NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES AND IDENTIFYING PARTICULARS OF F AND W REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA452/2016
[2019] NZCA 8

	BETWEEN	DAVID NOEL ROIGARD Appellant
	AND	THE QUEEN Respondent

Hearing:	11 and 12 July 2018
Court:	French, Cooper and Clifford JJ
Counsel:	R M Lithgow QC and N Levy for Appellant A Markham for Respondent
Judgment:	13 February 2019 at 11 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] The appellant David Roigard was convicted at his trial before Heath J and a jury of the murder of his son Aaron Roigard.[1] He was also convicted of eight charges of theft in a special relationship. Heath J sentenced him to life imprisonment with a minimum period of 19 years.[2] He now appeals against conviction and sentence.

[2] The theft charges were based on offending against Aaron who had been making regular payments to the appellant of money he earned as a farm worker. Aaron thought that the money was being invested by the appellant with a view to Aaron and his partner purchasing a farm property. However, the appellant used the money for his own purposes. The Crown case was that the impending probability of Aaron becoming aware of the dishonesty offending provided the motive for the killing. The Crown's case was largely circumstantial. No body was ever found.

[3] A major issue pursued on appeal focuses on the Crown's reliance on the evidence of two confessions it was claimed Mr Roigard had given fellow inmates while on remand in custody. Both had significant histories of dishonesty and their dishonesty was underlined in cross-examination. One of the witnesses, F, said that Mr Roigard told him he had struck his son three times from behind, using a wood splitter as a weapon. He had then disposed of the body. This evidence, if accepted by the jury, would have greatly diminished the prospect of a manslaughter defence based on an eruption of emotions, which was one theory being advanced by the defence. Only one wood splitter was found at the site, and it was established by the forensic evidence that it could not have been the murder weapon. This led

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1 We refer throughout to David Roigard as Mr Roigard, or the appellant, and to the deceased as Aaron.

2 *R v Roigard* [2016] NZHC 166.

the Crown to suggest to the jury that there must have been another wood splitter, based on F's testimony.

[4] The other inmate who gave evidence was W. W said that the appellant told him the police would never find his son's body and that "he got what he deserved".

[5] Two of the arguments advanced on appeal concerned these inmate confessions. It is said first that inmate confession evidence should be inadmissible, as a matter of law. Mr Lithgow QC for the appellant argues for a rule to that effect, essentially inviting us to depart from the law set out by the Supreme Court in *Hudson v R*.[3] The second argument advanced on appeal is that if the inmate evidence was admissible, the Judge's directions on the evidence in this case were wholly inadequate having regard to its importance in the context of the trial and the degree to which the evidence had been impeached during cross-examination.

[6] The third ground of appeal alleges that trial counsel, Mr Keegan, allegedly destroyed the foundation of the defence he was instructed to present. Mr Lithgow complains that the main emphasis of Mr Keegan's closing address was that Mr Roigard had in fact killed his son just as inmate F testified, and that F's evidence could be relied on to found a manslaughter verdict. It is said that the possibility of manslaughter was emphasised to an extent incompatible with Mr Roigard's primary instruction which was that counsel should make forceful submissions to the jury that Mr Roigard was not guilty of murder. It is claimed that a miscarriage of justice arose because trial counsel felt unable to address the jury on manslaughter without referring to the evidence of F in a manner that gave considerable credit to F's evidence. In fact, it was critical to the defence that F should be viewed as a liar, who had given false evidence to the jury as had been shown by the cross-examination.

[7] The fourth ground of appeal focuses on evidence called by the Crown about internet material accessed by Mr Roigard concerning a "Mexican chainsaw massacre" and how a blow to the head could result in instant death. Reference was also made to what the appellant claimed he would do if anyone harmed his daughter. Linked to this was evidence that Mr Roigard knew where to bury bodies. He claims that this

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3 *Hudson v R* [2011] NZSC 51, [2011] 3 NZLR 289.

evidence was all prejudicial, but of no probative value and should not have been admitted.

[8] In relation to the sentence appeal, it is claimed that the case did not meet the criteria for the imposition of a minimum non-parole period.

[9] Before examining the detail of the arguments advanced in support of the appeal and the Crown's response, it is appropriate to address the facts in more detail.

Background facts

[10] Aaron was 27 years old at the time of his disappearance. He lived with his partner Ms Thoms in rural Taranaki. They had two young sons. He had moderate intellectual limitation but had diligently worked on a dairy farm for a number of years. Friends described him as hard working and frugal. Although he was not "dumb", there were some things that were "over his head".

[11] Because of Aaron's intellectual limitations, Mr Roigard assisted him in financial matters. Since at least 2007, Aaron had been paying a significant proportion of his fortnightly earnings into what he understood would be an investment that would help him to realise a dream he had of owning his own farm. The payments were made direct into Mr Roigard's personal account, under the description "Sovereign". Aaron understood the appellant had invested the money on his behalf, with the help of the appellant's employers, Mr and Mrs Armstrong. Between 2007 and 2014, the sums paid amounted to over $66,000.

[12] Aaron understood from the appellant that the investment would mature in April 2014. Consistently with this, the last payment that Aaron made was on 2 April 2014. According to Ms Thoms, it was around that time that they thought the money would become available. The couple thought that the money would be available for them to buy a property of their own and in anticipation of that both resigned from their jobs in November 2013, even though they were not then aware of an available farm property to purchase. At the time, Ms Thoms was pregnant with their second child who was born on 25 April 2014.

[13] In fact, there was no accumulated investment. Mr Roigard had spent the money on himself and made excuses as to why the investment was not available in April. He contacted a real estate agent and showed Aaron a farm property that he claimed would be purchased with the investment money in May 2014. Subsequently, he told Aaron that that purchase had fallen through, showing him a different farm that he said would be purchased instead.

[14] Aaron left his home and drove to his parents' house on the morning of Monday 2 June 2014. He believed that when there, he would be meeting the Armstrongs and signing papers confirming the purchase of a farm. He and Ms Thoms had begun to pack up their house for the move and he had changed his Facebook status to that of "farm owner". He had made arrangements with a friend, Mr Bevans, to be available from 10.00 am to assist with the shift. Mr Bevans drove to Aaron and Ms Thoms' house on Auroa Road. When he got there, she told him that things were running a bit late and that Aaron was with the appellant. At 11.12 am, Ms Thoms received a text from Aaron's phone saying, "They here". At 12.02 pm, Aaron phoned Ms Thoms about arrangements for a horse float to help in the move. She handed the phone to Mr Bevans and in that discussion he said the Armstrongs still hadn't turned up. Mr Bevans heard Mr Roigard in the background saying, "We'll give them half an hour".

[15] At 12.53 pm, Mr Bevans' phone received a text message from Aaron's phone, saying "They're here now. Fuckin time. Old man giving shit to them." In fact, the Armstrongs never went to the appellant's farm that day.

[16] At 1.41 pm, the appellant phoned Ms Thoms on her cellphone. She answered the phone and handed it at the appellant's request to Mr Bevans. The appellant asked him if he'd seen or heard from Aaron. Mr Bevans said that the appellant sounded quite distraught and "upset". According to Mr Bevans, the appellant said, "there was a bit of confrontation" between Aaron and the people supposedly selling the farm. Mr Roigard said he hadn't been present, but he had heard a "kerfuffle over at the house where they were supposed to be doing this paperwork". Then:

> Basically Aaron stormed off out to the car, drove the car down to the end of the driveway and got picked up by a car.

[17] According to Mr Bevans, the appellant told him that the car in which Aaron had driven away was a dark green or blue Holden Commodore. It had "skidded off quite fast", heading toward the coast. As he relayed what had happened, the appellant continued to sound upset and was almost crying. The appellant gave further detail about the argument that had taken place. He claimed to have heard Aaron say, "You can shove your fuckin farm up your arse." Aaron had apparently said this to "a woman, to do with this farm".

[18] The appellant allegedly told Mr Bevans that he ran down the track, tried to catch Aaron but missed him. Aaron's car had been left at the end of the track. At that point, the appellant had rung Mr Bevans. He said that he would bring the car back and dropped it off, asking Mr Bevans if he could then give him a ride back to the Roigard property. About 20 minutes later, the appellant arrived in Aaron's car, which he parked at the front of the house. Mr Bevans described him as "shaking" and "almost crying" as he repeated what he had previously told Mr Bevans that afternoon. Mr Bevans then drove the appellant home. On the way, the appellant suggested that Aaron just needed time to cool off.

[19] Friends and family began searching for Aaron. At 4.45 pm that day, Mr Roigard told Ms Thoms that the Armstrongs were "very fucking pissed" with Aaron for how he'd spoken to them at the meeting. Ms Thoms noticed that the farm to which they were supposedly moving was still occupied. She sent Mr Roigard a text, "[I] want the truth something not rite here", but there was no answer. At 5 pm, she reported Aaron missing. A missing persons inquiry began which later was upgraded to a homicide inquiry. Aaron has never been located nor was there any sighting of the Holden Commodore to which the appellant had referred.

[20] Mr and Mrs Armstrong, the appellant's employers, farmed three farms in the area, two being dairy farms and the third a dry stock block that supported the dairy farm. They employed two sharemilkers, who themselves employed others. They also employed the appellant as a maintenance manager for their properties. He was provided with accommodation. There was some social interaction between the Armstrongs and the Roigard family and they occasionally shared dinners. Aaron was engaged to assist by sharemilkers on the farms and on one occasion was

engaged by the Armstrongs to perform labouring work. Mrs Armstrong gave evidence that her last contact with Aaron would have been five or six years before the day he went missing. Mr Armstrong on the other hand gave evidence that he had seen him about four to six weeks prior to that day. Both Mr and Mrs Armstrong denied having had any discussions with the appellant in relation to investments or investing money, or in relation to assisting with the purchase of a farm by Aaron. There was no challenge to that evidence.

[21] The Crown case at the trial was that Mr Roigard murdered Aaron at some time after the 12.02 pm phone call and prior to a text which the Crown claimed the appellant had sent to Ms Thoms from Aaron's phone at 12.12, "They on there way." Then prior to 1.02 pm he had disposed of Aaron's body at a pre-arranged location. He had planned to carry out the killing, motivated by his desire to cover up his fraud on Aaron.

[22] Constable Dey, a police constable based at Opunake, knew the Roigards, and when he heard a police communication about Aaron being missing he volunteered to go to speak to the family on the night of 2 June. Mr Roigard told Constable Dey that he and Aaron had had an argument about the purchase of a "fictitious" farm and that Aaron had driven off. Mr Roigard described seeing a green Holden Commodore but said he could not tell whether Aaron was in the car or not. He had then inspected Aaron's vehicle, found the car keys and wallet in the car but realised that the cellphone was not there. He had then made inquiries of Aaron's friends to no avail. He repeated a number of times that he should have told Aaron at an earlier stage that the farm purchase was fictitious. Mr Roigard told the constable that Aaron had been putting money aside for the purpose of buying a farm, and that he had told him he had organised with Mrs Armstrong to take the money, that she was investing it in a company, Sovereign Investments or some similar name, for the purpose of purchasing a dairy farm.

[23] Mr Roigard underwent a formal interview on DVD on 12 June 2014. On that occasion, he gave a new account of the payments made by Aaron, saying that they were initially made to repay him for assistance he had given Aaron with respect to the purchase of motor vehicles. He acknowledged, however, that they continued long after he had been repaid. He claimed that he told Aaron that he had overpaid him but

Aaron continued the payments. He also claimed that Aaron was happy to continue making the payments knowing that the appellant would spend the money. He said that, "for some stupid reason" Aaron had used the word "sovereign" when making the deposits into the appellant's account. He did not know why he had done this.

[24] The appellant said that the farm purchase was Aaron's fantasy. He had simply gone along with it and had visited farms with him which he knew he could not afford to avoid putting Aaron in a bad mood. He was scared that in the latter circumstances Aaron would refuse to let him see his son (the appellant's grandson). He claimed that he had tried to persuade Aaron to explain to his partner that he could not afford a farm, but Aaron could not be deflected. It was like "talking to a brick … wall". On the Sunday before Aaron's disappearance the appellant claimed to have gone to Aaron's house and noted that Ms Thoms had started packing. He said that Aaron had to tell her what the position was, and that it had gone far too far. Aaron had in fact asked the appellant to tell her, but he had not felt able to.

[25] At the trial, in addition to the evidence of the appellant's use of Aaron's money for his own purposes, the Crown was in a position to call evidence that the appellant was in possession of Aaron's cellphone after his disappearance and evidence that suggested the appellant was away from his property at a time consistent when Aaron's body could have been disposed of by him. A call made by the appellant to Aaron's voice mail at 1.14 pm inquiring after Aaron's whereabouts suggested that it was not made from his property. There was background noise in the voice mail call which was consistent with it having been made in a moving car. Another message sent to Ms Thoms from Aaron's phone at 12.47 pm which the Crown said was authored by the appellant had been repeated 16 times; one explanation for that was that the phone had been out of the reception area.

[26] In addition, there was evidence from ESR witnesses. A forensic scientist, Ms Neale, gave evidence that luminol testing (which establishes the presence of blood) was carried out on 12 June. The tests were positive in an oval shaped area measuring 1 x 1.1 m between two wood sheds on Mr Roigard's property. Ms Neale also gave evidence that about six small blood stains were located on the front of a door to one of the wood sheds. Four of those stains were contact or transfer blood stains,

that is, they had occurred through contact with a source of blood which was wet. Two of the stains were "landed", that is, they represented blood that had travelled through the air to land on the surface concerned. Samples of these stains were consistent with being the appellant's blood.

[27] A rusty wood splitter was located in one of the wood sheds. It was examined by another senior forensic scientist employed by ESR, Ms Glenys Knight. She described it as very rusty and very blunt. She carried out a standard paper test for sharpness using paper, which the splitter would not cut. She also carried out tests for the presence of blood, finding none on the axe head and top of the handle. However, in a later test, Ms Knight found two circular stains on the handle which were reddish in colour. Both gave a positive test for the presence of blood. Ms Knight thought that these were landed stains, rather than transfer stains. Ms Knight made swabs of the two blood stains (referred to in evidence as stains A and B).

[28] Another ESR witness, Mr Timothy Power, had expertise in the area of DNA analysis. Mr Power was asked whether he could obtain a DNA profile from blood stains A and B. He was able to obtain a partial profile from one of the stains which he said provided very strong scientific support for it being Aaron's blood. According to Ms Knight, the appearance of the stains meant a source of wet blood had been subject to a "really hard force". In her opinion "there's been an action of some force [that] has created the blood droplets, flying through the air and landing on this area".

[29] The topography and land form in the area was described in evidence as having lots of drains and lahars, undulating with extensive holes having been dug over the years to bury larger rocks and reinstate the land as flat, suitable for pastural farming. It was the Crown's case that the land in the vicinity was such that a body could have been buried or otherwise concealed. There was evidence from a Mr Phillip Hopkinson who had worked on the Armstrong properties as a farm hand and had become friendly with Mr Roigard. Mr Hopkinson gave evidence that on 9 May 2014 he had dropped some firewood off at the appellant's home, noticed that he seemed "distraught" and that he told him Aaron had been missing for two days, having left without his car or money. In fact, Aaron had not been missing at that time. Mr Hopkinson had looked Aaron up on Facebook, sending him a friend request. After Aaron replied and they

had exchanged brief messages, Mr Hopkinson rang the appellant to tell him he had found Aaron. Shortly after that, Aaron "unfriended" Mr Hopkinson on Facebook after speaking to the appellant. Then, about a week prior to 2 June, Mr Hopkinson rang Mr Roigard to offer his help looking for Aaron but the latter declined, saying that the police were involved.

[30] On the afternoon of 2 June when Aaron had in fact "disappeared", the appellant tried to ring Mr Hopkinson on a number of occasions. Later that evening they managed to speak. According to Mr Hopkinson, Mr Roigard was crying and said that Aaron was "still missing". He then claimed that the Facebook messages Mr Hopkinson had received from Aaron were not actually sent by Aaron, but by Ms Thoms' sister. Ms Thoms' sister, however, gave unchallenged evidence that she did not have access to Aaron's Facebook account and had never signed in as him.

[31] Mr Hopkinson also gave evidence that Mr Roigard had previously told him, during a discussion they were having about protecting their daughters, that he would not have a problem with killing someone and that he had places where no one would ever find them. When Mr Hopkinson asked him where those places were, he did not say and just laughed.

First ground of appeal — general inadmissibility of inmate confession evidence

[32] As noted above, the first ground of appeal centred on a submission that inmate confession evidence should be inadmissible as a matter of law. Mr Lithgow was highly critical of the admission of such evidence by New Zealand courts, decrying what he described as the courts' direct involvement in the "corrupt practice of procuring paid witnesses in support of state allegations". The fact that courts recognise assistance given by inmates prepared to give evidence in relation to claimed confessions by defendants means that the courts are "directly procuring, rewarding and enforcing the evidence of fraudsters, for payment". The fact that the evidence was "paid" (in terms of the rewards offered and provided for giving it) should be enough to exclude it.

[33] Mr Lithgow complained of the Crown's refusal to provide details of deals and benefits provided to witnesses over the last 30 years. He suggested that in most murders in the last 10 years, cellmate confession witnesses had been called. Where a

case involves allegations of murder and there is no body, the inmate can fabricate a story with little chance of being caught out. Mr Lithgow contrasted the absence of record keeping in relation to rewards offered to inmate witnesses with the older Crown practice of granting immunity to co-accused or potential co-accused which were dealt with in a centralised and orderly process, with a formal record being kept. He also emphasised the lack of judicial involvement in any process concerning the inmate evidence other than the limited role played under s 122 of the Evidence Act 2006.

[34] Section 122 of the Evidence Act provides as follows:

> **122 Judicial directions about evidence which may be unreliable**
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> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
>
> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
>
> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
>
> (a) hearsay evidence:
>
> (b) evidence of a statement by the defendant, if that evidence is the only evidence implicating the defendant:
>
> (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
>
> (d) evidence of a statement by the defendant to another person made while both the defendant and the other person were detained in prison, a Police station, or another place of detention:
>
> (e) evidence about the conduct of the defendant if that conduct is alleged to have occurred more than 10 years previously.
>
> (3) In a criminal proceeding tried with a jury, a party may request the Judge to give a warning under subsection (1) but the Judge need not comply with that request—
>
> (a) if the Judge is of the opinion that to do so might unnecessarily emphasise evidence; or
>
> (b) if the Judge is of the opinion that there is any other good reason not to comply with the request.
>
> …

[35] Mr Lithgow submitted that the warning contemplated in s 122(1) by the Judge to the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it is insufficient without being tailored to fit the case and the role of the subject evidence in it. On its own, the warning is weak and vague. Mr Lithgow referred to various articles in North American publications emphasising the risk of wrongful conviction as a consequence of allowing such evidence; the inability of jurors to respond adequately to warnings in relation to it and confirmation bias.

[36] Mr Lithgow conceded frankly that the arguments he addressed had all been attempted in *Hudson v R* without success. He submitted that this Court should re-examine the reasoning in *Hudson* and the Supreme Court's conclusion that having provided no mechanism for exclusion the Evidence Act assumed that the sole question with respect to inmate evidence was one of weight, and that issue should be determined by a jury having received appropriate warnings under s 122.

[37] Mr Lithgow submitted that conclusion was not just in particular to ss 6(b) and (c), 8(1)(a), 10, 11 and 30 of the Evidence Act, as well as the right to a fair trial, the right to present a defence and the right to examine witnesses under the same conditions as the prosecution affirmed respectively by s 25(a), (e) and (f) of the New Zealand Bill of Rights Act 1990.

[38] Mr Lithgow argued it is axiomatic that evidence which has been bought and paid for from a proven fraudster has been obtained unfairly, and in circumstances that no defendant or defendant's counsel would be permitted to replicate.

[39] The Supreme Court's decision in *Hudson* is comparatively recent. It holds that to treat the evidence of admissions made by a defendant to prison inmates as presumptively inadmissible would be contrary to the Evidence Act. As the Supreme Court said:

> [36] Such an approach would not be consistent with the scheme of the Evidence Act. Section 27 provides that the statement of a defendant is admissible when tendered by the prosecution and excludes certain admissibility rules, including the hearsay rule, in subs (3). Section 28, which addresses reliability by reference to the circumstances when such statements are made, is not engaged by the present situation where the primary controversy is instead as to whether the statements were in fact ever made.

> Unlike the situation with hearsay evidence, there is no reliability threshold for the admission of prison inmate confessional evidence. Nor did the legislature adopt the technique of declaring such evidence presumptively inadmissible unless particular criteria were adopted, as is the case with voice identification evidence. Specific provision for such evidence is, however, made in s 122(2)(d) and this is not couched in terms of exclusion but rather addresses the directions which the trial Judge should give to the jury. We recognise that there may be scope for excluding prison admission evidence under ss 7 and 8 of the Act, but, that said, the legislative scheme as a whole is indicative of a legislative intention that reliability decisions ought to be made by a properly cautioned jury.
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> (Footnotes omitted.)

[40] The reference in the last sentence of that quotation to ss 7 and 8 of the Evidence Act shows that the Supreme Court accepted that in particular circumstances inmate confession evidence might be excluded on the basis that its probative value is outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceedings. However, Mr Lithgow did not argue that that approach should be invoked in the present case. It would have been very difficult for him to do so because trial counsel did not challenge the admissibility of the evidence, and as will be seen, sought to rely on it for the purposes of one of the defences (that Aaron's death was the result of manslaughter).

[41] Rather, Mr Lithgow's inadmissibility argument was based on the generic characteristics of inmate confession evidence. We are unable to accept that ground of appeal, because it is contrary to the Supreme Court's decision in *Hudson*.

Second ground of appeal — inadequate directions on the inmate evidence

[42] It is necessary at this point to describe the evidence that was called from F and W, and to explain what the Judge said about it to the jury.

The inmate confession evidence

[43] Mr Roigard was charged with Aaron's murder on 17 October 2014. On that day, he was remanded in custody, and subsequently pleaded not guilty. F was a prisoner in the At Risk Unit at Kaitoke Prison. He said he had a conversation with the appellant on Saturday 1 November in the Unit's day room. According to F, the appellant spoke in detail about the case.

[44] F said that the appellant told him he had been accused of killing his son Aaron but that the police did not in his opinion have much of a case. The appellant also told F the police did not have a body, did not have a murder weapon and that the case against him was circumstantial, all theory and conjecture. According to F, the appellant told him that in addition to Aaron he had a daughter who lived with him at home and the family lived on a farm where he was the manager.

[45] F referred to the appellant talking about evidence about a "one punch knockout" that the police had looked at on his phone or computer, which was not relevant. On the other hand, there were things that Mr Roigard had looked at that were relevant, and in this category they were looking at either a "Mexican massacre" or "Mexican chainsaw massacre", which related to a Mexican drug cartel. That was evidently more relevant, but the police had not picked up on it. F also referred to polling from a cellphone tower in Stratford that for "some reason" was relevant, but overall his estimate was the police case was not strong and he expected to get bail the following week.

[46] The appellant also allegedly told F about money paid by Aaron into what he must have believed was an investment account of some kind, but it was an account that the appellant had. Aaron had paid in about $68,000. He mentioned the name "sovereign". The $68,000 had caused a substantial rift between the appellant and Aaron, Aaron seeking to have the money repaid. This was something to do with "some farm purchase of some kind". The payments had been made over a period of about eight years, Aaron thinking it was for "some savings scheme".

[47] F said they also discussed the police search of his property. He claimed Mr Roigard said that when they did the initial search they overlooked some things, one of them being something to do with a "splitter" that they had initially overlooked but later taken away. The police had used cadaver dogs in the search, but had found nothing.

[48] They were together again the following day, Sunday 2 November, from 1.30 pm. They continued to discuss matters relevant to the case. F reported Mr Roigard saying initially that Aaron would turn up, that he would come back, but

later this changed, the appellant saying that Aaron would not come back. In this discussion, Mr Roigard described Aaron as a bit of a hot head and said that there had been "quite a bit of angst" created by the money. Aaron had been pressing him for some time to get the money back for his farm purchase, there had been disagreements over that which had become quite heated and then turned into a major disagreement. Aaron threatened to go to the authorities unless the appellant came up with the money.

[49] Hearing that, Mr Roigard picked up the splitter and lashed out with it, hitting Aaron over the head. Aaron had been walking away at the time. He said he struck three blows. Mr Roigard, according to F, said he was quite shocked initially and thought he had knocked Aaron out, before realising the situation was more severe. It had been just a spur of the moment or instinct "thing". The assault had occurred in a location where Mr Roigard's blood had been found.[4] F said that the appellant told him that after hitting Aaron with the wood splitter he had cleaned up the site with a "scoop or something of that nature", and that he had somehow moved the body past the house in either a van or a ute. F said he assumed the scoop was on a tractor, but also said that was only presumption on his part. As to going past the house, Mr Roigard had said he was quite nervous about that because his wife and daughter were both inside the house. He had driven past the house in a ute or small truck of some kind. As he recounted these details, F said that Mr Roigard looked "quite perturbed". This conversation lasted for about an hour and 45 minutes to two hours, during which they were alone.

[50] According to F, there was a third meeting and discussion on Sunday 9 November 2014. It took place in the same day room at the At Risk Unit of the prison where the previous discussions had taken place. F said he asked Mr Roigard why he had not told the police that he had acted on the spur of the moment, and that what occurred was an accident. F claimed Mr Roigard replied that he did not think the police would believe him, referring again to the money issue.

[51] F also claimed that they had discussed the whereabouts of Aaron's body. F said he prompted discussion by saying that Opunake has a big beach, to which the appellant

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4 F had earlier said that Mr Roigard told him that the police had found his blood somewhere at the farm, but not Aaron's.

responded by saying that things get washed up on beaches. Mr Roigard then said something about the body having been placed a long way up Eltham Road. F said in evidence he had been trying to find out information from the appellant because what had happened "just seemed wrong".

[52] There was a further discussion on a date which is unclear from F's evidence, but apparently either between Christmas and 31 December 2014, or in January 2015. F pursued the issue of the whereabouts of Aaron's body; the appellant said it was deep, and it was on the top of Hastings Road. It would be difficult to find. F said in evidence that he had had some prior discussions with the police and they were interested to find out where the body was. F said it was he who had initiated the discussions, on this and the previous occasions.

[53] Mr Keegan's cross-examination of F focused mainly on his convictions for a range of dishonesty offences and what he stood to gain by giving his evidence. F admitted that since 1981 he had amassed 154 criminal convictions, 138 of which involved dishonesty. He said most (133) related to a major serious fraud operation in the 1990s. He had, however, also been convicted on 30 September 2014 of 15 offences as a result of a Serious Fraud Office prosecution. He confirmed that he had an outstanding appeal against his sentence on those offences and that he had received a 25% discount at sentencing on another matter,[5] involving escaping from custody and kidnapping his wife, on account of giving his statements to the police. He reluctantly conceded that his cooperation with the police might be a matter relied on at the hearing of the outstanding appeal, then due to take place the week following his giving evidence, but professed disappointment at the way he had been treated by the police who had not been very helpful and the "unenviable position" in which he and his family were placed in terms of safety and security by having to come to court and give evidence. F also acknowledged the appellant having told him that if Aaron was alive he would be able to confirm the appellant had not defrauded him, but later said that money was an issue between them.

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5 He received a further 25% discount on account of a guilty plea.

[54] Mr Lithgow relied in argument on appeal on a police job sheet (not in evidence at the trial) of a police interview of F at the Whanganui Prison on 6 November 2014. This was immediately after the first two discussions F had with the appellant, on 1 and 2 November as noted above. F was recorded in the job sheet as saying he had valuable information and would like to work out a deal to influence the likely sentence on the escaping and kidnapping matters. The job sheet records that the officer conducting the interview said he was not interested in any negotiations or deals to impact the outcome of those matters, but was happy to listen and pass on the details to a suitable person. Ultimately, it appears that the Crown followed the approach discussed by this Court in *R v Hadfield*; it would respond to any cooperation at sentencing but would not do deals in advance in return for evidence.[6] There was no evidence at the trial that F was promised any particular favourable treatment in return for his giving evidence, but it is clear that, as Mr Lithgow submitted, F received a substantial benefit for providing information and agreeing to give evidence and would have known that benefit would not accrue on the outstanding SFO matters if he failed to do so. In broad outline, the position was drawn from F in cross-examination and the jury would have been aware of it. It was also mentioned by Mr Keegan in closing and, as we will describe, by the Judge in summing up.

[55] W's evidence was less extensive. He had been remanded in August 2015 on charges of unlawful possession of firearms and receiving stolen goods. He spoke with Mr Roigard when they were together in the Te Waimarie wing in Whanganui Prison. Soon after they met, W heard Mr Roigard telling another inmate that the police were trying to get someone in the prison to spy on him. Nevertheless, Mr Roigard was prepared to discuss details of the case with W. He reported him saying that the police would never find Aaron's body, and that he got what he deserved.

[56] W also claimed that the appellant said the police had either searched or were about to search a nursery on Eltham Road to try to find the body, but that they would find nothing. W said Mr Roigard also told him that they had searched the farm using cadaver dogs and they had found an old family pet goat. He also talked about an axe with blood on it. He said it had a speck of Aaron's blood on it. W asked him how the

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6 *R v Hadfield* CA337/06, 14 December 2006.

blood came to be on the axe. Mr Roigard responded that someone said he had attacked Aaron on the front lawn and then moved him with a tractor, but the tractor would not fit on the lawn to do that so they must be lying. Mr Roigard also said the police had charged him because of the "money side of it", explaining that Aaron had been giving him money to hold to buy a farm, but that he had spent it.

[57] The appellant also allegedly told W that his son's car had been left at the end of a driveway, that they had an argument, that they went driving in the car and that the appellant had returned leaving the car at the end of the driveway. He explained that Aaron and the appellant had argued after Aaron's partner had found out that the farm proposal was not true, and "it was all backfiring". W also said that Mr Roigard told him that F was testifying to try to get time off his sentence, and that he was lying.

[58] In cross-examination, W confirmed that Mr Roigard told him that when he got out of prison he intended to look for his son, and that he did not know where he was. He mentioned he thought Aaron might have gone to Australia. In cross-examination W also conceded that he had 112 convictions between 1992 and October 2015, 64 of which were for dishonesty related offending. Convictions included those for burglary, receiving, theft, unlawful taking of a motor vehicle and giving false details with respect to his identity.

[59] He also accepted that on 24 September 2015 he made contact with the New Plymouth police to tell them that he had some information concerning Mr Roigard. The police visited him in Whanganui prison on the following day and he was aware that any information that he provided the police might attract a benefit.

[60] W was sentenced in the District Court on 24 November in respect of the charges of possession of firearms and receiving, as well as dealing in methamphetamine. A sentence of home detention was imposed. The Crown accepts that that sentence was calculated so as to reflect assistance W had given to the police in the present case and in an unrelated matter.

The defence closing address

[61] In his closing address, Mr Keegan submitted first that the jury could not be sure that Aaron was dead. However, if they concluded that he was, there were then three options. First, that he had committed suicide. Second, that the appellant had killed Aaron with the necessary murderous intent, in which case he would be guilty of murder. The third option was that Mr Roigard killed Aaron but had not intended to do so with the result that he could only be guilty of manslaughter. Mr Keegan then submitted that the Crown could not establish how Aaron had died and in this context, Mr Keegan mounted a very strong attack on the credibility of F. He noted that the only forensic evidence linked to Aaron was a tiny spot of blood on the handle of the splitter which had been excluded as a murder weapon. But in the absence of any evidence as to how the blood came to be on the handle, or establishing when that might have occurred, the jury was left with the fact that that splitter had been excluded as the murder weapon. The possibility that the blood got on to the splitter at a time other than the alleged attack on Aaron could not be excluded.

[62] Mr Keegan's attack on F's credibility included describing him as a "career criminal", and as a "professional and accomplished liar" with a long history of lying for his own advantage. He was a "sophisticated liar and a manipulator".

[63] Mr Keegan told the jury the defence did not dispute that F had "deep and meaningful conversation" with Mr Roigard. He proceeded to submit that Mr Roigard had repeated to F his version of events as he had told it to the police, giving him all the facts which he could then "flower up" into a confession by the appellant. Mr Keegan submitted F had created an embellished story to entice the police, taking the appellant's comments about a splitter axe and possibly something about a blow to the head and weaving that into a confession. Significantly, the only evidence of a physical altercation between the appellant and Aaron came from F, and it related to a "non-existent splitter" being used to hit Aaron over the head once, and twice again somewhere on the body not specified.

[64] In short, the only narrative the Crown had of murder was based on F's extremely unreliable evidence.

[65] Mr Keegan submitted W was in the same category as F. He described him as a "thorough little crook" who knew the police were interested in getting information, initiated conversations with Mr Roigard and manufactured a statement by Mr Roigard that the police would never find his son and that "he got what he deserved".

[66] On the face of it, the manner in which Mr Keegan closed for the defence was consistent with what Mr Roigard had instructed him. In an affidavit sworn by Mr Keegan at Mr Lithgow's request for the purposes of the appeal after Mr Roigard signed a waiver of privilege, Mr Keegan stated that he understood from Mr Roigard's instructions to him that most of the conversations F was reporting, including as to the problems over money, had occurred as stated by F. And in respect of W, there had been "questions asked and answered during ordinary interactions between remand prisoners". However, he understood from Mr Roigard that "both cellmate witnesses were lying when they said that Mr Roigard had admitted to them that he had assaulted or injured Aaron on or about 2 June 2014 and knew where Aaron's body was".

[67] In the circumstances, Mr Keegan's tactical approach to the inmate confession evidence was to demonstrate that neither witness was worthy of belief, particularly on the important issue of Mr Roigard's involvement in Aaron's death. They had a significant history of dishonesty, particularly F whose history included previous convictions for complicated and sophisticated fraud.

The summing-up

[68] In summing up, Heath J gave a reliability warning concerning the evidence of F and W in the following terms:

> [74] I will now deal with the evidence from the two prison inmates. You have heard evidence from [F] and [W], both of whom were incarcerated with Mr Roigard while he was on remand pending trial. Each alleges that Mr Roigard said things to indicate he had killed his son. Because they were detained in prison and may have had a motive to lie to gain benefits when they were sentenced on charges before the courts, I must warn you about your assessment of their reliability as witnesses.
>
> [75] The motive to lie arises from their expectation of a benefit when sentenced on the offences for which they had been remanded in custody. During the trial, I explained to you the reason why both of these witnesses might have expected to receive lesser sentences on the basis of their assistance in providing evidence in this case. Judges are required to give credit for actual

or promised assistance as a means of acknowledging that inmates should be encouraged to provide important evidence in circumstances where they might be putting themselves or their families at risk.

[76] In that situation, both did have a motive to give false evidence. Your task is to determine whether that motive affected the reliability of what they told you.

[77] Mr Keegan drew attention to extensive lists of criminal convictions for offences of dishonesty involving both [F] and [W]. He described [F] as clever and manipulative and motivated to shorten any stay in prison as much as possible. He referred to the summary of facts in the most recent fraud prosecution of [F] which he submitted demonstrated [F's] ability to take established facts and twist and embellish them for personal gain. He contended that [F's] ability to do that led to his ultimate evidence being false.

[78] Mr Keegan made similar criticisms of [W]. He too is suggested to have embellished information provided by Mr Roigard so as to obtain a benefit by way of sentence reduction on charges he was facing. The context in which that information was procured involved steps being taken by the police to obtain any relevant evidence from inmates.

[79] Those factors mean you must approach the evidence of both [F] and [W] with caution. Having said that, I remind you that there was no challenge to the fact that Mr Roigard had conversations with both of them in prison. I would suggest that you consider whether the two witnesses could have obtained information that they say Mr Roigard told them from other sources and whether their evidence can be independently confirmed by other evidence that you accept. If so, there will be a need to determine separately whether either witness has embellished evidence so as to make it materially misleading.

[80] So, in summary:

[a] I warn you to act cautiously in finding Mr Roigard guilty on the murder charge in reliance on the evidence of [F] and/or [W].

[b] There is a risk that you could reach a guilty verdict on that charge in reliance on a witness who may have had a motive to give false evidence and who has a track record of dishonest conduct.

[c] But having taken care in the assessment of the evidence, it is for you to determine whether the evidence is reliable or not.

Submissions

[69] Mr Lithgow submitted that the directions were inadequate in the circumstances of this case. He was critical of the fact that F and W had been grouped together in the Judge's instructions whereas one witness was strong and other vague. Mr Lithgow

also complained that nothing had been said about the "perniciousness of this kind of person". There was no frank acceptance that F had already been rewarded and that if he did not give the evidence as promised such reward would be unwound. Further, the Judge had effectively endorsed F and W by referring to the obligation of judges to give credit for actual or promised assistance to encourage inmates to provide evidence in circumstances where they might be putting themselves or their families at risk. The idea that they were putting themselves at risk in this case had no factual basis. This was particularly ironic in the case of F, who when he escaped from prison had kidnapped his wife and threatened her with a machete.

[70] Mr Lithgow focused on [79] of the Judge's summing-up, claiming that what was said after the first sentence would have had a serious undermining effect on the cross-examination which should have left the witnesses wholly discredited. While it was correct that there had been no challenge to the fact that Mr Roigard had conversations with both F and W, that missed the point that Mr Roigard had maintained his innocence in the discussions and F had added the evidence about the fatal assault. The Judge should have acted on the obvious fact that the credibility of F had been totally destroyed including the embellished confession about the appellant having hit Aaron with the wood splitter.

[71] Ms Markham for the Crown submitted, however, that the Judge's directions clearly met the requirements of s 122 of the Evidence Act. She noted that Mr Keegan had raised no objection to the directions at the trial and emphasised that:

(a) The Judge had referred on a number of occasions to the need for caution in deciding whether to rely on the evidence and did so using mandatory language.

(b) He explained why the caution was required and indeed went further, telling the jury that both witnesses did in fact have a motive to give false evidence. He had also couched the warning by reference not only to the incentives but also to the criminal histories of F and W.

(c) The Judge alerted the jury to the possibility F and W may have gleaned details from other sources (although that was not alleged by the defence at the trial, nor on appeal).

(d) The Judge fairly summarised the defence submissions without at this stage referring to competing Crown submissions.

(e) The directions were appropriately tailored to the facts of the case and, in particular, highlighted the issue as to whether the witnesses had "embellished" the conversations in order to mislead.

Discussion

[72] Mr Lithgow's strongest submission on this part of the case was that the Judge should have emphasised the defence contention that although there had been discussions between the appellant and F, Mr Roigard had not admitted killing Aaron: the alleged confession was F's invention. This should have been accompanied by a stronger warning that F in particular, but also W, had been shown in cross-examination to be utterly unreliable witnesses.

[73] While we can see some force in those submissions they really amount to a repetition in this context of the reasoning advanced under the first ground of appeal. The proposition is that because of the extent of their past dishonesty offending the witnesses were simply not to be believed when it came to allegations not admitted by the appellant. In reality that is simply a reworking of the first ground of appeal, claiming that the evidence is generically bad because of the character of the witnesses. We think it is incompatible with *Hudson*, and the fact that the evidence is admissible for the reasons already addressed in dealing with the first ground. In effect, Mr Lithgow suggests that the Judge should have instructed the jury not to believe F and W. While such an approach might be taken where it was clear that the whole of a witness's evidence was demonstrably false, it would not be appropriate in a case where it was clear that substantial parts of what a witness was saying was in fact correct, and verifiable by reference to known facts.

[74] That was the case here, with the defence accepting that the conversations took place, and in the case of F, Mr Keegan characterised them as "deep and meaningful". Mr Keegan had not felt able, given his instructions, to challenge F and W's evidence in its entirety — especially as relevant to the fraud charges. We consider it would be illogical to hold that in these circumstances the Judge should have isolated out those parts of the conversations which were particularly adverse to Mr Roigard's interests, and warn the jury against accepting them because the witnesses were habitual liars, while at the same time accepting the veracity of other parts of their evidence. Put simply, if the witnesses' testimony must be rejected because of their inherent dishonesty, it is difficult to see how any of it could be accepted. That is an important consideration because while Mr Lithgow can legitimately argue that it is only on the basis of F's evidence that the Crown can construct a narrative of murder, the same evidence established a basis for the defence contention that Aaron's death was the result of manslaughter: Mr Keegan submitted to the jury that F's evidence was consistent with manslaughter, that "[a] path to manslaughter exists on [F's] evidence".

[75] In this respect Mr Keegan submitted to the jury that "the unlawful act that would have caused Aaron's death would be an assault. He told him,[7] they fought, he killed him, he didn't mean to." He developed the scenario as follows:

> Evidence of a physical altercation between [Mr Roigard] and Aaron comes from [F] and is of a non-existent splitter being used to hit him in the head once and twice again somewhere on the body but not specified where. You cannot be sure he hasn't flowered that up. Hit him over the head with a splitter, the scientists say wasn't the killing weapon. Put the splitter to one side ladies and gentlemen, what [F] says about that, maybe it was with some other weapon that we haven't found, maybe it was with something else, maybe it was with a blow, maybe he got a fatal injury which David caused in some other way. We don't know. If you're sure he killed him and covered it up you can't be sure how it happened, the only narrative you have in terms of how it happened is from [F].
>
> Any confrontation … would have been spontaneous … and the cover up of it, panicked and cobbled together. Overall, doesn't it sit better with common sense that this was a case of manslaughter, that no one, not even [Mr Roigard], would have wanted to kill his son … You can't be sure of murder. If you can't be sure of murder it must be manslaughter. … Although we tell you that [F] is an unreliable witness, his evidence is consistent with manslaughter. If you feel that it has a ring of truth about it you still can't be sure of some of the details that he gives around that splitter. The number of blows, what actually

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7 The context makes it clear Mr Keegan was saying Mr Roigard told Aaron about the money.

> happened, what can you rely upon? A path to manslaughter exists on [F's] evidence and it exists also intrinsically, inherently without it.

[76] This was to use parts of F's testimony while inviting the jury to reject the reference to the wood splitter as the murder weapon. Scientific evidence supported that approach. It is in this context that the Judge's summing-up must be considered. The defence was clearly wanting to rely on F's evidence to set the scene of a spontaneous argument developing between father and son leading to the fatal confrontation. The appellant was reportedly shocked, thinking that he had knocked Aaron out, before realising the situation was more severe. This was information helpful to the defence. On the other hand, the jury could be invited to reject the worst aspect of F's evidence, the wood splitter reference, because of the ESR evidence. The Judge's summing-up had the advantage that it allowed the jury to take exactly this approach to F's evidence.

[77] Thus, the Judge reminded the jury there was no challenge to the fact that the conversations with F and W had taken place in prison. He asked the jury to consider whether F and W could have obtained their information from sources other than the appellant, and whether their evidence could be independently confirmed by other evidence. Acting on these instructions the jury could properly have concluded that the appellant and Aaron were together on the appellant's property at the time alleged by the Crown and would have argued about the money just as F and W said. There was much evidence indicating that the appellant would have run out of excuses for the absence of the money. Then, the instruction was to determine separately whether either witness has embellished evidence so as to make it materially misleading. Here, the jury could weigh the defence "flowering up" allegation, an allegation not without substance because of the wood splitter reference. The Judge had already introduced the motive F and W would have had to do so. He again reminded the jury of the risk of reaching a guilty verdict as a result of relying on a witness who may have had a motive to give false evidence, and who has a track record of dishonest conduct. We do not think the Judge was obliged to do anything more. We consider what

the Judge said fulfilled the requirements of *Benedetto v R*,[8] as applied by this Court in *R v Ngarino*.[9]

[78] We can deal more briefly with the other criticisms of the summing-up made by Mr Lithgow. We do not consider there is anything in the complaint that the Judge grouped F and W together in giving his directions. The necessary differentiation between them was inherent in their evidence. Otherwise they were appropriately dealt with together, although the instructions placed slightly more emphasis on F in any event.

[79] As to the complaint that the Judge had said nothing about the "perniciousness of this kind of person" it was made plain in the Judge's remarks that they were people who might be motivated to lie and had a track record of dishonesty. It was then for the jury to decide what weight to give their evidence. We think Mr Lithgow's suggestion that the Judge should dwell on their "perniciousness" is difficult to reconcile with the fact that some of what F said was clearly true and the role of the jury was to ascertain what was or might be false. Strongly critical language from the bench would not assist with that task.

[80] While it is correct that F had already received some reward for his evidence, the SFO matters were still not finally resolved. In any event we consider what the Judge said was sufficient to establish that the jury needed to be cautious about the evidence of F and W. The Judge said both had a motive to lie "to gain benefits when they were sentenced on charges before the courts". This phrase could be applied to benefits already conferred as well as those in expectation. In any event, precision of language was not necessary to get the point across.

[81] As to the Judge's reference to potentially putting their families at risk, we accept that such a risk only arose theoretically in this case, but we do not accept that the Judge's remarks would have been seen as directly applicable to F and W. His observations were more in the nature of explaining the law's policy in respect of inmate confessions, and why it is considered desirable to encourage the provision of

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8 *Benedetto v R* [2003] UKPC 27, [2003] 1 WLR 1545.
9 *R v Ngarino* [2009] NZCA 200 at [43]–[44].

evidence from such witnesses. We do not read the summing-up as an "endorsement" of F and W, as Mr Lithgow claimed.

[82] Finally, we do not accept Mr Lithgow's argument that the Judge's instruction at [79] would have had the effect of undermining Mr Keegan's cross-examination of the witnesses. The essence of this point is really that the witnesses should have been disbelieved because of their criminal records and, in F's case, because of the embellished confession about the wood splitter. The ESR evidence was of course a possible indicator that this part of F's evidence might have been invented. The alternative, as the Crown suggested, was that a different wood splitter (which was never located) might have been used in the assault. That was clearly an issue for the jury to decide. So too it was for the jury to decide how it should respond to the criminal histories of F and W. Contrary to Mr Lithgow's submission, we do not think the Judge was in a position to sum up to the jury on the basis that the witnesses had been totally discredited by the cross-examination.

[83] For these reasons we reject the second ground of appeal.

Third ground of appeal — breach of instructions causing miscarriage of justice

[84] This ground of appeal asserts that having attacked F and W as dishonest to the point of being unworthy of belief, trial counsel then "destroyed that central line of defence" by closing "overwhelmingly" on the basis that the actual plausible defence was that Mr Roigard had in fact killed Aaron in accordance with F's account and that could be relied on to found a manslaughter defence. While Mr Roigard gave written instructions to Mr Keegan agreeing that manslaughter could be put, the instructions did not grant Mr Keegan the right to destroy the "instructed primary defence" of denial of involvement. Mr Lithgow complains that is what the defence closing did from the outset. He submits that the terms of the closing were such as to indicate that it was Mr Keegan's preferred approach to the case, and this was inappropriate given the primary instruction to make forceful submissions to the jury to find Mr Roigard not guilty of murder.

[85] Mr Lithgow advanced a further submission that a miscarriage of justice has arisen because trial counsel felt unable to address the jury on manslaughter without

referring to the evidence of F in a way that gave considerable credit to his evidence. However, it was critical to the defence that F remained the liar and giver of false evidence that he had been shown to be in cross-examination. Contrary to Mr Keegan's address to the jury, there was nothing in F's evidence that supported a manslaughter verdict. Even if the jury had been persuaded to disbelieve F by the cross-examination, the defence closing address suggesting that the critical part of F's evidence was in fact the path to a manslaughter verdict would have led the jury to put weight on Mr Roigard's confession as recounted by F.

[86] The written instructions which Mr Keegan obtained from Mr Roigard shortly before delivering his closing address were as follows:

> I David Roigard, acknowledging receipt of all previous written advice, instruct my trial counsel Paul Keegan and Joanna Woodcock as to the following in respect of the closing address to be given to the jury in my trial for murder and fraud:
>
> Generally I permit you to make a closing address to the jury **as best you see fit** however I expect you to make forceful submissions to the jury to find me not guilty of murder. I leave the content of those submissions entirely up to you. I concede that the jury is almost certain to convict me of fraud.
>
> Further and **without conceding guilt** on murder, manslaughter or fraud I permit you to address the jury that if they are satisfied beyond a reasonable doubt that I killed my son then the evidence is far more consistent with manslaughter than murder.
>
> I acknowledge your advice that the jury is highly **likely** to find that [Aaron] was deluded and further that the jury will be highly **unlikely** to believe what I have told Police about his disappearance.
>
> I acknowledge generally that I will have a significant credibility problem with the jury.
>
> I direct and instruct you to do your very best with the available evidence while bearing in mind these difficulties.
>
> (Emphasis in original.)

[87] Those instructions, however, should not be seen in isolation from earlier events. It is clear from the second affidavit sworn by Mr Keegan for the purposes of the appeal at the request of the Crown, dated 5 June 2018, that the possibility of closing to the jury on manslaughter was raised with the appellant. The affidavit included reference to a trial notebook maintained by junior defence counsel. An extract showed

that on day 12 of what was to be a 22-day trial, defence counsel told Mr Roigard that the circumstantial evidence, texts and cellphone calls meant that the jury would get "to the door of murder". On day 14, there was a discussion between counsel and Mr Roigard about the closing address, in which both murder and manslaughter were mentioned. In a letter to Mr Roigard dated 4 December 2015, Mr Keegan referred to the need to confirm his instructions about how he should address the jury at the end of the trial. Mr Keegan identified the possibility of giving a closing address to the jury consistent with Mr Roigard's denial of defrauding or deluding Aaron, or causing his death. However, given that there was strong evidence that Mr Roigard defrauded and deluded Aaron, Mr Keegan suggested that acknowledging that strong evidence would restore Mr Roigard's credibility with the jury. He expressed his opinion that the jury was highly likely to reach conclusions adverse to Mr Roigard on these issues in any event. He continued:

> You also need to consider whether I should address the jury in respect of a verdict of manslaughter as opposed to murder or alternatively whether on the murder charge it is all or nothing. As discussed it is my opinion that you could be convicted of murder and in this respect I would like to have the opportunity to address manslaughter.

[88] Mr Keegan emphasised that the choice was ultimately Mr Roigard's to make.

[89] Mr Keegan wrote a further letter dated 11 December which included the following paragraph:

> You have instructed us that you will leave the decision as to how … we can best close to the jury to us. We confirm that we will not concede anything and acknowledge your instructions to us that you did not hurt Aaron however as we have outlined the balance of the evidence creates a real possibility that the jury will get to the point where they are sure you caused Aaron's death. Without being realistic about this reality you would raise the chances of being convicted of murder to a greater level.

[90] Given this background it is clear Mr Roigard would have understood the issues and this is confirmed by his written instructions earlier set out. He was content to leave the content of Mr Keegan's closing address to him. While he told Mr Keegan that he expected him to make forceful submissions to the jury to find him not guilty of murder, he gave permission to contend that if the jury were satisfied beyond a reasonable doubt that Mr Roigard had killed Aaron, the evidence was far more

consistent with manslaughter than murder. He also acknowledged that the jury was highly likely to find that Aaron was deluded and unlikely to believe what he had said about Aaron's disappearance. Further, he acknowledged he would have a significant credibility problem with the jury and directed Mr Keegan to do his best with the available evidence while bearing in mind the difficulties.

[91] There was an inherent tension in maintaining the stance that Aaron had disappeared and might still be alive, while at the same time saying the Crown had not proved murderous intent, with the result that if satisfied Mr Roigard killed Aaron the jury would be left with a manslaughter verdict. Mr Roigard conceded his account of the circumstances in which Aaron disappeared would probably not be believed. This meant there was no plausible explanation for his disappearance at the very time when the appellant's fraudulent use of his money had become apparent.[10] The weight of the Crown's circumstantial case meant realistically they would conclude that Mr Roigard must have killed him. That meant that the appropriate course to follow was to address strongly on the facts pointing to manslaughter as opposed to murder.

[92] The exclusion of the wood splitter found with Aaron's blood on it as the murder weapon meant that the defence could mount a strong credibility attack on that part of F's evidence, as well as the general implications of his criminal history. It left the Crown having to rely on the fact that Aaron had been helping Mr Roigard to split wood the day before and to invite the jury to infer that there must have been two wood splitters, one the murder weapon, disposed of with Aaron's body. We consider Mr Keegan's emphasis on manslaughter in the circumstances of the case was fully justified and the best way of fulfilling Mr Roigard's instruction that Mr Keegan should make forceful submissions that he was not guilty of murder.

[93] It was also plainly appropriate for Mr Keegan to accept that the evidence of F and W would be accepted at least in part. The scenario of a quarrel between the two men, a scuffle developing and Mr Roigard spontaneously doing something unlawful that killed Aaron could be fitted into F's account especially if use of a wood splitter

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[10] Mr Keegan did advance a submission that Aaron may have committed suicide, faced as he had been by a devastating revelation that his money was gone. A difficulty with that theory, however, was the presence of his car at the appellant's property and the absence of a body despite an extensive search over a 300 m radius from the place where father and son were together.

was excluded as Mr Keegan submitted it must be. We see nothing wrong in the way Mr Keegan treated F's evidence in this respect, in the passages quoted earlier. To the extent the approach made jury findings of disappearance without death or suicide less likely, that was simply the result of the circumstances with which Mr Keegan had to deal.

[94] We add that, contrary to Mr Lithgow's submissions, we do not read the written instructions as requiring the principal emphasis of the closing to be on the appellant's non-involvement in Aaron's death. The instruction was to forcefully submit the appellant was not guilty of murder. Mr Lithgow appears to be of the view that this required Mr Keegan to place the most emphasis on a submission Mr Roigard had not been involved in the killing of Aaron. The more natural reading suggests it was a defence of no murderous intent that was to be emphasised. That fits with the acknowledgement in the instructions that the jury were unlikely to believe the appellant's account of Mr Roigard's disappearance, and the specific reference to submitting the evidence was far more consistent with manslaughter than murder. In our view, a defence which sought to emphasise non-involvement in Aaron's death would have been unsuccessful and counter-productive.

[95] We have concluded that Mr Keegan's closing to the jury was in accordance with Mr Roigard's instructions and no miscarriage of justice arose from it. We therefore reject the third ground of appeal.

Fourth ground of appeal — inadmissible prejudicial evidence

[96] The fourth ground of appeal concerns evidence called at the trial that the appellant or someone with access to his phone had accessed a Yahoo Answers site in relation to the question "Why can one blow to the head kill you instantly?" The site had been accessed on three occasions on 10 May 2014. Secondly, the appellant contends that evidence again relating to a search from the appellant's phone on YouTube using the term "chainsaw beheadings" (material linked to the Mexican Mafia) should not have been admitted. This included materials relating to beheadings; the YouTube material fell short of depicting actual beheadings. Thirdly, the appellant

complains of the admission of statements made by Mr Roigard about knowing where to hide bodies where no one would find them.

[97] All of this evidence was considered by Heath J in a pre-trial judgment delivered on 16 April 2015. With respect to the first two categories of evidence, the Judge recorded:[11]

> The Crown wishes to elicit evidence of 23 images relating to "beheadings" from YouTube searches variously created on 11, 15 and 19 April 2014. The majority of the images are said to relate to "execution-style killings of one person with a chainsaw or knife" and one of "a Mafia attack with a chainsaw". In addition, Mr Gill is expected to give evidence that, on 10 May 2014, the cellphone was used to search: "Why can one blow to the head kill you instantly? — Yahoo Answers".

[98] The Judge noted the Crown contention that the evidence should be admissible as tending to assist in proving Mr Roigard's intention to kill Aaron. As to that, the only evidence available to the Crown at that stage as the mode of killing was that of F who it was known would give evidence that Mr Roigard had told him about attacking Aaron with the wood splitter. The context also included F's statement to the police that Mr Roigard had said that the police should have taken more notice of the "Mexican Chainsaw Massacre" video which was more relevant to the disposal of bodies. The Judge considered that the proposed evidence linking the reference to the Mexican chainsaw massacre to Mr Roigard's cellphone was relevant to F's credibility, as F was unlikely to have known (other than through Mr Roigard) that a link to that video was on Mr Roigard's cellphone.[12] He thought the evidence was relevant, "and not so unfairly prejudicial to the defendant that it ought to be ruled inadmissible".[13]

[99] Mr Lithgow noted that it was acknowledged at the pre-trial hearing that Mr Roigard had spoken to F about the evidence the police had obtained and the significance that might be made of it. That part of F's evidence was not disputed. He also submitted that there was a "big distinction" between disclosing a fact unknown to the police and merely recycling the state of disclosure that the police had the phone and had discovered the material.

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11 *R v Roigard* [2015] NZHC 727 at [77].
12 At [81].
13 At [82].

[100] As we understand the pre-trial ruling, Heath J thought the evidence was relevant, and the fact that F reported Mr Roigard referring to it was a consideration which might be thought to lend credibility to F's account of his discussions with Mr Roigard. We do not consider there was any error in that approach.

[101] As to the issue about evidence concerning Mr Roigard's claim to know where to dispose of bodies where they would not be found, that evidence was ruled inadmissible by Heath J on the basis that it had insufficient probative value, having regard to its unfairly prejudicial effect.[14]

[102] However, the Solicitor-General sought leave to appeal that ruling under s 217 of the Criminal Procedure Act 2011. This Court granted leave to appeal and allowed the appeal holding that the evidence in question was admissible "to the extent it relates to statements said to have been made by Mr Roigard about his ability to hide bodies".[15]

[103] Mr Lithgow complains now that the evidence should have been excluded because it arose contextually in a discussion F was having about protecting daughters from harm. However, we see no proper basis upon which this Court should revisit the decision made pre-trial about the admissibility of this evidence. Mr Lithgow made no attempt to argue that there had been a relevant change in the evidence or the law since the pre-trial appeal was determined.[16]

[104] We note that Mr Lithgow conceded that the issues raised in this part of the appeal, even if determined in the appellant's favour, would be insufficient to establish a miscarriage of justice as a result of the admission of the evidence in question.

[105] For the reasons we have given we reject the fourth ground of appeal.

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14 At [75]–[76].
15 *R v Roigard* [2015] NZCA 430 at [40].
16 See *Winders v R* [2018] NZCA 277 at [45]–[49].

Sentence appeal

[106] At sentencing, the Crown sought imposition of a minimum term of between 20 and 22 years. Mr Lithgow submitted that the case did not meet the statutory criteria for the imposition of a minimum non-parole period at all, but if one were to be imposed it should be less than the 19 years that was given.

[107] We note that before Heath J, Mr Keegan accepted that s 104 of the Sentencing Act 2002 applied. He contended, however, that a minimum period of 17 years would have been sufficient.

[108] Section 104(1) of the Sentencing Act provides that the Court must make an order imposing a minimum period of imprisonment of at least 17 years in the circumstances set out in the subsection. Heath J thought that two or potentially three of the relevant circumstances applied, namely those in s 104(1)(a), (b) or (i). His reasoning is encapsulated in the following extract from his sentencing notes:[17]

> [50] My task is to determine the minimum period of imprisonment that you must serve before being eligible to apply for parole. I start by considering whether this is a case to which s 104 of the Sentencing Act applies, which, unless it would be manifestly unjust to do so, requires a minimum non-parole period of at least 17 years to be imposed.
>
> [51] All murders are serious. But those to which s 104 applies involve aggravating factors that heighten the level of a killer's culpability and cause members of the public to view what has occurred with greater opprobrium.
>
> [52] In this case I am satisfied that two relevant factors exist. They are:
>
> (a) The murder was committed in an attempt to avoid detection and prosecution for other offences that you committed, namely the theft of Aaron's money.
>
> (b) The murder was committed with a high level of callousness.
>
> [53] I include within the scope of the "callous" behaviour, the disposal of Aaron's body, your refusal to tell anyone where it might be found, and your continued attempts to paint what happened as no more than a deliberate decision on the part of Aaron "to disappear". The precise characterisation of those factors is not important. The question is whether they represent aggravating factors of a type that brings your crime within the scope of s 104.
>
> [54] Whether those factors are viewed as part of the "callous" nature of the offending or independently as other "[exceptional] circumstances", they come

[17] *R v Roigard* [2016] NZHC 166.

> within the section. Disposal and concealment of a body causes great pain and distress to those close to the victim; in that regard I refer in particular to Ms Thoms and the children. The effect that can have becomes more acute when the body is not located subsequently.
>
> [55] Ms Clarke submits that those factors, taken together with other aggravating factors, justifies a minimum non-parole period of between 20 and 22 years. On the other hand, Mr Keegan has contended on your behalf that a minimum period of 17 years is sufficient to mark the offending.
>
> (Footnotes omitted.)

[109] Mr Lithgow emphasised the callousness of all murders, referring to *R v Parsons*, in which five Judges of this Court emphasised that the power to impose a minimum term under s 80 of the Criminal Justice Act 1985 was to be exercised "sparingly", and only in "the exceptional case which is so horrendous or repugnant as to justify additional denunciation …".[18] In that case the appellant had been convicted of the murder of his father and sentenced to life imprisonment with a non-parole period of 13 years. It was held that factors relied upon by the Judge were insufficient for the imposition of the minimum term.

[110] The enactment of the Sentencing Act, however, with its more extensive statement of factors that can justify the imposition of a minimum term coupled with the mandatory obligation stated at the outset of s 104(1) requires a different approach. As this Court held in *R v Williams*, the court is bound to give effect to the legislative policy underlying the provision.[19] The Court said:

> [67] We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.

[111] We did not understand Mr Lithgow to dispute that the murder was committed by Mr Roigard in an attempt to avoid detection and prosecution for the theft of Aaron's

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18 *R v Parsons* [1996] 3 NZLR 129 (CA) at 131.
19 *R v Williams* [2005] 2 NZLR 506 (CA).

money. That being the case, s 104(1)(a) applied, with the consequence the Judge was obliged to impose a minimum period of imprisonment of at least 17 years, unless he considered it would be manifestly unjust to do so.

[112] The Judge's conclusion that the murder was committed with a high level of callousness was based, as can be seen from his sentencing remarks, not only on the crime itself, but on the disposal of the body, Mr Roigard's refusal to tell anyone where it might be found and ongoing efforts to suggest Aaron had simply disappeared. The Judge considered that these factors could contribute to a conclusion the murder was committed with a high level of callousness[20] or were "other exceptional circumstances" for the purposes of the subsection.[21] In so concluding, it is clear that the Judge was influenced in particular by the ongoing effect of the appellant's conduct on his wife and children.

[113] At the end of [54] of his sentencing remarks, Heath J made a footnote reference to a decision of the Court of Appeal of England and Wales, *R v Ahmed*, where it was held that conduct subsequent to the appellant's murder of his wife, including concealment of the body and its later disposal, could be taken into account as aggravating features.[22] Mr Lithgow pointed out that concealment of the body was an express aggravating factor under the Criminal Justice Act 2003 (UK), and there is no equivalent provision here. There can, however, be no doubt that Heath J was correct to acknowledge the pain and distress that must be caused to surviving victims such as Aaron's partner and children as a result of the continued concealment of the body. We see no reason why such subsequent conduct cannot be taken into account for the purposes of s 104(1)(e).[23] It is the paradigm case of absence of remorse.

[114] In addition to the considerations set out in the passage from the sentencing notes quoted above, the Judge referred to a further aggravating factor which he characterised as Mr Roigard's "breach of the inherent trust that must exist between father and son". He observed that Aaron had been entitled to trust Mr Roigard with

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20 Sentencing Act 2002, s 104(1)(e).
21 Section 104(1)(i).
22 *R v Ahmed* [2012] EWCA Crim 251 at [15].
23 *R v Frost* [2008] NZCA 406 at [40] is authority for that proposition. See too *R v Korewha* [2015] NZHC 308; and *Carroll v R* [2018] NZCA 320.

his money and his life and to expect support from him: his trust had been "tragically misplaced". The Judge also highlighted Mr Roigard's lack of concern for Aaron, his partner, and his grandchildren.

[115] We are satisfied that the combination of circumstances on which the Judge relied was sufficient for the imposition of the minimum term of 19 years.

[116] The appeal against sentence is dismissed accordingly.

Result

[117] The appeals against conviction and sentence are dismissed.

Solicitors:
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