IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA144/2024
[2024] NZCA 565

BETWEEN	LESLIE CAVELL Appellant
AND	THE KING Respondent

Hearing: 1 October 2024

Court: Collins, Brewer and Osborne JJ

Counsel: E J Riddell for Appellant
M J Lillico for Respondent

Judgment: 6 November 2024 at 11 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Osborne J)

Introduction

[1] Leslie Cavell (now aged 64) was found guilty by a District Court jury on charges of possession of methamphetamine for supply and possession of MDMA for supply. He had pleaded guilty (immediately before trial) to possession of a firearm,

ammunition, cannabis, and a methamphetamine pipe. Mr Cavell was sentenced by Judge Rielly to two years and eight months' imprisonment.[1]

[2] Mr Cavell appeals his conviction on the charges of possession of methamphetamine for supply and possession of MDMA for supply on the basis there was prosecutorial misconduct and fresh evidence is available. The ground based on prosecutorial misconduct relates to passages in the prosecutor's closing address (set out at [24] below) in which the prosecutor discussed Mr Cavell's failure to call his partner as a witness. Mr Cavell also appeals his sentence on the basis he should have received an additional, substantial discount for matters identified in a report submitted under s 27 of the Sentencing Act 2002 (s 27 report).

The basic facts of the arrest

[3] Mr Cavell and his partner were stopped in their campervan by police coming off a ferry in Picton on 4 December 2020. The campervan was searched. Police located 35.8 grams of methamphetamine, 18.1 grams of MDMA, $201,074.30 in cash, a Smith & Wesson .44 Magnum revolver, six .44 Magnum rounds, five 12-gauge shotgun shells, sets of digital scales, and a methamphetamine pipe.

The trial

Crown case

[4] The Crown alleged Mr Cavell was both a user and dealer of methamphetamine. He had travelled to the North Island on 25 November 2020 intending to use the large sum of cash in his possession to obtain a substantial quantity of methamphetamine which he would bring back to Nelson to sell. The Crown led evidence of messages between Mr Cavell and a contact "Pedros Kelos", which discussed methamphetamine supply and pricing (at $6,000 an ounce). The Crown asserted the methamphetamine and MDMA in Mr Cavell's possession when he was arrested was all he had managed to get hold of, which is why he was returning home with over $200,000 cash. The Crown suggested he had the pistol for protection.

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1 *R v Cavell* [2024] NZDC 4046 [sentencing notes].

[5] The amounts of methamphetamine and MDMA identified in the charges meant Mr Cavell had the onus of proving he did not possess the two drugs for supply.[2]

Defence case

[6] Mr Cavell gave evidence. He said the seized methamphetamine and MDMA were for the personal use of himself and his partner. He and his partner had significant drug addictions and were using copious amounts of methamphetamine on a daily basis. He called expert evidence relating to hair follicle tests of both himself and his partner to corroborate this. Mr Cavell said the trip to the North Island was not a drug buying trip. Rather it was a trip to visit friends, potentially buy a vehicle, and to take a scenic flight he had a voucher for. Not all aspects of the trip went to plan. Mr Cavell and his partner had a flexi ticket for their return trip, so left the North Island earlier than planned.

The sentence

Factual assessments

[7] The Judge summarised the evidence. She noted it was clear at least some of the methamphetamine and MDMA in Mr Cavell's possession was for personal use.[3] The Judge did not accept Mr Cavell's evidence about the quantities Mr Cavell said he and his pertnar were using.[4] The Judge accepted the cannabis and the methamphetamine pipe were for Mr Cavell's personal use.[5] She considered his evidence of the extent of personal consumption to be inflated, unrealistic, and exaggerated.[6] The Judge considered it was likely Mr Cavell had the cash to purchase large amounts of methamphetamine and that he had tried to do so from "Pedros Kelos", in quantities exceeding what the latter could supply at the time.[7]

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2 Misuse of Drugs Act 1975, s 6(6).
3 Sentencing notes, above n 1, at [18].
4 At [19].
5 At [22].
6 At [19].
7 At [14].

[8] The Judge concluded Mr Cavell was an independent drug dealer when he was stopped by police.[8]

[9] The Judge found Mr Cavell had intended to use the firearm, if necessary, during his dealings with others in the trade of drugs. She took into account the nature of the firearms and the fact there was matching ammunition nearby, meaning the firearm could easily be made operable, in circumstances where Mr Cavell and his partner were using significant amounts of Class A and B drugs and at the same time were in possession of drugs for the purpose of sale.[9]

Assessment of the sentence — starting point

[10] The Judge set the starting point for sentence on the charge of methamphetamine for supply at three years' imprisonment,[10] uplifted by six months for the charge of possession of MDMA for supply and by a further six months for the unlawful possession of a firearm and ammunition.[11] No uplift was applied for the less serious charges.

[11] The adjusted starting point for Mr Cavell's offending was therefore four years' imprisonment.

Aggravating and mitigating factors

[12] The Judge did not apply an uplift for Mr Cavell's previous convictions for drug offending, noting they were for predominantly Class C drugs and did not involve drug dealing.[12]

[13] The Judge allowed Mr Cavell a five per cent credit for the guilty plea on a number of charges entered immediately before trial, with the credit applied across all his offending.[13]

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8 At [24].
9 At [21].
10 At [28].
11 At [29]–[30].
12 At [34]–[35].
13 At [36].

[14] The Judge considered matters advanced by way of personal mitigating factors:[14]

(a) The impact of Mr Cavell's ill health on serving a term of imprisonment: Mr Cavell has significant health issues that cause him significant pain and affect his mobility, a condition unable to be adequately addressed through a settled reduction regime. These will render imprisonment more difficult for Mr Cavell than for others. The Judge gave a 10 per cent credit for this.

(b) Good character: against the background of Mr Cavell's history of offending, the references provided by others indicating Mr Cavell's friendship and support did not warrant a credit.

(c) Background deprivation and drug addiction: an addictions service report recorded Mr Cavell had an unhappy childhood with physical abuse, divided family and challenging circumstances. He had described a very unusual pattern of methamphetamine use, reporting very high levels of use but experiencing side effects incongruent with such a level of use. In relation to rehabilitation, the Judge referred to the addictions service report which recorded Mr Cavell blaming others, suggesting he should not be treated like others who are real criminals, and not believing he had a substance abuse issue or required rehabilitation. The Judge also considered the s 27 and the pre-sentence reports, and observed she had great difficulty in trying to reconcile everything Mr Cavell had said to the different report writers. The Judge, while acknowledging Mr Cavell had a difficult upbringing and a significant addiction, concluded the very high risk he posed of reoffending and his lack of insight and remorse meant no further credit should be given for his "addictive behaviours".

(d) Rehabilitation: the Judge expressed concern Mr Cavell had very little, if any, motivation to rehabilitate.

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[14] At [37]–[44].

(e) Remorse: no credit was allowed for remorse as, although Mr Cavell had written a letter of apology, the Judge identified no remorse on his part.

[15] The Judge allowed Mr Cavell a further credit of nine months to account for 22 months spent on varying conditions of bail.[15]

[16] The end sentence of two years and eight months' imprisonment was calculated by deducting from the four years' starting point seven months (15 per cent) and then nine months.[16]

Principles on appeal

[17] Section 232(2) of the Criminal Procedure Act 2011 provides that a first appeal court may only allow an appeal against conviction if satisfied that the trial judge "erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred", or that "a miscarriage of justice has occurred for any reason". A miscarriage of justice means any error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial.[17] In this section, a trial includes a proceeding in which the appellant pleaded guilty.[18] The appeal proceeds by way of rehearing and this Court is required to form a view of the facts.[19]

[18] Appeals against sentence can be brought as of right by s 244 of the Criminal Procedure Act and must be determined in accordance with s 250 of that Act. An appeal against sentence may be allowed by the first appeal court only if it is satisfied there has been an error in the imposition of the sentence and a different sentence should be imposed.[20] As this Court identified in *Tutakangahau v R*, a court "will not intervene where the sentence is within the range that can properly be justified

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15 At [51].
16 At [51].
17 Criminal Procedure Act 2011, s 232(4).
18 Section 232(5).
19 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [26]–[32].
20 Criminal Procedure Act, s 250(2) and 250(3).

by accepted sentencing principles".[21] It is appropriate for this Court to intervene and substitute its own views only if the sentence being appealed is "manifestly excessive" and not justified by the relevant sentencing principles.[22]

The trial

The Judge's opening comments

[19] In her opening comments, the Judge addressed the jury in standard terms on the fact the defendant was presumed innocent and the nature of the burden of proof and the standard of proof. She also explained to the jury she would be addressing them at the conclusion of the case on any matter on which the defendant had to prove a particular matter.

Prosecutor's conduct

[20] In her opening address, the prosecutor had explained to the jury the burden and standard of proof and explained those concepts with particular reference to the reverse onus:

> I was just telling you how the burden of proof is on the Crown and the standard of proof is beyond reasonable doubt, however, in relation to this charge once the Crown has proved that the defendant was in possession of more than 5 grams of methamphetamine the balance of proof shifts to Mr Cavell and he must then satisfy you on the balance of probabilities meaning that it is more likely than not that he did not possess any portion of the methamphetamine for the purpose of supplying or selling it to any other person.

[21] In her cross-examination of the appellant, the prosecutor did not suggest (expressly or implicitly) that the partner should have been called as a witness. Nothing in the cross-examination touched on the onus applying.

[22] In her closing, the prosecutor noted correctly that Mr Cavell had accepted he was in possession of the methamphetamine and then continued:

> At this point it is presumed to be held in possession for the purpose of supply. At this point, the onus shifts to Mr Cavell. It is not enough if you think it is possible that he didn't possess it with the intent of supplying to others. He has

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21 *Tutakangahau v R* [2014] NZHC 556 at [10]; aff'd *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

22 *Ripia v R* [2011] NZCA 101 at [15].

> to prove that it is more likely than not, that he did not possess any portion of the methamphetamine for the purpose of supplying or selling it to another person. The test is the same for the MDMA charge.

[23] Key passages from the prosecutor's closing during trial, which are the subject of this appeal, are:[23]

> When I cross-examined Mr Cavell I asked him whether he accepted that he had lied to Detective Evans when Detective Evans asked him whether [his partner] knew anything about the items in the campervan and he replied: "Nothing". The point is that [the partner] actually knew about the drugs. Clearly she did know about them; the hair follicle test shows that she was a drug user. The point that it shows is that Mr Cavell is prepared to (1) lie to the person who is investigating him, to mislead them and (2) he says what most suits him at the time. *This is especially true in relation to his former partner … She isn't a witness in this trial but she has ended up taking on the role of something of a silent witness. She is ever present in the evidence, and you have heard lots about her but you haven't heard from her. The defendant didn't call her as a witness to corroborate what he said. It affects the weight that you can give to his evidence. She is the most obvious person who could back up what he says.* I suggest that Mr Cavell has used [his partner], in her absence, to give whatever evidence suits him most at the time. At the time of his arrest when he is asked about what [his partner] knows of the items in the campervan he says "Nothing". That would have suited him most at the time, to divert police attention away from his partner; he would not have wanted to get on the wrong side of her and upset her. But now he is here on trial and they have separated. *Without her here, he has been free to give you whatever impression he wants to give you about her, to leave you with the impression that this methamphetamine was solely for their use.* To say that they bought seven sets of scales so that they could sell them in the shop. He has attempted to give you the impression that she stole an expensive car. On the other hand he has called her a lovely person. He tells us that it was [his partner's] job to manage their accounts. He partly seemed to blame her for not paying his tax. *He blames her when it suits him. She has not had the opportunity to defend herself or say whether any of it is right or not.*

Defence counsel's closing

[24] Counsel for Mr Cavell addressed the Crown comments in her closing:

> In this closing address I am going to walk you through the reason that the evidence shows this methamphetamine and MDMA belonged to Mr Cavell and [his partner] for their own use, and I interpose here to say that Mr Cavell did bear no onus in calling [his partner] as a witness, as my friend suggests. He did not assume a responsibility to call defence evidence in any way. The onus and this is something I will come to further; the onus is to displace the presumptive amounts for MDMA and methamphetamine not to call evidence.
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> …

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[23] Emphasis added.

> You might wonder why [Mr Cavell's partner] appears to be something of a silent player in this whole thing. Mr Cavell's evidence is that she and he used meth and methamphetamine. A text message from her on page 64 of your photo booklet appears to be about methamphetamine. More specifically it appears to be about [the partner's] use of methamphetamine and an argument about the same. You give more than that to your mates and misses and so on.
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> Mr Cavell's evidence about meth-fuelled relationships, fighting and jealousy comes into focus when you read this message. But [the partner's] involvement cannot be overlooked even if you haven't heard from her. The main reason her involvement is relevant is because of the way the five-gram presumption applies for meth and MDMA.
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> If there's two of them tucking into the meth and the MDMA you're going to need to adjust your calculations, 35.8 grams for one become 17.9 grams each. 18 grams of MDMA for one becomes 9 grams of MDMA each.

Application for a mistrial

[25] The defendant, at the end of closing addresses, unsuccessfully applied for a mistrial on the basis the Crown had breached evidential rules around a defendant having the presumption of innocence and not having to give or call any particular evidence in their defence. Counsel's submission was that, following the Crown's closing (above at [24]), the jury might well be left wondering if Mr Cavell's partner would have had something to say. The inference was that if Mr Cavell had called her, she would have been able to corroborate what he said if it were accurate, with the opposite inference able to be drawn when she was not called. Counsel submitted that, as the case already involved a reverse onus, the impugned passages in the Crown's closing risked further confusion about the "onus on Mr Cavell" — the Crown had wrongly put an onus on Mr Cavell in the closing.

[26] The Judge declined to direct a mistrial, recording:

> [27] The most unfortunate remarks made as part of this submission, in my assessment, are that "she" was not called by the defendant as a witness to corroborate what he said, in circumstances where there is no requirement for corroboration, and where that is a clear reference to a defendant failing to call a witness in their defence.
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> [28] That is mitigated to a degree by the follow-on submission that that should affect the weight that should be attached to Mr Cavell's evidence, not the reliability of it directly.
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> [29] It is also concerning that the submission was made that she is the most obvious person who could back up what he says with a reference later in the

address to "without her here, he has been able to give whatever impression he wanted about her".

[30] Further, it is also somewhat concerning that the submission was made that "she" has not had the opportunity to defend herself or say whether any of it is right or not, in circumstances where [the partner] is not a person on trial, and there was no obligation on the defendant to call her as a witness.

[31] That said, directing a mistrial is a significant direction to make, and the Court always has to be cognisant of balancing the overall interests of justice with the rights of the defendant to a fair trial.

[32] I have already drafted a strongly worded direction to the jury about this part of the Crown closing and how it fits with the defendant's evidence both generally and in circumstances where he has an onus in respect of one element of the charges proceeding to verdicts.

[33] I consider that a strong direction can overcome prejudice to Mr Cavell. It is well accepted that juries are believed to follow the directions of the trial judge.

The Judge's summing up

[27] The Judge directly addressed the Crown closing in her summing up:

[30] Ms Goodison said to you in her closing address that Mr Cavell did not call [the partner] as a witness, but that by his narrative it made her somewhat of a silent witness. She said that that meant that there was an absence of corroboration of what Mr Cavell has said. She said that he said what he likes about [the partner] to support his narrative in circumstances where [the partner] has not had the opportunity to respond or to give her own narrative. Ms Goodison said to you that this should affect the weight you attach to Mr Cavell's evidence about [the partner's] role in matters.

[31] I am giving you a very strong direction that a defendant does not have to give evidence and they do not have to call any particular evidence, or person to give evidence. Even in a case like this, where Mr Cavell has an onus to satisfy you in regard to one of the elements of the charges, whether he did not possess any portion of either of the controlled drugs for the purpose of supplying it, or selling it, to another person, he did not have to give evidence, or call any particular evidence or witnesses. He chose to give evidence and to offer evidence about toxicology and hair samples taken from he and [his partner].

[32] A defendant has a choice whether to give or call evidence and what evidence they call. It is a matter for you what weight you attach to Mr Cavell's evidence, but you must not speculate about why [his partner] has not been called to give evidence by the Crown or the defence. You must also not speculate about what she may or may not have said about any matter. And you must not reason that the fact that [the partner] did not give evidence undermines the defence case. There is no requirement for corroboration of Mr Cavell's account.

> [33] It is a matter for you what weight you attach to Mr Cavell's evidence, but the fact that [his partner] did not give evidence does not undermine the defence case.

[28] Later in her summing-up, the Judge explained to the jury the burden of proof and the standard of proof, before explaining to the jury how the onus could shift to the defendant and the standard of proof then applied.

Application to adduce fresh evidence

The application

[29] Mr Cavell seeks leave to adduce June 2024 affidavits of two of his friends, namely:

(a) John Morton, who recalls visiting Mr Cavell and his partner when they were travelling around the North Island in December 2020. Mr Cavell told him they were on a tiki tour through the North Island.

(b) Rourke Crawford-Flett, who says Mr Cavell and his partner stayed with him for a couple of nights in late-November/early-December 2020, at which time Mr Cavell "seemed to be in holiday mode", far more relaxed than on previous occasions when they had met.

The test for admission of fresh evidence

[30] The principles for assessing the admissibility of fresh evidence for appeals against conviction are well established. A sequential series of tests is involved. If the evidence is not credible, it should not be admitted. If it is credible, the question that then arises is whether it is fresh in the sense that it is evidence which could not have been obtained from the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on

the safety of the conviction. If there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.[24]

Submissions

[31] The apparent credibility of what the two deponents had to say is not in issue.

[32] Ms Riddell for Mr Cavell submitted the evidence could be regarded as fresh because it arguably was only when the Crown opened its case that it became clear the Crown, rather than relying primarily on the reverse onus, was also relying on evidence indicating the North Island trip was a methamphetamine-buying event.

[33] Ms Riddell submitted further that this Court cannot be satisfied the evidence, if admitted, would have no effect on the safety of Mr Cavell's convictions — the evidence shows Mr Cavell and his partner were undertaking holiday-type activities on a trip around the North Island and visiting people on the way.

Analysis — evidence

[34] The leave application will be declined for two reasons:

(a) The affidavit evidence is not fresh. The Crown clearly intended to lead evidence at the trial to indicate the North Island trip was not for wholly innocent purposes. The Crown's evidence included a photo booklet incorporating CCTV stills from various North Island petrol stations and a record of messages between Mr Cavell and his contact "Pedros Kelos", indicating where on his travel Mr Cavell would be and discussing, on the Crown's case, prices for ounces of methamphetamine. Further, Mr Cavell in his own evidence (above at [6]) was covering the proposition that one of several innocent purposes of his trip was to visit friends.

(b) The affidavit evidence is not cogent in relation to the Crown's allegations of possession for the purpose of supply. As submitted by

[24] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

> Mr Lillico for the Crown, the aims of visiting two friends while journeying in the North Island and obtaining methamphetamine with considerable cash reserves are not mutually exclusive. Mr Cavell's non-disclosure to his friends of plans around methamphetamine purchasing does not point cogently to the journey being wholly innocent.

[35] In our view, the new evidence does not present a direct and plausible challenge to the critical question for the jury — whether Mr Cavell had discharged the reverse onus so as to satisfy them the drugs were entirely for personal consumption. It will not be admitted.

Conviction appeal

Prosecutorial misconduct — principles

[36] The Supreme Court in *Stewart v R* identified prosecutorial misconduct as a matter that may prejudice the fairness of a trial:[25]

> [31] Section 25(a) of the New Zealand Bill of Rights Act 1990 guarantees a fair hearing to everyone who is charged with an offence. A trial before a judge and jury will not be fair if a prosecutor acts in a way which creates substantial prejudice and the judge cannot or does not counteract that prejudice by directions to the jury. The attack of the prosecutor on Dr Davis and the alleged motivation to lie unfairly resulted in substantial prejudice to the defence. The Judge did not attempt to redress that prejudice. To the contrary, his directions compounded the prejudice by appearing to endorse the inappropriate submissions.
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> [32] Lord Bingham of Cornhill said when delivering the judgment of the Privy Council in *Randall v R*:
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> > "[28] … it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as

[25] *R v Stewart (Eric)* [2009] NZSC 53, [2009] 3 NZLR 425 (footnotes omitted).

> unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

[37] The Supreme Court recognised the prosecutorial misconduct at Mr Stewart's trial rendered it unfair and also could have affected the trial outcome, resulting in a miscarriage of justice.[26]

Comment on the failure to call a witness — principles

[38] This Court in *Perry Corporation* v *Ithaca (Custodians) Ltd* (*Ithaca*) (a civil appeal) identified the nature of inferences that may legitimately be drawn from the failure to call a material witness.[27] The Court rejected the suggestion there was a "rule" in this regard, instead identifying a principle of law was involved:[28]

> [153] … There is no rule. Rather, there is a principle of the law of evidence authorising (but not mandating) a particular form of reasoning. The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:
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> (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
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> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
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> (c) the absence of the witness is unexplained.
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> [154] Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it. The result of such an inference, however, is not to prove the opposite party's case but to strengthen the weight of evidence of the opposite party or reduce the weight of evidence of the party who failed to call the witness.

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26 At [34]–[37].
27 *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA).
28 Per Gault P, Blanchard, Anderson and Glazebrook JJ.

[39] This Court revisited the law in this area, this time on a criminal appeal, in *R v Nobakht*.[29] The law as to what inferences may legitimately be drawn from the failure to call a material witness was described as "a little murky", but with *Ithaca* appearing to be the New Zealand position.[30] The Court recognised that, in drawing inferences from the failure to call witnesses, greater caution is required in criminal cases:[31]

> [91] *Ithaca* was, of course, a civil case, but the same principle applies in criminal cases, although, in practice, with greater caution. It is the principle underlining cases like *Trompert v Police* … *R v Gunthorp* … and *R v Haig* … per William Young P and Chambers J. The reason for caution stems from the fact that this principle of the law of evidence rubs up against the fundamental right of an accused not to be compelled to be a witness, now enshrined in s 25(d) of the New Zealand Bill of Rights Act 1990. See generally the excellent discussion on this topic in Rishworth & others *The New Zealand Bill of Rights* …
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> [92] This [C]ourt noted in *Haig* … that the *Trompert* approach was "applied fairly conservatively in New Zealand". The [C]ourt said: "Judges seldom comment adversely when an accused has not given evidence." So too they seldom comment about defence witnesses who might have been called. There are two main reasons for that conservative approach. First, judges are concerned not to say anything which might undermine the principal direction as to onus and standard of proof. Secondly, the "particular form of reasoning" which is authorised (but not mandated) in situations of missing evidence is subtle, as the extract from *Ithaca* … shows. If a judge were to direct a jury as to inferences that can be drawn from a party's failure to call a witness, he or she would have to be careful to direct not only on the three criteria that must be established before the absence of a witness becomes material but also on the nature of the inference to be drawn from the failure to call a witness. In most cases, judges conclude it is safer not to enter this particular minefield and instead instruct juries to decide the case on the evidence they have heard and not to speculate on what others might have said if called.

[40] In *R v Konnerth*, the appellant was convicted of possession of cannabis for the purpose of sale. The appellant said the cannabis was not his and that he did not know anything about it. At trial, the prosecutor had commented on the fact that the appellant had not called his flatmate as a witness, when the flatmate formed part of the appellant's explanation that the cannabis did not belong to him.[32] On appeal, the remedial importance of the trial Judge correcting the inappropriate submission of a

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29 *R v Nobakht* [2007] NZCA 488.
30 At [88].
31 Citations omitted.
32 *R v Konnerth* CA149/06, 20 June 2006.

prosecutor was identified by this Court.[33] The prosecutor had commented on the failure of the defendant to call evidence to meet the reverse onus the defendant faced. This Court held the inappropriate comment had been adequately addressed through the Judge's summing up:[34]

> [13] … Comment in a closing address by a prosecutor about a witness not being called by the defence may amount to improper conduct by a Crown prosecutor requiring firm action by the trial Judge. But it does not fall within the specific prohibition of s 366 [of the Crimes Act 1961].
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> [14] *R v Trounson* … and *R v E* … make it clear that if there is adequate and careful dealing with counsel transgression by the Judge in summing up to the jury, then in the particular circumstances of the case, an Appellate Court may conclude that no risk of a miscarriage of justice arises.
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> …
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> [19] Prosecutors are rightly criticised if they contravene s 366 and in many cases such breaches are so serious to require the setting aside of an adverse verdict. But in this case the breach was adequately corrected and remedied by the clear and firm directions of the trial judge. Viewing the content of submissions of both Crown and defence counsel as well as the careful summing-up, we are satisfied that there is no risk that a miscarriage of justice was occasioned by the breach of s 366.

Submissions

[41] Ms Riddell submitted the threshold requirements for the drawing of an inference from a defendant's failure to call evidence, as identified in *Nobakht*,[35] were not met in this case. The prosecutor's approach here ultimately had the effect of undermining Mr Cavell's fundamental right to silence.

[42] Ms Riddell submitted the circumstances relating to Mr Cavell's partner meant, in terms of the threshold test for an inference under *Ithaca*,[36] Mr Cavell would not have been expected to call his partner. Ms Riddell noted the Crown had elected not to call his partner although she was "available" as a witness. Any evidence his partner could give for the defence would have been limited through her having the right to privilege against self-incrimination (in relation to her simple possession of controlled

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33 At [17]–[19].
34 Citations omitted.
35 *R v Nobakht*, above n 29, at [88].
36 *Ithaca (Custodians) Ltd v Perry Corporation*, above n 27, at [153] per Gault P, Blanchard, Anderson and Glazebrook JJ.

drugs). Mr Cavell's denial of any intention to supply drugs was clear without calling his partner. The denial had some support from the evidence adduced in relation to the hair follicle tests. In short, this was not a situation where there was a particular matter that needed to be explained beyond the explanation already provided by the defendant.

[43] Ms Riddell noted Mr Cavell did not give evidence as to why he was not calling his partner as a witness and he was not cross-examined as to the reasons for her not being called. Ms Riddell submitted the Crown's failure to give Mr Cavell the opportunity to respond on the reason for the partner's absence, when the Crown would ultimately comment on that absence in closing, was a breach of the cross-examination duty under s 92 of the Evidence Act 2006.

[44] Ms Riddell suggested that, once the prosecutor closed in relation to the partner's absence in the way she did, any closing comments defence counsel chose to make as to the Crown also not calling the partner (with an invitation for the jury to draw the inference that anything the partner would have had to say would not have helped the Crown case) would have attracted a negative direction from the Judge asking the jury not to speculate.

[45] Ms Riddell emphasised there was no obligation on Mr Cavell to give or call evidence and the prosecutor was not permitted to comment on Mr Cavell's election to not give evidence. She submitted the prosecutor, by embarking on a "detailed submission" on the failure to call a witness, undermined Mr Cavell's fundamental right of silence.

[46] Ms Riddell submitted, although the prosecutor had qualified her closing address by saying "[i]t affects the weight that [the jury] can give to [Mr Cavell's] evidence", the prosecutor's submissions as a whole were clearly directed to inviting the jury to draw an adverse inference as to Mr Cavell's credibility because he had not called the partner as a witness.

[47] Ms Riddell submitted the nature of the prosecutor's comments was so erroneous they could not be overcome by judicial direction. In her submission, the Judge's directions, by repeating references to "an absence of corroboration" and by

observing Mr Cavell "said what he likes about [the partner]", had the effect of reinforcing the Crown's closing submissions.

Analysis

[48] As recognised by both counsel, the prosecutor's comments (above at [24]) as to Mr Cavell not calling his partner as a witness to corroborate what he had said were inappropriate. The prosecutor's closing remarks in parts could have been understood by the jury to suggest the defendant carried an onus of proof. The circumstances in which the jury, under the approach in *Ithaca*, could have been invited to draw an adverse inference (above at [38]), were not present. Had the prosecutor's comments been left uncorrected by the Judge, the jury may have been left with the impression Mr Cavell was obliged to call his partner as a witness and to provide corroboration of his evidence.

[49] The essential issue here is whether, as in *Konnerth*, the breach was adequately corrected and remedied by clear and firm directions of the trial Judge.

[50] In our view, it was. The four paragraphs the Judge devoted in her summing up to correcting the prosecutor's comments, as set out at [27] above, were accurately described by the Judge herself as a "very strong direction". Having accurately summarised the content and import of the prosecutor's comments, the Judge informed the jury pursuant to her "very strong direction" that:

(a) the defendant does not have to give evidence;

(b) the defendant does not have to call any particular evidence or any person to give evidence;

(c) even with the onus Mr Cavell had to satisfy the jury in regard to one of the elements of the charges, he did not have to give evidence or call any particular evidence or witnesses;

(d) it was a matter for the jury what weight to attach to Mr Cavell's evidence;

(e) it was not for the jury to speculate why the partner had not been called to give evidence or about what she might have said;

(f) the jury must not reason that because the partner did not give evidence the defence case was undermined; and

(g) there was no requirement for corroboration of Mr Cavell's account.

[51] These directions directly addressed and corrected the errors in the prosecutor's comments. We are satisfied the prosecutor's errors could not have affected the trial outcome, so as to result in a miscarriage of justice.

[52] The appeal against conviction will be dismissed.

Sentence appeal

The s 27 report

[53] The s 27 report provided for Mr Cavell's sentencing was prepared by a professional social worker based on interviews with Mr Cavell and a woman (not his partner) who has been a close friend of Mr Cavell for many years.

[54] The report writer provided an overview of "causative background factors" which accurately summarised the more detailed discussion later in the report:[37]

> (a) Childhood trauma — subject to psychological, physical and sexual abuse by his parents that has never been therapeutically addressed
>
> (b) Abandonment by his father in his early teens — separation of his parents and his father's dislike of him ended his relationship with his father long term, despite attempts by Mr Cavell to reconcile for his own children's benefit.
>
> (c) Addiction issues — as a result of the childhood trauma, used drugs to mask and avoid the pain he was carrying; and
>
> (d) Loss and grief — death of their 7 month old baby to cot death and an immediate incarceration prevented him from grieving the loss of his baby.

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[37] Emphasis omitted.

[55] The report writer concluded with a summary:

> Mr Cavell has been subjected to a traumatic childhood, suffering from physical, sexual and psychological abuse and devoid of a functional or loving relationship with either parent growing up. He has also experienced significant cultural disconnection carrying the whakamā of being Māori. He has used substances throughout his life to avoid and mask the pain of that trauma. Mr Cavell is vulnerable, therefore it is important that he access therapy to address the unaddressed childhood trauma, grief and loss and build his self-esteem and self-worth, and with ongoing support from Te Piki Oranga to prevent a relapse there is every chance Mr Cavell can lead an offending free life.

[56] The issue is whether Mr Cavell's sentence was manifestly excessive due to insufficient discounts afforded for his personal circumstances as outlined in this report. Mr Cavell relies particularly on the matters as summarised by the report writer as set out above at [53]–[54].

Appellant's submissions

[57] Ms Riddell noted the Judge's acceptance that Mr Cavell had a difficult upbringing. She submitted this must indicate the Judge accepted the existence of the factors summarised in the s 27 report. Ms Riddell noted also the Judge accepted Mr Cavell had a "significant addiction". She submitted these circumstances meant this was not a case of solely commercial drug dealing where courts are often more reluctant to give discounts for personal circumstances.

[58] Ms Riddell submitted the Judge, by refusing any credit for matters of personal background on the grounds Mr Cavell was at very high risk of reoffending and lacked insight and remorse, ignored principles established in *Berkland v R*.[38]

[59] Ms Riddell submitted the Judge also erred in concluding Mr Cavell lacked insight into his offending given that while on bail, he had engaged with an addictions service to seek treatment for his methamphetamine addiction.

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[38] Referring to *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [111]–[112], [116] and [128].

Crown's submissions

[60] For the Crown, Mr Lillico submitted the Judge, with the benefit of observing the appellant at the trial including in giving evidence, was entitled to reject an allowance for background leading to addiction, based on the s 27 report. This was because of the nature of Mr Cavell's offending and the Judge's correct assessment that Mr Cavell was not really motivated to rehabilitate. Although Mr Cavell plainly has a methamphetamine addiction, his culpability was not materially impacted by his addiction — he was sentenced for methamphetamine offending at more than a minor level, which he had profited from on a commercial scale, and for which he had not taken any responsibility.

[61] Mr Lillico also noted the extent of the discount (nine months) for the time Mr Cavell spent on bail when Mr Cavell had had issues with compliance. In particular, Mr Cavell had breached the terms of his EM bail (pending sentencing) by being found with methamphetamine and other drugs in his system.

[62] In Mr Lillico's submission, the end sentence of two years and eight months' imprisonment was well within range and not manifestly excessive.

Analysis

[63] The single matter relied on by Ms Riddell as leading to a manifestly excessive sentence was the Judge's refusal to recognise Mr Cavell was entitled to any credit for the contribution of his background to his offending.

[64] The starting point lies in the court making a realistic assessment of whether Mr Cavell's background has causatively contributed to his offending. Was his level of agency significantly reduced by circumstances in his background which affected his agency?

[65] On the information before the Judge at sentencing, we consider the Judge ought to have recognised a causal relationship between Mr Cavell's background (particularly his drug addiction) and his offending.

[66] The Judge however was then required to consider the other aspects of Mr Cavell's offending relevant to his degree of culpability. The nature and extent of Mr Cavell's drug purchasing trip, including its orchestration, points to an increased agency on his part. In the terms used by the Supreme Court in *Berkland*, this was offending on a commercial scale undertaken in "a clear-eyed and cynical way".[39]

[67] These factors lead us to conclude Mr Cavell had a substantial level of agency in his offending reduced only marginally by his addiction. In our view, a modest credit for background circumstances was called for. A credit of five per cent would have been appropriate.

[68] We must then consider whether the sentence imposed (two years and eight months' imprisonment) was manifestly excessive. Having regard to the particular offending involved (most particularly the convictions for possession of drugs for supply and possession of a firearm and ammunition), the end sentence appears appropriate, notwithstanding the view we have reached in relation to the lack of credit for Mr Cavell's personal background. That overall assessment is reinforced when we consider the credit of nine months provided by the Judge on account of Mr Cavell's 22 months spent on varying conditions of bail. Mr Cavell's serious breach of his bail terms (involving the use of drugs) would appropriately have led to no credit in this regard. Even had there been full compliance with bail terms, the credit of nine months could be viewed as generous.

[69] The end sentence was within range and can properly be justified by accepted sentencing principles. The sentence appeal will be dismissed.

Result

[70] The application to adduce further evidence is declined.

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[39] At [128] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

[71] The appeals against conviction and sentence are dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent