

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA495/2021
[2023] NZCA 26**

BETWEEN	SAMUEL DEAN FANE Appellant
AND	THE KING Respondent

Hearing:	22 November 2022
Court:	Katz, Mander and Downs JJ
Counsel:	S J Lance for Appellant M J Lillico and H S Cunningham for Respondent
Judgment:	22 February 2023 at 10:30 am

JUDGMENT OF THE COURT

- A The appeal against conviction is dismissed.**
B The appeal against sentence is dismissed.
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REASONS OF THE COURT

(Given by Mander J)

[1] Samuel Fane (Samuel) was convicted of the murders of two men, Paul Lasslett and Nicholas Littlewood, following a jury trial before van Bohemen J. The Crown's case was that Samuel had travelled with his brother, Anthony Fane (Anthony), from Auckland to Tauranga to kill Mr Lasslett, who his brother believed was having an affair with his partner, Jessie-Lee Booth. Anthony had already by this time killed Ms Booth. Mr Littlewood happened to be present when the Fane brothers arrived at Mr Lasslett's address. Both Mr Lasslett and Mr Littlewood were shot dead. The two

brothers then went their separate ways in an endeavour to avoid apprehension. However, Anthony was killed in an encounter with police and Samuel arrested in Christchurch.

[2] Samuel Fane appeals his murder convictions on the basis the evidence was insufficient to prove he was a party to the murders of the two men; the trial Judge materially misdirected the jury on the law relating to parties; and did not fairly put the defence case as it related to the murder of Mr Lasslett. Further grounds include alleged misdirections concerning the standard of proof and the need for jury unanimity. Samuel Fane also appeals his sentence of life imprisonment that was accompanied by an order he serve a minimum period of imprisonment (MPI) of 17 years. However, it is acknowledged the sentence appeal is largely dependent on the outcome of the appeal against his convictions.

Background

[3] On the evening of 9 February 2020, Anthony killed Jessie-Lee Booth at their home in Tauranga. He believed she had been having an affair with Mr Lasslett. After leaving her body on the floor of their house, he put their two children into his car and drove to his mother's house in Auckland, arriving in the early hours of the following morning. Anthony spent much of that day in the company of his brothers, Jesse and Samuel. Jesse gave varying accounts in his evidence of what Anthony said to him but in his original statement to police he said Anthony told him he intended to kill Mr Lasslett. Anthony said to Jesse that he had intended to go alone but that Samuel insisted on coming with him.

[4] On 11 February 2020, Anthony and Samuel set out from Auckland to drive to Tauranga, where Mr Lasslett lived. They had with them a cutdown .22 rifle. Before they left Samuel contacted a cousin to arrange for bullets for the firearm to be left in a letterbox. In the event, the brothers did not collect the bullets but later that afternoon they acquired a cutdown pump action shotgun.

[5] Samuel and Anthony spent the day travelling to Tauranga and then driving around that city. It was the Crown's case that during the two days the men were in each other's company, Anthony told Samuel about his suspicions of Ms Booth being

unfaithful to him and that he had killed her. The defence contested that was the case. However, Samuel would later tell a fourth brother, Cody Fane, that he knew there was no point in trying to talk Anthony out of what he was planning to do.

[6] At around 7.40 pm on the evening of 11 February, the two brothers arrived at Mr Lasslett's rural address at Omanawa, a short distance outside Tauranga. They walked onto the property and approached a glass sliding door of the converted shed where Mr Lasslett lived. Mr Lasslett was shot in the side of the head with the shotgun and in the back with the rifle. Mr Littlewood, who happened to be at the property at the time, was shot twice with the shotgun. It appears both men were shot from a position immediately outside the sliding door.

[7] As the Fane brothers drove away, shots were fired from the rifle at a witness Daniel De Martin, who had been working at the property with Mr Littlewood and had observed the shootings from a distance. Mr De Martin raised the alarm and sought assistance for the two men, but both died at the scene.

[8] The brothers drove to their cousin's house at Waitakaruru, where Samuel had arranged to meet his partner, Sarah Lee Tarei. After hiding their vehicle at that address, Samuel and Ms Tarei, who would later be charged and convicted of being an accessory after the fact to the two murders, drove back to Auckland and then to Hamilton in another vehicle. Samuel took with him the shotgun used in the shootings and sought to return it to the person from whom it had been obtained but that person did not want it back. Meanwhile, Anthony drove back to Auckland on a motorcycle borrowed from his cousin.

[9] On 12 February, Samuel, together with his partner and their young daughter, drove to Wellington. While waiting for the ferry, Samuel called Cody, who was in South Auckland Prison (the prison conversation). The telephone call lasted for almost two hours and for a period Anthony also joined the call. The brothers discussed, in what the trial Judge later described as "poorly disguised terms",¹ what had occurred at Mr Lasslett's address and their present intentions. Anthony said he would not allow

¹ *R v Fane* [2021] NZHC 1961 [Sentencing Notes] at [14].

the police to arrest him and would go out “in a blaze of glory”. Samuel spoke of his intention to change his appearance.

[10] Prior to Anthony joining the call, Samuel told Cody that people would soon learn about what he called “the first half of the story”, which could reasonably be taken to be a reference to Anthony having killed his partner. He spoke about what happened as being “Judgement Day”. After Anthony left the call, Samuel told Cody about how happy Anthony had been after the killings, how he had been determined to support his brother (to have his back “a hundred”) and how he could not let Anthony go alone to finish what he had started.

[11] On 13 February, Anthony was killed near Tauranga during a confrontation with police. The .22 rifle used in the shootings was found in his vehicle. The following day, as a result of information provided by Jesse Fane, the police went to Anthony’s Tauranga property and found Ms Booth’s body. That same day, police in Christchurch arrested Samuel, who had shaved his head. The shotgun used to kill Messrs Lasslett and Littlewood was found in the boot of Ms Tarei’s vehicle.

The framing of the Crown’s case

[12] Before turning to the appeal itself, we set out the way the Crown approached its prosecution of Samuel Fane and the alternative bases on which it said he was criminally liable for the two murders. We start with s 66 of the Crimes Act 1961 (the Act) which provides:

66 Parties to offences

- (1) Every one is a party to and guilty of an offence who—
 - (a) actually commits the offence; or
 - (b) does or omits an act for the purpose of aiding any person to commit the offence; or
 - (c) abets any person in the commission of the offence; or
 - (d) incites, counsels, or procures any person to commit the offence.
- (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a

party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

[13] The case for the Crown was that Samuel Fane was either a principal offender who killed Paul Lasslett and/or Nicholas Littlewood with murderous intent (s 66(1)(a)), or assisted Anthony to kill those men knowing Anthony had murderous intent (s 66(1)(b)). Alternatively, that Samuel and Anthony formed a common purpose to kill Mr Lasslett and anyone else they found with him and knew the intentional death of Mr Lasslett and such other person was a probable consequence of that common purpose (s 66(2)).

[14] The trial Judge prepared a “Jury Issues paper” for the jury which set out the alternative bases or “scenarios” on which the Crown alleged Samuel Fane could be found liable for the two murders. Each scenario dealt with the offences with which Samuel had been charged including the lesser alternatives of manslaughter. In respect of each issue the alternative scenarios on which Samuel could be found liable for each man’s murder were set out for the jury’s assessment. In respect of each scenario the Judge provided a series of factual questions which the Crown was required to prove in order for the jury to find Samuel guilty of the particular charge in accordance with one or other of the alternative scenarios.

The appeal

[15] Mr Lance, who advanced the appeal on behalf of Samuel Fane, was critical of the way the Crown presented its case on the basis Samuel was guilty of the murders either as a principal, on the basis he had fired the shotgun,² or, alternatively, as a party, on the basis he had assisted his brother to commit the murders,³ or that the intentional killings had been the probable consequence of a common enterprise to shoot Mr Lasslett and anyone else they found with him.⁴ Mr Lance maintained the defence position that Anthony Fane was the principal offender who fired the fatal shots that killed both men was unassailable and the Crown’s pursuit of its case against Samuel

² Crimes Act 1961, s 66(1)(a).

³ Section 66(1)(b).

⁴ Section 66(2).

on these varied bases confused the jury and resulted in errors by the trial Judge in his summing up. The following grounds of appeal were identified.

Murder of Mr Littlewood

[16] Two grounds are relied upon in relation to Samuel Fane's conviction for the murder of Mr Littlewood:

- (a) There was insufficient evidence to support the Crown's case that Samuel was a party to Mr Littlewood's murder on the basis of s 66(2) of the Act.
- (b) The trial Judge failed in his summing up to adequately link the law to the facts as they related to this form of criminal liability.

Murder of Mr Lasslett

[17] Three grounds are relied upon to challenge Samuel Fane's conviction for the murder of Mr Lasslett:

- (a) There was insufficient evidence to prove Samuel had the required knowledge and intention to assist his brother to murder Mr Lasslett.
- (b) The trial Judge did not fairly sum up the defence case regarding Samuel's criminal liability as a party to Mr Lasslett's murder.
- (c) The Judge failed to direct the jury that for Samuel to be a party to Mr Lasslett's murder, pursuant to s 66(2) of the Act, the Crown had to prove Samuel knew that offence was a probable consequence of the brothers' common purpose to shoot Mr Lasslett.

The summing up

[18] Two other discrete grounds of appeal are relied upon by Samuel. It is alleged:

- (a) The jury received an erroneous direction that they did not have to be unanimous on which scenario Samuel was held criminally liable for the murders.
- (b) The trial Judge made a material error when directing the jury on the standard of proof.

[19] We consider each of these grounds in the order they were argued before us.

Murder of Mr Littlewood

Sufficiency of evidence for criminal liability under s 66(2) of the Act

[20] Mr Lance argued there was no proper basis upon which Samuel could be held criminally liable for the murder of Mr Littlewood on a party basis under s 66(2) of the Act. He submitted there could be no dispute that Mr Littlewood simply happened to be present by chance when the brothers arrived at Mr Lasslett's place. It appears he may have been working at the property, but he was not previously known to either brother. Therefore, Mr Lance submitted, in the absence of either brother knowing Mr Littlewood would be present, Samuel could not have contemplated this person's murder and there was therefore insufficient evidence upon which the jury could draw the necessary inference that he had the required knowledge and intention to assist Anthony to kill a person neither brother knew would be there.

[21] In relation to the second ground of appeal relating to Samuel's conviction for the murder of Mr Littlewood, Mr Lance submitted the trial Judge did not adequately link his directions regarding the law as it related to party liability under s 66(2) and the evidence in a way that was "helpful" to the jury. He argued this was because there was no evidence upon which to found criminal liability on such a basis. In support of his argument, Mr Lance referred to the Supreme Court's decision of *Ahsin v R* where, in the context of a case involving alternative pathways to establishing party liability, that Court commented on the need to provide directions regarding a defendant's

criminal liability that linked the law with the evidence in order to make it clear what facts the jury must be satisfied of in order to establish each legal requirement in the individual circumstances of a particular defendant.⁵

Analysis

[22] The Crown originally advanced its case of Samuel being a party to the murder of Mr Littlewood on the alternative basis he had formed a common purpose with Anthony to shoot Mr Littlewood (s 66(2)) or had intentionally assisted or encouraged Anthony to kill Mr Littlewood with murderous intent (s 66(1)). That approach was flawed because it was not possible for Samuel to have intentionally provided assistance to Anthony to murder someone that neither brother knew was going to be present; nor could they have formed a common intention to do so. The common purpose could only have been to shoot the intended target, Mr Lasslett. This was appreciated by the Judge shortly before his summing up and resulted in the s 66(1) scenario for the murder and manslaughter of Mr Littlewood being removed from the jury's consideration.

[23] It also led to a reformulation of the s 66(2) scenario that limited the common purpose to the shooting of Mr Lasslett and identified for the jury's assessment whether Samuel had appreciated the intentional killing of any person they found with Mr Lasslett was a probable consequence of the pursuit of that common purpose. We consider the Judge was correct to put the issue of Samuel Fane's criminal liability as a party for the murder of Mr Littlewood on that adjusted basis. It was a course that Mr Lance is recorded as having welcomed at the time.

[24] Proof of both brothers' contended common purpose to shoot Mr Lasslett and to assist each other to achieve that purpose, and whether Samuel knew the intentional killing of any person found with Mr Lasslett was a probable consequence of prosecuting that common purpose, was reliant on drawing reasonable inferences from the evidence. Mr Lance submitted that such inferences could not be drawn and the only available conclusion was that Anthony was acting independently of his brother

⁵ *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [162]–[163] per McGrath, Glazebrook and Tipping JJ.

and was solely responsible for Mr Littlewood's murder. However, we do not consider that to be the case. We are satisfied there was sufficient evidence from which the jury could conclude Samuel was well aware of his brother's intention to murder Mr Lasslett and that this was the objective of going with loaded firearms to his address.

[25] Anthony and Samuel had spent most of the preceding day in each other's company. Jesse was a reluctant witness but his evidence included that, before leaving for Tauranga, Anthony had told him that he was going to confront Mr Lasslett and kill him. Samuel had said to him that he was going with Anthony. Other evidence included Samuel telling his mother, before the two brothers set off together, that he had come to support Anthony and was not going to work that day. Samuel also told Ms Tarei: "I just can't let my brother do it alone".

[26] It is apparent from the recorded prison conversation that Samuel was aware before travelling to Tauranga that Anthony had already killed his partner. In the prison conversation Samuel said that he was talking to Anthony and:

I was about to say like fuck ... fuck you reckon it's worth it? If you reckon its throwing everything away? ... And then just before I was about to say that, he told me something and I was like, fuck aw well I can't say that now then. Like fuck if he's done it already. ... Yeah he'd already did the first one ... And I was just like whoa, aw okay. So what are we up to?

We consider it to be tolerably clear this was a reference to Anthony having already killed his partner and that the jury were entitled to judge Samuel's knowledge of Anthony's intentions towards Mr Lasslett in light of him having already killed Ms Booth.

[27] In addition to the evidence of the attempt to source ammunition for the .22 rifle and attempting to procure another gun before acquiring the shotgun which Samuel sought to return after the murders, there is the eyewitness evidence of Mr De Martin. He saw two men at the open ranch slider of Mr Lasslett's residence, each with a firearm held in a firing position "just blatantly firing into the — into that room". We consider this evidence when taken together provides an ample basis upon which the jury could reasonably infer that Samuel was aware of Anthony's intention to kill Mr Lasslett,

having already killed his partner, and that he joined with his brother to assist him in that murder.

[28] The remaining question was whether, having agreed to assist Anthony to achieve that purpose, Samuel appreciated there was a real risk that any person found with Mr Lasslett would also have to be killed. Having regard to the swift nature of the killings, Mr De Martin's eyewitness account of the two men at the open ranch slider each firing a weapon, and Samuel's comment to Cody during the prison conversation that the "other dude in the house" was in the "... wrong place, [at the] wrong time" and could not be left to "... watch it", we consider such a conclusion was reasonably available to the jury. In that regard we also note Mr De Martin was shot at when his presence became known to the brothers as they departed the scene. Samuel, himself, refers in the prison conversation to shooting at people who watched them leave. The brothers demonstrated no hesitation about shooting those who got in their way.

[29] We consider it was open to the jury on the available evidence to reasonably infer it was within Samuel's contemplation, when deciding to assist his brother in the common enterprise to kill Mr Lasslett, that there was a real risk of others also being killed. Further, that Samuel must have appreciated that a probable consequence of carrying out the plan to kill Mr Lasslett would be the need to kill anyone who should be present to witness the murder.

Adequacy of trial Judge's directions linking the law to the facts

[30] We turn now to the second ground of appeal relating to Samuel's conviction for the murder of Mr Littlewood which concerns the adequacy of the trial Judge's directions. We commence our analysis of this issue by observing that this case was far removed from the difficulties that arose in *Ahsin v R*, which concerned multiple defendants in respect of whom various alternative bases were put forward to establish their respective criminal liability as parties.⁶ Unlike in that case, we do not consider the jury would have been confused as to the evidence the Crown relied on to establish Samuel's liability as a party to the murder of Mr Littlewood. He was the sole defendant on trial for that murder and there was no risk of the jury conflating the law

⁶ *Ahsin v R*, above n 5.

or evidence relating to the charges he faced with different forms of liability and other evidence relating to co-defendants facing the same charges, as was the case in *Ahsin*.

[31] In relation to the murder of Mr Littlewood, the trial Judge identified the two “scenarios” which the Crown had put forward as alternative routes to finding Samuel guilty of that charge. The first, as a principal, was based on the proposition that Samuel had fired the shotgun at Mr Littlewood that resulted in the two wounds caused by buckshot, which the medical evidence showed had caused Mr Littlewood’s death. The Judge then referred to the second scenario that involved the brothers having formed a shared understanding or common purpose to shoot Mr Lasslett and to help each other to achieve that common purpose. The Judge directed the jury that:

The key issue is whether you can be sure that Samuel Fane knew that the intentional killing of an unknown person they found at the converted shed while they were carrying out the common purpose of shooting Paul Lasslett was a probable consequence of that common purpose. To reach such a conclusion you must have evidence that the common purpose of killing Paul Lasslett embraced that probability. Just because it happened does not prove the common purpose.

[32] We think it plain the final words “common purpose” were intended to read “probable consequence”. However, any concerns regarding that obvious slip are allayed by the Jury Issues paper referred to by the Judge throughout his directions on the elements of the charges and party liability. In relation to the second scenario, the murder of Mr Littlewood as a party by being part of a common enterprise, a discrete issue explicitly identified for the jury’s consideration was whether the Crown had made the jury sure that Samuel knew (ie, actually appreciated) that the intentional killing of any person they found with Mr Lasslett was a probable consequence of the common purpose. The issue of whether they had formed a common intention had been identified to the jury for its mandatory consideration in an earlier question regarding whether the Crown had proved the brothers had formed a common intention to shoot Mr Lasslett and to help each other achieve that purpose.

[33] Insofar as there is criticism of the Judge not referring to the evidence of the common purpose in relation to this charge, that evidence had already been reviewed when addressing the same common purpose in relation to the charge of murdering Mr Lasslett and did not need to be repeated. As is almost inevitable with elements of

an offence involving a defendant's knowledge or state of mind, proof of Samuel's appreciation of the killing of a person who happened to be present as a probable consequence or real risk of carrying out the common purpose of shooting Mr Lasslett was a matter of inference to be drawn from the evidence.

[34] The Judge informed the jury the alternative form of party liability under s 66(1) was not available in respect of the charge of murdering Mr Littlewood because it was not possible to find that Samuel had intentionally assisted his brother to kill a person neither of them knew was going to be at Mr Lasslett's address. The jury therefore would have been aware there was no suggestion of any prior knowledge of Mr Littlewood's actual presence. We consider the jury would have understood the basis upon which Samuel's knowledge of the alleged probable consequence of an unknown person being present at the time Mr Lasslett was killed was being put forward for their consideration. We have already reviewed some of the evidence available to the jury to reasonably infer Samuel's knowledge of that being a real risk of executing the plan to kill Mr Lasslett and we are satisfied such a conclusion was legitimately available to the jury.

[35] We do not consider the Judge's directions relating to Samuel Fane's criminal liability under s 66(2) of the Act, were, in the circumstances of this case, inadequate or created any confusion regarding the law and the applicable evidence.

Murder of Mr Lasslett

Sufficiency of evidence to prove elements of intent and knowledge for the purposes of s 66(1) party liability

[36] Mr Lance submitted there was insufficient evidence to prove Samuel knew of his brother's plan to kill Mr Lasslett and establish to the requisite standard that his actions in accompanying Anthony, including supplying and driving the vehicle and asking his cousin for bullets for the .22 rifle, were intended to assist Anthony to murder Mr Lasslett in order for him to be held criminally liable as a party under s 66(1) of the Act.

[37] In support of this argument, Mr Lance referred to Jesse Fane's evidence of Anthony telling him he was going to "confront" Mr Lasslett and that he was going to challenge him about having an affair with Ms Booth. Mr Lance relied on Jesse's evidence that his brother was just bragging and "trying to be the man". Mr Lance is correct — there was no direct evidence of Jesse conversing with Samuel about what was planned, nor that Samuel was present when Anthony told Jesse about what he intended to do, which extended, at least in the statement Jesse made to police, to saying that he was going to kill Mr Lasslett.

[38] Mr Lance also submitted that in the prison conversation Samuel did not make any admissions he was aware of what Anthony might do. However, as already noted, we are satisfied the inference the Crown sought the jury to make from various statements made by Samuel during the course of the prison conversation regarding Anthony having already killed his partner was reasonably available. Mr Lance pointed to other evidence which he submitted was equivocal as to Samuel's knowledge of his brother's intentions, including his claim to a police officer he only went with his brother to make sure he was safe. These pieces of evidence taken in isolation may well be equivocal but we consider the totality of the evidence provided a firm basis for the jury to conclude Samuel was aware his brother intended to commit murder and that his actions could reasonably be interpreted as intending to assist him in that endeavour. The argument made on behalf of Samuel tends to overlook the cumulative effect of the Crown's case that extends to evidence of Samuel's actual participation in the shooting. This was stressed to us by the Crown in its submissions.

[39] The pathologist's evidence was that Mr Lasslett was shot with both the pump action shotgun and the .22 rifle and that both of these gunshot wounds were fatal. There was evidence to support the conclusion Samuel had used the shotgun. This weapon had been obtained by Samuel and Anthony when they were together in Tauranga. It was Samuel who tried to return the shotgun afterwards and it was he who took it to Christchurch. Samuel's use of the shotgun to kill Mr Lasslett was consistent with Mr De Martin's evidence of hearing a number of different types of shots being fired very rapidly and simultaneously. That witness saw two men firing into the converted shed. Based on that eyewitness account, the Crown were able to submit to the jury that if they were not sure Samuel had shot Mr Lasslett with the shotgun, he

must have been the person who shot him with the .22 rifle, because Mr De Martin's evidence was that the two guns were being fired at the same time and the pathologist's evidence was that the shots from either would have been fatal.

[40] Mr Lance put store on the trial Judge electing to sentence Samuel on the basis Anthony was the principal offender in respect of both murders and that Samuel was a party. Because of the way the Crown had to present its case, which inherently included some acknowledgment it was difficult to be sure who may have shot who but that Samuel was at least a party to the murders, and Anthony's obvious motivation to kill Mr Lasslett, having already slain his partner, the Judge's approach was entirely understandable. However, that does not detract from the body of evidence demonstrating Samuel's level of involvement and the clear inferences that can be drawn from that evidence as to his state of mind and knowledge of his brother's intentions.

[41] We have already referred to the indisputable evidence of Samuel providing a vehicle for his brother and accompanying him to Tauranga, asking his cousin for bullets and participating in the search to obtain an additional gun in Tauranga before going with Anthony to Mr Lasslett's address. Mr Lance, as he did at trial, may dispute what can be taken from the prison conversation, but we consider it is relatively clear what Samuel said. While he initially considered trying to talk Anthony out of killing Mr Lasslett, upon learning his brother had already killed his partner he no longer thought that was an option and committed himself to assisting Anthony. It was open to the jury to conclude from the prison conversation that Samuel knew Anthony intended to kill Mr Lasslett.

[42] In summary, therefore, we do not consider there was insufficient evidence to find Samuel held the necessary intention to assist his brother to murder Mr Lasslett to render him a party to that offence pursuant to s 66(1) of the Act.

Fairness of summing up defence case

[43] The next ground of Samuel Fane's appeal against his conviction for Mr Lasslett's murder, but which has wider application to both murder charges, was that the Judge had not fairly summed up the defence case when directing the jury. This

ground was not elaborated upon in great detail in Mr Lance's written submissions but the complaint centred on the Judge's observations in respect of two submissions advanced in support of Samuel's case. The first was an explanation proffered for the brothers having taken guns with them for defensive or protective purposes. The jury were invited to imagine what may have happened if Mr Lasslett had been upstairs at his residence when they arrived and had accessed a "loaded magnum" under the bed.

[44] The Judge reminded the jury there was no evidence that either brother was aware of the presence of this firearm at Mr Lasslett's place and to consider, if the jury did accept Anthony had some apprehension about Mr Lasslett's "underworld associations", whether his actions, in heading straight to the converted shed and opening fire on two unarmed men, were consistent with the asserted defensive purpose.

[45] The second aspect the Judge commented upon was the emphasis that had been placed on whether Anthony had told Jesse about what "he" or "they" were going to do when they went to Tauranga.⁷ The Judge observed that Jesse's evidence about what Anthony told him of his intentions was not limited to just confronting Mr Lasslett but also included Anthony having told him he was going to kill Mr Lasslett. While there was little evidence about what Anthony had said to Samuel before they left Auckland for Tauranga, the Judge reminded the jury of Jesse's evidence that Anthony had by this time already discussed the trip with Samuel and that Samuel had insisted he was coming along despite Anthony trying to persuade him not to.

[46] Against that background, the Judge posed two questions for the jury's consideration. The first was, if Anthony had told Jesse about what he was going to do when he got to Tauranga, what could reasonably be inferred about what Anthony would have told Samuel before they left, and over the course of their day-long drive to and around Tauranga? Second, whether those inferences were consistent with known facts that included what Samuel had said to the other brother, Cody, during the prison conversation about why he went with Anthony to Tauranga.

⁷ Jesse Fane told police at interview that "I knew *they* were going to kill Laz. I also knew they were going to Ormsby Lane, Omanawa" (emphasis added), but later in evidence qualified whether he meant to include Samuel in that statement.

[47] There is no prohibition on a judge commenting on issues of fact so long as it is made clear the jury remains the sole arbiter of fact,⁸ which the Judge clearly did in this case. We consider the Judge was entitled to observe the argument made in support of the brothers having armed themselves for defensive purposes out of a concern that Mr Lasslett had access to a loaded gun overlooked the lack of any evidence they possessed any knowledge of the presence of such a firearm. That avoided a risk the jury would erroneously assume that was the case. Similarly, it was legitimate for the Judge to remind the jury that, when assessing Jesse's evidence of what Anthony had said about his intentions, his evidence had not been limited to Anthony simply confronting Mr Lasslett, as was submitted on behalf of Samuel, but also included that Anthony had told him he was going to kill Mr Lasslett.

[48] Earlier in his summing up the Judge traversed in some detail the defence case that Anthony was the only principal offender who had fired all the shots that had killed the two men and the evidence that supported Anthony having been the sole protagonist who had the motive to kill Mr Lasslett. Moreover, the Judge traversed the defence case, as advanced by Mr Lance, that invited the jury to conclude Samuel had only been going along to support his brother who he believed was only going to confront Mr Lasslett and challenge him about having an affair with his partner. Later in his summing up, albeit when addressing Samuel's potential criminal liability under s 66(2), the Judge further reviewed the defence case as it related to Samuel's state of knowledge. He repeated counsel's submissions that Anthony had not told others while in Auckland that he had already killed his partner and repeated a submission that Anthony had not wanted Samuel to come with him. The Judge noted, in particular, a passage in the prison conversation where Anthony had commented on Samuel's eyes as indicating that what occurred at Mr Lasslett's address had been a surprise to Samuel and therefore not part of any plan. Submissions emphasising the lack of any disguise or attempt to conceal their identities as indicating there could not have been a plan to kill Mr Lasslett were also repeated.

⁸ *B (CA182/2018) v R* [2019] NZCA 18 at [55], citing *R v Keremete* CA247/03, 23 October 2003 at [18]–[19].

[49] It is well established that it is not necessary for a judge to strive for an artificial balance between rival cases where the evidence clearly favours one side or the other,⁹ and it was not suggested the Judge's summing up had left the jury in any doubt that the facts were for them to assess. We consider the Judge presented the issues for the jury's determination fairly and summarised the parties' respective cases in a way that made it clear what the defence case was in response to the Crown's contentions that Samuel was guilty either as a principal offender or a party. That was encapsulated by the Judge when he directed the case for Samuel was that it was his brother who had killed Messrs Lasslett and Littlewood and that, while Samuel had been present, he did not know that Anthony intended to kill the men or to cause them bodily injury that Anthony knew would be likely to cause death. Further, that Samuel and Anthony had not formed a common purpose to kill Mr Lasslett or anyone else they found at his address.

[50] While the Judge did remind the jury of certain pieces of evidence when reviewing arguments made on behalf of Samuel, we consider he was entitled to do so in order to allow the jury to consider whether those submissions represented overreach by counsel and properly assess the weight to be attached to those arguments with the benefit of a complete account of the evidence. It is not suggested the Judge's observations regarding the state of the evidence were inaccurate, nor, importantly, that the questions he posed for the jury's consideration were other than highly relevant issues properly identified to the jury for its consideration. It follows that we do not consider the Judge unfairly summed up the defence case when directing the jury.

Failure to direct on required element of knowledge to establish party liability under s 66(2) of the Act

[51] The third ground of appeal against Samuel's conviction for Mr Lasslett's murder was a submission the trial Judge failed to direct the jury on the requirement that he knew the intentional killing of Mr Lasslett would be a probable consequence of the prosecution of his and Anthony's common purpose. We consider the answer to this complaint is axiomatic. To demonstrate this, we set Samuel's argument out in full.

⁹ *B (CA182/2018) v R*, above n 8, at [55] citing *R v Keremete*, above n 8, at [18]–[19].

[52] The Judge directed the jury on the third scenario put forward by the Crown, upon which Samuel could be found guilty of the murder of Mr Lasslett as a party, pursuant to s 66(2) of the Act, in the following way:

[106] Section 66(2) does not require a plan in the sense of a formal agreement. The Supreme Court has said the requirement is that there be a shared understanding to commit an unlawful act and agreement to help each other in achieving that shared understanding. If those elements are satisfied, all those who are part of the shared understanding are liable for any unlawful acts that are committed if the unlawful acts were a probable consequence of the shared understanding. The fact a shared understanding may have been unwise and poorly executed does not mean there was no shared understanding.

[107] So the question for you to decide here is whether you are sure Anthony Fane and Samuel Fane had a shared understanding or common purpose that Paul Lasslett would be killed and that they had agreed to help each other in achieving that shared understanding or common purpose and that Paul Lasslett was killed in pursuing that common purpose.

[53] The complaint made about this direction is that the Judge has not specifically directed the jury on the need for the party to the agreement (Samuel Fane) to have knowledge that the offence, being the intentional killing of Mr Lasslett by Anthony, was a probable consequence of the common intention to prosecute the unlawful purpose.

[54] We accept a party to a common purpose must have appreciated or been cognisant of the real risk, or probable consequence, a particular offence would be committed by any party to the common purpose, in the prosecution of the common purpose, to be convicted of that offence. However, in the circumstance of this case, the articulated common purpose and the probable consequence of its prosecution are effectively one in the same, at least in relation to the killing of Mr Lasslett. That observation arguably tends to validate Mr Lance's criticism that the Crown's approach was unnecessarily complicated, and we acknowledge very little was gained by the Crown by also proceeding under s 66(2) for the purpose of establishing Samuel Fane's criminal liability for the murder of Mr Lasslett. However, the short point is that the common intention the Crown was required to prove that Samuel held with his brother, namely to shoot Mr Lasslett, was substantially the same outcome as the alleged probable consequence. The omission of any reference to Samuel having to know the killing of Mr Lasslett was the probable consequence of what was the same common purpose was, in our view, largely inconsequential.

[55] We are satisfied that, in any event, the jury were adequately directed on this issue and would have been well aware of the need for Samuel to be cognisant of Mr Lasslett's murder being a probable consequence of the unlawful purpose of shooting him. The Jury Issues paper provided to the jury explicitly covered the point. The jury were told the Crown needed to have made them sure that Anthony and Samuel had formed a common intention to shoot Mr Lasslett and agreed to help each other and participate to achieve that purpose. Further, that Mr Lasslett had been killed in the course of the pursuit of that common purpose, and that:

- (e) Samuel Fane:
 - (i) Intended Paul Lasslett to be killed; or
 - (ii) Knew (i.e. actually appreciated) that the intentional killing of Paul Lasslett was a probable consequence of that common purpose.

[56] For completeness, we note that when summarising the Crown and defence cases, the third basis upon which the Crown had put its case regarding Samuel's criminal liability was reviewed. The Judge expressly referred to the Crown's allegation that Samuel knew the intentional death of Mr Lasslett was a probable consequence of that common purpose. Moreover, in providing formal directions on the law regarding s 66(2), the Judge stated:

[82] The other route is s 66(2), where two or more persons have formed a common intention to do something unlawful and to help each other in pursuing that unlawful purpose. In such circumstances, all persons are liable for any offence committed by any of them in prosecuting that common purpose if the commission of the offence was *known* to be a probable consequence of prosecuting that common purpose.

(emphasis added)

[57] We do not consider there is realistically any possibility of a miscarriage arising from the way the Judge directed the jury on s 66(2) in relation to the murder of Mr Lasslett. As submitted by Mr Lillico, on behalf of the Crown, if the jury had found that Anthony and Samuel Fane had formed a common intention to shoot Mr Lasslett, as they would needed to have done in order to be considering the question of whether the intentional killing of Mr Lasslett was a probable consequence of that common purpose, clearly the jury would have to have been satisfied that Samuel had knowledge of such a potential outcome.

Jury unanimity

[58] The trial Judge directed the jury on the need for their verdicts on each charge to be unanimous, in the sense that each juror agreed with the individual verdicts. In further explanation, the Judge stated:

[27] You will have seen in the memorandum and in the Jury Issues paper that you may find Mr Fane guilty of the murder of Mr Lasslett and of the murder of Mr Littlewood if you all agree that Mr Fane was liable for their deaths under one of the alternative scenarios set out in the paper, even if you do not all agree as to which of those scenarios applies.

[28] I will explain the reasons for this later. I mention it now so you are aware that the directions in the Jury Issues paper do not alter the requirement that you must be unanimous as to whether you find Mr Fane and Ms Tarei guilty or not guilty of the charges against them.

[59] Mr Lance submitted the Judge did not go on later in his summing up to explain the reasons and that he was obliged to do so “because of the quite different *actus reus* and *mens rea* requirements for each of the pathways relied on by the Crown for both allegations of murder”. It was Mr Lance’s contention that each of the pathways involved separate “transactions”. This was a reference to the Supreme Court’s explanation in *Ahsin* as to when unanimity is required when different bases for criminal liability are relied upon by the Crown:¹⁰

[182] Unanimity will generally be required as to the particular transaction or event on which criminal liability is based. Where alternative factual bases for liability are separated in time, place or nature, so that they should properly be seen as different transactions, rather than relating to a single one, unanimity will be required as to the particular event that provides the factual basis for the jury’s verdict. The necessary unanimity may be achieved either by laying separate charges in relation to each alternative or by a clear direction to the jury that they must be agreed as to the same factual basis for their verdict.

...

[184] The underlying principle also applies in the context of party liability with an important clarification. In many cases, different factual routes to liability under s 66 can properly be seen to be alternative forms of participation in a single transaction, rather than involving separate transactions. A notable instance is where the Crown case is that the offending took place at a certain time and place and in a particular manner, and the defendant is guilty either by personally committing the offence or by engaging someone to do so.

¹⁰ *Ahsin v R*, above n 5 per McGrath, Glazebrook and Tipping JJ (footnotes omitted).

[60] Contrary to Mr Lance's submission, the trial Judge did return to the subject of unanimity in his summing up:

[74] As Mr Lance said yesterday, this is not a multi-choice exercise in which you must choose one option. But nor should you think there is anything wrong or untoward about the use of scenarios. This method of putting questions to the jury implements guidance handed down by the Supreme Court.

[75] That guidance is that where, as here, there are alternative bases upon which liability can be established, if those alternatives all relate to [a] single set of events a jury can return a guilty verdict if they are each satisfied that the charge has been proven on one of those forms of involvement, even if the jury are not unanimous as to precise manner of involvement.

[61] We consider the Judge's direction was correct. Each charge of murder was a single transaction offence which did not involve different factual bases for liability. It was not, for example, a case like *R v Chignell*, where the Crown presented alternative scenarios of the deceased having died either from a blow struck by one of the defendants in Auckland or having subsequently drowned when he was thrown by the defendants over a waterfall in Taupo sometime later.¹¹ In such a situation the jury were required to be unanimous on one or other of those factual scenarios.

[62] The alternative ways in which Samuel Fane could be found guilty of the murders involved circumstances that were identical in time, place and nature. There was no serious dispute at trial as to the cause of death, nor was there any dispute as to the presence of Samuel and his brother at Mr Lasslett's address at the time the shots were fired. However, various scenarios were available on the evidence regarding Samuel's participation in the killings and the respective roles of the brothers which gave rise to different pathways by which Samuel could be held criminally liable. The fact these alternative pathways were available did not change the fact each murder was a single transaction or event. The jurors only needed to be satisfied that Samuel was involved in that transaction one way or the other, as those alternative avenues represented different ways Samuel could be held criminally liable for the same acts of murder.

[63] This ground of appeal is dismissed.

¹¹ *R v Chignell* [1991] 2 NZLR 257 (CA).

***Wanhalla* direction**

[64] The final ground of appeal concerns the way the Judge directed the jury on the standard of proof and, in particular, his departure from the exact wording of the so-called *Wanhalla* direction provided by this Court as guidance to judges when directing juries on this important principle.¹² We set out the Judge’s direction in full:

[19] This brings me to the related subject, the standard of proof. That standard is *beyond reasonable doubt*.

[20] Proof beyond reasonable doubt is a very high standard. The Crown will have met that standard only if you are sure that the defendants are guilty.

[21] It is not enough for the Crown to persuade you Mr Fane and Ms Tarei are probably or even very likely guilty. You have to be sure. That is the test.

[22] On the other hand, *and I emphasise this*, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events. The Crown does not have to do that.

[23] What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in your minds about a defendant’s guilt after you have given careful and impartial consideration to all of the evidence. I will repeat that. A reasonable doubt is an honest and reasonable uncertainty left in your minds about a person’s guilt after you have given careful and impartial consideration to all of the evidence.

[65] The complaint concerns the highlighted words “and I emphasise this ...”, which Mr Lance submitted should not have been included in the Judge’s direction. It was submitted the use of those words undermined the purpose of the direction and that the emphasis given by the Judge to the direction “it is virtually impossible to prove anything to an absolute certainty ...”, was arguably confusing. Mr Lance submitted, because of the complicated way the Crown had presented its case, involving various scenarios about which the Court was obliged to provide extensive legal directions, it was important for the Judge to be clear about the standard of proof.

[66] Judges are not required to follow the *Wanhalla* direction verbatim, provided the principles of the burden and onus of proof are properly conveyed to the jury.¹³ We do not accept the additional words used by the Judge undermined either the clarity or effect of the direction. The Judge adequately conveyed to the jury the essential matters

¹² *R v Wanhalla* [2007] 2 NZLR 573 (CA).

¹³ At [52].

needed to understand the concept of proof beyond reasonable doubt. We do not consider the Judge's emphasis on the impossibility of proof to a standard of absolute certainty undermined or made any material difference to the importance of what he had already said about proof beyond reasonable doubt being a very high standard, and the need for the jury to be sure before they could convict the defendant. The direction included the standard caution that it was not enough for the Crown to persuade the jury that Samuel was probably or even very likely guilty.

[67] This Court, in *Wanhalla*, itself warned against what it described as “too close a focus on the precise nuances of judicial directions”.¹⁴ We accept Mr Lillico's submission the Judge's emphasis that “absolute certainty” was not the standard did not undermine the effect of his direction that the jury had to be sure before finding Samuel guilty. Nor do we consider the standard of proof beyond reasonable doubt was diluted by the Judge's words or that the Judge's deviation from the exact script of the suggested *Wanhalla* direction was capable of giving rise to a miscarriage of justice.

Sentence appeal

[68] Samuel Fane's sentence appeal was almost entirely premised on him successfully challenging one of his murder convictions. It was acknowledged that, in the event his appeal against those convictions was dismissed, the Court would be unlikely to entertain his sentence appeal. Nevertheless, Mr Lance did venture the submission that this Court may not agree with the Judge's findings of premeditation at sentencing and that Samuel Fane's culpability may be found to have been significantly less, in which case it was suggested the MPI could potentially have been lower.

[69] Having upheld Samuel's convictions on both murder charges, we do not consider there is any basis to disturb the 17-year MPI. Leaving aside whether the murders involved the unlawful entry into a dwelling house, it is evident the double homicide involved a high level of brutality and callousness given the summary way in

¹⁴ At [52].

which the two victims were effectively executed.¹⁵ In any event, Samuel Fane was convicted of two counts of murder.¹⁶

[70] The question relating to premeditation could not have been clearer. The murder of Mr Lasslett was a deliberate killing which Samuel was found to have intentionally assisted in the knowledge that was his brother's intention. While the murder of Mr Littlewood lacked that high level of premeditation, it nevertheless was the product of a premeditated plan to kill another person to which Samuel was a party. These circumstances of the killings reinforced rather than detracted from the application of the 17-year MPI, which cannot be held to have been manifestly unjust.

Result

[71] The appeal against conviction is dismissed.

[72] The appeal against sentence is dismissed.

Solicitors:

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¹⁵ Sentencing Act 2002, s 104(1)(e).

¹⁶ Section 104(1)(h).