Preface

This is the 11th Student Edition which continues the tradition begun in 1996 of making available a convenient encapsulation of the core elements of Adams on Criminal Law. As has always been the case this includes all the hallmarks of the primary work. It is a selection from the multi-volumed Adams and what is included reflects the same years of experience, assessment and consideration of the author team.

The Evidence Act 2006 is now old hat with countless authoritative decisions of it in the Supreme Court and the Court of Appeal but the major procedural reforms of recent years are now part of the daily diet in the Courts and their thrust and effect are explored are available for application.

Although this continues to be called a Student Edition it is used and valued by Judges, lawyers, academics and civil servants as a handy and reliable starting point for dealing with all criminal law issues.

Hon Sir Bruce Robertson
Wellington
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CA24.30 Actus reus negated?
Conceptually it may be debated whether impossibility negates the actus reus of an offence, or provides a defence notwithstanding that all the elements of an offence have come into existence: Tifaga v Dept of Labour [1980] 2 NZLR 235 (CA) at 241, 245. The Court of Appeal has held that the defendant may be convicted if the proscribed state of affairs continues after it has ceased to be impossible to comply with the law: Finau v Dept of Labour [1984] 2 NZLR 396 (CA), The Court of Appeal has held that if the offence is one of strict or absolute liability, the defence fails if the defendant could have avoided the impossibility by due diligence: Tifaga. In the context of regulatory offences, this defence is now subsumed by the defence of total absence of fault (see [CA20.43]–[CA20.49]), but in the case of other offences, in principle fault should exclude the defence only if the defendant acted with the requisite mens rea before the impossibility, and there should be no reversal of the persuasive burden of proof: R v Bailey [1983] 1 WLR 760, at 764–765. There may be instances where the statute is so drafted that impossibility may provide a defence notwithstanding that it arose from fault on the part of the defendant: Stockdale v Coulson [1974] 3 All ER 154. Nor will the defence fail merely because the defendant would not have complied with the law had this been possible: Starri v SA Police (1995) 80 A Crim R 197.

CA24.31 Exclusion of defence
In exceptional cases the defence of impossibility may be excluded because to recognise it would be inconsistent with the scheme of the legislation creating the offence: [CA20.02]. For example, in Finau v Dept of Labour [1984] 2 NZLR 396 (CA), it was not doubted that it would have been excluded if its availability conferred a new immigration status on the defendant, allowing her to remain indefinitely. The same conclusion might be reached if the statute provides a particular procedure for release from impossible or unreasonable obligations, compare Dobson v Wairewa County [1968] NZLR 284, at 287, or if it authorises remedial action and its terms assume that the obligation was lawful. The same conclusion might be reached if the statute is so drafted that impossibility may provide a defence notwithstanding that it arose from fault on the part of the defendant: Stockdale v Coulson [1974] 3 All ER 154. Nor will the defence fail merely because the defendant would not have complied with the law had this been possible: Starri v SA Police (1995) 80 A Crim R 197.

Ignorance of law

The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

Compare: 1908 No 32 s 45

CA25.01 Ignorance of law no defence
This section encapsulates the long recognised principle that ignorance or mistake of law is no defence, at least when the ignorance or mistake relates to the law which renders the conduct an offence. The rule has been pressed to great lengths. The law in question may have been unclear, but the mere fact that a mistake as to legal consequences of conduct was not attributable to negligence provides no defence: R v Forster (1992) 70 CCC (3d) 59 (SCC); R v Castance (2005) 194 CCC (3d) 225 (Man CA). This is so even if the defendant acts in reliance on the advice of a lawyer: Cooper v Simmons (1862) 7 H & N 707; R v Clayton (1943) 33 CR App R 113, at 118–119. Compare R v Fox [2000] 1 NZLR 641, (1999) 17 CRNZ 216 (CA) where the rule applied even though licensed dealers had shared the defendant’s mistaken view that machine guns operated by compressed air were not classified as “restricted weapons”. The rule has been applied to foreigners whose conduct was lawful in their own country: R v Esop (1836) 7 C & P 456; R v Barronet and Allain (1852) Dears CC 51; and to a person who could not have known of the statute in question because he was at sea when it was enacted and he offended: R v Bailey (1800) Russ & Ry 1. In R v Molla [1980] 2 SCR 356, 55 CCC (2d) 558 (SCC), the Supreme Court of Canada held that s 19 of the Canadian Criminal Code (the equivalent to s 25) denies any defence based on ignorance of the existence of the law or mistake as to its meaning, scope, or

When an enactment prohibits conduct which a person is already engaged in, ignorance of the new law will be relevant to the determination of whether its transgression should be excused on the basis that the conduct was discontinued within a reasonable time: Burns v Nowell (1880) 5 QBD 444; [CA24.29]. In Lim Chin Aik v R [1963] AC 160 (PC), at 171, the Privy Council held that the rule would not apply if the law in question was unpublished and there was no provision for those subject to it to find out what it was by appropriate inquiry. Similarly, Canadian courts have long recognised a defence of “invincible mistake of law” in situations where “it was impossible for the person charged to know the law, either because it had not been promulgated or because it was not published in a satisfactory way so that its existence and contents could be known”: Coro de l’École Polytechnique v Canada 2004 FCA 127, at [39]; R v Ross (1944) 84 CCC 107 (BCCC); R v Catholique (1980) 49 CCC (2d) 65 (NWTSC). It is unclear whether s 25 could be interpreted so as not to apply to such a case.

In Griffin v Marsh (1994) 34 NSWLR 104, at 122–123, Smart J favoured the development of a defence of reasonable mistake of law (but which would not be available if a defendant acted on advice which was “cute, slick or accommodating”). Any such development lies in the future, and would involve amendment of s 25. However, there are cases where error of law may provide the foundation of a defence of lack of mens rea.

CA25.02  
Error of law excluding mens rea

A defendant may sometimes be entitled to an acquittal because of lack of mens rea even though this was caused wholly or partly by ignorance or mistake of law. First, it is sometimes difficult to distinguish between mistake of fact (which may also excuse) and mistake of law. A belief as to ownership often involves a proposition of law, but mistakes as to private rights are generally regarded as mistakes of fact. Cooper v Philibb (1867) LR 6 HL 149, at 170. Compare Police v Shadbolt (1976) 2 NZLR 409. More generally, in Thomas v R (1937) 59 CLR 279, at 306, where on a prosecution for bigamy the defendant claimed mistake as to the validity of a marriage, Dixon J stated that “a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law”. See also R v Davidson (1971) 3 CCC (2d) 509 (BCCA), at 515–516; R v Manuel [2008] BCCA 143. However this may not apply to every such “compound event”. A “factual” error may nevertheless be regarded as a mistake of law if the belief would not have been formed but for an error of law: Power v Hopp (1976) 14 SASR 337, at 345 per Bray CJ. The authorities are reviewed by Smart J in Griffin v Marsh (1994) 34 NSWLR 104, at 117–123. In R v Klundert (2004) 242 DLR (4th) 644 (Ont CA), the Court held, at [59], that a “mistaken belief that a statute is invalid or is otherwise not applicable to that person’s conduct is a mistake of law … that is irrelevant to the existence of the fault requirement”.

A failure to advert to an essential fact may be regarded as simply ignorance of fact even if the inadvertence was a result of ignorance of the law: compare Durey v Police (1984) 1 CRNZ 392 (HC). In some cases such inadvertence may be regarded as no more than ignorance of the law unless there was a positive belief about the relevant facts: Attorney-General’s Reference (No 1 of 1995) [1996] Crim LR 575; compare Attorney-General v Auckland District Court (2000) 8 NZCLC 262,314. Whether the defendant knows the law or not, it appears that it will be excusing mistake of fact if he or she mistakenly assumes that whatever facts are needed for the conduct to be lawful exist or have occurred: Kumar v Immigration Dept [1978] 2 NZLR 553 (CA) (mistaken belief that a card provided by an official was a lawful permit); R v Metuariki [1986] 1 NZLR 488, (1986) 2 CRNZ 116 (CA) (mistaken belief that hallucinatory substance of an unknown genus was not a controlled drug). This will not be the case if facts assumed by the defendant could not have made the conduct lawful, which may have been the case in De Malmanche v McKenzie (1990) 6 CRNZ 49. If a person believes that his or her conduct is unlawful, but also believes in facts which would mean that in truth it is not, the error of law will not constitute mens rea: R v Taaffe [1984] AC 539, [1984] 1 All ER 747. If a person believes that the conduct is unlawful and it is, it appears that it will be no defence that he or she was merely uncertain or ignorant of essential facts: compare Burrows v MOT (1989) 5 CRNZ 417; R v Metuariki [1986] 1 NZLR 488, (1986) 2 CRNZ 116 (CA).

CA25.03  
Legislation expressly requiring guilty mind

The definition of an offence sometimes includes terms which allow a defence if a mistake in law results in a belief that conduct is lawful, for example, “without claim of right”. A mistake of civil law may also bring a person within a statutory defence of “reasonable excuse”: Maintenance Office v Stark [1977] 1 NZLR 78. It is likely to be otherwise if the mistake is as to the criminal law (R v Jones (Terence) [1995] 1 Cr App R 262, 2 WLR 64), or if the defence is one of “lawful excuse”: Ashworth, “Excusable mistake of law” [1974] Crim LR 652.
There have also been cases where mistake of law has been held to exclude the state of mind required by such common terms as “wilfully” or “knowing”, for example, *Donnelly v CIR* [1960] NZLR 469; *Secretary of State for Trade and Industry v Hart* [1982] 1 All ER 817; contrast *Police v Shadbolt* [1976] 2 NZLR 409; *R v Simpson* [1978] 2 NZLR 221 (CA), at 225–226 was predicated on the basis that when the statute expressly required an intent to obstruct a constable in the execution of duty this could be excluded by either mistake of fact or mistake as to the law governing a constable’s powers: Chambers, “Criminal law: Blunders and misunderstanding and policemen in the execution of their duties” (1979) 8 NZULR 392. Usually it will be wrong (indeed “wholly unacceptable”) to interpret words such as “knowing” as requiring knowledge of the relevant law: *Grant v Borg* [1982] 2 All ER 257 (HL), at 263: *Acton-Adams v Wainuiot CC* (1989) 4 CRNZ 594. The approach in *Grant v Borg* was applied in *R v Leolah* [2001] 1 NZLR 562, (2000) 18 CRNZ 505 (CA); see [CA105B.01]. Mere mistake as to the law governing the offence charged cannot negate knowledge or mens rea which is an implied ingredient of an offence, *Booth v MOT* [1988] 2 NZLR 217 is not in conformity with that proposition — but compare *Breen v Police* (1989) 5 CRNZ 238. In *Waiau v Police* [1987] 1 NZLR 754, (1987) 2 CRNZ 370 (CA), at 759; 375 the Court held that an incorrect understanding of the law regarding a constable’s powers could not excuse when knowledge was an implied ingredient. It was noted that: “The defence of total absence of fault cannot extend to pure mistakes of law.” See also *Aalders v MOT* [1989] 1 NZLR 372, (1988) 3 CRNZ 620 (HC); *R v Mola* [1980] 2 SCR 356, 55 CCC (2d) 558 (SCC); *R v Pontes* (1995) 100 CCC (3d) 353, 41 CR (4th) 201 (SCC); [CA20.46]. Compare *Police v Cameron* (1997) 15 FRNZ 269, [1997] DCR 286 where ignorance that conduct was in breach of a protection order was held to negate the knowledge impliedly required, although it seems that it arose from the defendant’s understandable ignorance of the effect of s 133(5) of the Domestic Violence Act 1995, which deemed existing non-molestation orders to have the (wider) effect of protection orders under the 1995 Act. It may have been more satisfactory to treat this as a “reasonable excuse”, which s 49(1) of the Act allows as a defence. The decision in *Cameron* was not followed in *Skelton v Police* [1998] NZLR 102, on the basis that ignorance or mistake as to the law rendering conduct an offence does not provide a defence, even if such ignorance or mistake was supported by a solicitor’s advice. The possibility of “reasonable excuse” was not discussed. In *Walker v Police* HC Auckland CRI-2004-404-362, 17 August 2005, the Judge applied the approach of *Skelton* that “persons required to observe protection orders are deemed to have notice of its contents”, and held that once the defendant was aware of the existence of the order, any claimed ignorance or mistake as to its contents could not provide a defence. Similarly in *Alofaki v Police* HC Whangarei CRI-2006-488-43, 19 March 2007, the Court held that knowledge that a temporary protection order had been made imputed knowledge of the legal fact that that temporary order would ultimately become a final order of indefinite duration.

Conversely in *Keung v Police* HC Christchurch CRI-2009-409-94, 5 November 2009, the Court rejected an argument that the defendant’s erroneous belief, based on a factual miscalculation of the dates involved, that his period would expire, was a “mistake as to statutory terms” and hence a mistake of law. The defendant was well aware of the statutory terms and the duration of his suspension, he was simply factually mistaken as to the date on which the period would expire.

**CA25.04 Claim of right**

A mistake of law will sometimes support a claim that the defendant acted with claim of right: see [CA24.04.01]–[CA24.04.04]. However, claim of right is relevant only when its absence is required by the definition of the offence in question: *R v Cargill* [1995] 3 NZLR 263, (1995) 13 CRNZ 291 (CA); [CA24.04.03].

**CA25.05 Officially induced error**

In some jurisdictions, courts have accepted that there might be a defence if a defendant acted on erroneous advice on the law from an official responsible for administering the law in question, for example, *People v Ferguson* 134 Cal App 41 (1933); *R v MacDougall* (1983) 142 DLR (3d) 216 (SCC); *R v Cancoil Thermal Corp and Parkinson* (1986) 27 CCC (3d) 295 (Ont CA). The existence of such a defence was left open in *R v Forster* (1992) 70 CCC (3d) 59 (SCC). In *R v Jorgensen* (1995) 129 DLR (4th) 510, 102 CCC (3d) 97 (SCC), Lamer CJFavouring the principle as providing a ground on which the trial judge may order a stay of proceedings. In *Lévis (City) v Tétraïd; Lévis (City) v 2629-4470 Québec Inc* (2006) 207 CCC (3d) 1 (SCC), the Court accepted that the defence had become established and confirmed that it will only be available where the defendant prove on the balance of probabilities that the defendant actually considered the legal consequences of his or her actions and committed the offence as the result of an error of law or of mixed law and fact, made in reliance on erroneous but reasonable advice from an appropriate official. The mere failure of the relevant officials to enforce the law in the past cannot give rise to the defence: *R v Marsland* 2012...
SKCA 47. Such a defence has yet to find favour in England. See, for example, *Surrey County Council v Battersby* [1965] 2 QB 124; *Cambridgeshire and Isle of Ely County Council v Rust* [1972] 2 QB 426; Ashworth, “Excusable mistake of law” [1974] Crim LR 652. In Australia it has been rejected by the High Court in *Ostrowski v Palmer* [2004] HCA 30, at [53]–[59].


**Sentence or process**

26 **Execution of sentence, process, or warrant**

(1) Every ministerial officer of any Court authorised to execute a lawful sentence, and every [prison manager] of any [prison], and every person lawfully assisting any such ministerial officer or [prison manager], is justified in executing the sentence.

(2) Every ministerial officer of any Court duly authorised to execute any lawful process of the Court, whether of a civil or a criminal nature, and every person lawfully assisting him, is justified in executing it; and every [prison manager] required under the process to receive and detain any person is justified in receiving and detaining him.

(3) Every one duly authorised to execute a lawful warrant issued by any Court or Justice [or Community Magistrate] or other person having jurisdiction to issue the warrant, and every person lawfully assisting him, is justified in executing the warrant; and every [prison manager] required under the warrant to receive and detain any person is justified in receiving and detaining him.

Compare: 1908 No 32 s 46

27 **Execution of erroneous sentence or process**

If a sentence is passed or a process is issued by a Court having jurisdiction under any circumstances to pass such a sentence or issue such a process, or if a warrant is issued by a Court or person having jurisdiction under any circumstances to issue such a warrant, the sentence passed or process or warrant issued shall be sufficient to justify the execution of it by every officer, [prison manager], or other person authorised to execute it, and by every person lawfully assisting him, notwithstanding that—

(a) The Court passing the sentence or issuing the process had no authority to pass that sentence or issue that process in the particular case; or

(b) The Court or other person issuing the warrant had no jurisdiction to issue it, or exceeded its or his jurisdiction in issuing it, in the particular case.

Compare: 1908 No 32 s 47

28 **Sentence or process without jurisdiction**

(1) Every officer, [prison manager], or person executing any sentence, process, or warrant, and every person lawfully assisting him, shall be protected from criminal responsibility if—

(a) He acts in good faith under the belief that the sentence or process was that of a Court having jurisdiction, or, as the case may be, that the warrant was that of a

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(a) it is not a defence to a charge under section 134 that the young person concerned consented; and

(b) it is not a defence to a charge under section 134 that the person charged believed that the young person concerned was of or over the age of 16 years.

[135 Indecent assault]

Every one is liable to imprisonment for a term not exceeding 7 years who indecently assaults another person.

CA135.01 “Assault”

Whereas by virtue of s 2(1B), ss 129A, 131, 131B, 132 and 134 extend to indecent acts not involving the element of assault on the part of the defendant (see [CA2.09]–[CA2.12]), s 135 requires an actual assault. The assault need not be forceful or violent; a gentle caress may suffice. The term “assault” as defined in s 2(1), does not necessarily involve a “battery”, but may be no more than an attempt to apply force, or a threat by any act or gesture to do so: see [CA2.03.02]. Where a man, alone with a woman in a train, exposed her person and advanced towards her with an invitation to intercourse, this was treated as an indecent assault without regard to the disputed question whether he had put his hand on her shoulder: R v Rolfe (1952) 36 Cr App R 4; Smith v R [2012] NZCA 419 (the act of standing in his neighbour’s doorway with his penis exposed, suggesting sex while holding the door to prevent her from shutting it, amounted to a threat rather than merely a tactless and clumsy invitation to have sex with him; the fact that she was able to push the door shut or that the defendant then left could not alter the matter). Similarly in R v Kahui HC Auckland CRI-2006-057-1135, 29 June 2007, it was held that threats inducing the complainant to use a vibrator on herself while the defendant watched would constitute an indecent assault. In R v Leason (1968) 52 Cr App R 185 (CA), at 187, it was held that the act of assault need not be in itself indecent:

“The definition of ‘indecent assault’ which has long been accepted in these Courts is an assault accompanied with circumstances of indecency.”

In that case, acts of kissing and other mild familiarities were sufficient because accompanied by suggestions of intercourse or sex play. Mere indecent expressions, with a request for intercourse, will not suffice, even if followed by a mild but not indecent assault: R v Turner (1900) 18 NZLR 874.

Provided the defendant has the present ability to effect his or her purpose, the complainant need not be aware of the force or threat: R v Kerr [1988] 1 NZLR 270, (1987) 2 CRNZ 407 (CA), at 274; 411; see [CA2.03.06].

In R v Speck [1977] 2 All ER 859 (CA), the Court held that inactivity in response to an indecent act by a child amounted to an assault as constituting an invitation to do the indecent act. Although in New Zealand such conduct falls within the meaning of “does an indecent act on another” in s 2(1B) and is accordingly caught by ss 129A, 131–134 and 138, it is difficult to see how merely permitting an indecent act to occur can fulfil the requirements of “assault” in s 2(1). See also R v Sutton [1977] 3 All ER 476 (CA).

No matter how minor the assault, conviction under s 135 will trigger the “three strikes” warning/sentencing regime provided for by ss 86A–86I of the Sentencing Act 2002. For the prosecution and sentencing implications of this, see [SA86A.03].

CA135.02 Elements constituting indecent assault

R v Court [1989] AC 28, [1988] 2 All ER 221 (HL) suggests the prosecution must prove:

(a) That the defendant assaulted the complainant;

(b) That the assault, or the assault and the circumstances accompanying it, were indecent. “Indecent” means that which is capable of being, and which the tribunal of fact finds would be, considered by right-minded persons as indecent: see [CA2.09]; and

(c) That the defendant intended to commit an assault that in its nature or because of the circumstances, was indecent. As Lord Griffiths put it at 34, the “extra mental element” required for indecent assault is an “intent to do something indecent ... in the sense of an affront to ... sexual modesty or, in other words, an intent to do that which the jury find indecent”. Evidence of the defendant’s reasons for acting will be admissible to support or negative that the assault was an indecent one and was so intended, even if such reasons were not disclosed at the time of the act. For example, evidence that the defendant’s secret motive was to obtain sexual gratification or to humiliate the victim may show...
that an act otherwise capable of being regarded as decent was indecent, and evidence that the motive was to punish wrongdoing, or to search the complainant, might show the contrary.

In that case the House of Lords held that smacking a clothed girl on her buttocks in order to satisfy a buttock fetish was an indecent assault. The smacking itself may have been equivocal, but the admitted purpose rendered it indecent. Conversely, the House made it clear that an act that was in itself incapable of being seen as indecent would not be rendered unlawful by an undisclosed indecent purpose on the part of the defendant: 

**Court at 33, 222**, per Lord Keith; **R v George** [1956] Crim LR 52 (removal of a girl’s shoe in satisfaction of a shoe fetish); **Kumar v R** [2006] EWCA Crim 1946 (a genuine, properly conducted medical examination will not be rendered indecent by a “secret indecent motive” or by the fact that the defendant obtains sexual gratification from it). Similarly, Canadian courts have held that in determining whether an assault has been committed “in circumstances of a sexual nature” contrary to Criminal Code, RSC 1970, c. C-34, s 244(1), the defendant’s “motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances”: **R v Chase** [1987] 2 SCR 293 at [11].

Where the act complained of is “inherently indecent”, the inference will generally be “irresistible” that the intention was to assault the complainant “in a manner which right-minded persons would clearly think was indecent” unless the defendant can suggest some “lawful justification” for the conduct: **R v Court**, 42–43, per Lord Ackner – for example, that the act was done with a view to advice or treatment by a qualified, or even an unqualified, person: **R v Hall** [1952] 1 KB 302 (CA), at 307. In the absence of any such “lawful justification”, the fact that an “inherently indecent” act was done for some purpose other than sexual gratification is irrelevant: **R v Court**, at 35, per Lord Griffiths; **R v K HC Whangarei CRI-2008-027-2728**, 9 December 2009 (defendant claiming that his displacement of his (unconscious) victim’s clothing was to conceal his offending, not for sexual gratification).

In **Milne v Police** [1990] 6 CRNZ 636 (HC), Gault J held that these elements are relevant to indecent assault in New Zealand. Intention is determined by what was said and done. “Indecent” is to be given the meaning it is accorded in general usage and is to be judged in the context of “time, place, and circumstances”: **R v Dunn** [1973] 2 NZLR 481 (CA), at 483. Hence while in Milne, where a man touched the complainant around the arms and kissed her on the lips after she had rejected his request that she agree to his doing so, the Court was satisfied that the acts were indecent, Gault J was also clear that “a kiss, even unwelcome, upon an adult in many circumstances although objectionable will not be indecent”: **Milne**, at 641. Accordingly in **Peters v Police HC Whangarei CRI-2006-088-4622**, 18 June 2007, Priestley J held that feigned inadvertent touching of the outside of the complainant’s thigh accompanied by complimentary remarks about her appearance, in the front seat of a taxi at 3 am, which ceased as soon as she indicated that it was unwelcome, was not indecent. Rather in his view it was simply part of the “ancient rituals of the human mating dance”. As such it was unlikely that the appellant had the necessary mens rea either — since his intention could well have been simply “designed to see whether he could take matters further with the complainant”. Compare **Inglis v Police** (1986) 2 CRNZ 463 (HC) (kiss on the lips of a seven-year-old girl held indecent); **R v Butler** CA194/02, 26 February 2003 (kiss on the breast of a sleeping nine-year-old girl by a 34 year-old male family member held indecent); **R v Palmer** [2009] NZCA 616 (open to the jury to conclude that the relevant conduct was indecent and to infer that the appellant had acted with the necessary mens rea when he persisted in hugging and kissing the complainant despite her resistance). See also **Harrison v Police** HC Christchurch AP8/88, 31 October 1988 as to accidental touching; and **R v Graham-Kerr** [1988] 1 WLR 1098, (1989) 88 Cr App R 302 (CA) as to motive in relation to photographs.

In **R v Armstrong** [2007] NZCA 221, the 18-year-old appellant admitted putting his hand up the 14-year-old complainant’s skirt, but claimed that the touching was consensual and had in fact been initiated by her. The charges had been filed under s 134 and the appellant was aware of the complainant’s age, so it was accepted that consent itself could not provide a defence. However on appeal the appellant argued first, that his actions were not indecent because they were part of mutual consensual touching and, secondly, that he did not recognise that his actions would be regarded as indecent. In ordering a retrial the Court appears to have accepted that in order for the appellant to be convicted of indecent assault the prosecution had to prove both that the touching was indecent and the “separate question of whether the appellant recognised his actions would be regarded as indecent” (at [33]). Insofar as this indicates that the “extra mental element” required for indecent assault extends to a recognition by the defendant that his or her actions would be regarded as indecent by “right thinking persons” it is inconsistent with the decision of the House of Lords in **Court** (above).
CA135.03 Consent

As an assault is required, consent will generally provide a defence (see [CA196.08]), although if consent is not in issue, failure to direct on it will not involve a miscarriage of justice: R v Allison CA489/95, 21 February 1996.

(1) The fact of consent

Any asserted consent must be “genuine” (see [CA128A.07]), and must not be negated by one or more of the “circumstances” set out in s 128A (see [CA128A.01]–[CA128A.06]). Although the onus of negating consent rests with the prosecution, this onus will not arise unless there is evidence from which consent can be reasonably inferred: R v Nazif [1987] 2 NZLR 122 (CA), at 128.

For discussion of consent as a defence generally, see [CA63.03]–[CA63.14].

(2) Belief in consent

In respect of indecent assault, a genuine belief as to consent will be a sufficient defence. The requirement of “belief on reasonable grounds” in respect of the offence of sexual violation as laid down in ss 128(2)(b) and (3)(b) does not apply in respect of indecent assault: R v Nazif [1987] 2 NZLR 122 (CA), and R v Brown CA179/94, 7 July 1994. The same position was reached in England in R v Kimber [1983] 1 WLR 1118, [1983] 3 All ER 316 (CA), in which the Court applied the principle laid down by the House of Lords in Director of Public Prosecutions v Morgan [1976] AC 182, [1975] 2 All ER 347 (HL) to the offence of indecent assault.

However in Kimber, the Court also held that recklessness as to the existence of consent would be sufficient so that there would be liability if the defendant “couldn’t care less whether or not the victim is consenting”: see 1123; 320. Whatever this meant in the English context at the time, it is clear that in New Zealand, as in post-R v G [2004] 1 AC 1034, [2004] 1 Cr App R 21 (HL) England and Wales, the test will be one of “subjective” recklessness requiring that the defendant at least be aware of the possibility of lack of consent: see [CA20.24]–[CA20.26] for discussion of this test.

In R v Bonora (1994) 35 NSWLR 74 (NSW CA), it was similarly held that recklessness as to the existence of consent was sufficient, with the result that the defendant could be convicted where he was aware of at least the possible absence of consent. However, in Fitzgerald v Kennard (1995) 38 NSWLR 184 (NSW CA), a majority held that it sufficed that the defendant was reckless as to absence of consent in the sense that the defendant either was aware that consent might be absent or gave no thought to the question. This adoption of an “objective” test was influenced by a wish to achieve consistency with the rule applicable to rape in New South Wales: see R v Tolmie (1995) 37 NSWLR 660 (NSW CCA); Bochkov v R [2009] NSWCCA 166; [CA20.26].

It is often said that to provide a defence the defendant’s belief in consent must be “honest”. Insofar as this means simply that the belief must be a genuine one, it adds nothing to the basic requirement and its inclusion is tautological but “unobjectionable”: Dorn v R [2010] NZCA 461, at [24]. Nevertheless in Hayes v R [2008] NZSC 3, (2008) 23 CRNZ 720, at [34], the Court held that even when used correctly in this sense, the potential for jury confusion is such that “[i]t is best to avoid the issue when summing up by using language such as ‘did the accused believe’”. Once there is evidence of some circumstance which supports an inference of belief, so as to lend the possibility an “air of reality”: R v Livermore (1995) 43 CR (4th) 1, 102 CCC (3d) 212 (SCC); the onus is on the Crown to negate it.

CA135.04 Lesser included offence

As to included offences generally see Criminal Procedure Act 2011, s 143: [CPA143.02]. In R v Norris (1988) 3 CRNZ 527, Tipping J held that, while the physical elements of the offence of indecent assault are necessarily included in the offence of sexual violation, the mental requirements are different in that in respect of sexual violation the defendant must have reasonable grounds for an honest belief as to consent whereas in respect of indecent assault he or she need only have an honest belief. A defendant is entitled to be acquitted if he or she honestly believed the complainant was consenting even though considered objectively the grounds of his or her belief were unreasonable. It could not therefore be said in respect of what is now s 143 of the Criminal Procedure Act 2011 that indecent assault was “necessarily included”. See also R v Springfield (1969) 53 Cr App R 608 (CA); however, compare R v Leonard CA179/90, 6 June 1991, in which the Court of Appeal, without discussing the point, substituted a charge of indecent assault for one of sexual violation for “kissing complainant on the vagina”.
1961 No 43 > Pt 4 > s 71 Crimes Act 1961

71 Accessory after the fact

(1) An accessory after the fact to an offence is one who, knowing any person to have been a party to the offence, receives, comforts, or assists that person or tampers with or actively suppresses any evidence against him, in order to enable him to escape after arrest or to avoid arrest or conviction.

(2) No person whose spouse or civil union partner has been a party to an offence becomes an accessory after the fact to that offence by doing any act to which this section applies in order to enable the spouse or civil union partner, or the spouse, civil union partner, and any other person who has been a party to the offence, to escape after arrest or to avoid arrest or conviction.

Compare: 1908 No 32 s 92; Criminal Code (1954), s 23 (Canada)

CA71.02 Essential elements of liability — subs (1)

Four essential elements must be proved to establish liability under s 71(1): see R v Thomson (1992) 9 CRNZ 108; R v Briggs HC Whangerei CRJ-2008-027-660, 17 March 2009; Ganahoa v Police HC Auckland AP137/91, 2 July 1991:

(a) That an offence was committed by the person received, comforted or assisted by an accessory;

(b) That, at the time of receiving, comforting or assisting that person, the accessory knew that person was a party to the offence;

(c) That the accessory received, comforted or assisted that person or tampered with or actively suppressed any evidence against that person;

(d) That, at the time of receiving, comforting or assisting etc, the accessory’s purpose was to enable that person to escape after arrest or to avoid arrest or conviction.

As to the availability of charges under s 117(e) (attempting to obstruct, prevent, pervert, or defeat the course of justice) where one or more of these elements cannot be proved, see McMahon v R [2009] NZCA 472; [CA117.04].

(1) The commission of an offence

Section 71(1) presupposes the commission of an “offence” by someone liable as a principal or secondary “party”. This requirement will exclude liability as an accessory after the fact where the person assisted was not criminally responsible for his or her act, for example by reason of age or insanity under ss 21, 22, or 23. In such a case ss 21(2), 22(2), and 23(4) cannot apply since an accessory after the fact is not a “party” to the “offence” committed: R v Paterson [1976] 2 NZLR 394 (CA); [CA66.04]. The same reasoning applies where, unbeknownst to the intending accessory, the original offender is not guilty of an offence because of the existence of a justificatory defence such as self-defence or lawful authority. Compare R v Haqiqzai CA158/02, 8 December 2002 at [29]–[30] where the Court held that where what the defendant intended to do was justified in self-defence under s 48, it would not constitute an “offence involving bodily injury or the threat or fear of violence”. Whether this reasoning would extend to defences such as compulsion and necessity is unclear. As to proof of the original offence on the trial of an accessory after the fact, see [CA71.03], and as to conviction of an accessory where the original offender is acquitted, see [CA71.05].

(2) Knowledge of commission of offence

Knowledge means actual knowledge or belief in the sense of having no real doubt that the person assisted was a party to the relevant offence. This can be shown either by proof of actual knowledge or by evidence of “wilful blindness” on the part of the alleged accessory. A person will be wilfully blind where it is shown that they have “had [their] suspicions aroused” as to the truth of the situation and have “deliberately refrained from making further inquiries or confirming [their] suspicion because [they] wanted to remain in ignorance”: R v Martin [2007] NZCA 386 at [10]. Where the Crown can show wilful blindness in this sense, the relevant knowledge will be presumed: see generally [CA20.35], [CA66.19(1)(b)].

Ignorance of the offender’s identity is immaterial to an accessory’s liability: R v Brindley [1971] 2 QB 300 (so held for the cognate offence of assisting a person guilty of an arrestable offence under s 4 of the Criminal Law Act 1967 (UK)). The phrase “knowing any person to have been a party to the offence” refers to an accessory’s knowledge of the acts which make the person assisted a party to the offence. See R v Carter, ex p Attorney-
General [1990] 2 Qd R 371 (CA). So long as an accessory has such knowledge, ignorance that these acts amount in law to an offence is no defence: s 25. On the other hand a belief, justified on the facts or otherwise, that circumstances exist that, if true, would render the acts committed by the offender no offence (eg by establishing a defence of lawful authority or some other justificatory defence such as self-defence) will negative the required knowledge, whether or not the alleged accessory is aware of their legal significance.

A charge under s 71(1) must specify “the offence” committed by the person assisted and requires proof that the alleged accessory knew that person committed that offence. See Duong (1998) 124 CCC (3d) 392 (Ont CA), where it was held that liability could not be established merely on proof of generalised knowledge that the person assisted had committed some offence. An accessory may not need to know the precise offence to which the person assisted is a party: but to compare, see R v Tevendale [1955] VLR 95; R v Stone [1981] VR 737. In principle there seems no compelling reason for requiring such a specific degree of knowledge under s 71(1) when the “precise offence” view has been rejected for secondary parties under s 66(1); see [CA66.19(1)(a)]. On that basis A would be liable if he or she knows the type of offence to which B, the person assisted, is a party: see R v Baker (1999) 28 NZLR 536 (CA); R v Kinura (1992) 9 CRNZ 115 (CA); Cooper v Ministry of Transport [1991] 2 NZLR 693 (HC); R v Bainbridge [1960] 1 QB 129. If A knows that B has committed some offence, but does not know which one, A may also be liable if the offence is one of a range of offences which A knew B was likely to have committed: see Kimura (above); R v Maxwell [1978] 3 All ER 1140, 1 WLR 1350.

Where A is charged as an accessory after the fact to a homicide by B, it would appear sufficient that A knew B was a party to “culpable homicide” which is a necessary ingredient of both murder and manslaughter; R v Mane (1989) 5 CRNZ 375 (HC); R v Tomkins [1985] 2 NZLR 253; (1985) 1 CRNZ 827 (CA); see [CA66.08]. In R v Ali HC Auckland CRI-2003-292-1224, 27 July 2004, it was held that a person charged as an accessory after the fact to murder may be convicted as an accessory after the fact to manslaughter where the principal offender is charged with murder but convicted of manslaughter. See also R v Nadan HC Auckland CRI-2003-292-1224, 1 November 2004.

(3) Receiving, comforting or assisting etc

There must be proof of an act of receiving, comforting, or assisting the offender, or tampering with or actively suppressing evidence against him or her. Because liability under s 71(1) attaches to criminal involvement “after the fact”, the offence must be complete when the act of receiving etc is performed. A cannot be convicted as an accessory after the fact to murder by B when A’s act was wholly performed before the actus reus of murder was completed by the victim’s death: R v Mane (1989) 5 CRNZ 375 (HC). But A may be liable as a secondary party under s 66(1)(b) to murder by B or perhaps as an accessory after the fact to some non-fatal offence that had been completed by B when A rendered assistance, for example wounding with intent under s 188. Compare Larkins v Police [1987] 2 NZLR 282, (1987) 3 CRNZ 49 (HC); where a conviction under s 71(1) was substituted for the original conviction under s 66(1)(b) because B’s offence was completed after A gave assistance. On appropriate facts A’s conduct may also amount to some other offence, for example obstructing the course of justice contrary to s 117: Mane (above); see also R v Nadan HC Auckland CRI-2003-292-1224, 1 November 2004.

“Receives”, “comforts”, and “assists” are traditional common law terms which appear in the institutional works and decided cases alongside “harbours” and “maintains”. Historically, the courts have not construed these words literally but have regarded them as expressing a general allegation that a defendant, by one means or another, assisted the offender to evade justice. They are all active verbs requiring something more than a mere omission to act: Sykes v Director of Public Prosecutions [1962] AC 528; Leaman v R [1986] Tas R 223; R v Ready [1982] VLR 85; R v Dumont (1921) 64 DLR 128; R v Young (1950) 10 CR 142; Darch v Weight (1984) 79 CR 140; R v Winston [1995] 2 Qd R 204 (CA). In the case of suppressing evidence this requirement is made explicit by the adverb “actively”, while tampering with evidence necessarily connotes active conduct. Although deliberately concealing evidence or providing false information to the authorities is covered by s 71(1), mere silence or non-disclosure, for example by failing to report an offence to the police, will not attract liability: Leaman (above), on the parallel provision of s 6(1) of the Tasmanian Criminal Code. While such an omission may give rise to criminal responsibility in those jurisdictions which retain the common law offence of misprision of felony, that form of liability does not exist in New Zealand: s 9. A distinction may be drawn between a bare omission to act and passive acquiescence that would be culpable under s 71(1), for example where A, with the required mens rea, tacitly agrees to B taking refuge in A’s house: R v Goddard [1962] 1 WLR 1282.

Receiving, comforting, assisting or tampering with or actively suppressing evidence are not mutually exclusive categories of conduct. Tampering with or actively suppressing evidence can amount to assisting: R v Briggs
HC Whangerei CRI-2008-027-660, 17 March 2009, where it was observed that there is no reason to think that each category of conduct in s 71(1) was intended to operate exclusively without allowance for overlap.

Where the charge is tampering with or actively suppressing evidence “against” a party to an offence, the evidence suppressed need not be such as to prove that person’s guilt directly or conclusively. It will be sufficient if the evidence suppressed is part of assorted provable facts which in combination lead to the conclusion that the person assisted was guilty of an offence: R v Thomson (1992) 9 CRNZ 108 (HC). In Reddy v R [2011] NZCA 184, [2011] 3 NZLR 22, the Court of Appeal considered that it seemed unduly favourable to a defendant to require the prosecution to prove that what the defendant destroyed would in fact have been evidence had it not been destroyed. Rather than requiring such an exacting standard when the evidence is no longer available, the Court concluded that the test which better fitted the purposes of s 71(1) was whether what was tampered with or suppressed “could be” evidence. On appeal the Supreme Court declined to review this conclusion, holding that it was, in the circumstances, incapable of affecting the outcome: Ah-Chong [2011] NZSC 136.

Although the act of receiving, comforting, or assisting, etc need not have been successful in enabling the offender to escape after arrest or to avoid arrest or conviction, it must have actually helped the offender in some way: Thomson (above). See [CA66.17(1)] for criticism of Larkins (above), where the facts disclosed no more than a completely ineffectual attempt to be an accessory after the fact; see also R v Maloney (1901) 18 WN (NSW) 96; R v Dawson [1961] VR 773. There is a suggestion in R v Hartley [1978] 2 NZLR 199 (CA) that liability under s 71(1) may be subject to a de minimis qualification. Although the point was not directly in issue, the Court suggested that casual or minimal acts of assistance might not be “significant enough to come within the ambit of s 71(1)”. However, in Thomson (above), Williamson J doubted whether a de minimis qualification applies to s 71. In his view an act of assistance, however slight, is a sufficient basis of liability under s 71, though the degree or significance of the act would normally affect either the decision whether to prosecute at all or the appropriate penalty. In some cases the trivial or slight nature of the act may also be relevant to an application for discharge under s 347.

The assistance need not be given to the offender directly. A can become an accessory after the fact to B’s offence by giving assistance to C, another accessory after the fact, who directly assists B: R v McKenna [1960] 1 QB 411; R v West (1962) 46 Cr App R 296 (CCA).

The same applies where an accessory indirectly assists the offender through the agency of an innocent actor: Briggs (above). There it was recognised that any other conclusion would allow an accessory to escape liability by procuring an innocent person to carry out acts that assist the offender, eg by inducing a young child to deliver car keys to the offender to assist his escape.

Despite occasional judicial statements to the contrary at common law, liability under s 71(1) is not confined to acts that assist the “person” of the offender such as providing shelter or sustenance: compare Sykes (above) with R v Levy [1912] 1 KB 158, and R v Tevendale [1955] VLR 95. Under the Act the broad term “assists” is used, and there is express recognition that liability extends to interference with evidence against the offender. The range of conduct covered by s 71(1) is illustrated by the following cases:

(a) Providing the offender with food, clothing, shelter, or transport: R v Otto [1951] NZLR 602 (CA); R v Lepper CA102/84, 2 November 1984; R v Hurley [1967] VR 526;
(b) Acting as a lookout for the offender: Larkins (above);
(c) Locating a receiver willing to buy property stolen by the offender: Dawson (above);
(d) Giving false information about the offender to the police or other authorities: R v French (1977) 37 CCC (2d) 201 (Ont CA); Leaman (above); Morris v R (1979) 99 DLR (3d) 420 (SCC);
(e) Giving advice, information, material, or services to the offender: R v Royal (No 28) (1993) 10 CRNZ 266; West (above); R v Young (1950) 10 CR 142; Tevendale (above); and
(f) Altering, concealing, or destroying evidence against the offender: Royal (above); Lepper (above); Thomson (above); Levy (above); R v Williamson [1972] 2 NSWLR 281.

The same act can render a person liable both as a receiver of dishonestly obtained goods and as an accessory after the fact to the original offence of dishonesty. The elements of liability for the two offences are different and the act of receiving does not itself constitute a receiver as an accessory after the fact. To be liable under s 71(1) a receiver must have intended, by the act of receiving, to assist the original offender to avoid arrest or conviction, even though that purpose may have been secondary to the receiver’s principal object of making a personal gain: R v Andrews (1963) 47 Cr App R 32 (CCA); R v Healey (1964) 49 Cr App R 77 (CCA); R v
(4) The required purpose

The words “in order to” in the concluding clause of s 71(1) import a requirement of intention or purpose. Mere knowledge that an act is likely to assist the offender is not sufficient in itself, though it may sustain an inference of purposive action. The purpose of assisting the offender to evade justice need not be the exclusive or even dominant reason for an accessory’s act. So long as one of an accessory’s purposes was to enable the offender to escape or to avoid arrest or conviction, it is immaterial that the accessory may also have acted to avoid personal arrest or for reasons of friendship, fear, or personal gain: R v Lepper CA102/84, 2 November 1984; Ganahoa v Police HC Auckland AP137/91, 2 July 1991; R v Andrews [1963] 47 Cr App R 32 (CCA); Sykes v Director of Public Prosecutions [1962] AC 528; R v Jones [1949] 1 KB 194 (CA); R v Lucraft [1966] 50 Cr App R 296; R v Hurley [1967] VR 526; Leaman v R [1986] Tas R 223; see also the cases cited at [CA71.01] on the liability of receivers as accessories after the fact. A person will not incur liability under s 71(1) where he or she acted solely for some purpose other than assisting the offender to escape after arrest or to avoid arrest or conviction: see, for example, Richardson v Police HC Christchurch A81/02, 27 August 2002, where the overwhelming purpose of the appellant was not to assist the principal offender but to “save his own skin”. It was also accepted in that case that while the required purpose need not be exclusive or dominant, it must nonetheless be more than “in the back of [the] mind”. See also Morris v R (1979) 99 DLR (3d) 420 (SCC).

CA71.06 Attempting to be accessory

Although it is doubtful that there can be an attempt to aid, abet etc as a secondary party ([CA66.13(1)]), the same does not apply to attempting to be an accessory after the fact. In R v DH CA215/02, 26 July 2002 the appellant was charged with attempting to be an accessory after the fact to murder by assisting others in an unsuccessful attempt to dispose of an instrument used as a weapon in a fatal robbery.

CA71.07 Exemption for spouses and civil union partners — subs (2)

Section 71(2) operates as an exception to the general rule in s 71(1). In its original form, the exception applied to a married person whose spouse had been a party to an offence. Historically, as reflected in the 1893 and 1908 Acts, the exception in favour of married persons was partly based on the common law presumption that an act done by a wife in her husband’s presence was done under compulsion. Following the abolition of that presumption by s 24(3) of the current Act, the exception was to be explained as recognition of both spouses’ attachment to the marital bond.

As a result of s 7 of the Relationships (Statutory References) Act 2005, the current provision applies to any person whose spouse or civil union partner has been a party to an offence. See also ss 77(3) of the Armed Forces Discipline Act 1971. For the nature of a “civil union”, see ss 4 and 5 of the Civil Union Act 2004. Subject to that change, the new provision reproduces the substance of its predecessor. A person will not become an accessory after the fact by doing something intended only to enable his or her spouse or civil union partner, or the spouse, civil union partner and any third person who has been a party to an offence, to escape after arrest or to avoid arrest or conviction.

The expression “married person” under the former provision did not include someone living in a de facto relationship with the person assisted: see Leaman v R [1986] Tas R 223 on the meaning of “married woman” under the corresponding provision in s 6(2) of the Tasmanian Criminal Code. The limitation in the current provision to a “spouse” or “civil union partner” will also exclude a person living in a de facto relationship, in view of the express recognition of “de facto partners” in other enactments affected by the Relationships (Statutory References) Act 2005.

72 Attempts

(1) Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.
mere words disavowing intent may not always undo the threatening nature of a menacing act: G Williams, *Textbook of Criminal Law* (2nd ed), at 175, discussing *R v Light* (1857) Dears & B 332.

Section 2(1) expressly provides that it suffices that the threatener either “has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose”. This preserves the common law requirement that the defendant has, or is reasonably believed to have, the ability to apply force immediately, and not merely at some significantly later time, and the provision of the alternative clearly overrules a dictum of Tindal CJ in *Stephens v Myers* (1830) 4 C & P 349, which erroneously suggested that actual ability to execute the threat was essential: compare *R v St George* (1840) 9 C & P 483, 173 ER 921, at 493, 926 per Parke B. In *Secretary v R* (1996) 5 NTLR 96, it was held under a similar provision that there was an assault when force was threatened at a future time and it was evident that the defendant would have the ability to effect it at that time. It was held further that the assault continued while the threat remained unwithdrawn, even while the defendant was asleep. In *Lees v Visser* [2000] TASSC 3, (2000) 9 Tas R 103, it was held that the Tasmanian Criminal Code definition did not require a threat of immediate or imminent force, notwithstanding the requirement of actual or apparent “present ability”. In *R v Kerr* [1988] 1 NZLR 270, (1987) 2 CRNZ 407 (CA), this aspect of the definition was cited in support of a further conclusion. The defendant had briefly stood over a sleeping woman with an axe in his hand, causing an onlooker to think that he intended to hit her. In affirming the defendant’s conviction for assault the Court of Appeal held that, provided the defendant in fact has the present ability to effect “his purpose”, menacing conduct which “displays hostility” towards another (the “recipient” of the threat) may constitute an assault even though the person at whom it is “directed” is unaware of it. The Court accepted that it is otherwise at common law: *R v McNamara* [1954] VLR 137, but held that this conclusion was justified by the “clear” statutory definition.

It is arguable whether the approach in *Kerr* is justified by either the terms or purpose of s 2(1). There was no suggestion that the defendant believed that the potential victim, or anyone else, was aware of his conduct, but unless he did, the decision seems inconsistent with the conclusion in *R v Meek* [1981] 1 NZLR 499 (CA), at 502–503, that “it is of the essence of a threat that it should be made with the intention of influencing the mind of the person to whom it is addressed … that the words should be intended to be taken seriously”. See also *Police v Greaves* [1964] NZLR 295 (CA), at 298; *Bicknell v Police* (1990) 6 CRNZ 500 (HC).

**CA196.08 Consent**

At common law the courts have defined assault and battery as requiring the threat or application of “unlawful” force, so that when the issue arises the prosecution must prove that there was no consent negating the unlawfulness of the force, and that the defendant did not believe that there was such consent: *R v Kimber* [1983] 1 WLR 1118, [1983] 3 All ER 316 (CA); *Beckford v R* [1988] AC 130, [1987] 3 WLR 611, [1987] 3 All ER 425 (PC), at 144; 431. In New Zealand, neither the statutory definition of assault in s 2(1), nor the provision for the offence in s 196, makes any reference to consent. Nevertheless, subject to certain exceptions, consent is a common law justification, excuse, or defence to assault which is preserved by s 20. Moreover, a genuine belief in consent, even if there were no reasonable grounds for it, also provides a defence, and if there is evidence making consent or belief in consent a live issue the prosecution has the burden of proving its absence: *R v Nazif* [1987] 2 NZLR 122 (CA), at 128; *Police v Bannin* [1991] 2 NZLR 237, also reported as *B v Police* (1991) 7 CRNZ 55 (HC), at 244–245; 63; *R v Lee* [2006] 3 NZLR 42, (2006) 22 CRNZ 568 (CA) at [181]; [CA63.04]. In some instances statute expressly removes consent as a defence: see ss 133, 134, 140, and [41]; and in some instances the common law excludes it. For commentary on consent as a defence, see [CA63.03]–[CA63.14].

**197 Disabling**

(1) Every one is liable to imprisonment for a term not exceeding 5 years who, wilfully and without lawful justification or excuse, stupefies or renders unconscious any other person.

(2) Repealed.

**198 Discharging firearm or doing dangerous act with intent**

(1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to do grievous bodily harm,—

(a) Discharges any firearm, airgun, or other similar weapon at any person; or
(b) Sends or delivers to any person, or puts in any place, any explosive or injurious substance or device; or
(c) Sets fire to any property.

(2) Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to injure, or with reckless disregard for the safety of others, does any of the acts referred to in subsection (1) of this section.

[(3) Repealed.]

Compare: 1908 No 32 ss 197(b), (c), (d), 198; 1941 No 10 part Schedule

[198A Using any firearm against law enforcement officer, etc

(1) Every one is liable to imprisonment for a term not exceeding 14 years who uses any firearm in any manner whatever against any member of the Police, or any traffic officer, or any prison officer, acting in the course of his or her duty knowing that, or being reckless whether or not, that person is a member of the Police or a traffic officer or a prison officer so acting.

(2) Every one is liable to imprisonment for a term not exceeding 10 years who uses any firearm in any manner whatever with intent to resist the lawful arrest or detention of himself or herself or of any other person.]

[198B Commission of crime with firearm

(1) Every one is liable to imprisonment for a term not exceeding 10 years who,—
(a) In committing any [imprisonable offence], uses any firearm; or
(b) While committing any [imprisonable offence], has any firearm with him or her in circumstances that prima facie show an intention to use it in connection with that [imprisonable offence].

[[[2) Repealed.]]

CA198B.02 “Has any firearm with him or her”

This expression means knowingly has the firearm with him or her: R v Cugullere [1961] 2 All ER 343, [1961] 1 WLR 858 (CA); R v Russell (1985) 81 Cr App R 315. Mere possession is insufficient; there must be accompanying circumstances showing a prima facie intention to use the firearm. It is suggested also that there must be evidence that the defendant not only had possession, in the sense that he or she knowingly had custody or control of a firearm, but also that it was at the time available and at hand for him or her to use while committing the offence. In decisions on similar provisions in firearms legislation the courts have indicated that “having with him a firearm” requires “a very close physical link and a degree of immediate control over the weapon by the man alleged to have the firearm with him”: R v Kelt [1977] 1 WLR 1365, [1977] 3 All ER 1099, (1977) 65 Cr App R 74, at 1369, cited with approval in R v Manapouri [1995] 2 NZLR 407, (1995) 13 CRNZ 85 (CA), at 417; 96. In that case it was considered likely that a similar interpretation would be applied in offences under this section, and it was held that two or more persons can be charged in regard to a single firearm that each “had with him” if each had an appropriate degree of control over it. These must be matters of fact and degree. In R v Pawlicki [1992] 1 WLR 827, 3 All ER 902 (CA), the defendant was held to have a firearm with him when the firearm was inside the defendant’s locked car, which was parked outside the building inside which he was found. There must be “a very close physical link and a degree of immediate control” over the firearm by the defendant, although it may be shared by two or more people: R v Manapouri (above), at 417, 96. (See further [AA55.02].)

199 Acid throwing

(1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to injure or disfigure any one, throws at or applies to any person any corrosive or injurious substance.
200 Poisoning with intent

(1) Every one is liable to imprisonment for a term not exceeding 14 years who, with intent to cause grievous bodily harm to any one, administers to or causes to be taken by any person any poison or other noxious substance.

(2) Every one is liable to imprisonment for a term not exceeding 3 years who, with intent to cause inconvenience or annoyance to any one, or for any unlawful purpose, administers to, or causes to be taken by, any person any poison or other noxious substance.

201 Infecting with disease

(1) Every one is liable to imprisonment for a term not exceeding 14 years who, wilfully and without lawful justification or excuse, causes or produces in any other person any disease or sickness.

202 Setting traps, etc

(1) Every one is liable to imprisonment for a term not exceeding 5 years who, with intent to injure, or with reckless disregard for the safety of others, sets or places or causes to be set or placed any trap or device that is likely to injure any person.

(2) Every one is liable to imprisonment for a term not exceeding 3 years who, being in occupation or possession of any place where any such trap or device has been set or placed, knowingly and wilfully permits it to remain there in such a condition that any person is likely to be injured by it.

202A Possession of offensive weapons or disabling substances

(1) In subsection (4)(a) of this section offensive weapon means any article made or altered for use for causing bodily injury, or intended by the person having it with him for such use.

(2) In subsection (4)(b) of this section offensive weapon means any article capable of being used for causing bodily injury.

(3) In this section disabling substance means any anaesthetising or other substance produced for use for disabling persons, or intended by any person having it with him for such use.

(4) Every one is liable to imprisonment for a term not exceeding [3 years][—

(a) Who, without lawful authority or reasonable excuse, has with him in any public place any [knife or] offensive weapon or disabling substance; or

(b) Who has in his possession in any place any offensive weapon or disabling substance in circumstances that prima facie show an intention to use it to commit an offence involving bodily injury or the threat or fear of violence.
It is a defence to a charge under subsection (4)(b) of this section if the person charged proves that he did not intend to use the offensive weapon or disabling substance to commit an offence involving bodily injury or the threat or fear of violence.

CA202A.01 Offensive weapons

Four categories of offensive weapon can be identified:

(a) An article made for use for causing bodily injury (subs (1));
(b) An article altered for use for causing bodily injury (subs (1));
(c) An article intended for use for causing bodily injury by the person having it with him or her (subs (1)); and
(d) An article capable of being used for causing bodily injury (subs (2) and (4)(b)).

While there is considerable overlap between categories, the distinction between the first two and the last two classes is of practical importance. Categories (a) and (b) are often described as offensive weapons per se. All the prosecution has to prove is possession of such a weapon in a public place. No proof of an intention to use it to cause bodily injury is needed: *Watts v Police* (1984) 1 CRNZ 227 (HC); *Davis v Alexander* (1970) 54 Cr App R 398, nor will the Crown be required to negative the existence of any “lawful authority or reasonable excuse” unless the defence has first established an evidential foundation for such a claim: see further on the evidential burden in matters of defence [ED1.02]; [ED1.07] in Bruce Robertson (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Brookers). If the article falls into categories (c) or (d), the onus is on the prosecution to prove either an intention to injure or at least that the circumstances prima facie suggest the existence of such an intention.

CA202A.02 Article made for use for causing bodily injury


On the other hand, some dangerous and apparently offensive articles have not been so regarded: a catapult and a machete: *Southwell v Chadwick* (1987) 85 Cr App R 235 (CA). Where an item can be used for both law-abiding and illicit purposes, it will not be regarded as falling into this category, for example, a sheath knife: *R v Williamson*; a sambar bag or a razor: *R v Petrier*; a pickaxe handle: *R v Cugillere* [1961] 2 All ER 343, [1961] 1 WLR 858 (CA); a fishing knife: *Gibson* [1963] Crim LR 281 (CA); a carving knife: *R v Rapier* (1980) 70 Cr App R 17 (CA); and a stone: *Harrison v Thornton* (1979) 68 Cr App R 28.

It has been held that flick knives and butterfly knives reveal by their design that they are made to cause injury to the person. Judicial notice can be taken of this fact, and evidence about it is not required: *Director of Public Prosecutions v Hyde* [1998] 1 WLR 1222; *R v Simpson* [1983] 1 WLR 1494 (CA); *Gibson v Wales* [1983] 1 WLR 393 (QB); *R v Vassili* [2011] EWCA Crim 615, [2011] 2 Cr App R 5; the Court held that a flick knife will remain offensive per se regardless of whether it has also been made to serve an innocent secondary function — in that case as a lighter.

However, the question of whether any particular knife is an offensive weapon under this definition is of no practical significance in New Zealand due to the provision of a specific offence of having a knife in any public place in subs (4)(a). Once it is shown that the weapon in question is in fact a knife, any additional characteristics or uses it might have will be relevant only to the issue of lawful authority or reasonable excuse.

CA202A.03 Article altered for use for causing bodily injury

This category concerns articles made for one purpose, but altered or adapted for use for causing injury. It includes such things as: a potato with a razor blade inserted: *R v Williamson* (1978) 67 Cr App R 35 (CA); a bottle broken for the purpose; a softball bat enhanced with nails; or a fork bent so that it could be used as a knuckleduster. The defendant need not have made the alteration, but it must be apparent that it was made for the purpose of causing injury. What of the situation where an article, such as a bottle, is accidentally broken, but then used as a weapon? It is arguable that it has not been “altered for use for causing bodily injury” at all. In *Wood v Commissioner of Police of the Metropolis* [1986] 1 WLR 796 (QB), a piece of broken glass picked up and used by the defendant in a fight was held not to be an offensive weapon. Conversely in *Bryan v Mott* (1976) 62 Cr App R 71 a broken milk bottle picked up by the defendant with the intention of using it to
commit suicide was held to be an offensive weapon. In such a case the article concerned would, in any event, be likely to fall under the third or fourth categories.

CA20A.04 Article intended for use for causing bodily injury

An article that is not per se an offensive weapon falls into the third category if it is carried by the defendant with the intention that it be used for causing bodily injury. Although normally the defendant’s intention will be to use the weapon to injure other people, there appears to be no reason why an article intended solely for self-harm should not also fall within this definition: Bryan v Mott (1976) 62 Cr App R 71 (broken milk bottle picked up by the defendant with the intention of using it to commit suicide held to be an offensive weapon). Any article carried for the purpose of inflicting injury can be an offensive weapon, although it must be intrinsically capable of doing so. Whether an article falls into this category is a question of fact: R v Allamby [1974] 1 WLR 1494 (CA); R v Williamson (1978) 67 Cr App R 35 (CA).

Intention must accompany the carriage of the weapon, a past intention that has been abandoned will not suffice: R v Allamby. On the other hand, a conditional intention to use the article for causing bodily injury, should it become necessary to do so, is sufficient. It is immaterial whether the article is carried for offensive or defensive purposes, although that may be relevant to the issue of “reasonable excuse” under subs (4)(a): Thompson v Police HC Invercargill AP35/96, 6 May 1996; [CA20A.08(4)].

An intention to intimidate, rather than cause injury will not be enough to bring an otherwise inoffensive article within this category. Although in the context of threatening gestures made with a knife, Lord Goddard regarded “frightening a person or intimidating a person” as sufficient (Woodward v Koessler [1958] 1 WLR 1255) subsequent decisions have doubted this. In R v Edmonds [1963] 2 QB 142, [1963] 1 All ER 828 (CA), an intention to frighten was held to be sufficient only if it was of a sort which was capable of producing injury through shock. Similarly in R v Rapier (1980) 70 Cr App R 17 (CA), the Court emphasised that use of the word “intimidate” in directing juries should be avoided unless the evidence disclosed an intention to cause injury by shock — a situation which it described as exceedingly rare. On this basis, carrying a cut-throat razor in a public place with the express intention of intimidating others would not amount to possessing an offensive weapon.

It is the intention of the possessor, rather than the quality of the article itself that determines whether it falls into the third category. The use to which the article is put will often be powerful evidence of that intention: Woodward v Koessler [1958] 1 WLR 1255 (use of a sheath knife to threaten a caretaker); R v Powell [1963] Crim LR 511 (presenting a toy pistol at a hospital porter); Harrison v Thornton [1966] Crim LR 388 (picking up and throwing a stone in the course of a fight); Considine v Kirkpatrick [1971] SASR 73 (use of a studded belt in the course of a fight). Where there is no evidence of use or intended use as a weapon, possession of articles that could be used for causing injury, even in suspicious circumstances, will not suffice: R v Petrie [1961] 1 WLR 358, [1961] 1 All ER 466 (CA) (passenger in car with a cut-throat razor); R v Edmond [1963] 2 QB 142, [1963] 1 All ER 828 (CA) (possession of lead piping, a starting pistol, and a hammer handle).

CA20A.05 Article capable of being used for causing bodily injury

This category applies to offences under subs (4)(b) only. Whereas an article will not fall into the third category of offensive weapon unless it is both capable of causing bodily injury and intended by its possessor for such use, the only requirement for this class is that the article is capable of causing bodily injury. However, the offence provision requires proof of additional attendant circumstances, see [CA20A.09(1)] below.

CA20A.06 Disabling substance

“Disabling substance” is defined in subs (3). Like the definition of “offensive weapon” in subs (1), it includes any substance produced for the purpose of disabling, or any anaesthetizing or other substance intended by the person possessing it for disabling any person. “Disable” will carry its ordinary meaning of removing or significantly reducing any person’s power of acting.

CA20A.07 Subsections (4)(a) and (4)(b) — “having with” or “possessing” any weapon or disabling substance

It is for the prosecution to prove both that the object or substance falls under the section and that the defendant either “has it with him” in any public place or has possession of it. Both “possession of” and having a relevant weapon or substance “with” you require a physical element of effective control or custody together with a mental element of knowledge of that control or custody: R v Cugullere [1961] 2 All ER 343, [1961] 1 WLR 858 (CA); and see [CA233.02]. In New Zealand this has been taken to mean that a person who is unaware of the presence of an item through “fault of memory” would not be guilty of possession or having it.
with them: *Police v Rowles* [1974] 2 NZLR 756, per Mahon J at 759 (a case in which forgetfulness was not, however, in issue, the defence being that the defendant believed the cannabis was gone); *Krishna v Police* HC Auckland AP190/98, 18 November 1998; and see generally on “forgotten knowledge” [CA20.21]; [CA233.03].

The position in England is different. In *R v Martindale* [1986] 3 All ER 25, [1986] 1 WLR 1042 (CA) the Court held that “possession does not depend on the alleged possessor’s powers of memory”, and later English case law has confirmed that in that jurisdiction “mere forgetfulness” will never constitute a defence in such cases; *R v McCalla* (1988) 87 Cr App R 372 (CA); *R v Tsap* [2008] EWCA (Crim) 2580.

Whereas “possession” requires only effective control of an item — so that it can extend to items held by another but who will surrender them on demand: *R v McRae* (1993) 10 CRNZ 61 (CA) — having an item “with” you imports an extra element of propinquity: *R v McCalla* (above). The article should be either on the person of the offender, or reasonably available to him or her, or at hand. In *Ellmers v Police* (1988) 3 CRNZ 259 (HC), the appellants who admitted ownership of a mace found in a car close nearby was held to have the weapon “with him”. On the other hand having a weapon “with” you is wider than the concept of “carrying” a weapon: *R v Pawlicki* [1992] 1 WLR 827, 3 All ER 902 (CA). See also [AA51.02].

Where two or more offenders each have an appropriate degree of control over a single weapon, each may be said to have had it “with him”: *R v Manapouri* [1995] 2 NZLR 407, (1995) 13 CRNZ 85 (CA) at 417; 96.

**CA202A.08**

The subsection (4)(a) offence

The possession or carriage in a public place of a knife, an offensive weapon defined by subs (1) (namely an article falling into any of the first three categories referred to in [CA202A.01]), or a disabling substance, without lawful authority or reasonable excuse is an offence under subs (4)(a). While the repeal of s 67(8) of the Summary Proceedings Act 1957 as from 1 July 2013 means that the onus of proving the absence of any such “lawful authority or reasonable excuse” beyond reasonable doubt is now always ultimately on the prosecution, the obligation to do so will not arise unless the defence can first point to evidence making such a defence a live issue: see generally on the evidential burden placed on the defendant in relation to such “matters of defence” [CA20.05]; and [ED1.02], [ED1.07] in Bruce Robertson (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Brookers).

(1) **“Public place”**

The term “public place” is not defined for the purposes of the Crimes Act 1961. However, by analogy with the definition in s 2 of the Summary Offences Act 1981, the expression will bear its usual meaning of a place to which the public has access and will include the inside of a private vehicle which is on a public road: *Police v Tito* (1994) 11 CRNZ 609 (HC). For commentary on the s 2 definition see *Adams on Criminal Law — Offences and Defences*, at [SO2.12.04]–[SO2.12.09].

(2) **Without “lawful authority”**

“Lawful authority” requires a legal justification for possession of the weapon. The term includes people “who from time to time carry an offensive weapon as a matter of duty — the soldier with a firearm and the police officer with a baton”: *Bryan v Mott* (1976) 62 Cr App R 71, at 73. The duty cannot be imposed on an employee by an employer, it must be of a public nature and supported by law. See also Card, “Authority and excuse as defences to crime” [1969] Crim LR 359, at 415. Security guards on duty at a dance hall had no lawful authority and, in the circumstances, no reasonable excuse, for carrying truncheons: *R v Spanner* [1973] Crim LR 704 (CA).

(3) **“Reasonable excuse”**

“Reasonable excuse” is broader than “lawful excuse”. The test is whether a reasonable person would accept that in the particular circumstances it was a proper occasion for carrying such a weapon. Even an honestly held belief will be insufficient unless it is also reasonable: *Bryan v Mott* (1976) 62 Cr App R 71. It has been held in England that a person who has “merely forgotten” that he has a knife with him does not have a “good reason” for possession of it: *Director of Public Prosecutions v Gregson* (1993) 96 Cr App R 240; *R v Tsap* [2008] EWCA (Crim) 2580. On the other hand:

“when such forgetfulness is coupled with particular circumstances relating to the original acquisition of the article, the combination of the original acquisition and the subsequent forgetfulness of possessing it may, given sufficient facts, be a reasonable excuse for having the offensive weapon with one.” (*R v McCalla* (1988) 87 Cr App R 372 (CA)) at 379.
A person who places a weapon in his or her car with the intention of handing it in to the police but then forgets to do so, may well have a defence of reasonable excuse if the weapon is subsequently discovered.

A defendant must be able to point to some evidentiary foundation for a claim of reasonable excuse and, if the defendant’s purpose was aggressive, it is “most unlikely” to succeed, although a defensive intention may raise a more difficult question: Thompson v Police HC Invercargill AP35/96, 6 May 1996. In R v Densu [1998] 1 Cr App R 400 (CA) it was said that the object of the offence is to eradicate the carriage of offensive weapons and that the scope of reasonable excuse is “restricted”. It was held that ignorance that the object was a weapon plus the use of it for a particular lawful purpose did not provide a “reasonable excuse”; but see commentary in [1998] Crim LR 346.

It is for the judge to decide as a matter of law whether the evidence is capable of amounting to a reasonable excuse. If it is, it is for the jury to determine if it in fact does so: R v Bown [2003] EWCA Crim 1989, [2004] 1 Cr App R 13 at [16]. In this context it may be argued that the juxtaposition of the expression “reasonable excuse” with “lawful authority” in subs (4)(a) as coequal statutory defences may suggest that “reasonable excuse” must mean something more than “any” excuse and could be limited to reasons which commend themselves to the court as proper and necessary exceptions to the general prohibition: Lister v Lees 1994 SLT 1328 (HCJAC). In that case the High Court of Justiciary held that the defendant did not have “good reason” for having in his possession a metal spike, which he used for the sole purpose of opening tins of glue to sniff, and which he had forgotten to throw away. However, in determining whether an excuse is, in law, capable of amounting to a “reasonable excuse” it may not be necessary for a court to make a moral judgment as to whether it is innocent or non-innocent. Each case must depend on its own facts and circumstances. In determining the issue the court will have regard to the general purpose of the legislation and, where the legislation contains a general prohibition, whether the reason advanced appears to constitute a justifiable exception to that prohibition. Furthermore, in ruling on the availability of the defence a court should be slow to rule that the evidence is, as a matter of law, incapable of amounting to a reasonable excuse: R v Bown, at [18].

(4) Carriage of weapons in public for self-defence

The carriage of weapons for self-protection will not necessarily amount to a reasonable excuse. While the phrase “reasonable excuse” would ordinarily include possession of an offensive weapon in circumstances where its use would be justified under s 48, the regular and routine possession of weapons for defensive purposes has not received the sanction of the courts: Watts v Police (1984) 1 CRNZ 227 (HC); Evans v Hughes (1972) 56 CRNZ 813 (QB); R v McAuley [2009] EWCA Crim 2130, [2010] 1 Cr App R 11 at [9] where the Court held that the equivalent English provision “was not intended to sanction the permanent or constant carrying of a weapon merely because of some constant or enduring supposed or actual threat or danger to the carrier”.

In principle where a claim of self-protection is raised, the question is whether, based on the facts as the defendant understood them, there was, on an objective analysis, a well-founded fear of attack in a public place such that possession of the weapon for self-defence was a proportionate response to the threat established: Chatha v Police HC Palmerston North AP21/02, 18 November 2002. This inquiry is undertaken by asking two questions:

(a) What were the facts as understood by the defendant? And

(b) Having regard to those facts, would a reasonable person believe this was a proper occasion for the carrying of a weapon of the type in question?

In R v McAuley at [13], this second question was described as requiring the finder of fact to “determine how imminent, how soon, how likely and how serious the anticipated attack has to be to constitute a good reason”. In R v Clancy [2012] EWCA Crim 8, [2012] 1 WLR 2536 at [23] the Court rejected an argument that, by analogy with the defence of self-defence, the decision as to whether the appellant had “good reason” for carrying a knife should be based on her own view of the situation facing her, holding that the jury should have been told:

“that they should simply find the facts, including any facts as to the appellant’s state of mind and the reason for it, and in the light of the facts as they found them decide whether in their view the defence was established. … If the jury considers that defendant’s view of the facts was wholly unreasonable, for example, because [s]he was drunk or had taken drugs or was suffering from mental illness, we think it unlikely that they would find that the defence has been made out, but ultimately it is a matter for them.”

Equally, the type of weapon chosen will have to be proportionate to the threat against which the defendant was guarding: Thompson v Police HC Invercargill AP35/96, 6 May 1996.
In Thompson the defence was upheld when the defendant may have gone into a public place for an innocent purpose while carrying a baseball bat for defence against gang members who he believed were armed and presented an imminent threat. Conversely, carriage of weapons in genuine fear of attack because acquaintances had been attacked four weeks earlier was held not to be a reasonable excuse in Pittard v Mahoney [1976] Crim LR 169; compare Evans v Hughes [1972] 56 Cr App R 813 (QB) (defence available where the defendant was attacked seven days earlier and remained in fear); R v McAuley [2009] EWCA Crim 2130, [2010] 1 Cr App R 11 (defendant had been attacked previously and subsequently threatened again five days prior to taking a knife with him when passing through an area he knew his attacker frequented). The question was also considered in Taikato v The Queen [1996] HCA 28, (1996) 186 CLR 454 in relation to a statute prohibiting public possession of irritants or dangerous substances. The majority required as a minimum “a well-founded fear of attack in the public place in question”. Relevant factors included the immediacy of the perceived threat, the nature of the thing, the time, location, and circumstances, and the defendant’s personal characteristics (at 467). The other Judges also denied that as a matter of law the defendant must anticipate an “imminent” attack (at 470–471, 478–479). See further, Adams on Criminal Law — Offences and Defences, at [SO13A.08].

CA202A.09 The subsection (4)(b) offence

The possession anywhere of a disabling substance or any article capable of being used for causing bodily injury in circumstances that “prima facie show an intention” to use it to inflict or risk bodily injury or to threaten violence will be an offence under subs (4)(b), whether or not the defendant would otherwise have lawful authority or a reasonable excuse for that possession. Where possession of a weapon in the relevant circumstances has been established the defendant must be convicted unless he or she can prove on the balance of probabilities that they did not intend to use the weapon to injure or threaten any person.

(1) “Circumstances that prima facie show an intention”

“Prima facie” carries its usual meaning of “at first appearance” or “on the face of it”. In R v Haqiqzai CA158/02, 18 December 2002 the Court held that the intention engaged by subs (4)(b) is to be ascertained objectively by reference to the actual circumstances existing when the offence was committed, rather than the circumstances as the defendant perceived them to be. Prima facie circumstances are those that are sufficient to show or establish an intent in the absence of evidence to the contrary. Two iron bars lying on the front seat of a car, for example, would not by themselves raise sufficient prima facie evidence of intention. Whether the “circumstances” should include facts of which an observer would be unaware is problematic: see, however, Ahuriri v Police HC Auckland A193/99, 17 March 2000 where the statutory test was held to be satisfied when a constable saw an intruder in a house drop a pair of scissors, although the full facts made it likely that the intruder had just picked the scissors up from a couch on which he was lying.

Consistent with the principle in Police v Smith [1974] 2 NZLR 32 (SC) (see below at [CA202A.11]), it will not be sufficient for the prosecution to rely solely on evidence of a single violent use or attempted use of the article to establish that it was possessed with the necessary prima facie intention.

(2) Carriage of weapons capable of being used for causing injury for self-defence

In Tuli v Police (1987) 2 CRNZ 638 (HC) it was assumed that self-defence could be raised as a defence to a charge under subs (4)(b). It is now clear that this is not the case, at least as the defence of self-defence is conventionally understood: R v Busby CA211/01, 26 September 2001 at [14]; R v Haqiqzai CA158/02, 18 December 2002 at [24]–[28]; R v Ahmed [2009] NZCA 220, [2010] 1 NZLR 262, (2009) 24 CRNZ 477 at [74].

In R v Haqiqzai it was held that the difficulty with subs (4)(b) where self-defence may be in issue is that the “circumstances that prima facie show an intention” must be ascertained objectively by reference to the actual circumstances existing when the offence was committed, rather than the circumstances as the defendant perceived them to be. If the actual circumstances prima facie admit the reasonable possibility that a person was in possession of a weapon in order to defend themselves or others by using no more force than was reasonable in the apparent circumstances, the Crown has not proved the offence. If, however, the actual circumstances do not suggest such a possibility, it will not be open to the defendant to negative the finding of a prima facie intention to commit an offence by simply producing evidence of a defensive intention in the ordinary way under s 48: see [CA48.17]. Any such defence will have to be brought within subs (5), which requires that it be proved on the balance of probabilities: see [CA202A.10].
CA202A.10 The lack of intent defence under subs (5)

It is a defence to a charge under subs (4)(b) (but not to a charge laid under subs (4)(a)) for the defendant to prove on the balance of probabilities that he or she did not intend to use the weapon or disabling substance to commit an offence involving bodily injury, or the threat or fear of violence.

In *R v Haqiqzai* CA158/02, 18 December 2002 at [29]–[30] it was held that, where the defendant seeks to justify possession of an offensive weapon pursuant to subs (5) on the basis of self-defence, he or she must prove on the balance of probabilities that the possession was with the intention of defending themselves or others, and of using no more force in doing so than was reasonable in the circumstances as they believed them to be. In such a case subs (5) provides a defence because what the defendant intends to do is justified under s 48 and accordingly will not constitute an “offence involving bodily injury or the threat or fear of violence”. While this reasoning will no doubt apply equally to other justificatory defences — for example those relating to defence of property — whether it can also extend to situations where the defendant’s possession is sought to be excused by compulsion, necessity, or any other non-justificatory defence is undecided. Compare, however, *R v Kerr* 2004 SCC 44, [2004] 2 SCR 371 at [93]–[96] per LeBel J (necessity and not self-defence the appropriate defence on a charge requiring proof of an intention to possess a weapon for a “dangerous purpose”).

CA202A.11 Innocent possession and a subsequent formation of an aggressive intention

In *Police v Smith* [1974] 2 NZLR 32 (SC), the appellant who had been using a knife to eat a pie at a pie cart brandished it at the proprietor in the course of an argument. He was subsequently charged with possessing an offensive weapon, namely the knife. Could the original lawful possession of the knife become transformed into the criminal possession of an offensive weapon because of the later formulation of an intent to use it to cause bodily injury? Following *R v Jura* [1954] 1 QB 503, [1954] 1 All ER 696 (CA), Mahon J concluded that it could not. It was not sufficient for the prosecution to rely solely on the use or attempted use of the article as proving intent to injure if there was prior possession of that article without the statutory intention. Innocent possession could not be transformed into guilty possession solely through the subsequent use of the article in question.

The approach in *R v Jura* and *Police v Smith* has been followed in English cases: *R v Dayle* [1974] 1 WLR 181 (CA) (the appellant took a car jack from the boot of his car and threw it at an adversary); *Ohlson v Hylton* [1975] 1 WLR 724 (QB) (a carpenter carrying tools of trade used a hammer in an altercation); *R v Humphreys* [1977] Crim LR 225 (CA) (use of a penknife in the course of a fight); *Bates v Balman* [1979] 1 WLR 1190 (involving the use of a clasp knife borrowed from a friend during a fight). In *R v Veasey* [1999] Crim LR 158 (where a driver had attacked another with a bar designed to lock a steering wheel) the Court held that a charge of assault was appropriate and adequate for cases such as these. On the other hand, the offence in s 202A will be committed if, before making aggressive use of the article, the defendant has the intent to use it for causing bodily injury for a “significant” or “identifiable” period of time: *John v Police* HC Christchurch AP76/98, 27 May 1998 (where the defendant removed his belt from his trousers and wrapped it round his fist while watching a fracas).

[202B] Powers in respect of crime against section 202A (Repealed)

[202BA] Sentencing for second crime against section 202A(4)

Where—

(a) Any person is convicted of a crime against paragraph (a) or paragraph (b) of section 202A(4) of this Act; and

(b) That person has previously been convicted on at least 1 occasion within the preceding 2 years of a crime against either of those paragraphs,—

the Court shall impose [[a sentence of imprisonment (within the meaning of section 4(1) of the Sentencing Act 2002)] on the offender unless the Court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced.]

[202C] Assault with weapon

(1) Every one is liable to imprisonment for a term not exceeding 5 years who,—
(a) In assaulting any person, uses any thing as a weapon; or
(b) While assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon.

[[(2) Repealed.]]

CA202C.01 Victim awareness of threat
See generally the commentary to s 198A. A defendant who approached a sleeping woman and raised an axe over her body was properly convicted of an assault under this section, even though the complainant was unaware of the threat: R v Kerr [1988] 1 NZLR 270, (1987) 2 CRNZ 407 (CA).

CA202C.02 Uses any thing as a weapon
In contrast with s 202A, there is no definition of “weapon”. Reference is made to “any thing” (not “article”). This could include an animate thing, such as a dog: R v McLeod (1993) 84 CCC (3d) 336 (CA). This was accepted without argument in R v Hills (1999) 16 CRNZ 673 (CA). A car may be a “weapon” for the purposes of the section: Dawson v Police HC Rotorua CRI200346373, 3 February 2004.

203 Endangering transport (Repealed)

204 Impeding rescue
(1) Every one is liable to imprisonment for a term not exceeding 10 years who, without lawful justification or excuse, prevents or impedes or attempts to prevent or impede any person who is attempting to save his own life or the life of any other person.
(2) No one is guilty of an offence against this section who does any such act as aforesaid in the course of saving his own life or the life of any other person.

Compare: 1908 No 32 s 201; Criminal Code (1954), s 227 (Canada)

[Female genital mutilation]

[204A Female genital mutilation]

(1) For the purposes of this section,—

Female genital mutilation means the excision, infibulation, or mutilation of the whole or part of the labia majora, labia minora, or clitoris of any person:

midwife means a health practitioner who is, or is deemed to be, registered with the Midwifery Council established by section 114(3) of the Health Practitioners Competence Assurance Act 2003 as a practitioner of the profession of midwifery.]

Registered midwife: Definition Repealed

Sexual reassignment procedure means any surgical procedure that is performed for the purposes of altering (whether wholly or partly) the genital appearance of a person to the genital appearance of a person of the opposite sex:

Trainee health professional means any person who is receiving training or gaining experience under the supervision of—

(a) A medical practitioner for the purpose of gaining registration as a medical practitioner; or
(b) A … midwife for the purpose of gaining registration as a … midwife.

(2) Subject to subsection (3) of this section, every one is liable to imprisonment for a term not exceeding 7 years who performs, or causes to be performed, on any other person, any act involving female genital mutilation.

(3) Nothing in subsection (2) of this section applies in respect of—
231 Crimes Act 1961

[231] Burglary

(1) Every one commits burglary and is liable to imprisonment for a term not exceeding 10 years who—

(a) enters any building or ship, or part of a building or ship, without authority and with intent to commit [[an imprisonable offence]] in the building or ship; or

(b) having entered any building or ship, remains in it without authority and with intent to commit [[an imprisonable offence]] in the building or ship.

(2) In this section and in section 232, building means any building or structure of any description, whether permanent or temporary; and includes a tent, caravan, or houseboat; and also includes any enclosed yard or any closed cave or closed tunnel.

(3) For the purposes of this section and section 232,—

(a) entrance into a building or ship is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by that person, is within the building or ship; and

(b) every one who gains entrance to a building or ship by any threat or artifice used for that purpose is to be treated as having entered without authority.

Compare: 1961 No 43 ss 240, 241, 242

CA231.01 Subsection (1) offences — distinction between offences

The offence of burglary, as re-defined in 2003, is committed where a person either enters a building etc without authority with intent to commit an offence therein (subs (1)(a)), or remains in a building without authority. Under subs (1)(a) the prosecution must prove there has been an unauthorised entry at a time when there was also an intent to commit an offence in the building entered (see R v Sturm [2007] NZCA 175, at [33], endorsing and applying the reasoning in Police v Bannin [1991] 2 NZLR 237, also reported as B v Police (1991) 7 CRNZ 55). As discussed below at [CA231.04], the prosecution must also show the defendant knew the entry was unauthorised or was reckless as to a lack of authority. There is no requirement that the offence intended at the time of entry actually be committed.

By contrast, under subs (1)(b), there must be a remaining within the building without authority. The term “remaining” suggests this form of the offence may be committed in two ways. First, the physical element of the offence is complete on the act (if it is not better characterised as an omission) of deliberately remaining in the building after the point where the defendant should have left the building. This act or omission must be done with intent to commit an offence in the building. The alternative is that there is a continuing act of remaining in the building without authority, and the continuing act is accompanied at some point by an intent to commit an offence within the building. An unauthorised act of remaining may therefore become burglary if there is a later formation of the necessary mental element. There will be no need to consider the circumstances of entry into the building except so far as they may relate to the issue of whether the remaining in the building was without authority. Again, it is not necessary that the offence intended be committed.

On this analysis burglary under subs (1)(b) may be seen as a continuing offence. It has been held in England that burglary by unlawful entry does not terminate at the point of entry but continues for some time, for example while goods taken are being removed from the premises: R v Bristow [2013] EWCA Crim 1540, at [23]. For further discussion see [CA232.01].

CA231.02 Subsection (1) offence — “entry”

Subsection (3)(a) provides assistance as to the meaning of the word “entry”.

There will be an “entry” for the purposes of the section when:

(a) Any part of the defendant’s body comes within the building. At common law it was sufficient if a fingertip “entered” even though this occurred only during the act of breaking: R v Davis (1823) R &
R v Manning.

The word itself connotes an element of completeness, but this is a matter of permission to enter onto (or remain within) the premises given by the occupier or person entitled to give permission to enter. The Act does not provide a definition of “authority”; therefore the general law will apply. Guidance can be gained from the cases considering police entry onto premises (see the discussion at [CA315.08]). Express permission to enter onto (or remain within) the premises given by the occupier or person entitled to give consent to, or authority for, such entry or remaining will clearly amount to “authority”. Consent or permission given by a person ostensibly in a position to determine whether a person may enter or remain on premises will be “authority” for these purposes (compare R v Bradley [1997] 15 CRNZ 363, 4 HRNZ 153 (CA)). In many cases there will be implied authority to enter buildings or ships. A shopkeeper or restaurateur usually extends an implied invitation to the public (or a section thereof) to enter the premises to make or consider making purchases. Individuals who enter retail premises while those premises are open to the public thus enter with implied authority.

CA231.03 Subsection (1) offence — “building or ship”

The offence of burglary may be committed by entry into a ship or building, or a part of a ship or building. “Ship” is defined in s 2 (see [CA2.33.01]). “Building” is defined in subs (2) in terms which are wider than at common law, and include instances which would not come within the usual meaning of the word. There appears to be no authority in New Zealand as to when work on any building has progressed sufficiently for it to be considered a “structure”. The word itself connotes an element of completeness, but this is a matter of degree. In R v Manning (1871) LR 1 CCR 338, an unfinished house, of which all the internal and external walls had been completed, the roof was on and the floor was substantially complete, was held to be a “Building”, but Lush J, at 341, stated (obiter) that “four walls erected a foot high” would not be a building. A house in a similar state of construction to that in Manning would be a “structure” in New Zealand, but there may be difficulties with buildings where work has not progressed to the same extent.

More difficult questions arise in relation to vehicles other than caravans (which are specifically mentioned). In Pritchard v Police HC Dunedin CRI-2006-412-43, 7 December 2006 it was held that a housebus was a “building” for the purposes of s 231, on the basis that the essence of the offence of burglary is invasion of “private space” and of living accommodation. On that basis any vehicle used for accommodation may be argued to be a “building”. Whether the courts will extend that reading to include other vehicles not used as living accommodation is unclear. The Canadian Criminal Code specifically includes railway vehicles, trailers, and aircraft. In England, under a different statutory definition, an articulated goods trailer supported by its own wheels and struts and attached to a power supply while being used for temporary storage was held in Norfolk Constabulary v Seekings and Gould [1986] Crim LR 167 not to be a building. It was acknowledged in Pritchard (above) that there might be some overlap of s 231 and s 226(2) dealing with entry into vehicles, but that this was intended by Parliament as both offences contemplated entry into a ship.

A yard may be “enclosed” if the bulk of the boundary is in some way enclosed. A continuous and unbroken enclosure is not necessary; Police v Batista-Pulgar SC Wellington M154/79, 24 May 1979. As to what is an “enclosure”, see Quartromini v Peck [1972] 3 All ER 521. An unenclosed yard was held not to be a “structure” for the purposes of a similarly defined offence in R v Ausland 2010 ABCA 17, (2010) 251 CCC (3d) 207 at [10]-[11].

CA231.04 Subsection (1) offence — “without authority”

The Act does not provide a definition of “authority”; therefore the general law will apply. Guidance can be gained from the cases considering police entry onto premises (see the discussion at [CA315.08]). Express permission to enter onto (or remain within) the premises given by the occupier or person entitled to give consent to, or authority for, such entry or remaining will clearly amount to “authority”. Consent or permission given by a person ostensibly in a position to determine whether a person may enter or remain on premises will be “authority” for these purposes (compare R v Bradley [1997] 15 CRNZ 363, 4 HRNZ 153 (CA)). In many cases there will be implied authority to enter buildings or ships. A shopkeeper or restaurateur usually extends an implied invitation to the public (or a section thereof) to enter the premises to make or consider making purchases. Individuals who enter retail premises while those premises are open to the public thus enter with authority, an authority which is not lost where they enter with an intention to commit an offence in the building, or if they later remain in the building after forming an intention to commit an offence therein: Police v Barwell HC Christchurch CRI-2006-409-77, 6 July 2006. There may also be implied authority in other circumstances, such as entry into multi-occupier buildings for the purpose of making inquiries of a particular occupier (compare the implied licence to enter premises discussed at [CA315.08]).

In Keen v R [2008] NZCA 36, at [8], it was held that where an issue as to authority is raised, the trial judge should put the issue to the jury in this form:

(i) What is the authority asserted?

(ii) What is the extent of that authority?
Was it exceeded?

In appropriate cases the prosecution may rely on the provisions of subs (3)(b) which provides that entry obtained by any threat or artifice is deemed to be without authority. This extended meaning catches cases where there is an appearance of consent to the entry, but true consent is absent. The threat does require to be one of physical violence. Absence of consent arising from deception or artifice is illustrated by *R v Boyle* [1954] 2 QB 292, where the defendant gained entry by pretending to be a radio engineer with the BBC who had been sent to examine a radio in the victim’s premises.

**CA231.06 Mental element as to lack of authority**

The statute does not expressly require that the defendant know or be aware that the entry be without authority. General principle (see the discussion at [CA20.13]) requires that the prosecution should have to establish knowledge or recklessness, at least, in relation to every aspect of the actus reus of the offence. On that basis, the prosecution must show the defendant knew he or she had no authority to enter or was reckless as to that possibility. The distinction between that mental element and intention to commit an offence in the building is essential. See *R v Spero* (2006) 13 VR 225, (2006) 161 A Crim R 13 at 238–239; 27–28.

Thus, if the defendant believed he or she had been given authority to enter, or remain on, premises he or she would not commit any offence, even if he or she is mistaken as to some matter of fact (eg, the identity of the premises, or of a person who has purported to give authority for the entry). A mistaken belief as to the legal position — such as whether or not a tenancy agreement was valid or not (as a result of which the defendant believed he or she had a legal right to enter or remain) would not provide a defence (see the commentary to s 25).

**CA231.07 Subsection (1) offence — “with intent to commit an imprisonable offence”**

The section requires proof of an intent to commit an imprisonable offence at the time of entry. For discussion of whether or when the Crown must identify the offence alleged, see [CA231.08]. The offence need not be one of dishonesty. The best evidence of intent to commit an imprisonable offence will be proof that an offence was committed inside the premises entered, but the intent may be established by any other relevant evidence. However, if the defendant entered at a time where he or she lacked the mens rea for any offence, there is no burglary: *R v Collins* [1973] QB 100, [1972] 2 All ER 1105.

A conditional intent to commit an imprisonable offence is sufficient. There is a burglary, for example, where the defendant breaks and enters a chemist’s shop intending to steal any drugs of a particular type he or she may find therein: *Attorney-General’s References (Nos 1 and 2 of 1979)* [1980] QB 180.

### 232 Aggravated burglary

(1) Every one is liable to imprisonment for a term not exceeding 14 years who,—

(a) while committing burglary, has a weapon with him or her or uses anything as a weapon; or

(b) having committed burglary, has a weapon with him or her, or uses anything as a weapon, while still in the building or ship.

(2) Every one is liable to imprisonment for a term not exceeding 5 years who is armed with a weapon with intent to commit burglary.

Compare: 1961 No 43, ss 240A, 243

**CA232.01 Subsection (1) offences — “committing burglary” and “having committed burglary”**

The offences in subs (1) are conceptually simple in that they provide for burglary to be aggravated by the defendant either being armed with a weapon or using some item as a weapon. The meaning of “weapon” is discussed at [CA232.02]. The application of each of the parts of the subsection depends on the court being able to determine the terminal point of a burglary. Under subs (1)(a) the defendant must be shown to have been armed with a weapon or used some item as a weapon; either when entering a building without authority and with an intent to commit an offence therein, or while remaining in the building without authority and with intent to commit an offence therein, but in each case the prosecution must show the burglary had not been completed before the defendant acquired the weapon or used an item as a weapon. For the offence under subs (1)(b), the prosecution must show that the burglary had been committed before the time when the defendant was armed or used an item as a weapon. These requirements may on occasion cause some difficulty,
because the terminal point of a burglary cannot be as easily defined as its initial commission. In *R v Bristow* [2013] EWCA Crim 1540, at [23], the English Court of Appeal held that burglary was a continuing offence and did not cease at the point where unlawful entry was gained. Rather it would continue until some later point such as the removal of stolen items from the premises burgled or escape from those premises. That view may readily be applied to the offence in subs (1)(a), but is harder to reconcile with subs (1)(b) which contemplates the burglary having been completed before the burglar leaves the building or ship. As with many other issues it may be a matter to be determined on the particular facts of the case.

If the defendant’s conduct could fall within either subs (1)(a) or (1)(b), but which it was cannot be shown beyond reasonable doubt, the defendant cannot be convicted of either (compare the theft/receiving difficulty discussed at [CA219.09]; see also [CA226.03]).

CA232.02 "Weapon"
The section requires that the defendant have with him or her a "weapon" or have used some thing as a weapon. The word "weapon" carries the meaning of something used to inflict bodily injury: see *R v Carroll* [1975] 2 NZLR 474 (SC), at 479. It will include not only items such as guns or swords which are designed to be used for that purpose, but also any other item which the defendant intended to use to inflict harm should the need arise: *R v Mason* CA517/05, 11 April 2006.

CA232.03 "Has … with him or her or uses"
The words "has a weapon with him or her" require no more than that the weapon is on the person of the defendant or is readily available to him or her: *Ellmers v Police* (1988) 3 CRNZ 259 (HC). A narrower interpretation has been applied in England, where "has with him" is often construed as "carrying": *R v Kelt* [1977] 1 WLR 1365, [1977] 3 All ER 1099, (1977) 65 Cr App R 74. The difference is significant if only one of several burglars carries a weapon, as on the English approach the offence of aggravated burglary is only committed by those who enter actually carrying a weapon: *R v Klass* [1998] 1 Cr App R 453. In New Zealand two or more persons can each be said to have with them a weapon if each has ready access to, and a significant degree of control over, the weapon: see *R v Manapouri* [1995] 2 NZLR 407, (1995) 13 CRNZ 85 (CA), at 417; 96, where it was held, on a charge under the Arms Act 1983, that each of two offenders could contemporaneously "have with him" the same firearm.

A weapon may be "used" where words or conduct show the defendant has actual possession of a weapon or it is immediate availability. In *R v Steele* (2007) 221 CCC(3d) 14 (SCC), at [32], it was held that a weapon might be "used" where the defendant threatens its use by a co-offender.

The presence or use of a weapon in aggravated burglary removes offences under s 232 from the class or type of offences encompassed in burglary under s 231. Before a defendant can be convicted as a party to aggravated burglary by virtue of s 66(1), it must be shown that he or she was aware of the essential matters constituting the offence. The defendant must have contemplated a burglary by the principal party and that the party would have a weapon while inside the premises: *R v Kimura* (1992) 9 CRNZ 115 (CA).

CA232.04 Subsection (2) offence
The subsection creates an offence of lesser gravity than those in subs (1). The requirement that the defendant be "armed" with a weapon means the defendant must physically carry or have immediately available the weapon in question. There is no requirement of proof of intent to use the weapon to cause injury: *R v Jones* [1987] 2 All ER 692. As to "weapon" see [CA232.02]. The required "intent to commit burglary" will require an intention to enter or remain in the building or ship for the purpose of committing an offence therein, together with knowledge or belief the entry or remaining is without authority.

### 233 Being disguised or in possession of instrument for burglary

1. Every one is liable to imprisonment for a term not exceeding 3 years who, without lawful authority or excuse,—
   a. has in his or her possession any instrument capable of being used for burglary with intent to use it for such a purpose; or
   b. has his or her face covered or is otherwise disguised with intent to commit any [imprisonable offence].

2. If any person is convicted of being in possession of an instrument for burglary, the Court may, if it thinks fit, order the instrument to be forfeited to the Crown or disposed

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CPA35.01 Court dealing with category 1 offence before trial
The proceeding for a category 1 offence before the trial must be heard and determined is in the District Court in which the charging document was filed in accordance with s 14 (subs (1)) unless:

(a) an order is made to transfer the proceeding to another District Court or other place: s 157(1); District Courts Act 1947, s 4A; or

(b) the offence is to be heard with another offence that must be heard by a jury (and the District Court in which the charging document was filed does not have jury trial jurisdiction) or is to be heard in the High Court: ss 71(4), 139.

See also [CPA71.01] for the trial court, place of trial and procedure for trial of a category 1 offence.

CPA35.02 Court dealing with category 2 or 3 offence before trial
The proceeding for a category 2 or 3 offence before the trial must be heard and determined is in the District Court in which the charging document was filed in accordance with s 14 (subs (2)) unless:

(a) the trial court is not the court in which the charging document was filed: ss 35(2), 75; or

(b) the defendant pleads guilty and the proceeding must be transferred to the High Court for sentencing: s 114(2); or

(c) an order is made to transfer the proceeding to another District Court or other place: s 157(1); District Courts Act 1947, s 4A; or

(d) the offence is to be heard with another offence that must be heard by a jury (and the District Court in which the charging document was filed does not have jury trial jurisdiction) or is to be heard in the High Court: ss 72(5)(b), 73(6)(b), 139.

See also [CPA72.01] and [CPA73.01] for the trial court, place of trial and procedure for trial of a category 2 or 3 offence.

36 Court dealing with proceeding before transfer for trial: category 4

(1) A defendant’s first appearance in court for a category 4 offence before the proceeding is transferred under subsection (2) must be in the District Court in which the charging document was filed.

(2) On the adjournment of the proceeding after the defendant’s first appearance in court the court must transfer the proceeding to the High Court.

(3) This section is subject to—

(a) section 191; and

(b) any order made under section 4A of the District Courts Act 1947 or under section 157 of this Act.

Part 3
Procedure before trial
(s 37 to s 104)

Subpart 1—Pleas
(s 37 to s 49)

Entering plea

37 Defendant may enter plea

(1) At any time before the court requires a plea under section 39 the court may receive a plea from the defendant.

(2) The defendant may plead either guilty or not guilty, or enter a special plea.
(3) If the defendant is not represented by a lawyer,—
   (a) the court must be satisfied that the defendant—
      (i) has been informed of his or her rights to legal representation, including
          the right to apply for legal aid under the Legal Services Act 2011; and
      (ii) has fully understood those rights; and
      (iii) has had a reasonable opportunity to exercise those rights; and
   (b) the substance of the charge must be read to the defendant.

(4) A defendant who is represented by a lawyer may plead not guilty or enter a special
    plea by filing a notice in court.

(5) The Registrar must notify the prosecutor if a notice is received under subsection (4)
    from the defendant.

(6) If the defendant is not before the court but indicates that he or she intends to plead
    guilty, the defendant must be brought before the court to enter a plea.

(7) A Registrar may exercise the power of the court under this section to receive a not
    guilty plea from a defendant charged with a category 1, 2, or 3 offence.

CPA37.01 Entry of plea
A defendant may enter a plea at any time before the court requires him or her to plead under s 39: subs (1).
The plea may be a not guilty plea, guilty plea or special plea: subs (2).
The entry of a not guilty plea to a category 2, 3 or 4 offence triggers the case management procedure: s 54. It
also triggers the requirement for the prosecutor to provide the defendant with full disclosure, which must be
provided as soon as reasonably practicable after the defendant has pleaded not guilty: Criminal Disclosure Act
2008, s 13(1). A defendant who pleads not guilty to a category 3 offence who wishes to be tried by a jury must
make that election at the time that the not guilty plea is entered: s 51.
A defendant who pleads guilty must be dealt with in accordance with s 114.
The special pleas are a plea of previous conviction (s 46), previous acquittal (s 47) or pardon (s 48). The
availability of a special plea must be determined in accordance with s 49.

CPA37.02 Pleas by notice
If the defendant is represented by a lawyer, the defendant may enter a not guilty plea or a special plea to any
offence by filing a notice, rather than appearing in court to plead: subs (4). The plea will be dealt with at the
defendant’s next appearance. Except if a defendant is charged with a category 1 offence (see s 38(1)), a
defendant who indicates that he or she wishes to plead guilty cannot enter that plea by notice but must instead
be brought before the court to enter the plea: subs (6).
The notice must contain the information specified in rr 2.1 and 4.4 of the Criminal Procedure Rules 2012. The
notice must be authenticated prior to filing (r 2.2) and may be filed by sending it to the Registry’s address for
filing (which may be an electronic address) or by delivering it to the Registry by hand (r 2.3). It need not be
served on the prosecutor (r 2.4(b)) given the notification requirements in subs (5). A template for the notice is
at www.justice.govt.nz.

CPA37.03 Plea to a category 4 offence
A defendant charged with a category 4 offence will first appear in the District Court, before being transferred
to the High Court for his or her second appearance: s 36(1) and 36(2). As a not guilty plea to a category 4
offence may only be entered in the High Court (s 40), there is no ability for a defendant to plead not guilty to a
category 4 offence at his or her first appearance.
A defendant may plead guilty to a category 4 offence at his or her first appearance in the District Court but
must then be transferred to the High Court for sentencing: s 36(1) and 36(2); s 114(2). The District Court may
order the preparation of a pre-sentence report in anticipation of the defendant’s sentencing in the High Court:
Sentencing Act 2002, s 26. It is also possible, however unlikely, for a defendant to enter a special plea to a
category 4 offence at his or her first appearance. The availability of that plea must be decided by a High Court Judge: s 49(4).

CPA37.04 Unrepresented defendant

Before an unrepresented defendant may enter a plea, the court must be satisfied that the defendant has been informed of and understands his or her rights to legal representation and has had an opportunity to exercise those rights: subs (3)(a). See further s 24(c) of the New Zealand Bill of Rights Act 1990 (defendant’s right to consult and instruct a lawyer), s 6 of the Legal Services Act 2011 (grant of legal aid for criminal matters) and [TP3] (representation of defendants in criminal trials). The court must also read the substance of the charge to the defendant: subs (3)(b). These requirements reflect in large measure those that previously applied under s 41A of the Summary Proceedings Act 1957 when a Registrar received a not guilty plea from an unrepresented defendant. There are no similar requirements in respect of represented defendants, whose access to legal advice and knowledge of the charge can be assumed by the fact of their representation.

CPA37.05 Subsection (3)(a): “is satisfied”

The requirement that the court is “satisfied” does not imply any onus or standard of proof but invites the court to evaluate all relevant matters and reach a judgment as to whether or not it is satisfied: R v A [CA255/09] [2009] NZCA 380 at [10]; Iti v R [2011] NZCA 114 at [30]; R v Leitch [1998] 1 NZLR 420, (1997) 15 CRNZ 321 (CA) at 428, 327.

CPA37.06 “the court”

The court that may receive the plea is the court presided over by a judicial officer with authority to exercise the court’s jurisdiction in relation to the matter: s 5. See also s 9.

If Justices of the Peace or Community Magistrates are presiding in respect of an offence for which they have trial jurisdiction under s 355 and s 356, they are the “court” for the purposes of s 37 and may receive any plea to that offence. Community Magistrates may also receive a guilty plea to an offence for which they have jurisdiction under s 357(1): s 361(3).

Justices and Community Magistrates have jurisdiction to receive a not guilty plea or special plea to any other offence in category 1, 2 or 3: s 361(1)(a). A defendant who indicates that he or she intends to plead guilty must be brought before a judge to enter that plea: s 361(2).

CPA37.07 Power of Registrar to receive not guilty plea

Registrars may exercise the power of the court and receive a not guilty plea to an offence in category 1, 2 or 3: subs (7). The ability for Registrars to do so recognises the practice of Registrars’ list courts, which typically deal with defendants at their first and second appearances.

If a defendant appearing before a Registrar indicates that he or she wishes to plead guilty to an offence, the defendant must be brought before a court. A Registrar may not receive a special plea.

CPA37.08 Lawyer or corporate representative may act for defendant

The defendant’s case may be conducted by a lawyer, the defendant personally, or if the defendant is a corporation, a representative of the corporation to the extent the corporation authorises: s 11. References to the “defendant” in s 37 and associated provisions should be read as meaning the defendant’s lawyer or the corporate representative unless the context requires otherwise: see further [CPA11.01]. While it is possible for a defendant’s lawyer to enter a not guilty plea or special plea on the defendant’s behalf, the defendant must always be personally before the court when a guilty plea is to be entered: see subs (6), s 43(2). A corporate representative who is not a lawyer is an unrepresented defendant for the purposes of the Act: see further [CPA12.02].

38 Right to plead to category 1 offence by notice

(1) Despite section 37, a defendant charged with a category 1 offence may plead guilty or not guilty, or enter a special plea, by filing a notice in court.

(2) A defendant who pleads guilty may—

(a) indicate in the notice whether he or she wishes to appear at court for sentencing; and
(2) A direction under subsection (1) may be given on the Judge’s own motion or on the application of the prosecutor or the defendant.

**Subpart 4—Sentence indications**

(s 60 to s 65)

### 60 Meaning of sentence indication

A **sentence indication** is a statement by the court that, if the defendant pleads guilty to the offence alleged in the charge, or any other specified offence, at that time, the court would or would not (as the case may be) be likely to impose on the defendant—

(a) a sentence of a particular type or types; or

(b) a sentence of a particular type or types within a specified range (for example, periods of time or monetary amounts); or

(c) a sentence of a particular type or types and of a particular quantum (for example, periods of time or monetary amounts).

**CPA60.02 Definition of “sentence indication”**

Broadly, s 60 defines a sentence indication as a statement by a court of the sentence it is likely to impose if the defendant pleads guilty to the offence alleged in the charge, or any other specified offence, at that time.

Under s 60, a sentence indication may relate to:

- sentence type only — eg, a sentence of imprisonment rather than a non-custodial sentence, or a specific non-custodial sentence such as community work;
- sentence type within a particular range or of a particular quantum — eg, a sentence of imprisonment within a range of two-and-a-half to three years, or a fine of between $1,500 and $2,000;
- what sentence would not be imposed — in particular, that a sentence of imprisonment would not be imposed;
- a combination of sentences.

A sentence indication relates to the sentence that will be given if the defendant pleads guilty at that time, and is therefore time sensitive: see also s 64 and [CPA64.01].

Sentence indications are about sentences. Indications as to starting points should not be given; they leave room for too many subsequent adjustments and therefore do not provide the clarity and the basis for an informed choice as to plea that an indication is intended to provide: *Taylor v R* [2013] NZCA 55 at [21].

**CPA60.03 Sentence indication may be given on offence that is not charged**

A sentence indication will usually relate to the offence(s) with which the defendant has been charged. However, the reference in s 60 to “any other specified offence” makes it possible for an indication to be given for an offence that is not the subject of a charge. Section 60 therefore gives implicit recognition to charge negotiations between the prosecution and defence, since the most likely situation where a sentence indication will be sought for a non-charged offence is when there is ongoing discussion between the parties as to the appropriate charge.

The presumption that a sentence indication should be given only once in a proceeding is likely to restrict the extent to which a sentence indication is sought in these circumstances: s 62(4). As with any other sentence indication, the court will need to be satisfied it has sufficient information available to it before it gives an indication: s 61(2). The minimum information requirements before an indication can be given as to type and quantum will also apply: s 61(3).

Whenever a sentence indication is sought on an offence that is not charged, it is probable that both parties agree on the charge in respect of which the indication is sought and should advise the court of the factual basis underpinning the agreement. The court should only give an indication if the prosecution confirms that it intends to seek leave to amend the charge if the defendant intimates that a guilty plea will be entered. There is no requirement for the parties to agree to amend the charge, or for the charge to be formally amended, before the indication is given, as any agreement by the prosecutor to either course is likely to be conditional on the entry of a guilty plea.
CPA60.04 Indicated sentence must be consistent with the sentencing framework

Any sentence indicated must be consistent with the requirements of the Sentencing Act 2002, as well as applicable guideline judgments and other case law: see, in this respect, R v Edwards [2006] 3 NZLR 180, (2005) 22 CRNZ 309 (CA) at [42].

In light of the purpose of sentence indications and the guidance provided in R v Hessell [2010] NZSC 135, [2011] 1 NZLR 607, (2010) 24 CRNZ 966, the court should ordinarily identify separately the reduction in sentence that would be given if the defendant pleaded guilty and the final sentence that would be imposed.

A sentence indication should not lead the offender to believe that, in the absence of a guilty plea, he or she will receive a harsher sentence than would be justified on the facts, since this is inviting a guilty plea on a false premise: Witehira v R [2013] NZCA 58 at [24]–[25].

61 Giving sentence indication

(1) A court may give a sentence indication, but only at the request of the defendant made before the trial.

(2) Subject to subsection (3), if the defendant requests a sentence indication the court may give one if it is satisfied that the information available to it at that time is sufficient for that purpose.

(3) Without limiting the information that the court may require before giving a sentence indication, the court must have the following information before giving a sentence indication of a kind described in section 60(c):

(a) a summary of the facts on which the sentence indication is to be given, agreed on by the prosecutor and the defendant; and

(b) information as to any previous conviction of the defendant; and

(c) a copy of any victim impact statement that has been prepared in relation to the offence concerned under the Victims’ Rights Act 2002.

62 Further provisions relating to giving sentence indication

(1) If the court proposes to give a sentence indication, the court may give the prosecutor and the defendant an opportunity to be heard on the matter.

(2) A sentence indication must be given in open court.

(3) Every sentence indication must be recorded by the court.

(4) A second or subsequent sentence indication may be given in a proceeding only if, since the previous sentence indication, there has been a change in circumstances that is likely to materially affect the question of the appropriate sentence type or quantum.

(5) No party may appeal against a decision to give or not to give a sentence indication.

63 Offence and penalty relating to sentence indication

(1) Every person commits an offence who, before the defendant has been sentenced or the charge has been dismissed, knowingly publishes any information about—

(a) a request for a sentence indication; or

(b) a sentence indication that has been given.

(2) A person who commits an offence against subsection (1) is liable on conviction,—

(a) in the case of an individual, to a term of imprisonment not exceeding 3 months:

(b) in the case of a body corporate, to a fine not exceeding $50,000.
(b) Subsection (2)(c) is directed at the conduct of the authorities, in that the Court must consider whether
the Police and Solicitor-General have moved with appropriate speed since discovering the possible
existence of the new and compelling evidence.

(c) The other matters to which the Court must have particular regard also appear in s 151 and are
discussed at [CPA151.06].

155 Orders to safeguard fairness of retrial
An order for a retrial under section 151 or 154 may be granted subject to—

(a) any conditions that the court considers are required to safeguard the fairness of the
retrial:

(b) any other directions as to the conduct of the retrial.

Compare: 1961 No 43 s 378E

156 Effect of order for retrial
(1) If an order for a retrial is granted under section 151 or 154,—

(a) the order of the court must be certified by the Judge or, as the case requires, the
presiding Judge to the Registrar of the court before which the person was tried,
and the order must be carried into effect:

(b) the court that orders the retrial or the court before which the person was tried
may—

(i) issue a summons to the person to attend at the court before which the
person was tried (and the provisions of this Act apply as if it were a
summons to attend a hearing); or

(ii) issue a warrant to arrest the person and bring him or her before a court
(and the provisions of this Act apply as if it were a warrant to arrest a
defendant):

(c) if the person appears in court in accordance with a summons or is brought
before a court under an arrest warrant, section 168(1) applies with any
necessary modifications as if the proceeding was adjourned:

(d) the retrial must be conducted in the same manner as a retrial ordered following
a successful appeal by a defendant against conviction.

(2) Subsection (1) overrides sections 45 to 48 and any other enactment or rule of law.

Compare: 1961 No 43 s 378F

Transfer of proceedings to court at different place

157 Transfer of proceedings to court at different place or different sitting

(1) A District Court Judge may, on his or her own motion or on the application of the
prosecutor or the defendant, transfer a proceeding to a District Court at a place or
sitting other than that determined in accordance with section 35, 71, 72, or 73, as the
case may be, if the court is satisfied that it is in the interests of justice that the
proceeding be heard at that other place or sitting.

(2) The High Court at a place may, on its own motion or on the application of the
prosecutor or the defendant, transfer a proceeding to the High Court at a place or
sitting other than that determined in accordance with section 72, 73, or 74, as the case
may be, if the court is satisfied that it is in the interests of justice that the proceeding be
heard at that other place or sitting.

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(3) With the consent of all parties, an order under this section may be made by [a District Court presided over by 1 or more Justices or 1 or more Community Magistrates] in respect of a proceeding for—

(a) a category 1 or 2 offence; or

(b) a category 3 offence punishable by a term of imprisonment not exceeding 3 years, if the defendant has not elected a jury trial.

[(3A) A Registrar may exercise the power specified in subsection (3).]

(4) Except as provided in sections 217 and 218, no person may object to any order under this section.

Compare: 1961 No 43 ss 322, 326(2)

**CPA157.05 General approach to transfer decisions**

The court may only order a transfer if satisfied that it is in the interests of justice to do so: subss (1) and (2). This provides the court with the ability to deal with all considerations that may be relevant to a decision to transfer, while preserving the presumption in favour of trying the offence in the community which has the greatest factual and residential connection with the offending.

The “interests of justice” test reflects that which previously applied under s 322(1) of the Crimes Act 1961 in the indictable jurisdiction, under which a transfer could be made if doing so appeared to the court to be “expedient for the ends of justice”. There was a broad jurisdiction to transfer proceedings in the summary jurisdiction under s 34(2) of the Summary Proceedings Act 1957. Despite the different approaches in the summary and indictable jurisdictions, the principles governing decisions to transfer proceedings were broadly similar.

The principles that governed decisions under s 322 of the Crimes Act were summarised by the Court of Appeal in *McNaughton v R* [2012] NZCA 16 at [6]. These principles continue to have force in respect of decisions in jury trial cases under s 157 and can be applied to decisions in judge-alone cases. The principles are as follows:

(a) The initial factual position is that a defendant is to be tried in the court nearest to the place where the crime was committed unless the venue is changed. This is because the law requires the charging document for an offence to be filed in the District Court that is nearest to where the offence is alleged to have been committed: s 14. See also *R v Houghton* CA371/99, 23 November 1999; *Warren v Police* [1999] 3 NZLR 411 (HC).

(b) In jury trial cases, it is a longstanding tenet that a defendant be tried by jurors drawn from the place in which the offence was committed. That tenet has statutory recognition in s 5(5) of the Juries Act 1981, which refers to the principle that so far as practicable a jury should be drawn from the community in which the alleged offence occurred. See also *R v Middleton* CA218/00, 26 September 2000 at [31].

(c) Consideration of a change of venue is best applied against s 25(a) of the New Zealand Bill of Rights Act 1990 which gives every defendant “the right to a fair and public hearing by an independent and impartial court”. Section 157 enables a court to change the trial venue in order to ensure that.

(d) It is not particularly helpful to refer to an onus, and wrong to refer to a high threshold. A party applying to change the trial venue needs to persuade the court that there is a real risk that a fair and impartial trial is not possible at the existing location: see also *R v Tuckerman* CA48/86, 18 April 1986 applied in *R v Mayer-Hare* [1990] 2 NZLR 561 (CA). The use of the word “real” means that the court must be persuaded that the risk actually exists, and is not illusory or fanciful.

(e) Section 157 provides that the court “may” change the trial venue. That requires the exercise of discretion and an evaluative assessment of all relevant considerations in the context of the particular case: see *R v Foreman (No 2)* [2008] NZCA 55 at [13]. In respect of decisions under s 322, this exercise was described by the High Court in *Te Wini v R* HC Tauranga CRI-2008-270-361, 3 October 2011 at [5] as requiring the court to:

“undertake an evaluative assessment in which it identifies the risks associated with the trial if it is held at the existing venue, and any means by which those risks may be neutralised or minimised.”
In the event that it determines that the risks cannot be adequately addressed, the Court is likely to exercise its discretion to make an order changing the venue of the trial to another centre.”

The cumulative effect of a number of factors, none in itself sufficient, may show that a change of venue should be ordered: *R v Mayer-Hare*, above.

See also *Warren v Police* [1995] 3 NZLR 411 (HC) at 414 in respect of changes of venue in the previous summary jurisdiction. Fisher J held that, while a strong reason was required to move a trial from the “original community concerned”, there would be a greater readiness to move a summary prosecution as opposed to a jury trial, particularly when there was no real public interest in the case. It will rarely (if ever) be appropriate to change the venue of a judge-alone trial to meet fair trial concerns: *R v Sullivan (No 2)* [2013] NZHC 2058 at [48].

**CPA157.06 Particular considerations in jury trial cases**

1. **Requirement to show real risk that fair and impartial trial not possible**

   In jury trial cases, the requirement to show that there is a real risk that a fair and impartial trial is not possible almost inevitably requires that something in the circumstances suggests:

   (a) There is a real risk, or at least a reasonable perception of a risk, that any jury empanelled for the trial will be tainted by the prejudice of one or more jurors; and

   (b) An impartial jury cannot be obtained by the use of appropriate measures during the jury selection process: see *R v Smail* [2009] NZCA 549 at [31]; *R v Johnston* CA60/04, 29 March 2004.

Appropriate measures may include disqualification of persons from localities where sympathy or prejudice might be expected, and the normal requests that potential jurors with knowledge of the case or parties disclose that knowledge. Potential jurors may be questioned as to their knowledge of parties or witnesses. Jurors may be expected to heed the normal judicial direction to decide the case solely on the evidence heard. The court may also have regard to the size of the pool of potential jurors: *R v Te Kahu* [2006] 1 NZLR 459, (2005) 22 CRNZ 133 (CA). Where the pool is small, care must be taken to ensure that any questioning of potential jurors does not unnecessarily limit the number of jurors available for the trial, or unduly emphasise particular issues: *R v Marinkovich* CA226/04, 29 July 2004.

2. **Local prejudice**

   A change of venue may be ordered where there is a real risk that one or more jurors will have some connection with the alleged offending or with people involved in the trial (whether the defendant, the prosecution, witnesses, victims or complainants) so that their impartiality is compromised, even though they might consider themselves unpredisposed.

   A sufficient risk of prejudice may be found where there is a risk of jurors having, or believing themselves to have:

   (a) information relating to the investigation of the offence: *R v Davis* [1964] NZLR 417 (SC);

   (b) contacts predisposing them to sympathy with a complainant: *R v Mayer-Hare* [1990] 2 NZLR 561 (CA);

   (c) connections to, or hostility toward, rival gangs which have been involved in significant violent offending: *R v Te Kahu* [2006] 1 NZLR 459, (2005) 22 CRNZ 133 (CA).

It is not likely to be enough that the defendant, a victim, a complainant or a witness is well-known in the local community. The local conditions must be likely to give rise to a “real and substantial danger of sympathies being engaged or extreme reactions of prejudice emerging”: *R v Houghton* CA371/99, 23 November 1999 at [15]. For a rare example of a change of venue because of local sympathy toward the victim, see *R v Weatherston (No 2)* HC Dunedin CRI-2008-012-137, 17 February 2009. Where such a degree of local sympathy or prejudice is established but would not be likely to be encountered in other centres, a change of venue will be appropriate: *R v Middleton* CA218/00, 26 September 2000.

A change of venue is not likely to be required if the local prejudice is limited to a small discrete area so that any persons possibly affected by prejudice can be readily identified and challenged: *R v Harbour* HC Napier T26/93, 17 February 1994.
(3) Publicity adverse to a fair and impartial trial

A change of venue or an order that the trial be delayed to a later sitting may be granted because media publicity relating to the case has prevented a fair and impartial trial when and where the trial was scheduled. An applicant will have to show that the nature and extent of the publicity would make it impossible to find an impartial jury, even after the normal request that potential jurors having any connection with the defendant or witnesses disclose the connection, and the standard judicial instruction to the jury to have regard only to the evidence in the case.

The Court of Appeal has referred to empirical research by the Law Commission which established that pre-trial publicity is less likely to affect jurors than had generally been thought to be the case in earlier years; see R v Middleton CA218/00, 26 September 2000 and R v Milligan [2007] NZCA 536. It will therefore be more difficult to establish that pre-trial publicity necessitates a change of venue or trial at a different sitting, and older cases must be read with caution.

Relevant considerations include:

(a) The nature of the publicity, and the extent to which it may have gone beyond proper reporting or breached a court order: R v Coghill [1995] 3 NZLR 651, (1995) 13 CRNZ 258, 2 HRNZ 125 (CA); R v Howse HC Palmerston North T38/98, 12 November 1998. The more geographically widespread the publicity is, the less likely it is that a change of venue will be necessary and effective to ensure a fair trial: R v Gildies CA252/05, 28 March 2006. Prejudicial information on the internet will not support a change of venue as such material can be sourced from any location: R v Smail [2009] NZCA 549. The length of time between the publicity and the trial may also be relevant: R v Coghill, above; R v Brown (1987) 3 CRNZ 136 (HC).

(b) The extent to which any prejudicial effect of media publicity of the case may have been overtaken or swamped by publicity given to other cases before the courts, so that potential jurors would not be likely to associate prejudicial publicity with the defendant in the instant case: R v Coghill, above; R v Brown, above.

The test was met in R v Holdem (1987) 3 CRNZ 103 (HC), where a change of venue was ordered because extreme local publicity in Christchurch (including publicity about the conduct of persons who attended the District Court hearing, the effect of a Member of Parliament’s statement as to the defendant’s history, and reports of the statement) meant there was a significant risk that an impartial trial could not be conducted in that city. Where media publicity alone would not justify a change of venue, the cumulative effect of such publicity and other factors may do so: R v Mayne-Hare [1990] 2 NZLR 561 (CA), above. The same principle applies to orders for a trial at a different sitting.

CPA157.07 Other relevant considerations to decision to transfer

Other relevant considerations to a decision under s 157 include:

(a) If the design of the court buildings are such that counsel, jurors and witnesses could not be safeguarded against intimidatory behaviour: R v Te Kahu [2006] 1 NZLR 459, (2005) 22 CRNZ 133 (CA).

(b) The interests of the complainant or relatives of a victim: R v Te Kahu, above; Warren v Police [1995] 3 NZLR 411 (HC) at 414; compare R v Chadwick HC New Plymouth T49/3, 1 June 1993.

(c) If the transfer of a jury trial proceeding is less intrusive on the defendant’s rights than an order for a judge-alone trial: R v Pritchard HC Napier CRI-2008-020-2387, 23 February 2009. In contrast, the court may consider whether an alternative to transfer is open to the defendant to avoid the risk of a prejudiced jury: see R v Greer (2001) 19 CRNZ 372 (CA), where the court considered that a defendant who elects jury trial and then seeks a change of venue because of a risk of jury bias may be better advised to withdraw the election.

(d) Issues of cost or convenience alone will not generally justify a change of venue unless they have the potential to affect the fairness of the trial: Theobald v R [2013] NZCA 259 at [22]. The position may be different if a change of venue is not opposed or if there are concerns about delay and a case may be heard more quickly elsewhere (although it will always be necessary to establish that a change of venue is in the interests of justice): Theobald v R, above. The convenience of judges and counsel should only be taken into account in very unusual and exceptional circumstances: R v Foreman (No 2) [2008] NZCA 55 at [16].
The interests of any co-defendants. In *Nahona v R* [2011] NZCA 461 at [12], the Court held that a change of venue should not be ordered where a co-defendant had not sought such an order and severance of the trials was inappropriate. An exception to this general principle is necessary in respect of co-conspirators, where the principle that alleged co-conspirators should be tried together may require a change of venue for the trial of one of them: *R v Barry* (1986) 2 CRNZ 56 (HC).

158 Attendance of witness at substitute court

(1) If a proceeding is transferred under section 157, the Registrar of the court that transfers the proceeding must ensure that any witness summoned to attend the proceeding is given notice of the transfer.

(2) The notice given under subsection (1) has the same effect as if it were a summons to attend the court to which the proceeding is transferred.

Compare: 1961 No 43 s 324

Obtaining attendance of witnesses

159 Issue of summons to witness

(1) Either the prosecutor or the defendant may at any time obtain from a judicial officer or a Registrar a summons calling on any person to appear as a witness at any hearing in relation to a charge.

(2) A summons issued under subsection (1) may require the person summoned to bring with him or her and produce at the hearing any document or thing that is specified in the summons.

(3) A person commits an offence if that person—

(a) has been served with a summons issued under subsection (1) requiring the person to appear as a witness at a hearing; and

(b) refuses or fails, without reasonable excuse, to appear or to produce any document or thing required by the summons to be produced.

(4) A person who commits an offence under subsection (3) is liable on conviction to a fine not exceeding $1,000.

Compare: 1957 No 87 s 20(1), (2), (5); 1961 No 43 s 351(2)

160 Summons to witness to non-party disclosure hearing

(1) If an application for a non-party disclosure hearing is granted under section 25 of the Criminal Disclosure Act 2008, the defendant may apply to a judicial officer or the Registrar for the issue of a summons calling on any person to appear at that hearing.

(2) If subsection (1) applies, sections 159(2) to (4) and 161 to 164 apply with any necessary modifications.

Compare: 1957 No 87 s 20(1A)

161 Issue of warrant to obtain attendance of witness

(1) A judicial officer may issue a warrant to arrest a person and bring him or her before the court if—

(a) the person summoned as a witness under section 159 fails to appear at the time and place appointed and no reasonable excuse is offered for his or her failure, and the judicial officer is satisfied that the summons was served on the person; or
(a) a notice of appeal, if the court appealed to is the District Court, High Court, or Court of Appeal; or
(b) a notice of application for leave to appeal, if the court appealed to is the Supreme Court.

(2) A notice of appeal or notice of application for leave to appeal must be filed within 20 working days after the date of sentence for the conviction appealed against.

(3) The first appeal court may, at any time, extend the time allowed for filing a notice of appeal or notice of application for leave to appeal.

Compare: 1961 No 43 s 388

232 First appeal court to determine appeal

(1) A first appeal court must determine a first appeal under this subpart in accordance with this section.

(2) The first appeal court must allow a first appeal under this subpart if satisfied that,—
   (a) in the case of a jury trial, having regard to the evidence, the jury’s verdict was unreasonable; or
   (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
   (c) in any case, a miscarriage of justice has occurred for any reason.

(3) The first appeal court must dismiss a first appeal under this subpart in any other case.

(4) In subsection (2), **miscarriage of justice** means 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.

(5) In subsection (4), **trial** includes a proceeding in which the appellant pleaded guilty.

Compare: 1957 No 87 ss 119(1), 121; 1961 No 43 s 385; Criminal Procedure Act 2009 s 276 (Victoria)

**CPA232.02 Subsection (2)(a): jury’s verdict unreasonable having regard to the evidence**

Subsection (2)(a) largely carries over the ground of appeal previously in s 385(1)(a) of the Crimes Act 1961. The reference in s 385(1)(a) to a verdict that “cannot be supported” has not been carried forward; as an unsupported verdict must necessarily be an unreasonable verdict, its removal has no practical significance: see Owen v R [2007] NZSC 102, [2008] 2 NZLR 37, (2007) 23 CRNZ 710 at [12].

A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the defendant was guilty: Owen v R, above, at [17].

This cardinal principle is supplemented by points from R v Munro [2007] NZCA 510, [2008] 2 NZLR 87, (2007) 23 CRNZ 63, stated by the Supreme Court in Owen v R, above, at [13] to be:

(a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
(b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
(c) The weight to be given to individual pieces of evidence is essentially a jury function.
(d) Reasonable minds may disagree on matters of fact.
(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
(f) An appellant who invokes s 385(1)(a) [now s 232(2)(a)] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

Terms such as "unsafe", "unsatisfactory" or "dangerous to convict" express the consequence of an unreasonable verdict and should not be used as tests in themselves: *Owen v R*, above, at [17].

An inconsistent verdict will be an unreasonable verdict: see further [CPA232.08].

**CPA232.03 Subsection (2)(b): Judge’s assessment of evidence in judge-alone trial resulted in miscarriage of justice**

The ground in subs (2)(b) is new and reflects the approach previously taken to appeals against conviction following a defended hearing in the summary jurisdiction.

As introduced in the Criminal Procedure (Reform and Modernisation) Bill 2010 (No 243), s 232 reflected s 119(1) of the Summary Proceedings Act 1957 which provided that an appeal against conviction following a judge-alone trial, as with all general appeals in the summary jurisdiction, proceeded by way of a rehearing. This enabled the court to substitute its own view of the facts, “instead of merely supervising the fact-finding function of a jury”: *Herewini v Ministry of Transport* [1992] 3 NZLR 482, (1992) 8 CRNZ 247 (HC) at 491, 256.

This reference was removed from the Bill by the Justice and Electoral Committee, on the basis that it implied that appeals against conviction from jury trials did not proceed by way of rehearing: see Criminal Procedure (Reform and Modernisation) Bill 2010 (No 243-2) (commentary) at 9. In light of s 24 of the Supreme Court Act 2003, under which all appeals to the Supreme Court proceed by way of rehearing, this implication was not considered an accurate statement of the law.

Arguably, nothing is lost as a result of the omission of an explicit reference to the rehearing procedure, with the difference in approach between determining an appeal against conviction in a jury trial case and the same exercise in a judge-alone case reflected in the grounds in subs (2)(a) and subs (2)(b). By implication, subs (2)(b) requires the appeal court to give a judge’s reasoning close scrutiny and come to its own decision on the facts. See also *R v Slavich* [2009] NZCA 188 at [33], where the Court tentatively indicated that closer appellate scrutiny of the reasoning process was appropriate where a fully reasoned judgment was given. This is also the position in Canada: see *R v Biniaris* 2000 SCC 15, [2000] 1 SCR 381.

However, as with appeals from jury trial cases, the appeal court must also be mindful of any disadvantage in not seeing and hearing the witnesses: *Sullivan v Police* HC Auckland CRI-2008-404-152, 2 October 2008 at [30]. In *Rae v Police* HC Hamilton CRI-2006-419-162, 3 May 2007 at [38], the Court emphasised that the well-accepted principle that an appeal court will only interfere with a trial judge’s findings of fact in exceptional circumstances also applied to appeals against conviction under s 115 of the Summary Proceedings Act 1957.

**CPA232.04 Subsection (2)(c): miscarriage has occurred for any other reason**

The phrase “miscarriage of justice” is defined in subs (4). The appeal court must be satisfied that an error, irregularity or occurrence either created a real risk that the outcome of the trial was affected (subs (4)(a)) or that it resulted in an unfair trial or a trial that was a nullity (subs (4)(b)). See further [CPA232.05]–[CPA232.07].

The broad ground of appeal in subs (2)(c) means that there is an overlap in practice between that ground and the other grounds of appeal in subs (2)(a) and (b). See, for example, *R v Stewart* [2009] NZSC 53, [2009] NZLR 425; [2009] 24 CRNZ 774 at [34], where the Supreme Court indicated that prosecutorial error may result in a miscarriage of justice or an unfair trial. However, there are some cases that can only be dealt with under subs (2)(c), particularly those where the alleged error, irregularity or occurrence does not relate to the fact-finder’s assessment of the evidence.

In considering whether a miscarriage has occurred, the appeal court may consider all relevant admissible material: *R v Shepherd* [2008] NZCA 17 at [10].

**CPA232.05 Subsection (4)(a): miscarriage of justice if real risk that outcome of trial affected**

The appeal court must determine whether an error, irregularity or occurrence in or in relation to the trial or affecting the trial has created a real risk that the outcome of the trial was affected. Irregularities “which plainly could not, either singly or collectively, have affected the result of the trial” are not properly miscarriages of

A “real risk” is one that might well have eventuated, and requires the court to be persuaded that the risk actually exists and is not illusory or fanciful; see, in the context of the test for a change of venue under s 157, *McNaughton v R* [2012] NZCA 16 at [6]. In the context of an appeal against conviction on the grounds of counsel incompetence, Tipping J held in *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730, (2005) 21 CRNZ 977 at [110] that a “real risk arises if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong”.

The effect of subs (4)(a) is therefore to focus on the actual, rather than theoretical, effect of the error, irregularity or occurrence on the outcome of the trial. This was also the effect of the proviso under s 385(1) of the Crimes Act 1961. As described by the Supreme Court in *R v Matenga*, above, at [31], the operation of the proviso required that:

> “having identified a true miscarriage, that is, something which has gone wrong and which was capable of affecting the result of the trial, the task of the Court of Appeal under the proviso is then to consider whether that potentially adverse effect on the result may actually, that is, in reality, have occurred. The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that notwithstanding there has been a miscarriage, the guilty verdict was inevitable. Importantly, the Court should not apply the proviso simply because it considers there was enough evidence to enable a reasonable jury to convict. In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused.”

The extent to which subs (4)(a) captures the full effect of the proviso is unclear. Parliament’s intention when introducing the Criminal Procedure (Reform and Modernisation) Bill 2010 (No 243) was to consolidate and simplify current provisions without changing the core principles underlying the courts’ current approach to appeals against conviction: Criminal Procedure (Reform and Modernisation) Bill 2010 (No 243-2) (commentary) at 9. Consistent with that approach, the threshold for allowing an appeal on the relevant grounds under s 232 was that a substantial miscarriage of justice had occurred, providing a clear link to the proviso under s 385(1).

The situation has been complicated by the removal at the Committee stages of the Bill’s passage through Parliament of the word “substantial” from cl 236 (now s 232 of the Criminal Procedure Act 2011), from the threshold for allowing certain appeals on a question of law under s 300(1)(b) and from provisions that deal with the criteria for granting leave for a second appeal to the High Court or the Court of Appeal. Parliament’s intention in removing the word “substantial” from cl 236 is unclear, although it appears that no significant change in approach was intended, at least as it affected the criteria for leave for a second appeal: see further Hon Simon Power, Minister of Justice, third reading speech (4 October 2011) 676 NZPD 21637; [CPA232.01(2)]; [CPA223.04].

It is arguable that, despite the removal of the word “substantial”, the effect of the proviso is maintained in subs (4)(a). This is because subs (4) enables a court to dismiss an appeal if it is satisfied that the guilty verdict was inevitable or the only reasonably possible verdict; that is, that the error, irregularity or occurrence in or in relation to the trial did not affect, or create a real risk of affecting, the outcome of the trial.

That interpretation is consistent with the approach preferred by Tipping J in *Sungsuwan v R*, above, in relation to s 385(1)(c) of the Crimes Act 1961, under which the Court could uphold an appeal if satisfied on any ground that there was a miscarriage of justice. Tipping J held at [113] that a miscarriage of justice under s 385(1)(c) was demonstrated when something went wrong with the trial or in some other relevant way which must have led to a real risk of an unsafe verdict. As this approach required an analysis of both the defect and its impact, para (c) and the proviso were thus fused.

**CPA232.06 Subsection 4(b): trial is unfair**

The appeal court must allow an appeal if satisfied that an error, irregularity or occurrence in or in relation to or affecting the trial has resulted in an unfair trial: subs (4)(b). The right to a fair trial is an absolute right which is affirmed by s 25(a) of the New Zealand Bill of Rights Act 1990: *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300, (2006) 22 CRNZ 755 at [77].

The assessment of the fairness of a trial is to be made in relation to the trial overall: *Condon v R*, above, at [78]. In that case, the Supreme Court noted that:
“A verdict will not be set aside merely because there has been an irregularity in one, or even more than one, facet of the trial. It is not every departure from good practice which renders a trial unfair, as Lord Bingham made clear in a passage in Randall, which was referred to with approval in Howse. He said that it is at the 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 unfair and quash the conviction as unsafe. In Howse it was said that this approach is one of general application.”

There will be no miscarriage of justice arising from an unfair trial where the appellant has knowingly waived the relevant fair trial right: see Sharma v R [2006] NZSC 81 (waiver of a procedural right) and R v McCosker [2010] QCA 52, (2010) 199 A Crim R 462 (waiver of right to an impartial jury). Conduct subsequent to a fair trial cannot retrospectively taint the trial: R v Petch [2005] EWCA Crim 1883, [2005] 2 Cr App R 40 (later disparate treatment of co-offender not affecting fairness of trial).

There may be cases where a defect in the trial causes an unacceptable appearance of unfairness without actual prejudice to the defendant: see, for example, James v R [2011] NZCA 219, [2012] 1 NZLR 353 at [20] (failure to properly address the question of a juror’s capacity to act as a juror created a risk of a miscarriage of justice even though the verdict would have stood had the issue been explored and the juror discharged) and R v Walker 2010 SKCA 84, (2010) 258 CCC (3d) 36 at [19] (convictions quashed where the Judge had twice met with counsel in the defendant’s absence and suggested that the case be resolved by a negotiated guilty plea).

See also [CPA232.09]–[CPA232.13].

CPA232.07 Subsection (4)(b): trial is a nullity

There has been little judicial discussion of the concept of “nullity”.

Nullity concerns cases where some fundamental procedural error has occurred: This includes where a conviction is entered after a trial in a court that has no jurisdiction to try the offence: R v O (No 2) [1999] 1 NZLR 326, also reported as R v Accused (CA47/98) (1998) 18 CRNZ 622 (CA) at 328, 625; or where the charge does not disclose a criminal offence: R v Fonotia [2007] NZCA 188, [2007] 3 NZLR 338, (2007) 23 CRNZ 459. In R v Harris [2008] NZCA 300 the Court of Appeal questioned, but did not finally decide, whether a trial that is wrongly continued with 10 jurors (see now Juries Act 1981, s 22(1A)) becomes a nullity at that point.

By contrast a less fundamental procedural error will not make the proceedings a nullity: see further s 379 and associated commentary, under which proceedings are not to be questioned for want of form unless the court is satisfied that there has been a miscarriage of justice. Section 379 cannot be used to cure defects that are so radical that the proceedings should be seen as no more than a nullity: Hall v Ministry of Transport [1991] 2 NZLR 53 (CA) at 58; Police v Thomas [1977] 1 NZLR 109 (CA) at 121.

The Act includes specific provisions to protect the validity of proceedings where the court has acted in error or without jurisdiction: see s 14(3) (proceeding not invalid only because charging document not filed in correct District Court); s 69 (proceeding not invalid only because protocol offence not identified and considered in accordance with s 67 and 68); s 187(5) (proceeding not invalid only because not conducted in accordance with Crown Prosecution Regulations 2013); s 380 (proceeding not invalid only because defendant should have been dealt with in Youth Court); s 382(3) (no act done without prescribed fee being paid invalid by reason only of the non-payment of the fee); s 401 (proceeding not invalid only because wrongly conducted in accordance with old law).

A court hearing an appeal from a conviction following a trial which was a nullity because the court lacked jurisdiction should not amend the charges to cure the jurisdictional defect: Hedges v Police HC Whangarei CRI-2009-488-49, 9 September 2010 at [37]–[38].

CPA232.08 Inconsistent verdicts

The court may allow an appeal against a guilty verdict on one charge if it is inconsistent with a not guilty verdict on another charge. The principles were summarised in Dempsey v R [2013] NZCA 297 at [17]–[18]:

(a) The general principle is that a conviction is unsafe if no reasonable jury, properly instructed, could have arrived at the conclusion that was reached: R v Shipton [2007] 2 NZLR 218 (CA) at [75] citing R v Stone [1955] Crim LR 120 (Crim App) per Devlin J.

(b) An appellate court can only intervene if the appellant has discharged the burden of demonstrating that the only explanation for the inconsistency is that either the jury was confused, or it adopted the wrong approach: R v Shipton, above, at [75].
The court generally ought to be reluctant to interfere with a jury verdict given the respect for the functions which the law assigns to juries, and the general satisfaction with their performance: R v H [2000] 2 NZLR 581, (2000) 18 CRNZ 432 (CA) at [28]–[30].

The appellant must show a prima facie inconsistency: R v Shipton, above, at [76]. A verdict cannot truly be said to be inconsistent unless it can be seen that a common ingredient of the crimes in issue must have been differently found by the jury: B (CA862/11) v R [2012] NZCA 602 at [10](a) citing R v Irvine CA234/87, 4 March 1988.

If a prima facie inconsistency is established, the court must then inquire whether there is any rational or logical explanation for the inconsistent verdict. It is only when no reasonable jury applying their minds properly to the evidence could have arrived at the conclusion that it reached, that the verdicts cannot stand together: B (CA862/11) v R, above, at [10](c).


Inconsistency is unsustainable if the different verdicts indicate that the jury must have accepted certain evidence in relation to one charge but rejected the same evidence in relation to another: R v Maddix CA424/00, 1 March 2001 at [22]. Similarly, there will be unsustainable inconsistency if it is apparent the jury accepted a defence advanced by the defendant in relation to one charge but, on the same evidence, did not accept it in relation to another: Vaigalepa v R [2011] NZCA 168 at [8]. The court is not likely to find inconsistency where the jury may have taken into account on one charge a defence on which the defendant did not rely but which was left to the jury in the summing-up: R v Ethio CA146/06, 9 August 2006.

Apparent inconsistency is not enough. There is no inconsistency where verdicts are reconcilable because of differences in the relevant elements of the charges (as in R v Irvine, above) or differences in the nature and quality of the admissible evidence (as in R v K CA49/96, 13 August 1996 and R v Jack-Kino CA44/95, 22 May 1996). Nor is there any necessary inconsistency where the jury may simply have found a witness’s evidence credible on one charge but not on another: R v Stewart CA515/05, 15 August 2006. An apparent inconsistency may be unobjectionable if it appears that an acquittal reflects the jury’s innate sense of justice rather than a deficiency in the proof: R v H, above; R v Foley CA287/94, 24 July 1996; MacKenzie v R [1996] HCA 35, (1996) 190 CLR 348.

It will generally be difficult to demonstrate inconsistency between verdicts reached in respect of alleged co-offenders or co-conspirators. Inconsistency will usually require that the same jury have apparently made different findings as to guilt in the light of identical evidence: Osland v R [1998] HCA 75, (1998) 197 CLR 316; [CA3]01.10. If there were separate trials or significant differences between the cases against the various defendants, inconsistency will be hard to establish. The court must look to any differences in the evidence admissible against each: R v Pittiman 2006 SCC 9, [2006] 1 SCR 381 at [7]–[10]; or in the circumstances and merits of any defence each relied on: R v Ahmad (2000) 146 CCC (3d) 506 (ONCA) at 510.

The conviction of one defendant as a secondary party to an offence is not inconsistent with the acquittal of the alleged principal where it is certain that the offence took place but the identity of the principal offender is not proved to the requisite standard: Stewart v R [2011] NZSC 62, [2012] 1 NZLR 1 at [5]. Conviction of a defendant as a secondary party is unsustainable where the acquittal of the alleged principal — at the same or at a different trial — is only explicable on the basis of there being real doubt whether the offence was ever committed: see Stewart v R, above, at [6].

For an extended discussion of inconsistent verdicts, see [TP23].

**CPA232.09 Improper judicial intervention in trial or other indication of bias**


Where it is alleged that judicial intervention in the course of the trial or the content or delivery of the summing-up has deprived the defendant of a fair trial, affidavit evidence of the events of the trial may be filed, although it is preferable to proceed on the basis of a memorandum agreed by counsel: R v Fotu, above, at 134, 182. Where affidavit evidence is tendered, it should be objective and should avoid the subjective views of the deponent: R v Fotu, above, at 134, 182; R v Lomolli, above, at 670, 25.
Disqualifying bias may arise in other ways: see generally [TP25]. In determining whether a judge’s prior knowledge of the defendant’s history or circumstances might give rise to a “real danger or real likelihood” of bias, account must be taken of the normal expectation that a trial judge will be likely to be acquainted with such matters through the normal operation of the court process: R v Ellis CA31/97, 4 June 1997; R v Thompson [2005] 3 NZLR 577 (CA). Bias is not to be presumed because a judge has earlier considered in other proceedings a legal point now in issue: see Taunoa v Attorney-General [2006] NZSC 94 at [4].

**CPA232.10 Improper disclosure of material that is prejudicial to the defendant**

Improper disclosure of material that is prejudicial to the defendant may make a trial unfair.

If the disclosure has occurred before trial, the normal remedy will be to seek a change of venue (as to which see s 157) and/or a stay of proceedings. A defendant who has not sought a change of venue to avoid alleged prejudicial effects on the trial, such as the effect of pre-trial publicity, will rarely be able to raise a claim after conviction that such factors produced a miscarriage of justice: R v Coghill [1995] 3 NZLR 651, (1995) 13 CRNZ 258, 2 HRNZ 125 (CA) at 662, 271, 140.

If prejudicial material is published during the trial which comes to the attention of the jury or individual jurors, there may be a miscarriage of justice if the impact of such material is too great to be remedied by appropriate judicial direction: R v Wickliffe CA480/97, 9 September 1998. A failure to raise with the trial judge media reports that might improperly influence the jury is likely to be fatal to a claim that reports caused a miscarriage of justice: Down v R [2011] NZCA 138 at [27]. The Court of Appeal has indicated that concerns as to the impact of pre-publicity may in the past have been overstated: R v Middleton CA218/00, 26 September 2000 at [12]; R v Curtis CA224/06, 10 August 2006 at [16].

Material that is prejudicial to the defendant may also be improperly disclosed at the trial. This issue has generally arisen with inadvertent disclosure in evidence given by a witness that the defendant has previously been convicted of other offences, but may also arise where documents referring to that prejudicial material have been accidentally included in material to which the jury has access (as, for example, in R v Osborne [2009] NZCA 53). The issue has also arisen when evidence has been heard at trial in relation to charges that do not proceed (as, for example, in Storey v R [2013] NZCA 500). The judge may decide to continue the trial rather than discharge the jury (as to which see [TP14.02]) if the judge considers an appropriate direction as to the irrelevance of that information will remedy any prejudice: R v Thompson [2006] 2 NZLR 577 (CA) and (SC), also reported (Supreme Court only) as T v R (2006) 22 CRNZ 981 (SC). See also R v Rongonui [2000] 2 NZLR 385, (2000) 17 CRNZ 310 (CA) at [26].

In respect of the disclosure of a defendant’s previous convictions, much will turn on the nature of the defence case and whether the defence is significantly affected by the disclosure of the prior history. See, for example, R v Rongonui, above, where the real issue was the defendant’s state of mind, and the evidence of the prior convictions was “overwhelmed by the context” and did not significantly affect the defence. The position might be different if the jury were likely to use the defendant’s prior history illegitimately, for example to support a disputed identification (R v Rongonui, above, at [24]) or to reject exculpatory evidence given by the defendant. Particular care may be needed where evidence at the trial inevitably reveals that the defendant is a prison inmate at the time of trial. If the defendant is at that time on remand awaiting trial, the judge should explain this, and its significance, to the jury: Byles v R [2010] NZCA 255 at [19]–[20].

**CPA232.11 Conduct of defence counsel**

(1) **General approach**

In Sunguswan v R [2005] NZSC 57, [2006] 1 NZLR 730, (2005) 21 CRNZ 977 at [70], the Supreme Court emphasised the need for an appeal court considering any appeal on this basis to retain its focus on the question of whether a miscarriage of justice has occurred, rather than focussing on whether there were shortcomings in counsel’s performance and how those shortcomings might be characterised:

“…while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel’s conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.”

See also R v Scurrah CA159/06, 12 September 2006 at [17]–[20] where the Court of Appeal summarised the approach required by the majority in Sunguswan v R, above, as follows:
The approach appears to be, then, to ask first whether there was an error on the part of counsel and, if so, whether there is a real risk that it affected the outcome by rendering the verdict unsafe. If the answer to both questions is ‘yes’, this will generally be sufficient to establish a miscarriage of justice.

On the other hand, where counsel has made a tactical decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the outcome of the trial. This reflects the reality that trial counsel must make decisions before and during trial, exercising their best judgment in the circumstances as they exist at the time. Simply because, with hindsight, such a decision is seen to have reduced the chance of the accused achieving a favourable outcome does not mean that there has been a miscarriage of justice. Nor will there have been a miscarriage of justice simply because some other decision is thought, with hindsight, to have offered a better prospect of an outcome favourable to the accused than the decision made.

This analysis will be sufficient to deal with most cases. “But there will be rare cases where, although there was no error on the part of counsel (in the sense that what counsel did, or did not, do was objectively reasonable at the time), an appeal will be allowed because there is a real risk that there has been a miscarriage of justice.”

Appeal courts view allegations against defence counsel by a convicted person sceptically, on the basis that there is a natural tendency of those rightly convicted to blame their counsel, rather than themselves, for their predicament: 


For an extended discussion of defence counsel conduct at trial, see [TP24.08]–[TP24.16]. For an appeal to be allowed under s 232, it will need to be shown that the conduct created a real risk that the outcome of the trial was affected (subs (4)(a)) or that it resulted in an unfair trial (subs (4)(b)). For the approach taken under the repealed s 385 of the Crimes Act 1961, see [CAS385.13] (archived commentary, online only).

The court will normally order a retrial if an appeal against conviction is allowed because of the conduct of the appellant’s trial counsel: 

R v J (CA360/06) [2007] NZCA 141 at [20]–[21].

(2) Formal requirements for such appeals

The formal requirements for an appeal on the basis of trial counsel’s conduct are set out in r 12A of the Court of Appeal (Criminal) Rules 2001 and r 8.7 of the Criminal Procedure Rules 2012.

If the appellant wishes to waive privilege under s 65 of the Evidence Act 2006, the appellant must provide a written waiver of privilege in respect of those communications. In cases where privilege is not waived and the court is unable to resolve factual issues, the court is entitled to take into account the fact that the appellant could have adduced that evidence and has not done so: 

R v E (CA113/09) [2009] NZCA 554 at [43].

The applicable rules imply fresh evidence may be called at the appeal to establish counsel error or its absence. See further [CPA335.02(3)(c)] for the admissibility of fresh evidence relating to alleged counsel error.

It is usual for the appellant also to file an affidavit setting out his or her account of facts in issue. In 

R v Burns [2007] NZCA 308 at [31], the Court of Appeal indicated that it is likely to refuse to accept an affidavit from an appellant who declines to be cross-examined on it.

The Court of Appeal has given guidance to trial counsel and counsel on appeal as to the manner in which issues as to trial counsel’s conduct should be explored: see 

R v Clode [2008] NZCA 421, [2009] 1 NZLR 312 at [28]–[32]. This is the revised judgment following recall of the original: see 

R v Clode CA156/08, 15 October 2008. Where an appellant alleges trial counsel error, the merits of that ground must be re-evaluated by appellate counsel in the light of any material disclosed by trial counsel following a waiver of privilege, to determine whether the ground can properly be advanced: 

R v Hunter [2009] NZCA 249 at [16].

It will rarely be appropriate to deal with an appeal alleging trial counsel error without an oral hearing: 


CPA232.12 Conduct of prosecutor

Improper conduct when instituting the prosecution may mean the trial is unfair: see, for example, 

R v Mullen [2000] QB 520 (CA) at 535–536, where the prosecution had unlawfully procured the appellant’s return to England. Such pre-trial matters may also be the subject of an application for a charge’s dismissal under s 147: see further [CPA147.08] and [CPA147.09].
Improper behaviour at the trial may render the trial unfair. Prosecuting counsel are expected to present the case “dispassionately and with scrupulous fairness”, because a lack of fairness by the prosecutor may mean that the trial becomes unfair and because of the professional obligations of prosecutors: see Rules of Professional Conduct for Barristers and Solicitors (7th ed, New Zealand Law Society, Wellington, 2004), at r 9.01; [TP24.01]–[TP24.02]. The relevant law and principles are discussed in Stewart v R [2009] NZSC 53, [2009] 3 NZLR 425, (2009) 24 CRNZ 774.

Jury addresses should not be couched in terms that invite unfair prejudice against the defendant and thereby undermine the fairness of the trial: T (CA483/12) v R [2013] NZCA 298 at [17]. Introduction by prosecuting counsel of factors of prejudice or emotion may cause a miscarriage of justice: Stewart v R, above; R v Routston [1976] 2 NZLR 644 (CA); R v Thomas CA305/98, 15 December 1998. Nor should the prosecutor in closing refer to irrelevant or inadmissible evidence: T (CA483/12) v R, above, at [20]. In some cases prompt, firm and clear directions from the judge may negate the impact of improper behaviour by the prosecutor: see R v Hodges CA435/02, 19 August 2003; R v E (CA242/03) CA242/03, 9 October 2003.


Prosecuting counsel should not make comments which criticise the defendant for exercising the right to counsel afforded by law: R v Pananti [2000] 1 NZLR 234, (1999) 17 CRNZ 519 (CA) at [23] (counsel criticised the credibility of a defendant’s video interview because it was given after the defendant had consulted a lawyer); R v White (1999) 132 CCC (3d) 373 (ONCA) at 382 (the defendant’s evidence at trial was challenged based on alleged “advantages” of pre-trial disclosure). The position may be different where the disclosure issue is opened up by the defence: R v Cavan (2000) 139 CCC (3d) 449 (ONCA) at 464–465.

Where the prosecutor may legitimately invite a jury to disbelieve an explanation given out of court and not confirmed by testimony at trial, the invitation should be made in appropriate terms and without the use of inflammatory and pejorative language: R v Shaw CA429/99, 28 March 2000; Benedetto v R [2003] UKPC 27, [2003] 1 WLR 1545 at [55]. A prosecutor should not accuse a witness of having a motive to lie without there being an appropriate evidential foundation for the accusation: Stewart v R, above, at [26]. In R v E (CA308/06) [2007] NZCA 404, [2008] 3 NZLR 145, (2007) 23 CRNZ 976 at [96], the Court of Appeal emphasised the importance of observing this rule in relation to challenges to the evidence of a defendant, noting that it is wrong and unfair for the prosecutor to suggest that the defendant’s evidence should be scrutinised more closely simply because he or she is the defendant.

**CPA232.13 Delay**

A miscarriage of justice will occur if a delay in the bringing of proceedings has caused the trial to be unfair: R v Accused [1991] 3 NZLR 405 (CA) at 407. In such cases, the court can review the question of unfairness in the light of events at the trial: R v W [1995] 1 NZLR 548 also reported as R v Accused (1994) 12 CRNZ 500 (CA) at 553, 502. While delay may give rise to prejudice, the question is always whether prejudice may properly be inferred on the facts of the particular case: R v Accused (CA260/92) [1993] 2 NZLR 286 (CA) at 288. See also R v Hughes CA470/96, 28 May 1997 and R v Ewart CA451/96, 31 July 1997.

See further [CPA147.10].

**CPA232.14 Appeal following guilty plea**

Section 232 specifically caters for the possibility of an appeal against conviction following a guilty plea. The grounds of appeal available in subs (4) apply as if the “trial” was the proceeding in which the defendant pleaded guilty: subs (5).

It is only in exceptional circumstances that an appeal against conviction will be entertained after a plea of guilty. An appellant must in effect show that a miscarriage of justice will result if the conviction is not overturned: R v Le Page [2005] 2 NZLR 845 (CA) at [16]. In R v Proctor [2007] NZCA 289 at [4], the Court of Appeal framed the essential issue on such appeals as whether a miscarriage of justice will result unless [the appellant] is able to impugn his pleas of guilty. For the English law on this point, see R v Chalkley [1998] QB 848, [1998] All ER 155 (CA); R v Thomas [2000] 1 Cr App R 447 (CA); R v Togher [2001] 1 Cr App R 33 (CA).

An appeal will rarely succeed where the defendant has had competent and correct legal advice before the plea: R v Stretch [1982] 1 NZLR 225 (CA) or, except in “very rare circumstances”, if the court is satisfied that the plea was made freely and on an informed basis: R v Merrilees [2009] NZCA 59. This includes if the defendant has an arguable defence which he or she chose not to advance after proper advice about the charges and the quality of the defence: Hussein v R [2011] NZCA 58 at [22]. Leave will not be given if the guilty plea was
entered by a competent defendant who had no viable defence: *R v Ericson* [2007] NZCA 18. A more relaxed view may be taken by the court if a defendant was unrepresented when the plea was made: *Udy v Police* [1964] NZLR 235 (SC).

The circumstances in which an appeal against conviction following a guilty plea may be allowed can be broadly summarised as follows:

1. **If the appellant did not appreciate the nature of the charge, or did not intend to admit his or her guilt, or if on the admitted facts the appellant could not have been guilty of the offence charged:** See *Udy v Police*, above; *R v Taylor* [1967] NZLR 577 (SC); *R v Chalkley*, above. In determining whether the appellant comprehended the charge or was aware of the consequences of pleading guilty the court may have regard to any prior experience of the criminal justice system which the appellant may possess: *R v Roycroft* CA312/01, 4 September 2002.

2. **If the appellant’s ability to determine whether or not to plead guilty was affected by a permanent impairment or lack of capacity or by ill-health or other circumstances:** *Gardiner v Levin District Court* HC Palmerston North CIV-2006-454-630, 24 November 2006; *Leeder v Christchurch District Court* [2005] NZAR 18 (HC).

3. **If there is a possible defence to the charge of which the appellant was unaware when he or she pleaded guilty, whether because of incompetent legal advice or otherwise:** *R v Le Comte* [1952] NZLR 564 (CA); *R v Merrilees*, above; *Watts v R* [2011] NZCA 41; *Sharp v District Court at Whangarei* [1999] NZAR 221 (HC).

4. **If there is some impropriety in the conduct of the proceedings or of the prosecution:** *R v Nevin* 2006 NSCA 72, (2006) 245 NSR (2d) 52; *R v Djekic* (2000) 147 CCC (3d) 572 (ONCA). See also *Lewitzki v Police* HC Hamilton AP11797, 15 December 1997.

5. **If the plea was induced by a ruling which embodied a wrong decision on a question of law.** This may most commonly arise where the judge has ruled that a particular defence is not open to the defendant on the facts (*R v Clarke* [1972] 1 All ER 219, (1972) 56 Cr App R 225 (CA)) or that certain evidence is (or is not) admissible. The preferable course in such cases is for the appellant to appeal on a question of law under s 296 or, in appropriate cases, to apply for the dismissal of the charge under s 147 rather than entering a plea of guilty “under protest” and appealing against conviction: *R v Zhang* CA153/04, 13 July 2004 at [15]. English cases hold that the court should not extend the time for appealing in such cases (see *R v Hawkins* [1997] 1 Cr App R 234 (CA)).


See also [CPA115.02].

**CPA232.14A Effect on appeal of post-conviction admissions**

Post-conviction admissions of guilt (for example, as part of the sentencing process) may lead the court to conclude that no miscarriage of justice has occurred: see *R v Vaituliao* [2007] NZCA 525; *M (CA428/09) v R* [2010] NZCA 127; *Gilfedder v R* [2013] NZCA 426. A case-by-case assessment is required having regard to the grounds of appeal and the circumstances, including the position the defendant adopted at trial and the nature of the admissions made.

**CPA232.16 Appeal relying on ground not taken at trial**

It is not necessarily fatal to an appeal if the point being challenged on appeal was not raised by counsel at trial: see *R v Paika* [1998] 3 NZLR 587 (CA) at 591; *Gamble v R* [2012] NZCA 91 at [34]–[36].

Generally, an appellant will not normally be permitted to have a conviction set aside on the basis that the appellant had a defence available which he or she had not advanced at the trial. The policy basis for the rule was enunciated by Lord Taylor LCJ in *R v Ahluwalia* [1992] 4 All ER 889, [1993] 96 Cr App R 133 (CA) at 899–900, 142 (cited in *R v Power* CA187/96, 22 October 1996):

“… otherwise … defendants might be encouraged to run one defence at trial in the belief that if it fails, this court would allow a different defence to be raised and give the defendant, in effect, two opportunities to run different defences.”

The underlying test is the interests of justice: see *R v Power*, above.
For limitations on an appellant’s ability to challenge the admissibility of evidence admitted without objection at trial, see R v P [1996] 3 NZLR 132 (CA) at 135.

233 Orders, etc, on successful first appeal

(1) This section applies if a first appeal court allows a first appeal under this subpart.

(2) The court must set aside the conviction.

(3) The court must also—
   (a) direct that a judgment of acquittal be entered; or
   (b) direct that a new trial be held; or
   (c) exercise the powers under section 234; or
   (d) exercise the powers under section 235(2); or
   (e) make any other order it considers justice requires.

(4) The court may also exercise the powers under section 236.

Compare: 1961 No 43 ss 385(2), 386

CPA233.03 Subsection (3)(e): any other order that justice requires

In R v Morris [2007] NZCA 578, (2008) 23 NZTC 21,790 at [15], the Court of Appeal left open the question of whether it has power to make orders imposing limitations on the form a retrial might take (eg, by limiting the evidence that may be adduced). Overseas appeal courts have held that they may impose conditions on retrials: see, for example, R v Warsing [1998] 3 SCR 579, (1998) 130 CCC (3d) 259; R v Pearson [1998] 3 SCR 620, (1998) 130 CCC (3d) 293. These conditions may include requiring the trial to be limited to particular offences, whether or not those offences were originally charged: AJS v R [2007] HCA 27, (2007) 235 CLR 505 at [15].

A stay is a “rare and exceptional remedy”: R v Vaihu [2010] NZCA 145 at [55]. The court may order a stay of proceedings where there is a credible case against the appellant but no purpose would be served by a retrial or a retrial could not be fair: R v Yorston [2008] NZCA 285 at [25]; R v Collier (1996) 14 CRNZ 439 (CA). A stay following undue delay is the correct remedy only where the delay was egregious or due to prosecutorial misconduct: Hancock v R [2012] NZCA 292 at [37].

CPA233.04 Considerations particular to a conviction entered in a judge-alone trial

Under the repealed s 131 of the Summary Proceedings Act 1957, the High Court on appeal was able to direct a rehearing of the information in the District Court. This has been replaced by the power to order a retrial under subs (3)(b).

If a conviction is set aside on the basis of judicial bias or excessive questioning by the trial judge, the proper course is to direct that the retrial be conducted before another judge, unless there is some special reason to the contrary: EH Cochrane Ltd v Ministry of Transport [1987] 1 NZLR 146, (1987) 3 CRNZ 38 (CA).

234 Conviction and sentence for different offence may be substituted

(1) Subsection (2) applies if a person was found guilty at trial of an offence (offence A) and the first appeal court allows the convicted person’s appeal against conviction for that offence.

(2) The first appeal court may direct that a judgment of conviction for a different offence (offence B), including an offence that the trial court could, in accordance with section 136(1), have substituted for offence A, be entered if satisfied that—
   (a) the person could have been found guilty, at the person’s trial for offence A, of offence B; and
   (b) the trial judge or the jury, as required, must have been satisfied of facts that prove the person guilty of offence B.