IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA65/2021
[2021] NZCA 279

BETWEEN	JUSTIN RICHARD BURKE Appellant
AND	THE QUEEN Respondent

Hearing:	11 November 2021
Court:	Brown, Mallon and Moore JJ
Counsel:	J R Rapley QC and S M Grieve for Appellant F R J Sinclair and A M Harvey for Respondent
Judgment:	29 June 2022 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS

BROWN AND MOORE JJ

(Given by Moore J)

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Introduction

[1] Justin Burke was charged as a party to the murder of Shayne Heappey with the principal, Matthew Webber. Mr Webber pleaded guilty to murder before trial. At his trial in the Christchurch High Court, the jury acquitted Mr Burke of murder but found him guilty of manslaughter. Osborne J sentenced Mr Burke to five years and two months' imprisonment.

[2] Mr Burke appeals both his conviction and sentence. The primary focus of the conviction appeal is the Judge's directions to the jury on common purpose liability for manslaughter under s 66(2) of the Crimes Act 1961 (Crimes Act). The challenge relates to the nature and extent of a secondary party's foreseeability: whether it was necessary for the jury to be satisfied that Mr Burke foresaw Mr Heappey's death as a probable consequence of pursuing the common purpose he shared with Mr Webber, or as the Judge directed, a lesser level of foreseeability was available.

[3] The other grounds of appeal relate to claims that the Judge misdirected the jury and assertions of prosecutorial misconduct.

[4] The sentence appeal is advanced on the sole basis that the starting point was too high, resulting in the imposition of a sentence which was manifestly excessive.

Background

[5] Mr Burke arrived in Christchurch from the North Island in November 2018. There he had been closely associated with the Nomads gang (Nomads). On his arrival in Christchurch he aspired to become a patched member of the Christchurch Chapter of the Nomads. He met the President of the Christchurch Chapter of the Nomads, Randall Waho. He subsequently began a relationship with Mr Waho's stepdaughter, Leonie Cook.

[6] A seemingly minor dispute, which quickly escalated, arose between Ms Cook and a Nomads member, Shayne Heappey. It related to Mr Heappey's use of a stolen car which Ms Cook considered was hers. She also alleged he owed her $300 for drugs.

[7] It seems that despite Ms Cook's attempts to resolve their differences, Mr Heappey was stubbornly resistant. Frustrated by his conduct, Ms Cook elevated her complaints to her stepfather. This step, consistent with gang convention, necessarily brought into question Mr Heappey's respect for the Nomads and, more particularly, the authority of Mr Waho as President of the Christchurch Chapter.

[8] Mr Waho attempted to resolve the dispute by having the vehicle returned. He also attempted to arrange a number of meetings with Mr Heappey. Despite Mr Heappey appearing to agree to attend, he repeatedly failed to show. Unsurprisingly, this conduct aggravated the rising tensions between Mr Heappey and the Nomads.

[9] Against this background, and no doubt conscious of his increasingly perilous position, Mr Heappey sent a message to Mr Waho on 6 December 2018. He accepted he needed to be punished and agreed to make himself available for that purpose the following evening. His message read:[1]

> I can't do it tonight, no excuse Mad, I'm not all there tonight Mad, I'll come over tomorrow to see you and Matty to collect my punishment. I have no excuses, just not up to it, yeah.

[10] "Mad" is a generic nickname used by Nomads affiliates towards others in the gang. "Matty" was a reference to Mr Webber, Mr Burke's co-defendant who was then the Nomads' enforcer and disciplinarian. He had a reputation for ruthlessness and unpredictability.

[11] Despite his offer to present himself the following night, Mr Heappey did not show.

[12] The immediate events preceding Mr Heappey's killing started in the early evening of 8 December 2018, when Messrs Burke, Webber and Waho met at the Russley home of Richard Sims, another patched member of the Nomads. The Crown case was that there Mr Sims gave knives to Messrs Waho and Webber. The Crown alleged that Mr Burke saw them being distributed and Mr Webber demonstrated to

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[1] Spelling and grammatical errors in the original message have been corrected.

him how duct tape could be added to the blade to prevent it bending during use. The defence disputed that this occurred.[2] CCTV footage then shows Messrs Burke and Webber together at the nearby Bush Inn shopping centre for about 20 minutes between 6.57 pm and 7.16 pm.

[13] Later that evening, Mr Sims sent Mr Heappey a text asking him where he lived. Mr Heappey told him. Shortly afterwards, Mr Sims arrived at the address, picked him up and drove him back to his home. Mr Sims then sent a text to others, including Mr Webber and Ms Cook, advising that he had Mr Heappey at his address and to get Mr Webber there as soon as possible.

[14] Mr Burke and Ms Cook then drove to the address of Lucan Moore, a gang associate, where Mr Webber was temporarily residing in a caravan. Mr Moore's evidence at the trial was that he had become increasingly concerned about Mr Webber's recent behaviour. Mr Moore said that Mr Webber had nearly killed him three weeks earlier and he had seen Mr Webber in possession of a small knife. According to Mr Moore, when Ms Cook and Mr Burke arrived and told Mr Webber that Mr Heappey had been found, Mr Moore detected "a look" in Mr Webber's eye that made him worried Mr Webber might do something dangerous, adding that anyone who did not know Mr Webber well would not have noticed.

[15] As they left Mr Moore's address, Mr Moore said that Mr Webber showed him a small knife which he put in his pocket. Mr Moore said he did not think that Mr Burke knew Mr Webber was armed. Mr Moore said that he was sufficiently concerned to say to Mr Webber as he was leaving "don't fuckin kill him, eh, he's one of our mates". Mr Moore's evidence was that when this was said Mr Burke was about five to six metres ahead. But he also said the comment was "loud enough for anyone else to hear that was around us".

[16] Ms Cook, with Messrs Burke and Webber, arrived at Mr Sims' house shortly before 11.00 pm.

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[2] Mr Burke's knowledge of the knife was a key ingredient of liability for murder, as reflected in the trial Judge's question trail. Given that the jury found Mr Burke guilty of manslaughter, the Judge ultimately sentenced Mr Burke on the basis that he did not know Mr Webber had and would use a knife in his attack on Mr Heappey.

[17] There are differing accounts as to how it was that Mr Heappey ended up outside the house in the presence of Messrs Webber and Burke. In particular, whether they escorted him outside or he went outside on his volition. What does appear to be uncontroversial is that outside the house, Mr Webber attacked Mr Heappey with a knife. He inflicted 14 stab wounds. These included defensive wounds consistent with Mr Heappey trying to fend off or grab the knife. The pathology evidence was that Mr Webber would have to have been standing very close to Mr Heappey; the same sort of distance as if punching. For how long the assault took place is uncertain, but according to the Crown's pathologist it could have occurred over a period of between 10 to 15 seconds or over a few minutes.

[18] Those inside the house could hear scuffling and sounds consistent with fighting. This was followed by a bang on the door. One of the occupants opened it. Mr Heappey fell through the door. Mr Burke was grappling with him as he staggered back inside. Mr Burke fell on him and punched and strangled him.

[19] Mr Heappey was taken to hospital when those present realised how grave his injuries were. He was declared dead at approximately 11.36 pm.

[20] The post-mortem examination discovered numerous cutting or stab wounds consistent with being caused by a knife, with three to the chest. One wound, 12 cm deep, was the major operating cause of the blood loss from which Mr Heappey died.

[21] Mr Burke fled to Dunedin where he was arrested on 17 December 2018.

[22] When asked what the plan was and what was supposed to have happened to Mr Heappey, Mr Burke replied that it did not relate to the car or the drug debt. Mr Burke said:

> … it was over his disrespect to, the President and all that type of stuff okay, what's meant to happen him, he's just meant to get told off … maybe, a punch or two … but, that other person [Mr Webber] … they weren't even meant to … but [Mr Webber] took it under [his] own control and took the person outside on [his] own and done what [he] did …
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> …

> Basically it was hey, it was just give him a rark up, that's all it was, give him a rark up, just a little, reminder of who he is, and where he is, and what he's a part of, and life goes on, we don't want to hurt him, cause we don't want to lose him, that type of …

[23] When asked whether Mr Webber had been on methamphetamine, Mr Burke said that he was and agreed that Mr Webber was "mad".

[24] As for his own role, Mr Burke said that he had been inside with the door closed when the attack on Mr Heappey started. He said he went outside to ask questions of Mr Heappey and grabbed him to calm him down. He said:

> … I'm trying to save him, like I didn't even know he'd been stabbed, I was trying to save him from getting a mean hiding you know like come on bro, just calm down, cos I know how these situations go, normally it's just a mean hiding …

[25] Those inside the house said that Mr Burke had been outside with Mr Webber.

The trial

[26] Mr Burke was charged as a party to murder under ss 167 and 66 of the Crimes Act. He pleaded not guilty and went to trial.

[27] The Crown's case for murder was that there was a shared plan to punish Mr Heappey for his disrespect of Mr Waho and the Nomads. The Crown alleged that Mr Burke and the other offenders shared a common purpose to give Mr Heappey "a mean hiding".[3] The Crown submitted to the jury that Mr Burke was guilty of murder because he knew Mr Webber could well kill Mr Heappey, that eventuality being a probable consequence of their common unlawful intention to violently punish him.

[28] The defence, on the other hand, submitted to the jury that for Mr Burke to be liable for either murder or manslaughter, he must have foreseen death as a probable consequence of their plan to assault Mr Heappey. This, the defence submitted,

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[3] The Crown's submissions to the jury referred to the level of violence in various ways, including "a hiding, serious violence" and "a mean hiding, serious violence".

required Mr Burke to know that Mr Webber had a knife because there was no other evidence of serious violence which would mean death was a probable consequence.

[29] The defence's submission was at odds with the Judge's directions as reflected in the question trail. This addressed the circumstances in which Mr Burke could be found guilty of manslaughter, irrespective of whether he was aware that Mr Webber was armed with the knife. The relevant part of the question trail read:

> **21. Are you sure that Mr Burke knew that Mr Webber knew the assault would be dangerous, being likely to cause harm that was more than trivial?**
>
> If all 12 of you answer **yes**, you must **find Mr Burke guilty of manslaughter** under alternative 2. Do not continue.
>
> …
>
> **22. Are you sure that Mr Burke, despite not knowing that Mr Webber possessed a knife, knew that Mr Webber knew the assault would be dangerous, being likely to cause harm that was more than trivial?**
>
> If all 12 of you answer **yes**, you must **find Mr Burke guilty of manslaughter** under alternative 2. Do not continue.
>
> (Emphasis original.)

[30] The jury convicted Mr Burke of manslaughter.

Approach to appeal

[31] Mr Burke now appeals against his conviction and sentence.

Appeal against conviction

[32] Appeals against conviction are brought under s 232 of the Criminal Procedure Act 2011 (CPA). This Court must allow the appeal if it is satisfied that the jury's verdict was unreasonable or that a miscarriage of justice has occurred for any reason.[4] A miscarriage of justice includes any error, irregularity, or occurrence in or in relation to or affecting the trial that:[5]

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4 Section 232(2)(a) and (c).
5 Section 232(4).

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

[33] A real risk arises if there is a reasonable possibility that a more favourable verdict might have been delivered if nothing had gone wrong.[6]

Appeal against sentence

[34] Appeals against sentence are brought under s 250 of the CPA. This Court must allow the appeal if it is satisfied that for any reason there was an error in the sentence imposed on conviction and a different sentence should be imposed.[7] The focus is on the sentence imposed, rather than the process by which it is reached.[8] The Court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles.[9] To this end the concept of a "manifestly excessive" sentence is well-engrained and there is no reason not to use it.[10]

Grounds of appeal against conviction

[35] Six grounds are advanced on the conviction appeal:

(a) whether the Judge misdirected the jury in relation to the level of foreseeability required for liability for manslaughter under s 66(2) of the Crimes Act;

(b) whether the Judge failed to give a propensity direction where one was required;

(c) whether the Judge failed to adequately direct the jury as to Mr Burke's right to silence;

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6 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730 at [110] per Tipping J.
7 Section 250(2).
8 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
9 At [36].
10 At [35].

(d) whether the Judge failed to give a direction about the admission of facts document where one was required;

(e) whether the Judge failed to adequately direct the jury as to previous inconsistent statements; and

(f) whether the prosecutor failed to present the Crown case in a measured and dispassionate way.

Did the Judge misdirect the jury in relation to the level of foreseeability required for s 66(2) liability for manslaughter?

[36] The crux of this aspect of the appeal is the extent to which a party charged with common purpose liability for manslaughter must foresee that the principal offender would inflict violence upon the victim and the level of violence which needs to have been foreseen.

Submissions

[37] Ms Grieve, who presented this aspect of the argument for Mr Burke, submitted that for the jury to have returned a verdict of guilty for manslaughter under s 66(2), Mr Burke was required to foresee the risk of violence at a level where death was a probable consequence of pursuing the common purpose. Ms Grieve submitted that the Judge erred by misdirecting the jury in relation to the level of foreseeability required for s 66(2) liability for manslaughter. She submitted that s 66(2) liability for manslaughter requires that the secondary party foresees the risk of an unlawful act which is sufficiently serious that it could cause death in pursuit of the common purpose.

[38] Ms Grieve observed that the Crown opened their case by pitching the common purpose shared by all co-defendants at a "hiding", but adjusted that formulation as the trial evolved, eventually closing the Crown case by putting the level of violence foreseen at a "mean hiding". She submitted that to justify such a submission, either the Crown needed to prove that Mr Burke and Mr Webber amended their plan to inflict more serious violence, or that the original plan to beat Mr Heappey was with sufficient

violence that Mr Burke could have foreseen death resulting. She submitted that the Crown's formulation of the alleged plan to commit serious violence was wholly reliant on Mr Burke's knowledge of the knife. In the absence of evidence establishing he knew Mr Webber was armed with the knife, the jury could not have concluded that Mr Burke would have anticipated violence to a level where death might result.

[39] Relatedly, Ms Grieve submitted that the Judge was wrong in principle to include in the question trail that Mr Burke would be guilty of manslaughter if he had knowledge that the assault would be dangerous, despite not knowing Mr Webber had a knife. She submitted that this direction rendered knowledge of the knife incidental to liability. She submitted that as a consequence a conviction for manslaughter was inevitable, and a miscarriage of justice resulted.

[40] Mr Sinclair, for the Crown, responded that because proof of manslaughter for a principal does not require foresight of death, party liability under s 66(2) cannot require more.

[41] He submitted that the Judge did not misdirect the jury on the mens rea requirement for manslaughter as a secondary party; the requisite mens rea is limited to knowledge of the attack that caused the death. It is thus wrong to say that because manslaughter is a homicide offence, a s 66(2) party must appreciate death as a probable consequence. To do so is to conflate the separate requirements of mens rea and causation. Such an approach elevates the required knowledge and mental component of manslaughter to something approaching reckless murder under s 167(b) of the Crimes Act. He thus submitted that the question trail correctly stated the legal requirements.

Statutory framework

[42] Section 171 of the Crimes Act provides that culpable homicide not amounting to murder is manslaughter. Homicide may be culpable or not culpable.[11] One route for finding a homicide is culpable is where the killing of a person was by an

[11] Crimes Act 1961, s 160(1).

unlawful act.[12] This was the basis on which the Crown said liability for culpable homicide in this case arose.

[43] Manslaughter based on an unlawful act requires the unlawful act to be dangerous. As in *R v Church*, the test has historically been phrased as requiring that the unlawful act "be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm".[13] More recently, in *R v Lee*, this Court confirmed that "it must be an act likely to do harm to the deceased or to some class of persons of whom he was one".[14] The harm must be "more than trivial".[15] However, since the unlawful act must be a substantial and operative cause of death, "it is likely to be relatively unusual for it not to meet the threshold".[16]

[44] Section 66(2) provides that where two 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. A "probable consequence" is something that "might well happen" or "could well happen",[17] or, in other words, something where there is a "a real risk, a substantial risk" of it happening.[18]

Is foresight of death a requirement for secondary party liability for manslaughter under s 66(2)?

[45] We turn to consider whether foresight of death is a requirement for secondary party liability for manslaughter under s 66(2).

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12 Section 160(2)(a). An "unlawful act" is defined by s 2 as "a breach of any legislation".
13 *R v Church* [1966] 1 QB 59 (Crim App) at 70.
14 *R v Lee* [2006] 3 NZLR 42 (CA) at [137], quoting *R v Myatt* [1991] 1 NZLR 674 (CA) at 679.
15 *R v Lee*, above n 14, at [138].
16 At [138]. See also *Q (CA418/2016) v R* [2017] NZCA 185 at [26] for the requirement that the act be a "substantial and operative" cause of death.
17 *Uhrle v R* [2016] NZSC 64, (2016) 28 CRNZ 270 at [5], n 6; and *R v Gush* [1980] 2 NZLR 92 (CA) at 94.
18 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [100], quoting *R v Piri* [1987] 1 NZLR 66 (CA) at 79.

[46] In submitting that it is, Ms Grieve relied upon the Supreme Court's decision in *Edmonds v R*.[19] There the Court proceeded on the basis that the trial Judge was correct to direct the jury that a secondary party was liable for manslaughter only if he or she appreciated that the killing of somebody was a probable consequence of the prosecution of the common purpose:

> [10] The Judge was of the view that the appellant could be found guilty of manslaughter only if the jury were satisfied that he appreciated that the killing of somebody was a probable consequence of the prosecution of the common purpose. It is arguable that this was unnecessary, as we will explain later. For present purposes, it is sufficient to note that we are leaving for another day resolution of the issue whether the Judge was correct and we will address this appeal on the assumption that he was.

[47] Ms Grieve submitted that *Edmonds* should be read as authority for the proposition that a secondary party is liable for manslaughter only where that party foresees the risk of the principal facilitating the common purpose by performing an unlawful act which is sufficiently serious that it could well cause death. She submitted that the Supreme Court's approach was to establish that knowledge by tying it to the nature and seriousness of the common purpose.[20]

[48] In our view the Supreme Court's comments should not be interpreted as decisively as counsel presses. It was unnecessary for that Court to prescribe the standard of knowledge applicable to secondary parties. That is because nothing turned on it in *Edmonds*. The dispositive issue concerned the appellant's knowledge of the weapon used to cause death. The Court determined the case on the basis that there was no need for the Crown to prove that the appellant knew that a stabbing (as opposed to some other form of death-causing violence) was a probable consequence of the

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19 *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445.

20 In this context the Supreme Court commented at [49] that "[t]he lower the criminality of the alleged common purpose, the easier it will be to establish, but perhaps the harder it will be to show that the ultimate offence was recognised to be a probable consequence of its implementation. The higher the criminality of the alleged common purpose (and thus the closer it is to the offence eventually committed), the more difficult it may be to establish that particular defendants formed the intention to prosecute that common purpose, but the easier it will be to infer that such defendants (that is, those who did form that intention) knew that the ultimate offence was a probable consequence of its implementation." In our view the Supreme Court's reasoning here simply explains that the prosecutor in this type of case is faced with a strategic decision as to where to pitch the level of criminality allegedly captured by the common purpose. This does not bear upon where the mens rea requirement for secondary party liability should be set. The requisite standard will, however, be a factor in the prosecutor's decision. The prosecutor would not allege that the common purpose involved, for example, a group merely yelling threats at the victim without inflicting actual violence.

implementation of the common purpose.[21] Either formulation of the common purpose necessarily meant that the appellant would have foreseen the risk of the principal offender causing death.

[49] It follows that this was the reasoning which led the Court to find there had been no miscarriage of justice. Not only did the Court say that it was "leaving for another day resolution of the issue whether the Judge was correct" but, significantly in our view, the Court commented that it doubted whether the standard of knowledge was properly pitched at that level:

> [27] Both under the Crimes Act and at common law very limited mens rea (not extending to an appreciation that death is likely) is required to be established against a principal to justify a conviction for manslaughter. The same is true of a party who is prosecuted as an aider and abettor (under both s 66(1)(b), (c) or (d) and under the Accessories and Abettors Act) and at common law under common purpose liability principles. Whether this is also always the case in New Zealand under common purpose principles is unclear. It certainly is where the principal has been found guilty of murder under s 168 but the practice in other culpable homicide cases has been to require the Crown to show that the secondary party subjectively appreciated that death was a probable consequence of the implementation of the common purpose. As we have said, it is arguable whether this is correct, but it is unnecessary for us to address this further in these reasons.
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> (Footnotes omitted.)

[50] Despite not explicitly stating what the requisite standard of knowledge is, it is apparent that the Supreme Court contemplated that it may well sit below a subjective appreciation that death was a probable consequence of the implementation of the common purpose. In our view it is sufficient for present purposes to observe that the comments in *Edmonds* do not support Ms Grieve's submission to the extent she suggests.

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21 At [54].

[51] The Crown, on the other hand, relies on *R v Rapira*.[22] This concerned the aggravated robbery of a delivery driver where the principal offender fatally struck the victim in the head with a baseball bat. This Court commented:[23]

> [22] A secondary party under s 66(2) of the Crimes Act is liable for "every offence" committed by another party to a common intention to prosecute any unlawful purpose if the commission of "that offence" was known to be a probable consequence of the prosecution of the common purpose. If the offence committed by the principal is murder *on the basis of s 168*, a secondary party will be guilty of murder if he knows that the principal intends to cause grievous bodily injury for the facilitation of a specified offence. Just as intention to kill or knowledge that death is likely to ensue is not necessary for the liability of the principal under s 168, it is not necessary for a secondary party. …
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> (Emphasis added.)

[52] Significantly, the Court's comments concern only secondary liability for murder under s 168, the so-called "felony murder" provision, rather than s 167. That is why the Court went on to distinguish *R v Hamilton*, *R v Tomkins* and *R v Te Moni*.[24]

[53] *Hamilton* and *Tomkins* were both cases where the principal offender was charged under s 167. The Court commented that in such cases, a secondary party for murder under s 66(2) must know the offence, that is an intentional killing or causing grievous bodily injury likely to cause death, is a probable consequence of the prosecution of the common purpose.[25] While the standard for party liability for

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22 *R v Rapira* [2003] 3 NZLR 794 (CA).

23 Citing *R v Morrison* [1968] NZLR 156 (CA); *R v Hardiman* [1995] 2 NZLR 650 (CA) at 652; and *R v Tuhoro* [1998] 3 NZLR 568 (CA) at 572–573. See also *R v P (No 3)* [2015] NZHC 1424. That case concerned a robbery of a dairy where the principal offender killed a shopkeeper with a knife. The principal offender was charged with murder under s 168. Lang J held that liability for manslaughter under s 66(2) required the Crown to prove that the secondary party knew that the intentional infliction of some physical harm (not being transitory or trifling) on an occupant of the store was a probable consequence of carrying out the unlawful common purpose.

24 At [23]–[25], citing *R v Hamilton* [1985] 2 NZLR 245 (CA); *R v Tomkins* [1985] 2 NZLR 253 (CA); and *R v Te Moni* [1998] 1 NZLR 641 (CA).

25 At [24].

manslaughter is lower, the Court considered that it still required an appreciation of the risk of killing. For example, in *Tomkins* the Court commented that:[26]

> The common feature of the rather less grave cases is that the subjective foresight necessary to make the accused guilty of the murder as a party is lacking. Nevertheless he will be guilty of manslaughter if the jury are satisfied that he knew that, as knives were being carried, a killing could well eventuate — even by their use in some way or circumstances totally unexpected.

[54] In *Te Moni*, however, the trial Judge's direction prescribed a lower standard. The case concerned a group of offenders who entered a bank with the intention of robbing it. The robbery went wrong from the outset. It culminated in the principal killing a bank teller with a shotgun.[27]

[55] The principal was charged with murder under both ss 167 and 168.[28] This Court noted that it was "impossible to say which of the four intents the jury found proved".[29] There was evidence to support a verdict on any of the bases advanced by the Crown, although it was unlikely that the jury decided the case on the basis of an actual intent to kill under s 167(a).[30]

[56] The trial Judge directed the jury that under s 66(2) the secondary parties would be liable for murder if those parties "knew there was a substantial or real risk that [the principal offender] would kill with murderous intent in the circumstances which in fact arose".[31] The trial Judge continued:[32]

> If the others, that is not the one with the gun, intend such injury, they would be guilty of murder. However, if such injury was not intended by the others,

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26 *R v Tomkins*, above n 24, at 256. The Court also phrased the standard as "if he knew only that at some stage in the course of the carrying out of the criminal plan there was a real risk of a killing short of murder, he will be guilty of manslaughter. So too if he foresaw any real risk of murder but it was committed at a time or in circumstances very different from anything he ever contemplated: so different that the jury are not satisfied that the murder should fairly be regarded as occurring in the carrying out of the plan. In the latter case they can still convict of manslaughter if satisfied that he must have known that, with lethal weapons being carried, there was an ever-present real risk of a killing in some way."

27 *R v Te Moni*, above n 24, at 643–644.

28 At 645–646. Specifically, the principal offender was charged under s 167(a) (intent to cause death), s 167(b) (intentional bodily injury known to be likely to cause death and reckless whether death ensued), s 167(d) (unlawful act likely to cause death) and s 168(1)(a) (intentionally causing grievous bodily injury to facilitate the commission of kidnapping or robbery or both; or facilitating flight, avoiding detection, or resisting lawful apprehension).

29 At 646.

30 At 646.

31 At 647.

32 At 648.

> they must be acquitted of murder, but having engaged in an enterprise which envisaged some degree of violence, albeit nothing more than fright, they will be guilty of manslaughter.

[57] This Court noted that the above direction overstated the requirement of intention (insofar as it referred to secondary parties having an intention to cause death themselves, rather than knowledge of the risk of the principal offender doing so).[33] However, there was no basis for the appellants to complain because that error operated in their favour.[34] If the overstated intention requirement is excised from the trial Judge's direction, the relevant standard for manslaughter as a secondary party is involvement in "an enterprise which envisaged some degree of violence".

[58] In our view this expression sets the standard at the correct level (albeit not in a way we would phrase it). Our reasons follow.

[59] First, this approach is consistent with the statutory language. A secondary party under s 66(2) is liable for the commission of an offence if "*that offence* was known to be a probable consequence of the prosecution of the common purpose". Where "that offence" is manslaughter, the principal offender commits the offence by doing an unlawful act that is likely to do more than trivial harm to the victim, with that unlawful act being causative of death. For the reasons discussed, there is no requirement that the principal offender foresees the risk of death. The secondary party can thus foresee the actus reus and non-specific mens rea elements of manslaughter being a probable consequence of the common purpose without appreciating the risk of death. The secondary party need only foresee the risk of an unlawful act that is likely to do more than trivial harm. We do not accept that the statutory language imports an elevated requirement that a secondary party foresees the risk of death.

[60] Secondly, this interpretation is consistent with logic. If secondary party liability for manslaughter required a party to foresee the risk of death, the distinction between reckless murder and manslaughter would be rendered illusory. A secondary party who did not foresee the risk of death would be guilty of neither murder nor manslaughter. However, if the secondary party was required to foresee the risk of

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33 At 648.
34 At 648.

death resulting from the common purpose, how could the jury not find that the principal was reckless as to whether death ensued? In that case the secondary party would be liable for both reckless murder and manslaughter. Such an approach leads to an absurdity; either the secondary party foresaw the risk of death and is thus liable for both reckless murder and manslaughter, or they did not foresee such a risk in which case they would be acquitted of any form of culpable homicide.

[61] Thirdly, such an interpretation is congruent with the orthodox approach to a secondary party charged with aiding and abetting manslaughter under s 66(1)(b), (c) or (d). The Supreme Court has noted that in such a case there is a "very limited mens rea" requirement "not extending to an appreciation that death is likely".[35] In *R v Renata*, this Court phrased the standard as:[36]

> … where one person unlawfully assaults another by a dangerous application of force, the assailant is guilty of manslaughter if death is caused even in a most unexpected way.

[62] There is nothing about the statutory language of s 66(2) *vis-à-vis* that of s 66(1) which indicates that a heightened mens rea is required for the former. Both are phrased by reference to the particular offence committed by the principal offender and logically should be consistent with the elements of that offence. The co-offenders are, of course, parties to the same offence.

[63] Fourth, this approach is consistent with the view of the learned authors of *Adams on Criminal Law*, who comment that:[37]

> … in cases involving manslaughter by unlawful act there is no requirement that principal and secondary parties under s 66(1) must foresee a risk of death as a consequence of an unlawful act. …The same principle must also apply to secondary parties to manslaughter under s 66(2). To hold that a secondary party under s 66(2) must know that death is a probable consequence would be to require proof of something which is not an element of manslaughter by unlawful act and which is not required of the principal party, who actually causes death, nor of secondary parties under s 66(1)(b)–(d).

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35 *Edmonds v R*, above n 19, at [27].

36 *R v Renata* [1992] 2 NZLR 346 (CA) at 349.

37 Simon France (ed) *Adams on Criminal Law — Offences and Defences* (online looseleaf ed, Thomson Reuters) at [CA66.28(3)(b)].

[64] Finally, although *Rapira* concerned s 168, that case is nevertheless useful as a statement of general principle that secondary party liability under s 66(2) should not require an elevated mens rea comparable to that of the principal. It is inherent in the offence of manslaughter that the offender has a state of mind falling short of an appreciation that death might result from their actions. It cannot be correct that a secondary party to manslaughter could have as great or a greater appreciation of the risk of the principal offender's actions than the principal themselves. That is particularly so where the co-offenders have formulated a common purpose upon which they expect the others to act.

[65] Before leaving this aspect of the discussion we note that Ms Grieve expressed concern that if this interpretation was correct it would result in a much lower level of criminality being required to support a conviction for manslaughter. However, it must not be overlooked that a secondary party is only liable where they participate with another or others in prosecuting an unlawful common purpose and death is caused as a probable consequence of prosecuting that purpose. Criminalisation of the secondary party's conduct is not unjustified where there is an agreement to do an unlawful act, the pursuit of which causes another's death.

[66] For these reasons, we conclude that a secondary party is liable for manslaughter under s 66(2) if:

(a) an unlawful act likely to do more than trivial harm to the deceased was known by that secondary party to be a probable consequence of the prosecution of the common purpose; and

(b) that unlawful act was a substantial and operative cause of death.

Did the Judge misdirect the jury so as to give rise to a miscarriage of justice?

[67] The Judge directed the jury that Mr Burke would be liable for manslaughter under s 66(2) if he "knew that Mr Webber knew the assault would be dangerous, being likely to cause harm that was more than trivial", regardless of whether he knew that Mr Webber had a knife. Given our discussion above, that direction was correct as a matter of law.

[68] At trial, the defence submitted that the jury could only find Mr Burke guilty of manslaughter if they were sure he knew Mr Webber had a knife. On appeal, Ms Grieve submitted that the Crown had failed to prove that Mr Burke knew Mr Webber was armed, and that the Judge should have directed the jury on the relationship between the common purpose and the weapon.

[69] That submission rests on a false premise. As we have found, liability for manslaughter under s 66(2) requires only that the secondary offender foresee an unlawful act likely to do more than trivial harm as a probable consequence of the prosecution of the common purpose. The common purpose of administering a hiding in the gang context of the trial is easily sufficient to meet the threshold of "more than trivial harm". Knowledge of the weapon was unnecessary. Knowledge to that level is more consistent with elevating the level of criminality from manslaughter to murder.

[70] Nor does Ms Grieve's submission that Mr Webber's actions were a major departure from the common purpose assist the appeal. While the Judge's question trail did not use the term "major departure", it nevertheless traversed the elements of party liability for manslaughter, including that the stabbing was committed in the course of carrying out the common goal (to inflict a beating). It is implicit in returning a verdict of manslaughter that the jury concluded that Mr Burke did not foresee Mr Webber would stab Mr Heappey causing his death. Had the jury considered that he did, the proper verdict would obviously have been one of guilty of murder. Instead, the jury found that the common purpose involved at least the infliction of a beating. On our analysis the fact that death resulted from Mr Webber's actions in pursuit of that purpose was a sufficient basis for the jury to find Mr Burke guilty of manslaughter.

[71] It is plain from the evidence, indeed it appears to have been common ground, that there was a common purpose to punish Mr Heappey by way of a hiding. In a pre-trial decision admitting as evidence the convictions of Mr Sim, Mr Waho and Ms Cook, Osborne J commented that those convictions were sufficient to prove that there was "an intention to give Mr Heappey his punishment in the form of a physical beating or 'hiding'".[38]

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[38] *R v Burke* [2020] NZHC 1186 at [23].

[72] It was clearly open to the jury to infer from the evidence that Mr Burke was involved in that common purpose. Indeed, that Mr Burke was a part of such a plan was inherent in the defence theory of the case. Ms Grieve's opening address captured this point when she said:

> At no stage did Mr Burke contemplate that Mr Heappey would be killed, quite the opposite. Mr Burke thought that Mr Heappey would get told off, maybe given a hiding or punched because that was the plan. That was what was supposed to happen and that was what the president of the Nomads gang had ordered was to happen.

[73] The evidence established that Mr Burke went with Ms Cook to pick up Mr Webber and take him to Mr Sim's address to administer Mr Heappey's punishment. Mr Burke knew that Mr Heappey had disrespected Mr Waho. He knew how gangs worked. He knew that punishment for disrespect often involved delivering violent discipline. When interviewed by the police he told them that he expected Mr Heappey to get a "speaking to" and possibly a "punch or two in the head". He said, "cos I know how these situations go, normally it's just a mean hiding".

[74] Mr Burke told the police that he was inside the house during the assault. However, Mr Nicho gave evidence placing Mr Burke outside with Mr Webber while he attacked Mr Heappey. Further, the same witness said that Mr Burke tumbled inside grappling with Mr Heappey and began to choke him once they fell to the floor. It was open to the jury to disbelieve Mr Burke's account and find that he was actively involved in the attack on Mr Heappey.

[75] The Crown case was that Mr Burke had a motive to assist in this way because he wanted to establish himself in the Nomads. He told the police that he had been patched "two days before this" (the ambiguity of that statement meant it was disputed whether he was patched before or after the incident). The Crown nevertheless invited the jury to find that Mr Burke involved himself in the punishment to gain respect within the gang and ingratiate himself with Ms Cook.

[76] On that evidence it was clearly open to the jury to find that Mr Burke shared with Mr Webber the common purpose of punishing Mr Heappey by giving him a hiding. We consider the Judge did not misdirect the jury on the standard for liability

for manslaughter under s 66(2). Given the meaning of "hiding" in the gang context it is unsurprising that the jury found the evidential threshold for foreseeability of more than trivial harm was met. There was no misdirection and it follows we do not accept there is a risk of a miscarriage of justice.

Did the Judge fail to give a propensity direction where one was required?

[77] We next turn to consider the claim that the Judge failed to give a propensity direction where, it is submitted, one was required.

Submissions

[78] Mr Rapley QC, who presented this aspect of Mr Burke's appeal, submitted that the Judge failed to direct the jury on how to use the propensity evidence relating to Mr Webber's history of impulsive violence. He submitted that a critical part of the defence case was that Mr Burke had not known Mr Webber for long and, unlike others connected to the Christchurch Nomads, did not know of Mr Webber's reputation for unpredictable volatility. He submitted that the Judge should have directed the jury that the defence's case was that Mr Webber went beyond the common plan to give Mr Heappey a physical hiding and that Mr Burke could not have foreseen that this might occur.

[79] Mr Sinclair submitted that the defence's position would have been well understood by the jury. The Judge captured the point adequately when he summarised the defence case. No elaborate propensity direction was required. In any event, the evidence had no bearing on liability for manslaughter because the requisite foreseeability of an unlawful act causing more than trivial harm to Mr Heappey was nevertheless met.

Did the Judge fail to give a propensity direction, so as to give rise to a miscarriage of justice?

[80] The propensity evidence was adduced by the defence to support their case.[39] The defence submitted that Mr Webber was violent and impulsive. His criminal

[39] The defence obtained a ruling under s 40(2) of the Evidence Act 2006 that the evidence of Mr Webber's violent and impulsive tendencies was admissible in *R v Burke* [2020] NZHC 2144.

history of violent offending was used to support that submission. The defence theory was that Mr Webber had a tendency to act in such a violent and unpredictable way as to spontaneously commit murder. The defence said Mr Burke was ignorant of this reputation. As a consequence, he did not foresee the risk that Mr Webber might inflict far more serious harm on Mr Heappey than he could ever have anticipated.

[81] The propensity evidence here is atypical. It is more common for propensity evidence to relate to a defendant's tendency to have a particular state of mind or to act in a particular way. In those circumstances, it is necessary for the Judge to ensure that the evidence is properly admissible and is not used by the jury to support an impermissible line of reasoning. Where there is a risk of impermissible reasoning the Judge should direct the jury not to use the evidence in that way or attribute to it disproportionate weight.

[82] That was not the case here. The Judge did not give a standard propensity direction along those lines. Nor was he required to. While the evidence went towards establishing Mr Webber's propensity for unpredictable violence, he was not a defendant. The propensity rules in ss 41 to 43 of the Evidence Act therefore did not apply. The evidence was relevant and admissible under ss 7 and 8. We add, however, that the Judge's omission does not give rise to a risk that justice miscarried, for three reasons.

[83] First, the Judge clearly explained the purpose of the evidence when summarising the defence case:

> … [Mr Rapley] referred to the interaction between Mr Webber and Mr Burke — the limited knowledge that Mr Burke had of Mr Webber, and suggested to you that Mr Webber's unpredictability and volatility were unknown to Mr Burke. He described that to you, you will recall, as the key to this trial.

[84] While the Judge did not make specific reference to the propensity evidence in explaining this aspect of the defence case, the jury were nevertheless told that "Mr Webber's unpredictability and volatility" was "key to this trial". The jury would have understood from the Judge's comments that the evidence of Mr Webber's violent tendencies was relevant to the question of whether Mr Webber departed from the plan.

[85] Secondly, the propensity evidence formed part of and supported the defence case. Even if the jury had misused the propensity evidence, this would have favoured the defence. The defence adduced the evidence to show that Mr Webber was a volatile and violent man. Had the jury attributed excessive weight to Mr Webber's violent character, it could only have assisted the defence in showing Mr Webber was someone who would be likely to depart from the plan by spontaneously stabbing Mr Heappey. That would go some way towards establishing that the common purpose shared with Mr Burke did not contemplate violence where death might result.

[86] Thirdly, the propensity evidence had only limited bearing on Mr Burke's liability for manslaughter. As discussed, whether Mr Webber departed from the plan was principally relevant to Mr Burke's liability for murder. Liability for manslaughter requires only that an unlawful act likely to do more than trivial harm to Mr Heappey was known by Mr Burke to be a probable consequence of the prosecution of the common purpose. There was a wealth of evidence establishing that the common purpose was to punish Mr Heappey by giving him a "hiding". Propensity evidence tending to show that Mr Webber was a particularly violent and unpredictable man was of only marginal utility in establishing Mr Burke's liability for manslaughter.

[87] For these reasons we are satisfied that the Judge's failure to give a propensity direction did not give rise to a risk of miscarriage of justice. This ground of appeal fails.

Did the Judge fail to adequately direct the jury as to Mr Burke's right to silence?

[88] This ground of appeal concerns the directions the Judge gave on a defendant's right to silence and, relatedly, the election not to give evidence.

Submissions

[89] Mr Rapley submitted that while the Judge correctly directed the jury on Mr Burke's right not to call evidence in his defence, he failed to direct them that Mr Burke also had a right not to give evidence himself. He submitted that the way the Judge expressed the direction was confusing and conflated Mr Burke's out of Court statements with his rights and protections during the trial process.

Furthermore, even if the jury was made aware of Mr Burke's right not to give evidence, they were not directed on what that meant or how it might affect their deliberations. He submitted that the standard jury direction on a defendant refraining from giving evidence is fundamental. It must be given flawlessly to avoid the risk of a miscarriage of justice.

[90] Mr Sinclair submitted that, when taking into account the Judge's opening remarks, the summing up, and counsel's submissions to the jury, the thrust of the Judge's directions was clear. He submitted that the jury would have understood that Mr Burke's election not to give evidence could not be held against him. Nothing changed the presumption that he was innocent until proved otherwise and the burden of proof lay on the Crown. He submitted that any deficiencies were insufficient to result in a miscarriage of justice.

Did the Judge fail to adequately direct the jury as to Mr Burke's right to silence, so as to give rise to a risk of a miscarriage of justice?

[91] Section 25(d) of the New Zealand Bill of Rights Act 1990 enshrines the right of a defendant in a criminal trial not to be compelled to be a witness or to confess guilt. This right, among others, protects the defendant against the danger of having the exercise of their right not to testify at trial presented in such a fashion as to suggest that their silence was a cloak for their guilt.[40] Trial judges should direct the jury that the defendant has an absolute right to elect not to give evidence and that no adverse inference may be drawn from their election not to do so.

[92] Mr Rapley complained that the trial Judge failed to direct the jury that the fact Mr Burke had not given evidence did not add to the case against him and no adverse inference should be drawn against him because he had not given evidence.

[93] While it is best practice for a Judge to explicitly direct the jury in this way at both the opening and closing of the case, the thrust of the directions actually given was clear.

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[40] *R v L* [1996] 1 NZLR 53 (CA).

[94] In the Judge's opening remarks, he told the jury that:

> [54] Then, at the end of the Crown case, Mr Burke also is entitled to call his own evidence. He does not have to call evidence. He may or may not — it is entirely his choice. He has an absolute right not to give evidence, not to call evidence, and you must not read anything into whether he gives evidence or calls evidence. But I will say a bit more about that at the conclusion of the evidence.

[95] Mr Rapley submitted that directing the jury that they "must not read anything into whether [the defendant] gives evidence or calls evidence" is unclear. He argued that this direction omitted directing the jury that it must not draw any adverse inference against Mr Burke if he did not give evidence or call evidence.

[96] We accept the Judge's remarks in his summing up were less than explicit. He said:

> [30] The starting point of a trial is the presumption of innocence. Mr Burke is to be treated as innocent unless and until the Crown proves its case, proves that he is guilty. The onus of proof — that is the burden the Crown has — rests on the Crown from beginning to end. There is no onus on Mr Burke at any stage of the trial to prove his innocence. The presumption of innocence means that he did not need to call evidence, he did not have to establish anything in evidence, nor did he have to speak to the Police.

[97] It would have been preferable for all elements relating to the defendant's right to silence to have been covered together in the summing up. However, we are satisfied that when the Judge's directions in his opening remarks are read with those in his summing up the effect is sufficiently clear. He pointed out that Mr Burke's right not to give or call evidence is absolute. He told the jury that they could not "read anything into" that choice. It is difficult to read into those words, taken in context, anything other than a direction not to draw any adverse inference from Mr Burke's choice not to give evidence. We also note the way the Judge in his summing up linked the concept of the defendant not having to call evidence with not being required to prove anything. From this combination, it would have been clear to the jury that the defendant was not required to give evidence and that no adverse inference should be drawn against him from not doing so.

[98] It follows we are satisfied that this ground of appeal is not made out.

Did the Judge fail to adequately direct the jury as to previous inconsistent statements?

[99] Next we turn to consider the Judge's alleged failure to adequately direct the jury as to previous inconsistent statements.

Submissions

[100] Mr Rapley submitted that the Judge's directions on previous inconsistent statements were inadequate. He claimed that the Judge should have told the jury that when assessing the credibility and reliability of the witnesses, and the accuracy of their evidence, they may consider any inconsistency highlighted by their earlier statements and the explanation the witness has given for the difference. He said the Judge should then have given examples. The Judge's failure to do so gave rise to a risk of a miscarriage of justice.

[101] Mr Sinclair submitted that the previous inconsistent statements which Mr Rapley referred to could not have been relied upon by the jury in convicting Mr Burke of manslaughter. He submitted that the inconsistencies in the evidence, particularly Mr Moore's evidence distancing Mr Burke from the knife, were favourable to the defence. In any event, he submitted that these inconsistencies could have no bearing on the issues relating to manslaughter under s 66(2). He submitted that the common purpose to assault Mr Heappey was undisputed.

Did the Judge fail to direct the jury as to previous inconsistent statements, so as to give rise to a miscarriage of justice?

[102] There were several occasions during the trial where witnesses gave evidence that was inconsistent with their previous statements.

[103] The Judge gave the following direction on previous inconsistent statements:

> [199] You will have seen and heard a number of witnesses asked questions about the contents of their prior statements. The purpose of putting earlier statements to witnesses is usually either to help refresh their memory from the earlier statement or to put to the witness apparent inconsistencies between the earlier statement and the statement now given.

> [200] In considering the evidence of those witnesses, having heard the witness tested, it is for you to assess and weigh their evidence in the normal way having regard to those matters of reliability and credibility.

[104] Mr Rapley complained that the Judge should have provided specific examples of previous inconsistent statements. In our view that was unnecessary. In their final submissions, both the Crown and defence referred to examples of inconsistency relevant to their respective cases.

[105] Mr Rapley made specific reference to inconsistencies in Mr Nicho's evidence. He gave examples which included the length of time Mr Burke and Mr Webber were outside with Mr Heappey; whether Mr Burke could see blood when he was choking Mr Heappey; and whether Mr Heappey likely died from Mr Burke choking him. He also referred to passages of Ms Murdoch's evidence. She was inconsistent about the time Mr Burke and Mr Webber were outside the house with Mr Heappey.

[106] In our view, none of these inconsistencies were of moment. In a case where the focus was Mr Burke's knowledge and foreseeability, they were peripheral and only of marginal relevance. There was sufficient evidence for the jury to conclude that Mr Burke was outside with Mr Webber, that he was there for the purpose of facilitating the plan to give Mr Heappey a hiding, and that he participated in the assault by choking him. No risk of a miscarriage of justice arises from the Judge not addressing specific examples of inconsistent statements when summing up.

[107] This ground of appeal fails.

Did the Judge fail to give a direction about the admission of facts document where one was required?

[108] Mr Rapley claims that the Judge failed to direct the jury on the use and significance of the admission of facts document, where such a direction was required.[41] The document ran to 14 pages and contained Mr Webber's extensive criminal history which, in itself, occupied some five pages. Mr Rapley described the evidence contained in the document as important. The complaint is that the Judge should have given the standard direction that the agreed facts formed part of the

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41 This document was prepared under s 9 of the Evidence Act 2006.

general pool of evidence available to the jury. Mr Rapley submitted that the agreed facts directly related not only to the issue of whether there was a departure by Mr Webber from the agreed plan, but were also connected to the propensity evidence and how that might be used.

[109] In our view this point may be dealt with in short order. The Judge's summing up expressly addressed the agreed facts in the following way:

> [8] What is the evidence? You will have a pretty good idea by now. It comes from several sources. It obviously includes the oral evidence you have heard from the witnesses who came into court, and you also have heard evidence that has been read by consent. Please don't think that the evidence read by consent has any lesser quality, it doesn't. You will have the exhibits that have been produced — records of all sorts of nature. You will also have the memoranda of agreed facts. You should consider all that evidence, both the evidence that was led by the Crown and the documents that were referred to and produced in the course of the hearing.

[110] The Judge explained to the jury that the agreed facts document (together with the other evidence read by consent) was evidence available to the jury. The Judge noted that such evidence was not of any lesser quality. The jury was told to consider that evidence alongside all of the evidence led at trial. We also note that the Judge had previously explained to the jury how to deal with evidence generally.

[111] There is no room for doubt that the jury was made aware that the admission of facts document contained evidence admitted by consent and that these facts formed part of the available evidence. No risk of a miscarriage of justice arises.

[112] This ground of appeal fails.

Did the prosecutor fail to present the Crown case in a measured and dispassionate way?

[113] Mr Rapley's final ground of appeal is that the prosecutor failed to present the Crown case in a measured and dispassionate way. He submitted that there are four particular aspects of the prosecutor's conduct which fall to be considered under this heading:

(a) The prosecutor should not have referred to Mr Burke by the nickname "Menace". This inflamed bias against Mr Burke.

(b) The prosecutor improperly questioned a witness about a newspaper article about the case. The article was irrelevant and the prosecutor's questions were designed to elicit answers that Mr Burke had made disparaging comments about Mr Heappey.

(c) The prosecutor reviewed the evidence in an imbalanced manner and improperly invited the jury to reject the evidence of reliable, independent witnesses and instead prefer the evidence of hostile and unreliable witnesses, the latter favouring the Crown case.

(d) The prosecutor injected further colour and emotion into the Crown's closing address by referring to a text message sent by Mr Webber to Mr Waho in which he said he had "sorted out that weed in the garden". The prosecutor improperly linked this evidence to the submission that Mr Burke was a willing and integral part of that plan.

[114] Mr Rapley accepted that the conduct of the prosecutor, in and of itself, might not be sufficient to satisfy this Court that the appeal should be allowed, but when combined with the other grounds advanced, it adds weight to the risk that justice miscarried.

[115] Mr Sinclair submitted that there was no impropriety on the part of the prosecutor. Addressing each of Mr Rapley's criticisms in turn, Mr Sinclair submitted that:

(a) The newspaper article was a legitimate matter for the Crown to explore. He submitted that Mr Burke wove a narrative of being inside the house, protective of Mr Heappey and remorseful at his death. He submitted that contrary evidence was clearly relevant to Mr Burke's credibility.

(b) The Crown reviewed the evidence in a balanced manner. He submitted that the Crown was clear that it was a matter for the jury to weigh up the evidence and choose which to accept.

(c) The prosecutor did not improperly refer to Mr Webber's text describing Mr Heappey as a "weed in the garden". He submitted that the message was legitimately linked to the submission that there was a negative sentiment towards Mr Heappey shared among the relevant gang members. He submitted that the point being made here was that Mr Burke knew he was part of a mission to inflict violent punishment on a miscreant.

[116] Mr Sinclair further submitted that, given the difficulties with the preceding grounds of appeal, this ground adds nothing to the case. He submitted that Mr Rapley accepted that these contentions are insufficient to engender a real risk of a miscarriage of justice in themselves.

Duties of the prosecutor

[117] The trial duties of a prosecutor are well-established.[42] The prosecutor must not adopt tactics which involve an appeal to prejudice or amount to an intemperate or emotional attack on the defendant.[43] Counsel is not entitled to be emotive or inflammatory. The Crown should lay the facts dispassionately before the jury and present the case for the guilt of the defendant clearly and analytically.[44] A failure to perform these duties may give rise to a real risk of a miscarriage of justice.[45]

[118] We turn now to consider each of the criticisms advanced by Mr Rapley.

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42 *Stewart v R* [2009] NZSC 53, [2009] 3 NZLR 425 at [19].
43 At [19], quoting *R v Roulston* [1976] 2 NZLR 644 at 654.
44 *Stewart v R*, above n 42, at [20], quoting *R v Hodges* CA435/02, 19 August 2003 at [20].
45 *Stewart v R*, above n 42, at [34].

Did the prosecutor improperly refer to Mr Burke by his nickname?

[119] Mr Rapley submitted that in a case where other significant figures were not referred to by their nicknames, the prosecutor's reference to Mr Burke's nickname of "Menace" was improper.

[120] We cannot accept this criticism. Contrary to Mr Rapley's claim, various parties, including Mr Burke, were referred to by their nicknames. The nicknames were used by both witnesses and counsel. In fact, so frequent were these references that the jury asked for "a list of nicknames with birth names as they are being referred to differently by witnesses and lawyers (very interchangeable)". This occurred on the second day of trial.

[121] The use of nicknames and the references to Mr Burke as "Menace" were inevitable and unavoidable. That was because a number of witnesses knew him only by that name. For example, the witness Jacob Jones explained that he only learned of Mr Burke's real name in Court:

> Q. Who was driving the van?
>
> A. I think Menace was.
>
> Q. Sorry you've said Menace was?
>
> A. Oh, sorry, Justin.
>
> Q. No, that's okay. Is that a nickname that you know Mr Burke by?
>
> A. Yeah. I didn't even know his name until court.

[122] Other Nomads members were also referred to by their nicknames. Defence counsel used Mr Burke's nickname. They also referred to other parties by their nicknames, such as Mr Webber as "Matty Mad". In the context of a case where nicknames were often the only means by which a witness knew another, it is entirely understandable that these references were used in preference to a more formal form of address. Indeed, had this process not been adopted inevitable confusion would have followed.

[123] Relatedly, we cannot accept that the references to Mr Burke as "Menace" ran a risk of a miscarriage of justice. The prosecution never suggested that Mr Burke's nickname inferred he was of a violent disposition. The prosecutor did not use the nickname in her final submissions. The agreed statement of facts referenced the nickname "Menace". In any event, the Judge expressly confronted the issue when, in the course of his summing up, he referred the jury to Mr Rapley's submission that Mr Burke's nickname was not relevant to their task:

> He reminded you in the context of references to Mr Burke by reference to his nickname "Menace" that anything which injected colour or emotion is not relevant to your task.

[124] It follows we do not accept this criticism.

Did the prosecutor improperly question a witness about a newspaper article reporting on the case?

[125] Crown counsel examined Mr Burke's former cellmate about a newspaper article which Mr Burke had been given. He said Mr Burke described one of the men mentioned in the article as a "fuckin' knobhead".

[126] There was some dispute over whether the person Mr Burke was referring to was Mr Heappey or Mr Webber. The prosecutor submitted that Mr Burke was referring to Mr Heappey. This was said to be consistent with Mr Burke's comments to his father, recorded in a phone call, where his response to Mr Heappey being portrayed as a "good guy" in the media was that Mr Heappey was "a gang member as well". In closing, the prosecution further highlighted Leah Davidson's evidence that Mr Burke told her he stabbed Mr Heappey, and Mr Moore's evidence that after the killing he showed him the knife and his bloodstained boxers.

[127] Mr Rapley submitted that the prosecutor's purpose in pursuing this line of questioning was in the hope the witness would disclose disparaging comments made by Mr Burke about Mr Heappey. In doing so, he said the prosecutor's intention was to appeal to the jurors' emotions, biases and prejudices against Mr Burke.

[128] We cannot agree. Mr Burke's negative comments to others about Mr Heappey and the incident are relevant to the jury's assessment of the weight to be given of his

account to the police where, essentially, he minimised his role and claimed he had been protective of Mr Heappey, and that Mr Heappey fell over and he was trying to help him get up. He made various exculpatory comments to others. But to those associated with the Nomads, he tended to glorify and brag about what he did. The prosecutor's enquiry about the newspaper article was simply one element of Mr Burke's conduct that went to Mr Burke's credibility on the point and the weight the jury could give to his exculpatory statements to the police and others. In combination with other similar evidence referred to by the prosecution, a foundation was set for the jury to reject Mr Burke's accounts. In her closing address that is what the prosecutor invited the jury to do. Taken in context, that course was orthodox and perfectly legitimate. While we accept that evidence of Mr Burke making disparaging comments about Mr Heappey might evoke some prejudice, the counter-narrative was properly before the jury for their assessment.

Did the prosecutor review the evidence in an unbalanced manner?

[129] Mr Rapley complained that the prosecutor selectively reviewed aspects of the evidence. He claimed that this was unbalanced. Mr Rapley submitted that the Crown advanced as credible evidence which was unreliable and inconsistent while, on the other hand, invited the jury to reject demonstrably independent evidence. By way of example, Mr Rapley referred to the independent evidence of the next-door neighbour, Mr Shannon, who looked across into the scene when the attack was taking place. Mr Shannon said he was unable to see anything because it was too dark and the security lights were not operating. Mr Rapley contrasted this with the evidence of Mr Nicho, relied on by the Crown to say the area outside was light. Mr Rapley described Mr Nicho as hostile and demonstrating animus towards Mr Burke.

[130] There is nothing in this point. In closing, the prosecutor invited the jury to prefer Mr Nicho's evidence because, among other things, he was more proximate to the assault. That is an entirely proper submission. It is not prosecutorial misconduct for counsel to invite the jury to accept relevant and admissible evidence which supports their case. The context and the way the prosecutor invited the jury to use the evidence was balanced and fair. After reviewing the competing accounts, she put it this way:

> It's a matter for you. This is a classic, factual matter for you to weigh the evidence of what everybody said and decide whether Mr Burke was able to see the knife that night.

Did the prosecutor improperly draw a nexus between Mr Burke and Mr Webber's text message referring to Mr Heappey as a "weed in the garden"?

[131] Mr Rapley's last criticism of the prosecutor relates to a text message sent from Mr Webber to Mr Waho saying:

> Madsta sorted out that weed in the garden yfh ur son will be home very soon yfh

[132] Mr Rapley submitted that Mr Burke had no connection with this message, and it was improper for the prosecutor to refer to it in closing.

[133] This submission misconstrues the Crown case. It was central to the Crown's theory that there was a plan to discipline Mr Heappey. It was legitimate for the Crown to refer to this message for a number of reasons. First, it illustrated the negative sentiments of the Nomads towards Mr Heappey. This was consistent with other evidence that he had disrespected the gang and that this was the motive for what followed. Secondly, it supported the narrative that Mr Waho ordered Mr Heappey to be punished. Thirdly, it is evidence that when the text was sent the plan had been completed, evidently successfully and according to plan. Fourthly, the message supported other evidence tending to prove that Mr Webber was the Nomads' enforcer who dealt with wrongdoers. From this combination it was open to the prosecutor to submit that there was a common purpose within the relevant Nomads diaspora, including Mr Burke, to punish Mr Heappey.

[134] The prosecutor did not attempt to draw any illegitimate nexus between Mr Burke and the text message. Rather, she submitted that Mr Burke, from his general knowledge of how the Nomads operated, would have contemplated that the gang's enforcer might well inflict serious violence in the course of delivering punishment.

[135] Viewed in that way we are satisfied there was nothing improper in Crown counsel's approach.

Conclusion on the Crown's conduct of the case

[136] Mr Rapley accepted that his complaints against the prosecutor would not, in and of themselves, be sufficient to give rise to a risk of miscarriage of justice. Rather, he submitted that when considered with the other grounds of appeal, their combined effect should lead this Court to find that justice did, in fact, miscarry and set aside the verdict. Given that we have dismissed the other grounds of appeal, the complaints concerning the prosecutor's conduct cannot be dispositive.

[137] The appeal against conviction is dismissed.

Did the sentencing Judge impose a sentence that was manifestly excessive?

[138] The sole issue to be determined on this aspect of the appeal is whether the Judge imposed a sentence that was manifestly excessive.

[139] Osborne J proceeded on the basis that Mr Burke was found guilty of manslaughter on the basis of s 66(2), with the common purpose being to give Mr Heappey a "hiding".[46] The Judge found the aggravating features of Mr Burke's offending included premeditation; multiple attackers and the gang context; the vulnerability of the victim; and the serious injuries which caused Mr Heappey's death.[47] His Honour determined that given the lack of evidence that Mr Burke knew Mr Webber had a knife, the extreme violence inflicted by Mr Webber with that knife could not be counted as an aggravating factor against Mr Burke.[48] The Judge thus considered that Mr Burke's offending fell within the middle of band two of *R v Taueki*.[49] Having regard to other similar cases,[50] particularly *R v Innes*,[51] the Judge adopted a starting point of six years and six months' imprisonment.[52]

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46 *R v Burke* [2021] NZHC 136 at [13].
47 At [22].
48 At [23].
49 At [26], citing *R v Taueki* [2005] 3 NZLR 372 (CA).
50 At [31]–[35], citing *R v Betham* [2016] NZHC 2107; *R v Bush* [2018] NZHC 1354; *R v Pomare* [2016] NZHC 1346; *Te Kani v R* [2020] NZCA 69; *R v Hura* [2018] NZHC 3347; *R v Brider* HC Wellington CRI-2004-241-116, 3 September 2009; and *R v Hartley* [1978] 2 NZLR 199 (CA).
51 At [33], citing *R v Innes* [2016] NZHC 1195.
52 At [29] and [36].

[140] Applying discounts of five per cent for remorse,[53] including an offer to plead guilty to a lesser offence,[54] and 15 per cent for personal background circumstances and rehabilitative prospects[55] to the starting point resulted in an end sentence of five years and two months' imprisonment.[56]

[141] Mr Rapley submitted that the Judge erred by adopting a starting point that was too high. He said that it failed to account for the Judge's finding that Mr Burke did not know Mr Webber was armed with the knife. Nor did the Judge assess Mr Burke's culpability in terms of his role, particularly when compared to his co-defendants. He submitted that the appropriate starting point was three and a half years' imprisonment.

[142] Mr Sinclair submitted that the Judge properly took into account Mr Burke's role when setting the starting point. He submitted that Mr Burke was markedly more involved in the attack than his co-offenders (save for Mr Webber). He therefore submitted that the Judge adopted a starting point that appropriately reflected Mr Burke's culpability.

[143] We are satisfied that the starting point of six and a half years' imprisonment was within the available range, for the reasons which follow.

[144] First, we do not accept the Judge failed to take into account that Mr Burke did not know Mr Webber was armed with a knife. The Judge dealt with this squarely when he listed the aggravating factors:

> [23] By reason of the evidence as to your knowledge in relation to the knife and the stabbing, I do not treat the fact that [Mr Webber] committed extreme violence with a knife as his weapon as aggravating features relevant to your culpability. That said, the serious injuries which Mr Heappey sustained are relevant.

[145] Had the Judge determined the use of the knife as a weapon and the extreme violence of the attack to be aggravating factors, a starting point in band three of *Taueki*

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53 At [43].
54 At [47].
55 At [56].
56 At [57].

would have been called for.[57] Instead, the Judge correctly adopted a starting point in band two.

[146] Secondly, we do not accept Mr Rapley's submission that Mr Burke's culpability is on par with that of Mr Waho, Ms Cook or Mr Sim. Mr Rapley submitted that Mr Burke's offending required only that he be a party to an assault likely to do more than trivial harm, while the other offenders' states of mind included an intention to injure. Mr Rapley claimed that they intended to cause greater harm. While this may be true, manslaughter is the more serious offence. A charge of manslaughter requires that the victim die. The maximum penalty is life imprisonment.[58] Because the nature and seriousness of manslaughter cases are so variable, there will be cases where the gravity of the offending is less serious than a case of causing grievous bodily harm with intent to injure. For the reasons given by the Judge, we are satisfied that this is not such a case.

[147] The Judge dealt with this when explaining how Mr Burke's offending fell within band two of *Taueki*:

> [28] I consider your offending falls into the middle of band two, as set out in *R v Taueki*. That would suggest a starting point of six to eight years. It also reflects my assessment that your manslaughter conviction reflects more culpable offending than that of Mr Waho, Mr Sim or Ms Cook. You were present and involved throughout the murderous attack. You alone of Mr Webber's co-offenders were present with Mr Webber at the time Mr Heappey was taken outside to be dealt with. You provided the extra presence, which made Mr Heappey's escape and survival less likely. As you explained to the probation officer, the point at which you punched and choked Mr Heappey was when he was trying to "take off".
>
> (Footnote omitted.)

[148] We are satisfied the starting point of six years and six months' imprisonment was within the range available to the Judge.[59] The end sentence was not manifestly excessive. The sentence appeal must fail.

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57 *R v Taueki*, above n 49, at [40].

58 Crimes Act 1961, s 177.

59 In *R v Madams* [2017] NZHC 81, one offender, L, participated in a group assault on a gang president, who later died. L pleaded guilty to manslaughter. L struck the victim with a weapon once. Mallon J adopted a starting point of seven years' imprisonment.

In *R v Innes*, above n 50, Mr Innes was a party to manslaughter for creating a plan with the principal offender to obtain drugs from the occupants of a house. Mr Innes lured them out of the

Result

[149] The appeal against conviction is dismissed.

[150] The appeal against sentence is dismissed.

MALLON J

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Introduction

[151] I write this separate judgment on the trial Judge's directions on s 66(2) of the Crimes Act. I do so because I consider it was necessary to direct the jury that, for a manslaughter verdict, they had to be sure that Mr Burke foresaw a real risk that Mr Heappey would be killed in the course of carrying out the common purpose that Mr Burke shared with Mr Webber. In short, I consider that, because a killing is a core element of a manslaughter offence, it is part of what must be foreseen as a risk when Mr Burke committed to the common purpose. I agree with the majority judgment on all the other issues on appeal.

The meaning of "offence"

[152] I start with the words of s 66(2) and first principles. Section 66(2) provides that Mr Burke is a party to the "offence" committed by Mr Webber in the prosecution

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house and the principal offender threatened them with a knife. The principal offender eventually stabbed one of the occupants to death with the knife. Mander J adopted a starting point of four and a half years' imprisonment.

In our view Mr Burke's offending is considerably worse than that in *Innes* because he anticipated the use of violence and then participated in the physical assault of the deceased. It is less serious than that in *Madams*, however, because he did not use a weapon and was not aware of Mr Webber doing so.

of the common purpose (a physical beating or "hiding") if "that offence" was known by Mr Burke to be a probable consequence of the prosecution of that common purpose.

[153] The content of an offence (or crime) is determined by its statutory definition. It is made up of the actus reus committed with the necessary mens rea as defined by the statute. The actus reus is every part of the definition of the offence, other than references to the required mens rea or to any excuse. It includes an act and any consequence of that act.[60] The mens rea refers to the state of mind expressly or impliedly required by the definition of the charged offence.[61] Where the actus reus of the charged offence requires a person's conduct to bring about a particular consequence, the person will have a sufficient mental state as to that consequence if he or she intends to bring about that consequence and also, in many cases, if he or she was reckless as to that consequence occurring.[62]

[154] The actus reus of murder and manslaughter is a "culpable homicide", that is, a culpable killing of another person.[63] Put another way, it is an essential ingredient of any offence of culpable homicide that there be a killing of one person by another.[64] For present purposes, the relevant culpability is an unlawful act.[65] The unlawful act

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60 Richard Card and Jill Molloy *Card, Cross and Jones Criminal Law* (22nd ed, Oxford University Press, Oxford, 2016) at 41. See also Glanville Williams *Criminal Law: The General Part* (2nd ed, Stevens and Sons, London, 1961) at 19: "One cannot formulate a test for the ingredients of an act, except the test of what is required by law for the external situation of a crime. Writers have often pointed out that there is generally no harm in a man's crooking his right forefinger, unless it is (for example) around the trigger of a loaded gun which is pointing at someone. The muscular contraction, regarded as an *actus reus*, cannot be separated from its circumstances. When the specification of a crime includes a number of circumstances, all of these are essential and all must be regarded as part of the *actus reus*. It will be shown later that any narrower view is undesirable because it creates greater uncertainty and also because it leads straight to haphazard strict responsibility in crime, enabling judges to pick and choose in different ways between elements of a crime for the purpose of the requirement of *mens rea.* The view that *actus reus* means *all* the external ingredients of the crime is not only the simplest and clearest but the one that gives the most satisfactory results." The preceding passage was quoted in support of the definition of actus reus in Bryan A Garner (ed) *Black's Law Dictionary* (11th ed, Thomson Reuters, St Paul, 2019) at 45–46: "**actus reus** … **1.** The wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability; a forbidden act <the actus reus for theft is the taking of or unlawful control over property without the owner's consent>. **2.** The voluntary act or omission, the attendant circumstances, and the social harm caused by a criminal act, all of which make up the physical components of a crime."

61 Card and Molloy, above n 60, at 77.

62 At 78.

63 Crimes Act 1961, ss 158 and 160(3).

64 Gerald Orchard "Strict Liability and Parties to Murder and Manslaughter" [1997] NZLJ 93 at 93. The same point is made by Julia Tolmie "Uncertainty and Potential Overreach in the New Zealand Common Purpose Doctrine" (2014) 26 NZULR 441 at 466.

65 Crimes Act, s 160(2)(a).

will be murder if it is committed with murderous intent (which has an extended definition) or manslaughter if it is not.[66]

[155] It seems to me, then, that for a party to a common purpose to be liable under s 66(2) for murder or manslaughter for a killing carried out by the principal, the offence that must be foreseen as a real risk by that party is a culpable homicide. That is, as relevant here, the real risk that the victim will be killed by the principal's unlawful act. If that is foreseen, whether the party is guilty of murder or manslaughter will depend only on whether the party also foresees the risk that the principal will kill the victim with murderous intent. If the party does, they have foreseen all the actus reus and mens rea components that make up the offence of murder. If the party does not, they have foreseen all the actus reus and mens rea components of manslaughter.[67] If the party does not foresee the risk of a killing, they are entitled to an acquittal on the charge.[68]

[156] On my view, the majority's analysis at [59] omits a central requirement from the actus reus component of the offence of manslaughter that must be foreseen by the party: that the act carried out by the principal is one that causes a person to be killed. The actus reus in my view is not simply the assault. Rather, it is an assault causing a death. Both the assault and its consequences must be proven.

[157] I consider the majority's approach effectively conflates the mens rea element for a manslaughter verdict for a principal with the mens rea component of s 66(2). The mens rea component of s 66(2) is that the "offence" committed by the principal was known to be a probable consequence of the prosecution of the common purpose.[69] In other words, it must be proven that the party knew that the "offence" (being those things that make up the actus reus and mens rea requirements of the offence, which

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66 Sections 167 or 168 (murder) and s 171 (manslaughter).

67 This is consistent with *Ahsin v R*, above n 18, at [102(e)], commenting that foreseeability of the "offence" under s 66(2) requires "foresight of both the physical and mental elements of the essential facts of the offence".

68 They may be liable on a charge that relates to their participation in the unlawful common purpose, however. For example, in some cases the parties are also charged with participating in an organised criminal group, as was the case in *Edmonds v R*, above n 19, where the party had pleaded guilty to that charge. Two of the parties in *R v Madams*, above n 59, were also charged with this offence and found guilty of it at trial.

69 In addition to the mens rea component relating to the person's participation in the common unlawful goal.

for manslaughter is an unlawful act that causes the victim to die) was something that could well happen in the prosecution of the common purpose.

[158] The majority makes the point at [60] that if the party is required to foresee the risk of death from the prosecution of the common purpose, there is no difference between a party's liability for manslaughter and their liability for murder. I am not sure this is correct. I illustrate my thinking with reference to the circumstances in this case.

[159] Mr Webber was convicted of murder. Mr Burke would also be guilty of murder under s 66(2) if:

(a) Mr Webber and Mr Burke shared a common understanding to give Mr Heappey a hiding;

(b) Mr Webber and Mr Burke agreed to help each other with that (here they agreed that Mr Webber would carry out the assault and Mr Burke would assist with his presence, providing "weight in numbers" and to stop Mr Heappey from escaping); and

(c) Mr Burke knew it could well happen that, in the course of carrying out the hiding, Mr Webber would kill Mr Heappey with murderous intent.

[160] The last element involves Mr Burke knowing that it could well happen that:

(a) Mr Webber could kill Mr Heappey intending to do so; or

(b) Mr Webber could kill Mr Heappey meaning to cause him serious injury, knowing this was likely to cause death, and consciously running that risk.

[161] Mr Burke would be guilty of manslaughter under s 66(2) if:

(a) Mr Webber and Mr Burke shared a common understanding to give Mr Heappey a hiding;

(b) Mr Webber and Mr Burke agreed to help each other with that (here they agreed that Mr Webber would carry out the assault and Mr Burke would assist with his presence, providing "weight in numbers" and to stop Mr Heappey from escaping); and

(c) Mr Burke knew it could well happen that in the course of carrying out the hiding, Mr Webber would kill Mr Heappey without intending to do so, or without intending to cause him serious injury and knowing that injury would likely cause him to die and consciously running that risk.

[162] How might Mr Burke have known this could well happen? The answer might be this. Mr Burke might have recognised the risk that, when carrying out the "hiding", Mr Webber might not realise his own strength and, in the heat of the moment, inflict a punch that was more forceful than he (Mr Webber) intended and without him (Mr Webber) appreciating that it was likely to cause Mr Heappey's death. If so, Mr Burke had agreed to participate in an assault that he understood might go further than the plan and cause Mr Heappey's death. But that does not mean that he also appreciated the risk of Mr Webber doing that intentionally or intending to cause Mr Heappey serious harm and knowing that it was likely to cause him to die and consciously running that risk. Without that additional appreciation of the circumstances in which Mr Heappey might be killed, he would be guilty of manslaughter and not murder.

[163] I now consider the cases. Although there are some earlier cases, the key cases of this Court on the issue of parties to homicide are *R v Tomkins* and *R v Te Moni* on the one hand (where the murder charge was brought under s 167)[70] and *R v Tuhoro* and *R v Rapira* (where the murder charge was brought under s 168) on the other.[71]

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70 In *R v Te Moni*, above n 24, the charge of murder was laid under both ss 167 and 168, but the appeal did not discuss s 168, as is noted in *R v Rapira*, above n 22, at [25].

71 *R v Tomkins*, above n 24, per Cooke and McMullin JJ, and Sir Thaddeus McCarthy; *R v Te Moni,* above n 24, per Eichelbaum CJ, Blanchard and Heron JJ; *R v Tuhoro*, above n 23, per Eichelbaum CJ, Thomas and Goddard JJ; and *R v Rapira*, above n 22, per Elias CJ, Gault P and McGrath J.

Section 167 charge

[164] *Tomkins* followed soon after *R v Hamilton*, where the Court held that under s 66(2) the party may be convicted of a lesser form of homicide than the principal and that the jury should have been directed to consider manslaughter.[72] Having made this clear in *Hamilton*, the Court in *Tomkins* was asked to provide guidance for directions to juries on party liability for murder or manslaughter in common enterprise cases. The Court said the "offence" under s 66 "is rightly to be seen, simply and broadly, as culpable homicide".[73] It gave the following guidance for directing juries:[74]

> He will be guilty of the murder if he intentionally helped or encouraged it. He will also be guilty of it if he foresaw murder by a confederate, and in the kind of situation which arose, as a real risk. *But if he knew only* that at some stage in the course of the carrying out of the criminal plan *there was a real risk of a killing short of murder, he will be guilty of manslaughter*. So too if he foresaw a real risk of murder but it was committed at a time or in circumstances very different from anything he ever contemplated: so different that the jury are not satisfied that the murder should fairly be regarded as occurring in the carrying out of the plan. In the latter case *they can still convict of manslaughter if satisfied that he must have known that*, with lethal weapons being carried, *there was an ever-present real risk of a killing* in some way.

[165] The case involved the robbery and murder of a taxi driver, where the principal stabbed the victim and the party stood by with a knife in his hand held by his side. The party, who said he thought the knives were only to be used to frighten the victim, challenged his conviction of manslaughter. The Court concluded that verdict was available because, when lethal weapons are carried, the party must know that there was an ever-present real risk of a killing in some way.[75]

[166] In *Te Moni*, the appeal issue was whether the principal had departed from the common plan (to carry out a bank robbery) by killing a bank teller with a firearm supplied to the principal by the parties. The principal was convicted of murder. The parties were charged under s 66(2). One of the parties was convicted of murder and the other two were convicted of manslaughter. All three parties appealed.

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72 *R v Hamilton*, above n 24, at 251.

73 *R v Tomkins*, above n 24, at 256.

74 At 256 (emphasis added). The first sentence in this guidance related to s 66(1) liability. The requirements for s 66(1) liability were further discussed in *R v Renata*, above n 36.

75 At 256.

[167] In considering this issue, the Court cited in full the above quoted paragraph from *R v Tomkins* and summarised it into the following propositions:[76]

> 1. If the principal offender commits murder, a secondary party may be guilty of the murder (under s 66(1)) if he intentionally helped or encouraged it. …
>
> 2. He will also be guilty if he knew there was a real or substantial risk that murder would be committed by another participant, in the kind of situation which arose. …
>
> 3. If the accused knew there was a real risk of a killing, but did not contemplate any substantial risk that the killing would occur in circumstances amounting to murder, he will be guilty of manslaughter only. …
>
> 4. If the accused foresaw a real risk of murder, but in the event murder was committed at a time or in circumstances very different from anything the accused ever contemplated … he will not be guilty of murder. But he can still be convicted of manslaughter if the jury was satisfied the accused must have known that, with lethal weapons being carried, there was an ever-present risk of a killing in some way.

[168] The critical parts of the trial Judge's directions in *Te Moni* were:[77]

> … the law recognises the difference between murder and manslaughter. *The first question is whether the accused you are considering knew that the probable consequences were that someone might be killed.* …
>
> He or she will be guilty of murder under s 66(2) if the Crown proves beyond reasonable doubt that he or she knew there was a substantial or real risk that Matenga [the principal] would kill with murderous intent in the circumstances which in fact arose. Where two or more persons agree to commit a robbery by one of them, armed with a loaded gun, and the circumstances are such as to justify the inference that the very least that is to be done is to use the gun to cause fear in others, there is always a likelihood that in the excitement and tensions of the occasion the gun may be used so as to cause serious injury. …

[169] The Court was satisfied that the Judge had clearly directed the jury on the requirement for foresight that there might be a homicide, the circumstances in which the homicide might be murder, and that they had a choice between murder, manslaughter and acquittal. The issue was whether the directions covered the fourth principle set out at [167], because the parties contended that the common purpose had ended by the time of the fatal shot. However, the Court was satisfied that the principal

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[76] *R v Te Moni*, above n 24, at 649–650.

[77] At 647 (emphasis added). The Judge went on to give the direction set out at [56] of the majority judgment which, as the majority note, went further than was necessary for a s 66(2) case.

had shot the bank teller in the prosecution of the common plan with the lethal weapon supplied by the parties.[78]

[170] The Court went on to say:[79]

> Matenga was a nervous, inexperienced young man and the risk of murder could not possibly be described as remote. He killed Mr Brown in an attempt to avoid being overpowered and captured … from the point of view of the secondary participants it was always a real possibility that exactly what then occurred would happen; that a bank employee would be shot when trying to overpower the robber with the gun. Mahaki and Te Moni might be counted as lucky to have escaped with a verdict of manslaughter, but the jury may have reasoned that they were not in as good a position as Lemalie [who was convicted of murder] to see the obvious risks of supplying Matenga with a loaded weapon.

[171] The italicised words in *Tomkins* and the third proposition in *Te Moni* support my view at [155] and [161]. A killing must be foreseen by the party to a common enterprise in order for them to be convicted of manslaughter under s 66(2), where they are charged as a party to a murder under s 167. In both *Tomkins* and *Te Moni* the manslaughter verdicts were available because they must have foreseen the risk of a killing (because of the presence of lethal weapons and the obvious risk they involved) even if they did not foresee a killing with murderous intent.[80]

Section 168 charge

[172] In *Rapira*, this Court took a different position where the principal was convicted of murder under s 168.[81] That section provides circumstances in which a culpable homicide is murder even though the offender does not mean for death to ensue or does not know that death is likely to ensue. Following *Tuhoro* and obiter comments in *R v Hardiman* (approved in *Tuhoro*), *Rapira* held that: when the principal is guilty of murder under s 168, the parties would be guilty of murder if they had knowledge that intentional infliction of grievous bodily harm by a person who was part of the common purpose was probable; they would be guilty of manslaughter if they knew that the infliction of more than trivial harm was a probable consequence of

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78 At 649–651.

79 At 651 (emphasis added).

80 This is a subjective test. Tolmie, above n 64, at 462–463, notes the risk of hindsight bias with s 66(2), that is the tendency to view events as being more predictable than they really are.

81 *R v Rapira*, above n 22.

the common purpose; and there was no requirement that death be intended or foreseen by the party.[82]

[173] I acknowledge that the *Hardiman*, *Tuhoro* and *Rapira* line of authorities (concerning party liability under s 66(2) on a s 168 murder charge) is arguably inconsistent with my view that, for s 66(2) party liability on a s 167 murder charge, to have foresight of the "offence" committed by the principal, there must be foresight of a killing. This is because it is also a core element of the offence of murder under s 168 (the offence that must be foreseen by the party) that there be a "homicide", that is the killing of a person.

[174] If my reasoning for s 66(2) liability on a s 167 murder charge applied to a s 168 murder charge, the party would need to foresee that a killing of a s 168 kind could well happen from the prosecution of the common purpose to be guilty of murder. The different mens rea requirements between the principal and the offender would reflect the fact that the principal is the person who does the killing (the offence incidental to the common purpose), whereas the party is liable because he or she agreed to carry out a (criminal) common purpose and foresaw the risk of a death from doing so.[83] As it has been said, an "actus reus deficit is usually counterbalanced by a mens rea surplus".[84]

[175] The reasoning in the obiter comments in *Hardiman* (accepted in *Tuhoro* and *Rapira*) was the subject of criticism by Professor Orchard, whose comments included the following:[85]

> The only aspect of murder "defined in" s 168 is the mens rea which will suffice in certain cases. As to that element it will be enough under s 66(2) that a party foresees that the principal may well act with the state of mind … but, as its terms recognise, s 168 can apply only when there has been a culpable homicide: even murder "as defined in" s 168 requires the unlawful killing of a human being. …
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> …

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82 *R v Tuhoro*, above n 23, at 571–573; *R v Hardiman*, above n 23, at 652 and 654; and *R v Rapira*, above n 22, at [21]–[33].

83 Tolmie, above n 64, at 465–467.

84 At 466, n 133, where the author attributed the quote to Beatrice Krebs "Joint Criminal Enterprise" (2010) 73 MLR 578 at 590.

85 Orchard, above n 64, at 94 (citations omitted).

> The dicta in *Hardiman* … allow[s] convictions for murder although the accused did not advert to an essential ingredient of the actus reus of the crime. The imposition of such strict liability in this context may be thought to be wrong in principle … but in the case of principal offenders it is expressly provided for in s 168, and in the case of secondary parties under s 66(1). This result is at least not clearly inconsistent with the terms of the Act. But it is submitted that this is not true of s 66(2) and that when that is relied upon the rule is unsupportable. Section 66(2) codifies a "wider principle" governing secondary liability … and it would not be anomalous if it were held that its seemingly clear terms demand more knowledge of likely consequences than is required of a principal, or an aider, abettor, counsellor or procurer.

[176] While Professor Orchard's views were considered but not adopted in *Tuhoro*,[86] the additional knowledge of likely consequence required of a party under s 66(2) than of the principal is consistent with my view about what it is that the party must foresee to be convicted of manslaughter when the charge is brought under s 167. As discussed in *Tuhoro*, the difference in approach to s 66(2) liability when the charge is s 168 (as opposed to s 167) reflects the policy of s 168. When s 168 is charged, the offence for the purposes of s 66(2) "is to be taken to be murder as defined in s 168(1)(a)".[87] The Court preferred a unanimous decision of the Supreme Court of Canada on the point as more correctly giving effect to the purpose of ss 168 and 66(2).[88] The Court explained:[89]

> Section 168 reflects a policy deeming persons to be guilty of murder when they have intentionally inflicted serious injury for the purpose of facilitating the commission of specified offences at the higher end of the scale. Uniquely, in relation to the definition of murder, foresight of a killing is not required; … It is consonant with the intent of the legislature that parties to the offending should likewise be liable to the fullest extent notwithstanding that in their case too they did not foresee the death of the victim. Having regard to the increasing number of persons prepared to combine for major criminal activity, as [counsel for the Crown] submitted it is neither contrary to public policy nor unjust to hold them to account on the same basis as the actual perpetrator of any crimes within the scope of their criminal plan.

[177] Both *Tuhoro* and *Rapira* distinguished *Tomkins* rather than overruled it.[90] They do not hold that when the murder charge is brought under s 167 it is unnecessary

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86 *R v Tuhoro*, above n 23, at 572–573.

87 At 573. Professor Orchard's point is that s 168 only defines the mens rea and still requires a killing.

88 *R v Trinneer* [1970] SCR 638, followed in *R v Jackson* [1993] 4 SCR 573.

89 *R v Tuhoro*, above n 23, at 573. The policy rationale was cited with approval in *Rapira*, above n 22, at [21].

90 *R v Tuhoro*, above n 23, at 577; and *R v Rapira*, above n 22, at [24].

for a party charged under s 66(2) to foresee the risk of death to be guilty of either murder or manslaughter.

[178] That leads me to whether *Edmonds v R* requires a different approach to a s 167 murder charge for s 66(2) party liability.[91] That case was about whether a party under s 66(2) needed to have knowledge of the weapon used by the principal who carried out the killing to be guilty of manslaughter, where the agreed common purpose was to inflict serious violence and to help each other with that.

[179] However, as the majority has set out earlier, the Supreme Court raised whether it was necessary or correct to direct juries in culpable homicide cases, other than under s 168, that the party must subjectively appreciate that death was a probable consequence of the prosecution of the common purpose.[92] Certainly, that is a signal that the Court might decide in a future case that the practice is not correct. However, the Court might not do so when the time comes and it hears full argument on the issue. Perhaps in support of my view on the issue of the "offence" that must be foreseen is that, on the knowledge of a weapon issue (the issue before the Court), *Edmonds* emphasises the importance of following what s 66(2) actually says.[93]

Conclusion

[180] I conclude that the words of the provisions and principle support my view that, for a party under s 66(2) to be liable for murder or manslaughter under s 167, he or she must appreciate the risk that someone will be killed. I consider this is supported by the cases of this Court that have directly addressed it. The s 168 cases have distinguished rather than overruled these cases and *Edmonds* did not decide the issue. I do not think it is for this Court to extend to s 167 the purposive interpretation that was favoured in *Tuhoro* and *Rapira* for s 168. I therefore consider that the jury question trail was in error because, under s 66(2), it directed that the jury could convict Mr Burke of manslaughter without requiring that he foresee the risk of the victim being killed by the actions of Mr Webber.

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91 *Edmonds v R,* above n 19, per Elias CJ, Blanchard, Tipping, McGrath and William Young JJ.

92 At [10] and [27], citing: *R v Rapira*, above n 22, at [25]; *R v Curtis* [1988] 1 NZLR 734 (CA) at 740–741 (a case concerning a charge that failed under s 66(2) and which could have been brought under s 66(1)); and the practice in other jurisdictions and the common law.

93 *Edmonds v R*, above n 19, at [47].

[181] I note that the jury question trail put the path to s 66(2) liability for manslaughter on two bases. The first required that Mr Burke know that Mr Webber was in possession of a knife at the time of the assault.[94] This was in line with the Judge's directions on the alternative basis for liability under s 66(1) where, following *R v Hartley*, the Judge directed the jury to consider whether Mr Burke knew that Mr Webber would stab the victim and intended to assist with it.[95]

[182] The route to liability if Mr Burke knew that Mr Webber was in possession of a knife would likely have led to a manslaughter verdict under s 66(2) on the basis of *Tomkins*. That is because, as in *Tomkins,* if Mr Burke knew that a lethal weapon was carried in the prosecution of the common purpose to "inflict a physical beating or hiding", he must have known that there was an ever-present real risk of a killing in some way.[96] The jury was unlikely to have had any difficulty with this if directed to consider whether Mr Burke had this knowledge.

[183] However, if the jury were not sure of whether Mr Burke knew Mr Webber was in possession of a knife, they were directed that they could still convict Mr Burke of manslaughter if he "knew that Mr Webber knew the assault would be dangerous, being likely to cause harm that was more than trivial", without a further direction about whether Mr Burke foresaw the risk of a killing.

[184] It is not known which route the jury took, and this was the subject of submissions at sentencing. When sentencing Mr Burke, the Judge said:[97]

> [13] … That is, the verdict does not record whether the jury found you guilty because you encouraged or assisted Mr Webber in the stabbing of Mr Heappey or, on the other hand, because you were involved in a plan to punish Mr Heappey by assaulting him. I will sentence you on the basis that you were guilty as a party under s 66(2), and that the plan involved Mr Heappey getting a physical beating or "hiding". But I do not ignore the fact that you knew Mr Webber to be both the gang's enforcer and a person prone to violence — as you described it to the probation officer he was "often crazy and out of control". You also knew that you were both operating in a meth-fuelled environment.

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94 The question that proceeded question 21 set out at [29] of the majority judgment was "[a]re you sure that Mr Burke knew that Mr Webber was in possession of a knife at the time of the assault on Mr Heappey? If yes, go to question 21. If no, go to question 22."

95 *R v Hartley* [2007] NZCA 31, [2007] 3 NZLR 299.

96 *R v Tomkins*, above n 24, at 256.

97 *R v Burke*, above n 46.

> [14] [Defence counsel] also addressed me on the matter of what you know or did not know about Mr Webber's possession of a knife that day. As a notional 13th juror, I am not satisfied that you knew for sure that Mr Webber had a knife on him at the time the two of you escorted him outside for his punishment, but I proceed on the basis that you knew his possession of a knife was a distinct possibility.

[185] Although I take a different view from the majority on the necessary legal directions, a manslaughter verdict was inevitable on these facts if the jury had been directed that they needed to be sure that Mr Burke knew it could well happen that Mr Heappey would die. Mr Burke was prepared to join the common plan and help with it, knowing the risk that Mr Webber, a gang enforcer operating in a meth-fuelled environment, would take a knife to the hiding Mr Heappey was to be given for disrespecting the gang president. In those circumstances, he must have known of the risk that Mr Webber would kill the victim. I agree with the Crown's submission that there was no injustice in a conviction of manslaughter on these facts.

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