Criminal Proceedings\(^1\) in the New Zealand Supreme Court – The First Ten Years

Conference Paper (Draft)\(^2\) – not to be cited

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Introduction

Ten years is not a particularly lengthy span in the life-time of a superior court - not enough for anything more than tentative assessments to be offered about the operation and jurisprudence of the newly-minted New Zealand Supreme Court, at least in the Criminal Law sphere. That said, some over-arching comments might usefully be made. It is notable that the Court has not been called upon to make many decisions in the area of substantive, doctrinal criminal law. By far the majority of cases in the area originally allotted to me for the purposes of this exercise have been concerned with the rules of Evidence. My hypothetical explanation for this state of affairs is that the Crimes Act 1961 is a mature code of substantive criminal law, whereas the laws of Evidence and Procedure have been the subject of very significant reform processes culminating in the Evidence Act 2006 and (to a much lesser extent) the Criminal Procedure Act 2011 respectively. These measures have challenged many of the established ways of thinking in these areas of the law, and the resultant case law has inevitably exposed some of the gaps and flaws in the new legislation.

A provisional conclusion (perhaps better described as an observation) is that the court has been appropriately receptive to these reforms, and has attempted as best it can to give effect to what Parliament has enacted, being alive to the proposals of the Law Commission which generated most of the reform proposals in this area of the law. This is at variance with the experience of the treatment sometimes accorded to new

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\(^1\) My initial brief from the organisers of the Conference was to include Criminal proceedings generally, covering Evidence and Procedure in addition to the substantive doctrinal criminal law. It became apparent to me in the course of preparing the paper that my decision to accept that brief was unwise. The Supreme Court has been extremely busy in the area of Evidence, in particular, because of the enactment of the Evidence Act 2006. Rather late in the preparation for the Conference, therefore, I suggested to the organisers that the book to be published based on the revised papers would be better for the inclusion of a separate section on Evidence, and I am grateful for their agreement to adopt that course.

\(^2\) I am grateful for the list of the Court’s eligible decisions for inclusion in the survey supplied by the organisers of the Conference, which I have supplemented by my own subsequent researches. No doubt there are some that I have missed, and I should be grateful for any advice as to my errors in this respect.
legislation in the United Kingdom,\(^3\) where the courts have tended to remain resistant to attempts to bring legislative history to bear on problems that have arisen, and not to be constrained by what is found even when it is brought to their Lordships’ attention.\(^4\)

**Some historical background\(^5\)**

Reading the reports leading up to the abolition of the appeal to the Privy Council and the creation of the Supreme Court.\(^6\) it is quite striking that the framers of the Act did not set out to make particular provision for the role of the Court in the area of the Criminal Law. “Striking” because, of one thing we can be reasonably certain, namely that one of the general aspirations of the promoters of the Supreme Court legislation was to “improve access to justice” for New Zealand’s litigants and public to the highest court in the land.\(^7\) This was always bound to have a far more significant impact in the area of the Criminal Law than the Civil, largely because of the historical reluctance of the Privy Council to grant leave, and for that matter, the infrequency with which leave to appeal was sought because of lack of funding in particular.\(^8\) There

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\(^3\) For a general discussion of the way in which the New Zealand courts have taken their own approach to the use of parliamentary history in the interpretation of legislation, and a comparison with other jurisdictions such as Australia and the United Kingdom, see Catherine J. Iorns Magallanes “The ‘Just Do It’ Approach to using Parliamentary History Materials in Statutory Interpretation” [2009] 15 Canta LR 205.

\(^4\) The best known example of this phenomenon is to be found in the decision on impossible attempts, *Anderton v Ryan* [1985] A.C. 560 which was delivered after the legislature had sought to rectify the law in the Criminal Attempts Act 1981. The House held that there was still a distinction to be drawn between “factual” and “legal” impossibility even after Parliament had sought to abolish it. Professor Glanville Williams wrote one of the most withering learned articles ever published, “The Lords and Impossible Attempts or Quis Custodiet Custodes Ipsos” [1986] 45 C.L.J. 33. It was not very long before the issue arose again in *Shivpuri* [1987] A.C. 1. The House of Lords decided to reverse its own previous decision, admitting that it had been wrong - using the power under the 1966 Practice Statement to do so.

\(^5\) I have had the benefit of reading Professor Margaret Wilson’s paper for this Conference, “Establishing a Final Court of Appeal for New Zealand”. I am extremely grateful to her for permitting me to see it.

\(^6\) See in particular the Report of the Advisory Group, *Replacing the Privy Council: A New Supreme Court* (April 2002), chaired by the Solicitor-General of the day (and now Justice of the Supreme Court), Mr Terence Arnold Q.C., at para 76. I have referred to it in this paper as “the Arnold Report”.

\(^7\) The aspiration is now to be found in the purpose clause of the Supreme Court Act 2003, at s 3(1)(a)(iii).

\(^8\) See the remarks of Lord Kerr in *Lundy v R* [2013] UKPC 29, [2014] 2 NZLR 273 at [3] where his Lordship speaks of eg lack of legal aid and the inability to find *pro bono* representation etc. as being amongst the reasons why the appeal in that case was so long delayed. I would hazard the guess that this was fairly typical of the reasons why
is a prediction in the Arnold Report\(^9\) that there would be a much greater number of appeals in this area. In so far as this development was seen as a virtual certainty, criminal lawyers would say that the Committee intended that it should happen.

**What are the figures?**

The Arnold Report\(^10\) lists the cases heard by the Privy Council. Between 1851 and 2002, there were 7 appeals to the Privy Council in Criminal Law cases, of which only 2 were allowed. Leave was almost never given. Petitions for special leave to appeal between 1903 and 2001 are listed in Appendix E, Table Two. Seven Criminal Law cases are identified (six of them in the decade 1974 to 1984) and in all of them, leave to appeal was refused. The figures may be slightly misleading, because they refer to reported cases only, and there may well have been other cases of application for special leave that went unreported. But we can fairly safely conclude that the Privy Council made very little direct contribution to the Criminal jurisprudence of New Zealand.

The contrast with the period under consideration (2004 to 2014) is stark, if not startling. In the ten year period, there have been 553 applications for leave to appeal in criminal cases. Of these, 19\% have been granted, a total of 104 cases.\(^11\) By any measure this is a significant increase.

**The role of a second tier court of appeal in the Criminal Law context\(^12\)**

A number of purposes of granting at right of appeal to a second court of appeal can be identified. In announcing the introduction of the Supreme Court Bill to Parliament, the Attorney-General (Margaret Wilson) is reported to have said that the purpose of the Court was to perform the traditional roles of the Privy Council, namely “error correction, clarification and development”.\(^13\) In addition to this, the Court’s own

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people who contended that they had been the victims of a miscarriage of justice were thwarted in their attempts to vindicate that assertion through the judicial process.

\(^9\) Arnold, above n. 6, at para 76.

\(^10\) Above, n. 6, Appendix E.

\(^11\) website

\(^12\) A. Le Sueur and R. Cornes, “What do top courts do?” (2000) 53 CLP 553. This article is based on the research conducted by the same authors and later published as *The Future of the United Kingdom’s Highest Courts* (UCL, Constitution Unit, 2001).

\(^13\) Government Media Release, 9 December 2002. I am reliant for this information on the article of Professor Philip Joseph, ‘Constitutional Law’ [2003] NZ Law Rev 387, 395. The correction of error was not mentioned by the Attorney-General in her speech
website says that “… As the court of final appeal, the Supreme Court has the role of maintaining overall coherence in the legal system”.  

Absent from the identified purposes mentioned by the Attorney-General is the task of preventing miscarriages of justice in the instant case that is the subject of the appeal. But it is clear from the numerous references to miscarriages of justice in the grounds for appeal sections of the Supreme Court Act itself that this is one of the primary considerations in the disposal of these appeals. In one of the earliest appeals, R v Sungsuawan, the Court held unanimously that “the statutory ground of appeal which justified intervention was that there had been a miscarriage of justice. The focus was to be on the safety of the verdict. The Court would also intervene to prevent a miscarriage of justice, however caused”.

The same case is an illustration of the Court clarifying the law and correcting error, each of the three approved grounds of appeal being “That the Court of Appeal erred in ….”.  

The remarks of the Court in Fukofuka v R’s giving guidance to trial judges also illustrates one of the core functions of a Supreme Court. “… we emphasise the importance of trial judges complying with the mandatory requirements of s 126 and its underlying policy” on giving warnings of the known dangers of identification evidence, and recognising the difficulties of formulating such guidance in the context of propensity evidence.

Also coming in to this category must be the sentencing decision in Hessell v R which, since it gives guidance as to the discount to be allowed for a guilty plea is clearly directed to sentencing judges, and which as a result must be regarded as one of its most influential judgments.

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19 A Lexis search reveals that the decision has been cited in an enormous number of cases, which gives some (albeit rough and ready) measure of its importance.
Further guidance is to be found in section 3 of the Supreme Court Act itself, the purpose clause, which provides that:

(1) The purpose of this Act is—

(a) to establish within New Zealand a new court of final appeal comprising New Zealand judges—

(i) to recognise that New Zealand is an independent nation with its own history and traditions; and

(ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and

(iii) to improve access to justice; and

(b) to provide for the court's jurisdiction and related matters; and

(c) to end appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts; and

(d) to make related amendments to certain enactments relating to courts or judicial proceedings.

(2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament. 

The stated purposes are, then, a blend of the symbolic (recognising independent nationhood), practical, if somewhat delphic in expression (improving access to justice, which in the criminal law context means making it somewhat less expensive to bring proceedings in the highest court of the nation)21 and a mixture of the two (ending appeals to the Privy Council).

It may be said that once all of these purposes have been articulated, it can be seen that we are demanding a great deal of our highest court, particularly in the criminal law context, where the need for clarity in the voice of the highest court is most needed, for the guidance of the courts below. The court, after all, consists of five independent members who cannot be expected to speak with one voice. Nor should it do so. One of the lessons to be learned from the D.P.P. v Smith debacle22 was that if the Court does produce a single judgment, it is likely to be read as if it has some almost legislative significance. In that case, Lord Denning gave the single speech holding, in effect, that a person might be guilty of the offence of murder, and capital murder at that, where his mens rea was no more that gross negligence, because of the fiction

20 See Margaret Wilson’s paper, above n 5.

21 The explanatory notes to the Bill as introduced make it plain that this is what was intended.

22 See below at n 29.
that a person is presumed to intend the natural and probably consequence. Legislation was required to reverse the decision.\textsuperscript{23}

\textbf{Replacement and continuing relations with/influence of the Privy Council}

The jurisdiction of the Privy Council continued (and continues) to exist in relation to decisions of the NZ Court of Appeal in cases decided before 1 January 2004, by virtue of the Supreme Court Act 2003 ss 50(1)(c)(i) and s 52(1)(b)(i). It is still open to persons aggrieved by decisions of the New Zealand court before that date to seek leave to appeal, and several appellants have availed themselves of this. Somewhat perversely perhaps given the history just recounted, the Privy Council has given leave and heard the appeals in a number of high profile cases\textsuperscript{24} since the Supreme Court Act 2003 came in to effect, most recently in \textit{Lundy v The Queen}\textsuperscript{25} and \textit{Pora v The Queen}.\textsuperscript{26}

The fact that the Privy Council has contributed very little to the criminal jurisprudence of New Zealand’s Criminal Law means, in terms of precedent that it is more or less obliged to follow,\textsuperscript{27} that the Supreme Court is in a not dissimilar position to the House of Lords when the Administration of Justice Act 1960 made appeals to the Lords far more readily available to appellants in England and Wales. Until that legislation was enacted, the test for being granted leave to appeal required that the Court of Appeal should certify that a point of law of “exceptional public importance” was involved in the case, and the fiat of the Attorney-General (who had been the successful litigant in the court below) was also required. Not surprisingly, there were very few appeals in the course of the first two thirds of the twentieth century. The fiat requirement was abolished by the 1960 Act, and the certificate had to subsequently state that a point of law of “general” rather than “exceptional” “public importance”\textsuperscript{28} was involved.

\textsuperscript{23} Criminal Justice Act 1967.

\textsuperscript{24} The other Privy Council cases falling in to this category include the highly controversial case of \textit{Bain v R} [2007] UKPC 33, where the successful appellant was retried and acquitted in June 2009, \textit{Barlow v R} [2009] UKPC 30 and \textit{R v Pora} UKPC 2013/0081. The convicted murder/rapist was released on probation on 14 April 2014, and his application for leave to appeal is set down to be heard in the Privy Council on 4-5 November 2014.


\textsuperscript{26} UKPC 2013/0081.

\textsuperscript{27} For a useful discussion of this matter, see Thomas Joseph, “Precedent in the Supreme Court” [2011] NZLJ 9.

\textsuperscript{28} Compare the similar but slightly different language of the Supreme Court Act 2003, s. 13(2)(a), set out below at p. 8.
In effect, when those constraints were removed, the House of Lords was given *tabula rasa* to reformulate the criminal law, since there were almost no decided cases constraining their Lordships. In the first year of the new regime, the House delivered itself of three decisions that were the subject of enormous criticism, and it was slow to grant leave to appeal for almost a decade thereafter. Since that time, a good deal of case law has made its way to the House and now the Supreme Court. For many years the reputation of the House of Lords in Criminal cases was rather low. Probably for many academic lawyers at least, the nadir was the decision of the House of Lords in *Caldwell*, to the effect that the *mens rea* of recklessness could be satisfied even where the risk in question was not appreciated by the actor if the risk was an obvious and serious one. This was a significant departure from the criminal law as it had been hitherto understood, and required the House to overrule previous decisions, made at the lower level. After strenuous criticisms, and many years later, the House decided to depart from its earlier decision, restoring the law to its former state.

So far as I have been able to ascertain, there has been only one case in which the New Zealand Supreme Court has thus far decided that previous decisions of the Court of Appeal should no longer be followed. In *Y v R*, the question was whether the appellant, on undisputed facts, was guilty of offences of indecencies with three underage boys, contrary to sections 132(3) and 134(3) of the Crimes Act 1961 (as amplified by section 2(1)(b), which required that the acts of indecency had been done “with or on” the victims), in a situation where he had requested the boys to masturbate in his presence. A District Court judge had granted a discharge under section 347, but the Court of Appeal allowed an appeal from the Crown and the s. 347 discharge was set aside.

In *Trower v R*, the Court of Appeal took the view that an expanded reading of the phrase “with or on” to become “effectively a synonym for ‘in the presence of’” as the trial judge had interpreted it to be was too broad a reading, and quashed the conviction. That was in essence the basis on which the District Court had granted the discharge in *Y v R*, and the question was whether he was correct to have done so. The Supreme Court held not. Particularly in cases where the defendant had requested the child to perform the indecency in question for purposes of his own sexual

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33 [2014] NZSC 34.

gratification, it was a jury question as to whether or not the indecent acts were “with or on” the defendant. The Court went on to give guidance to trial judges as to the way in which they should go about giving directions to the juries in these types of cases.

At [23], the Court says: “It follows that we consider that (a) Trower was wrongly decided and (b) the judgment in R v S took too narrow an approach to the circumstances in which liability might be imposed”. The Court also noted at [27] that “no decision of this Court or the Privy Council interpreted ss 132 and 134 in a manner inconsistent with the view adopted in this judgment”. My point at this stage is that given the historical lack of appeals to the Privy Council, it is most unlikely that there will ever be cases in which Privy Council has given judgments in appeals concerned with the state of New Zealand’s substantive law.

Some procedural matters

Unlike appeals to the Court of Appeal, where there is an appeal as of right,\(^{35}\) for the Supreme Court, leave to appeal is required, and can be given only by the Supreme Court itself.\(^{36}\) This should allow the Court to manage its own workload, and to select those cases that are best suited to enable it to perform the functions expected of a final appeal court.

The decisions as to whether or not appeal should be granted are taken by a panel of three judges (generally on the papers, but in rare cases, where appropriate, after a hearing). The decisions are usually briefly reported, sometimes to be found in the Law Reports, and they are available for consultation on the Supreme Court’s website. They are generally not particularly informative to those who are not familiar with the issues in the decision from which appeal is being taken, with the grounds cited being relatively formulaic.

Criteria for leave to appeal

The grounds on which leave to appeal may be granted are to be found in the Supreme Court Act 2003, s13

- “(1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.
  (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
    o (a) the appeal involves a matter of general or public importance;\(^{37}\) or

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\(^{35}\) Cf the position in the United Kingdom, where leave is required to appeal to the Court of Appeal.

\(^{36}\) Supreme Court Act 2003, s. 12 ***

\(^{37}\) cf the United Kingdom position which stipulates that both qualifiers must be satisfied ie the point certified must be one of “general public importance”.

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o (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
o (c) the appeal involves a matter of general commercial significance.

(3) For the purposes of subsection (2), a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.

(4) The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

(5) Subsection (2) does not limit the generality of subsection (1); and subsection (3) does not limit the generality of subsection (2)(a).”

The framework established by the Crimes Act 1961

New Zealand’s Criminal Law is largely contained in and governed by the Crimes Act 1961, which is supplemented in cases of less serious offending by the Summary Offences Act 1981. This is a piece of legislation with a venerable history, based on the Stephen Code, first enacted in 1893, consolidated in 1908 and then substantially modified and modernised in 1961. From the outset, it contained sections on Evidence and Procedure in addition to the substantive criminal law, but it did not have a section on what has been called “The General Part”, or more specifically what was meant by intention, recklessness and negligence, the fault elements. It has had amendments grafted on to it from time to time (misuse of computers, for example, and participating


39 The principal common law exception to this proposition is to be found in the hybrid law of contempt of court, which has a problematic distinction between civil and criminal contempt, and with which the Court has been seized on two occasions: Siemer [2010] NZSC 54, [2010] 3 NZLR 767; [2013] NZSC 68, [2013] 3 NZLR 441. This is not the forum in which these arcane matters should be explored.

40 Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (1879) which included Sir James Fitzjames Stephen as part of its membership. It was he who initiated the codification project that was adopted in many of the Colonies but not in England and Wales.
in an organised criminal group in s 98A) as new forms of mischief-making come to light and are deemed worthy of pursuit through the criminal sanction. Scope for judicial law-making correspondingly decreased by comparison with United Kingdom comparators. As a result, in my view, the substantive criminal law is a relatively stable body of well understood legal rules, and as a consequence, there have been very few decisions in the period under survey devoted to the elaboration of doctrinal criminal law.41

**The Bill of Rights Act 1990**

One potentially dislocating development to the criminal justice process was injected in 1990, in the shape of the Bill Of Rights Act. This measure has affected both the scope of the substantive criminal law in areas such as the exercise of freedom of speech, as decided in the cases of *Morse v Police*42 and *Brooker v Police*,43 by requiring that the freedom protected by section 14 should be explicitly considered when charges of offensive speech and disorderly behaviour and are under consideration. In addition, the right to a fair trial is now governed and guaranteed by New Zealand Bill of Rights Act 1990, ss 24(g) and 25(a), (e) and (f) it has affected procedure (the right to a fair trial in the interpreter case)44 and evidence. The free speech decisions have been much discussed by commentators, and are treated for the purposes of this Conference by Professor Rishworth. In so far as the law now requires the courts to give explicit consideration to the rights protected, BORA has brought a fresh dimension to an old problem of accommodating the conflicting claims that arise in this area.

**Translation of legal proceedings**

The extent to which the right to a fair trial now includes the right to the assistance of an interpreter was considered by the Court in *Abdula v R*.45 This matter manifestly is of increasing significance as the population of New Zealand is rapidly becoming more

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41 Leave has recently been given in two decisions, one concerning the nature of “property” for the purposes of the law of theft: *Dixon v R* [2014] NZCA 329, [2014] 3 NZLR 504, and the other *A(CA 814/2013) v The Queen* [2014] NZSC 157, concerning the requisite mens rea for liability under s 119(2) of the Crimes Act (assault with intent to commit sexual violation of the other person).


multi-cultural, \textsuperscript{46} and explicit provision is made in s 24(g) of the Bill of Rights Act 1990, which provides that “Everyone who is charged with an offence – “(g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court”.

The appellant and another were tried for rape. They were both from Ethiopia, and spoke the Oromo language. The appellant had originally made a statement in English, and said initially that he did not need the services of an interpreter. His co-accused however spoke little if any English, and an interpreter was brought to New Zealand from Australia. At the start of the trial, the judge asked the interpreter if he would also act for the appellant, and he agreed to do so. At the trial, the interpreter sat between the two accused. There was clearly some concern about this process. Sometimes the interpretation was simultaneous, and not spoken clearly or loudly enough to be heard by everybody in the court.

The Court took the view that it was for the appellant to show, on the balance of probabilities that the proceedings did not properly respect the right to a fair trial. In the particular case, it had not been shown that the interpretation provided at the trial had fallen below the standard required by the Bill of Rights Act. The judge had taken steps to achieve and maintain the required standard of interpretation, the appellant had not indicated at the trial that he had had difficulties understanding the evidence or the procedure.

However, the Court considered that there had been some lapses from best practice, and gave advice as to how matters should be conducted in the future. It is the responsibility of he judge, throughout the trial, to ensure that the interpreter is discharging the responsibility competently, both by facilitating the process and observing whether it appears to be working satisfactorily. Consecutive interpretation rather than simultaneous is highly desirable, and the interpreter should at all times speak in a voice loud enough for all in the courtroom to hear. An audio recording should be made at all criminal trials in which an interpreter provides assistance to the accused.

\textbf{THE SUBSTANTIVE CRIMINAL LAW}

\textbf{Necessity and compulsion – a BORA element?}

In \textit{Akulue v R}\textsuperscript{47} the appellant (who was of Nigerian origin but living in New Zealand) was charged with (and convicted of) participating in the importation of controlled drugs. His role was to meet the importer in New Zealand and pass them to a third person. He wished to adduce evidence that a man in Nigeria had threatened to kidnap

\textsuperscript{46} Unscientific though the observation might be, it is interesting to note the ethnic diversity in the names of the appellants in the cases mentioned in this paper and in the Evidence cases coming regularly before the courts.

and kill members of his family still in Nigeria unless he participated in the importation. The trial judge ruled that, although it was common ground that s 24 of the Crimes Act 1961 regulating “compulsion” was inapplicable, evidence could be led to support a common law defence of necessity that had been preserved by s 20 of the Crimes Act. The Solicitor-General appealed successfully to the Court of Appeal against the availability of a defence of necessity, and the defendant appealed to the Supreme Court against this ruling, arguing in addition that the defence under s 24 was available.

The Court held (unanimously) that no defence was available.

The requirements under s 24 of the Crimes Act 1961 that the threats had to have an immediate character and had to derive from a person who was present at the time of the offence could not encompass the person making the threats being in Nigeria and the defendant being in Auckland when the offending occurred. Nor were the threats of harm able to be inflicted immediately on the defendant’s family in Nigeria.

The common law defence of compulsion was not preserved by s 20 of the Crimes Act. Section 24 excluded any common law defence of necessity based on threats of harm sourced in other persons. It might be different if the factual scenario amounted to “duress of circumstances”

Several aspects of the decision warrant comment. The Court considered the decision of the Supreme Court of Canada, *R v Ruzic*, the facts of which were remarkably similar. Similar too is the legal framework in Canada, in the sense that the Charter of Rights and Freedoms was based on the International Covenant on Civil and Political Rights, and the Criminal Code is also based on the Stephen Code, so that the provisions governing compulsion are remarkably similar. In that case, the Court took the view that the compulsion section, as drafted, was inconsistent with the Canadian Charter of Rights, and in particular s 7 which provides:

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

The Court held that it is a principle of fundamental justice that conduct which is morally involuntary should not attract criminal liability.

The New Zealand Court disagreed with the latter proposition. It said that it did not accept that recognition of moral involuntariness is a principle of fundamental justice. It also made the point that the Canadian Court has the power to override legislation, and did so in this case by replacing the immediacy and presence restrictions with requirements that there be a “close temporal connection between the threat and the harm threatened”, and that there be no safe avenue of escape.

“As the Court of Appeal noted, various proposals to amend the law of

48 2001 SCC 24, 1 SCR 687.
compulsion have been floated over recent years, but there has been no legislative response. Mrs Smith for the appellant suggested that this absence of response warrants judicial intervention. We, however, see intervention along the lines that she proposes to be inconsistent with the proper limits of our role. It would be an obvious usurpation of legislative function for the courts to allow, under the guise of a common law defence of necessity, a defence based on compulsion by threats in respect of the offences listed in s 24(2). This being so it might be thought to be equally an usurpation of legislative function to allow such a defence to be advanced in circumstances where other requirements of s 24, in particular, immediacy and presence, have not been satisfied.”

Justified use of force

The appellant in Taueki v R\textsuperscript{49} had been convicted of an assault, the trial judge having rejected a claim that his conduct was justified under section 56 of the Crimes Act 1961, which in limited circumstances permits the use of force in the protection of property. The incident that was the subject of the charge occurred on Maori freehold land, and the appellant was one of the beneficial owners of the land. He had sought forcibly to prevent some Sailing Club members who were authorised users of the land and a lake (Horowhenua) from taking a boat on the lake, believing that appropriate cleaning operations had not been effected to the boat. Although no great force was used, his conduct was clearly a technical assault.

56. Defence of land or building – (1) Every one in peaceable possession of any land or building, and every one lawfully assisting him or acting by his authority, is justified in using reasonable force to prevent any person from trespassing on the land or building or to remove him therefrom, if he does not strike or do bodily harm to that person.”

Mr Taueki’s argument was that he was in peaceable possession of the domain. But the Court concluded that he was not, saying that although neither ownership of property nor a claim of right was necessarily required before a person had possession as required by s 56 of the Crimes Act 1961, the concept of possession in s 56 was that which underpinned the law of trespass. Possession accordingly turned on whether the person raising the defence had actual control over the property in question. Whether a person had sufficient control to be in possession was a factual question turning on all the circumstances, including, for example, the nature of the land in question and the manner in which it was usually enjoyed.\textsuperscript{50} A mistaken belief, whether reasonable or not, as to peaceable possession did not suffice to enable a person who was not in fact in possession of land to rely on the defence in s 56 of the Crimes Act.


Furthermore, the defendant had insufficient control to be in possession of the area concerned as required by s 56 of the Crimes Act. The statutory right, provided for in s 18(5) of the Reserves and Other Lands Disposal Act 1956, to “free and unrestricted use” of land did not confer any control over or amount to possession of the land, especially given the nature of the land as a public domain.

**Accessorial Liability – joint enterprise and common purpose**

The Court has had occasion to consider accessorial liability in two cases, which involved the interpretation and application of section 66 of the Crimes Act 1961. The limited extent to which the Court will look at common law sources for the purposes of deciding the state of New Zealand law is illustrated by the case of *Edmonds v R*, which concerned the scope of the law on joint enterprise and common purpose accessorial liability.

The appellant and two other men were convicted of manslaughter. They were part of a group who had been gathered together by Edmonds for the purpose of attacking another group of men. They armed themselves with a variety of weapons (including a gun which was in the possession of the appellant, a blunt instrument such as a baseball bat and a knife). Two of the group, at the appellants urging (he said “go, go, go”) chased members of the other group, and in the course of the exchange, the victim was killed by stabbing by a principal who was convicted of murder.

According to the prosecution case, the situation was catered for by section 66(2) of the Crimes Act 1961 which provides that:

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

Complaint was made on appeal that the judge had not told the jury that they could only find the appellant guilty if he knew that the principal had a knife in his possession.

The Court was invited to consider recent authorities from other jurisdictions, including the United Kingdom and Australia. In the United Kingdom, in particular, the law governing joint enterprise liability has become excessively complicated and arguably over-inclusive, as the result of a decision of the House of Lords in *R v Powell (Anthony)*. Subsequently, in *R v Rahman*, the House sought to restrict the

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51 [2011] NZSC 159, [2012] NZLR 445. The reasons of the Court were delivered by William Young J.

scope of liability, by emphasising notions such as that an accomplice was not guilty as an accessory if what was done by the principal was “fundamentally different” from what the parties had originally agreed to do, a “radical departure by the primary killer from the foreseen purpose of the enterprise”\textsuperscript{54} A fundamental difference might be found in the comparison between the weapons used in the killing. According to Lord Hutton in \textit{Powell}, “in the present case the use of a knife was fundamentally different to the use of a wooden post.” In New Zealand, matters of this kind were canvassed by the Court of Appeal in \textit{R v Vaihu}\textsuperscript{55} and again in \textit{Rameka v R}\textsuperscript{56} where the Court sought to accommodate these distinctions in to the statutory language of the Crimes Act.

Fresh complications were added by the United Kingdom’s Supreme Court in \textit{R v Gnagno}\textsuperscript{57}, the nature of which are encapsulated in the title of an article written on the case by a recently retired member of the Court of Appeal, Sir Richard Buxton, “Being an accessory to one’s own murder”\textsuperscript{58}

In a section of the judgment in \textit{Edmonds}, headed “Setting the legal scene”\textsuperscript{59} the Court explains the significant differences between the mental element in murder as between New Zealand and the United Kingdom, and the effect that this can have on the application of the common purpose rules. In the latter jurisdiction,

> “the mens rea requirement for murder includes an intention to inflict grievous bodily harm, and common purpose liability requires merely an awareness that an assault with such an intention is likely. So a party to the assault who did not inflict the fatal injury, did not intend that anyone should be killed and did not even foresee the possibility of this happening can be found guilty of murder if he or she foresaw the possibility of an assault with intent to inflict grievous bodily harm. There has been much concern in England that rigorous application of these principles tends to over-criminalise the conduct of secondary parties, particularly where they may not have foreseen the particular course of events which resulted in death.”

\textsuperscript{54} Lord Bingham, at [24]-[26].  
\textsuperscript{55} [2009] NZCA 111.  
\textsuperscript{56} [2011] NZCA 75. Limited leave to appeal to the Supreme Court was granted [2013] NZSC 121.  
\textsuperscript{57} [2011] UKSC 59, [2012] 1 AC 827. See Graham Virgo, “Joint Enterprise Liability is Dead: Long Live Accessorial Liability” [2012] Crim LR 850 who describes the case as “one of the most significant decisions on the subject of accessorial liability in England and Wales for many years”.  
\textsuperscript{58} [2012] Crim L.R. 275.  
\textsuperscript{59} At [21].
The response of the Court was, in the language of the headnote, that Rahman was “not adopted.” In the words of Young J. again,

“[47] The approach of New Zealand courts to common purpose liability must be firmly based on the wording of s 66(2). That section recognises only one relevant level of risk, which is the probability of the offence in issue being committed. If the level of risk recognised by the secondary party is at that standard, it cannot matter that the actual level of risk was greater than was recognised. It follows that there can be no stand-alone legal requirement that common purpose liability depends on the party’s knowledge that one or more members of his or her group were armed or, if so, with what weapons. As well, given the wording of s 66(2), there is no scope for a liability test which rests on concepts of fundamental difference associated with the level of danger recognised by the party. All that is necessary is that the level of appreciated risk meets the s 66(2) standard.”

Accessorial responsibility arose again for consideration in Ahsin and Rameka v R. 60

The appellants were two young women, one of whom was in a relationship with Black Power members (three of whom had been convicted of the murder of a Mongrel Mob Member in relation to the incident giving rise to the present appeals). Both women had been convicted of murder as accessories, although the form of assistance alleged had not been specified in the indictments. Ashin had driven the car to the fatal encounter, and Rameka was a passenger. The Crown had argued that a common purpose had been formed earlier in the day as a result of three altercations between members of the groups, but did not specify in the indictment which section or sections of s 66 upon which it was seeking to rely. All of the judges were agreed that this had made the task of the trial judge and jury a great deal more complicated than it should have been.

It is difficult in a paper such as the present to do justice to the depth and complexity of the issues and arguments, but in addition to considering the scope and applications of the sections of the Crimes Act, the issues at stake included: the question of whether the two appellants might have been able to assert a defence of withdrawal, which might either be the assertion of a common law defence under section 20 of the Crimes Act (which was the view of the majority, McGrath, Glazebrook and Tipping JJ.) or a denial that the elements of the offence of the offence had been proved: whether section 66(2) applied in cases where the common purpose was to commit the very offence that was the subject of the common purpose (as had been suggested by the Court of Appeal in Bounavong v R. 61) or whether, by contrast, it covered only those actions of the other participants that were collateral to the original common purpose.

A question also arose about the extent to which the verdict of the jury was required to be unanimous. The Chief Justice delivered a separate judgment, concurring with the majority that both convictions should be quashed and a retrial ordered, but taking a

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different view from the majority which had concluded that “an offence by an accessory party is complete when assistance is given” [20]. Young J delivered a separate judgment in which he decided *multa inter alia* that the decision of the Court of Appeal in Bounavong was “not correct” [238] and that section 20, properly interpreted in the light of the general scheme and history of the Crimes Act would not allow for a general defence of withdrawal as the majority had decided. In several passages of his judgment, he offers guidance to prosecutors as to the way in which the case should be explained.\(^62\)

**Corruption**

The same fidelity to the statutory language of the Crimes Act 1961 is evident in the corruption case of *Field v R*,\(^63\) an appeal by the Member of Parliament who had been convicted of an offence under the Crimes Act 1961, s. 103(1) by accepting the free labouring services of immigrant workers whom he had assisted in their dealings with the immigration authorities, valued at some $50,000.

It was argued on appeal that the trial judge had misdirected the jury. The Judge directed the jury that the services would have been accepted corruptly if Mr Field had known or believed that the work done on the property was done because he had provided or it was anticipated that he would provide immigration services. Mr Field appealed to the Supreme Court, arguing additionally that a gratuity given after the event *Which event* could not constitute a bribe.

At [19], William Young J says

“we see no need to engage with whether a gratuity could be a bribe at common law. This is because s 99 defines ‘bribe’ in non-pejorative terms …”

The Court looks at the legislative history of the Crimes Act provisions, which can be traced back to the Corrupt Practices Prevention Act 1845 which made it a criminal offence to engage in the bribery of voters.\(^64\)

**Evidence\(^65\) and Procedure\(^66\)**

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\(^{62}\) See in particular [242]-[243].


\(^{64}\) Apart from these election offences, there is a wide held view that members of the United Kingdom Parliament are outside the law of bribery and corruption. See A.T.H. Smith, *Property Offences: The Protection of Property Through the Criminal Law* (1994) paras 25-39 to 25-41.

\(^{65}\) B. Robertson (ed) *Adams on Criminal Law – (online looseleaf ed, Brookers).* See Mahoney, McDonald, Optican and Tinsley, *The Evidence Act 2006, Act & Analysis*
By comparison with the substantive Criminal Law, the Law of Evidence underwent a major revision before and during the period under review, driven by the Law Commission, which conducted a lengthy research and reform project, starting in August 1989 and culminating in the Evidence Act 2006. To summarise the impact of these changes in the language of Justice William Young, “The Act operates very differently from the position as it was under the common law and earlier non-comprehensive Evidence Acts.” What was formerly described as “similar fact” evidence, for example, has become “propensity”.

The relationship between the Act and the pre-existing common law is in places unclear, and the question has been asked “whether there is a need for greater certainty about the status of the common law under the Act.” That status is addressed by sections 10 and 12 of the Act, but “The question has arisen because of a handful of cases where the common law has been employed in a way that, arguably, is not anticipated by those provisions.”

Improperly obtained evidence

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3rd ed (2014); Elisabeth McDonald, Principles of Evidence in Criminal Cases (2012); Don Mathieson (ed) Cross on Evidence (online looseleaf ed, LexisNexis)

66 See generally eds J Finn, Don Mathias and Ron Mansfield, Criminal Procedure in New Zealand (2013), chap 14 (Appeals). Mention might be made here of the development of “question trails” and “issue sheets”, which began as a uniquely New Zealand development.


68 Some transitional provisions of the Act came in to force on 18 July 2007 and the remainder of the Act as from 1 August 2007.

69 In a Foreword to the 3rd edition of Mahoney, McDonald, Optican and Tinsley, The Evidence Act 2006: Act and Analysis (2014), His Honour adds that “Because the Act is appreciably different from earlier law, reliance on previous experience is unsafe”.


Arguably the most controversial evidentiary/procedural decision taken by the Court during the period was case of *Hamed v R*\(^{72}\) which concerned the litigation surrounding the police filming surveillance of persons believed to have participated in military style training in the Urewera Ranges. These resulted in 11 defendants being charged with firearms offences, and four of the defendants being charged with being part of an organised criminal group. At a pre-trial hearing, the defence challenged the admissibility of much of the physical evidence, on the grounds that it had been improperly obtained and was, as such, inadmissible by virtue of s 30 of the Evidence Act 2006. It was alleged that to obtain much of the material, the police hadtrespassed on private land and violated the protection against unreasonable search and seizure contained in s 21 of the Bill of Rights Act 1990. The police had sought and were granted successive search warrants under s 198 of the Summary Proceedings Act 1957. It was accepted by the Crown that these warrants did not authorise the police to install the surveillance cameras notwithstanding that this is what the police had sought. All members of the Court were agreed that the surveillance evidence was obtained in the course of unlawful trespass, but that some of the evidence could nevertheless be admitted under section 30 of the Evidence Act after appropriate balancing tests as provided for in the statute had been conducted.

It would be difficult in a brief overview to do justice to all of the issues that arose in consequence.\(^73\) The factual scenario is extremely complex, but making the task of the commentator (or indeed for legal practitioners and judges who have to work with the decision)\(^74\) infinitely more difficult is the fact that the members of the Court disagreed


\(^{74}\) In *Lorigan v R* [2012] NZCA 264, (2012) CRNZ 729, the Court of Appeal says at [3] that “in view of the significance of the issues for other impending trials involving evidence obtained by the police from covert video surveillance, however, we have undertaken an evaluation of the judgments in *Hamed* with a view to articulating this Court’s view as to the current state of the law in relation to the admissibility of evidence obtained by covert video surveillance of the kind that took place in this case”. It also agreed that it is very difficult to determine the ratio on at least one of the points at issue. “[15] In the High Court, the Crown argued that the covert video surveillance in the present case did not amount to a search for the purposes of s 21 of the Bill of Rights. Lang J reviewed the judgments of the Judges of the Supreme Court in *Hamed v R*, and expressed the view that no clear ratio on this issue emerged. However, he concluded that the covert video surveillance in the present case met the criteria for search suggested by two of the three Supreme Court Judges who
over a great many of the issues raised. To illustrate - the headnote identifies no fewer than 8 holdings. Of these, only 4 were unanimous. So far as the other 4 were concerned, there is absolutely no consistency as to the population of the majority. On finding number 3, Tipping J was the lone dissent. On finding 6, the Chief Justice expressed no view and finding number 8 is broken down into four sub-holdings. On 8(a), Elias CJ and Tipping J dissented. On 8(b) the finding was unanimous. On 8(c) Blanchard and Tipping JJ dissented and on 8(d), the dissent consisted of McGrath and Gault JJ.

On the issues over which there was unanimity – it was agreed that warrants obtained under the Summary Proceedings Act 1957, s 198 could not be used to authorise searches for material that was not present on the property to be searched at the time when the warrants were issued.

It was also agreed that the entries on the land could not be justified on the basis of any implied licence. In the absence of any intention to communicate with the owners of the land, a licence would have to have been expressly granted by an owner or occupier when the entry was made, or such permission would have to have been apparent on previous occasions when entry had been made. The landowners appeared to have allowed the public to use the land for recreational purposes, but there was nothing to indicate that they tolerated entry by the police for the purpose of investigating crime.

Following the finding that there had been a search under s 21, the Court had to consider whether the search had been unreasonable. The degree of intrusion into privacy, together with the nature of the place or object searched and the reasons why the search took place informed the assessment of reasonableness. The appellants had had a reasonable expectation of privacy in respect of police surveillance activities and in person searches on private land.

considered the issue in Hamed v R, and therefore proceeded on the basis that there was a search for the purposes of s 21.”

75 Elisabeth McDonald, Principles of Evidence in Criminal Cases (2012) at 242 concludes that the difference of opinion in the court “has not assisted the development of a consistent approach to the balancing exercise under s 30”. In Lorigan, [2012] NZCA 264, the Court of Appeal looks at adjacent cases R v Ngan [2007] NZSC 105, [2008] 2 NZLR 48; R v Fraser [1997] 2 NZLR 442, R v Gardiner (1997) 15 CRNZ 131, Rogers v Television New Zealand [2007] NZSC 91, [2008] 2 NZLR 277 with a view to reconstructing the views of the judges who sat in Hamed but did not express a view on some of the relevant issues on the basis that they had discussed the same issues in those earlier cases.

76 The Court distinguished one of its previous decisions, Tararo v R [2010] NZSC 157, [2012] 2 NZLR 145, in the course of this holding. R. Mahoney, “Licentious Confusion” [2011] NZLJ 412 is highly critical of this aspect of the decision.
Conclusions

To be concluded, post conference