accident had the jury been properly directed on murderous intent, and on unlawful act. As noted in *Primeau*,[134] the jury was entitled to be properly directed and may have evaluated all evidence differently had it received such a direction. The Court should not seek to speculate on how the jury might have proceeded on mens rea had it been properly directed.

VI Conclusion

81. Accidents are ubiquitous in everyday life. But their ubiquity does not mean that their legal effects are well-understood or that their treatment by the law should be anything less than careful. In this case the Judge erred and misdirected the jury. Furthermore, the Court of Appeal did not review the problem with the attention it deserved. A retrial is now warranted.

2 April 2024

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[134] *Primeau v R* above n 86.