IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 59/2023**

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

RESPONDENT'S SUBMISSIONS ON APPEAL

15 May 2024

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION
CONTAINS NO SUPPRESSED INFORMATION AND IS SUITABLE FOR PUBLICATION

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SUMMARY

1. Kelvin Kana was killed by a single shotgun blast to his torso, delivered at close range. Moetu Kaitai had brought the gun to the scene, loaded it, and pointed it at him during a heated argument, with her finger on the trigger. Her defence was that Mr Kana's death was the result of an involuntary or unintentional discharge that occurred during a "tug-of-war" struggle with Mr Kana over the weapon, causing Ms Kaitai's finger to depress the trigger. The jury rejected her defence, and she was found guilty of Mr Kana's murder.

2. The Court of Appeal dismissed Ms Kaitai's appeal against conviction. This Court granted leave for a second appeal on the question of 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 appeal turns on whether the trial Judge adequately directed on those issues.

3. Ms Kaitai's defence – that the gun was discharged as a result of an "unintentional" act – was plainly before the jury. The jury was fairly directed to consider whether Mr Kana's own actions interrupted the chain of causation. In the Judge's directions on murderous intent, the jury was told that if they concluded it was a reasonable possibility the gun discharged unintentionally, this was clearly relevant to Ms Kaitai's intent. These directions were fair and accurate and did not displace the burden of proof.

BACKGROUND

Facts

The offending

4. On the afternoon of Sunday 10 May 2020, Mr Kana was in the garage at a property in Moa Place, Tokoroa, playing darts with two friends.[1] Ms Kaitai arrived, carrying a shotgun with her, which she put on top of a bar table, hidden under a coat.[2]

5. There was some animus between Ms Kaitai and Mr Kana.[3] Two days earlier, Ms Kaitai had been in a parked van with friends. Mr Kana had knocked on the

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[1] Evidence of Jerry-Lee Lewis, Court of Appeal Evidence 03 (**NOE**) at 36; evidence of Carlo Mihaere, NOE at 104.

[2] Sentencing notes, Court of Appeal Case on Appeal 02 (**COA**) at 332.

window and tried to enter. In response, Ms Kaitai picked up the shotgun, jumped out and said something along the lines of: "I'll just shoot you now, I ain't scared" while pointing the gun.[4]

6. At Moa Place on 10 May, Ms Kaitai and Mr Kana began to argue soon after she arrived, and it quickly became heated.[5] Ms Kaitai picked up the gun, loaded it, and told Mr Kana to stand back.[6] She pointed the gun at him, with her finger on the trigger. Moments later the gun discharged into the centre of Mr Kana's torso, inflicting fatal injuries.[7]

7. There were two others present in the garage at the time:

   7.1 Carlo Mihaere told Police his attention was directed elsewhere when the gun discharged: he was playing darts and had his back to Ms Kaitai and Mr Kana.[8] He heard a bang, turned around, and saw Mr Kana falling to the floor.[9]

   7.2 In a video interview undertaken on the day of the shooting, Jerry-Lee Lewis told Police he saw Mr Kana *try* to grab the gun when Ms Kaitai pointed it at him.[10] When Mr Kana reached for the gun, Mr Lewis said Ms Kaitai pulled it up over her shoulder, where Mr Kana could not grab it. She then brought it back down, so it was aimed directly at him and, "in an instant", he was shot.[11] Mr Lewis said Mr Kana only got a hand on the gun after it had been brought back down and was pointing right at him. Mr Lewis told Police, "You know it's just that it's just in an instant. It's just like (demonstrates movement) boomf, that fast".[12] The movement he

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3 Crown closing, COA at 253.

4 Evidence of Hope Allan, NOE at 206-207. Sentencing notes, COA at 331. Charge 2.

5 Evidence of Carlo Mihaere, NOE at 113-14.

6 Sentencing notes, COA at 332.

7 Evidence of forensic pathologist Dr Rexson Tse, NOE at 362.

8 Exhibit 13 (Extract from Mr Mihaere's statement to Police on 10 May 2020) at p 1, lines 29-32, Court of Appeal Exhibits 05 (**Exhibits**) at 107.

9 At p 1, lines 5-7 and p 2, lines 1-3, Exhibits at 107-08.

10 At p 1, lines 17-27, Exhibits at 104. See also Ruling (No 4) of Muir J [Re: Evidence of Jerry-Lee Lewis] (**Ruling (No 4)**) at [6], COA at 116.

11 Exhibit 11 (Extracts from Mr Lewis's statement to Police on 10 May 2020) at pp 1-2, Exhibits at 104-105. Mr Lewis's account of what took place is best understood by watching the relevant portions of his interview with Police as he physically demonstrates what he witnessed. The jury at trial was played the portions of his interview from duration 16:46 to 17:54 and 26:24 to 26:25. Justice Muir described what is seen in these portions in Ruling (No 4) at [6]-[8], COA at 116.

12 At p 2, lines 6-7, Exhibits at 105.

demonstrated was described by the Judge, having viewed the video interview, as:[13]

> the weapon being brought down from the vertical to the perpendicular position and, consistent with what Mr Lewis in fact says, discharge of the gun at a point almost coterminous with the point at which the movement is complete.

8. Ms Kaitai fled the scene in distress and discarded the gun at a neighbouring property.[14] She was arrested the following morning. Ms Kaitai was reluctant to speak to Police but did tell them Mr Kana had punched her in the face.[15] She said she tried to push him off her but denied having shot him.[16] She was sick of men attacking her and no one doing anything.[17]

9. Ms Kaitai was charged with Mr Kana's murder,[18] as well as threatening to kill him two days earlier.[19] She also faced charges of threatening to kill another man some weeks before,[20] and presenting a firearm at a third man on a separate occasion.[21]

The trial

10. Mr Lewis was the key Crown witness.[22] He said he heard Ms Kaitai telling Mr Kana to get away from her a few times, but he did not move away. Mr Lewis saw Ms Kaitai then pick up a gun, load it, and point it at Mr Kana,[23] who did not retreat.

11. As described in his Police interview, Mr Lewis said he saw Mr Kana going "to try and go for [the gun], pulled back" (the witness demonstrated pulling both hands over his right-hand shoulder) and "then when it came back down again towards – and went over here, that's all I know".[24]

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13 Ruling (No 4) at [8], COA at 116.
14 Sentencing notes, COA at 332.
15 Exhibits at 93-94.
16 Exhibits at 96 ("No, no, no, no no, I'll never do that, no").
17 Exhibits at 90, "I didn't intend, it wasn't my intentions to do that but a I was just sick of males attacking me and no-one did anything …".
18 Charge List, COA at 27.
19 Charge 3.
20 Charge 1 Threatening to kill Huxsta Te Purei (not guilty verdict).
21 On presenting a firearm at Mr Ngaru Tai (charge 2), Ms Kaitai was discharged pursuant to s 147 of the Criminal Procedure Act 2011 (**CPA**), see COA at 151.
22 NOE from 36.
23 NOE at 72.
24 NOE at 46.

12. When asked at trial whether Mr Kana was "able to grab the gun …when she pulled it back" his answer was, "Yeah".[25] This differed from his account to Police that Mr Kana only managed to get hold of the gun once Ms Kaitai had brought it back down, at which point the gun fired "in an instant".[26] At trial, he said that when she pulled the gun away (over her shoulder), Mr Kana grabbed at it and it "looked like he did [get his hands on the gun] …cos he was up there like that so he obviously looked like he did have".[27] At another stage he said it "looked like" he had grabbed it.[28]

13. Mr Lewis then seemed to describe Mr Kana pulling the gun towards his own abdomen,[29] them "wrestling" and then "boom". Ms Kaitai had the trigger end of the gun and Mr Kana was by the barrel.

14. While not declared hostile, Mr Lewis was plainly unenthusiastic about giving evidence,[30] and told the prosecutor he did not want to refresh his memory by viewing the video. The Crown was nevertheless permitted to put extracts of his Police interview to him.[31] When asked about the inconsistency between the two descriptions of when Mr Kana first got his hand on the gun, Mr Lewis simply said he remembered it differently now.[32] When asked to explain the difference between the wrestling with the gun described in court and his account in the interview that it happened "in an instant", he appeared to revert to his interview, saying, "thinking about now from then to now, you know, I don't […] sorta like I thought it might have been a bit of wrestling but

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25 NOE at 46.

26 When asked, in his Police interview, whether Mr Kana managed to get hold of the gun when Mr Kaitai had pulled it back over her shoulder, he said "No no. He did when it was back over here [demonstrating Ms Kaitai having brought the gun back down to torso height]." Exhibit 11 at p 1, lines 17-18, Exhibits at 104.

27 NOE at 72.

28 NOE at 94 (under cross examination).

29 NOE at 73-74.

30 See Ruling (No 3) of Muir J [Re: Evidence of Jerry-Lee Lewis], 16 August 2022; Ruling (No 4); and NOE in particular at 61-64.

31 Ruling (No 4) at 114-17 of COA and see NOE from 77. Muir J determined that, "having regard to the majority judgment in *Hannigan* and, in particular, its recognition of the fact that where there are ambiguities in the evidence of a witness or apparent inconsistencies between the evidence and other evidence which is or will be before the Court, it [is] appropriate to allow limited and targeted leading questions that jurisdiction is properly invoked in respect of the two instances [of inconsistencies between Mr Lewis's interview and his evidence at trial] identified." Ruling (No 4) at [9] citing *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612, (2013) 26 CRNZ 502, at 116-17 of COA.

32 NOE at 82.

mustn't have been."[33]

15. The gun was recovered and tested by a Police armourer, Andrew Fletcher.[34] It had no mechanical issues; it was not susceptible to accidental firing. In fact, the gun required significant pressure on the trigger to discharge (5 kg of pressure compared to the usual range of 1.8 to 3.6 kg).[35]

16. Under cross-examination, Mr Fletcher was asked about a hypothetical scenario where someone pulling on the end of the barrel might cause an "accidental discharge". Mr Fletcher's view was that because the person with their finger on the trigger would also have their hand around the pistol grip of the weapon, he would expect the whole hand to travel with the firearm.[36] However, he accepted that, if the person holding the gun was trying to pull back themselves, they might cause the weapon to discharge.[37] The defence also called an expert[38] who agreed that the weapon required considerable pressure to activate the trigger, but could not discount the possibility it could be unintentionally activated if "yanked to and fro".[39]

17. When Carlo Mihaere, the other person in the garage when the shooting took place, gave evidence, he gave a very different account to that in his earlier interview with Police. Despite having told Police that he was playing darts with his back to Ms Kaitai and Mr Kana, and only turned around after he heard the gun discharge,[40] at trial he described, for the first time, a struggle, saying he saw Ms Kaitai and Mr Kana "tug-of-warring" over the gun.[41]

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[33] NOE at 82.
[34] Evidence of Andrew Fletcher, NOE from 214.
[35] Evidence of Andrew Fletcher, NOE at 229.
[36] NOE at 234.
[37] NOE at 235.
[38] Mark Mastaglio, a forensic firearm analyst from the United Kingdom. His view was that the shotgun was fired at close range (less than a metre), and he was critical of aspects of the investigation.
[39] NOE at 399-403. He said "as long as the finger is on the trigger and enough pressure is applied by whatever mechanism, depending on the force of the struggle, one can't discount it": NOE at 408.
[40] Exhibit 13 (Extracts from interview statement of Mr Mihaere dated 10 May 2020), Exhibits at 107-08.
[41] NOE at 111.

18. The Judge allowed the Crown to refer Mr Mihaere to what he said in his interview and ask him about the inconsistency.[42] As described by the Judge:[43]

> When taken back to the written transcript, he doubled-down on his position and refused to accept the basic proposition that he had not referred to the tussle in his EVI. He then took apparent offence at what he described as the way [the prosecutor] was looking at him.

19. Mr Mihaere was declared hostile. When further questioned by the prosecutor, he confirmed that what he told Police in his interview was the truth but denied that he was not telling the truth in his evidence in court.[44] Under cross-examination from defence counsel, he maintained he had seen a "tug-of-war" over the gun.[45]

Crown case

20. The Crown case was that Ms Kaitai took the gun – and ammunition – with her when she went to Moa Place. It was indisputable that she loaded the gun, pointed it directly at Mr Kana, and had her finger on the trigger when it discharged.

21. The Crown invited the jury to accept what Mr Lewis – the only true eyewitness – had told Police on the day: that she pulled the gun up and away, then aimed right back at Mr Kana and fired in an instant. On that account, Mr Kana did not get a hand on the gun until it was pointed right at his abdomen immediately before it discharged. The prosecutor invited the jury to accept what he said in the video interview, explicitly saying it was "upon this top quality evidence to the Police on the day that the Crown rests its case on murder".[46]

22. The Crown invited the jury to reject the suggestion at trial that there was some kind of "wrestling" over the gun[47] as Mr Lewis had indicated at trial.

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[42] Ruling (No 5) of Muir J [Re: Evidence of Carlo Mihaere], 17 August 2022, COA at 133. As with Mr Lewis, this ruling was made on the basis of *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612, (2013) 26 CRNZ 502.

[43] Ruling (No 6) of Muir J [Re: Hostility] at [4], COA at 136. Also see NOE at 124-26. While not seen by the jury, Mr Mihaere was also observed by Court staff saying to Ms Kaitai, "Love you, sis" as he left Court so that the prosecutor could make the earlier application under *Hannigan v R*. See Benchnote at [15], COA at 121.

[44] NOE at 127-28.

[45] NOE at 130.

[46] Crown closing at [13], COA at 166.

[47] Crown closing at [33]-[36], COA at 172-73.

The reality was Mr Kana could only have got his hand on the gun when it was already aimed at him, and given his comparative strength, if he had been able to grab it any earlier, he would have been able to redirect it.[48]

23. Ms Kaitai pulled the trigger while in close range to Mr Kana and with the gun pointing directly at him. The Crown case was that this was reckless murder.[49] "[S]he intended to injure him when she pulled the trigger. She knew that he could die. She went ahead and she did it anyway."[50] These factors established a "crystal clear" murderous intent that was connected to an act of aggression, rather than self-defence.[51]

24. The Crown case was that it was "murder because she pulled the trigger knowing that she could injure him, knowing that that injury might kill him and she went ahead and did it anyway".[52] But the Crown acknowledged that if the jury found Mr Kana's death was caused not by Ms Kaitai pulling the trigger and instead, "if something else set the gun off but it was caused in part because her finger is on the trigger…then there's no intention to cause a bodily injury".[53] The prosecutor "conceded" then the outcome would be manslaughter.[54]

Defence case

25. The defence invited the jury to accept Mr Lewis's trial evidence.[55] Counsel argued "[t]he pulling of the gun towards him, trying to get it off her … has caused the trigger to be pulled, this was an accident."[56] While the gun required an unusually high level of pressure on the trigger to discharge, the

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48 Crown closing at [35], COA at 173.
49 Crown closing at [42], COA at 175.
50 Crown closing at [43], COA at 175.
51 Crown closing at [57], COA at 179-80.
52 Crown closing at [57], COA at 346.
53 Crown closing at [78], COA at 187.
54 When addressing the intent element, the prosecutor 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. … [I]f something else set the gun off but it was caused in part because her finger is on the trigger – that careless handing of the firearm – then there's no intention to cause a bodily injury… that's where the rubber meets the road in terms of murder/manslaughter": Crown closing at [78], COA at 187-88.
55 Although counsel also submitted there might not actually be an inconsistency between the two accounts, see COA at 204.
56 Defence closing address, COA at 216.

experts said it was possible for this to occur in a struggle.[57]

26. Counsel submitted Mr Kana's death was therefore not the result of an unlawful act. The gun was accidentally discharged – and the chain of causation was broken – by Mr Kana grabbing and pulling the barrel towards him, causing Ms Kaitai's finger to depress the trigger.[58] Thus:[59]

> […] Mr Kana's death was not the result of an unlawful act because the Crown cannot exclude as a reasonable possibility that the discharge of the weapon only occurred as a result of it being grabbed by Mr Kana [….]
>
> It's an intervening event. The pulling of the gun towards him, trying to get it off her which has caused the trigger to be pulled, this was an accident. It was an unintentional discharge or not a willed act by Ms Kaitai. Rather, it was the intervening act by Mr Kana in grabbing on the barrel and pulling on it which has caused the trigger to be pulled.

27. In response to the Crown's alternative argument that the presentation, loading and pointing of the firearm itself was an unlawful act, Ms Kaitai relied on self-defence. The "sole motive" for presenting the firearm was protection:[60] Ms Kaitai was acting in self-defence when she picked up the gun, so that was not an unlawful act. In support, counsel referred to Ms Kaitai having been assaulted by another man in that same garage previously,[61] and submitted that Mr Kana was trying to attack her, and she was just trying to get him to leave her alone.[62]

28. In the event that the jury made it to the part of the question trail where it was necessary to consider Ms Kaitai's intent when she shot Mr Kana, the defence submitted that her only intention was for him to leave.[63] She did not intend to injure him, did not consciously appreciate the risk of death, and did not choose to run that risk. Her distressed demeanour afterwards was said to be consistent with the gun going off "by accident".

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57 A defence firearms expert agreed the gun would require considerable pressure on the trigger to discharge but could not discount the possibility that such pressure could applied in the context of a struggle. Evidence of Mr Mastaglio, NOE at 408.

58 Defence closing, COA at 216.

59 Defence closing, COA at 216.

60 Defence closing, COA at 217.

61 As Ms Kaitai said in her Police interview.

62 Defence closing, COA at 220-21. The Crown had not intended to lead Ms Kaitai's interview (as she had asked to leave the interview several times) but it was admitted at the request of defence, as recorded in the Judge's Benchnote at [33]-[39], COA at 125-26.

63 Defence closing, COA at 223.

Summing up

29. The Judge's summing up was in three parts: general directions, the elements of the offences, and a summary of the respective cases. The second part of the summing up – where the trial Judge distributed the question trail and took the jury through the elements of the offences[64] – is the focus of this appeal.

30. As to the murder charge, the Judge first gave "reasonably high level" directions introducing the elements of the offence of murder.[65] This included advice that: "if you find that there is a reasonable possibility that Mr Kana's death was not the result of an unlawful act on Ms Kaitai's part, then you must find Ms Kaitai not guilty of murder. You must also find her not guilty of manslaughter…".[66]

31. The Judge then took the jury through the question trail in detail:

    31.1 The jury was invited first to consider whether Mr Kaitai's actions **caused** Mr Kana's death. Were they sure that Ms Kaitai "did something which was a substantial and operative cause of Mr Kana's death".[67] The jury must consider "whether the Crown has disproved the reasonable possibility that the gun was fired involuntarily by reason only of it being grabbed by Mr Kana".[68] The Crown and defence cases as to causation were addressed here too. The Judge explained this was a factual issue for the jury to determine.[69]

    31.2 The causation direction had been the subject of some discussion between counsel and the Judge at trial. Ms Kaitai's trial counsel requested particular emphasis be given to the fact that an intervening act can break the chain of causation.[70] The Judge expressly declined to direct the jury that "the defendant will generally not be liable for the death of a victim where the

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64 Question trail distributed at [67] of summing up, COA at 244.
65 Summing up at [76]-[85], COA at 245-47.
66 Summing up at [82], COA at 246.
67 Issue 1, question 1, question trail, COA at 280. See summing up at [88], COA at 248.
68 Question trail, COA at 280, and see the oral directions at summing up at [96], COA at 250.
69 Summing up at [97] (COA at 250) and [99] (COA at 251).
70 See Benchnote at [58(c)], COA at 131. The directions at [97], COA at 250, may be a response to this request.

immediate cause of death was the result of a voluntary and informed act by the victim”.[71]

32. The second question for the jury was whether death was as a result of an **unlawful act**.[72] The Crown case was that, at a minimum, Mr Kana’s death was caused by the unlawful act of careless use of a firearm. There was no unlawful act if Ms Kaitai was acting in self-defence.[73]

33. If the jury was satisfied of both causation and an unlawful act, they were next asked to consider Ms Kaitai’s **intent**:[74]

    33.1 Importantly, the jury was reminded that this was an issue they would “only consider if you find that the Crown has proved beyond a reasonable doubt that the death occurred as a result of an unlawful act and the defence of self-defence does not apply”.[75]

    33.2 The murderous intent relied upon by the Crown was “reckless homicide”[76] which required consideration of whether she (a) intended to cause bodily injury, (b) knew there was a real risk her actions would cause death, and (c) consciously ran the risk Mr Kana would die as a result.[77]

    33.3 The defence case was the gun was discharged as a result of “an unintentional act”, and the jury was told “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”.[78]

34. Finally, the Judge addressed the respective cases. When summarising the

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71 See Benchnote at [53], COA at 129, discussed further below at [64].

72 Issue 1, question 2, question trail, COA at 280, and summing up from [100], COA at 251.

73 See summing up at [83], COA at 247, and when addressing question trail from [103]-[125], and see the Question Trail, COA at 281-282. The Judge had earlier directed at [82]: “If you find that there is a reasonable possibility that Mr Kana's death was not the result of an unlawful act on Ms Kaitai's part, then you must find Ms Kaitai not guilty of murder. You must also find her not guilty of manslaughter as the death would not be a culpable homicide. Homicide which is not culpable or blameworthy is not an offence.” COA at 246-247.

74 Issue 3, page 5 of the question trail and summing up from [126], COA at 256.

75 Summing up at [127], COA at 256.

76 Crimes Act 1961, s 167(b): “Culpable homicide is murder in each of the following cases… (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not.”

77 Summing up at [129]-[135], COA at 256-58.

Crown case on intent, the Judge referred to the Crown's submission that there were the "two pathways available to you": the Crown's primary case of recklessness,[79] or the alternative path of carelessness. The carelessness path would be available if the jury concluded the gun was discharged as a result of Mr Kana pulling it, and the Crown acknowledged this path led to manslaughter.[80] The defence submissions on her lack of intent were also summarised: her only intention was for him to leave.[81]

Verdicts and sentencing

35. During their deliberations, the jury asked for "the outline of Murderous Intent provided by the judge in his summation".[82] After consultation with counsel, the jury was provided a copy of the relevant directions of the summing up ([126]-[139]) in written form.[83] The jury also asked "if a manslaughter charge is decided, how do we report/announce that to the court?", and the Court explained.[84]

36. Verdicts were returned shortly thereafter. Ms Kaitai was found guilty of murder, and previously threatening to kill Mr Kana (charges 3 and 4). The jury acquitted her of earlier threatening to kill Mr Huxsta Te Purei (charge 1).[85] Charge 2 (a charge alleging an earlier threat to kill another man: Ngaru Tai Enua) was dismissed at the close of the Crown case.[86]

37. Ms Kaitai was later sentenced to life imprisonment with a minimum term of ten years and nine months.[87]

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78 Summing up at [136], COA at 258.

79 Summing up from [165], COA at 265.

80 Summing up at [167], COA at 265. See also Crown closing at [78], COA at 188.

81 Summing up at [205], COA at 274: "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."

82 Jury question 1, COA at 283.

83 See COA at 284.

84 Jury question 2, COA at 287.

85 The witness did not answer his summons and could not be located for a warrant to arrest to be executed.

86 This charge was dismissed at the close of the Crown case pursuant to s 147 CPA on 19 August 2022. See Minute (No 3) of Muir J dated 19 August 2022, COA at 150. The jury was advised, see NOE at 369.

87 Sentencing notes of Muir J, 23 September 2022, COA from 330. There was a sentence appeal filed in the Court of Appeal, but this was ultimately abandoned.

38. Ms Kaitai's name was suppressed during trial, but that lapsed at sentencing.[88] The Crown is not aware of any extant suppression orders.

Court of Appeal

39. Ms Kaitai's first appeal focussed on the adequacy of the trial Judge's directions about causation and murderous intent, and a comment by the Judge on the absence of sworn evidence from Ms Kaitai. The Court of Appeal found the defence was fairly presented at trial and further elaboration was not necessary to explain how accident was relevant to intent.[89] Comments on the absence of evidence from Ms Kaitai were directed at explaining that the jury could nevertheless consider her subjective state of mind. The Judge fairly identified the relevant evidence for the jury and did not invite an adverse inference. The appeal was dismissed.

THIS APPEAL

40. Ms Kaitai's core contention in this Court is that the summing up failed to give the jury sufficient explanation as to how an accidental discharge of the firearm "relates" to murderous intent. She says it was insufficient for the jury to be told an accident was "relevant" to intent; they should also have been specifically directed that accident "negated" intent. The appellant also argues that the summing up did not properly address involuntariness,[90] and improperly inverted the burden of proof.[91]

Legal framework for a "defence of accident"

41. Ms Kaitai's defence at trial was that the gun fired as a result of an "unintentional discharge or not a willed act by Ms Kaitai".[92] To describe this as

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88 Minute of Muir J, 15 August 2022, COA at 103; Minute (No 4) of Muir J, 26 August 2022, COA at 289. Sentencing notes, COA at 346.

89 The Court found "the concept of an accident would have been well understood by the jury and in the circumstances of this case…did not require further elaboration." Court of Appeal decision at [45], Supreme Court Casebook 01 (**SCCOA**) at 19.

90 Appellant's submissions at paragraph [77].

91 Appellant's submissions at paragraph [75].

92 Defence closing, COA at 216.

a "defence of accident"[93] is ambiguous and potentially confusing. A firearms expert at trial used the term "unintentional discharge" for this situation, preferring "accidental discharge" for instances of mechanical fault.[94]

42. Unlike the position in parts of Australia, there is no specific defence of accident in New Zealand. Where the facts raise a question of accident, the issue is better regarded as whether the defence version of events demonstrates an element of the offence is absent:

    42.1 Something may occur "by accident" where what is meant is an absence of the intent, purpose or desire to bring about a consequence – in other words a denial of mens rea. (For example, I intended to shoot my gun at a tree, not the victim.)

    42.2 The term is also used in the sense that the defendant was not responsible for the actus reus (the acts were not the result of conscious volition). (For example, there was a mechanical fault with the gun, or the act occurred while I was having a seizure and unable to control my body.) This is an issue of involuntariness, and in effect a denial of responsibility for the actus reus.

43. In the homicide context, if a jury accepts (i.e. does not exclude the reasonable possibility of) an accident, an acquittal does not necessarily follow. Other unlawful actions of the defendant may still be a cause of death. In other words, if one of the defendant's actions was involuntary, but he or she also undertook voluntary acts that were a real and substantial cause of death, the elements of manslaughter can still be met.[95] Or, if there is no voluntariness issue, but an absence of murderous intent, again the result will

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93 See appellant's submissions at [1]. Canadian commentators have described the phrase "at best unnecessary and at worst misleading": M Manning & P Sankoff *Manning, Mewett & Sankoff: Criminal Law* (5th ed, online looseleaf ed, Lexis Nexis) at [13.171] (Respondent's bundle).

94 The Judge formed the view trial counsel used the phrase "unintentional discharge" based on this distinction: see Summing up at [81], COA at 246. The defence forensic firearm expert's comment is at NOE 405: "I make the distinction between – and I know it's a subtle one but I think it's worth making – I make the distinction between 'accidental discharged' [sic] and 'unintentional discharge'. When I talk about 'accidental discharge', I was specifically referring to the absence of any mechanical defect. 'Unintentional discharge', I refer to the concept of the trigger being activated unintentionally." NOE at 405.

95 Assuming of course that an unlawful act was made out.

be manslaughter rather than a complete acquittal.[96]

44. Where an accident is raised by the defence, it will potentially[97] be relevant to either voluntariness or mens rea (or both). Much will depend on the circumstances of the particular case. For that reason, absolute propositions, such as "accidents are by definition unintentional"[98] or "an accident involves an involuntary act",[99] should be avoided.

45. In this case, the voluntariness of Ms Kaitai's actions was questioned in a limited way: simply in relation to the activation of the trigger. Given her other (voluntary) actions, this issue was properly addressed as one of causation.[100] Her mens rea at the time she pulled the trigger was also squarely in issue.

46. The focus of this appeal is whether the summing up in this case adequately reflected the above legal position and enabled the jury to fairly consider Ms Kaitai's defence. The respondent submits the summing up enabled the jury to consider whether Ms Kaitai's voluntary actions caused Mr Kana's death, and whether she had the required mens rea. There is no miscarriage of justice.

Jury directions: general principles

47. This appeal focuses on the adequacy of the trial Judge's directions to the jury, specifically in relation to the elements of the offence.

48. The Judge's task is to "remind [the jury] of the evidence, marshal the facts and provide them, so to speak, with the agenda for their discussions".[101] The trial Judge should "give the jury as much help as possible by identifying the issues presented by the case and the evidence which is relevant to those issues."[102] In a complex case it may be particularly important for the Judge to give the key factual allegations order and coherence for the jury to assist them in

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96 If the defendant had the required mens rea in relation to a different victim but killed another "by accident or mistake" then the result is murder by operation of s 167(c) Crimes Act 1961. (Respondent's bundle).

97 But not always, cf. the appellant's second principle at in the appellant's submissions at [65].

98 This is the appellant's fifth principle in the appellant's submissions at [68].

99 This is the appellant's fourth principle in the appellant's submissions at [67].

100 Ms Kaitai appears to have taken no issue with the voluntariness of her actions being addressed in this way, other than submitting different directions should have been given about the contribution of Mr Kana's actions, see below.

101 *Z (SC79/17) v R* [2018] NZSC 56 at [38] (Respondent's bundle), citing Lord Devlin *Trial by Jury* (Stevens & Sons, London, 1956) at 115.

102 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [41] (Respondent's bundle).

completing their task.[103] Ultimately, the summing up must strike a balance between being "both comprehensive and comprehensible".[104]

49. Lengthy and unnecessarily complicated or elaborate directions should be avoided.[105] Further "additions and elaborations" to jury directions can risk confusing a jury.[106]

50. Trial judges must direct the jury on all elements of the offence with which the defendant is charged (even if not at issue in the trial).[107] Ultimately, directions on the elements must make it clear that a guilty verdict can be returned only if the Crown has proved the elements of the offence beyond reasonable doubt.

51. Summings up must be tailored to the particular case,[108] and be "as closely tied to the facts of the case as the circumstances permit".[109] Directions should not "stray too far" from the statutory wording and the facts of the case.[110] Concrete rather than abstract language should be used.[111]

52. Written directions (question trails) may be helpful even in a simple case,[112] and will be necessary in more complex cases.[113]

53. Overall, the summing up must be fair and balanced. A Judge is entitled to indicate his or her own views of the evidence, provided that "as a whole the

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103 *Emery v R* [2021] NZCA 158 at [34], citing *Waters v R* [2018] NZCA 84 at [8].

104 As described by the Canadian Supreme Court in *R v Rodgerson* 2015 SCC 38 at [50].

105 See for example *L v R* [2006] NZSC 18, [2006] 3 NZLR 291 at [41] where this Court said "[t]his is unfortunately an example of an unnecessarily complicated and elaborate summing up."

106 See for example *R v Wanhalla* [2007] 2 NZLR 573 at [31] (Respondent's bundle), citing *R v Adams* CA70/05, 5 September 2005 at [63]. For example, elaborate directions about inferences have been discouraged by the Court of Appeal, where the preference for simple directions has been expressed: *R v Puttick* CA46/85, 23 August 1985 and *R v Hart* [1986] 2 NZLR 408 at 413. The Court of Appeal cited *Puttick* in *Do v R* [2024] NZCA 97 at [24], noting "[e]xtensive jury directions about inferences are generally discouraged."

107 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [35] referring to sexual offences, and *Thompson v R* [2019] NZCA 297 at [21] and [22], adopting the principle as one of general application.

108 The required jury directions have been described as "a case-specific issue": *Stanley v R* [2012] NZCA 462 at [20], cited with approval in *Stanley v R* [2013] NZSC 2 at [3].

109 *Z (SC79/17) v R* [2018] NZSC 56 (Respondent's bundle) at [39] (referring to jury questions).

110 *Burke v R* [2024] NZSC 37 at [45](b), per O'Regan, Williams and Kós JJ.

111 Justice William Young "Summing up to Juries in Criminal Cases – What Jury Research says about Current Rules and Practice" (2003) Crim LR 665 at 687, citing Lord Justice Auld *Review of the Criminal Courts of England and Wales: Report* (Lord Chancellor's Department, 2001) at 534-536. In *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [214], William Young J (in dissent) used similar language, noting the majority of this Court had proposed judges direct juries "in a simple and concrete way."

112 But the Court of Appeal has held a question trail is not required as a matter of law in a case where the issue is relatively straightforward: *Papa v R* [2015] NZCA 238 at [8].

113 *Papa v R* [2015] NZCA 238 at [8]. See also William Young J, above n 111, at 687: "Obviously in complex and nuanced cases the need for written directions is most obvious."

summing up is fairly balanced and a fair presentation of the case to the jury".[114]

54. Where a summing up is challenged on appeal:

54.1 The adequacy of a summing up must always be assessed as a whole[115] and in the context of the trial and the issues that arose.[116] The extent and content of directions should generally be left to the trial Judge who has the "feel" of the case[117] (and perhaps also a view of the jury).[118]

54.2 Directions are only *required* where they are essential to ensure the defendant has a fair trial.[119] There is no requirement for a *perfectly* instructed jury.[120] "Directions should not be mandatory

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114 *R v Fotu* [1995] 3 NZLR 129 (CA), at 138, cited in *Swarbrick v R* [2023] NZCA 671 at [23], where the Court of Appeal held references to what a jury "probably will" find in relation to an element of the offence, even accompanied with comments that it was a matter for the jury, rendered the summing up unbalanced and unfair.

115 *R v Wanhalla* [2007] 2 NZLR 573 at [27] (Respondent's bundle), citing Privy Council in *Walters v R* [1969] 2 AC 26 at 30, where Lord Gardiner noted "[i]t is the effect of the summing up as a whole that matters." See also *Waara v R* [2010] NZCA 517 at [32]: "The inquiry must be whether the summing up read as a whole against the factual background, the evidence given at trial, the charges themselves and the prosecution and defence cases was unbalanced and unfair and may have led to a miscarriage of justice. An approach which cherry-picks, compares and dissects without this contextual analysis and overview does not ultimately assist."

116 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [167]: "The adequacy of the Judge's summing up must be assessed in the context of the trial, the issues that arose, and the case against each defendant". See also *Stanley v R* [2012] NZCA 462 at [20] where the adequacy of directions in a summing up was said to be a "case specific issue".

117 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [40] (Respondent's bundle). See also *R v Keremete* CA247/03, 23 October 2003 at [18] (recently re-approved in *Berry v R* [2024] NZCA 20 at [63]): "A judge's summing up must identify the fundamental facts in issue, be balanced in its treatment of opposing contentions with respect to those facts, and leave the jury in no doubt that the facts are for them and not the judge. … [T]here is a wide discretion as to the level of detail to which the judge descends in carrying out that task."

118 *R v Wanhalla* [2007] 2 NZLR 573 at [27] (Respondent's bundle), citing Privy Council in *Walters v R* [1969] 2 AC 26 at 30: "By the time he sums up the Judge at the trial has had an opportunity of observing the jurors. In their Lordships' view it is best left to his discretion to choose the most appropriate set of words in which to make *that* jury understand that they must not return a verdict against a defendant unless they are sure of his guilt; and if the Judge feels that any of them, through unfamiliarity with court procedure, are in danger of thinking that they are engaged in some task more esoteric than applying to the evidence adduced at the trial the common sense with which they approach matters of importance to them in their ordinary lives, then the use of such analogies such as that used by [the trial Judge] in the present case, whether in the words in which he expressed it or in those used in any of the other cases to which reference has been made, may be helpful and is in their Lordships' view unexceptional." Emphasis in original.

119 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [40] (Respondent's bundle).

120 "It is undoubtedly important that jurors try the right facts according to the appropriate legal principles in each case. However, we must ensure that the yardstick by which we measure the fitness of a trial judge's directions to the jury does not become overly onerous. We must strive to avoid the proliferation of very lengthy charges in which judges often quote large extracts from appellate decisions simply to safeguard verdicts from appeal. Neither the Crown nor the accused benefits from a confused jury. Indeed justice suffers. These comments are not meant to suggest that we sanction misdirected verdicts. This Court has stated on repeated occasions that accused individuals are entitled to properly instructed

unless, without them, there is a real risk that the jury will approach the matter in an inappropriate way or in a way which does not do the defendant's case justice."[121]

54.3 An appellate court should consider whether the jury would have reached the same conclusion by the application of common sense to the evidence, as they would have if more direction had been given: [122]

> Failure to give a direction that is no more than assistance in applying common sense to the evidence should not automatically be treated as a ground of appeal, let alone as a reason to allow an appeal.

55. It should also be noted at this point that New Zealand appellate courts have been less prescriptive than their Australian and Canadian counterparts regarding summings up and "in particular, far less enthusiastic about requiring particular forms of direction to be given in respect of commonly recurring issues".[123]

Jury directions: this case

56. The ultimate question for this Court is whether the summing up adequately identified the key factual allegations and correct legal questions for the jury, in light of the principles reviewed above.

57. Three questions are raised here:

57.1 Was the jury properly directed as to the relevance of accident to voluntariness and/or causation?

57.2 Was the jury properly directed as to the relevance of accident to mens rea?

57.3 Did the Judge invert the burden of proof?

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juries. There is, however, no requirement for perfectly instructed juries. As I specifically indicated at the hearing of this case, a standard of perfection would render very few judges in Canada, including myself, capable of charging juries to the satisfaction of such a standard." Per Lamer CJ in the Supreme Court of Canada in *R v Jacquard*, [1997] 1 SCR 314, cited in *Barton v R* [2019] SCC 33, [2019] 2 SCR 573 (Appellant's bundle V1 at 179).

121 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [41] (Respondent's bundle).

122 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 (Respondent's bundle) at [105], citing Lord Phillips of Worth Matravers CJ in *R v Campbell* [2007] EWCA Crim 1472, [2007] 1 WLR 2798 at [23].

123 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [80].

The "defence of accident" and involuntary acts

58. The appellant contends "the jury were not properly directed on the legal meaning of accident when it came to involuntary acts".[124] The only specific criticism, though, is the absence of a direction that the jury should acquit if they decided the "immediate cause of death" was the voluntary and informed act of the victim.[125] This is, in reality, a criticism of the causation directions, and there is no principled basis to require the suggested direction.

Voluntariness

59. The requirement for voluntariness is fundamental to the criminal law.[126] Voluntariness "requires a willed action from the mind to the muscles, the result of which constitutes the relevant actus reus".[127]

60. The issue of voluntariness arose here in a limited way: on the defence case the gun discharged during a "tug-of-war" struggle over the gun. This was not so much an issue of "loss of conscious volition", but an argument that Mr Kana's actions broke the chain of causation. Moreover, the only arguably involuntary act was the activation of the trigger, against a background of other voluntary steps taken by Ms Kaitai: carrying a gun, loading it, presenting it, and putting her finger on the trigger. The jury was required to consider her conduct as a whole.

Causation

61. The real issue in this case was whether Ms Kaitai's (voluntary) actions caused Mr Kana's death – and the jury received ample causation directions.

62. Homicide is "the killing of a human being by another, directly or indirectly, by any means whatsoever".[128] At the time of death, the defendant's conduct must be a "a substantial and operative cause".[129] It need not be "the" substantial and operative cause, or even the main cause.[130] It was ultimately a

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124 Appellant's submissions at [78].

125 Appellant's submissions at [77].

126 It is a fundamental requirement of the criminal law that a defendant must not be held liable for the occurrence of an actus reus unless he or she was responsible for it: A Simester, W Brookbanks & N Boister *Principles of Criminal Law* (5th ed, online looseleaf ed, Thomson Reuters) at ch 3.4.

127 *R v Paterson* [2014] NZCA 235, [2014] NZAR 855 at [18].

128 Crimes Act 1961, s 158.

129 See for example *R v McKinnon* [1980] 2 NZLR 31 (CA), and *Perry v R* [2018] NZCA 595 at [56] (Respondent's bundle).

130 *Perry v R* [2018] NZCA 595 at [56] (Respondent's bundle). Through threats and assaults the defendants

factual question for the jury whether the defendant's conduct was a factual and sufficient cause of death. Given Ms Kaitai's preceding conduct, even if the activation of the trigger was involuntary, it was clearly open to the jury to conclude her actions were still a cause of death. They were directed accordingly: if the Crown did not disprove the reasonable possibility the gun was fired "involuntarily by reason *only* of it being grabbed by Mr Kana" they must acquit. The question trail asked:[131]

> 1. Are you sure that, on the afternoon of 10 May 2020, Ms Kaitai did something which was a substantial and operative cause of Mr Kana's death?
>
> *Notes:* *A substantial and operative cause does not have to be the main or the only cause of death but it must have played a part which was not insubstantial or insignificant.*
>
> *In this case there is no issue that Mr Kana was shot and killed by a gun held by Ms Kaitai. The issue is whether the Crown has disproved the reasonable possibility that the gun was fired involuntarily by reason only of it being grabbed by Mr Kana.*
>
> If **NO**, find Ms Kaitai not guilty.
>
> If **YES**, got to question two.

63. The jury needed to determine whether Mr Kana's actions broke the chain of causation. The jury was directed accordingly:[132]

> [96] If the Crown has not excluded as a reasonable possibility that Mr Kana grabbed the end of the gun, pulled it, that Ms Kaitai'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.
>
> [97] Identification of the act or acts causing death is a factual inquiry for you the Jury. The law is clear that it is for the jury to determine what act or acts were done by the accused and whether they or any one of them caused death. What is necessary is that the unlawful act or acts are a substantial and operative cause of death. They do not need to be the main or the only cause of death. But they must have played a part which was not insubstantial or insignificant. That said, it is possible for the chain of causation to be broken by

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had caused the victim to run and hide and he subsequently drowned in a levee. The jury was directed to consider whether the defendants' actions were a "substantial and operative cause even though [they were] not the main cause". The defendants argued the victim's actions broke the chain of causation, and the jury was directed to consider whether the victim's actions were reasonably foreseeable. The directions were upheld by the Court of Appeal (their appeals were allowed on other grounds).

[131] COA at 280.

[132] Summing up, COA at 250.

> some intervening and unanticipated event. For example, despite someone loading and pointing a gun at a person and putting their finger on the trigger, if the person at whom it is pointed is then hit by a bolt of lightening [sic] or someone else then takes the opportunity to discharge a gun at them in that moment, you would be likely to find the chain of causation broken. But those are extreme examples and the further you come back from these extremes, so progressively more difficult the job of the fact-finder -you the jury - becomes.
>
> [98] In this case my advice is to be careful about too refined an analysis of the "act" causing death. It is a matter entirely for you but even if the Crown has not excluded the reasonable possibility that activation of the trigger was caused by Mr Kana grabbing the barrel and pulling it, 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).
>
> [99] Whether these actions were a substantial and operative cause of Mr Kana's death is, however, for you and for you alone. I intend in no way to lead you to any particular conclusion just by referencing some of the issues you might wish to consider in that analysis.

64. In this Court, as in the courts below, Ms Kaitai says the Judge should have *also* directed the jury that she "will not be liable for the death of Mr Kana if the immediate cause of death was the result of a voluntary and informed act by Mr Kana".[133] The Judge specifically declined to direct in this way at trial.[134] The Judge was plainly right not to do so.

65. The jury's task was to determine whether Ms Kaitai's actions were a real and substantial cause of death – not the "immediate" cause of death. In any event, Mr Kana's actions – in circumstances where a loaded firearm is pointed at him, and he has only moments to respond – can hardly be described as "voluntary and informed" acts.

66. At trial, the appellant relied on a reference to the requested direction in *Adams on Criminal Law*, but the cases where a direction of that nature was given are factually distinct from this case, such as where the victim has voluntarily consumed drugs.[135] The victim's actions break the chain of

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133 Appellant's submissions at [77].

134 See Benchnote, COA at 129. Trial counsel nevertheless made this submission to the jury – see COA at 216: "The law says that Ms Kaitai is not responsible for a voluntary and informed act of Mr Kana which has broken the chain of causation."

135 Mathew Downs (ed) *Adams on Criminal Law – Offences and Defences* (online looseleaf ed, Thomson Reuters) at [CA158.10] (Respondent's bundle). The appellant also suggests this direction was given in a

causation where they have intervened to bring about the outcome "without his or her choice to do so being induced, fettered, or constrained by the situation [the defendant] has created".[136]

67. The jury was not required, as the appellant appears to contend, to take a narrow view of causation focussing only on the moment the trigger was depressed. Such an "overly refined analysis"[137] was not required and would (as the High Court of Australia has described in similar circumstances) "divorce the contraction of the finger from the admittedly deliberate pointing of a loaded and cocked weapon at the deceased and its discharge".[138]

68. The Judge's directions on Mr Kana's actions as a *novus actus interveniens*, were arguably generous to Ms Kaitai. Where a victim has acted in reaction to the defendant's wrongdoing, in a manner that was a reasonably foreseeable possibility, their actions are generally not regarded as a *novus actus interveniens*.[139] It is at least arguable that a struggle over the gun is a reasonably foreseeable possibility once a gun is presented at close range. A similar principle underpins the rule that where a defendant causes a victim, by threats or violence, to cause their own death this will be culpable homicide.[140] Such a direction was not sought here, but the availability of this direction puts Ms Kaitai's other submissions in perspective.

69. Causation was a matter for the jury and it was open to the jury to conclude Ms Kaitai's actions up until the gun was fired, including pointing a gun at

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previous murder trial of *Hati* (see appellant's submissions at paragraph [77]). Counsel understands that *Hati* was a previous trial conducted by the same trial Judge, and similar issues had arisen. The question trail in *Hati* did not include a direction that the defendant would not be liable for the victim's death if the immediate cause of death was the result of a voluntary and informed act by the victim. This direction was proposed by counsel for Ms Kaitai. See Benchnote at [53] and [54], COA at 129.

136 See A Simester, W Brookbanks & N Boister *Principles of Criminal Law* (5th ed, online looseleaf ed, Thomson Reuters) at [3.3.3(2)] (Respondent's bundle). The House of Lords refers to exceptions to this principle including where the situation was one involving duress or necessity: *R v Kennedy (No 2)* [2007] UKHL 38, [2008] 1 Cr. App. R. 19 at 261: "The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another."

137 See *Murray v R* [2002] HCA 26 at [49] (Appellant's bundle V3 at 508.)

138 *Murray v R* [2002] HCA 26 at [50], per Gummow and Hayne JJ (majority).

139 As expressed in A Simester, W Brookbanks & N Boister *Principles of Criminal Law* (5th ed, online looseleaf ed, Thomson Reuters) at [3.3.3(3)] p 96 (Respondent's bundle).

140 Crimes Act 1961, s 160(2)(d).

Mr Kana with her finger on the trigger, were (also) a cause of death.

70. It follows that Ms Kaitai would become liable for manslaughter in circumstances when she did not intentionally pull the trigger. (But not murder, as the Crown acknowledged.) This result is unremarkable and consistent with previous authorities such as *Wickliffe,*[141] *Reti,*[142] and *Marino*[143] in New Zealand, *Ryan*[144] and *Murray*[145] in Australia, and *McKenna*[146] in

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[141] Re *Wickliffe* [1987] 1 NZLR 55 (CA) (Appellant's bundle V1). The defendant had entered a jewellery shop with a loaded pistol and pointed it at people with a finger on the trigger. He claimed the gun discharged unintentionally when he was jolted. In the court's view, on the facts most favourable to the defendant, although the immediate cause of death was an involuntary act by the defendant, this was not a novus actus interveniens. His earlier conduct was sufficient for him to have been said to "kill" the victim. A manslaughter verdict was substituted on appeal.

[142] *R v Reti* CA212/03, 16 December 2003 (Respondent's bundle). The defendant was trying to prevent sexual advances from the deceased and had opened a knife and presented it at the deceased to deter him advancing further. The defendant said the deceased then impaled himself on the knife. The Court of Appeal commented that presenting the knife was an unlawful act of itself (so manslaughter could be established, absent self-defence).

[143] *R v Marino* CA327/95, 8 November 1995 (Respondent's bundle). The appellant defended a murder charge on the basis he had the gun on his lap and was startled by the victim coming out of the darkness. He said "instinctively jerked back" and the gun discharged. The Court of Appeal found the trial court erred by not putting manslaughter to the jury (the appellant submitted that the unlawful act of carrying a loaded weapon was itself an act likely to cause the death of another by inadvertence or by accident) and overturned the murder conviction.

[144] *Ryan v R* (1967) 121 CLR 205 (HCA) (Respondent's bundle). The defendant took a gun with him to rob a petrol station. He pointed the gun towards the back of the victim (with his finger on the trigger and with the safety catch off), while attempting to tie up another person. The victim moved suddenly, and the defendant was surprised and stepped back – the gun discharged. The victim did not touch the weapon: the only pressure came from the defendant's finger. His counsel argued this occurred by a reflex movement. In declining special leave to appeal, the High Court of Australia discussed whether a reflex action was properly regarded as involuntary. The defendant had accepted he was guilty of manslaughter and did not invite a full acquittal. The judgment of Taylor and Owen JJ contains a useful discussion of causation issues: "It was argued before us that the act which caused the wounding and almost instantaneous death of Taylor was the pressure of the applicant's finger on the trigger of the loaded and cocked rifle; … and that the jury should have been directed to acquit of both murder and of manslaughter if they found that to have been the fact or had a reasonable doubt about the matter. But the fact is that the wounding and death were caused by a combination of acts done in pursuance of the design to commit the robbery. They included the loading and cocking of the rifle, the failure to apply the safety catch, the presentation of the rifle at [the victim] with the finger of the applicant on the trigger in circumstances in which an attempt at resistance might well have been expected. No suggestion was or could be made that these acts were involuntary. They were done deliberately and were as much part of the act causing death as was the pressure of the trigger which fired the rifle. It is impossible to isolate the act of pressing the trigger from the other circumstances and argue that it, alone, caused the wounding and death. In these circumstances we doubt very much whether a jury could reasonably conclude that Taylor's death was not caused by any act of the applicant or entertain a reasonable doubt about the matter." (at 231).

[145] In *Murray v R* [2002] HCA 26 (Appellant's bundle V3) the appellant, carrying a shotgun, went into the room the deceased was in, and said the deceased moved suddenly and his arm shot out and hit him. Something hit the appellant in the head and the gun went off. The trial judge gave directions about accident and intent, but not about unwilled acts. The conviction was overturned by the High Court as a result of directions that suggested the jury simply needed to prefer one version of events over the other. When considering whether an "accidental act" was made out (for the particular statutory defence in Queensland) the High Court held a narrow view was not required and it was "important to avoid an overly refined analysis" of the act causing death (at [49] per Gummow and Hayne JJ).

[146] In *McKenna v R* (2015) NBCA 32 (Appellant's bundle V1) the appellant alleged the victim grabbed the gun barrel and pulled on it. The appellant said this caused the gun to discharge accidentally. There was no question the appellant's acts were nevertheless causative of death and "there was no air of reality in raising the defence of accidental discharge to the included offence of manslaughter" (at [12]).

Canada.

71. It was quite a different situation to that considered by the Court of Appeal of Quebec in *Primeau v R*,[147] to which the appellant refers. There the appellant said he had been holding a rifle (which he did not know was loaded) down by his thigh. The victim threw himself at the appellant, and the appellant stepped back to avoid him, lost his balance and struck his arm on the couch, causing the rifle to discharge. He said that he never pointed the rifle at the victim and never had his finger on the trigger. The Court found that the trial judge had erred in not explaining to the jury how this apparent accidental discharge was relevant to the actus reus of the offence. The judge had "made no reference to accident in relation to the actus reus of murder or manslaughter, nor any mention of the elements of unlawful-act manslaughter."[148]

72. This can be contrasted with the approach of the trial Judge in the present case. He discussed the defence theory of an accident separately both at the actus reus / causation part of the question trial and summing up, and later, when he addressed the issue of intent. The summing up adequately dealt with the defence account of unintentional discharge as it related to causation and voluntariness, where there was no dispute that Ms Kaitai had loaded and presented the firearm at Mr Kana with her finger on the trigger.

73. The next question is whether it was fairly and accurately encapsulated in the mens rea directions.

The "defence of accident" and murderous intent

74. The appellant's main focus in this Court is on the adequacy of the jury directions on murderous intent. Her complaint is essentially about the emphasis given in the direction. She says more explanation was necessary to aid the jury's consideration of the mens rea for murder. Given the issue was one of common sense – the relevance of an *unintentional* act to *intent* – it is difficult to see how such a direction could be regarded as necessary, much less one required to avoid a miscarriage of justice.

75. The jury direction on the mens rea for murder in this case needed to do two

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[147] *Primeau v R* [2017] QCCA 1394 (Appellant's bundle V2).

things:

75.1 accurately identify what the Crown needed to establish beyond reasonable doubt; and

75.2 identify the competing cases and the facts on which they were based.

76. The directions here did both.

77. Once the jury had concluded that death was caused by an unlawful act, and had excluded self-defence, they were next asked to consider Ms Kaitai's intent:[149]

> *ISSUE THREE: INTENT*
>
> 1. Are you sure that, when Ms Kaitai shot Mr Kana:
>
> (a) Ms Kaitai intended to cause Mr Kana bodily injury that was more than minor in nature;
>
> **AND**
>
> (b) Ms Kaitai knew (that is, consciously appreciated) that there was a real risk that shooting Mr Kana could cause his death;
>
> **AND**
>
> (c) Ms Kaitai consciously ran the risk that Mr Kana would die as a result of shooting him?
>
> *Notes:*
>
> *(1) Bodily injury is harm that is more than trifling or transitory and which affects the health or comfort of the victim.*
>
> *(2) "Knew" means that Ms Kaitai had an actual or conscious appreciation that death was likely.*
>
> *(3) "Likely" means that death could well happen or was a real risk.*
>
> If **YES**, find Ms Kaitai guilty of murder.
>
> If **NO**, find Ms Kaitai not guilty of murder, but guilty of manslaughter.

148 At [29], citing the Criminal Code, s 222(5)(a).

149 Question trail, COA at 282.

78. The key part of the summing up in respect of murderous intent was at [136], which specifically directed the jury to consider the possibility of an unintentional discharge:[150]

> I also need to go back at this point to the question of whether the gun was discharged as a result of what Mr Jenkins calls an "**unintentional act"** and 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 [Kaitai] had her finger on the trigger. 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.** So, you have to come back to consider those issues again. (emphasis added)

79. This paragraph was part of the portion of the summing up provided in writing to the jury after a question.[151]

80. The direction reminded the jury of the defence assertion that the gun was discharged as a result of an "unintentional" act and advised them that, if they concluded this was a reasonable possibility, "then that would clearly be an issue relevant to [murderous intent]".[152] Thus, their attention was directed both to the factual assertion, and its relevance to the issue in question. The jury was also directed to consider her intent "at the time the gun discharged".[153]

81. The appellant asserts this was insufficient: the Judge should have explained *how* an unintentional discharge was relevant to their consideration of her intent. But, as the Court of Appeal found, further elaboration was unnecessary.[154]

82. The relationship between:

    82.1 a factual finding that the gun may have been discharged as a result of an *unintentional* act; and

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150 Summing up at [136], COA at 258.

151 Following a jury question, the jury was provided with a copy of [126]-[139] of the summing up. See COA at 283.

152 Summing up at [136], COA at 258.

82.2 the question of whether Ms Kaitai *intended* to cause bodily injury, would have been plain for the jury to see. This was not a situation where the jury would need any particular assistance from the Judge.

83. The Judge *might* have gone further and told the jury that if they accepted the gun was discharged accidentally (or unintentionally) then Ms Kaitai would not have intended to injure Mr Kana. His Honour would have been repeating a concession made by the prosecutor. But such a direction cannot be regarded, though, as necessary for a fair trial. It was for the jury to determine the issue based on their own common sense. The absence of that further explanation cannot be regarded as a material omission or material misdirection and cannot have caused a miscarriage of justice.

84. The appellant has undertaken a helpful review of case law in Canada and Australia. United Kingdom cases are also mentioned but seem not to provide any material assistance. None of these cases indicate the further directions sought by the appellant should be required in New Zealand.

Canada

85. A number of Canadian cases have held that where a "defence of accident"[155] is raised, it is necessary for a trial judge to "link" the concept of "accident" to the *mens rea* for the offence, or tell the jury that "accident related to the absence of intent".[156] The trial Judge did as much in this case: by identifying the factual issue for the jury when directing on intent, and advising this issue was relevant to their enquiry.

86. Some comments in the Canadian authorities go further and say the Judge should *specifically instruct* that "as a matter of law the defence of accident <u>negates</u> or <u>relates to the absence</u> of intent".[157] In substance that is what

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153 No issue regarding concurrence of actus reus and mens rea arises.

154 Court of Appeal decision at [45], SCCOA at 19.

155 Despite the use of this terminology, "accident" is not a specific defence in Canada. In the Supreme Court of Canada decision in *Barton*, the majority referred to the "so-called 'defence' of 'accident'". *Barton* [2019] SCC 33, [2019] 2 SCR 573 at [194] (Appellant's bundle V1 at 116).

156 *R v Sutherland* [1993] SJ No 442 (Respondent's bundle) at [41].

157 See for example *R v Sutherland* [1993] SJ No 442 (Respondent's bundle) where the Saskatchewan Court of Appeal held the trial judge "should have specifically instructed the jury that as a matter of law, accident related to the absence of intent. 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 anytime instruct the jury that as a matter of law the defence of accident negates or relates to the absence of intent. I am of the

occurred here: the jury was instructed that the accident ("unintentional act") was relevant to intent. The absence of the phrase "matter of law" and use of "negates" do not appear to be essential to the reasoning. It is difficult to see why a jury would need to be specifically directed that an account of accident "relates to the absence of intent", where there can be no suggestion an accident indicates the *presence* of such intent. No Canadian conviction in the cases relied on by the appellant has been overturned simply based on the absence of a specific direction that "accident negates intent".[158]

87. In any event, the idea that accident "negates" intent, is conceptually confusing, and unlikely to assist a jury. The existence of an accident does not "negate" intent in the sense it nullifies something that is otherwise there – rather the argument was that Ms Kaitai simply never had the required intent. A direction about "negating" intent is potentially confusing, and unlikely to achieve the goal of striking a balance between the summing up being "both comprehensive and *comprehensible*".[159]

Australia

88. As the appellant acknowledges, the legal context is somewhat different in Australia, where at least some states have a statutory defence of accident. The most useful Australian discussion of the need for jury directions as to murderous intent in the context of an alleged accident is in *Stevens v R.*[160] There, the appellant claimed that the victim was about to shoot himself with a rifle, he attempted to take the gun away from the victim and he was

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opinion that even when read in the context of all the evidence and with his other instructions to the jury, that is that it was necessary for them to determine whether the appellant intended to cause the death of the victim, the issue of accident as it related to intent was not put fairly to the jury. In my opinion his instructions are inadequate on the issue of accident as it relates to intent and amount to misdirection" (at [41]). And see also *McKenna v R* [2015] BNCA 32 (Appellant's bundle V1).

158 In *R v Roe* [2009] BCCA 193 (Appellant's bundle V1) the trial judge had *no* discussion of "accident" or the elements of manslaughter. See at [13]. In *R v Hughes* [1942] SCR 517 (Appellant's bundle V2) the trial judge failed to direct the jury that if they took view that pistol was discharged unintentionally, they might properly bring in a verdict of manslaughter. In *R v Tennant* [1975] 23 CCC (2d) 80 (Appellant's bundle V2) the trial directions appear to have been extremely brief and did not make any attempt to link the concept of an accidental or unintentional discharge of the firearm to the *mens rea* requirements for murder. In *O'Brien v R* [2003] NBCA 25 (Appellant's bundle V2) there were errors in the use of the appellant's criminal history at trial. In *McKenna v R* [2015] BNCA 32 (Appellant's bundle V1) the trial judge misdirected jury that a finding of accident could lead to a complete acquittal, rather than simply an absence of intent for murder so that the appellant could still be guilty of manslaughter. The Court adopted the view expressed in *Sutherland* as to the need for "accident to be linked to the concept of intent". There was a further error in manslaughter directions.

159 *R v Rodgerson* 2015 SCC 38.

160 *Stevens v R* [2005] HCA 65 (Appellant's bundle V2).

accidentally shot. The High Court of Australia found the trial judge erred by not putting the specific statutory accident defence to the jury.

89. More relevantly to the present issue, Kirby J also commented adversely on the trial judge not "drawing to the jury's attention" that if they concluded the killing was accidental, the mental element required for murder was necessarily excluded.[161] Kirby J held: "one way or the other, the jury's attention should have been drawn explicitly to accident and proper instructions given by the trial judge".[162] This suggests a direction of relevance to intent should suffice. And again (unlike the present case) the actual jury direction in that case appears to have made no mention of accident in the intent directions.[163] The jury in Ms Kaitai's case plainly had their attention drawn to the relevance of an unintentional act to mens rea.

Conclusion

90. The summing up gave the jury a clear "agenda for discussions", fairly encapsulated the defence case and accurately represented the elements of the offence. The trial Judge:

    90.1 was clear about the intent that was required for murder;[164]

    90.2 directed the jury that it was Ms Kaitai's state of mind at the time of the shooting that they had to consider;[165]

    90.3 directed the jury's attention to the defence case that the shooting was unintentional and the obvious relevance of this to their consideration of intent;[166] and

    90.4 repeated the Crown's concession that if murderous intent had not been proved, then Ms Kaitai could be found guilty of

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161 At 62, per Kirby J.

162 At 63, per Kirby J.

163 As quoted in the judgment of Callinan J at 73-74, the direction on intent was: "A person who unlawfully kills another intending to cause the death of the person killed, or intending to do the person killed some grievous bodily harm, is guilty murder… You must decide in this case, having carefully considered all of the evidence, whether you are satisfied beyond reasonable doubt that the accused had such an intention at the relevant time, because the Crown case here is that the accused unlawfully killed the deceased intending to cause his death or at least intending to do him some grievous bodily harm. You may think that it is obvious if one were to shoot another in the forehead the inference could be drawn of the intention to cause death."

164 Summing up at [129]-[134], COA at 256-58.

165 At [132] and [136], COA at 257-58.

manslaughter.[167]

91. In the context of an otherwise lengthy and somewhat complex summing up, a more detailed direction was not required.

Burden of proof

92. The appellant says that [136] of the summing up was also problematic as it inverted the burden of proof. She points to the Judge's use of the expressions, "whether you regard it as a reasonable possibility" and "if you nevertheless thought it was a reasonable possibility" in that paragraph, and says these did not reflect that it was for the Crown to disprove those possibilities beyond a reasonable doubt.[168]

93. But the Judge's use of these expressions was unexceptional. This type of language was expressly approved in *Wanhalla*, where the Court of Appeal gave the example: "*If you think there is a reasonable possibility* that the accused was not there then you should find him or her not guilty" (emphasis added) as the type of short-form direction that may be "usefully employed" when addressing the elements of the offence and any defences.[169] There is nothing objectionable about the trial Judge's use of the same formulation here.

94. In any event, it was abundantly clear from the summing up, when read as a whole, where the burden of proof lay.[170] The Judge reminded the jury that the Crown had the burden of proof on several other occasions, leading up to the paragraph in question.[171]

95. Likewise, Ms Kaitai criticises the Judge's reference to the Crown's submission that they needed to "pick a path",[172] and notes that "it was for the Crown to prove one of these paths beyond a reasonable doubt, not for the jury to accept one of them".[173] But the reference to the jury having to "pick a path"

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166 At [136] and [139], COA at 258.
167 At [85], [127] and [138], COA at 247, 256 and 258.
168 Appellant's submissions at paragraph [72].
169 *R v Wanhalla* [2007] 2 NZLR 573, (2006) 22 CRNZ 843 (CA) at [51] (Respondent's bundle).
170 Summing up at [9]-[16], COA at 230-32.
171 At [30], [35], [37], [66], [77], [78], [79], [80], [83]-[85], [87], [96], [98], [115]-[116], [118]-[119], [121], [127], [129]. See also, during the discussion of the defence case at [197]-[201] and [205].
172 Appellant's submissions at paragraph [75], with reference to the summing up at [168], COA at 265.
173 Citing *Murray v R* [2002] HCA 26, (2002) 211 CLR 193 at [57] (Appellant's bundle V3),per Gummow and

was not a suggestion by the Crown that the jury had to choose between the Crown case and the defence case (as was the issue in *Murray*). Rather, it was a submission that, if the jury was sure that Mr Kana's death had been caused by an unlawful act, then they would have to determine what that unlawful act was. Was it simply the careless acts leading up to the shooting (i.e. presenting the gun, loading it and pointing it at Mr Kana with her finger on the trigger) or was it the reckless act of aiming it at him and pulling the trigger?[174] There was no suggestion that the task of the jury was to prefer the Crown's version of events over the defence's. Rather, it was a suggestion that whatever unlawful act the jury found had been proved would be of great importance as they worked through the remaining questions of the question trail.

Summary

101. For the above reasons the appeal should be dismissed.

15 May 2024

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Z R Johnston | B J Thompson
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

Hayne JJ.

174 Crown closing at [62], COA at 182.

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3. *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11

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5. *R v Wanhalla* [2007] 2 NZLR 573 (CA)

6. *R v Reti* CA212/03, 16 December 2003

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8. *Perry v R* [2018] NZCA 595

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9. *Ryan v R* [1967] HCA 2, (1967) 121 CLR 205

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10. *R v Sutherland* (1993) 84 CCC (3d) 484 (SKCA)

Texts

11. Morris Manning and Peter Sankoff, Manning, Mewett & Sankoff: Criminal Law (5th ed, LexisNexis) at 13.171

12. Mathew Downs (ed) Adams on Criminal Law (online ed, Thomson Reuters) at CA158

13. AP Simester and WJ Brookbanks Principles of Criminal Law (5th ed, Thomson Reuters, Wellington, 2019) at 3.3 and 3.4