IN THE COURT OF APPEAL OF NEW ZEALAND

CA7/2015
[2016] NZCA 179

	BETWEEN	KARL TEANGIOTAU NUKU Appellant
	AND	THE QUEEN Respondent

Hearing:	9 March 2016
Court:	Winkelmann, Peters and Collins JJ
Counsel:	Appellant in person I R Murray for Respondent P L Borich as counsel assisting the Court
Judgment:	6 May 2016 at 11.30 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Winkelmann J)

Table of Contents

[1] Mr Nuku was convicted, following a trial in the Auckland District Court before Judge Collins and a jury, of one charge of aggravated robbery and one charge of unlawful possession of firearms. His co-accused, Mr Pandey-Johnson, was convicted on the same counts. Mr Nuku was sentenced to eight and a half years' imprisonment.[1] He now appeals against conviction and sentence.

[2] Mr Nuku is self-represented in respect of this appeal. Mr Borich was appointed as counsel to assist the Court to ensure that all arguments that should be made on appeal were before the Court. Although, as it transpired, Mr Nuku was an effective advocate of his own cause, we were assisted by additional matters that Mr Borich was able to draw to our attention by way of clarification or amplification.

[3] Mr Nuku advances multiple grounds in support of his conviction appeal as follows:

---

1 *R v Nuku* DC Auckland CRI-2011-443-15, 10 June 2014 at [18] [Sentencing notes].

(a) The jury verdict was unreasonable as it was not supported by the evidence.

(b) A miscarriage of justice has occurred because the charges against Mr Nuku should not have been heard alongside those against Mr Pandey-Johnson. Because they were tried together, the jury heard highly prejudicial evidence which was inadmissible against Mr Nuku.

(c) The Crown's conduct of the case caused him unfair prejudice and amounted to prosecutorial misconduct.

(d) There were various errors by the trial Judge.

(e) There was misconduct by a police officer involved in the case who, without advising the defence, visited Mr Nuku's cell when Mr Nuku was attending at Court for trial.

[4] Mr Nuku appeals his sentence on the ground that it was manifestly excessive.

Background

Aggravated Robbery

[5] The Crown case was that Mr Pandey-Johnson and Mr Nuku devised a plan whereby Mr Nuku would visit Mr Dingemans, a former boyfriend of Mr Pandey-Johnson's sister. Once inside Mr Dingemans' house, Mr Nuku would feed information to Mr Pandey-Johnson to facilitate a home-invasion-style attack; Mr Nuku would in effect act as a Trojan horse. The Crown alleged the attack was motivated by Mr Dingemans' purported mistreatment of Mr Pandey-Johnson's sister.

[6] Both Mr Nuku and Mr Pandey-Johnson knew Mr Dingemans. Mr Dingemans had socialised relatively often with Mr Pandey-Johnson over the years. Mr Nuku knew him less well and, on Mr Dingemans' evidence, had never been to the flat before the night of the attack.[2]

---

[2] Mr Nuku disputed this in argument before us.

[7] As to the events on the night in question, 5 January 2010, Mr Nuku arrived unannounced at Mr Dingemans' address in the early evening. He told Mr Dingemans that Mr Pandey-Johnson's sister had gone missing and he was trying to find her. Mr Dingemans was in the middle of band practice and suggested that Mr Nuku come back later so that they could talk.

[8] Mr Nuku returned later, carrying a bottle of whiskey. Over the next few hours Mr Dingemans and Mr Nuku drank the whiskey, listened to music and watched DVDs. Their evening was eventually disrupted by the entry into the house of two masked men. The Crown case was that the smaller of the two men, carrying a .22 rifle, was Mr Pandey-Johnson.

[9] The two intruders were aggressive toward Mr Dingemans. They repeatedly asked him "where is it?", and generally threatened him. They beat him and stabbed him in the hand and thigh with a screwdriver. The two men entered the bedroom of Mr Dingemans' flatmate, Mr Hutchinson, where he and his girlfriend were sleeping. Mr Hutchinson was woken with a .22 in his face, and his girlfriend was hit with the back side of the rifle. The couple was made to move into the lounge and the occupants of the house were then tied up. Mr Hutchinson's evidence was that at some point Mr Dingemans yelled out to the room something like, "What are you doing, what do you want, Casper?" Mr Dingemans only knew Mr Pandey-Johnson as "Casper".

[10] As a result of the assault, Mr Dingemans lost consciousness. On coming to, he found the intruders had left and he was lying face down in a pool of blood in the doorway to his bedroom. The only items taken by the intruders were Mr Dingemans' iPhone and a bag of marijuana.

[11] Mr Nuku was threatened during the attack and tied up along with the others. The evidence-in-chief of Mr Dingemans and Mr Hutchinson was that Mr Nuku was otherwise left alone, although Mr Dingemans accepted on cross-examination that he had previously made a statement to the police to the effect that Mr Nuku had received a couple of "twacks". Likewise, Mr Hutchinson admitted he told police that he thought Mr Nuku had been hit. In evidence, Mr Dingemans said he had seen

Mr Nuku using a mobile phone, although he could not say whether Mr Nuku had been sending texts or just receiving them.

Possession of firearms

[12] The Crown case in connection with this count was as follows. Around 11 January 2010, Mr Pandey-Johnson, Mr Nuku and a female companion visited the New Plymouth house of Ms Davies, a relative of Mr Pandey-Johnson. Mr Nuku carried Mr Pandey-Johnson's bags into the house: a green canvas bag and a black rubbish sack. The green canvas bag contained firearms: a rifle with a wooden handle, one full-barrelled shotgun and one sawn-off shotgun, with the barrel that had been sawn off still with it. Each of the guns was wrapped in sheets. The bags were put in the spare room where Mr Pandey-Johnson was to sleep. Mr Nuku and the female then left.

[13] The next night, Mr Pandey-Johnson retrieved the three firearms from the room in which the bags were stowed and showed them to Ms Davies and another occupant of the house, Mr Banks. Mr Banks' evidence was that he had handled at least one of the guns because Mr Pandey-Johnson could not open it.

[14] Mr Pandey-Johnson took one of the guns with him when he left the address. That gun was later found in a car Mr Pandey-Johnson had dumped. Sometime later, Mr Banks retrieved the remaining two guns from the green canvas bag, wiping them down to remove fingerprints. He then put them back in the room, inside the bag. The guns were discovered by police in a wardrobe in the room, wrapped in sheets and in the green canvas bag which had the name "Danny Nuku" on it. Danny Nuku is Mr Nuku's father.

First ground of appeal: unreasonable verdict

[15] Mr Nuku argues that there was inadequate evidence to support the Crown case that he was involved in the aggravated robbery. The evidence, such as it was, better supported the conclusion that, along with the other occupants of the house, he was a victim of the attack.

[16] As to the firearms charge, Mr Nuku says there was no evidence that he was in possession of the firearms. The Crown relied on Ms Davies' evidence that Mr Nuku had brought the green canvas bag into the house, but this was extracted from her with leading questions and, when viewed as a whole, her evidence was that she had not seen Mr Nuku with the bag. Even if the Crown was correct as to the nature of Ms Davies' evidence, there was no evidence that the guns were in the bag when it was carried into the house.

[17] Mr Nuku argues that the Crown case really depended upon no more than the fact that the guns were found in a bag with Mr Nuku's father's name upon it. He says the Crown was only able to secure a conviction because of illegitimate prejudice attaching to Mr Nuku from evidence which was inadmissible against him, and because of unfair conduct on the part of Crown counsel.

[18] Finally, Mr Nuku says that the law does not recognise the concept of joint possession of a firearm under s 45 of the Arms Act 1983.

Relevant principles

[19] The law in relation to unreasonable verdicts was stated by the Supreme Court in the following way in *R v Owen*:[3]

> The question is whether the verdict is unreasonable. That is the question the Court of Appeal must answer. The only necessary elaboration is that expressed earlier, namely that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.

[20] The threshold for interference with a jury verdict on this basis is high.[4]

Analysis

Aggravated Robbery

[21] The Crown case against Mr Nuku regarding the aggravated robbery rested upon it proving the following:

---

3 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].
4 *R v Kuka* [2009] NZCA 572 at [75].

(a) Mr Pandey-Johnson was one of the two men who entered the house.

(b) Very strong bonds of friendship existed between Mr Pandey-Johnson and Mr Nuku.

(c) Mr Nuku's behaviour on the night in question, including meeting with Mr Pandey-Johnson between his first and second visits to Mr Dingemans' house.

(d) Mr Nuku's visit to Mr Dingemans' house and his use of a cellphone when he was there.

[22] The Crown accepted that its case against Mr Nuku depended upon it proving that Mr Pandey-Johnson was the principal offender. The jury was directed only to go on to consider Mr Nuku's guilt in respect of the aggravated robbery charge if satisfied to the required standard that Mr Pandey-Johnson was one of the principal offenders. It follows from this that although some evidence against Mr Pandey-Johnson was inadmissible against Mr Nuku, if the jury was satisfied that Mr Pandey-Johnson was one of the principal offenders, the jury could take that fact into account when deliberating on the guilt or otherwise of Mr Nuku on count one.

[23] The Crown's case against Mr Pandey-Johnson on the aggravated robbery charge was strong. We do not traverse all of the evidence here but it included Ms Davies' and Mr Banks' evidence that Mr Pandey-Johnson told them on his visit to New Plymouth that he had stabbed "some guy" in the face and knee with a screwdriver, in an attack which squared with Mr Dingemans' and Mr Hutchinson's accounts of the aggravated robbery. Mr Pandey-Johnson told them he had acted in this way because of something Mr Dingemans had done to Mr Pandey-Johnson's sister. Ms Davies said Mr Pandey-Johnson showed them the clothes he wore during the robbery, told them they were soaked in Mr Dingemans' blood, and said that all he got from the robbery was a bag of "weed". Mr Dingemans' blood was found on one of the firearms found by police at Ms Davies' house. There was also evidence of text messages from Mr Pandey-Johnson in the days following the attack seeking

information as to the progress of police inquiries in relation to the aggravated robbery.

[24] Mr Pandey-Johnson gave evidence denying involvement, instead placing responsibility for the attack on Mr Banks. His account conflicted with that of Crown witnesses. The credibility of Ms Davies and Mr Banks was under strong challenge from the defence, but it was nevertheless open to the jury to prefer their evidence to that of Mr Pandey-Johnson. Finally, although Mr Pandey-Johnson had an alibi for the night of the attack (he was at home with his mother), evidence of his use of an EFTPOS card contradicted that account.

[25] As to the second limb of the Crown's case against Mr Nuku, a strong friendship between Mr Nuku and Mr Pandey-Johnson, there was evidence that the pair lived in the same house and also evidence of text messages from Mr Nuku to Mr Pandey-Johnson which revealed powerful bonds of friendship between the two.

[26] The third limb of the Crown case was Mr Nuku's behaviour around the time of the attack. Mr Nuku was at Mr Pandey-Johnson's house that night and it was open to the jury to infer that this was between his first and second visits to Mr Dingemans' house. Moreover, Mr Nuku's arrival at Mr Dingemans' house was unannounced and unexpected. Mr Dingemans was not Mr Nuku's friend.

[27] As to Mr Nuku's use of a phone, he was seen to have a phone during the evening, but later told the interviewing police officer that he did not have a phone. There was evidence that text messages were sent between the phone of Mr Pandey-Johnson and that of his girlfriend on the night in question, around the time of the aggravated robbery. Mr Pandey-Johnson sometimes used his girlfriend's phone and the Crown submitted to the jury that the texts were between Mr Pandey-Johnson using his phone, and Mr Nuku, using Mr Pandey-Johnson's girlfriend's phone.[5]

[28] We also note that there was evidence that a bag with Mr Dingemans' blood on it was found in Mr Nuku's car.

---

5 There was no evidence of the content of the texts.

[29] Taken together these strands of evidence provided a sufficient evidential basis from which a jury could reasonably be satisfied to the required standard of Mr Nuku's guilt; indeed, we consider that it was a strong Crown case.

Possession of firearms

[30] The Crown case against Mr Nuku was that he and Mr Pandey-Johnson had joint possession of the firearms. Contrary to Mr Nuku's argument, the law does recognise a concept of joint possession, including joint possession of firearms.[6]

[31] To prove this count against Mr Nuku, the Crown had to satisfy the jury beyond reasonable doubt that Mr Nuku intended to, and did, exercise control over one or more of the guns, the concept of control obviously importing with it the requirement that the jury be satisfied that Mr Nuku knew of the presence of the guns. That was how the jury was directed.

[32] Mr Nuku says that taken as a whole, Ms Davies' evidence was that she did not see the green canvas bag until after Mr Nuku had left her house, and that she did not see him with it. He relies on the initial three question and answer exchanges in the following passages of Ms Davies' evidence-in-chief:

> Q. And do you know if they had any travelling gear with them at that stage?
>
> A. Um, not until they'd left. Not until they had left, did they get [Mr Pandey-Johnson's] gear out of the car, if that's the —
>
> Q. Yes. So they had some gear with them did they?
>
> A. — oh yes, he had bought, I had a joint.
>
> Q. No, no. They had some stuff that they had brought with them, some travelling gear, as in bags?
>
> A. Yeah, but, you, I thought you — I didn't know about the bags until Karl and that left and then he brought them into the house, so at this stage, when they first turned up, I didn't know there was bags so that's, sorry, that's why I got confused.
>
> A. That's right.
>
> **THE COURT:**

---

6 See *Iti v R* [2012] NZCA 492 at [67].

No, that's fine, Ms Davies, yes.

EXAMINATION CONTINUES: MR MARCHANT

Q. At some stage, did you see some bags?

A. Yes.

Q. Okay. And I think you said you saw the bags when Nuku and someone else was about to leave, is that right?

A. Yeah, [Mr Pandey-Johnson] told them to go get his stuff out the boot and they brought it back in.

Q. I just want to ask you some questions about them getting the bags out of the boot, did you actually see them do that?

A. No.

Q. Did you see anyone with the bags?

A. Yes.

Q. And who did you see with, with the bags?

A. Well, Karl walked in with the bags and put them in, in just, and then I don't, I can't remember whether [Mr Pandey-Johnson] grabbed them off him and took them to the room or whether Karl took them and put them where the, in that room.

Q. And can you describe the bags that you say you saw the accused Nuku bringing in?

A. One was like an old camping bag and just, it looked quite old, like, the old sort of canvassy ones and black rubbish bag.

Q. And do you remember the colour of the old canvassy one?

A. Um —

Q. If you don't, just say so.

A. I think it had like a khaki green and maybe, I can't remember if it had a different colour as well but …

Q. So after the accused Nuku had brought the bags in, what did he do and the girl do?

A. They left.

…

[33] We do not agree with Mr Nuku's characterisation of Ms Davies' evidence. We are satisfied that when this series of questions and answers is read on its own, or in the context of the rest of the passages, Ms Davies' evidence is that she saw Mr Nuku bring the green canvas bag into the house *immediately before he left*.

[34] The Crown could and did point to the following additional evidence. If the jury was satisfied that Mr Nuku was involved in the aggravated robbery, that created a link between him and the firearms. The jury was entitled to conclude that, as he was part of the plan for the robbery, he would know of the presence of the firearms in the bag. When the guns were found by police they were in a bag with Mr Nuku's father's name on it. Finally, if the jury accepted that he carried the guns into the house in that bag, it is also a matter of common sense that he would have known they were in there. Three guns in a canvas bag would be difficult for someone to miss.

[35] To conclude, we consider there was sufficient evidence on which a jury could reasonably be satisfied to the required standard that Mr Nuku knew of the presence of the firearms in the green canvas bag, and intended to, and did, exercise control over those firearms.

Second ground of appeal: a miscarriage of justice occurred because Mr Nuku and Mr Pandey-Johnson were tried together

[36] Mr Nuku says that, because he was tried along with Mr Pandey-Johnson, the jury heard evidence of highly prejudicial admissions made by Mr Pandey-Johnson which implicated Mr Nuku in the offending but were inadmissible against Mr Nuku. He says that, because of this, the two should have been tried separately and the failure to sever the trials has resulted in a miscarriage of justice.[7]

[37] In our view it was inevitable that these two accused would be tried together. The case for a joint trial was overwhelming in circumstances where almost the same

[7] But we note defence counsel did not seek severance prior to trial.

evidence would be called against each accused, and where there was a risk of inconsistent verdicts if they were not tried together. As this Court said in *R v Fenton*:[8]

> [25] What the New Zealand cases show, and indeed most of the cases from other jurisdictions, is that there is a substantial public interest in having a joint trial of those who are said to have jointly committed a crime. The reasons are primarily to avoid the risk of inconsistent verdicts, to have all aspects of a joint enterprise considered at one and the same time, and to prevent duplication of time and effort for witnesses and the court system generally. This public interest will ordinarily outweigh the interests of an individual accused in not having inadmissible evidence before the jury. That is the usual problem in a joint trial from the accused's perspective. When given proper directions juries are to be regarded as capable in most cases of understanding and applying the distinction between admissible and inadmissible evidence.

[38] In this case judicial direction could address the admissibility issues of which Mr Nuku complains. There is no merit to this ground of appeal.

Third ground of appeal: prosecutorial misconduct

[39] Mr Nuku points to several instances of what he says was prosecutorial misconduct:

(a) Late amendment of indictment.

(b) Improper comments made during Crown opening and closing.

(c) Use of leading questions in evidence-in-chief, particularly that of Ms Davies.

(d) A failure on the part of prosecuting counsel to draw the attention of the Judge to an absence of an appropriate direction in relation to Mr Banks' evidence.

[40] It is helpful at this point to set out the relevant principles as to the duties of prosecuting counsel. It is the role of the prosecutor to ensure that justice is served.[9]

---

8 *R v Fenton* CA223/00, 14 September 2000.

9 *R v Stewart* [2009] NZSC 53, [2009] 3 NZLR 425 at [21].

Nevertheless, counsel representing the Crown is entitled to be firm in the presentation of the Crown case. Crown counsel is "entitled to contend forcefully but fairly for a verdict of guilty; but they must not strive for such a verdict at all costs".[10]

(a) Late amendment of indictment

[41] Mr Nuku says that he was prejudiced by the late amendment of the indictment to add in a charge of unlawful possession of a firearm, and that this amendment was unfair conduct on the part of Crown counsel. He had prepared for trial on the basis that he was to face a charge of aggravated robbery only. He would not have admitted certain facts had he known the indictment was to be amended in this way.

[42] The chronology of events does not support Mr Nuku's case that he was prejudiced by a late amendment. The amended indictment, which added a firearms charge against him, was filed nearly three weeks before the trial commenced on 26 May 2014. Although leave to amend was required,[11] there is no record of any opposition to that amendment. Moreover, the admission of facts was only signed on the morning of trial, 26 May 2014.

[43] This ground of appeal cannot therefore succeed.

(b) Comments made by prosecuting counsel during Crown opening and closing

[44] Mr Nuku takes issue with various aspects of the Crown opening and closing addresses.

The phone

[45] Mr Nuku says that Mr Walker for the Crown overstated the Crown's case in the following passage of the Crown opening:

> The accused Mr Nuku lied to the police officer who spoke to them after the aggravated robbery when he was being treated as the complainant. He said

---

10 *R v Hodges* CA435/02, 19 August 2003 at [20].
11 Crimes Act 1961, s 345D(1).

> he didn't have a phone and appeared to be evasive when asked questions about what happened.
>
> The police officer took Mr Nuku's phone off him and put it on a table next to the room he was being interviewed in but later that phone disappeared. An inescapable inference is that Mr Nuku took the phone back realising that it contained incriminating evidence.

[46] Mr Nuku submits that Crown counsel knew from police statements available to him before trial that the evidence the Crown would call would not support the submission as to an "inescapable inference". The police statements describe Mr Nuku as heavily intoxicated, and recounted that he had slept inside the interview room until the morning. No one claimed to have seen him leaving that room. On this evidence, Mr Nuku had no opportunity to steal the phone. Thus, Mr Walker's suggestion to the jury that it was an inescapable inference that he had taken the phone back was wrong.

[47] The evidence was that when Mr Nuku initially arrived at the police station, an officer took a cellphone from him and placed it on a table outside the interview room. A different officer subsequently interviewed Mr Nuku. That officer was not aware that a cellphone had been taken from Mr Nuku and gave evidence that, when she asked Mr Nuku if he had a cellphone, he said he did not. That was true, Mr Nuku says, because he did not own a phone.

[48] We do not assess the evidence given at trial as inconsistent with the inference the Crown invited in opening. Mr Nuku was not a suspect when he arrived at the police station. He was not under constant surveillance. The inference invited was available to the jury in all the circumstances of the case.

[49] We also note that by the time of Crown closing, the significance of this piece of evidence had receded. Mr Nuku takes no exception to the submission made during closing by Crown counsel, Mr Marchant, in connection with the phone as follows: "We don't know what happened to that phone, it's probably most likely, he wasn't being treated as an accused at that stage or a suspect, it's probably most likely that Mr Nuku took that phone back."

[50] This is the submission that the jury would have taken with it into the jury room, not the submission made in opening two weeks earlier.

[51] To conclude, we find no fault with this aspect of the Crown opening and closing, nor evidence that Mr Nuku was unfairly prejudiced by it.

The guns

[52] The next criticism is in relation to comments made by Mr Marchant in closing. In relation to Mr Nuku's knowledge of the presence of firearms in the green canvas bag, Mr Marchant said: "He must've known what was in that canvas bag because you can see what you can see in those photographs."

[53] Mr Nuku says that the relevant photographs showed the guns poking out of the bag, but there was no evidence to suggest that the guns were in that state when the green canvas bag was carried into the house.

[54] We do not read Crown counsel's comment as implying that the guns were visible when the bag was carried into the house. Indeed, given Ms Davies' evidence, that seems a reasonably far-fetched notion. Moreover, the photographs were adduced on the basis that they were photographs taken by police of items they found on search. They did not purport to be photographs taken on the day Mr Nuku was alleged to have carried the bag into the house. The point that counsel was making, as we understand it, related to the size and bulk of the arms, which made it likely that their presence in a canvas bag would be noticed.

[55] We accept, however, that the Judge misunderstood the point. In summing up the Crown case to the jury, the Judge said: "the Crown says again in all these circumstances using your common sense it is implausible that Mr Nuku would not know that those items sticking out of it are in fact firearms". Any risk of the jury being misled, if risk there was, came from this remark of the Judge.

[56] In the context of the trial, however, we do not consider that there was a risk that the jury would have been mistaken as to the effect of the evidence. The evidence

on the point was relatively straightforward, and the defence addressed the issue squarely in closing as follows:

> There is no evidence from Clare Davies of him being seen with a gun or guns at that time. Clare Davies didn't say she'd seen a gun poking out of the top of the bag or anything like that. It's the evidence from Claire Davies that Mr Nuku was asked to get – by Mr Pandey-Johnson – to get his bags, that is, Mr Pandey-Johnson's bags, out of the car. Mr Pandey-Johnson disputed that. He said that the bags were already brought into the house.

[57] Mr Nuku also complains about the following passage in Crown closing:

> According to Ms Davies, she said that [Mr Pandey-Johnson] told her that he was covered in blood, wearing the same clothes that he was wearing that night. She went on to say that he then went out and got the firearms, the firearms in the green canvas bag which had been brought into the house earlier. And she said that he rolled them out from the sheet and he saw the guns.

[58] Mr Nuku says that this is a misdescription of Ms Davies' evidence, as it suggests that she saw the guns inside the green canvas bag when Mr Pandey-Johnson fetched them from the room. Mr Nuku complains that this carried the risk of linking, in the minds of the jury, the guns and the green canvas bag. This would be unfair as Ms Davies did not say she saw the guns in the bag at this point, or indeed at any point.

[59] We accept Mr Nuku's point that the Crown should not have identified the guns in this way. There was after all one group of guns, and referring to them as "the firearms in the green canvas bag" was unnecessary. But these were just a few words in a lengthy trial, and we doubt jurors would have attached any weight to them, on either a conscious or a subconscious level. Moreover, they could not have created a real risk of prejudice to Mr Nuku. His defence was simple: he did not have possession and control of the bag or the guns. In closing, his counsel made the following statement: "There is no evidence of Mr Nuku having connection with those two guns in the meantime … There's no evidence that he was ever in control, or even had knowledge of their whereabouts".

Inviting jury to disbelieve a witness/suggesting a motive to lie

[60] Mr Nuku says that in closing, Mr Marchant invited the jury to disbelieve defence witnesses on the basis that they had a motive to lie due to family bonds. He submits there was no evidential basis for this submission, and the submission could, in itself, have caused a miscarriage of justice.

[61] Mr Nuku's argument focused on three aspects of defence evidence that the Crown invited the jury to disbelieve:

(a) The evidence of Mr Pandey-Johnson's mother, Ms Veena Pandey, that Mr Pandey-Johnson was at home on the night of the aggravated robbery.

(b) The evidence of Mr Pandey-Johnson's two sisters, Misha and Jasmine, that Misha had never been in a relationship with Mr Dingemans. That was significant evidence of course because, on the Crown case, matters concerning that relationship provided the motive for the attack on Mr Dingemans.

(c) The evidence of Ms Jasmine Pandey of a telephone call from Mr Banks. This was of course relevant to the defence case that it was Mr Banks, not Mr Pandey-Johnson, who carried out the aggravated robbery.

[62] In *R v Stewart* the Supreme Court said that "[A] witness should not be accused of having a motive to lie without there being an appropriate evidential foundation for the accusation."[12]

[63] We are satisfied that in each case the Crown had a proper basis for the submission it made that the evidence was not true. In respect of Ms Veena Pandey, the Crown submitted that she loved her son and wanted to help him "as any mother would". The Crown pointed to phone polling data, EFTPOS transactions and phone activity as contradicting her account.

---

[12] *R v Stewart*, above n 9, at [26].

[64] The Crown challenged by way of cross-examination the sisters' evidence that Ms Misha Pandey had not been in a relationship with Mr Dingemans. It was evidence that conflicted with the evidence of the Crown witnesses, Ms Davies and Mr Dingemans. There had also been text communication between Ms Misha Pandey and Mr Pandey-Johnson following the aggravated robbery, discussing inquiries into the progress police were making with their investigation. On one view of the facts, this tended to show that she was aware of her brother's involvement in the aggravated robbery and motivated to help him.

[65] The other critical piece of evidence was Ms Jasmine Pandey's evidence that she had answered a phone call from someone called Joe or Joseph, whom she identified as Mr Joseph Banks. She said Mr Banks asked her to pass a message on to her brother and Mr Nuku that Mr Banks wanted to see them urgently. This was an important piece of evidence for the defence, as on the defence case this call set up a meeting where Mr Banks confessed to Mr Pandey-Johnson that Mr Banks was involved in the aggravated robbery.

[66] Ms Jasmine Pandey's account was challenged on cross-examination. Her evidence also conflicted with that of Mr Banks. Again there was a proper basis for the submission made by the Crown.

The gloves

[67] Mr Nuku complains that the Crown referred to gloves found in Mr Nuku's car, and in doing so might have misled the jury to believe that its case was that the gloves found in the car had been used in the robbery. There was evidence the intruders had worn latex gloves.

[68] In closing, Crown counsel did refer to gloves being found in the car although the Crown did not put to any witness that those gloves were the gloves worn during the robbery. Mr Nuku now says that they were dish-washing gloves although this was not a line of cross-examination pursued by defence counsel.

[69] In the circumstances we think that the Crown cannot be criticised as to how it dealt with this evidence in closing. Although counsel referred to the presence of

gloves, he did not attempt to build anything on that. He did not invite the jury to infer that they were the gloves worn during the robbery.

Person of interest

[70] Mr Nuku also complains that when asking a question of a witness, Crown counsel said that Mr Nuku had been treated by police as a person of interest immediately following the aggravated robbery. He says this would have created an unfairly prejudicial view of him for the jury. There is nothing in this criticism. As a purported victim, he was a person of interest to police, which is why the police proceeded to interview him.

(c) Use of leading questions by Crown counsel

[71] Mr Nuku complains Mr Marchant used leading questions when conducting Ms Davies' evidence-in-chief. He relies upon the passage set out earlier at [32]. Mr Nuku says that under the guise of repeating Ms Davies' evidence to her, counsel effectively reshaped her evidence leading her back to the prosecutorial line that she saw Mr Nuku with the bags before he left.

[72] As we have addressed earlier, we do not accept that Mr Marchant mistook the effect of Ms Davies' evidence when repeating it back to her.

[73] The other portion of evidence complained of was as follows:

> Q. Did you know what happened to the guns in the canvas bag?
>
> A. That night?
>
> Q. That night, [Mr Pandey-Johnson had] shown you them in the lounge.
>
> A. He wrapped them back up and he put them back away in the room, you know, I think he's put them into the canvas bag in the wardrobe.

[74] Mr Nuku takes issue with the form of Mr Marchant's questioning of Ms Davies because it tended to locate the guns in the canvas bag for both the witness and the jury. We agree that the question would have been better framed without the words Mr Nuku complains of, when it was at issue whether the guns were in the bag when it was brought into the house. However we do not consider it caused Mr Nuku

prejudice in this particular context. As is apparent from Ms Davies' evidence, she did not know what happened to the guns. She was only able to speculate that they were placed in the canvas bag.

[75] Moreover, this complaint is linked to the earlier point raised by Mr Nuku in connection with the Crown closing. Our response is the same. Given Mr Nuku's defence, that he did not have possession or control of the bag, there was no risk to him of prejudice flowing from this form of questioning.

(d) Failure to draw the Judge's attention to the absence of an appropriate direction in relation to Mr Banks' evidence

[76] Mr Banks gave evidence of admissions made by Mr Pandey-Johnson. Although Mr Banks initially said that Mr Nuku was present when these admissions were made, he later accepted that he was mistaken. It follows that Mr Banks' evidence of these admissions was inadmissible against Mr Nuku, but there was no direction to this effect in the Judge's summing-up. Mr Nuku complains that the failure to ask for such direction was prosecutorial misconduct on the part of Crown counsel.

[77] We accept that it would have been helpful if Crown counsel had sought such a direction. If counsel identifies a deficiency in the direction and fails to bring that to the attention of the Judge, that could amount to misconduct, in this case, prosecutorial misconduct. But there is nothing to suggest that this was anything more than an oversight. We note that defence counsel, who could have been expected to be keenly aware of the admissibility issue, also failed to draw the issue to the attention of the Judge.

Fourth ground of appeal: errors on the part of the trial Judge

(a) Judicial interventions

[78] Mr Nuku submits that the trial Judge intervened excessively, which caused prejudice to the defence because most interventions occurred during defence counsel cross-examination and so had the effect of disrupting the defence case.

[79] Mr Nuku does not point to any particular intervention as being improper, but states that the Judge intervened during 13 out of 18 witnesses, resulting in around 48 judicial interventions. He states the Judge asked approximately 104 questions (excluding questions from the Court following re-examination).

[80] The appropriateness of judicial intervention is not assessed by numerical analysis. We have reviewed the evidence and while most interventions occurred during the cross-examination by counsel for Mr Pandey-Johnson, these interventions were usually to correct an error or ambiguity in a question. Interventions of this nature may be of assistance to counsel, but are usually made to assist the jury. Ensuring that the evidence is accurate, and not ambiguous, is a critical part of the judge's role. Having reviewed the record, we do not consider that the interventions were improper or that they caused prejudice to either accused.

(b) Direction on admissibility

[81] Mr Nuku contends that the trial Judge failed to give adequate direction to the jury that the evidence given by Ms Davies and Mr Banks of alleged confessions by Mr Pandey-Johnson, which implicated Mr Nuku, was inadmissible against Mr Nuku.

[82] In advance of Ms Davies giving evidence the Judge directed the jury as follows:

> Just before I call upon Mr Marchant to ask the next witness questions, just a bit of general information about one of the rules of evidence and I will talk to you about this later in the trial as well. Where two defendants, or more than two defendants, stand trial together there are, in fact what is happening is individual trials but it is being heard together … But one of the important rules that applies when there are two defendants, or co-defendants, is that any evidence that the Crown leads of what a defendant, one defendant, says to somebody else, another witness, is only evidence for or against that defendant, it is not evidence against a co-defendant. So, if you are to hear evidence in this case of, for example, things that Mr Pandey-Johnson says happened, it is evidence only in the case against Mr Pandey-Johnson. Anything that Mr Pandey-Johnson may have said about Mr Nuku is inadmissible in a trial against Mr Nuku.

[83] The Judge did not give a similar direction before Mr Banks gave his evidence, but he could not have anticipated the need to do so. Mr Banks' evidence-in-chief was that Mr Nuku was present when Mr Pandey-Johnson made the

admissions which incriminated Mr Nuku. He changed that evidence on cross-examination. Accordingly, when Mr Banks finished giving his evidence the Judge gave a direction as follows:

> You will recall that yesterday I gave you a direction about what one co-defendant might say in the absence of another co-defendant, so in this case we had evidence from Ms Davies and from Mr Banks. Things that they said that Mr Pandey-Johnson told them, the evidence is that when those things were said, Mr Nuku was not there.
>
> Now that evidence is evidence in the case of Mr Pandey-Johnson alone, so when you come to marshall and assess the evidence against Mr Nuku, you have no regard whatsoever to what it is that Ms Davies and Mr Banks said that Mr Pandey-Johnson had said about Mr Nuku.
>
> What Ms Davies and Mr Banks had to say, firstly if you accept that evidence, that is entirely a matter to you, whether you accept it or reject it but if you accept it, it is evidence in the case of Mr Pandey-Johnson alone.

[84] Further, in his summing-up, Judge Collins gave the following direction:

> [50] Now, before going on to deal with how the Crown and the defence dealt with those issues, there are some further directions I do need to give you. The first is in relation to a co-defendant's statement. If you accept Clare Davies' evidence, that is that Mr Pandey-Johnson told her that he had committed this home invasion aggravated robbery, then what he Pandey-Johnson said to her about Karl Nuku's involvement is inadmissible in the case against Mr Nuku. It is admissible in the case against Mr Pandey-Johnson to give support, the Crown says, to the credibility of Clare Davies' evidence. Crown says that Mr Pandey-Johnson gave a plausible explanation for Karl Nuku's presence. Therefore, the Crown says that is one factor which makes it more likely to be Mr Pandey-Johnson than Joseph Banks.
>
> [51] So I stress, you can take it into account when you are considering the case against Pandey-Johnson, that Clare Davies said that he said these things. The minute that you come to consider the case against Mr Nuku, if you accept what she has said, you accept her evidence, you just do not take that part into account whatsoever in considering the case against Mr Nuku.

[85] Although it would have been desirable for the trial Judge to include reference to Mr Banks' evidence in this direction, we have no doubt that the jury would have understood that the direction applied equally to the evidence of Mr Banks. As the Crown submits, because the evidence of Mr Banks related to the same conversation on which Ms Davies had given evidence, and given Judge Collins' previous direction in relation to the admissibility of Mr Banks' evidence, the jury would have been in

no doubt the directions on Ms Davies' evidence applied in the same way to that of Mr Banks.

(c) Failure to direct what actual assistance meant

[86] Mr Nuku submits because there was no direct evidence linking him to the aggravated robbery, it was critical that the Judge give a strong direction to the jury that before it could convict him on the charge of aggravated robbery, it had to be satisfied that he had actually assisted.

[87] Judge Collins said the Crown's case was that Mr Nuku was "on the inside helping with information and being available to Mr Pandey-Johnson and the other intruder by being already in the apartment". The Judge directed the jury that the Crown must prove that Mr Nuku provided actual assistance to Mr Pandey-Johnson and the other intruder in the course of the robbery. Further, the Judge directed that mere presence would not be enough to constitute actual assistance unless by his presence Mr Nuku intended to provide backup or to embolden the principal offender. That requirement was also covered in the question trail provided to the jury although the question trail did not provide any further definition of "actual assistance".

[88] The assistance alleged against Mr Nuku was clear from the summing-up and from the Crown closing. We doubt that any more useful definition of "actual assistance" could have been given. The issue for the jury was whether Mr Nuku was there providing information and available to provide backup if required.

(d) Intoxication direction not given

[89] Mr Nuku submits that due to his state of intoxication (after consuming nearly a full 40-ounce bottle of whiskey with Mr Dingemans and smoking a quantity of "hash" and "pot"), the Judge should have given an intoxication direction to the jury. Mr Nuku says his state of intoxication and inability to provide actual assistance was confirmed in the evidence of Mr Dingemans and Constable Carter, and his own witness statement to the police.

[90] We are not persuaded that an intoxication direction was required, when the Crown case was that assistance was provided through Mr Nuku messaging information via text. If Mr Nuku later became so intoxicated he was incapable of action, that is irrelevant.

[91] Similarly, if the assistance he provided was being on the "inside" with the intention to be available to provide backup, it is irrelevant that before the intruders arrived he became intoxicated, thereby reducing his ability to provide meaningful assistance.

[92] We also accept the Crown submission that since Mr Nuku's defence was that he was simply a victim, it was open to the Judge to conclude that providing such a direction would undermine that defence. We note that no intoxication direction was sought. We do not consider there was any error on the part of the Judge.

(e) Jury question trail

[93] Mr Nuku identifies alleged errors in the question trail. In relation to the firearms charge he complains that the Judge used the same question trail for both accused. We see no deficiency in this regard as the same elements had to be proved against each accused. The Judge nevertheless outlined for the jury the issues for each accused in respect of the charge.

[94] Mr Nuku also appears to complain the question trail was deficient because it did not specify a date for the firearms offending, and that created an ambiguity. However, the date was not an essential particular of the charge on which the jury had to be satisfied, as that was not a matter at issue at trial. It was common ground between the Crown and the defence that the visit to Ms Davies' house had occurred, and that it was after the aggravated robbery. We see no evidence of any ambiguity either with the form of the charge, or the question trail.

[95] Mr Nuku also criticises the failure of the Judge to provide any additional direction on the meaning of "an intention to exercise control" and "actual control" in relation to this count.

[96] The Judge did address this issue at [42] of his summing-up as follows:

> Now in count 2 the Crown has to prove that a particular accused that you are considering knew about the firearm, had knowledge about one or other of those firearms, that defendant willingly or voluntarily intended to exercise control over that firearm and that the accused or defendant did in fact have control over that firearm. So the Crown has to prove knowledge of the firearm, an intention to voluntarily exercise control over the firearm and prove actual control of the firearm. And, as I say, in this case you do not need to concern yourself about the issues of lawful sufficient and proper purpose, so that does not arise.

[97] This was adequate direction on this point.

Fifth ground of appeal: conduct of police officer

[98] Mr Nuku complains that an officer involved in the investigation and who was in Court throughout the trial, visited the prison where Mr Nuku was housed and was shown through Mr Nuku's cell at the prison. This visit occurred while Mr Nuku was at Court attending his own trial. Mr Nuku concedes that he cannot say that these events affected or compromised his right to a fair trial. The actions of the police officer cannot therefore provide a ground of appeal. Mr Nuku should pursue his concerns regarding this conduct through appropriate avenues, as was discussed at the hearing.

Outcome on conviction appeal

[99] This appeal is to be determined under s 385 of the Crimes Act 1961, the law which governed the determination of appeals prior to the coming into force of the Criminal Procedure Act 2011. Section 385 provides in material part:

> **385 Determination of appeals in ordinary cases**
>
> ...
>
> (1) On any appeal to which subsection (1AA) applies, the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—
>
> (a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

> (b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) that on any ground there was a miscarriage of justice; or
>
> (d) that the trial was a nullity—
>
> and in any other case shall dismiss the appeal:
>
> provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
>
> …

[100] This appeal seems to us to raise issues falling within s 385(1)(c), that on any ground there was a miscarriage of justice. Under that ground the appellant must point to something which has gone wrong and which was capable of affecting the outcome of the trial.[13] We have found deficiencies, admittedly very minor deficiencies, in Crown counsel's conduct in connection with the repeated tagging of the guns the subject of the firearms charge as "the guns in the green canvas bag". But for reasons set out above, we do not consider that was capable of affecting the outcome of the trial; it caused no prejudice to Mr Nuku. We also record that we do not consider that these minor deficiencies amount to misconduct on the part of Crown counsel.

[101] We have also found errors in the trial Judge's summing-up: the misdescription of the Crown case, and the failure to include aspects of Mr Banks' evidence in the category of evidence which was inadmissible against Mr Nuku. Again, for the reasons we have given, we do not consider them errors which were capable of affecting the outcome of the trial.

[102] We have found no other way in which something went wrong during the course of the trial. We therefore dismiss the appeal against conviction.

---

[13] *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [31].

Appeal against sentence

[103] Ground five in the points on appeal states that the sentence is manifestly excessive due to lack of evidence, although in his written submissions filed in support of the appeal, Mr Nuku argues that due to the nature of the grounds of appeal otherwise advanced, the sentence should be reduced to vitiate the gross injustice of the convictions entered. We have found no errors in the conduct of the trial on the part of the Judge, or on the part of the prosecution, which constituted or could constitute a miscarriage of justice. We therefore propose to address whether the sentence was manifestly excessive.

[104] Judge Collins assessed Mr Nuku as less culpable in the offending than Mr Pandey-Johnson.[14] He saw Mr Pandey-Johnson as the organiser; while Mr Nuku was not the organiser, nor did he participate in the violence.[15] The Judge said, however, that Mr Nuku did play "a crucial role in providing information to Mr Pandey-Johnson" and providing backup if needed.[16]

[105] For Mr Pandey-Johnson the Judge adopted a starting point of nine years' imprisonment,[17] and for Mr Nuku seven years' imprisonment.[18] He did not consider that there were any aggravating or mitigating factors personal to Mr Nuku.[19] With regard to the firearms charge, the Judge imposed a sentence of 18 months' imprisonment cumulative on the aggravated robbery sentence, therefore sentencing Mr Nuku to eight and a half years' imprisonment.[20]

[106] In selecting the starting points the Judge relied, inter alia, upon *R v Mako*, where the Court of Appeal said:[21]

> Forced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims, where weapons are brandished even if no serious injuries are inflicted would require a starting point of seven years or more. Where a private house is entered the starting

---

14 Sentencing notes, above n 1, at [14].
15 At [14].
16 At [14].
17 At [10].
18 At [15].
19 At [15].
20 At [18].
21 *R v Mako* [2000] 2 NZLR 170 (CA) at [58].

> point would be increased under the home invasion provisions to around ten years.

[107] We consider that the starting point selected was within the available range. We also consider that it was open to the Judge to impose a cumulative sentence in respect of the firearms charge. Count two depended upon offending separated in time from the aggravated robbery. A sentence of 18 months' imprisonment for that offending was stern, but still within the available range.

[108] It follows that the sentence imposed was not manifestly excessive.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent