IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA699/2017
[2018] NZCA 254

	BETWEEN	ROBERT JOHN SOLOMON GRACE Appellant
	AND	THE QUEEN Respondent

Hearing: 21 May 2018 (further material received on 6 June 2018)

Court: French, Ellis and Woolford JJ

Counsel: L A Andersen for Appellant
C A Brook for Respondent

Judgment: 16 July 2018 at 10.30 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal against sentence is dismissed.

C The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Ellis J)

[1] Mr Grace was convicted at trial on charges of wounding with intent to injure and injuring with intent to injure.[1] Those two charges were put to the jury as

[1] He was sentenced to three years and six months' imprisonment: *R v Grace* [2017] NZDC 21509.

alternatives to the original charges of wounding with intent to cause grievous bodily harm and injuring with intent to cause grievous bodily harm, respectively.[2] He now appeals his conviction on the ground that the two alternative charges were improperly added to the charge list during the course of the trial. He says the convictions are nullities.

[2] The appeal was filed out of time. Because the delay was short and has been explained, an extension of time was not opposed and we grant it accordingly.

[3] Mr Grace's sentence appeal was not pursued before us and is therefore dismissed.

Background

The offending

[4] Mr Grace was friends with Ms Brownlie. On the night in question he, Ms Brownlie and the complainant, Mr Howley, had been drinking at Mr Grace's house. Mr Grace became angry with Mr Howley for reasons to do with their respective relationships with Ms Brownlie. We do not need to venture into the details here. According to Mr Howley, Mr Grace hit him about four times about the head with a sharp weapon of some kind. One of the blows cut Mr Howley's right index finger and one cut his forehead. Both cuts required medical attention.

[5] Mr Howley then fled the house. He knocked over a wheelie bin full of bottles as he left. Later, he returned briefly to take Ms Brownlie back to her own house, which was a short distance away.

[6] At about 5 am the next morning, Mr Grace went to Ms Brownlie's house carrying a cricket bat. He banged on the front door but it was locked. Ms Brownlie and Mr Howley (who were in bed together) ignored him. Mr Grace climbed in an unlocked side window. He later said he had done this many times before, during his friendship with Ms Brownlie.

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[2] Mr Grace also faced a charge of threatening to kill and a charge of aggravated burglary.

[7] Mr Grace entered the bedroom where Ms Brownlie and Mr Howley were. He began hitting Mr Howley with the cricket bat. He directed the blows at Mr Howley's head, re-opening the cut on his forehead. Eventually Mr Howley managed to get out of the bed and stop the assault.

[8] Mr Grace denied that events had unfolded in the way described by Mr Howley and Ms Brownlie. He said Mr Howley's injuries must have been caused when he fell over the recycling bin.

The trial

[9] Mr Grace's trial began on 28 August 2017. The jury was given a "Jury Book" containing the charge list, admission of facts, a map of the area where the offending took place and a witness list. The charges on the charge list were:

(a) charge one: wounding with intent to cause grievous bodily harm;

(b) charge two: threatening to kill;

(c) charge three: aggravated burglary (entering a building with a weapon); and

(d) charge four: injuring with intent to cause grievous bodily harm.

[10] On the morning of 30 August 2017, after discussions with counsel in chambers, the Judge dismissed the charge of threatening to kill under s 147 of the Criminal Procedure Act 2011 (the CPA). At the instigation of Mr Grace's lawyer, it was also agreed that the lesser offences of wounding with intent to injure and injuring with intent to injure should be given to the jury as alternatives. An amended charge sheet was then created, which contained the following charges:

(a) charge one: wounding with intent to cause grievous bodily harm;

(b) charge two: wounding with intent to injure ("as an alternate charge");

(c) charge three: aggravated burglary;

(d) charge four: injuring with intent to cause grievous bodily harm; and

(e) charge five: injuring with intent to injure ("as an alternate charge").

[11] Shortly thereafter, the Judge advised the jury:

> Now, a further review of the evidence has meant that charges 1 and 4, as they are framed are remaining but there are included in that charge alternatives. So what the Crown have done, with my leave, is prepared a new charge list which takes out the threaten to kill charge but incorporates two alternative charges, so if that could now be distributed please.
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> So charges 2 and 5. Charge 2 is an alternative to charge 1, and charge 5 is an alternative to charge 4. Now what has to happen is that Mr Grace has to plead to those two charges, so we're now going to reads the charges to him and ask him to plead to those two charges and then we will resume and when I sum up the case to you and when counsel address you about the cases respectively, they will address you in respect of the alternatives, and I'll tell you how to deal with those when you go and consider your verdicts.

[12] Mr Grace was then asked to plead to the alternate charges. He pleaded not guilty.

[13] Later that day, the Crown closed on the basis charges two and five were alternatives to charges one and four. Defence counsel closed on the same basis.

[14] In his summing up the Judge said:

> In this case, charges 1 and 4 in your question trail have alternative charges — charges 2 and 5. You have to consider charge 1 first and if you reach a decision that the defendant is not guilty of that charge, you then consider the alternative charge 2. If, however, you find the defendant guilty on charge 1, you do not consider charge 2. The same applies to charge 4. You first consider charge 4 and only if you consider that the defendant is not guilty of that charge would you then consider the alternative charge. So if you find him guilty of charge 4, then you do not consider charge 5. If you find him not guilty of charge 4, then you must consider charge 5.

[15] At the end of his summing up, the Judge returned again to this topic:

> I just want to state again that you only need to consider the alternative charges, that is charges 2 and 5, if you do not reach guilty verdicts on charges 1 and 4. So if you find the defendant not guilty on charge 1, then you consider charge 2

> Similarly, if you find him not guilty on charge 4, then you consider charge 5. Otherwise you do not consider charges 2 and 5.

[16] The conclusion of the question trail for charge one told the jury that if they found Mr Grace guilty of charge one, they were to go to the alternative charge two. The question trail for charge two identified charge two as an alternative charge. The end of the charge four question trail advised the jury that if they found Mr Grace not guilty of charge four, they were to go to the alternative charge five. Apart from those references, the question trail did not contain a specific direction to *only* consider charges two and five if they reached not guilty verdicts on charges one and four.

[17] At 1.05 pm the following day, the Judge received a note from the jury advising:

> We are at a standstill and we would like some direction please.

[18] After speaking to counsel, the Judge sent a message to the jury asking whether they were stuck on all charges or just some. The jury's response was that they were stuck on four charges, "of which one is a majority". The Judge then called the jury back and gave them a majority verdict direction, as follows:

> [3] You may deliver a majority verdict on any charge. If any one juror disagrees on a charge, you may deliver your verdict. If more than one juror disagrees on a charge, you cannot deliver your verdict on that charge. However, you should try to reach unanimity until it is probable this will not happen.
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> [4] Before you can deliver a majority verdict on a charge, your foreperson will be asked in open Court to confirm it is not probable you will reach a unanimous verdict on that charge, and to confirm you have reached a majority verdict. You can bring in a unanimous verdict on one or more charges, and a majority verdict on one or more charges.
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> [5] So that you and your foreperson know what to expect when you come to deliver your verdicts, this is the procedure that would be followed for each charge. The registrar will ask:
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> > Members of the jury, on charge 1, have you reached a unanimous verdict, that is one on which all 12 of you agree?
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> [6] If the answer is yes, you will be asked whether your verdict is guilty or not guilty. If the answer is no, the question will be:
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> > Members of the jury, is it probable that you can reach unanimous verdict, that is one on which all 12 of you agree?

[7] If the answer is yes, then no verdict would be taken. If the answer is no, then the question would be:

> Members of the jury, have you reached a verdict on which all of you agree except one?

[8] If the answer is no, then no verdict will be taken. If the answer is yes, then you will be asked:

> Do you find the defendant guilty or not guilty?

[9] So your task, members of the jury, is to go back into the jury room to see whether or not you can reach unanimous verdicts, and if you cannot reach unanimous verdicts, whether or not you can reach majority verdicts.

[19] It seems that at 3.45 pm the Judge sent a note to the jury which read:

> Have you reached unanimous or majority verdicts on any charges?
>
> Charge 1 Yes Or No
>
> Charge 2 Yes Or No
>
> Charge 3 Yes Or No
>
> Charge 4 Yes Or No
>
> Charge 5 Yes Or No
>
> I do not want to know what the verdicts are.
>
> Are you likely to reach either unanimous or majority verdicts on any charges that you have not already reached verdicts? Yes or No
>
> You will also be asked these questions in open court but I need to know to make a decision about the continuation of your deliberations.

[20] At around 4 pm that afternoon the jury returned and verdicts were taken. The transcript shows that there was some confusion during that process, although that may be because the Judge had received a written response to his questions (the file does not make this clear). In summary:

(a) on charge one the jury:

(i) said that they could not, and were unlikely to, reach a unanimous verdict; but

(ii) were not then asked by the Registrar whether they had reached a verdict on which all but one of them agreed;

(b) on charge two they returned a unanimous guilty verdict;

(c) on charge three they:

(i) advised that they could not, and were unlikely to, reach a unanimous verdict; but

(ii) were not then asked whether they had reached a verdict on which all but one of them agreed;

(d) on charge four they:

(i) advised that they could not, and were unlikely to, reach a unanimous verdict; but

(ii) were not then asked whether they had reached a verdict on which all but one of them agreed;

(e) on charge five they:

(i) advised that they could not, and were unlikely to, reach a unanimous verdict;

(ii) were asked whether they had reached a verdict on which all but one of them agreed; and

(iii) returned a majority guilty verdict.

[21] Then, the Judge said:

> Thank you. Mr Grace, on charges 2 and 5, as a result of the jury's verdicts you will be convicted on those two charges. If you would just stand down in custody and I will deal with you shortly, thank you.

> Now Madam Foreperson, members of the jury, I want to thank you for your task. You have obviously applied yourself to these charges. I need to discuss with counsel what will happen with charge 3, but your findings on charge — charges 1 and 4, will mean that those two charges will be dismissed, I would suggest, I'm not sure, but that's probably what will happen, because they were alternative charges and it will be subject to the Crown's position. More likely than not Mr Grace will face another trial on the aggravated burglary charge, that's just the way the system operates. I know that you have tried hard and I thank you on behalf of the community, it's not easy to sit as 12 unknown people as judges of another citizen and you have applied yourself and I thank you very much.

[22] After the jury had left the Courtroom, the Judge had the following exchange with the prosecutor:

> **THE COURT:** Right, now Mr Donnelly, I might have overstepped the mark there but I suspect that the reality is that with charge 2 and 5 —
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> **MR DONNELLY:** I suspect, Sir, and what I'm going to ask just so I make sure I go through the process properly, is for the matter to be called again tomorrow. I just want to speak to the [officer in charge] and the complainant. I would, again I'm not, I don't want to be bound by this, but my view, at this time, is that we wouldn't proceed, I mean the two physical acts there's been guilty verdicts of those, although the lesser but that's —
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> **THE COURT:** Yeah —
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> **MR DONNELLY:** — and also the aggravated burglary, I mean again it's, it's a yeah, I think it would likely be that we don't proceed on that again –
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> **THE COURT:** Right —
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> **MR DONNELLY:** — but I just want to make sure I do the proper process —
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> **THE COURT:** — yes, sure, I understand that.
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> **MR DONNELLY:** I think 1 and 4 remain live because they weren't not guilties.
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> **THE COURT:** That's right, they do remain live and I realised that when I was saying it to the jury and I thought, "now hang on a minute, they do remain live," but — because they haven't found him not guilty on that charge.
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> **MR DONNELLY:** No, no, they're just unable to reach a verdict so …
>
> **THE COURT:** Yes, so —
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> **MR DONNELLY:** But I'll be in a position to answer that, whether the Crown wishes to proceed on 1, 4 — 1, 3 and 4 tomorrow.

[23] The next day the Crown advised that they did not wish to pursue a retrial on the other charges and, at that point, they were dismissed.

The appeal

[24] As initially formulated, Mr Grace's appeal can relatively quickly be dealt with. We have little hesitation in agreeing with Ms Brook for the Crown that:

(a) The "new" charges are properly regarded as (and were clearly intended to be) lesser "included" (and alternative) charges,[3] as is permitted by s 143 of the CPA, which provides:

> If the commission of the offence alleged (as described in the enactment creating the offence or in the charge) includes the commission of any other offence, the defendant may be convicted of that other offence if it is proved, even if the whole offence in the charge is not proved.

(b) The amendment of the charge list in this way did not amount to "adding" charges against him.

[25] In this latter respect, we also record our agreement with Ms Brook that a charge list simply summarises the charges in a convenient form for the jury. Unlike a charging document, it has no legal status; it is not constitutive of the charges faced by the defendant. Indeed, as she pointed out, the only statutory reference to charge lists can be found in r 5.9 of the Criminal Procedure Rules 2012, as follows:

> (3) After the jury has been sworn, the prosecutor must provide a copy of the charge list to each juror and each defendant, and the defendant must be asked to plead to each charge on the charge list.
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> (4) The charge list must itemise the first charge on which the defendant is charged as "charge 1" and any further charges sequentially in the same manner.
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> (5) If there are multiple charges, the Judge may direct the manner in which the charges are put to the defendant.
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> (6) The defendant must be given in charge to the jury after the jurors have each received a charge list.

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[3] An included charge is one that is necessarily included in the actual charge, either by reason of its definition, or how the charge is laid in the charge sheet. Burglary is an included charge when aggravated burglary is the actual charge.

[26] We acknowledge that in contrast to the position that pertained under the Crimes Act 1961, there is no power under the CPA to add new charges during a trial.[4] But that is not what happened here. The charges were alternative charges and only included in the charge sheet to assist the jury. A charge list has no legal status and therefore the absence of a power to amend it is irrelevant.

[27] As the hearing before us developed, however, it became apparent that other, more substantive, issues were raised by what occurred here. In particular, it became apparent that (as we have set out above):

(a) Mr Grace had been asked to plead to the included charges;

(b) the jury had given verdicts on the included charges without first delivering a verdict on the original charges to which they were alternatives;[5] and

(c) Mr Grace had been convicted on the included charges while the original charges remained "live".

[28] Those are the issues to which we now turn.

Discussion

[29] We begin by noting that the "verdicts" on the charges which did not ultimately result in convictions (charges one, three and four) were clearly irregular. Indeed, they were not verdicts at all. But the guilty verdicts on charges two and five were not

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4 Simon France (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CPA136.02]. The Crown *may* add new charges without leave up until the case review hearing, or the time the trial callover memorandum is filed (depending upon the applicable pre-trial procedure). After that date has passed but before trial, new charges may be added with leave of the court: Criminal Procedure Act 2011, s 191; and Crown Prosecution Regulations 2013, reg 6. But there is no mechanism to add charges during a trial, other than by commencing a new proceeding by way of filing charging documents and formally joining them to the existing proceeding.

5 Because they were hung on the original charges.

irregular. The verdict on charge two was unanimous. And the verdict on charge five complied with s 29C(2) of the Juries Act 1981 (the JA):

(a) the jury had been deliberating for more than four hours (from the afternoon of 30 August until 4 pm on 31 August);

(b) the jury had not reached a unanimous verdict;

(c) the foreperson stated in open court that the jury was not likely to reach a unanimous verdict, but had reached a verdict on which all but one of the jurors agreed; and

(d) it is clear from the Judge's acceptance of the verdicts that he considered the jury had had a reasonable period of time for deliberation having regard to the nature and complexity of the trial.

[30] This is not, therefore, a case like *Taula v R*, where the appellant's convictions were quashed because non-compliance with one of the s 29C preconditions rendered the verdicts nullities.[6]

[31] Nor do we consider that any risk of miscarriage arises from requiring Mr Grace separately to plead to the included offences. At most, that is an irregularity that could be cured by s 379 of the CPA.

[32] In our view, the only real issue here relates to taking verdicts on the included charges without first taking verdicts on the original, more serious, charges. We sought and received further written submissions on this point after the hearing.

[33] The starting and, we think, the end point is the analysis by this Court in *Lualua v R*.[7] In that case the jury had been unable to agree on count four in the indictment but had returned a guilty verdict on count five, which was an alternative, included, charge. It appears that the Judge and counsel at the time did not consider that taking that

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6 *Taula v R* [2017] NZCA 469 at [24] and [30].
7 *Lualua v R* [2007] NZCA 114.

verdict (and entering a conviction) would preclude a retrial on count four. When the Crown later signalled that it wished to pursue a retrial, however, the Judge "recalled" the conviction on count five in order to permit that to occur.

[34] One of a number of issues considered on appeal was whether the District Court Judge was entitled to accept the verdict on the alternative count five.[8]

[35] The Court's analysis of that issue is both comprehensive and directly on point. After noting that there was nothing to suggest that the jury's verdict on count five was not accepted or (accordingly) that Mr Lualua had, indeed, not been convicted on that count,[9] William Young P for the Court went on:

> [13] There has been debate as to whether a Judge can accept a verdict on a lesser alternative charge which is "included" in the primary count (eg as manslaughter usually is in a count alleging murder) where the jury cannot agree on the primary charge.
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> [14] The House of Lords in *R v Saunders* [1988] AC 148 held that it is open to the Judge to do so. In that case, the Judge (with the consent of counsel on both sides) had accepted a verdict of manslaughter where the jury were divided on whether the defendant was guilty of murder. Indeed, the House of Lords held that his right to take a verdict in relation to manslaughter did not depend on the consent of the prosecution and defence. Lord Ackner (at 161) summarised the position in this way:
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> > In a trial on an indictment for murder, where manslaughter is a possible verdict, the jury's task is first to consider whether or not they are satisfied that the accused is guilty or murder. It is only when they have made the positive determination that the accused is not guilty of murder that they should then proceed to consider the lesser offence of manslaughter. However, there is no legal principle which prevents this impediment to considering the lesser offence being removed by judicial intervention, namely by discharging the jury from the obligation of returning a verdict on the major offence, if the justice of the case so requires.
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> [15] In *R v Dwight* [1990] 1 NZLR 160, Cooke P (at 166) expressed reservations as to whether *Saunders* should be followed in New Zealand given s 374(6) of the Crimes Act. Section 374 relevantly provides:
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> > **374 Discharge of jury**
> >
> > (1) Subject to the provisions of this section, the Court may in its discretion, in the case of any emergency or

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8 At [9] and following.
9 At [11].

> casualty rendering it, in the opinion of the Court, highly expedient for the ends of justice to do so, discharge the jury without their giving a verdict.
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> (2) Without limiting subsection (1) of this section, where a jury has remained in deliberation for such period as the Judge thinks reasonable, being not less than 4 hours, and does not agree on the verdict to be given, the Judge may discharge the jury without their giving a verdict.
>
> …
>
> (6) Where the Court discharges a jury under this section, it shall either direct that a new jury be empanelled during the sitting of the Court, or postpone the trial on such terms as justice requires.

Cooke P's concern in *Dwight* seems to have been that the effect of these provisions is that where a jury is discharged from giving a verdict, s 374(6) requires there be a new trial and does not contemplate the taking of a verdict on an included charge.

[16] That view rests on a literal reading of s 374. It is axiomatic that this section applies on a count by count basis, ie a jury which agrees on some counts can return verdicts on those counts despite disagreeing on others. We think it is clear that s 374(6) does not completely occupy the ground in terms of what a Judge must do when there has been a disagreement. On this point we refer to the remarks of Henry J in *R v Barlow* [[1998] 2 NZLR 477 (CA) at 478], where he commented on s 374 and s 378 (which permits the Solicitor-General to grant a stay) and he went on:

> There is no other express statutory provision governing procedure following a disagreement, and accordingly the Court's power to give relief from an order under s 374(6) could only arise under s 347, the inherent jurisdiction to prevent an abuse of its process, or possibly the New Zealand Bill of Rights Act 1990.

Logic suggests that this list of exceptions is itself too limited. What if the practical effect of accepting a verdict on a lesser charge is to preclude a retrial on the primary count (for instance where the defendant is charged with the substantive offence and convicted of an attempt, see s 338(2), discussed below)? For present purposes, the remarks of Henry J are sufficient because, as will become apparent, we are satisfied that a further trial on count four would be an abuse of process.

[17] Against that background, we conclude that where the jury has disagreed on the primary count, the Judge may nonetheless take a verdict on a lesser alternative count (whether included or set out explicitly in the indictment as an alternative count). On the other hand, we are inclined to think that it would probably only be in exceptional circumstances (perhaps where the Judge intended to discharge the defendant on the primary count under s 347) that it would be appropriate to do so without the Crown's consent. We see this as consistent with the spirit of s 374(6) and, as well, with the

> principle that the prosecution will usually be entitled to a verdict on the primary count if it insists. Here, however, it is indisputable that the Crown and the defendant agreed with the verdict being taken on count five. It was therefore open to the Judge to take the verdict.

[36] Since *Lualua* was decided, s 374 has been repealed. The equivalents to ss 374(1), (2) and (6) can now be found in ss 22(1), (3) and 22A(4) of the JA. There has been no material amendment to the provisions and so the analysis in *Lualua* continues to apply.

[37] Mr Andersen for Mr Grace rightly accepted that there is no statutory barrier preventing a Judge from accepting conviction on an included or alternative charge where the jury is unable to agree on the principal charge. But, he said, the Judge should not exercise his or her discretion to accept a conviction on an included or alternative charge while the principal charge remains live and therefore subject to s 22A of the JA. He said that one of the following should first have occurred:

(a) a formal discharge on the principal charge; or

(b) the Crown agreeing to accept the verdict on the alternative charge on the basis that it will not proceed with the principal charge.

[38] But in our view, however, the present case is indistinguishable from *Lualua*. More particularly in both cases:

(a) the jury could not agree on the principal charges and no verdicts on them were taken;

(b) verdicts were taken on the included charges;

(c) the defendants were immediately convicted of the included charges;

(d) the juries were discharged;

(e) no objection was made by the Crown to any of those steps; but

(f) the Judge and the Crown (mistakenly) believed that a retrial on the principal charges might be possible and so the defendants were not immediately discharged on those charges.

[39] The short point is that a scenario such as the present could only give rise to a miscarriage in terms of s 232 of the CPA if the Crown sought to pursue a retrial on the principal charges. Unlike in *Lualua* (where this Court held that pursuit of those charges would be an abuse of process)[10] that did not happen here. The next day the Crown advised that a retrial would not be pursued and the principal charges were dismissed. There is no miscarriage.

Result

[40] The application for an extension of time is granted.

[41] The appeal against sentence is dismissed.

[42] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[10] *Lualua*, above n 7, at [29]–[30].