IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA2/2022
[2023] NZCA 143

BETWEEN	ABDIHAFID MOHAMED Appellant
AND	THE KING Respondent

Hearing: 31 October 2022

Court: French, Thomas and Mallon JJ

Counsel: S J Shamy for Appellant
S C Baker for Respondent

Judgment: 3 May 2023 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B Leave to adduce the evidence filed in support of the appeal to the extent that it is not within r 12A of the Court of Appeal (Criminal) Rules 2001 and is not credible is declined.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] On the afternoon of 5 December 2020, Jude Frank Okorie was stabbed in his home by a man he described as "the Somalian guy". The Crown case was that Abdihafid Ali Mohamed was the Somalian guy. Following a jury trial in the Christchurch District Court, Mr Mohamed was convicted on a charge of wounding Mr Okorie with intent to cause grievous bodily harm.[1] He was also convicted of an associated charge of failing to assist a police officer exercising a search by failing to provide the PIN to his phone.[2] He was subsequently sentenced by the trial Judge, Judge M J Callaghan, to seven years and two months' imprisonment.[3]

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1 Crimes Act 1961, s 188(1).
2 Search and Surveillance Act 2021, s 178.
3 *R v Mohamed* [2021] NZDC 24603.

[2] Mr Mohamed appeals his conviction. He contends:

(a) he did not make a fully informed election about whether to give evidence because he was not sufficiently informed of relevant matters and was given incorrect advice by his trial counsel;

(b) his trial counsel did not follow his instructions to present his defence on the basis that it was his flatmate "George" who was the person who stabbed Mr Okorie;

(c) his trial counsel should have made investigations of a potential witness, Saaid Abdukadir, who could corroborate that Mr Mohamed had a flatmate called George;

(d) he was not given adequate advice from his trial counsel before agreeing that the written statement of an eyewitness, Rosmilawati Walik, could be admitted by consent; and

(e) inadmissible evidence was admitted at his trial, namely identification evidence from Mr Okorie, evidence that Mr Mohamed had served time in prison in Australia and was deported from that country, and evidence of money being found at Mr Mohamed's address.

[3] The Crown opposes the appeal. It says none of the matters raised by Mr Mohamed give rise to a miscarriage of justice.

The respective cases at trial

The Crown case

[4] The Crown case was as follows. Mr Okorie had been asked by "Jerry", a person from the same African village as Mr Okorie but who now lived in Holland, to collect a debt for him. Mr Okorie was sent a phone number for the debtor and a photo of him. Mr Mohamed was the debtor and he had learned that Mr Okorie was looking for him. Mr Okorie's friend, Nasir Khadar, brought Mr Mohamed to the sleepout in

Hoon Hay Road, Christchurch where Mr Okorie lived. Mr Mohamed stabbed Mr Okorie because he did not want to pay the debt. Mr Khadar hid the machete knife before the police arrived. Mr Khadar was arrested and later charged and convicted of being an accessory to the stabbing.

[5] The principal evidence of the stabbing was given by Mr Okorie. The Crown also called evidence from the person who lived at the front of the Hoon Hay address and from investigating police officers. Statements from Ms Walik, who happened to visit Mr Okorie when the stabbing took place, and the doctor who attended on Mr Okorie were admitted by consent. Telecommunications data was also relied on. Mr Khadar was not called by the Crown. A week before the trial he had told the police that he did not want to give evidence because he feared for his safety and would stay silent. As later discussed, he gave evidence for the defence.

[6] Mr Okorie gave evidence that, prior to the stabbing, Jerry had contacted him to collect the debt and sent to him, via WhatsApp, two photographs of the man (whom Mr Okorie described as "the Somalian guy") and a contact cell phone number for him (referred to as the 8085 number).

[7] On 3 December 2020 Mr Okorie texted the 8085 number asking for an address. He received a text reply with an address he was to go to. He went to the address accompanied by "two Māori men" but the person in the photographs was not there. A friend gave him another address, and again accompanied by the two Māori guys, he went to that address. From outside the address, Mr Okorie sent a text message to the 8085 number asking for the money. He received a text response from that number. The sender of that response said his brother, who lived in Australia, would bring the money.

[8] On 4 December 2020, via Facebook messenger, Mr Okorie invited Mr Khadar to a house-warming on 5 December 2020. Mr Okorie told Mr Khadar that he recently moved into a new place in Hoon Hay, which was near Addington.

[9] On 5 December 2020, at 1.09 pm Mr Okorie received a text message from the 8085 number that said "I'm definitely going to catch you Big man". Mr Okorie

responded with a series of messages that included: “Fake man”, “U think ur smart”, “u went to jail in Australia”, “came back to New Zealand”, “I’m not into that shit business u are doing”, “But I will destroy ur game in Christchurch”, and “Go ask ur family nasir who iam”.

[10] Cell phone data showed that Mr Khadar called the 8085 number at 1.58 pm that day. Shortly after this, Mr Khadar telephoned Mr Okorie on Facebook messenger. Mr Okorie then sent a message to Mr Khadar with details of his Hoon Hay address.

[11] At around 2.45 pm, Mr Khadar arrived at the Hoon Hay address. On Mr Okorie’s account, Mr Khadar first went into the sleepout by himself and asked Mr Okorie if he was alone. Mr Okorie confirmed that he was. Mr Khadar told Mr Okorie that he had the Somalian guy outside who wanted to talk to Mr Okorie. Mr Okorie was surprised by this because his invitation to Mr Khadar was to come to his house for a housewarming.

[12] At 2.54 pm there was a voice call of 30 seconds from Mr Khadar’s phone to the 8085 number. The Crown said that this was Mr Khadar letting Mr Mohamed know that Mr Okorie was in the sleepout alone.

[13] Mr Okorie’s evidence was that the Somalian guy came into the sleepout and pulled out a long knife. The knife was a little longer than Mr Okorie’s forearm. The Somalian guy was saying “I got you, you think you are tough. I got you now”. He was breaking glass in the house and putting the knife under Mr Okorie’s neck. While this was happening, Mr Okorie’s ex-girlfriend, Ms Walik, knocked and came into the sleepout. Mr Khadar took her outside. The Somalian guy said he did not want to pay the money and started stabbing Mr Okorie after Mr Okorie had tried to grab the knife off him. Mr Okorie received three cuts – one to the side of his torso, one under his armpit and one into his back. Mr Okorie fainted, Mr Khadar came in to save him and the Somalian guy ran away.

[14] The incident was heard by the person who lived at the front of the address and other neighbours. They came to Mr Okorie’s assistance. A 111 call was made at 3.15 pm and the police and an ambulance responded.

[15] At 3.17.37 pm, 3.17.45 pm and 3.19.46 pm, there were three voice calls from the 8085 number to Mr Khadar's number of three seconds, three seconds and two seconds respectively. The Crown said this was Mr Mohamed attempting to make contact with Mr Khadar after fleeing from the scene.

[16] Detective Constable Gath was one of the attending officers. He arrived at 3.40 pm. Ms Walik gave Detective Constable Gath an account of what happened (a formal statement was taken from her later that day which gave an account broadly similar to Mr Okorie's account)[4] and told the officer that she had seen Mr Khadar taking a large knife out behind the sleepout. By this time, Mr Khadar had been arrested. Detective Constable Gath searched for the knife but could not find it. A subsequent police search for the knife also failed to find it.

[17] The ambulance had taken Mr Okorie to the hospital's emergency department. The doctor attending him observed a deep cut on his back and hip. Detective Constable Gath received word from the hospital that there was a screenshot of the offender on Mr Okorie's cell phone. He went to the hospital where Mr Okorie was almost hysterical. Detective Constable Gath had three cell phones with him that had been seized from the property. Mr Okorie showed Detective Constable Gath a photograph (the first of the two photographs that Jerry had sent to him) and the officer took a screenshot of that photograph. Mr Okorie declined to give the officer the PIN numbers for the three phones.

[18] On 7 December 2020 Detective Constable Gath again spoke with Mr Okorie. Mr Okorie provided him with access to the phone with the messages from Jerry, allowing him to look through the phone and take photographs of items that the Detective Constable considered to be relevant. One of the messages referred to sending details for money to go through Western Union. Another had the name "Bokhadar Sharifabden". Another was a photograph of the person Mr Okorie referred to as the Somalian guy. Mr Okorie also allowed the Detective Constable to look through one of the other phones. He did not provide the officer with access to the third cell phone, saying that it was an old phone.

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4 As discussed later at [94]–[100], her statement was admitted by consent because she was unavailable.

[19] On 8 December 2020 Mr Okorie brought into the police station a sheath and a cigarette packet that he said the Somalian guy had left at the address. The cigarette packet was not forensically tested due to the time that had elapsed since the incident and because Mr Okorie indicated it had been handled by several people. DNA testing of the sheath showed DNA from the victim and four other males but of insufficient grade to test against any other person's DNA.

[20] Detective Constable Gath carried out an internet search to identify the machete that matched the sheath. The machete he identified had a blade length of 30 cm and an overall length of 45 cm. A machete and sheath of the same kind was later found at Mr Mohamed's Buffon Street address when he was arrested on 31 December 2020.

[21] Based on Mr Okorie's understanding that the Somalian guy had served jail time in Australia and had then come to New Zealand (as per the messages Mr Okorie sent to the 8085 number shortly before the stabbing[5]), Detective Constable Gath obtained a list of deportees from Australia. Using time, ethnicity, age and location filters, the list was narrowed down to three, of which Mr Mohamed was one. Detective Constable Gath commented that Mr Mohamed had a quite distinctive blemish on his cheek which matched the photographs Mr Okorie had on his phone. He excluded the other two because they looked nothing like the person in the photographs.

[22] On 9 December 2020 Mr Okorie took part in a formal identification procedure.[6] He was shown eight photographs. He identified the person in photograph 2 as the Somalian guy who had stabbed him. He noted on the form: "He is the one that stabbed me", "It is <u>him</u>. I know it is him. He had the <u>knife</u>".[7] That person was Mr Mohamed.

[23] The Crown closed to the jury on the basis that Mr Mohamed was the person who stabbed Mr Okorie relying on the following evidence:

(a) Identification evidence from Mr Okorie:

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5 Refer [9] above.
6 Evidence Act 2006, s 45(3).
7 Emphasis in original.

(i) the evidence that Mr Okorie told the police at the hospital that he recognised the attacker as the same person in the photograph Jerry sent to him;[8] and

(ii) the evidence that Mr Okorie identified Mr Mohamed in the formal identification procedure.

(b) Evidence showing the 8085 number was used by Mr Mohamed and that a person using that phone was linked to the incident:

(i) Mr Okorie's evidence that Jerry had provided the 8085 number to Mr Okorie with images of the person who matched Mr Mohamed's appearance;

(ii) evidence that on 4 December 2020 the 8085 phone received a text message from a dentist about a recent dentist appointment that commenced "Dear Abdi";

(iii) evidence that on 4 December 2020 the 8085 phone sent a text message that commenced "Hey it's abdi" and which made a complaint about his neighbour at "64".

(iv) evidence from the investigating officers that Mr Mohamed was arrested at 63/10 Buffon Street on 31 December 2020, consistent with "64" being Mr Mohamed's neighbour;

(v) evidence that the 8085 number texted Mr Okorie around two hours before the stabbing saying "I'm definitely going to catch you big man"; and

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8 Mr Okorie's evidence was that he recognised Mr Mohamed as the person in the first photograph sent to him by Jerry. He was not asked by the police when he was in hospital if he had seen the second photograph of this person in his phone before he was stabbed. Mr Mohamed has since seen one of these photographs and accepted in his evidence on the appeal that he is the person in that photograph.

(vi) evidence that Mr Khadar called the 8085 number twice before the stabbing and that number tried to call Mr Khadar three times in quick succession after the stabbing at a time when that number appeared to be polling off cell towers near to where the stabbing took place.

(c) Evidence that a machete and a machete sheath found at Mr Mohamed's address when he was arrested matched a machete and sheath Mr Okorie found at his address after the incident.

(d) Evidence that confirmed Mr Mohamed was an Australian deportee, which was consistent with Mr Okorie's messages to the 8085 number prior to the incident that he knew the Somalian guy had been to jail in Australia and had come to New Zealand, and that Mr Mohamed was the only Australian deportee that matched Mr Okorie's description of the attacker.

[24] The Crown submitted that if the attacker was not Mr Mohamed then he must be about the unluckiest man in the world because all the evidence pointed to him. The Crown also submitted that Mr Khadar, who gave evidence for the defence, had no credibility.

The defence case

[25] The defence case was that Mr Mohamed was not the person who stabbed Mr Okorie.

[26] The defence called evidence from Mr Khadar. He said his full name was Sharif Abdinasir Mohamed Khadar and he was known as Sharif Khadar, Nasir Khadar or Nasir. He explained that Abdi is a sub name and means servant of Allah and was common to a lot of names. His own sub name was Abdinasir.

[27] He confirmed he was friends with Mr Okorie, who he knew as Frankie. He also confirmed he knew Mr Mohamed, who he knew as Hafid Ali Mohamed. He was closer to Mr Okorie than he was to Mr Mohamed. Mr Khadar confirmed he was at

Mr Okorie's address when the incident occurred with another man. He said the man was not Mr Mohamed.

[28] Mr Khadar would not say who the man was. He said that he feared for his own safety and that of his family if he said who it was. He had previously told the police the person he was with was "Red". He had gone to Mr Okorie's address and told him that Red was there to sort out a debt. Red then came into the sleepout. He did not recall if Red was holding the knife to Mr Okorie's neck before Ms Walik's arrival. Ms Walik then arrived. Things were pretty tense at this point. He went outside with Ms Walik. From outside, he could hear that something was going on in the sleepout.

[29] He said he did not see Red stabbing Mr Okorie. He tried to break up the fight and fell and hit his head on the table. By the time he was waking up from the fall, Red had gone. He took the knife and put it on the ground behind the sleepout.[9] He denied hiding it. He said he put it where it could be seen. He confirmed he had pleaded guilty to being an accessory after the fact to wounding with intent to cause grievous bodily harm and the basis for the charge was that he had thrown a knife from the scene of the crime over a fence.

[30] He said he did not recall the phone calls to his phone that day – he said his phone was flat at the time of the incident which meant he was unable to call 111 on it. In cross-examination, Mr Khadar said he had been contacted by Red at about 2 pm on 5 December and shortly after that he contacted Mr Okorie to get his address. He confirmed this was to sort out the situation with Mr Okorie. He confirmed they arrived at Mr Okorie's address just after 2.45 pm.

[31] It was put to him that he was lying about Red, and that the person he was with was Mr Mohamed. He denied this. He confirmed that he had told the police that he did not want to come to court. He was asked to confirm that he had denied knowing Mr Mohamed when asked by the police. He said the police had asked "do you know Abdi" and "do you know Mr Mohamed" but that, as there are lots of Abdis and Mohameds in his community, he did not know who they were referring to specifically.

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9 Ms Walik's statement had referred to seeing the person she described as the "fat guy" taking a big kitchen knife around the back of the sleepout.

It was put to him that he lied when he said he did not know the defendant Mr Mohamed. Mr Khadar said "no, I don't recall". It was put to him that he was scared of Mr Mohamed and that was why he was lying and saying that it wasn't Mr Mohamed. He said "those are all your assumptions. That's not what I said".

[32] The Crown was permitted to call rebuttal evidence from Detective Constable Gath.[10] He said that Mr Khadar was summonsed to attend Court and the Court's summons referred to the defendant by his full name. He said that, when he met with Mr Khadar in the week before trial, he referred to "Abdi Mohamed", "the defendant". He was confident that Mr Khadar knew who he was referring to. The rebuttal evidence included the following:

> Q. How confident are you that Mr Khadar knew you were referring to Mr Mohamed, the defendant?
>
> A. There was no confusion with our conversation of what, of who we were speaking about. It was like, he was, yeah, we were sure that we were speaking about the defendant.
>
> Q. And to be clear, what did he say about what he knew about Abdi Mohamed, the defendant?
>
> A. That he just knew him as Red, that he didn't know who he was and, yeah, only know him by the name of Red.
>
> Q Again, just because this is all very important, are you saying that Mr Khadar was talking about Abdi Mohamed as Red as the same person or not?
>
> A. So he was talking about, we were talking about the case and he was talking about Abdi Mohamed as Red but didn't know who that person was.

[33] The Detective Constable gave evidence of the job sheet he completed on the day of his conversation with Mr Khadar. That job sheet included the following:

> He did not wish to come to court and would stay silent or say that (Abdi) Mohamed was not the person who stabbed Frankie. He would not say who did though. He went on to say that he doesn't know Abdi Mohamed.

[34] The Detective Constable thought Mr Khadar was giving him "the run-around". As recorded in his job sheet, the officer told Mr Khadar that he had seen Mr Khadar

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[10] *R v Mohamed* DC Christchurch CRI-2020-009-010662, 21 September 2021 (Minute of Judge M J Callaghan).

and Abdi Mohamed arrive together at a remembrance service at the Deans Ave Mosque. The officer was at the Mosque as part of the police presence at the service.

[35] The defence closed to the jury on the basis that they should believe Mr Khadar that he was not with Mr Mohamed that day. The defence made the point that there was no scientific evidence that Mr Mohamed was at the sleepout when the stabbing occurred. The defence submitted that the Crown case relied primarily on the evidence of Mr Okorie who the jury should find was a very unreliable witness. This was for several reasons: Mr Okorie was adamant that he had only two phones yet Detective Constable Gath uplifted three phones and took them to the hospital; he gave a different description of the attacker than Ms Walik had given in her statement; Mr Okorie's evidence of finding the sheath was not to be believed as, if it had been left at the scene, then the police would have found it when they searched the sleepout. The defence also referred to the absence of evidence from the police about how common this type of knife was. The defence made the point that at the time of the messages about collecting the debt the only name in those messages was not Mr Mohamed's name.[11] The defence submitted that Mr Okorie falsely connected the man who stabbed him with the photo on his phone, and the later formal identification was tainted by that false connection.

Evidence on appeal

Affidavits

[36] Mr Mohamed filed affidavit evidence in support of his appeal and was cross-examined on it. Affidavit evidence from his brother, Abdiqaaliq Ali Mohamed, was also filed but he was not available for cross-examination. An affidavit was also filed from the defendant's cousin, Saaid Abdukadir. Mr Abdukadir was cross-examined. In addition, Mr Khadar gave evidence pursuant to a summons and was cross-examined.[12]

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11 The only name in the messages was Bokhadar Sharifabden.

12 Shortly before trial the possibility of an adjournment was raised on Mr Mohamed's behalf because of recent disclosure of an iPhone in police custody: *Mohamed v R* CA2/2022, 28 October 2022 (Minute of French J). However, at the outset of the appeal hearing, Mr Shamy advised that an adjournment was not sought.

[37] The Crown filed affidavits from Stephen Hembrow (Mr Mohamed's trial counsel), Philip McDonnell (counsel assisting Mr Hembrow at the trial), Detective Constable Gath, Michelle Bayliss and Gaynor Burgess. The evidence of the latter two related to the contention that a person called George had Mr Mohamed's phone and was the attacker. Mr Hembrow, Mr McDonnell and Ms Bayliss were all cross-examined.

[38] When an appeal alleges trial counsel error, affidavits responding to this ground of appeal do not require leave.[13] Most of the affidavits are in this category. The affidavits also cover evidence that Mr Mohamed now says should have been before the trial judge if counsel had not mishandled the evidence.[14] This Court's approach is to treat such evidence as fresh if persuaded that counsel error explains its absence from the record.[15] If the new evidence is credible, it is cogent in that it may give rise to a miscarriage of justice. It is necessary to analyse the new evidence as a whole and in the context of the evidence given at trial, which is a reasonably substantial task, to assess its credibility. Our finding on whether it is credible will ultimately determine whether leave to adduce it should be granted.

[39] We first consider Mr Mohamed's account of events relating to the stabbing, the evidence presented in support of this account on appeal and the Crown's response to that evidence, before considering the more specific evidence as to Mr Hembrow's instructions and advice.

Mr Mohamed's account

[40] Mr Mohamed said that he met Ibrahim Prince, known as Jerry, when he was in prison in Australia and that Jerry wanted him to sell drugs when he got out of prison on Jerry's behalf. On the day of his release, he was given the number for Jerry's sister. He made contact with her and was given $15,000 worth of methamphetamine.

[41] He said he did not account back to Jerry or his sister for this and went on the run. He came to New Zealand in 2018. In October 2020 he received a call from a

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13 Court of Appeal (Criminal) Rules 2001, r 12A.
14 Rule 12B. For example, Saaid Abdukadir's evidence.
15 *Loffley v R* [2013] NZCA 579 at [58]; and *S (CA88/2014) v R* [2014] NZCA 583 at [15].

very angry Jerry who told him he had two weeks to pay him back and the amount he owed had doubled to $30,000. Jerry also told him that if he did not do so he would pay for it in blood.

[42] He said he then tried to borrow the money from his brother, Abdiqaaliq Ali Mohamed, who was in Australia. His brother refused to pay the money. The same week he was approached by two Somalian men who he knew from the mosque. They warned him that Mongrel Mob members were looking for him and had a screenshot of his face. He rang his brother, who called a high school friend of his who had ties to the Mongrel Mob. This person was called George but he was known as Red. He met George who told him he would deal with Jerry. He gave George his SIM card. He ended up living at Buffon Street with George. The tenancy agreement was under Mr Mohamed's brother's name (that is, in the name of Abdiqaaliq Ali Mohamed). The tenants all used his brother's name, Abdi, when communicating with the landlord.

Supporting evidence

[43] Mr Mohamed sought to bolster this account with affidavit evidence purportedly from his brother. In that affidavit Abdiqaaliq said that he contacted his friend to help his brother (Abdihafid). His friend's name was George Rehutai, they went to Cashmere High School together and George was one of Abdiqaaliq's closest friends. George was of Māori descent, was "tallish" and had a dark brown complexion. George told Abdiqaaliq that he had ties to the Mongrel Mob and would be able to smooth everything over for his brother (Abdihafid). At this time, George was looking for a rental property. Abdiqaaliq was too. They agreed to share the burden of high rent prices and living expenses by renting a house together. Abdiqaaliq gave George his passport details to use for the tenancy agreement. When Abdiqaaliq moved out, Abdihafid moved in with George. This was as a favour to Abdiqaaliq to help George with the costs.

[44] Mr Mohamed also sought to bolster his account with the affidavit of Saaid Abdukadir. Saaid said he had received a call from his cousin, Abdiqaaliq Mohamed, asking him for help to lease a property. He wanted to use Saaid's tenancy records to help him find a place. Saaid said he did not mind doing the favour. On the viewing

day for the property, he was expecting to see Abdiqaaliq but instead a man named George arrived. He described George as skinny, tall and dark-skinned and was Māori or from the "Islands". Saaid was unclear what was happening, but knew from Abdiqaaliq that he had a good relationship with George. George filled out the tenancy agreement in Abdiqaaliq's name. Saaid later found out that Abdiqaaliq's brother, Abdihafid, started living in the property with George after Abdiqaaliq moved back to Australia for urgent family reasons.

The Crown's response

[45] Gaynor Burgess' evidence responded to the evidence of Abdiqaaliq that George was a friend from Cashmere High School. She is the attendance officer at that school. She confirmed that Abdiqaaliq Ali Mohamed attended that school from 2 September 2009 to 10 December 2010. However, the school records for that period did not show any person named as George Rehutai as attending the school. Moreover, the only "George" that attended the school between 2002 and 2010 had a different surname and attended between 31 January 2006 to 7 December 2009.

[46] The evidence of Michelle Bayliss responded to the evidence that George had lived at the Buffon Street address. She was the property manager for the address. There was an open home for the tenancy followed by an application process. She was not able to say whether she had met Abdiqaaliq at the open home. She confirmed she received an application in the names of Abdiqaaliq Ali Mohamed and Saaid Abdukadir. She received a copy of Abdiqaaliq Ali Mohamed's passport details. She confirmed that, whether it was she or another person from her office who signed the tenancy, the passport photo would have been checked against the person who was signing. She attached a copy of the tenancy agreement for the period of 17 October 2020 to 21 October 2021. It was in the names of Abdiqaaliq Ali Mohamed and Saaid Abdukadir and one of the contact phone numbers given for Abdiqaaliq Ali Mohamed was the 8085 number.

[47] Ms Bayliss said the only mention of a "George" was when Saaid Abdukadir contacted her about wanting to come off the tenancy. She spoke to Saaid by telephone on 2 September 2022 (about two weeks after Saaid had signed his affidavit for this

appeal). She asked him who was the tenant in late 2020. He told her the person living there was a male named George, who was Māori or Samoan, and that he lived there for three months before Abdiqaaliq Ali Mohamed moved in.

[48] Ms Bayliss' evidence also confirmed the connection of the 8085 number with the tenancy. She used this number to contact the tenant. When she did so, she believed she was speaking with Abdiqaaliq Ali Mohamed. She understood it was Abdiqaaliq Ali Mohamed who had made the complaint on 4 December 2020 about noise from the neighbouring property.

[49] Detective Constable Gath's affidavit provided further evidence of the link of the 8085 number with the tenancy. He reviewed the property inspection reports for the Buffon Street property. One of the images for the 3 December 2020 inspection showed a piece of paper attached to the top of the door. Enlarging the image showed that it was a message not to leave parcels at the door and to call the 8085 number.

Evidence as to instructions to Mr Hembrow

[50] Mr Mohamed retained Mr Hembrow on 11 August 2021. Following email communications, Mr Hembrow first met with Mr Mohamed on 15 September 2021. Mr Mohamed said this was a meeting of about 30 minutes. He revised this to about an hour when Mr McDonnell's evidence – that it lasted one and a half hours – was put to him. He accepted it was a proper meeting in which Mr Hembrow went through the Crown case and explained that it was a strong one.

[51] Mr Hembrow went through the telecommunications evidence with Mr Mohamed. Mr Mohamed's evidence was that this alarmed him as, until then, he had not understood how the case was linked to him. He said that he told Mr Hembrow that he was not using the 8085 number. Mr Mohamed said that he "realised" the messages must have been from "George who is also known as Red". He said that he was adamant that he did not attack Mr Okorie and he wanted to give evidence. He said that Mr Hembrow expressed disbelief at his version of events.

[52] Mr Hembrow agreed that Mr Mohamed's instructions at this meeting were that he did not attack Mr Okorie and that he wanted to give evidence. He said that

Mr Mohamed did not tell him about George or Red at this meeting but did say that he did not believe it was his mobile phone. Mr Hembrow said he told Mr Mohamed that there were difficulties with his instructions. He said he asked Mr Mohamed where he was at the time and whether he had credit card transactions that could place him elsewhere. He said Mr Mohamed did not provide an explanation of where he was, did not have credit card transactions and could not provide an alibi witness.

[53] Mr Mohamed was unhappy with Mr Hembrow's demeanour at the meeting. A few days later, on Saturday 18 September 2021, Mr Mohamed sent emails to Mr Hembrow. The first of these said:

> first of all, I don't care what you believe the outcome to be or care whether or not you have prenotions on whether I'm guilty or not.
>
> please just represent me to the best of your abilities and please contact me as soon as possible.
>
> I still plan to maintain my not guilt[y] plea and also wish to testify on my behalf regardless of the outcome as I understand the main facts against me are: the mobile phone, which I intend saying I have no knowledge of and have never owned or used that number and as for the sword found in the house, I will stat[e] that Im [sic] not the only tenant at that property and it is not mine.

[54] This email went on to set out questions to ask Mr Okorie in cross-examination. It concluded with "please call me asap you said Saturday im [sic] very conced [sic] at this point".

[55] In further emails that evening, Mr Mohamed set out questions to ask Detective Constable Gath in cross-examination and points to make about Ms Walik's statement. The later included making the points in cross-examination of Mr Okorie that he had told Ms Walik that he was from Jamaica and that he imported cars.

[56] Mr Mohamed and Mr Hembrow met again on Sunday, 19 September 2021 which was the day before the trial was to commence. Mr Mohamed's evidence was that he told Mr Hembrow that the debt was $15,000 that was owed to Mr Okorie's friend. He said he told Mr Hembrow he had been threatened and that his brother who lived in Australia had told him to give his phone to his brother's friend, George, who was known as Red. He said Mr Hembrow told him he would not be believed, and that it was too late to raise the issue of Red and his possession of the phone. He said

Mr Hembrow wanted to recuse himself but Mr Mohamed managed to convince Mr Hembrow to continue acting for him. Mr Mohamed said he signed a written document at this meeting saying he wanted to give evidence at his trial and that he would say that he had given his phone to Red and it was Red who made the calls.

[57] Mr Hembrow agreed with Mr Mohamed's evidence that they discussed the debt at this meeting. He said he advised that raising the issue of the debt would do Mr Mohamed no good because the jury might think this was a gangster attack by him to avoid paying the debt. He said he was told for the first time that the person who did the stabbing was George, who was a flatmate and was Nigerian/Cuban. He said he was not told how Mr Mohamed knew that George was the stabber. He said he was also not told of Mr Mohamed's brother's advice to give George his cell phone and nor that George was known as Red. He said he told Mr Mohamed that he needed to think about whether he should get another lawyer and seek an adjournment and Mr Hembrow should recuse himself. He said Mr Mohamed told him he wanted the trial to go ahead and he had faith in Mr Hembrow.

[58] The document Mr Mohamed signed at this meeting was produced by Mr Hembrow. It said:

> I Abdihafid Ali Mohamed instruct S Hembrow to cross examine at my trial starting 20 September 2021 on the basis that it was my flatmate George who made the phone calls on 224928085 and was the person who stabbed the victim on the 5th of December 2020.

[59] Mr Hembrow explained that he took the precaution of having Mr Mohamed sign this document because there was no evidence to back up Mr Mohamed's instructions. Without Mr Mohamed's specific instructions to cross-examine on this basis, he said that he would not have pursued this line of questioning. Mr Hembrow said he told Mr Mohamed that a decision would be made about whether he should give evidence after the Crown evidence. He understood Mr Mohamed to have accepted that advice.

[60] Mr Hembrow said that Mr Mohamed brought up the tenancy agreement for the Buffon Street address at the 19 September 2021 meeting. Mr Hembrow said that if the document was produced it would show that Mr Mohamed was a party to a forgery

in using his brother's name on the tenancy agreement to avoid an action against him if he defaulted on the rent or if there was damage.

[61] Following the meeting, Mr Hembrow sent an email to Mr Mohamed at 5.39 pm which said:

> Hi
>
> I am still at work on this
>
> I need to advise you that calling Mr Kahdar [sic] and you giving evidence is the very wrong thing to do in this trial.
>
> It turns it from a test of beyond reasonable doubt to who the jury thinks is telling the truth If the jury think you or Mr Kahdar [sic] are not telling the truth then the [sic] will convict you.
>
> To bring the name George in at this late stage telling me today for the first time gives no chance for investigation, supplying that investigation to the police to check out elc [sic]
>
> [You] will have now seen the job sheet of the police talk to Mr Kahdar [sic] last week. I would have no confidence in what he will say.
>
> We will talk at court tomorrow

[62] Mr Mohamed brought a hard copy of the tenancy agreement to Court the following day. This was signed in the name of his brother and was for the period 17 October 2020 and 21 October 2021. Mr Hembrow gave it to the officer in charge to make enquiries so that Mr Hembrow could cross-examine the officer on it if necessary. He did this because, as at the start of the trial, Mr Mohamed was still actively considering whether to give evidence. By the morning break, Mr Hembrow was handed a police job sheet. Police enquires with Immigration New Zealand revealed that Mr Mohamed's brother was in New Zealand for four days between 25 January 2020 and 29 January 2020 and prior to that had not been in the country for 10 years. This confirmed that Mr Mohamed's brother could not have lived at the Buffon Street address with George for any part of the tenancy.

[63] Mr Hembrow considered that the cross-examination of Mr Okorie had gone well. Mr Okorie had become "quite excitable". Mr Okorie did not know the person who stabbed him but was adamant that it was the person on his phone whom he subsequently identified in the photo montage procedure. At the end of the cross-

examination of Mr Okorie, Mr Hembrow discussed with Mr Mohamed that suggesting to Mr Okorie the name of Mr Mohamed's alleged flatmate would be regarded by the jury as "clutching at straws". He discussed with Mr Mohamed that he did not think it was in Mr Mohamed's interests to do this when there was no supporting information that George lived at the Buffon Street address. He advised Mr Mohamed that it would make the defence look weak. He asked Mr Mohamed if he wanted him to question Mr Okorie about George and Mr Mohamed agreed that Mr Hembrow should not. Mr Hembrow considered there was no point in asking the police witnesses either, as the police witnesses had no knowledge of George and there was nothing in the disclosure about George.

[64] On the second day of trial Mr Hembrow said he arrived at court at about 9 am and interviewed Mr Khadar. We understand that this was in preparation if Mr Khadar was to give defence evidence. Mr Khadar confirmed he would give the evidence that was in the brief of evidence the Crown had prepared. Mr Hembrow asked Mr Khadar whether there was any possibility that it was Mr Mohamed who was at Mr Okorie's address and who had caused Mr Okorie's injuries. Mr Khadar shook his head and said "no". Mr Hembrow also told Mr Khadar that Ms Walik said that Mr Khadar and the attacker were speaking in Arabic. Mr Khadar said he did not speak in Arabic with the attacker.

[65] The Crown case came to an end close to 1 pm on the second day of the trial. Mr Hembrow with his junior, Mr McConnell, went to see Mr Mohamed in the holding cell at about 2 pm. Mr Hembrow asked him whether he had made a decision about giving evidence. Mr Mohamed said that he thought the trial was going well and he would not give evidence. Mr Hembrow had Mr Mohamed sign a handwritten instruction that he "[did] not wish to give evidence at my trial". The instruction was dated 21 September 2021 at 2.10 pm.

[66] At the same time, Mr Hembrow had Mr Mohamed sign a further handwritten instruction concerning calling Mr Khadar to give evidence which said:

> I Abdihafid Ali Mohamed instruct my Barrister S Hembrow that I want him to call as a witness in my defence Sharifabdenasir Mohamed Khadar despite S Hembrow's warning to me that Mr Khadar under cross examination by the Crown may confirm that I was present at the scene of the crime. He has also

> warned me that if Mr Khadar gave false evidence it may lead to a charge of attempting to pervert the course of Justice against me.

[67] Mr Hembrow said he recorded this instruction and asked Mr Mohamed to sign it because he was concerned at the effect on the outcome and the consequences for Mr Mohamed if Mr Khadar appeared to be untruthful. In accordance with those instructions, Mr Mohamed did not give evidence and Mr Khadar did give evidence.

[68] As discussed above, Mr Khadar said that the attacker was "Red". Mr Hembrow did not ask Mr Khadar about George because there was no basis before the Court to suggest that George had access to Mr Mohamed's phone and was the attacker. Mr Hembrow said that he advised Mr Mohamed that it was pointless to ask Mr Khadar about George and would have potentially undermined Mr Khadar's credibility. He said Mr Mohamed agreed with this advice. Mr Hembrow checked with Mr Mohamed at the close of the examination in chief and again at the close of re-examination of Mr Khadar if Mr Mohamed wanted any further questions asked of Mr Khadar. Mr Mohamed said no.

[69] Mr Hembrow said that during the trial Mr Mohamed handed him small slips of paper with questions to ask witnesses. At no stage did Mr Mohamed ask him to put questions to witnesses about George. On the third day of the trial (22 September 2021) at 1.15 am, after all the trial evidence was completed and before closing addresses, Mr Mohamed sent an email to Mr Hembrow. This thanked Mr Hembrow for his "robust efforts" and for remaining "cool, calm and collect[ed]" when Mr Mohamed had probably been somewhat of a "nuisance". He said he was "truly grateful" and "regardless of the outcome" wanted to say "thank you". In cross-examination on this email on appeal, Mr Mohamed said he was just being polite and was not being genuine.

Our assessment of the evidence

[70] We prefer the evidence of Mr Hembrow to that of Mr Mohamed where their evidence differs. In particular, we prefer Mr Hembrow's evidence that the first time George was mentioned was on the Sunday before the trial and that at this time Mr Mohamed did not mention the involvement of his brother to help with his situation,

nor that George was known as Red and was Māori with ties to the Mongrel Mob. We prefer Mr Hembrow's evidence for several reasons.

[71] First, our assessment is that Mr Mohamed's brother did not rent the Buffon Street address. Rather, Mr Mohamed used his brother's name to apply for the tenancy. The police inquiries at trial revealed that his brother was not in the country at the relevant time. This confirmed Mr Hembrow's concerns, as conveyed to Mr Mohamed on the Sunday, that bringing up the tenancy agreement would show that he was a party to a forgery in applying for a tenancy in his brother's name. The checks by the property company do not exclude this. If the person letting the property checked the applicant's appearance against the passport photo, it is quite conceivable that she did not notice the difference between Mr Mohamed and the photo of his brother.

[72] Secondly, the alleged involvement of George arose only after the incriminating phone data was shown to Mr Mohamed on the Wednesday meeting before trial. Further, in our assessment, it was not until the Sunday that the name George was mentioned to Mr Hembrow. This is confirmed by Mr Mohamed's email on the Saturday in which Mr Mohamed said he intended on saying that the mobile phone was not his. Tellingly, he did not say that it belonged to his brother's friend, George, who was going to sort out his issue with Jerry. If that really was the position, there was no reason why Mr Mohamed would not have said so to his lawyer on the Wednesday, or certainly by the Saturday.

[73] Thirdly, our assessment is that Mr Mohamed did not tell Mr Hembrow before trial that "George" was also known as "Red". Mr Hembrow did not believe someone called Red had been mentioned before the trial. According to Mr Hembrow, the person mentioned on the Sunday was Nigerian/Cuban. According to what Mr Khadar said to Detective Constable Gath before trial, Mr Khadar was referring to Red as Mr Mohamed (whom he said he did not know). However, according to the evidence on appeal of Abdiqaaliq Ali Mohamed, Saaid Abdukadir and Mr Khadar, Red was Māori or a Pacific Islander. Again, tellingly, Mr Mohamed's handwritten instructions to Mr Hembrow on the Sunday did not refer to Red. Those instructions also provided no detail about George.

[74] Fourthly, the only detail provided about George came from the affidavit of Abdiqaaliq Ali Mohamed who was not available for cross-examination. That detail was shown to be incorrect. There was no George Rehutai at Cashmere High School as stated in that affidavit nor any George at the school at the relevant time. While Mr Mohamed's counsel advised us that he was no longer relying on Abdiqaaliq Ali Mohamed's affidavit, ostensibly because he was unavailable for cross-examination, the fact is that this affidavit was put forward in support of Mr Mohamed's appeal and the information in it has been shown to be false by Ms Burgess' evidence. There is no other reliable evidence that either a George or a Red was involved.

[75] Our assessment is that the account of George or Red as the attacker is not credible. Mr Mohamed only came up with the name George when he needed an explanation for why the incriminating telephone data for the 8085 number should not be attributed to him. He mentioned the name George for the first time at the meeting with Mr Hembrow on the Sunday before trial and said he was Nigerian/Cuban. Mr Khadar then gave evidence at the trial that someone known as Red was involved. For the purposes of the appeal, the story is now that George was known as Red and was a Māori or Pacific Islander who was a friend of Mr Mohamed's brother. Mr Mohamed, who is African,[16] said in cross-examination in the appeal hearing that, even though he allegedly lived with George, he had "assumed" George was Nigerian/Cuban based on the "lingo" he used but he didn't know his ethnicity. This was an unconvincing explanation for why he thought George was Nigerian/Cuban when he is now said to be Māori or Pacific Islander. Further, an attacker who was Māori or Pacific Islander is inconsistent with Ms Walik's statement that Arabic was spoken.

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[16] His passport shows his birthplace as Garissa. Prior to closing submissions, the Judge declined permission for defence counsel to inform the jury that Garissa was in Kenya. This was because it had not been put to Mr Okorie that Mr Mohamed was born in Kenya (not Somalia) and, if this was to go to the jury, the Crown would have adduced evidence that people in Garissa speak Somali: *R v Mohamed* DC Christchurch CRI-2020-009-010662, 22 September 2021 (Ruling 2 of Judge M J Callaghan).

Ground 1: election to give evidence

Introduction

[76] This ground of appeal concerns Mr Mohamed's wish to give evidence. He had conveyed that wish in the weekend before the trial. He decided against this during the lunch break at the end of the Crown case on the advice of his trial counsel, Mr Hembrow. It is said that Mr Mohamed's election was overborne by his trial counsel. It is said that it meant there was no evidential basis for Mr Mohamed's contention that he had given the 8085 phone to George and it was George who had attacked Mr Okorie.

Assessment

[77] It is well established that the election whether to give evidence is a fundamental decision reserved to the defendant and that trial counsel have an obligation to ensure the decision is an informed one.[17] If the defendant does not make a properly informed decision, the risk of a miscarriage of justice arises.[18]

[78] In this case, Mr Mohamed submits that his trial counsel failed to ensure that his election was properly informed. He submits that trial counsel should have prepared a brief of evidence that would have fleshed out the details of Mr Mohamed's account. He submits that instead, Mr Mohamed's wish to give evidence was overborne by Mr Hembrow's advice that he would not be believed. He says Mr Hembrow wrongly advised him in his email on the Sunday evening that giving evidence was the wrong thing to do because "[i]t turns it from a test of beyond reasonable doubt to who the jury thinks is telling the truth". This advice is said to be wrong because the jury was required to assess whether they were sure that the Crown had proven the allegations beyond reasonable doubt. Evidence from Mr Mohamed would have added to the pool of evidence to be considered together and, if his evidence supported by Mr Khadar could reasonably be true, it would raise a reasonable doubt.

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17 For example, see *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [73]; *Van der Krogt v R* [2020] NZCA 512 at [29]; *Judd v R* [2021] NZCA 345 at [39]; *Smith v R* [2022] NZCA 448 at [39]–[41]; *R v Scurrah* CA159/06, 12 September 2006 at[17]–[20]; and *Tarring v R* [2016] NZCA 452.

18 *Smith v R*, above n 17, at [40]; *R v Sungsuwan*, above n 17, at [66] and [115]; and *R v Scurrah*, above n 17, at [17]–[20].

[79] We do not accept this submission. Mr Hembrow was not in a position to flesh out a brief of evidence. This was not because Mr Hembrow failed in his duties. Rather, it was because Mr Mohamed had not provided any detail about George despite the opportunity to do so at the Wednesday and Sunday meetings before trial. It is clear that Mr Hembrow was concerned about the lack of detail. That is why he had Mr Mohamed sign a written instruction to cross-examine on the basis that George was the attacker. Mr Hembrow took this precaution because it was a risky tactic when there was no information to back this up and too little time before trial for the police to make checks about the alleged involvement of a George.

[80] Further, the advice in his Sunday evening email was not wrong. As Mr Hembrow said in that email, the concern was that the jury would not find Mr Khadar a reliable witness (given the police job sheet of Detective Constable Gath's recent meeting with him). Mr Hembrow was concerned that the jury would consider that Mr Mohamed and/or Mr Khadar were not telling the truth. In other words, Mr Mohamed's evidence in support of Mr Khadar's evidence would risk the jury taking the view that they were both lying, which was obviously prejudicial.

[81] It is plain that Mr Mohamed understood and accepted this advice when the time came to make his election. Mr Hembrow was forceful in his advice that giving evidence would be the wrong thing to do but that was because of the real risk that the jury would form the view that Mr Mohamed was lying. We do not accept that Mr Mohamed was overborne by Mr Hembrow. Rather, Mr Mohamed was comfortable with Mr Hembrow's conduct of the trial. Mr Mohamed's decision on whether to give evidence was finally made after the close of the Crown case. At this time, he said to Mr Hembrow that he thought the trial was going well and he would not give evidence. Mr Mohamed signed a handwritten instruction that he "[did] not wish to give evidence at [his] trial". Before closing addresses, Mr Mohamed thanked Mr Hembrow for his conduct of the trial. We consider Mr Mohamed's attempt on this appeal to resile from this thanks to be disingenuous. Indeed, that attempt it is a further illustration of Mr Mohamed's comfort with saying whatever he thinks he needs to say to advance his interests.

[82] We dismiss this ground of appeal.

Ground 2: failure to present his defence that George was the attacker

Introduction

[83] This ground of appeal is related to the first ground. Mr Mohamed refers to the written instructions provided to Mr Hembrow the day before the trial that Mr Hembrow was to cross-examine at the trial on the basis that it was Mr Mohamed's flatmate George who made the phone calls on the 8085 number and was the person who stabbed Mr Okorie.[19]

Assessment

[84] Failing to follow specific instructions to advance a defence based on the defendant's version of events is, like electing whether to give evidence, a fundamental decision that will generally give rise to a miscarriage of justice.[20] Mr Mohamed submits that, without Mr Hembrow having prepared a brief of evidence setting out his narrative, which would form the foundation for such cross-examination, Mr Hembrow was not in a position to follow his instructions to cross-examine on the basis that George was the attacker.

[85] In this case Mr Mohamed changed his instructions on advice from Mr Hembrow. We accept Mr Hembrow's evidence that he confirmed with Mr Hembrow before completing his cross-examination of Mr Okorie that he was not to cross-examine him on this basis. Mr Hembrow was rightly concerned, on Mr Mohamed's behalf, that it would come across as clutching at straws by suggesting to Mr Okorie that the attacker was called George whom Mr Mohamed flatted with and who was Nigerian/Cuban. Preparing a brief of evidence would not have assisted because Mr Mohamed had not given Mr Hembrow any more detail than this. The police had found no evidence of a George living at the Buffon Street address and there was no other basis for this suggestion beyond the scant information Mr Mohamed had provided. Mr Mohamed had declined the option of seeking an adjournment for further enquiries to be made of George.

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19 Refer above at [58].

20 *Smith v R*, above n 17, at [41]; and *R v Sungsuwan*, above n 17, at [65].

[86] The further information about George's involvement that Mr Mohamed has since provided for this appeal has evolved in light of Mr Khadar's evidence that the attacker was known as Red and was Māori or a Pacific Islander. Because it has evolved and is a made up story, it is unclear now what Mr Mohamed would have said if he had elected to give evidence. Mr Hembrow was rightly concerned that it would be harmful for the defence for Mr Mohamed to give evidence and for the jury to be satisfied that he was lying and Mr Khadar was too.

[87] In short, Mr Hembrow followed Mr Mohamed's instructions. There was no counsel error in failing to present the case on the basis that the attacker was George.

[88] We dismiss this ground of appeal.

Ground 3: failure to investigate relevant evidence

Introduction

[89] Mr Mohamed submits that Mr Hembrow erred by failing to investigate evidence from Saaid Abdukadir. He says Mr Abdukadir was an obvious person to speak to as his name was on the tenancy. He says Mr Abdukadir would have supported his account that George was his flatmate.

Assessment

[90] Mr Mohamed does not say that he suggested to Mr Hembrow prior to or during the trial that Mr Abdukadir could support his account that George lived at the Buffon Street address with him. Mr Hembrow's advice to Mr Mohamed was that the tenancy agreement should not be relied upon as it showed that Mr Mohamed was a party to a forgery in using his brother's name on the tenancy agreement. This was confirmed following police inquiries, made at Mr Hembrow's request, that showed that Mr Mohamed's brother could not have lived at the Buffon Street address with George for any part of the tenancy.

[91] Moreover, the evidence before this court from Mr Abdukadir is not credible. It cannot have been the case that he thought the tenancy was for Abdiqaaliq Ali Mohamed because Abdiqaaliq was not in the country. Mr Abdukadir's evidence was

that he understood at the time that Abdiqaaliq was in the country. He said he now realised that Abdiqaaliq must have been calling him from Australia when he said that he needed help to rent a property and when they planned to meet at Mr Abdukadir's house before the viewing. However, it is not credible that Abdiqaaliq would have planned to meet at Mr Abdukadir's house before the viewing given that he lived in Australia. Moreover, Mr Abdukadir's evidence was that the person who turned up at the viewing and signed the tenancy agreement was George, who was skinny, tall and dark-skinned, and either Māori or from the Pacific Islands. Yet the evidence from Ms Burgess is that the person signing the tenancy agreement would have been checked against Abdiqaaliq's passport photo and details. That photo and details are of an African man, not a Māori or Pacific Islander.

[92] Mr Hembrow was not in error in failing to make inquiries of Mr Abdukadir, before advising Mr Mohamed that the suggestion of George as the attacker should not be put to Mr Okorie and advising Mr Mohamed against giving evidence in these circumstances.

[93] We dismiss this ground of appeal.

Ground 4: inadequate advice regarding Ms Walik's statement

Introduction

[94] Mr Mohamed submits that he did not receive proper advice about whether Ms Walik's statement should be admitted by consent when it was apparent she was unavailable to give evidence. He says that her evidence was problematic because she gave a description that was similar to Mr Mohamed and said that he was speaking Arabic. He says the evidence needed to be tested in cross-examination if it was to be adduced.

Ms Walik's formal statement

[95] As noted earlier,[21] a formal statement was taken by the police from Ms Walik following the attack. The statement was taken at the police station and signed by Ms Walik at 6.20 pm.

[96] In that statement, she set out how she knew Mr Okorie (who had told her he was from Jamacia and imported car parts) and why she was visiting him on the day he was attacked. She described the attacker as being a slim guy, who was about 170 cm tall, with a thick beard, who was "black", was wearing sporty black clothing and who gestured at her to go away. He was speaking in Arabic to another guy who was "fat", "black", "very tall" and "big". She went outside with the fat man who told her that he was from Somalia and the other guy was from Sudan. While they were outside she heard Mr Okorie calling out for the fat guy whose name she could not remember. The fat guy went inside and came back with a big knife, like a kitchen knife, that had a black handle and a "funny shape". The fat guy took the knife around the back. Mr Okorie was saying something about blood and to get the knife, and was yelling to call the police. The fat guy was trying to help him.

Hearsay application

[97] Mr Hembrow received an email from Mr Taffs, the prosecutor, on 1 September 2021. Mr Taffs had just received an email from the police advising that immigration had confirmed that Ms Walik left the country on 28 July 2021 with a destination to Singapore. Immigration did not know whether she had travelled on to another destination from there but were able to say that she had not returned. Mr Taffs said that Ms Walik was aware of the trial date. He said he was considering making a hearsay application on the basis that she was not available if she did not return. Mr Taffs also asked whether the defence would be agreeable to the medical evidence concerning Mr Okorie's injuries being admitted by agreement under s 9 of the Evidence Act 2006.

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[21] At [5] above.

[98] Mr Hembrow forwarded the email to Mr Mohamed on 1 September 2020. Mr Hembrow said that he subsequently discussed these matters with Mr Mohamed by telephone. He advised that Mr Mohamed should agree to the medical evidence being admitted by consent. He advised that it would avoid the doctor being given a chance to expand on the level and seriousness of the injuries and having the jury focus on that. Mr Hembrow said that Mr Mohamed agreed with this advice.

[99] In the same conversation, Mr Hembrow said that Ms Walik's evidence helped them because she could not identify the attacker. Because of this, he said that the Crown's application to have her read her evidence was a good thing. Subsequently, on 19 September 2020, Mr Mohamed sent an email referring to points in Ms Walik's evidence that he wanted to use against Mr Okorie in cross-examination. These were where she said: "he told me he was from Jamaica", "he told me he imported car parts", and that she heard the offender say "if you call the police, you'll never see me again". Mr Hembrow's view was that to use these points, Ms Walik's statement would need to be admitted.

[100] The application to admit Ms Walik's statement was to be heard by the trial judge. At the start of the trial, Mr Hembrow advised the Judge that the evidence could be admitted by consent. On that basis, the Judge granted the application unopposed.[22]

Reliance on Ms Walik's statement

[101] In closing to the jury, the Crown referred to Ms Walik's statement as providing a "really good narrative" of what happened. The Crown did not directly rely on the statement to identify the attacker. As discussed above, the Crown relied on Mr Okorie's identification evidence, the phone data and Mr Mohamed's connection to the 8085 phone to identify Mr Mohamed as the attacker.[23]

[102] In closing to the jury, the defence agreed with the Crown that Ms Walik was probably the best witness as to the sequence of what happened. The defence submitted that Mr Okorie was an unreliable witness with reference to Ms Walik's statement that

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22 *R v Mohamed* DC Christchurch CRI-2020-009-010662, 20 September 2021 (Minute of Judge M J Callaghan).

23 Refer [23] above.

had been put to him in cross-examination. In that cross-examination, particular emphasis was placed on Mr Okorie's evidence that the attacker was a bigger build than him and that he was wearing a hoodie. This contrasted with Ms Walik's statement that the attacker was slim and wore a cap.

Mr Mohamed's evidence on appeal

[103] Mr Mohamed said in his evidence on appeal that he did not consent to this evidence. He did not recall seeing the email sent to him on 1 September 2022 and said that he must have overlooked it. He said Mr Hembrow did not telephone him about the evidence. He said he was first made aware on the Sunday before trial that Ms Walik was not in the country. He said he was not aware that he had the option of opposing the admission of the statement.

[104] Mr Mohamed also said that he did not see how Ms Walik's statement helped him. Her description of the attacker as "dark, black or dark with a beard" did not help him as he was dark-skinned and had a beard. He did not understand how she would be able to identify that Mr Okorie and the attacker had spoken Arabic and she had not mentioned seeing a two foot knife.

[105] Mr Hembrow further explained his view as to why he considered it to be in Mr Mohamed's interest to consent to the admission of Ms Walik's evidence. He considered it was helpful that she did not identify Mr Mohamed as the attacker. He did not regard her evidence as particularly supportive of the Crown's case. He thought that, if she did give evidence (if she was able to be located), there was the risk that she would remember something more, or even that she would see Mr Mohamed in court and identify him. If she could not be located, he thought that the application to admit her hearsay statement would be granted. He made a note of Mr Mohamed's consent to the statement being admitted at the bottom of her evidence.

Assessment

[106] We prefer Mr Hembrow's evidence to Mr Mohamed. We have already assessed Mr Mohamed as not being truthful about George. We consider his evidence, that Mr Hembrow did not discuss whether to consent to Ms Walik's statement being

admitted, is not credible. It is quite unlikely that Mr Hembrow would consent to the Crown's hearsay application without obtaining instructions from his client. It is also quite unlikely that Mr Hembrow would obtain Mr Mohamed's consent, without making it clear that Mr Mohamed did not have to consent. Mr Mohamed's email to Mr Hembrow, with questions to ask Mr Okorie based on that statement, is consistent with a discussion between them about her evidence.

[107] In *R v Sungsuwan*, Gault J said:[24]

> [66] There will be cases in which particular acts or omissions of counsel may in retrospect be seen to have possibly affected the outcome but they were deliberately judged at the time to be in the interests of the accused. In some cases the accused will have agreed or acquiesced – only to complain after conviction. Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.

[108] Mr Hembrow's advice was reasonable in the circumstances and could well be made by another competent counsel if there were a new trial. In any event, in contrast with the situation Gault J referred to, we consider the decision to admit Ms Walik's statement could not have affected the outcome. The Crown case was a very strong one. Mr Okorie had the opportunity to identify his attacker and was adamant it was the person whose photograph he had been sent. His identification was supported by the phone data and the evidence that linked Mr Mohamed to that data. Ms Walik's statement provided at least some basis to challenge that identification. There was very little else on which to do so. It was well open to the jury to reject Mr Khadar's evidence as unreliable.

[109] We dismiss this ground of appeal.

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[24] *R v Sungsuwan*, above n 17.

Ground 5: Inadmissible evidence

Introduction

[110] This ground of appeal concerns evidence that Mr Mohamed says should not have been admitted at his trial.

Identification evidence

[111] Mr Mohamed submits that Mr Okorie's identification of him in the photo montage was unsafe and evidence of it should not have been admitted. He submits that it is impossible to know whether Mr Okorie identified Mr Mohamed in the photo montage based on his memory of the person in the photographs in his phone or based on his memory of the person who stabbed him. Further, given his identification of Mr Mohamed based on the photographs in his phone, he submits the photo montage identification had no probative value.

[112] Mr Mohamed relies on *R v Ryan* in support of his submission.[25] This case concerned identity evidence of a police constable. In the execution of her duties, she had stopped a car to check its registration details. The constable asked for the driver's name, date of birth and address. She checked the details in the police National Intelligence Application (NIA) database. The NIA database included a photograph for the name and date of birth the driver had provided. She noted that, like the driver, the person in the photograph had a distinctive neck tattoo and eyebrow piercing. This caused her to believe that the driver was the person in the photograph. The NIA database also confirmed that the person's licence was suspended.[26]

[113] The constable advised the driver that the vehicle would be impounded. The driver took off and later abandoned the car and absconded. The person whose name and date of birth had been given to the constable when stopped for the registration check was later apprehended and charged. This person claimed that it was his brother who was the driver of the vehicle at the relevant time.[27]

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25 *R v Ryan* [2021] NZCA 147.
26 At [7].
27 At [12].

[114] This led to a challenge to the officer's identification of the driver with reference to the NIA database photograph on the grounds that the formal procedure under s 45 of the Evidence Act had not been carried out.[28] As the procedure was not followed, the question for the Court was whether there was "good reason for not following a formal procedure".[29] If there was, then the constable's identification of the driver based on the photograph in the NIA database was admissible against him on the charges unless he proved, on the balance of probabilities, that the evidence was unreliable.

[115] The constable gave evidence at the admissibility hearing that she had looked at the person's NIA profile 13 or 14 times when she was writing her first formal statement a month after the incident giving rise to the charges. She had looked at it again numerous times when completing her second formal statement. She said she had not conducted a formal identification because she had already viewed the NIA photograph. She understood that, because she would have a memory based on the photograph, she could no longer do the formal procedure.[30]

[116] In those circumstances, the Court found there was a good reason for not conducting the formal procedure. It could not be said with any certainty that the formal process would test her recall of the driver rather than her memory of the NIA photograph. Further, a firm identification in the formal process would give rise to a real risk of prejudice. That is because it would arguably bolster the constable's original identification but in an unfair way – since the formal identification was likely to be based on the officer's memory of the photograph rather than their memory of the driver from the incident.[31]

[117] That case can, however, be compared with *Gibbins v R*, the facts of which are closer to the present.[32] That case involved an identification witness who lived in an upstairs flat. His landlord lived in the downstairs flat. She showed the witness a video of her new boyfriend. A short time later, when returning to his flat in the early

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28 The formal procedure under that section is the photo montage procedure.
29 Evidence Act 2006, s 45(1).
30 At [20]–[22].
31 At [43]–[44].
32 *Gibbins v R* [2015] NZCA 462.

morning, the witness was stabbed by a man wearing a hoodie who demanded money and methamphetamine. The witness was interviewed by the police on the same day. He said the person who stabbed him was his landlord's boyfriend and that he recognised him from the video his landlord had shown to him. On the same day, he identified the landlord's boyfriend from a photo montage of eight photographs in a formal procedure.[33]

[118] Admissibility of the identification in the formal procedure was challenged as unreliable. This was because of the risk that this identification depended on the witness' recollection of what he had seem on the video rather than his recollection of the assailant at the time of the attack. This Court rejected this argument. It considered that doubts about its reliability were matters for cross-examination and an appropriate warning under s 126 of the Evidence Act would be given by the trial judge.[34]

[119] Another example is *Johnson v R*.[35] In that case, the victim identified his attacker as someone he had "seen … around" and "met" before but who was not a friend and not someone he associated with. He subsequently identified the same person in a formal procedure. This Court considered that there was strictly no requirement for police to have carried out a formal procedure given that the victim had recognised his attacker.[36] It noted that in some cases there is a need for caution about the use of a formal procedure where identification is based on recognition. However, it depended on the circumstances. In this case it was prudent to conduct a formal procedure because the victim knew the person he identified as the attacker but not well.[37]

[120] In the present case, whether it was necessary or not, a formal procedure was conducted. It was arguably prudent to conduct this procedure as a check on the reliability of Mr Okorie's identification based on the photograph Jerry had sent to him. The first of those, and the one that Mr Okorie said he identified his attacker from, is at an angle and the person appears to be wearing a hat, and has facial hair above his

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33 At [3]–[8].
34 At [14]–[15].
35 *Johnson v R* [2021] NZCA 233.
36 At [28], referring to *Harney v Police* [2011] NZSC 107, [2012] 1 NZLR 725 at [17]; and *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [65].
37 At [29].

lips and an obvious beard. The passport photograph used in the photo montage shows an image that is not at an angle, the person is not wearing a hat and has less obvious facial hair. It was at least some relevance to the jury that Mr Okorie identified Mr Mohamed in the photo montage (rather than identifying someone else or not recognising Mr Mohamed).

[121] The fact that the identification may have been based more on Mr Okorie's memory of the photograph received from Jerry than his memory of the incident was something that the defence could point to. However, that was a matter for the defence to raise, the Judge to direct on and the jury to assess.

[122] Mr Hembrow cross-examined Mr Okorie on whether he accurately recalled the attacker given the differences in his recollection to that of Ms Walik. He put it to Mr Okorie that, when he looked at the photo montage and identified Mr Mohamed, he had in mind the picture on his phone. Mr Okorie said:

> … I know who stabbed me. I know who stabbed me to this picture. I know. I'm not confusing my memory. I know who stabbed me when I see this picture police show me.

[123] Mr Hembrow also put it to Mr Okorie that an alternative was that he falsely accused Mr Mohamed because he did not want to tell the police who really had stabbed him. It was suggested that this was why Mr Okorie did not give the police access to all of his phones. Mr Okorie rejected this, again repeating that he knew who stabbed him, he was not confused and he showed photograph two in the montage to the police as the person who stabbed him.

[124] The defence closed to the jury on the basis that the photo montage identification was very unsatisfactory. It was suggested that Mr Okorie had been able to pick out Mr Mohamed in the montage because he had in his mind the picture apparently sent to him by Jerry. It was also suggested that Mr Okorie was falsely accusing the person whose photo was on his phone and that the police made no enquiries of Jerry to confirm or otherwise Mr Okorie's version of events.

[125] In summing up, the Judge gave detailed and full directions on identification. Several times he referred to the defence contention that the identification of

Mr Mohamed in the photo montage was flawed and unsafe because it was tainted by having looked at the photo on his phone shortly before identifying Mr Mohamed in the photo montage. The Judge provided a warning of the need for special caution before relying on identification evidence and the reasons why special caution was necessary in accordance with s 126 of the Evidence Act. The Judge discussed this with direct reference to matters in this case that were relevant to the jury's assessment of whether Mr Okorie's identification was reliable. These matters included that Mr Okorie did not know Mr Mohamed and only had the photo sent by Jerry prior to the incident from which to identify him at the time of the attack, the attack was in the middle of the day, there was no evidence that Mr Okorie's view of the attacker was obstructed, the whole incident for Mr Okorie would have been traumatic and Ms Walik's description was a little different, and that Mr Okorie had seen the photograph in his phone in hospital before the photo montage identification.[38]

[126] We consider identification evidence from the formal procedure did not give rise to a risk of a miscarriage of justice. The evidence was admissible. It had some probative value in confirming Mr Okorie's identification of the attacker as the person in the photograph sent to him by Jerry. The risk of prejudice through the identification in the formal procedure being a recollection of the photograph rather than the attacker was before the jury to assess from the defence cross-examination and closing address and the Judge's summing up. The jury were also warned to be especially cautious before relying on the identification evidence.

[127] We dismiss this ground of appeal.

Prison and deportee evidence

[128] Mr Mohamed submits that the evidence that he had been to prison and was deported should not have been admitted. He says there was nothing to indicate that the attacker, as opposed to the debtor, had been deported. He also says that the police did not have sufficient information from Mr Okorie within which to narrow his inquiry

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[38] We also note that, twice during the cross-examination Mr Okorie volunteered that the person who stabbed him was the person who was behind Mr Hembrow in the courtroom. The Judge gave a strong direction explaining why this kind of identification was unreliable and that the jury was to completely disregard this evidence. There was no challenge to this aspect of the evidence and the Judge's directions about it.

to deportees between 2018 and 2019. Finally, he says that what Mr Okorie told the police about this was double hearsay and not admissible to prove the truth of its contents.

[129] We do not accept this submission. The information that Mr Mohamed had been to prison and was deported was relied on as circumstantial evidence. It supported Mr Okorie's identification that his attacker was the person whose photo Jerry had sent to him and who was the same person as photo two in the photo montage (who it is not disputed was Mr Mohamed). Mr Okorie understood that this person owed a debt to Jerry, had been in prison in Australia and was recently deported. That understanding put Detective Constable Gath on inquiry as to who had been recently deported. His enquires revealed that Mr Mohamed had been in prison in Australia and had been deported. This was proven through Detective Constable's enquires, not through the admission of the text messages on Mr Okorie's phone. It was relevant to the jury's assessment of whether Mr Mohamed was the attacker that he had been to prison and was recently deported.

[130] We accept there was the risk of some prejudice to Mr Mohamed from the jury knowing that he had been to prison and was deported from Australia. However, the probative value of that information in supporting Mr Okorie's identification outweighed its prejudicial effect. If Mr Hembrow had sought to object to this evidence, that objection would not have been upheld.

[131] The limited use that could be made of the evidence was made clear to the jury by the Crown, Mr Hembrow and the trial judge. The Crown told the jury in opening the case and in its closing address that this evidence was irrelevant except for the purposes of identification and that it would be improper to use it in any other way. Mr Hembrow made the same point in his closing address. The trial judge carefully directed the jury about this evidence in his summing up. He gave the usual direction that the jury were to put aside prejudice in assessing the evidence. He specifically directed the jury, in firm terms, both towards the beginning and towards the end of his summing up, that the jury were not to reason that because Mr Mohamed was deported from Australian for criminal offending he must be guilty of the charges.

[132] We dismiss this ground of appeal.

Items found at Buffon Street

[133] Lastly, Mr Mohamed submits that evidence of money found at Mr Mohamed's address should not have been admitted at this trial. However, his submissions do not elaborate on this point. The relevance of this evidence was only that Jerry had asked Mr Okorie to collect a debt from the person whose photo Jerry sent. It might be said that its relevance was somewhat peripheral and potentially prejudicial.

[134] However, in our view a miscarriage of justice did not arise from this evidence being before the jury. The jury were already aware that the attacker had been to prison in Australia and had been deported and that he owed a debt to Jerry that Mr Okorie had been asked to collect. The evidence of cash at Mr Mohamed's house was consistent with this narrative and realistically did not give rise to any additional prejudice. The defence submitted to the jury that the money found at the address was irrelevant. As noted, the jury were properly directed not to use prejudice in assessing the evidence and specifically directed not to do so in relation to the prison and deportation evidence. Moreover, as we have earlier said, this was a very strong Crown case. It relied on Mr Okorie's identification evidence, supported by the phone data and the evidence that linked Mr Mohamed to the 8085 number. The Crown had no need to place any reliance on the items found at Mr Mohamed's house and did not do so.

[135] We dismiss this ground of appeal.

Result

[136] The appeal against conviction is dismissed.

[137] We decline leave to adduce the evidence filed in support of the appeal to the extent that it is not within r 12A of the Court of Appeal (Criminal) Rules 2001 and was not credible.

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