IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA12/2023
[2023] NZCA 488

BETWEEN	LYNDON PAUL SHEED Appellant
AND	THE KING Respondent

Hearing:	31 August 2023
Court:	Miller, Ellis and van Bohemen JJ
Counsel:	L A Andersen KC and S Gaskell for Appellant FRJ Sinclair for Respondent
Judgment:	5 October 2023 at 11.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Lyndon Sheed appeals his conviction and sentence for the manslaughter of Kane Wayman on 1 January 2021.[1] He was charged with murder but found guilty of manslaughter and sentenced to five years and six months' imprisonment.[2]

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1 Crimes Act 1961, s 171.
2 *R v Sheed* [2022] NZHC 3304 [sentencing notes] at [31].

[2] The conviction appeal raises issues of identification, participation and causation in a group assault which took place at the Mongols' gang pad at Burnham following an all-night party.

Narrative

[3] We begin by identifying those involved, establishing their prior knowledge of one another, and giving an overview of the facts pertaining to the case against Mr Sheed.

The participants

[4] Lyndon Sheed, aged 41 at the time of the incident, is a patched member of the Mongols Motorcycle Club. So is his older brother, Ricky Sheed.

[5] Elizabeth (Liz) Sheed is Lyndon's daughter. She was in a relationship with Mr Wayman. She had fallen out with him but he was attempting a reconciliation. Liz Sheed was also charged with murder, the Crown alleging that she had incited the attack on Mr Wayman. She was acquitted at trial.

[6] Kane Wayman was not connected with the Mongols. It appears he may have met Mr Sheed on one earlier occasion.

[7] Penny Poihipi, who was the key Crown witness, had begun what she described as a sexual connection with Mr Wayman after her release from prison on 20 December 2020.[3] She said that she withdrew from that relationship when she learned about Liz Sheed. She had not met any of the Sheeds until the night of the party and, Mr Wayman aside, did not know anyone else there.

[8] Mitchell Carston was a prospect for the Mongols who was said to have been involved in the attack on Mr Wayman. He too was charged with murder but acquitted.

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[3] We note that an order suppressing Ms Poihipi's name was made by Nation J prior to the trial: *R v Sheed* [2021] NZHC 3130 at [50]. The order was not renewed at trial or made permanent and counsel agree that it has effectively lapsed.

[9] A third man, who has never been identified, also participated in the attack on Mr Wayman. Ms Poihipi described him as Māori with curly hair (the curly-haired guy).

The narrative

[10] It appears that Liz Sheed invited Mr Wayman to the party and he invited Ms Poihipi to accompany him. The two women met when Mr Wayman picked them up from their respective addresses and drove them to the party in his car. Ms Poihipi described the car ride as "awkward" but the women warmed to one another during the evening.

[11] There were about 20 people at the party, including Lyndon Sheed. Ms Poihipi was introduced to him. She only knew him as "the dad", meaning Liz Sheed's father. During the evening, Ms Poihipi and Mr Sheed had intercourse in a sleepout where they were for a time before rejoining the party.

[12] Meanwhile it appeared that Mr Wayman was unhappy and by the early hours of the morning he had begun to act out, getting on others' nerves. The Crown case was that he had disrespected Mr Carston, and that Liz Sheed was very angry with him and had let Mr Sheed know about it.

[13] After a time Ms Poihipi and Mr Sheed returned to bed. While they were in the room they heard a commotion outside. They left the room to see what was happening. Mr Sheed put on his boxer shorts and Ms Poihipi said he was wearing a T-shirt. It appears he was barefoot.

[14] Outside they found Mr Wayman by his car in a confrontation with the curly-haired guy, who was punching Mr Wayman and claiming he had been disrespectful.

[15] The Crown case was that Lyndon Sheed and Mr Carston joined in. Ms Poihipi deposed that "the dad" then king-hit Mr Wayman and Mr Wayman fell to the ground. "The prospect" (Mr Carston) joined in. Mr Wayman was kicked and punched by the

three men. The Crown case was that he was left unconscious on the ground and did not recover consciousness.

[16] Ms Poihipi saw that Mr Wayman was in trouble and insisted on taking him to hospital. She obtained his car keys from a reluctant Liz Sheed and procured Mr Sheed and Mr Carston to lie him across the back seat of his car. He may have been lying on his back rather than in the recovery position. She then drove him to Christchurch Hospital, where he was pronounced dead. She deposed that, as she left the pad, Liz Sheed's father came to the driver's window and said "[yo]u fucking hear nothing, you fucking see nothing. Did you hear?"

[17] Initially Ms Poihipi told the police that she had found Mr Wayman by the side of the road, but she soon admitted that he had been assaulted at the Mongols pad. On the same day detectives conducted a formal identification process with Ms Poihipi, showing her a photomontage which included Ricky Sheed. It seems they believed at the time that Ricky Sheed was Liz Sheed's father. Ms Poihipi identified Ricky Sheed as "the dad" but commented that he looked fatter in the picture. Subsequent investigations satisfied the police that Ricky Sheed was away down south on the night of the party. The police also showed Ms Poihipi a photomontage including the man whom they suspected of being the curly-haired guy, but because she was mistakenly allowed to see a separate photo of him, her identification could not be used.

[18] Within an hour or so of Ms Poihipi leaving the pad, Lyndon Sheed drove to Invercargill. He declined an interview with police when he was arrested there on 2 January 2021 but he submitted to a medical examination, which found no evidence that he had been involved in a fight. There were no injuries to the backs of his hands or his feet.

The trial

[19] The three defendants stood trial at Christchurch beginning on 22 August 2022 before Mander J and a jury, who were reduced to 10 in number as the trial progressed. Lyndon Sheed and Mr Carston were charged as principals and parties, the Crown acknowledging that it could not prove who struck the fatal blow. The trial focused

principally on the involvement of each defendant, cause of death, and murderous intent. The Crown did not allege that they meant to kill.

[20] The Crown case relied very heavily on the evidence of Ms Poihipi. She was the only eyewitness to what had happened at the party. She admitted that after she relaxed there she became "really wasted" from consumption of alcohol and another substance she had been given, but she denied she was so intoxicated as to not know what was going on. She was subjected to sustained cross-examination, defence counsel contending that she was neither credible nor reliable and had given accounts of the assault which differed in important respects.

[21] There was some forensic evidence tending to support Ms Poihipi's account. Phone geolocation data confirmed general locations of those involved. Lyndon Sheed's DNA was found on Mr Wayman's shirt and his fingerprints were found on the exterior of the car. Mr Sheed accounted for the fingerprints by accepting that he had helped lift Mr Wayman into the back seat, and for the DNA by saying it may have got onto to his shirt by transference from Ms Poihipi. The Crown pointed to a fingerprint by the driver's window as evidence supporting Ms Poihipi's account of the threat made by Mr Sheed as she left the pad.

[22] Mr Sheed did not dispute that he was present and with Ms Poihipi. In the defence closing address, trial counsel (not Mr Andersen KC, who appeared for Mr Sheed before us) acknowledged that Lyndon Sheed was the person whom Ms Poihipi knew as Liz's father. Mr Sheed accepted that they had been in bed together and that he went outside to see what was happening when they heard the commotion. But he denied assaulting Mr Wayman at all. Trial counsel contended that Ms Poihipi had wrongly identified Lyndon Sheed and pointed to her mistaken identification of his brother Ricky Sheed. There was no suggestion before us that the approach taken by trial counsel was contrary to Mr Sheed's instructions. In his closing address, trial counsel focused rather on what Ms Poihipi claimed she had seen Mr Sheed do, contending that she had given differing accounts and her narrative of a king hit followed by a group attack was not borne out by the medical evidence. Trial counsel focused particularly on her admission that Mr Wayman may have been knocked to the

ground by the curly-haired guy, meaning that he must have gotten up again to be king hit by Mr Sheed. We return to this issue at [48]–[51] below.

[23] Mr Wayman's body showed signs of an assault, including facial, head and neck injuries, but while those injuries could cause death they were not so extensive or severe to make that likely. Nor did they confirm that his head had been stomped, although they did not exclude it either. He had a number of underlying medical conditions, including an enlarged heart (cardiomegaly), thickened walls of the heart's main pumping chamber (left ventricular hypertrophy) and obesity, that likely contributed to his death. He had taken methamphetamine.

[24] The pathologist who conducted the autopsy, Dr Leslie Anderson, identified five possible autopsy findings that could each potentially cause death on their own: blunt head trauma; neck compression/strangulation; an enlarged heart (which can cause an arrhythmia where the heart cannot continue pumping or stops altogether); methamphetamine use and positional asphyxia. The last of these causes was possible because Mr Wayman had been placed in the back seat of a car that was considerably shorter than he was. But in Dr Anderson's opinion the death was caused by the blunt head trauma and neck compression injuries on a background of heart problems and methamphetamine use. She thought it highly unlikely that his heart spontaneously went into an arrhythmia at the same time as he was assaulted. In her opinion, the degree of post-mortem changes suggested he was dead or actively dying before he was placed in the car.

[25] The Crown case was that the trauma of the assault was a substantial and operative cause of death. It called Dr Anderson and a cardiologist, Dr Ian Melton. Dr Melton agreed with Dr Anderson that sudden cardiac death due to a malignant arrhythmia was a viable explanation for Mr Wayman's death. The statistical likelihood of this happening at random for a man of Mr Wayman's age (46) and condition was low. Methamphetamine use was a highly unlikely cause. An acute stress response from an altercation was a more likely trigger. The Crown case, in a nutshell, was that the proximity of the assault to death meant that the assault must have been a substantial and operative cause, possibly through the mechanism of a fatal arrhythmia brought on by the stress of the assault.

[26] Mr Carston called a second pathologist, Dr Johan Duflou. Dr Duflou said it was not possible to be definitive but methamphetamine toxicity or a sudden heart attack occurring independently of the assault could have been the sole cause of death. He accepted that those involved in altercations have an increased risk of death and the risk is increased in people with heart disease. He also considered that positional asphyxia could account for death given Mr Wayman's obesity and the possibility that he was placed on his back in the car. However, he accepted that a person generally will only experience positional asphyxia if they cannot move because they are restrained or unconscious. He concluded that no definitive statements could be made in relation to a specific cause of death.

[27] With respect to positional asphyxia, the Crown case was that there was little evidence to support the possibility that he had been placed in the car in a position which prevented breathing and, in any event, it made no difference because he would have moved had he not been incapacitated by the assault. Mander J recorded in a bench note that all counsel agreed that even if positional asphyxia was the ultimate mechanism of death the key issue is what caused him to be unconscious or incapacitated so as to be unable to move himself in the car.

[28] As the Judge noted at sentencing, the jury must have accepted that the group assault was a substantial and operative cause of death.[4] He found that they must also have accepted that the "king hit" administered by Lyndon Sheed was a substantial and operative cause; it knocked him out and rendered him defenceless during the group attack that followed.[5]

The conviction appeal

[29] Mr Andersen advanced three grounds of appeal in his submissions:

(a) there is no admissible identification of Lyndon Sheed as "the dad";

(b) Ms Poihipi's account of the "king hit" was not reliable; and

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4 *Sheed*, above n 2, at [8].
5 At [5].

(c) the evidence did not prove beyond reasonable doubt that the "king hit" caused Mr Wayman's death.

[30] We address these grounds in turn.

Identification

Submissions

[31] We put the issue in context by recording that, at the outset, this was a case in which identification was likely to be in issue. That being so, the police needed to follow a formal procedure under s 45 of the Evidence Act 2006 if they wanted any identification evidence to be prima facie admissible under s 45(1) of that Act. A formal procedure should be undertaken as soon as practicable after the offence is reported.[6] In this case the police acted accordingly, conducting a formal procedure with Ms Poihipi on the day of the offence. Unfortunately, they thought Ricky Sheed was Liz's father. Ms Poihipi's misidentification of Ricky Sheed meant, as Mr Andersen acknowledged, that there was good reason not to conduct another formal procedure to see if she would identify Lyndon Sheed once the police had remedied their mistake.[7] It follows that it strictly was not necessary for the Crown to prove beyond reasonable doubt that the circumstances in which an identification of Lyndon Sheed was made had produced a reliable identification.[8]

[32] Mr Andersen's argument focused on the use of the photomontage of Ricky Sheed, contending that the Crown relied on it to identify Lyndon Sheed based on what was described in evidence as a "strong resemblance".[9] He contended that the prosecutor invited the jury to remark on the familial likeness. That was not a permissible visual identification under s 45 of the Evidence Act.

[33] Mr Andersen further argued that the only admissible evidence of identification before the jury was that of the formal identification procedure in which Ms Poihipi

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6 Evidence Act 2006, s 45(3)(a).

7 Section 45(4) lists the circumstances which constitute "good reasons" for not following formal procedure.

8 Section 45(2).

9 The witness was a Senior Constable who stopped a car driven by Lyndon Sheed in Invercargill on 1 January 2021. He thought the driver was Ricky Sheed, whom he had met previously.

identified Ricky Sheed as Liz's father. He argued that it was never established in evidence that Ricky Sheed was not at the party.

[34] For the Crown, Mr Sinclair responded that s 45 was not the gateway for admission of Ms Poihipi's evidence about Lyndon Sheed's involvement in the attack. Her evidence was not visual identification evidence as defined in s 4 of the Evidence Act; it was not offered to prove he was present at or near a place where an act constituting evidence of the offence was done at the time it was done. Rather, the evidence about what she saw was observation evidence of Mr Sheed's actions and his alleged participation in the offending.[10] The case proceeded on the agreed basis that Lyndon Sheed was present.

The Judge's identification directions

[35] The Judge directed the jury as follows:

> [171] I warn you that you must be cautious before finding any one of the defendant's guilty on the basis of Ms Poihipi's identification of them. The reason for this warning is that miscarriages of justice involving the wrongful conviction of innocent people can and have occurred because a person has been wrongly identified by one or more witnesses. Remember that a mistaken identification witness may be convincing and believe they are right, even though they are wrong.
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> [172] You need to examine closely the circumstances in which the identifications by Ms Poihipi were made. How long did she have the particular person she has identified under observation? At what distance? In what light? What were the surrounding circumstances or context of her observations? Was the observation impeded in any way? Had Ms Poihipi seen the people she observed before? How long did she see these people? Had she previously been in their company? Did she know them? If so, again, how long and in what circumstances? How long between the original observation and the subsequent identification procedures? What happened when she engaged in those processes and what were their result? These are all questions relevant to this issue.
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> [173] In respect to Ms Sheed, the Crown says Ms Poihipi had been in [Liz] Sheed's company not only for most of the previous night at the New Year's Eve function, interacting and socialising with her, but she had travelled in the same vehicle to the venue and was a person known to her by the time she observed her outside on the driveway on New Year's Day morning.
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> [174] Insofar as the issue of identification is concerned, [Liz] Sheed does not dispute being at the pad at the time Mr Wayman was assaulted or, indeed, actually going outside towards the end. However, she denies she said anything

[10] *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [42].

> at that time or that she approached Mr Wayman while he was lying on the ground, and that Ms Poihipi is mistaken or lying about that….
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> [175] In support of Ms Poihipi's identification of Mr Sheed as a person who assaulted Mr Wayman, the Crown says that she had been in his company throughout the night and the next morning. She slept with him twice and was actually with him when the two of them were disturbed by what was going on outside. She followed Mr Sheed outside and had him under observation as he approached Mr Wayman and the "curly haired guy", who Ms Poihipi had already seen assaulting Mr Wayman. It was daylight, Mr Sheed was wearing shorts or boxers, and the Crown says there is no reasonable basis to think Ms Poihipi would have mistaken who it was that struck Mr Wayman with a "king hit" and was punching him and kicking him on the ground as being other than [Liz] Sheed's father.
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> [176] The defence, however, asks you to consider Ms Poihipi's condition that morning. She had taken drugs and alcohol, had only just awoken, she was some distance back and things were happening suddenly and quickly. It was a stressful situation. Most importantly, she could not identify Mr Sheed from a montage of photographs — wrongly identifying Mr Sheed's brother. At that stage, the police were labouring under the mistaken belief that [Liz] Sheed's father was Ricky Sheed, not Lyndon Sheed, and Ms Poihipi had referred to the person she was socialising with and had sex with that night as Liz's father.

The photomontage of Ricky Sheed

[36] It will be seen that the Judge referred to the photomontage when recording the defence contention that Ms Poihipi's misidentification of Lyndon Sheed evidenced her unreliability. It appears that was the purpose for which the identification, including the photomontage, was before the jury. Defence counsel did not object to its admission.

[37] The prosecutor had taken it somewhat further in closing:

> … It is hard to see how the defence could dispute that Penny's identification of his being involved in the assault. She did pick out Ricky Sheed in the photo montage and he was not there. We know that and we know that the police initially thought that Ricky Sheed was Liz Sheed's father. But you have got the photo and you can see, I suggest, a familial likeness. Constable Evans who's evidence was read to you yesterday who stopped the car in Southland, that Lyndon Sheed was driving, he thought when he initially saw him that it was Ricky Sheed driving but found out it was Lyndon Sheed when he spoke to him. And you will remember when Penny identified Ricky [Sheed] in the montage, she said, made a comment to Detective McPherson that: "He looked fatter in the picture."

[38] It appears that the prosecutor's objective was to meet the defence contention that the misidentification made Ms Poihipi an unreliable witness. But in this passage

he invited the jury to infer by reference to familial likeness that Lyndon Sheed had been correctly identified as the man whom Ms Poihipi knew as Liz's father and had intercourse with. This was to use the photomontage as evidence identifying Lyndon through his resemblance to Ricky.

[39] However, the prosecutor was followed immediately by counsel for Lyndon Sheed, who confirmed, as we have noted above, that Mr Sheed accepted that he was Liz's father, that he was the person who had intercourse with Ms Poihipi, and that he went outside when he heard the commotion involving Mr Wayman. There was no doubt by the close of the trial that Mr Sheed was present at the scene of the offence. Hence the Judge's direction that the photomontage was relevant as evidence of Ms Poihipi's unreliability.

Was identification of Lyndon Sheed in issue?

[40] Mr Sinclair contended that Ms Poihipi's account is correctly described as observation evidence, as this Court used that term in *Edmonds v R*:[11]

> [42] There is a difference between observation and identification evidence. Identification evidence involves identifying an individual as being present at the scene of the offence – see the definition of "visual identification evidence" in s 4. By contrast, observation evidence concerns the actions of a person, including an offender's alleged participation in the offence. It is different from identification evidence, and there may be instances where it stands alone because the presence of the offender at the scene is not in dispute. For further discussion, see *R v Turaki* at [65] – [73].
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> [43] We also refer to *R v Chen*…, where the Court accepted that an identification parade is not required where an individual suspect disputes participatory acts, but accepts that he or she was present at the scene of the criminal activity. In such cases, identification of the suspect is not an issue.

[41] As this Court explained in *R v Peato*, *Edmonds* was in error to the extent that it suggested that observation evidence could never be visual identification evidence:[12]

> [22] The definition of "visual identification evidence" in s 4 and the linkage between ss 45 and 126 are not straightforward. To draw a bright-line distinction between visual identification evidence in the strict sense and observation evidence, and to require a s 126 warning for the former but not the latter, is not necessarily consistent with the evident statutory purpose of

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11 *Edmonds*, above n 10, citing *R v Turaki* [2009] NZCA 310 at [65]–[73] and *R v Chen* [2001] EWCA Crim 885 at [40].

12 *R v Peato* [2009] NZCA 333, [2010] 1 NZLR 788 citing *R v Slater* [1995] 1 Cr App R 584 at 590.

> avoiding miscarriages of justice through mistaken identifications. In particular, we do not see any necessary logical distinction in all cases between evidence identifying the accused as being present at or near the scene of an offence and evidence identifying which of several possible attackers was responsible for inflicting the fatal blow…
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> [23] Nor do we consider that an admission by an accused of presence at the scene of a crime necessarily means that there is no issue as to identification. For instance, in *R v Slater*… the Court said at 590:
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> > [It would be] contrary to common sense to require a *Turnbull* direction [that is, a warning to the jury about the dangers of identification evidence] in *all cases* where presence is admitted but conduct disputed. Purely by way of example, such a direction would not, in our view, generally be necessary if the defendant admitted he was the only person present when the complainant received his injuries, or if a woman and a man were present and the complainant said the man caused his injuries, or if a black man and a white man were present and the complainant said the white man caused the injuries, or if four men were present, three dressed in black and one in white, and the complainant said the man in white caused his injuries. Of course, in all but the first of those examples, an appropriate warning would need to be given if in a particular case, for example, the lighting was bad or there were other circumstances giving rise to the possibility of mistake. But, in our judgment, *the possibility of mistake is a necessary prerequisite for an identification issue to arise such as to require a* Turnbull *direction*. [Emphasis added.]

[42] As French J explained in *Pink v R*, after surveying the authorities since *Edmonds*:[13]

> … there is no bright line distinction between visual identification evidence in the strict sense and observation evidence. That is to say, it is wrong to suggest that an identification warning is only required when the defendant denies being at the scene. A warning may still be required when the defendant admits being present and it is a live issue as to whether he or someone else present was the perpetrator.

[43] Was there a dispute as to identification of Lyndon Sheed as the person who king-hit Mr Wayman and joined the group attack? It was never put to Ms Poihipi that she had identified the wrong man as "the dad" or that she had attributed to him actions undertaken by the curly-haired guy or "the prospect". The curly-haired guy was described as Māori. Mr Carston was described as tall and lanky. Lyndon Sheed identifies as Pākehā and the evidence does not establish his height. He was wearing boxer shorts and was barefoot. However, Lyndon Sheed denied any involvement in

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[13] *Pink v R* [2022] NZCA 306 at [59]. The Court had surveyed *Turaki*, above n 11, *Peato*, above n 12, *E (CA113/2009) v R (No 2)* [2010] NZCA 280 and *Witehira v R* [2011] NZCA 658.

the attack on Mr Wayman. His counsel argued strongly that Ms Poihipi was unreliable, highlighting her intoxication, the allegedly differing accounts she had given of the assault, and the alleged inconsistency between her account and the pathologist's evidence of Mr Wayman's injuries.

[44] Further, identification was in issue for Mr Carston ("the prospect"). His case was that the Crown had not proved that he was present during the assault. Ms Poihipi's identification rested on her observations of him as the bartender that night, but she also identified him as the person who opened the gate for Mr Wayman's car when they arrived at the party and it appears to have been common ground that she was wrong about that. She was not able to identify him when presented with a photomontage.

[45] For these reasons, an identification warning was required in this case for Mr Sheed and Mr Carston. In the passage quoted at [35] above Mander J did give an orthodox identification warning. No criticism is made of it.

Is there a risk that a miscarriage of justice occurred?

[46] We are satisfied that no risk of a miscarriage of justice arose from the Crown's use of the photomontage and Ms Poihipi's misidentification of Ricky Sheed. In our view the jury could properly find, and must have found, that Lyndon Sheed's identity as "the dad" and his participation in the attack on Mr Wayman were proved beyond reasonable doubt.

[47] It follows that there is nothing in the argument that the only identification evidence was Ms Pohipi's identification of Ricky Sheed, who was never positively excluded as being at the party. It is true that no witness appears to have stated that he was elsewhere,[14] but Lyndon Sheed's presence at the scene of the assault was not in issue and the evidence established that he was "the dad", and had participated in the attack, delivering the king hit.[15]

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[14] Lyndon Sheed's trial counsel asked Ms Poihipi in cross-examination if she was aware that Ricky Sheed was in Te Anau at the time of the party, but she did not know.

[15] In cross-examination Ms Poihipi said that the police had not told her she had made a mistaken identification.

Unreasonable verdict: unreliability of Ms Poihipi's account of the king hit

[48] Mr Sheed contends that the jury verdict was unreasonable because of the unreliability of Ms Poihipi's evidence. Mr Andersen argued that she admitted to being "wasted" and she gave two completely inconsistent accounts, one in which the curly-haired guy knocked Mr Wayman to the ground and the other in which he fell to the ground because "the dad" king-hit him.

[49] Mr Sinclair responded that there was no real inconsistency in the evidence. Ms Poihipi did say when she began her account of the fight in evidence in chief that the curly-haired guy kept punching Mr Wayman everywhere until "he literally just dropped." But she was adamant that "the dad" knocked him down with a king hit:

> The dad just king-hitted [sic] him.
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> …
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> … so dad's just knocked him and he's fell to the ground.
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> …
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> … The prospect's there, the curly haired guy's there. The dad's standing there and I just see the dad just whack Kane and Kane just dropped. He dropped on the ground like nothing.
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> …
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> I just seen him [Liz's Dad] punch Kane to the ground and then they've started booting him in the head…

[50] When challenged on who knocked Mr Wayman down, she said that he had stumbled backwards around the car under the attack from the curly-haired guy but did not go down to the ground.

[51] Ms Poihipi remained adamant that "the dad" king-hit Mr Wayman, who fell to the ground and did not get up again. She affirmed her account in re-examination. The apparent inconsistency was squarely before the jury. We are not persuaded that they could not reasonably accept her evidence about the king hit having regard to her explanation for having said that Mr Wayman "dropped" after being punched by the curly-haired guy.

Causation: was the king hit a substantial and operative cause of death?

[52] Mr Andersen contended that the evidence did not exclude positional asphyxia as a cause of death. He argued that:

(a) positional asphyxia is distinguishable from other possible causes of death as it does not fit within the Crown theory of causation (an underlying vulnerability triggered by the assault);

(b) positional asphyxia could have been caused by Mr Wayman lying on his back in the car;

(c) if it was a cause of death, positional asphyxia would break the chain of causation between any king hit and his death because he may not have died had he been placed on his side in the recovery position; and

(d) Dr Anderson concluded that there were no specific autopsy findings that excluded positional asphyxia while in the car as contributing to death.

[53] Mr Andersen argued that if the immediate cause was a stress-induced cardiac arrhythmia, it was not possible to pinpoint when the stress reaction occurred. It may have occurred during the verbal altercation or the initial physical altercation with the curly-haired guy. In the circumstances, the jury could not reasonably have been satisfied beyond reasonable doubt that the king hit was a substantial and operative cause of death.

[54] In response, Mr Sinclair pointed to the Judge's bench note (see [27] above), which recorded a consensus among counsel that if positional asphyxia was the ultimate mechanism of death, the key issue is what caused Mr Wayman to be in a condition where he was unable to move in the rear of the vehicle so he could breathe. It followed that if positional asphyxia was a contributing cause, it did not break the chain of causation because the assault remained a substantial and operative cause of death.[16]

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16 *R v Smith* [1959] 2 QB 35 at 43.

[55] Mr Sinclair also argued that the medical evidence was against the possibility that the initial altercation was the cause of cardiac arrhythmia. It showed rather that a stress response may "ramp up" as an event progresses. Further, as a matter of law Mr Sheed's involvement would still be a substantial and operative cause of death if it is supposed that Mr Wayman was actively dying from the shock of the initial attack; it is sufficient that the king hit accelerated the inevitable death. He pointed out that before the king hit Mr Wayman was conscious and attempting to defend himself. Lastly, counsel contended that at a minimum Mr Sheed became a party to manslaughter through his participation in a continuing assault by the curly-haired guy.

[56] In our view it was not necessary to exclude positional asphyxia as a contributing cause of death. It sufficed that the assault was a substantial and operating cause. To the extent that Mr Andersen argued positional asphyxia was a supervening cause which had to be excluded because it broke the chain of causation, we are unable to agree. The jury could reasonably find that the king hit caused Mr Wayman to fall to the ground where he was subjected to attack by a group including Mr Sheed and lost consciousness. If he experienced positional asphyxia in the car he did so because he was incapacitated and unable to move. For these reasons trial counsel were correct to recognise that the real question was why Mr Wayman was in no condition to move once placed in the car.

The sentence appeal

[57] Mander J adopted a starting point of five years eight months' imprisonment and reached the end sentence by making an allowance of two months for time spent on electronically-monitored bail.[17] He identified several aggravating factors: attacking the head; vulnerability of the victim/multiple attackers and the ongoing nature of the beating.[18] He accepted that there was no real premeditation but there could be no doubt about the deliberateness of Mr Sheed's actions.[19] His lack of action to assist Mr Wayman and his reluctance to respond to Ms Poihipi's appeals for help did him no credit. The Judge identified no personal mitigating factors.[20]

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17 Sentencing notes, above n 2, at [23] and [30]–[31].
18 At [15].
19 At [18].
20 At [25]–[29].

[58] Ms Gaskell, who argued the sentence appeal for Mr Sheed, contended that the starting point was too high; it should have been no more than four years' imprisonment. She contended that facts adopted for sentence were incorrect and painted Mr Sheed in the worst possible light. Specifically, the Judge found that Mr Sheed did not try to stop what was going on, that he proceeded to kick and punch Mr Wayman on the ground,[21] and that he only assisted in getting medical attention at Ms Poihipi's insistence.[22]

[59] Counsel urged that sentencing ought to have proceeded on the basis that this case was comparable to the "one punch" manslaughter cases. The Judge distinguished those cases because of the attack which followed the king hit, but that was a material error because the verdict implies that such conduct was not causative of death. Counsel argued that the comparable cases on which the Judge relied were all more serious than this one; they variously involved worse violence, premeditation, and a failure to lend assistance.[23]

[60] Counsel also submitted that an allowance ought to have been made for personal mitigating factors. A s 27 report pointed to learning difficulties, familial disconnection and poor role-modelling in Mr Sheed's early life. It stated that he was susceptible to substance abuse and offending behaviours, and was predisposed towards gang membership. The Judge considered the mitigating factors in isolation, finding none made a causal contribution.[24] He did not discuss the opinion of the author of the s 27 report, Tara Oakley, that the theory of intersectionality "lies at the heart of it". Ms Oakley defined intersectionality as "a theory often applied in feminist theory to explain the amplification of impact that occurs at the intersection of factors pertaining to difficulty or inequality, such as gender, race, and class".[25]

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21 At [4].

22 At [7].

23 *Blackler v R* [2019] NZCA 232; *R v Tavita* [2022] NZHC 2841; *R v Tafutu* [2014] NZHC 657; and *R v Williams* [2022] NZHC 2206.

24 Sentencing notes, above n 2, at [25]–[27].

25 The Oxford Dictionary of Human Geography offers a plain language definition: the theory that various forms of discrimination based on race, gender, disability, sexuality and other forms of identity, do not work independently but interact to produce particular forms of social oppression: Alisdair Rogers, Noel Castree and Rob Kitchin *A Dictionary of Human Geography* (online ed, Oxford University Press, Oxford, 2013) at definition of "intersectionality".

[61] We do not accept these submissions.

[62] So far as the starting point is concerned, Mander J correctly compared the offending to cases of aggravated violence. This case would fall within band 2 (5–10 years' imprisonment) under the *Taueki* sentencing guideline judgment because of the grievous harm done, the attack to the head, and the involvement of multiple attackers.[26] It is not the case that the jury verdicts exclude the assault which followed the king hit as a contributing cause of death, and even if they did Mr Sheed's involvement in that attack would still add to his culpability. Counsel did not develop the submissions that the Judge could not find that Mr Sheed did nothing to stop the attack and assisted Mr Wayman only when Ms Poihipi insisted. Ms Poihipi gave evidence to that effect and it is evident that Mander J, like the jury, found her an honest and generally reliable witness. The starting point adopted was within range.[27]

[63] Turning to personal mitigating factors, the Judge was not required to accept Ms Oakley's opinion, based on Mr Sheed's instructions, that his background made a significant causal contribution to the offending in fact. The s 27 report was not evidence.[28] It was information which the Judge must receive unless there was good reason not to do so but need not accept.[29]

[64] Offenders commonly present with several disadvantages which interact to help to explain how their background may have related in fact to the commission of the offence, justifying sentence discounts which can be substantial.[30] These disadvantages are not limited to characteristics or circumstances that have led to the offender experiencing discrimination founded on identity. But whatever the source of disadvantage, some causal connection is required if background is to mitigate sentence. The existence of that connection and its impact on the sentence are questions of judicial judgement.

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26 *R v Taueki* [2005] 3 NZLR 372 (CA) at [31], [34] and [38].
27 Compare *Blackler v R*, above n 23, at [27] and *R v Tai* [2010] NZCA 598 at [23]–[24].
28 *Greening v R* [2023] NZCA 432 at [17].
29 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [141] and [183]–[186].
30 See *Poi v R* [2020] NZCA 312.

[65] We share the Judge's view that the causal connection between Mr Sheed's background and this offending is weak.[31]

[66] The s 27 report states that Mr Sheed attributes the offending to intoxication at the time and his responsibility as the gang member "on watch" to "sort it out".

[67] However, his intoxication at the time is not a mitigating factor.[32] Background may contribute to addiction, but the report also discloses that he had previously managed to abstain from alcohol for 14 years.

[68] As to the linkage to gang membership, Mr Sheed's background of social disconnection, educational difficulties and unemployment may go some way to explain why he first joined a gang in 2012 as a mature adult. It is also understandable that Mr Wayman's behaviour might lead to him being ejected from the gang pad. As a senior gang member Mr Sheed may have felt that he needed to ensure that happened. But the Judge took Mr Wayman's behaviour into account when setting the starting point. And in our view Mr Sheed's background cannot be said to mitigate his culpability for his decision to join a group attack, to king-hit Mr Wayman, and then to participate in kicking and punching while Mr Wayman lay defenceless on the ground.

[69] For these reasons we are not persuaded that the Judge was wrong to deny Mr Sheed a discount for personal mitigating factors.

[70] Standing back, we do not accept that the sentence was manifestly excessive.

Disposition

[71] The appeal against conviction is dismissed.

[72] The appeal against sentence is dismissed.

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31 Sentencing notes, above n 2, at [26].
32 Sentencing Act 2002, s 9(3).