NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA215/2022
[2023] NZCA 422

BETWEEN	AARON LEE WALLACE Appellant
AND	THE KING Respondent

Hearing:	16 February 2023, further submissions received 3 March 2023
Court:	French, Ellis and Churchman JJ
Counsel:	W C Pyke for Appellant M F Laracy and H S Cunningham for Respondent
Judgment:	5 September 2023 at 2.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

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[1] In February 2022, following a retrial before Judge Greig and a jury,[1] Mr Wallace was convicted of one charge of sexual violation, one charge of kidnapping and one charge of male assaults female.[2] He was sentenced to seven years' imprisonment.[3] He now appeals his convictions on three grounds.[4]

[2] Due to COVID-related matters the appeal was filed 13 working days late. An extension of time was granted by Clifford J in a minute dated 20 July 2022.

Overview

[3] Two of the grounds of Mr Wallace's appeal highlight the challenges the coronavirus pandemic posed for the courts, and particularly for jury trials. The two questions posed are whether, under the law as it was in February 2022 — approximately two weeks after the first community case of the Omicron variant had been confirmed in New Zealand,[5] the Judge was able, on health and safety grounds, to:

(a) require a crucial witness who was unvaccinated to wear a mask covering her nose and mouth while giving her evidence; and

(b) prevent a qualified, but unvaccinated, member of a jury panel who had attended court pursuant to a summons from being part of the jury balloting process and (so) from serving on a jury.

[4] If the answer to either question is no, there are further questions about the effect of the error on the fairness of the trial and on the validity of the jury's verdicts.

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1 The first trial ended in a mistrial, on 21 April 2021.

2 Crimes Act 1961, ss 128(1)(b) (maximum penalty of 20 years' imprisonment), 209 (maximum penalty of 14 years' imprisonment), and 194(b) (maximum penalty of two years' imprisonment) respectively. Mr Wallace was found not guilty of four further charges (all of which related to the same events).

3 *R v Wallace* [2022] NZDC 4658 at [34].

4 An appeal against sentence has since been abandoned.

5 Manatū Hauora | Ministry of Health "COVID-19: variants" (5 May 2023) <www.health.govt.nz>.

[5] For reasons we explain, while the panel is ultimately unanimous on the outcome, there is a difference of opinion about the cogency of the "unvaccinated juror" ground of appeal.

[6] The third ground of appeal is whether the Judge erred in giving the jury a majority verdict direction as and when he did. It is convenient to address this issue first.

Taking a majority verdict

[7] As noted earlier, Mr Wallace faced seven charges at trial.[6]

[8] The evidence was complete on Friday 11 February 2022 and closing addresses and the summing up were delivered on Monday 14 February. The jury began its deliberations at 2.08 pm. At 3.30 pm there was a jury question relating to the kidnapping charge. This was answered by the Judge a few minutes before 4 pm and, after continuing their deliberations, the jury was sent home at 5.01 pm.

[9] The jury advised they had reached some decisions but were "split" on the sexual violation charge (and more specifically, on the question of consent) at 10 am the next day. Sometime later, the Judge inquired whether they were making progress towards a unanimous verdict, advising that the jury should let him know "when and if" they wanted a majority verdict direction. At 11.20 am the jury again advised they were making no progress and that a majority verdict "[was] not likely".

[10] The jury was brought back to Court at 11.29 am and, presumably after the foreperson had confirmed in open court that a unanimous verdict was unlikely, at 11.31 am the Judge reiterated his direction on consent and gave an orthodox majority verdict direction.

[11] The jury returned its verdicts (unanimously not guilty on four charges, unanimously guilty on two and guilty by majority on the sexual violation charge) at

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6 Alongside the charges we have already discussed, Mr Wallace was charged with one charge of injuring with intent to injure, one charge of threatening to cause grievous bodily harm, and a second and third charge of male assaults female under ss 189(2), 306(1)(a) and 194(b) of the Crimes Act respectively.

2.20 pm. As indicated by their earlier communication, the jury had been unable to agree on the most serious, sexual violation charge.

[12] Section 29C(2) of the Juries Act 1981 (the JA) provides that a court may accept a majority verdict if:

> (a) the jury has deliberated for at least four hours; and
>
> (b) the jurors have not reached a unanimous verdict; and
>
> (c) the foreperson of the jury has stated in open court—
>
> > (i) that there is no probability of the jury reaching a unanimous verdict; and
> >
> > (ii) that the jury has reached a majority verdict; and
>
> (d) the court considers that the jury has had a period of time for deliberation that the court thinks reasonable, having regard to the nature and complexity of the trial.

[13] The "at least 4 hours" requirement was (just) met here. The jury deliberated for two hours and 53 minutes (between 2.08 pm and 5.01 pm) on 14 February and for one hour and 29 minutes (between 10 am and 11.29 am) on 15 February, before the majority verdict direction was given.[7] So they deliberated for a total of four hours and 22 minutes.

[14] Proceeding on the basis that the Judge considered this was a reasonable period of time in the circumstances, the other s 29C prerequisites were met.

[15] As we understood it from counsel's written submissions, Mr Wallace also contends (albeit rather faintly, by the time of the hearing before us) that the jury should

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[7] It is not clear from the log notes when the jury recommenced deliberating on 15 February. Although the log records Court (for Chambers) resuming at 10.22 am we take it that the jury had returned by 10 am, which is the recorded time of their communication.

have been given a *Papadopoulos* direction before (or possibly instead of) the majority verdict direction.[8] The difficulty with that, however, is that the Supreme Court has confirmed it is a matter of discretion for the trial judge whether, and when, to give a majority verdict direction and that it is generally preferable for a majority verdict direction to be given *before* a *Papadopoulos* direction.[9]

[16] In this case, the Judge gave an orthodox majority verdict direction. The Judge encouraged unanimity and reminded the jury of their oath, but cautioned them not to change their view merely for the sake of agreement. There is no appearance of error in this procedure and no record of any objections being raised by counsel at the time.

[17] This ground of appeal cannot succeed.

The COVID-19-related grounds: context

The COVID-19 "traffic light" system and the courts' response

[18] On 2 December 2021 the COVID-19 Alert Level System came to an end and New Zealand moved to the COVID-19 Protection Framework (known as the traffic light system).[10] At that point, New Plymouth was at the Orange setting.

[19] On 21 December 2021, the Chief Justice released a media statement about the operation of the Courts under the traffic light system, outlining processes which were to take effect from 31 January 2022. The statement detailed courthouse entry requirements:[11]

> (a) At all traffic light settings, every person entering the courthouse would be asked to show their My Vaccine Pass, or evidence of a recent negative COVID-19 test.

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8 The current form of the so-called *Papadopoulos* direction is to be found in *R v Accused* (CA 87/88) [1988] 2 NZLR 46 (CA) at 59. The direction in its original form is set out in *R v Papadopoulos* [1979] 1 NZLR 621 (CA) at 623 and 626.

9 *Hastie v R* [2012] NZSC 58, [2013] 1 NZLR 297 at [14].

10 Ministry of Health "History of the COVID-19 Protection Framework (traffic lights)" (10 October 2022) Unite against COVID-19 <https://covid19.govt.nz>.

11 Chief Justice Winkelmann "Court operations under the COVID-19 Protection Framework" (press release, 21 December 2021) Ngā Kōti o Aotearoa | Courts of New Zealand <https://www.courtsofnz.govt.nz>, emphasis added.

(b) In the High Court and District Court, people required to attend court in person would be allowed entry *even if* they did not show a Vaccine Pass or negative COVID-19 test. Rather, "their entry may be subject to special measures to manage health and safety risks. These entry requirements are subject to any court protocols, and to judicial direction".

[20] On 23 January 2022 New Zealand's first community cases of the Omicron variant were confirmed.[12] The whole country then moved to the Red setting at 11.59 pm.

[21] On 28 January the Ministry of Justice issued communications to the various law societies and associations detailing the processes that would be in place for the conduct of trials effective from 31 January. These reflected and amplified the Chief Justice's pre-Christmas statement, advising that:[13]

(a) those who were required to attend court in person (for example pursuant to a summons) would be permitted to enter the building *even if* they do not show a My Vaccine Pass or evidence of a recent negative COVID-19 test;

(b) there will be 'processes' in place (on a 'site-by-site' basis) to manage those who cannot show a vaccine pass or a negative test;

(c) attendees who have neither a vaccine pass nor proof of a negative COVID-19 test will be able to go to a pharmacy to do a rapid antigen test (RAT);

(d) all juror summonses would be sent with an accompanying information sheet explaining the new measures and advising that if the juror cannot

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12 Ministry of Health, above n 10.

13 Letter from Carl Crafar (Chief Operating Officer of the Ministry of Justice) to the New Zealand Law Society and others regarding implementing the COVID-19 Protection Framework in the courts and tribunals (28 January 2022) (emphasis added).

meet the new entry requirements they could ask to have their service excused or deferred;

(e) where an unvaccinated jury panellist is selected for a jury, direction will be sought from the presiding judge about how this will be managed;

(f) pre-balloting might be used, where appropriate, to reduce the need for jurors to attend in person; and

(g) masks would still need to be worn in all courts and tribunals.

[22] On 31 January 2022 the Chief District Court Judge issued a document entitled COVID-19 Protection Framework – Green, Orange and Red Protocol.[14] The protocol began:

> **Nothing in this protocol is intended to reduce fair trial rights, the right to natural justice, or rights under the New Zealand Bill of Rights Act 1990.**
>
> …
>
> The courts are an essential service and the District Court will remain open at Red, Orange and Green settings.
>
> This protocol recognises that local solutions may be necessary to best address local issues. Any variations must be approved by the Chief District Court Judge.

[23] Next, under the heading "Access to the District Court at Green, Orange, and Red Settings" the protocol stated:

> 2. Persons attending Court must:
>
> (i) show a vaccine pass; or
>
> (ii) provide evidence of a negative COVID-19 test administered within 72 hours of attendance; or
>
> (iii) provide evidence of a negative rapid antigen test administered within 24 hours of attendance.

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[14] Chief District Court Judge Heemi Taumaunu "Archived COVID-19 Protection Framework – Green, Orange and Red Protocol, commenced on 31 January 2022" (31 January 2022) Ngā Kōti o Aotearoa | Courts of New Zealand <https://www.courtsofnz.govt.nz>.

[24] This paragraph expressly included an endnote in the following terms:

> Nothing in this protocol will prevent the attendance at court of any person required to attend court, for example pursuant to a summons, legislative requirement or judicial direction, who does not meet the requirements in paragraph 2. Appropriate health and safety measures will be put in place.

[25] After setting out special provisions relating to defendants who did not meet the above requirements, the protocol specifically addressed the requirements for jurors, namely:

> 4. Those summoned for jury service who do not meet the requirements in paragraph 2 will be subject to separate arrangements with appropriate health and safety measures put in place by the Ministry of Justice.

[26] Under the heading "Health and safety" the Protocol provided:

> 10. All people who enter the Court must scan the QR code or complete the contact tracing register before entering the Court.
>
> 11. Persons present in the Court must observe all physical distancing requirements as specified by the Ministry of Justice. This may result in limits to the number of people permitted to enter the Court building.
>
> 12. Subject to limited exceptions, and the discretion of the presiding judge:
>
> a) Persons attending Court must wear a cloth mask, surgical mask or a KN95 (or equivalent) mask at all times within the court precinct. These will be provided.

[27] The "limited exceptions" to mask wearing that could be made were specified in an endnote to para 12 as follows:

> (i) People who have a mask exemption card issued by the Ministry of Health will not be required to wear a mask.
>
> (ii) Some court attendees (for example jurors, defendants and witnesses) may be directed by the Judge to wear a clear mask, which will be provided by the Court.
>
> (iii) Leave may be given to vaccinated attendees, or unvaccinated attendees who have provided a negative COVID-19 test result, to remove their mask when speaking.
>
> (iv) Leave may be given to unvaccinated court attendees who have not provided a negative COVID-19 test result to replace their

> KN95 (or equivalent) mask with a clear mask when giving evidence.

[28] Health and safety measures that would apply in courthouses were set out in para 13:

> a. access will be denied to anyone who is showing signs of illness, or has a body temperature of 38 degrees Celsius or higher, or has had close-contact with a suspected, probable or confirmed case of COVID-19;
>
> b. surgical masks will be provided at the entry to the courthouse for all those who do not have their own mask;
>
> c. cleaning products are available on site to enable staff and lawyers to keep their immediate areas clean (including AVL suites); and
>
> d. hand sanitiser will be readily available within the courtroom.

[29] And paras 14 and 15 provided:

> 14. Any concerns about health and safety in the Court should be raised with the local Court Manager in the first instance.
>
> 15. In the event of community transmission within a courthouse catchment area, public health advice will be adopted and further directions given.

The decisions by the trial Judge in Mr Wallace's case

[30] Mr Wallace's trial was set to begin in the New Plymouth District Court on 8 February 2022. As already noted, it was a retrial; the first trial had been in April 2021. On 8 February there were 202 new community cases of COVID-19, although that number increased exponentially over the next three weeks.[15]

[31] Four days before the trial began it seems there was a pre-trial conference between counsel and the Judge. In his minute that day the Judge recorded a "number of issues have arisen".[16] The first related to the vaccination status of the complainant, which the Judge addressed as follows:

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15 Ministry of Health "Update on COVID-19 Cases – 8 February 2022" (8 February 2022) Unite against COVID-19 <www.covid19.govt.nz>.

16 *R v Wallace* DC New Plymouth CRI-2018-043-001895, 4 February 2022 [Minute of Judge Greig] at [1].

> [2] … the complainant is unvaccinated and it would be my preference that she give evidence via CCTV/AVL.
>
> [3] I am advised by the Crown however that this will present insuperable difficulties for them in terms of the particular features of this complainant's evidence and what she will need to do. The Crown need to play a number of moving and still images and the complainant will need to refer to those during her evidence. This cannot be done remotely. The Crown know what they are talking about because this is a retrial.
>
> [4] I have therefore directed that the complainant gives her evidence wearing a mask. She will also be behind a clear Perspex screen. Prior to making that ruling I have consulted with the defence. My concern has been whether the defence consider that this will impact on the jury's ability to assess demeanour.
>
> [5] Mr Mooney, on behalf of Mr Wallace has advised that he is "not overly concerned" if the witness appears with a mask.

[32] The second issue related to what the Judge recorded as "my decision not to allow unvaccinated members of the jury pool into the courthouse".[17] He went on:

> [8] I consider that s 22 of the Juries Act 1981 allows me to stand down a juror who is unvaccinated. I acknowledge that there is some divergence in opinion as to whether this should only be done once the juror's name is drawn out of the barrel during the ballot. My direction to security has been that the unvaccinated jurors, whose identity is already known, should be intercepted outside the courthouse and turned away at that point. They will have reported for jury service, will be entitled to their allowance, but will not risk the health of other vaccinated jurors who will be present.
>
> [9] My reasons for making this direction, as opposed to standing them down inside the courtroom are simply that the New Plymouth courthouse is too small to allow me to separate the jury pool any further than it is already being separated. I have tried to do this, but have been assured by the registry staff that it is not possible. The New Plymouth courthouse has three courtrooms and the jury pool will already be spread between those three rooms. There is no other space that can be utilised.
>
> [10] Since I would in any case be standing those potential jurors down, it is unreasonable to allow them into the courthouse simply to do that, whilst at the same time risking the health of everyone else in the courthouse, vaccinated jury pool, court staff, counsel and any others.

[33] The Judge recorded that he was making this direction over the objection of defence counsel:

> [11] Mr Mooney has made his objection clear. He may have a number of reasons that he has not had time to properly articulate, but the reasons he advanced were that the jury room has been modified so that jurors can maintain social distance and that I should not eliminate potential jurors simply

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17 Minute of Judge Greig, above n 16, at [7].

> because of a choice they have made. Mr Mooney does not accept that s 22 of the Juries Act 1981 can be read to the extent that I have read it. He is concerned that the jury pool will not be representative of the community at large.
>
> [12] I acknowledge those reasons. They are valid considerations and I have given the matter further thought. My overwhelming priority must be for the safety of the remaining jury pool. I disagree with Mr Mooney that our jury room could accommodate a mixture of vaccinated and unvaccinated jurors. It measures approximately three metres by four metres and the windows cannot be opened. Furthermore, jurors have to pass through a small narrow corridor in order to enter the jury room. Given the way the Delta variant is supposed to have escaped into the community, I could not possibly eliminate the thought that breathed out air particles might not linger in the corridor long enough for the next person to pass through and inhale them.

[34] It seems defence counsel raised the juror issue again, immediately before the start of the trial on 8 February. He sought an adjournment. The Judge's first ruling (10 February) recorded:[18]

> [2] We are about to commence the trial. This is the first jury trial to be held at the New Plymouth District Court under the "red traffic light" system. Members of the public will be answering their summons for jury service. I have asked our security team not to admit members of the jury pool answering their summons who are unvaccinated.
>
> [3] I have further asked security to intercept the unvaccinated members of the jury pool in the street and turn them away before they enter the court. These directions have been made for a number of reasons.
>
> [4] The New Plymouth Courthouse is physically unable to separate the unvaccinated members of the jury pool from the vaccinated members of the jury pool. The courthouse has a total of three court rooms. In order to maintain social distancing, it is going to be necessary to spread the jury pool out amongst all three courtrooms and then ballot the final jury members from that point.
>
> [5] I have researched the situation with the manager of the criminal team. I am assured there is no room in which to separate the unvaccinated members of the jury pool from the vaccinated.
>
> [6] The jury room at New Plymouth is, in common with many other jury rooms, a small room in which jurors could not be spread out so that each is more than one and a half metres from the other.
>
> [7] The trial due to be heard is a re-trial; the defendant faces charges that include sexual violation along with assaults on a female, injuring, kidnapping and threatening to kill. I was advised by the Crown that, if this trial had to be aborted part-way through, it was unlikely they could get the complainant back for a third time.

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[18] *R v Wallace* [2022] NZDC 1879.

[8] The security of the trial and the protection of the jury pool were therefore, to my mind, primary considerations, to be looked at always through the lens of the defendant's right to a fair trial.

[9] If the Omicron figures start to climb dramatically during the course of the trial, as they were forecast to do, I want to be able to have done all I can to reassure the jury that they will not be in close contact with any unvaccinated people during their time giving their service as jurors. It is a message I intend to give them right at the start of trial.

[10] Section 22 of the Juries Act 1981, in my judgement, allows me to stand down a juror on a number of grounds. The presence of an unvaccinated juror in this jury panel constitutes such grounds. It cannot be expected that vaccinated jurors are required to mix with unvaccinated jurors, at close quarters, for several days on end. It would therefore be my decision to stand down any unvaccinated jurors.

[11] The issue then becomes, at what point are the unvaccinated jurors stood down?

[12] If the unvaccinated members of the jury pool could be kept separate from the vaccinated members of the jury pool, then there would be a case for having them assemble within the courthouse and stood down if drawn from the ballot. However, for the reasons already set out, that is not possible. There is nowhere that the unvaccinated members of the jury pool can be kept apart from the vaccinated members of the jury pool.

[13] Furthermore, recent advice to the bench has been that turning a juror around at the court entrance, in the midst of other people, could in itself be a spreading event.

[14] It is for those reasons that I asked security to intercept each member of the jury pool outside the courthouse and to tum away any unvaccinated jurors.

[15] I made it clear to counsel on the Friday before the trial was due to start that I would be taking such a step. The defence made its opposition clear.

[16] This morning I have been handed a notice of appeal, indicating that the defence intend to appeal against this decision. The defence then asked for the trial to be adjourned pursuant to s 301 of the Criminal Procedure Act 2011. I met with counsel in chambers.

[17] Mr Mooney advanced submissions that in his view s 301(4)(b)(iv) applied, that there was a novel question of law to be decided and that therefore the trial should be adjourned. I was not willing to do that. It is not in the interests of justice to do so.

[18] I accept that this is a novel question of law. However, this is not an issue, such as a ruling under the Evidence Act, where the outcome of the appeal could determine the outcome of the trial or have a significant impact on the evidence at trial. This is a decision I have already made and nothing can now change that. The unvaccinated juror could not be retrieved prior to trial.

> [19] As already mentioned, this is a re-trial and the complainant is fragile. Trial time is a precious resource and there are no backup trials ready to be heard in place of this one at the moment so far as I am aware.
>
> [20] The principal reason however for not vacating the trial is simply that my ruling will have no bearing on the jury's decision in terms of the evidence presented.
>
> [21] I also advised counsel that my understanding of the position with the jury pool today was that 64 vaccinated members of the jury pool were in the courthouse by 9.30 am having answered their summons. A further three had to be sent away because there was no capacity to hold any more than that number. One unvaccinated juror did present. I am told that juror was happy to be sent away.
>
> [22] The New Plymouth Courthouse is therefore unable to accommodate all of those members of the public who have been summonsed for jury service, whether they are vaccinated or not.

[35] As defence counsel had before the District Court Judge, Mr Pyke on appeal placed more emphasis on the Judge's exclusion of unvaccinated jurors than the Judge's requirement that the complainant wear a mask while giving her evidence or the majority verdict point.

[36] The unvaccinated juror issue is the most difficult aspect of this case, and it is also the issue on which the three of us are not in complete agreement, although we are agreed as to the final outcome. For that reason, we propose to deal with the "lesser" issue of the complainant wearing a mask first.

The mask-wearing complainant

[37] To reiterate for convenience, the Protocol issued by the Chief District Court Judge in January 2022 relevantly required: [19]

(a) generally, that all persons attending Court must wear a cloth mask, surgical mask or a KN95 (or equivalent) mask at all times within the court precinct;

(b) witnesses could be directed by a Judge to wear a clear mask;[20]

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19 Taumaunu, above n 14.

20 There is no information before us as to whether clear masks were, in fact, an option in the New Plymouth District Court in February 2022.

(c) leave could be given to unvaccinated attendees who have provided a negative COVID-19 test result, to remove their mask when speaking; and

(d) leave could be given to unvaccinated court attendees who have not provided a negative COVID-19 test result to replace their KN95 (or equivalent) mask with a clear mask when giving evidence.

[38] As the Protocol also made clear, however, these rules were all expressly subject to a defendant's fair trial rights.

R v NS: the niqab case

[39] The impact of witnesses who give evidence with their face covered on a defendant's fair trial rights was considered by the Supreme Court of Canada in *R v NS*.[21] The issue in that case was whether a complainant in a trial concerning sexual offences could be required to remove her niqab[22] while giving her evidence and, more particularly how the tension between two potentially competing Canadian Charter of Rights and Freedoms 1982 rights: a witness's religious freedom and a defendant's right to make full answer and defence could be resolved.[23]

[40] The majority held that always preferring one right to the other was not tenable.[24] Rather, the answer lay in striking a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the court.[25] Thus a witness who for sincere religious reasons wishes to wear the niqab while giving evidence in in a criminal trial will be required to remove it if:[26]

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21 *R v NS* 2012 SCC 72, [2012] 3 SCR 726.

22 The niqab covers the whole face apart from the eyes.

23 At [7].

24 At [47].

25 At [31] and [46]. Two judges concurred (with their own reasons) and one dissented. Justices LeBel and Rothstein were of the view that, for fair trial and open justice reasons, a witness should never be permitted to wear the niqab while giving evidence. Justice Abella was of the opposite opinion; unless the witness's face is directly relevant to the case (such as where identity is in issue) she should not be required to remove her niqab.

26 At [3].

(a) removal is necessary to prevent a serious risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) the salutary effects of requiring her to remove the niqab outweigh the deleterious effects of doing so.

[41] The majority's analysis involved posing four questions:[27]

(a) Would requiring the witness to remove the niqab while giving her evidence interfere with her religious freedom?

(b) Would permitting the witness to wear the niqab while giving her evidence create a serious risk to trial fairness?

(c) If both freedom of religion and trial fairness are engaged on the facts, is there a way to accommodate both rights and avoid the conflict between them?

(d) If no accommodation is possible, then do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

[42] The sincerity of the witness's religious beliefs is relevant to the first question.[28]

[43] Relevant to the second question is what the majority said was the deeply rooted presumption (uncontradicted by the material before them) that seeing a witness's face is important for a fair trial, because it facilitates effective cross-examination and the assessment of credibility.[29] But whether being unable to see the witness's face threatens trial fairness in any particular case will depend on the evidence that the witness is to provide and, in particular the centrality of the evidence and whether or not it is contested. If the evidence is not contested, then being unable to see the

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27 At [9].
28 At [13].
29 See discussion at [22]–[28].

witness's face will not impinge on trial fairness and a witness who wishes to wear the niqab for sincere religious reasons may do so.[30]

[44] The third question requires a judge to consider whether there are reasonably available alternative measures that would respect the witness's convictions while still preventing a serious risk to a defendant's fair trial.[31]

[45] And in terms of the weighing exercise required by the fourth question:[32]

(a) Assessing the deleterious effects of directing the niqab to be removed requires consideration of the importance of the religious practice to the witness, and the actual situation in the courtroom (such as the people present and any available measures that might limit the witness's face being exposed). The judge should also consider broader societal harms, such as discouraging niqab-wearing women from reporting offences and participating in the justice system.

(b) Relevant salutary effects include preventing harm to fair trial rights and safeguarding the administration of justice. When assessing potential harm to the accused's fair trial rights, the judge should consider the importance of the witness's evidence to the case, the extent to which effective cross-examination and credibility assessment of the witness are central to the case, and the nature of the proceedings. Where the liberty of the accused is at stake, the witness's evidence central and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance.

Applying R v NS to mask wearing during the pandemic

[46] In submissions made after the hearing of Mr Wallace's appeal Mr Pyke drew our attention to a recent Canadian case in which the majority's decision in *R v NS* had been applied in a COVID-19 context. In that case the trial judge was required to decide

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30 At [28]–[29].
31 At [33].
32 At [34]–[45].

whether some or all witnesses should be required to remove their masks while giving their evidence.[33] The Judge adopted a modified *R v NS* four question framework, as follows:[34]

> (i) Would requiring the witness to remove their mask interfere, in this case, with public health measures to limit transmission of the virus, and protect the safety of people in the courtroom?
>
> (ii) Would requiring the witness to wear a mask while testifying create a serious risk to a fair trial?
>
> (iii) If both an important public interest (here public health measures) and trial fairness are engaged on the facts, is there a way to accommodate both and avoid the conflict between them? and
>
> (iv) If no accommodation is possible, do the salutary effects of having the witness remove the face covering outweigh the deleterious effects of doing so?

[47] In answering the first question the Judge took a detailed account of the specific COVID-19 context within which the Court was operating, including relevant directions from the Chief Justice of Ontario and the public health and safety measures that would be in place in the courthouse. Of particular note in this respect is that, at that point in time (April 2021), the majority of people living in Ontario had not been vaccinated.[35] She concluded that:

> [60] … in the present state of scientific knowledge available to the court, and the present state of the pandemic in this city, I am satisfied that requiring witnesses who testify in person to remove their mask would interfere with public health measures to limit transmission of the COVID-19 virus, and protect the safety of people attending in the courtroom.

[48] In terms of the defendant's fair trial rights, Copeland J noted:

> [62] Mr MacKinnon is facing one count of second degree murder, and one count of attempted murder. Apart from a first degree murder charge, these are among the most serious charges in the *Criminal Code.* His interest in a fair trial is substantial. I would add that the public also has an interest in all trials being fair. I accept as well that given the liberty interest at stake for Mr MacKinnon as

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33 *R v MacKinnon* 2021 ONSC 2749, 155 OR (3d) 81.

34 At [37].

35 At [41] the Judge noted that the most recent publicly available vaccination data was that in the range of 20 per cent of residents of the City of Toronto, and a similar percentage of residents of the province over the age of 18 had received at least their first dose of a COVID-19 vaccine. And although court staff, counsel and judges were regarded as "essential workers" they had not been prioritised in the vaccine roll out. She said at [41]: "the effect of the current stage of vaccinations is that there is no question that a significant percentage of the people present in the courtroom for in-person portions of this trial will not be vaccinated at all".

> the defendant in a criminal trial, his fair trial rights must be zealously protected, even in the face of a global pandemic …

[49] The judge went on to record that there was no dispute that the credibility of some of the civilian witnesses would be very much in issue and that some of those witnesses were of central importance to the trial.[36] She noted that the majority in the Supreme Court had accepted that a witness's face being covered could impede an assessment of credibility by the trier of fact and may impede the ability to cross-examine.[37] But then, she said:[38]

> [67] In my view, it is important not to overstate the importance of seeing a witness' face to assessing the credibility and reliability of the witness. Claims about the importance of seeing a witness' full face are based on the claim that observing the witness' demeanour is important to assessing credibility and reliability (or as a cue in cross-examination). However, the Court of Appeal has cautioned against overreliance on demeanour evidence in assessing credibility and reliability … Reliance on demeanour in assessing credibility and reliability is based on generalizations about what people's demeanour means, and such generalizations can be wrong.
>
> [68] In addition, the experience of trial judges with witnesses wearing masks for public health reasons during the pandemic is not information that was before the Supreme Court in *N.S* As I advised counsel during submissions, in the fall of 2020, I conducted in-person trials where witnesses whose credibility was very much in issue testified wearing masks (including a defendant who testified in one trial). It was my experience as a trial judge who has had witnesses testify before me wearing masks that it did not affect my ability to assess the credibility and reliability of the witnesses' evidence.
>
> [69] My experience with masked witnesses during the pandemic is consistent with my experience as a trial judge in general: that the substance of a witness' evidence, and its relationship to the other evidence in a trial, are better guides to assessing credibility and reliability than a witness' demeanour. I refer to factors such as the logic and consistency of a witness' version of events; whether a witness' evidence is internally and externally consistent; whether the evidence of a witness is consistent or inconsistent with objective evidence; the consistency or lack of consistency in the witness' evidence in cross-examination; whether a witness had made statements inconsistent with their evidence in the past on matters of significance; evidence of bias, interest, or a motive to lie on the part of a witness; and the witness' ability to recall events. I do not entirely rule out demeanour, because as a matter of law, it is a factor that a trier of fact is entitled to consider. But in my experience, it is of limited value.
>
> [70] I note as well that the fact that parts of the face of a witness will be covered if they are required to wear a mask for public health reasons does not remove all indications of demeanour from either counsel or the court. The

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36 At [63].
37 At [65].
38 Citations omitted.

> other portions of the witness' face will still be visible, as will the witness' body language (at least in the upper body). The witness' voice and hesitation, if any, will be audible. Expressions of emotion from the voice or the rest of the face or upper body will be visible and audible.

[50] Although it was possible to imagine a case where seeing a witness' face might be critical, the Judge was not persuaded that this was one of those.[39] It was strictly unnecessary, therefore for her to consider the remaining two questions, although she recorded that (in terms of question three) witness evidence by videoconference would be a reasonable alternative that could accommodate both the public health concern to limit spread of the COVID-19 virus, and the defendant's fair trial rights.[40] Other possibilities were also canvassed.[41] The Judge expressed her findings as follows:

> [95] This is a difficult issue. There are no easy answers. But considering the balancing approach from *N.S.,* and all of the factors I have weighed in light of the current circumstances created by the pandemic, I find as follows:
>
> (i) Requiring witnesses to remove their masks while testifying in person would interfere with the important public health interest of limiting transmission of the COVID-19 virus in the courtroom – a risk that is heightened now with the increased transmissibility of variants of concern, the increased risk of hospitalization and death from variants of concern, and the present high case counts in the City of Toronto.
>
> (ii) I find that requiring that witnesses who testify in person to remain masked during their testimony does not create a serious risk to trial fairness.
>
> (iii) In the alternative, even if there is some minimal risk to trial fairness from not seeing the full faces of in-person witnesses during their testimony, the alternative of testimony by videoconference would allow counsel, the defendant, and me as the judge to see witnesses' full faces. It would allow counsel to cross-examine, and me to appropriately assess the credibility and reliability of witnesses, even where credibility is significantly in issue for a particular witness… Videoconference testimony would protect the public health interest in COVID-19 safety precautions, while allowing the defendant, counsel, and the court to see the witnesses' faces.

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39 At [74]–[75].
40 At [78]–[89].
41 At [90]–[92].

[51] She directed that all witnesses giving evidence in person were to remain masked, although she said she would determine later whether that direction applied to the defendant himself, should he choose to give evidence.[42] She concluded:

> [98] I want to say one more thing before closing. I want everyone involved in this case to understand that I believe that assessing the evidence fairly to both sides and ensuring a fair trial is my most important role as a judge. I would not make this ruling if I felt it would endanger Mr MacKinnon's right to a fair trial.

This case

[52] There are some differences between the context in *MacKinnon* and the present. In particular, the relevant vaccination rates in Taranaki were very high.[43] As well, we note that the possibility of the complainant giving her evidence by video link had been rejected by the Judge due to practical objections raised by the Crown.

[53] That said, the approach of the New Zealand courts to the importance of witness demeanour is very similar to that articulated in *MacKinnon*. It is no longer regarded as a good indicator of credibility and specific warnings are routinely given to jurors about that.[44] It follows that we agree with counsel for the Crown, Ms Laracy, that even if wearing a mask did make an assessment of the complainant's demeanour more difficult for the jury, this would have had no meaningful impact on Mr Wallace's fair trial rights. In any event (and as noted by Copeland J in *MacKinnon*) there were a number of aspects of demeanour (tone of voice, body language) that would still have been discernible despite the wearing of a mask.

[54] As far as any impact on cross-examination is concerned, the signal point is that Mr Wallace's then counsel was consulted before the ruling was made and expressed no concern about the complainant giving evidence while masked. Unusually, and importantly, defence counsel was in a remarkably good position to make an assessment about any prejudicial impact her masking might have had, because he had cross-examined the complainant before, during the first trial. Mr Pyke responsibly

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42 At [96].

43 Department of the Prime Minister and Cabinet and others *COVID-19 Response Weekly Report* (11 February 2022) at 33.

44 Following *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [46] the standard warning now given by trial judges is that "simply observing witnesses and watching their demeanour as they give evidence is not a good way to assess the truth or falsity of their evidence".

acknowledged this as a significant impediment to this aspect of Mr Wallace's appeal. We agree.

[55] This ground of appeal cannot succeed.

The unvaccinated juror

Statutory context

[56] Whether the Judge had the power to exclude a qualified, randomly selected but unvaccinated member of the jury panel from the jury selection process turns largely on a number of statutory provisions and their context. That context primarily comprises the JA, the Jury Rules 1990 (the Rules) and the Court Security Act 1999 (the CSA) as they were at the time material to these proceedings (February 2022). Also relevant, however, is certain primary and secondary legislation related to the pandemic: the Epidemic Preparedness Act 2006 (the EPA) and any secondary legislation made by the Chief District Court Judge under s 24A of that Act.

The Juries Act 1981

Qualification and liability to serve

[57] Section 6 is undoubtedly the cornerstone of the JA. It provides that, subject only to certain limited exceptions, every person who is registered as an elector is qualified and liable to serve as a juror upon all juries that may be empanelled for any trial within the jury district in which the person resides. Section 6 reflects the fundamental constitutional principle that juries are to be representative of a defendant's community.[45]

[58] The exceptions to qualification under s 6 are specified in ss 7 and 8.[46] Section 7 disqualifies those who have any convictions for serious offending (measured by the sentence imposed) and those with convictions for certain lesser, but recent, offending from serving on a jury "on any occasion". Section 8 prohibits certain office holders

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45 For a discussion of this principle, see *Ellis v R* [2011] NZCA 90.

46 A review of the predecessors to the JA shows that the trend over time has been to extend the reach of the duty and privilege of jury service. Most notably, any property qualification and the disqualification of women and Māori have long since disappeared.

(such as the Governor-General), those engaged in certain occupations (such as lawyers and police employees) and those with an intellectual disability from serving,[47] as well as "a person who, under section 15A, is excused by the Registrar from attending as a juror in any court on any occasion".[48] We discuss excusal under s 15A shortly.

Jury lists

[59] Section 9 provides for the compilation of jury lists by the Electoral Commission, at the behest of the chief executive of the Ministry of Justice. Such a list must not contain the name of any person who, according to the electoral roll, holds any office, or is engaged in any occupation, referred to in s 8 or in respect of whom a direction is in force under s 115 of the Electoral Act 1993 that their name, residence, and occupation not be published. But otherwise:[49]

> The Electoral Commission must, for each jury district, prepare a jury list containing a random selection of the names of people who, according to the electoral roll, reside in the jury district and are registered as electors.

[60] Section 12 controls access to, and the confidentiality of, these lists. Section 12A authorises the Registrar to amend a jury list by deleting any person who is not qualified in terms of s 6, disqualified under s 7, not permitted to serve under 8, has died, has successfully applied for a deferral of their service under s 14B or who is "otherwise prevented or excused from serving on a jury by this Act or by order of a Judge".[50]

The jury panel

[61] As required, the Registrar then compiles from a jury list a panel of those who are to be summoned for jury service. In doing so the Registrar must take reasonable steps to ensure those statutorily disqualified or directed not to serve are not on the

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47 "Intellectual disability" is defined in s 2 of the JA as having the same meaning as in the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

48 Juries Act 1981, s 8(hc); unless the person's permanent excusal has been cancelled under s 15A(3).

49 Section 9(3).

50 Under s 12A(2) a Registrar may act on their own knowledge or on any evidence they consider sufficient when exercising the s 12A(1) amendment power. As discussed shortly, a Judge may excuse a person on a jury list from serving in certain specified circumstances.

panel.[51] The method of compilation, which is specified in the Rules, is otherwise one of random selection.[52]

[62] Sections 14 and 14A governs inspection of the jury panel by others and the very limited use to which copies of the jury panel may be put.

Deferral and excusal of jury service: Registrars' powers

[63] The circumstances in which a person on a jury panel who has been summoned to attend Court may have their attendance excused or deferred by a Registrar, in advance of attendance are dealt with in ss 14B, 14C, 14D, 15 and 15A.

[64] Putting to one side certain prerequisites of a more procedural kind,[53] under s 14B deferral may only be granted by the Registrar if, by reason of —

> (a) the nature of that person's occupation or business, or of any special and pressing commitment arising in the course of that person's occupation or business:
>
> (aa) that the person has difficulties in understanding or communicating in the English language, so that they are not capable of acting effectively as a juror:
>
> (b) that person's disability:
>
> (c) that person's state of health, or family commitments, or other personal circumstances

— the Registrar is satisfied that attendance "would cause or result in undue hardship or serious inconvenience to that person, any other person, or the general public".[54] A deferral can only be granted under s 14B following a written application by or on behalf of the person concerned.[55]

[65] Under s 15 excusal *may* be granted where, due to one of the matters set out in s 14B, attendance would result in undue hardship or serious inconvenience to that person, any other person, or the general public. A Registrar must in addition be

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51 Sections 13(1) and 13(2).
52 Jury Rules 1990, rr 6(3) and 7(2).
53 For example, the deferral power can only be exercised in respect of a summons that is not a replacement summons under section 14C(1)(c).
54 Sections 14B(2)(c) and (3).
55 Section 14B(2)(c).

satisfied that, if the juror's attendance were required, the person would not be able to perform a juror's duties satisfactorily and that deferral under s 14B is not reasonably practicable.[56]

[66] Under s 15(2), a Registrar *must* excuse a person summoned to attend as a juror where the Registrar is satisfied that either:

(a) the person is a practising member of a religion that holds that jury service incompatible with its tenets; or

(b) is over the age of 65; or

(c) has served or attended for service as a juror at any time within the preceding two years; or

(d) has been excused from jury service for a period of time that has not yet expired.

[67] As before, a written application by or on behalf of the person concerned is an express prerequisite to the exercise of the excusal powers under s 15.

Deferral and excusal of jury service: Judges' powers

[68] The circumstances in which a person on a jury panel who has been summoned to attend may have their attendance excused by a Judge, *in advance* of attendance, are dealt with in ss 16 and 16AA.

[69] Section 16 confers an independent power on a Judge to "excuse a person summoned to attend as a juror on any occasion in the court in which the Judge sits from attending on that occasion".[57] Again, such an excusal can only occur following an application made by or on behalf of that person, although there does not seem to be a requirement that such an application be in writing. The circumstances in which the

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56 Section 15(1A)(b)-(c).
57 Section 16(1).

excusal power can be exercised are set out in subss (3) and (4), which respectively provide:[58]

> (3) The Judge may excuse the person from attending on that occasion if—
>
> (a) the panel that was used in summoning the person to attend as a juror has been compiled in respect of 1 trial only; and
>
> (b) the Judge is satisfied that the person is personally concerned in the facts of the case, or is closely connected with one of the parties or with one of the prospective witnesses.
>
> (4) The Judge may excuse the person from attending on that occasion if satisfied of either of the following:
>
> (a) a ground on which the Registrar could have excused that person under section 15;[59] or
>
> (b) that the person objects to jury service on grounds of conscience, whether or not of a religious character.[60]

[70] Under s 16AA, a Judge may, on their own motion or on the application of the Registrar or other registry staff member, cancel the summons of that person if satisfied that the person is not capable of acting effectively as a juror due to disability or difficulties communicating in the English language.[61]

[71] And s 16A empowers a Judge, at any time after the panel has been prepared in accordance with s 13, to order the removal of a trial to some other place if they are satisfied that "no adequate courtroom is available at the place" where the trial is to be held.[62]

Selecting the jury

[72] Sections 17 through 22C are grouped under the heading "Constitution of jury". They are concerned with the rules surrounding the selection of a jury of 12 jurors (s 17) and a foreperson (s 21) from the wider jury panel.

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58 Citations added.

59 Namely, the grounds set out at paras [65] and [66] above.

60 This is a wider ground for conscientious excusal than the ground under s 15(2)(a).

61 By dint of s 16AA(3) any such application must be made before the jury is constituted and, by dint of subs (4), must be heard in private. The word "disability" is defined in s 2 to include "visual or aural impairment".

62 Section 16A(1).

[73] Section 18 provides:[63]

> Where any case is to be tried by a jury, the persons who are to comprise the jury must be selected in the precincts of the court using the method determined in accordance with the jury rules.

[74] Subject to the powers of a Judge to discharge a juror under s 22, a jury is to comprise the first 12 people selected in accordance with s 18 who remain after all proper challenges have been allowed.[64]

[75] Section 22 assumes some importance in this case. Subsection (1) relevantly provides:

> (1) When this subsection applies, the court, having regard to the interests of justice, may either—
>
> (a) discharge the jury without the jury giving a verdict (whether unanimous or majority); or
>
> (b) discharge the juror or jurors concerned from the panel and jury and, subject to subsection (1A), proceed with the remaining jurors and take their verdict (whether unanimous or majority).

[76] The circumstances in which the subs (1) power may be exercised are set out in subs (2):

> (2) Subsection (1) applies if, and only if, before or after the jury is constituted but before the jury's verdict is taken, the court considers that—
>
> (a) a juror is incapable of performing, or continuing to perform, the juror's duty as a juror in the case; or
>
> (b) a juror is disqualified; or
>
> (c) a juror's spouse, civil union partner, or de facto partner, member of the juror's family, or member of the family of the juror's spouse, civil union partner, or de facto partner, is ill or has died; or
>
> (d) a juror is personally concerned in the facts of the case; or
>
> (e) a juror is closely connected with a party or witness or prospective witness.

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63 The relevant rules will be discussed later in this judgment.

64 Section 19.

[77] Sections 22A and 22B deal with the consequences of discharge under either ss 22(1) or (3). Insofar as discharges under s 22(1)(b) (the provision relied on by the Judge here) are concerned, they provide:

> **22A Consequences of discharge under section**
>
> (1) If a juror is discharged under section 22(1)(b),—
>
> (a) the discharge of the juror does not affect the juror's liability to serve on any other jury:
>
> (b) the court may, if the discharge occurs before the case is opened or the defendant is given in charge, require a further juror to be selected from the panel and sworn under sections 18 and 20:
>
> (c) the choice of a foreperson is not affected (even if 1 or more replacement jurors are selected and sworn under paragraph (b)) if that choice has already been made and the juror who was chosen as foreperson is not the juror discharged:
>
> (d) if the juror has, by the time he or she is discharged, been chosen as foreperson, another foreperson must be chosen under section 21 from among the other jurors (including any 1 or more replacement jurors selected and sworn under paragraph (b)).
>
> …
>
> (3) If the court proceeds with fewer than 12 jurors under section 22(1)(b), their verdict (whether unanimous or majority) has, despite section 17, the same effect as a verdict of 12 jurors.
>
> **22B Further provisions about discharge under section 22**
>
> (1) The court may discharge the jury or a juror or jurors under section 22(1) or (3)—
>
> (a) on an application for the purpose; or
>
> (b) on its own initiative.
>
> (2) A defendant is entitled to appear and be heard on an application under section 22.
>
> (3) In considering whether to discharge the jury or a juror or jurors under section 22(1) or (3), the court may conduct a hearing, and consider any evidence (other than evidence of the jury's deliberations) it thinks fit.

Challenges

[78] The Act then provides for different forms of challenge to prospective jurors by the parties during the jury selection process. Jurors can be challenged for want of qualification.[65] There is also provision for challenge for cause, on the ground that the juror is not indifferent between the parties, or not capable by reason of disability of acting effectively as a juror.[66] All challenges must be made before the juror concerned takes their seat in the jury box.[67]

[79] Section 27 also allows a judge to direct that a person "stand by" in certain circumstances. Such a direction may only be made on an application by a party with the consent of the other party,[68] or by the Judge of their own motion, where "satisfied that it is in the interests of justice to do so".[69] A juror who is directed to stand by is not discharged but remains available to be on the jury in the event the jury panel is exhausted.

Informalities

[80] Section 33 provides that no verdict shall in any way be affected "merely because":

> (a) any juror has been erroneously summoned from a greater distance or from a different district or otherwise than is required by this Act or the jury rules; or
>
> (b) any person who was not qualified and liable for jury service, or who was disqualified from jury service or was not according to section 8 to serve on a jury, nevertheless served on the jury; or
>
> (c) of any error, omission, or informality in any jury list, panel, or other document.

The Jury Rules 1990

[81] As is to be expected, the rules are generally procedural in nature, and it is not necessary to set them out at any length here.

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65 Section 23.
66 Section 25.
67 Section 26.
68 Section 27(1).
69 Section 27(2).

[82] What are, perhaps, worth specifically mentioning are the "jury card" and balloting processes, which are set out in rr 13 to 21. Thus:

(a) r 13 requires the Registrar to prepare a separate jury card in respect of every juror who has been summoned and whose service has not been deferred or excused under ss 14B, 15, 15A or 16 of the JA and to place the cards in the "principal ballot box";

(b) r 14 provides "[t]he jurors summoned to attend a court at a particular time shall assemble at that time in the area of the court precincts designated for the purpose by the Registrar"; and

(c) where a jury is required for a particular trial there may be a preliminary balloting (r 15(1)) and there must be a balloting of jurors (rr 17 or 18(2)). Both forms of balloting shall ensure random selection and take place in the presence of available jurors.[70] Preliminary balloting involves the Registrar drawing "out of the principal ballot box … a sufficient number of jury cards",[71] and balloting involves the Registrar drawing out a "number of jury cards sufficient to constitute the jury".[72]

[83] Rule 21 requires that jury cards balloted in accordance with rr 15(1) or 18(2) but not required for a particular trial are to be returned to the principal ballot box.

The Courts Security Act 1999

[84] We mention the CSA briefly here because although the Judge's ruling makes no reference to that Act, it seems he effected the exclusion of unvaccinated jury panellists through a direction to Court Security officers to not permit them to enter the courthouse.

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70 Jury Rules, rr 15, 17 and 18. The Jury Amendment Rules 2020 made changes to rr 15, 16 and 18 to permit the balloting and escorting of jurors to occur in multiple areas of the court precincts, and not in the physical presence of the Registrar, so as to meet "physical distancing requirements" where necessary.

71 Jury Rules, r 15(1).

72 Jury Rules, rr 17 and 18(2).

[85] There can be no doubt that the CSA confers powers on security officers to exclude persons from a court or courthouse and also contemplates the exercise of such powers by a Judge, at least when presiding over proceedings in a courtroom. Thus s 11A(3) makes the general right of members of the public to enter and remain in areas of a court that are open to the public subject to (among other things):

> …
>
> (b) any direction given by a presiding judicial officer that a person must not enter or remain in a courtroom or any other specified part of the court:
>
> (c) any inherent or implied jurisdiction of a Judge or presiding judicial officer to regulate the procedure of a court or tribunal over which that person presides:
>
> (d) any enactment regulating who may be present at proceedings.

[86] While these provisions recognise the reality that a Judge may in some circumstances direct that a member of the public be excluded from a courtroom or a court, they do not by and of themselves constitute a power to do so. So, absent some independent security related concern (which is the focus of the CSA), the lawfulness of a direction to exclude a jury panellist who has been summoned to attend court would still need to be consistent with the JA.

The Epidemic Preparedness Act 2006

[87] The COVID-19 pandemic resulted in the issue of an Epidemic Notice under s 5 of the EPA in March 2020.[73] The Notice remained in force in the months before, and during, Mr Wallace's retrial.[74]

[88] While an Epidemic Notice is in force, ss 24 and 24A of the EPA permit Judges and Heads of Bench to modify the rules of court.[75]

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[73] "Epidemic Preparedness (COVID-19) Notice 2020" (24 March 2020) *New Zealand Gazette* No 2020-go1368.

[74] "Epidemic Preparedness (COVID-19) Notice 2020 Renewal Notice (No 3) 2022" (12 September 2022) *New Zealand Gazette* No 2022-sl3849.

[75] Epidemic Preparedness Act 2006, s 24 was amended, and s 24A inserted, on 3 November 2021 by the COVID-19 Response (Management Measures) Legislation Act 2021.

[89] More particularly, under s 24 of the EPA, any Judge, including a Judge of the District Court, is empowered to modify any rule of court to any extent that they think necessary in the interests of justice to take into account the effects of the relevant epidemic. Section 4(1) states that the term "rules of court", in relation to a court,—

> (a) means rules (for example, the High Court Rules), or any secondary legislation (for example, regulations), regulating the practice and procedure of the court:
>
> (b) for the purposes of section 24, includes any applicable modifications made, and in force, under section 24A.

[90] A modification under s 24 may be absolute or subject to conditions and may be made "by stating an alternative means of complying with a requirement or restriction imposed by the rules".[76]

[91] And s 24A permits modification to the rules of court by Heads of Bench, on the same conditions as s 24. However, where a modification is made by a Head of Bench pursuant to this section, s 24A(4)(a) also deems it to have the status of secondary legislation.

31 January 2022 Protection Framework Protocol

[92] We have summarised the COVID-19 Protection Framework – Green, Orange and Red Protocol promulgated by the Chief District Court Judge on 31 January 2022 already.[77] Although it does not expressly refer to s 24A of the EPA, we proceed on the basis that it was promulgated pursuant to that section and so constituted secondary legislation.

The COVID-19 Response (Courts Safety) Legislation Act 2022

[93] Although not in force at the time of Mr Wallace's retrial, the COVID-19 Response (Courts Safety) Legislation Act 2022 (the Response Act) has some potential

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[76] Section 24(3)(b).
[77] See [22]–[29] above.

relevance here.[78] The Response Act temporarily amended the JA, the CSA and Criminal Procedure Act 2011 by inserting schedules into those Acts which contain provisions (called clauses) that replace certain sections in the Acts themselves, for so long as the Response Act remains in force. Amendments to the JA are contained in sch 3. The purpose of the Response Act was to "remove current legal barriers facing the judiciary … when addressing health and safety risks in the courts".[79]

[94] Central to the temporary modifications to the JA effected by the Response Act is the concept of "COVID-19 Jury Requirements", which are defined as meaning:[80]

> (a) requirements set out in a protocol issued by a Head of Bench under cl 4 (which are not subject to an exception under cl 5(1)) of Schedule 2 of the JA; and
>
> (b) any requirements made under cl 6 of Schedule 2 imposed by a Judge for a particular trial.

[95] As with the protocols made under the EPA, cl 4 protocols issued by Heads of Bench are deemed to be secondary legislation.[81] And importantly, cl 4(2)(a) makes it clear that requirements set out in such a protocol can *override* certain sections of the JA: s 13 (summoning of jurors), s 18 (selection of jurors) and s 22 (discharge of jurors or jury),[82] as well as the Rules.[83] This can be contrasted with requirements imposed by a Judge under cl 6, which must be trial and juror specific and cannot override the JA.

[96] As well:[84]

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78 The Response Act came into effect on 21 April 2022. To the extent there is any ambiguity in the earlier JA provisions, the provisions of the Response Act can be used as an in interpretive aid: see the discussion in Diggory Bailey and Luke Norbury *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, Lexis Nexis, London, 2020) at [24.19].

79 (10 March 2022) 757 NZPD (COVID-19 Response (Courts Safety) Legislation Bill – First Reading, David Parker).

80 Juries Act, sch 2 cl 1(1).

81 Juries Act, sch 2 cl 4(4).

82 Except s 22(1A).

83 Certain such protocols are, themselves, subject to exceptions directed by a Judge in the interests of justice: Juries Act, sch 2 cl 5.

84 All of the cls below are contained in sch 2 to the Juries Act.

(a) cl 8 authorises a Registrar to ask a person summoned to attend as a juror to provide information as to their ability to comply with the COVID-19 jury requirements;

(b) cl 9 extends the Registrar's deferral power to cases where the Registrar is not satisfied that the person the person meets the COVID-19 jury requirements;[85]

(c) cl 10 extends the Registrar's excusal power to cases where the Registrar is not satisfied that the person the person meets the COVID-19 jury requirements;[86]

(d) cl 11 makes it clear that anyone whose service is deferred or excused by a Registrar under cls 9 or 10 (or by a Judge pursuant to cl 15, 17 or 20) must not serve on the relevant occasion, *despite* s 6 of the JA;

(e) cls 12 and 14 confer powers on the Registrar to defer or excuse attendance on application by a person summoned to attend for personal reasons related to COVID-19;[87]

(f) in cases where a Registrar is unsure about whether to defer or excuse (under any of cls 9, 10, 12 or 14) the matter may be referred to a Judge for decision;[88]

(g) under cl 20 a Judge may also on their own initiative excuse a person summoned to attend from attending if not satisfied that the person the person meets the COVID-19 jury requirements;

(h) on an application by a person summoned to attend a Judge may excuse a person summoned to attend as a juror under cl 21 for personal reasons related to COVID-19;

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85 The power may be exercised on the Registrar's own initiative; cl 9(1).
86 The power may be exercised on the Registrar's own initiative; cl 10(1).
87 For example, where the person, or a member of their household is particularly vulnerable to COVID-19, as in cl 14(2)(a).
88 Clauses 15 and 16.

(i) s 18 of the JA is amended by cl 23 to remove the requirement that jury selection take place "in the precincts of the court"; and

(j) s 33 of the JA is amended by cl 24 by adding two further types of informality that do not affect verdicts.

[97] The Response Act relevantly amended the CSA by permitting court security officers to make inquiries of members of the public who wish to enter a courthouse as to whether they meet any COVID-19 related directions or requirements and to deny entry to those who have not or will not comply with such direction or requirements.[89]

The right to trial by an impartial jury: the importance of randomness

[98] By s 24(e) of New Zealand Bill of Rights Act 1990 (NZBORA) all persons charged with an offence carrying a penalty of imprisonment of two years or more have the right to the benefit of a trial by jury.[90] In *Katsuno v R* Kirby J said of the equivalent right in the Australian Constitution:[91]

> [Section] 80 of the Australian Constitution provides that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury…." This provision is a "fundamental law of the Commonwealth." Contrary to early opinions about its operation, it is now clearly established that the section requires that, in all cases involving offences against the law of the Commonwealth to which it applies, *a trial must be had which partakes of the essential features or requirements of jury trial. Such requirements include the impartiality and representativeness of the jurors. Amongst the "unchanging elements" of these requirements is that the panel of jurors must "be randomly or impartially selected rather than chosen by the prosecution or the State*."

[99] In New Zealand, the incorporation of impartiality in the s 24(e) right is made separately plain by s 25(a) of the NZBORA, which confirms the umbrella right of all who are charged with an offence to a fair and public hearing by a court that is independent and impartial.

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89 Schedule 1 of the Response Act inserted a new s 37 into the CSA to this effect.

90 Excluding those who are to be tried before a military tribunal.

91 *Katsuno v R* [1999] HCA 50, (1999) 199 CLR 40 at [67] (citations omitted, emphasis added).

[100] Where a jury is to be the decision-maker in a trial, the link between impartiality and random selection is fundamental. In *Gregory v United Kingdom* the European Court of Human Rights said:[92]

> 20. Jury service is regarded as an important civic duty. The Juries Act 1974, as amended, governs qualification for jury service, ineligibility, disqualification, excusal, discharge and other relevant matters.
>
> 21. Every person between 18 and 70 who satisfies the requirements set out in section 1 of the Juries Act 1974 is qualified to serve on a jury and liable to do so if summoned under section 2 of that Act. The electoral register serves as the basis of jury selection.
>
> 22. *Random selection of potential jurors is regarded as a key safeguard against corruption or bias in a sworn jury*. …

[101] Similarly, in *R v Robinson*, Nathan J observed that the emphasis on random selection throughout the Juries Act 1967 (Vic) reflected that "the quiddity of the jury system is the random composition of juries, designed to reflect the community and its values".[93] He elaborated:[94]

> … its contextual examination produces the conclusion that the selection of jurors *from amongst all enrolled persons, apart from those disqualified or ineligible, must be a random process. Any procedure which interferes with the chance selection of a juror is incompatible with the integrity of the system and should be eschewed*. This principle is not undermined, but is merely qualified by the right of an accused to challenge and the Crown to stand aside. I deal with the latter modification now, but the starting point must be to sustain the random selection of jurors.
>
> Jury service is both a right and an obligation of all electors. It enhances the citizen's commitment to the fair administration of justice and should be an obligation shared equally. As I have already observed, it is no longer a male privilege, nor is it now to be performed only by the wealthy. Juries are supposed to reflect the community in all its prisms. *Any vetting or pre-selection process is repugnant to these concepts*.

[102] And in New Zealand, in *R v Gordon-Smith (No 2)*, McGrath J observed:[95]

> The registrar must compile from the list received, as required, a panel of those who are to be summonsed for jury service. In doing so the registrar must take reasonable steps to ensure those disqualified or directed not to serve are not on the panel. The method of compilation, which is specified by jury rules, is

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92 *Gregory v United Kingdom* (1998) 25 EHRR 577 (ECHR) (emphasis added).

93 *R v Robinson* [1989] VR 289 (SC) at 304 (emphasis added), cited with approval in *Katsuno*, above n 91.

94 At 305–306 (emphasis added).

95 *R v Gordon-Smith (No 2)* [2009] NZSC 20, [2009] 2 NZLR 725 at [56] (citations omitted).

> otherwise one of random selection. The centrality of the random nature of the process in jury selection is maintained on the day of the trial when those called to serve on the jury for a particular trial are determined by a ballot of those summonsed.

[103] The cases in which the courts have been called upon to consider the issues around randomness and jury selection can be divided into two categories:

(a) cases in which it has been argued that it behoves a Judge to make a particular jury *more* "representative" by compelling *inclusion* of more persons from certain sections of society; and

(b) the "jury vetting" cases, which are concerned with the collection and dissemination of personal information about otherwise qualified jurors prior to trial, to enable the Crown (and possibly the defence) to decide whether to challenge, and therefore *exclude*, certain individuals from selection, on the grounds of presumptive bias.

Inclusionary vetting

[104] As far as we can ascertain, cases aimed at greater *inclusion* have always failed. The leading authority is probably the English and Welsh case of *R v Ford*.[96] There, one of the four grounds of appeal was that the trial judge had been wrong in declining to accede to an application for a multi-racial jury. In the absence of any specific statutory power permitting this, it had been submitted that Judges could exercise their residual common law power to achieve this result. This was rejected. The Court of Appeal said:[97]

> *At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving on the jury. This is part of the judge's duty to ensure that there is a fair trial*. It is based on the duty of a judge expressed by Lord Campbell CJ in *Reg v Mansell* (1857) 8 E & B 54 as a duty "to prevent scandal and perversion of justice." …
>
> *It is important to stress, however, that that is to be exercised to prevent individual jurors who are not competent from serving. It has never been held to include a discretion to discharge a competent juror or jurors in an attempt to secure a jury drawn from particular sections of the community, or otherwise*

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96 *R v Ford* [1989] QB 868; [1989] 3 All ER 445.
97 At 871–448 (emphasis added).

> *to influence the overall composition of the jury. For this latter purpose the law provides that "fairness" is achieved by the principle of random selection*.

[105] Six years later, the New Zealand High Court arrived at the same conclusion. In *R v Pairama,* an application to alter the composition of a jury on racial grounds was summarily dismissed; the Court held there was no jurisdiction to make such an order as the make-up of the jury is determined by chance, subject only to the statutory rights of challenge.[98] Penlington J also emphasised that randomness was a clear statutory requirement, saying:[99]

> There is no authority in law to order a jury with any particular composition.
>
> Until 1962 it was possible in New Zealand to have an all Maori jury. See s 4 and ss 141 to 151 of the Juries Act 1908. These provisions were repealed by s 2(2) of the Juries Amendment Act 1962 and the Schedule to that Act. It is no longer possible for an accused to call for either a Maori jury or for that matter a jury of any other ethnic composition**.** *Section 9 of the Juries Act 1981 and r 5 of the Jury Rules 1990 provide for the preparation of a jury list based on the electoral rolls for the jury district of the Court where jury trials are to be held. The list is prepared annually. It is composed of persons who have been selected by ballot or by any other method of selection based on chance*. When a jury trial is about to be held the Registrar is required to compile a panel from the jury list and summon those persons. *Once again, the members of the panel are selected by chance. And finally, the jury for any particular trial whether in the High Court or the District Court is selected at random. These provisions ensure that the make-up of any particular jury is determined by chance subject to the rights of challenge under s 23 (challenge for want of qualification), s 24 (challenge without cause; that is the peremptory challenge), and s 25 (challenge for cause).*

Exclusionary vetting

[106] The exclusionary vetting cases all involve the provision of information by police to a prosecutor about persons who appear on a jury panel for the purposes of its use in the exercise of the prosecution's statutory rights of challenge. The information provided is usually (but not always) about non-disqualifying convictions.

[107] The legality of this practice has been the subject of decisions by the New Zealand and Canadian Supreme Courts, and the High Court of Australia, with

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98 *R v Pairama* (1995) 13 CRNZ 496 (HC) at 502.

99 At 501–502 (emphasis added).

somewhat mixed results.[100] In the United Kingdom there were two sharply conflicting decisions on the issue delivered by the Criminal Division of the Court of Appeal within three months of each other, in 1980.[101] Jury vetting is now generally prohibited there.

[108] The divergence of approach between the cognate jurisdictions to which we have just referred can, to some extent, be explained by the differences in the relevant statutory regimes. But in New Zealand, Australia and (as just noted) the United Kingdom there has also been disagreement between members of the relevant courts as to the legality of these vetting practices and, in cases where unlawfulness has been found, about the consequences that follow.

Unlawfulness

[109] On this issue the panel is divided. I have reached a firmer conclusion than the majority, who — as they elaborate later — would prefer not to express a view in a case where some of the facts are unclear and any unlawfulness is not determinative of the appeal. Although (for reasons given shortly) I ultimately agree that the illegality here is not dispositive, I consider the material facts are clear and the fundamental nature of the matters at issue make it important to express a view. As well, I consider it is difficult to address the question of nullity without determining the nature of the error. So the views expressed in [111] to [137] below are mine alone.

[110] In the present case, the Judge directed, before the commencement of Mr Wallace's trial, that no unvaccinated jury panellists who had been summoned to attend on 8 February 2022 would be permitted to enter the Court building or to participate in the balloting process. He considered he had the power to do this under s 22 of the JA. As a consequence, one juror was, in fact, turned away.

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100 See, for example, *Katsuno*, above, n 91; *Gordon-Smith (No 2)*, above n 95; *R v Yumnu* 2012 SCC 73, [2012] 3 SCR 777; *R v Emms* 2012 SCC 74, [2012] 3 SCR 810; and *R v Davey* 2012 SCC 75, [2012] 3 SCR 828.

101 In *R v Crown Court at Sheffield, ex parte Brownlow* [1980] QB 350; [1980] 2 All ER 444, two judges of the Court of Appeal were strongly critical of the practice, Lord Denning MR calling it wholly impermissible and "unconstitutional" on the basis that it undermined the fundamental principle that jurors should be randomly selected. But three months later, in *R v Mason* [1981] QB 881, [1980] 3 All ER 777 a differently constituted bench disagreed.

[111] I consider this was unlawful for three reasons, any one of which would suffice to ground that conclusion. The reasons are that:

(a) the direction itself was unlawful because it purported to create a whole new class of disqualified jurors, outside the scheme of the JA, which comprised at least seven per cent of the total pool;[102]

(b) s 22 was not capable of authorising the dismissal of the juror in this case because:

(i) s 22 does not authorise the discharge of an as yet unidentified juror (or jurors) before the commencement of the trial; and

(ii) a qualified and healthy (but unvaccinated) juror cannot be said to be "incapable" of performing their duty as a juror.

The direction created a new class of disqualified jurors

[112] Section 6 of the JA expressly states that — subject *only* to ss 7 and 8 (neither of which have any application here) — every person who is currently registered as an elector "is qualified and liable" to serve as a juror. That the classes of disqualified or excepted persons are small, statutorily mandated (by ss 7 and 8) and closed is fundamental to the operation of the JA and the jury system as a whole. That is because jury selection that is truly random depends on it being so.[103] And as the authorities make clear, random selection from a broad community base is, in turn, the key to achieving impartiality and, so, to NZBORA compliance.

[113] The JA also sets out specific and limited grounds on which otherwise qualified individuals who have been summoned for jury service can be excused or have their service deferred (before the trial).[104] But none of those grounds were in play here. No

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102 The information provided to us by Ms Laracy was that at the time of Mr Wallace's trial, 93 per cent of Taranaki "people" (meaning adults) had been fully vaccinated and 90 per cent of Māori had received their first dose.

103 As a result of the juror being turned away at the courthouse door, it is difficult to see how the Registrar could have complied with the balloting procedures required by rr 13 to 21 of the Rules (set out at [82] and [83] above) all of which are concerned with the process of random selection.

104 Sections 14B, 14D, 15, 15A, 16 and 16AA.

doubt that is because they cannot be applied generally, or in the abstract, to a class of unidentified persons. That much is clear from the requirements in ss 14B, 15 and 16 for a specific (and usually written) application to be made by the person who is seeking to have their service deferred or excused. And the juror in question here was qualified, answered his summons and — as a matter of fact — did not apply for excusal or deferral.

[114] Unlawfulness of this kind would likely not be mitigated because, as a matter of happenstance, only one juror was *in fact* excluded as a result. There might have been twenty. And if twenty *had* been turned away it would be hard to argue that the direction had not only the intention, but the effect, of interfering with the randomness of the panel.

[115] Lastly, there is the issue of the Protocol issued by the Chief District Court Judge just prior to Mr Wallace's trial.[105] The legality of the Protocol itself depended on its consistency with the JA and it is no doubt for that reason that the Protocol treads a deliberate and careful line in this respect. To reiterate, for convenience:

(a) all those attending Court were required to show a vaccine pass or a recent (within the times specified) negative COVID-19 test;

(b) physical distancing requirements would be observed, which might limit the number of people permitted to enter the Court building; and

(c) subject only to the limited exceptions and the discretion of the presiding Judge masks were to be worn by all those attending Court.

[116] The Judge in the present case did not direct that any unvaccinated jury panellist be asked if they had had, or be offered, a COVID-19 test.

[117] And lastly, the Protocol also expressly stated that:

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105 Taumaunu, above n 14.

(a) it was not to operate to prevent any person required to attend Court pursuant to a summons from attending Court; and

(b) anyone summoned for jury service who did not meet the entry requirements summarised in [115](a) would be "subject to separate arrangements with appropriate health and safety measures put in place by the Ministry of Justice".

[118] These parts of the Protocol suggest that even jury panellists who did not meet the entry requirements (either a vaccine pass or recent negative test) were not simply to be turned away.

Section 22 can only be used to discharge an identified juror, once the trial has started

[119] The first argument relating to s 22 is that, as with the statutory grounds of deferral or excusal, the section is, on its terms, directed to identified individuals. Each of the grounds for discharge are geared to personal circumstances pertaining to "a juror", not some general characteristics of a class of, as yet, unascertained people.

[120] Secondly, I do not consider s 22 is capable of any application or use before the commencement of the trial.

[121] The Act is carefully structured in what might be called a chronological way. It begins with the general provisions about jury service itself: qualification and liability to serve. Next come all the provisions concerning jury panels before the trial (compilation jury lists, summonses, excusal and deferral). Then comes the part in which s 22 appears, which is headed "Constitution of the jury". "Constitution" in this context simply means the process of establishing or forming the jury — an act that is completed by swearing them in. By definition, a that process does not start until empanelling begins. So although s 22(2) refers to exercising the s 22(1) discharge power "before or after the jury is constituted", read in context that can only be a reference to a discharge during the empanelling process, but before it is complete.

[122] In terms of that context, the provisions under this heading are all concerned with balloting, jury selection, challenges and the selection of a foreperson and any

later issues that might have an effect of the jury established as a result. As well, the terms of s 22A imply that a juror who is discharged under s 22 will (together with either the rest of the jury panel or the rest of the jury) be present in Court and that the trial will be in the process of starting or will have already started. And as s 22B makes clear the s 22 discharge process is one that occurs in the presence of the defendant.[106] It also seems to me that for reasons of transparency — and in particular light of the importance of randomness — discharge should always occur in public/open court.

No s 22 grounds for discharge existed

[123] I necessarily proceed on the basis that the Chief District Court Judge's protocol (which had binding legal effect) would have been complied with and all jury panellists would, on arrival at the courthouse, have been asked whether they had recently undertaken, or whether they would undertake, a COVID test prior to being permitted to enter the courthouse.[107] In its terms, however, the Judge's direction was clearly aimed at bypassing that process and the appeal was argued on the basis that it had, indeed, done so.

[124] The only conceivable ground for a discharge under s 22 here was that any unvaccinated juror was "incapable of performing …, the juror's duty as a juror in the case".[108] I do not consider a healthy, negative testing, unvaccinated juror could be said to be "incapable" in that way.

[125] Whether the breadth accorded to the concept of "incapability" by some Judges can really be justified has been questioned by the Law Commission.[109] After noting the evidence that some judges do discharge potential jurors who were suffering from

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106 Section 22B expressly gives a defendant a right to be heard in circumstances where an application for discharge is made under s 22. Here, the order excluding unvaccinated jurors was made in chambers and the juror was turned away at the courthouse door.

107 The Protocol required that any panellist who declined a test was to be kept separate and would almost certainly have been found to be "incapable", in the event of selection. If that point had been reached the case becomes much more similar to *Iuliano v R* [2021] NZCA 432, which is discussed shortly, below. Obviously, any panellist who returned a positive test would also be "incapable" of serving.

108 In terms of s 22(2)(a).

109 Law Commission *Juries in Criminal Trials* (NZLC R69, 2001).

certain kinds of "non-physical disability" (such as emotional vulnerability) the Commission observed:[110]

> … The legal basis for this is unclear … We do not consider that these people are necessarily "incapable", rather as a matter of policy it is desirable that they are not obliged to serve.

[126] It was for that reason the Law Commission recommended a broader power to discharge, modelled on the equivalent provision in the Canadian Criminal Code, which simply states:[111]

> Where in the course of the trial the judge is satisfied that a juror should not, because of illness or *other reasonable cause*, continue to act, the judge may discharge the juror.

[127] Self-evidently, that recommendation was not pursued.

[128] That said, I acknowledge that this Court recently observed in *Iuliano v R*, (another COVID-19 case) that "incapability" continues to be broadly interpreted.[112] In that particular case, however, the trial had already started and there was no dispute that the juror concerned was unable to return to the courtroom unless and until she had returned a negative test. There was uncertainty about when those results would be available and a concern about (further) delays to the trial.[113] There was, accordingly, no dispute that she was not able (incapable) of performing her functions as a juror at the time she was discharged; the real issue was whether the Court should have waited. So, the facts there were not on all fours with the present.

[129] And lastly, it is worth noting in passing that the facts of *R v M* — the case cited in *Iuliano* as authority for the proposition that "incapability" includes posing a risk to the trial more generally — had facts very far from the present case.[114] There, the husband of a juror had been seen talking to relative of accused. The trial Judge discharged her on the ground that she had become "disqualified". The Court of Appeal disagreed, saying that the concept of disqualification suggested "a status rather than

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110 At [261].
111 At [265] (emphasis added).
112 Above n 107 at [29].
113 The Court was already only sitting on alternate days, due to the defendant's health condition.
114 *R v M* (1991) 7 CRNZ 439.

something that has happened" and that incapability was the better ground.[115] With respect, that is plainly correct; the contact between the juror's husband and a relative of the accused gave rise to a clear concern that the juror might not be able impartially to perform her functions as a juror.

A residual or common law power?

[130] It is also necessary to address the Crown's alternative submission that the Judge could have used his residual or common law discretion to discharge the juror here. But as will be evident from the passages from *Ford* set out earlier,[116] a Judge's residual common law discretion in matters of jury selection is a limited one. Not only must any such discretion be consistent (or, at least, not inconsistent) with the relevant legislation but it must be exercised in the interests of facilitating fair trial rights.

[131] That is also evident from the authorities closer to home. In particular, Ms Laracy referred us to the earlier case of *R v Greening*, where this Court confirmed a trial Judge's inherent power to dismiss a juror where his impartiality — and so the fairness of the trial — was in issue.[117] Gresson J writing for the (two judge) Court said:[118]

> … there is, in our opinion, an inherent jurisdiction by virtue of which the presiding Judge, if satisfied that justice requires that a particular juror should not be allowed to be sworn as a juror, may exclude him from the panel, or may exclude him after he has been balloted, and is coming forward to take his place in the jury box. It is not necessary, nor is it possible, to define in what cases this power should be exercised. *It is a power to be exercised judicially when the circumstances are such that a fair trial cannot be had if the particular juror is allowed to become one of the jury to try the case*. The authority for the existence of such a power is somewhat meagre, but, in our opinion, it is sufficient; and it is acted upon from time to time both in criminal and in civil trials.

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115 At 441. Incidentally, the relevant discharge provision at that time was s 374(3) of the Crimes Act 1961, which made it very clear that juror incapability could only arise *during* the trial. It gave the Court a discretion to discharge "If, at any time before the verdict of the jury is taken, any juror becomes in the opinion of the Court incapable of continuing to perform his or her duty …"

116 See above at [104].

117 *R v Greening* [1957] NZLR 906 (CA); That case was concerned with the consecutive trials of four offenders charged with raping the same 14-year-old girl. It transpired that some of jurors who had been on the jury that found one of the men guilty were then selected to sit as jurors at the trial of another of the men. The Court found that those jurors could not reasonably be seen to be impartial and should have been discharged by the judge.

118 At 915 (emphasis added).

[132] By way of authority for the existence of the power, Gresson J referred to the 19th century decision in *Mansell v R*,[119] (also referred to in the passages from *Ford* set out above) and then went on:[120]

> We think the power has been exercised in New Zealand, even though there is no reported case. It is within our knowledge that, in a recent trial for murder, the trial Judge excluded from the panel several persons on various grounds—at least one who asserted that he had conscientious objections to capital punishment, one or more who claimed an intimate acquaintance with the accused and his family, and another who was a relative of one of the chief witnesses for the prosecution. In our opinion, the Judge presiding at a criminal trial has power of his own motion to direct the removal from the panel of any jurors who have previously tried the same or a similar issue to that about to be tried, or, in the case of any juror duly called in the ballot, to exclude him, whether or not any challenge be made by either party, if in the exercise of a judicial discretion the Judge considers such juror is unlikely to be impartial or indifferent. … We think, in the case of the trial of the appellant, a direction should have been given by the presiding Judge excluding from the ballot the names of those jurors who had convicted Richardson; moreover, we think that the Judge would have so directed had his attention been called to the situation.

[133] The first and obvious point is that many of the grounds on which it was thought (in the older cases) that the residual discretion might be called upon are now encompassed by the JA itself. All jurors of the kind referred to in *Mansell* (a juror who is "completely deaf, or blind,[121] or afflicted with bodily disease which rendered it impossible for him to continue in the jury-box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relative that he could not duly attend to the evidence") would undoubtedly now fall under the s 22(2)(a) "incapability" umbrella.[122] So, too, with those whose presence on a jury might give rise to concerns of partiality; Judges have express statutory powers to excuse or discharge under ss 16(3), 22(2)(d) and (e). The ambit of the residual power has necessarily narrowed considerably.

[134] The second point is that none of the cases suggest that the common law power could be used to discharge otherwise qualified and impartial jurors who themselves suffer from no such disability, incapability or appearance of bias.

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119 *Mansell v R* (1857) 8 E & B 54, 169 ER 1048.

120 At 916–917.

121 There are, of course arguments to be made that, today, a juror who is deaf or blind might not be regarded as "incapable" but I do need to get into those here.

122 *Mansell v R,* above n 119, at 80–81; Although in 2001 the Law Commission suggested that an intoxicated juror might give rise to the need for resort to the residual power to discharge, such a juror would undoubtedly now be regarded as "incapable" (above n 109, at [254]).

[135] More generally, an inherent power cannot be inconsistent with a detailed statutory scheme, such as the JA. As Lord Hailsham said in *Richards v Richards*:[123]

> … where, as here, Parliament has spelt out in considerable detail what must be done in a particular class of case it is not open to litigants to bypass the … Act, nor to the courts to disregard its provisions by resorting to the earlier procedure, and thus choose to apply a different jurisprudence from that which the Act prescribes.

[136] And as Lord Sumption said, in another context, "the inherent jurisdiction should not be exercised in a manner which cuts across the statutory scheme".[124]

[137] All that said, however, I would accept that a judge has the inherent power to discharge an individual jury panellist during (or after) the empanelling process if it appeared that their presence or continued presence on a jury would be so disruptive that *other* jurors would be unable properly to fulfil their functions. In essence that was the Judge's rationale for doing what he did here. But whether or not the presence of a juror who was unvaccinated but (for the reasons given at [123] above) had complied with the requirement to return a negative test would have had that effect on other jurors is a matter of speculation. Had there been an empanelling process that accorded with the Protocol, the answer would, no doubt, be known.

[138] And if I am wrong in that, I am still unable to accept that the inherent power extends to making a blanket pre-trial ruling that excluded a particular group of otherwise qualified and lawfully summoned panellists from entering the courthouse or serving on a jury. For the reasons I have already given, I consider an order of that kind (and its execution) cuts directly across the fundamental precept of randomness in a way that is completely contrary to the JA.

What is the effect of any unlawfulness?

[139] Section 232(2) of the Criminal Procedure Act provides that the first appeal court must allow an appeal against conviction if satisfied, relevantly, that "a

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123 *Richards v Richards* [1984] AC 174 (HL) at 200.

124 *Re B (A Child) (Reunite International Child Abduction Centre and others intervening)* [2016] UKSC 4, [2016] AC 606 at [85].

miscarriage of justice has occurred for any reason". A miscarriage of justice is defined in s 232(4) as:

> … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

[140] For the purposes of the discussion that follows, we necessarily assume that the exclusion of the unvaccinated jury panellist was an "irregularity" or "error", despite the fact that the majority have not expressed a concluded view on that issue. As noted, however, we are unanimous in our conclusion that this (assumed) error was not vitiating, for the reasons below.

A real risk that the trial outcome was affected?

[141] First, there is inevitably a degree of speculation involved in concluding that there was a real risk that the outcome of the trial was affected. We do not know whether the juror who was sent home would have been selected during the balloting process or, if so, whether he might have been the subject of a challenge. We do not know whether (if selected and unchallenged) his presence on the jury might have led to a different outcome.[125]

[142] Those degrees of remoteness make it more difficult to say the risk that the outcome of the trial was affected by the error was a "real" one and we do not consider we could go that far.

[143] It is also not possible to conclude that the exclusion of the unvaccinated juror from the balloting process had an impact on the impartiality of the jury in fact selected in Mr Wallace's case. Despite that exclusion, the jurors ultimately chosen were randomly selected from the remaining panel and there is certainly nothing here to suggest that any or all of them were in any way predisposed either against or for Mr Wallace. So, it cannot be said that the trial was, in that sense, unfair.

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[125] Although we note that Mr Wallace's conviction on the most serious charge was a result of a majority verdict.

[144] Instead, the critical question here is whether the assumed unlawfulness could give rise to verdicts that were a nullity. In essence, this is a question going to jurisdiction.

Nullity: the authorities

[145] This Court's decision in *Abraham v District Court at Auckland* contains the most comprehensive recent discussion of the concept of nullity in this country.[126] The question for the Court there was whether the District Court had been wrong to reject the arguments that a failure to advise Mr Abraham of his right to elect trial by jury, in accordance with s 66(2) of the Summary Proceedings Act 1957 (the SPA), resulted in his subsequent guilty pleas being a nullity or his convictions constituting a miscarriage of justice.

[146] It was accepted that the failure was an error or irregularity in terms of s 204 of the SPA, which provided that no process or proceeding shall be held invalid "by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice". The Court noted that s 204 protects procedural and documentary error, subject to the miscarriage proviso and acknowledged that the Courts had previously recognised that the curative power of s 204 is not available at all "if a defect is so serious as to result in what should be stigmatised as a nullity".[127]

[147] After reviewing a number of relevant authorities (in which nullity variously had, and had not, been established), the Court said:[128]

> [48] The forgoing authorities indicate that whether a particular procedural failure constitutes a nullity in the context of s 204 is a matter of degree requiring an overall assessment of the particular failure against the relevant statutory background. It is critical to understand the place of the particular requirement in the scheme of the legislation. Further, as Cooke J noted in *Police v Thomas*, the concept of nullity will frequently overlap with the concept of miscarriage of justice in s 204.

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126 *Abraham v District Court at Auckland* [2007] NZCA 598, [2000] 2 NZLR 352. The decision in *Abraham* was effectively approved by the Supreme Court in *S v R* [2018] NZSC 124, [2019] 1 NZLR 408, which (like *Abraham*) was also concerned with an error relating to a defendant's mode of trial election.

127 At [42]; citing Cooke J (as he then was) in *Police v Thomas* [1977] 1 NZLR 109 (CA) at 121.

128 Citations omitted.

> [49] The application of the nullity concept will be straightforward in some situations. For example, if a judicial officer deals with a matter that he or she has no jurisdiction to deal with, it seems obvious that the resulting decision should be characterised as a "nullity" which cannot be rectified by resort to s 204. The effect of s 204 cannot be to confer jurisdiction where it does not exist. (A similar issue arises in relation to the application of the proviso to s 385(1) of the Crimes Act to trials that are nullities in terms of s 385(1)(d) – see *R v Blows* … and *R v O (No 2)* …). Similarly, where some process, the effect of which is to confer jurisdiction, has not been followed (for example, a statutorily required consent to prosecute has not been obtained), it is easy enough to characterise what follows as a nullity.

[148] The Court went on to observe that English law has undergone what had been described as a "sea change" in this area, summarised by the English and Welsh Court of Appeal in *R v Ashton* as follows:[129]

> [4] … whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ("a procedural failure"), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.
>
> [5] On the other hand, if a court acts without jurisdiction—if, for instance, a magistrates' court purports to try a defendant on a charge of homicide—then the proceedings will usually be invalid.

[149] Although there had been a series of decisions (discussed in *Ashton*) in which it was held that any failure to comply with the statutory procedure for determining the mode of trial would render any subsequent hearing ultra vires or a nullity, the Court in *Ashton* observed that those cases would be decided differently if they were decided "now" (in 2007):[130]

> … an inflexible invalidity rule is contrary to the interests of the accused and the prosecution, as well as running contrary to the public interest in the fair administration of criminal justice.

[150] So similarly, in Mr Abraham's case, the Court concluded that the error in not advising him of his right of election did not render his trial a nullity.[131]

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129 At [56]; quoting *R v Ashton* [2006] EWCA Crim 794, [2007] 1 WLR 181 (CA).

130 At [72].

131 *Abraham,* above n 126, at [60]; the Court went on to find there here had been a miscarriage of justice, on other grounds.

This case

[151] Self-evidently, the present is not a case involving either an error in terms of the s 66 election right or one that engages s 204 of the SPA. What is clear, however, is that whether the verdicts were rendered nullities requires an overall assessment of the error against the relevant statutory background. As noted in *Abraham*, in making that assessment it is critical to understand the place of the requirement that has been breached in the scheme of the legislation.[132]

[152] So, we begin with the assumed error itself: the Judge unlawfully directing the vetting of the jury panel with the object of excluding a certain class of juror despite their being qualified and able to serve. At a high level this could properly be regarded as a significant matter that was contrary to fundamental precepts and provisions of the JA, for the reasons Ellis J has given above.

[153] As a matter of reality, however, the Judge's direction resulted in security staff turning away a single jury panellist, who may or may not otherwise have been selected for Mr Wallace's jury. As we have already said, it is not possible to conclude that the absence of this juror from the panel made any difference at all to the trial or to the verdicts or that the jury that *was* selected was not impartial. We do not consider that it could have been parliament's intention that a trial by such a panel would be invalid.

[154] Had more jury panellists in fact been rejected, however, the question would undoubtedly be a more difficult one.

[155] For completeness, we record that, although we do not regard the assumed error here as vitiating, we also do not consider it one that is saved by s 33 of the JA. To reiterate for convenience, s 33 states that no verdict shall in any way be affected "merely because":

> (a) any juror has been erroneously summoned from a greater distance or from a different district or otherwise than is required by this Act or the jury rules; or

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[132] *Abraham,* above n 126, at [48].

(b) any person who was not qualified and liable for jury service, or who was disqualified from jury service or was not according to section 8 to serve on a jury, nevertheless served on the jury; or

(c) of any error, omission, or informality in any jury list, panel, or other document.

[156] There can be no question that neither (a) nor (b) are in play here. And (c) is concerned with errors (or omissions or informalities) in documents. There was no error in the jury list or jury panel. The (assumed) error was in the Judge *overriding* the jury panel.

[157] Nonetheless, for the reasons we have given, we are agreed that — even assuming illegality — the trial was not a nullity and the verdicts were not abortive.

FRENCH AND CHURCHMAN JJ

[158] We agree with the judgment of Ellis J save in one respect, and that relates to the issue of whether the sending away of the unvaccinated juror was unlawful.

[159] That issue is not a straightforward one and is further complicated in this case by uncertainty about the facts. It appears for example from the Judge's minute of 4 February 2022, that an inquiry about vaccination status may have been made at the time the summonses were first sent out to the jury panel. If so, what was the wording of the inquiry? And how many unvaccinated jurors were identified as a result? It is also unknown whether the card with the juror's name was put into the ballot box and if so at what point it was removed. It is also unknown exactly what the security guard said to the juror in question and what their response was.[133]

[160] In these circumstances and given the unanimity of the panel on the nullity issue, we would prefer to leave the complex issue of lawfulness for a case where it is determinative. We therefore express no concluded view and would only make the following observations.

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[133] There is for example no information whether the issue of a negative test was ever raised with the juror or even whether the juror had undertaken any test and was "negative testing".

[161] The Judge in this case was presented with a difficult situation given the confines of the courthouse in question, in particular the limited ability to socially distance in the court rooms for the purposes of jury selection and the inability to socially distance in the jury room, which the jury was expected to occupy for some four days. The first community case of Omicron in New Zealand had only just been detected and experts were warning it was highly transmissible. Exponential growth was considered inevitable.

[162] Against that background, we consider it was reasonable for the Judge to take the view that in the New Plymouth courthouse, an unvaccinated juror represented an unacceptable risk to the health of other jurors. That in turn heightened the risk of the trial (which was a re-trial) being de-railed part way through because of illness. There was also, in our assessment, a substantial risk that other jurors would feel vulnerable and anxious about being in such close proximity to an unvaccinated person and hence distracted from the important task at hand. As time went by, and the Omicron wave subsided, and more effective masks were widely available, it may be that jurors became more sanguine, but what happened needs to be seen in the context of early 2022. It is important to note too that the Judge gave counsel an opportunity to be heard and considered the possibility of alternative arrangements but concluded these were not practical or possible.

[163] Judges possess inherent or implied powers to control and manage a trial as well as a statutory power under s 22 to discharge a juror both before and after the jury is constituted if that juror is incapable of discharging their duties. As cases such as *Juliano*[134] and more recently *R v Wong*[135] demonstrate, the courts take a very broad attitude to what amounts to incapacity including in the context of unvaccinated jurors.

[164] If a reasonable foundation existed for concluding that a potential juror or jurors posed a risk to the integrity of the trial and/or health and safety of other court users, then in our view it seems odd that despite broad implied and statutory powers, a trial judge should nevertheless has been powerless to send that juror away and instead be

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134 *R v Iuliano*, above n 107.
135 *R v Wong* [2023] NZCA 341 at [25].

obliged to allow them to enter a crowded courtroom and so unnecessarily and unreasonably risk the health of others.

[165] We observe too that support for the Judge's approach can be found in some American and Canadian cases where appellate courts have upheld decisions to exclude unvaccinated jurors.[136] In a Canadian decision for example, it was held that to allow an unvaccinated person to serve as a juror would "irresponsibly introduce risk to the trial".[137]

[166] That said, we accept there was uncertainty in New Zealand as to the existence of a power to exclude unvaccinated jurors — no doubt for the very reasons relied upon by Ellis J — and that this uncertainty was one of the reasons for the enactment of the COVID-19 Response (Court Safety) Act. To what extent the legislation was intended to create new powers as opposed to clarifying and affirming existing ones is debatable. On any view of it, the legislation does of course tend to support that what the Judge did in this case was reasonable.

[167] Ultimately, even if there was an error of law, what matters for the purposes of this appeal is what impact the error had on Mr Wallace's trial. For the reasons articulated by Ellis J we are satisfied that it did not render the trial unfair and nor did it render the trial a nullity.

Result

[168] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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136 See for example *United States v Elias* 579 F Supp 3d 374 (ED NY 2022), *R v Barac* 2021 ONSC 6605; and *R v Aiello* 2021 ABQB 772.

137 *R v Frampton* 2021 ONSC 5733 at [7].