

Position Paper | Unreasonable Verdict

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Te Whāinga Matua | Purpose

1. This Position Paper sets out, in broad terms, the approach the Criminal Cases Review Commission | Te Kāhui Tātari Ture (Te Kāhui) will take when dealing with applications where the applicant has alleged that one or more of their guilty verdicts were unreasonable.
2. This Paper is designed to provide a summary of the key legal principles Te Kāhui will generally apply to applications that fall within the scope of this Paper.

Te Tūranga | Position

Overview

3. Where an applicant has already unsuccessfully raised unreasonable verdict(s) as a ground of appeal, Te Kāhui will review the approach taken by the appeal court and any new evidence. Where an applicant has not appealed, Te Kāhui will consider the approach that the appeal courts would likely take to such an appeal in order to inform the wider “interests of justice” assessment. However, while Te Kāhui faces the same disadvantage of the appeal court of having to rely on the written record of the trial, Te Kāhui also has investigative powers which may assist in determining whether a verdict was unreasonable.
4. The usual approach taken by appeal courts is that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied beyond reasonable doubt that the accused was guilty.¹ The test is different in respect of judge-alone trials. If the trial was before a judge-alone, a verdict was unreasonable if the appeal court comes to a different view of the evidence.²
5. Inconsistent verdicts can either be factual or legal. In relation to factual inconsistencies, a verdict will be inconsistent in circumstances where no reasonable jury could have arrived at different

¹ *Owen v R* [2007] NZSC 102 at [17].

² *Sena v Police* [2019] NZSC 55 at [38].

verdicts on the two different charges.³ An inconsistent verdict will generally be an unreasonable verdict.⁴

Role of Te Kāhui

6. The primary function of Te Kāhui is to investigate and review convictions and sentences to decide whether to refer them to an appeal court.⁵
7. A conviction or sentence may only be referred to an appeal court if Te Kāhui considers that it is in the interests of justice to do so.⁶
8. In deciding whether it is in the interests of justice to refer the case to the appeal court, the law requires Te Kāhui to consider the following matters:⁷
 - a. whether the eligible person has exercised their rights of appeal against the conviction or sentence;
 - b. the extent to which the application relates to argument, evidence, information, or a question of law raised or dealt with in proceedings relating to the conviction or sentence;
 - c. the prospects of the court allowing the appeal; and
 - d. any other matter that Te Kāhui considers relevant.
9. This position paper effectively relates to the third matter: the prospects of the court allowing the appeal.

Unreasonable verdict appeals

10. Because Te Kāhui must consider the prospects of an appeal court allowing an appeal, it is important to set out the approach appeal courts take when considering appeals argued on the ground that a verdict was unreasonable.
11. The approach taken by the appeal courts differs depending on whether the appellant was convicted by a jury in a jury trial, or by a Judge in a Judge-alone trial.

Jury trial

12. In the case of a jury trial, the appeal court must allow the appeal if satisfied that “having regard to the evidence, the jury’s verdict was unreasonable”.⁸ A verdict will be unreasonable if, having regard

³ *B (SC12/13) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [68].

⁴ At [68].

⁵ Criminal Cases Review Commission Act 2019, section 11.

⁶ Section 17(1).

⁷ Section 17(2).

⁸ Criminal Procedure Act 2011, section 232(2)(a).

to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.⁹

13. Appeal courts perform a review function and do not substitute their own view of the evidence.¹⁰ Appeal courts do not conduct a retrial on the written record,¹¹ and must give appropriate weight to advantages that the jury may have had. For example, the jury is best placed to assess the honesty, credibility and reliability of witnesses.¹² This is because the jury has the advantage of seeing and hearing witnesses over the course of the trial, whereas the appeal court must rely only on the written record. The weight given to individual pieces of evidence is essentially the jury's function, and reasonable minds may disagree on matters of fact.¹³ As it is the jury's role to be the finder of facts, appeal courts will not lightly interfere in this area.¹⁴
14. Given the advantages a jury has in seeing and hearing the witnesses, there is little scope for appeal courts to challenge a jury's verdict for unreasonableness where the verdict is largely based on credibility findings.¹⁵ Such verdicts would likely only be overturned where there is evidence that clearly contradicts the witness, or in cases of "glaring improbability".¹⁶ Inconsistencies between eyewitnesses about how events unfolded are unlikely to be sufficient to make a verdict unreasonable, provided there remains sufficient evidence on the elements of the offence for the jury to be legitimately sure of the accused's guilt.¹⁷

Judge-alone trial

15. In the case of a Judge-alone trial, an appeal court is required to form its own view of the facts.¹⁸ However, the appeal is not a "de novo" hearing and the appellant must show an error has been made.¹⁹ In assessing this, the appeal court must consider any advantage the trial Judge may have had – for example, in making credibility findings.²⁰ Appeals challenging credibility findings must be treated with "customary caution".²¹ The Judge is best placed to determine contested questions of fact based on contested oral evidence.²² The appeal court must allow the appeal if it comes to a different view on the evidence to the trial Judge²³ and "the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice occurred".²⁴

⁹ *Owen v R*, above n 1, at [17].

¹⁰ At [13], (endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87).

¹¹ At [13], (endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87).

¹² At [13], (endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87).

¹³ At [13] (endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87).

¹⁴ At [13] (endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87).

¹⁵ *P (CA84/17) v R* [2017] NZCA 319 at [49].

¹⁶ *R v Patel* [2009] NZCA 102 at [78].

¹⁷ *Edwards v R* [2018] NZCA 93 at [19].

¹⁸ *Sena*, above n 2, at [20] and [32].

¹⁹ At [38].

²⁰ At [38].

²¹ At [38].

²² At [40].

²³ At [38].

²⁴ Criminal Procedure Act 2011, section 232(2)(b).

16. A miscarriage of justice occurs where there is an error or irregularity that either created a real risk that the outcome of the trial was affected, or that has resulted in an unfair trial or a trial that was a nullity.²⁵
17. Unlike a jury, a judge is required to give reasons for their verdict. The reasons must address the substance of the case advanced by the “losing party”.²⁶ However, the reasons do not necessarily have to refer to every argument advanced by that party.²⁷

Inconsistent verdicts

18. Inconsistent verdicts can either be factual, meaning two verdicts cannot stand together given the evidence, or legal, meaning the verdicts cannot stand together as a matter of law.²⁸ In relation to factual inconsistencies, a verdict will be inconsistent in circumstances where no reasonable jury could have arrived at different verdicts on the two different charges.²⁹ An inconsistent verdict will generally be an unreasonable verdict. A court may allow an appeal if it finds a guilty verdict on one charge to be inconsistent with a not guilty verdict on another charge.
19. Courts are reluctant to conclude that a jury’s verdicts are inconsistent.³⁰ The jury is responsible for finding the facts in a case, and appeal courts do not interfere lightly in this area.³¹ Where there is some evidence to support the verdict that the appellant alleges is inconsistent, the court will generally not substitute its view for that of the jury.³² The appeal court will only intervene where the different verdicts show “an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury’s duty”.³³
20. Verdicts are not necessarily inconsistent where a jury found a witness’ evidence credible on one charge but not another³⁴ or where evidence from a witness proves some, but not all charges.³⁵ If verdicts are reconcilable due to differences in the elements of the charges,³⁶ or differences in the required mental elements³⁷ there will be no inconsistency. Further, if the inconsistency appears to be due to the jury’s innate sense of justice or as an exercise of mercy rather than a lack of evidence or illegitimate compromise, the inconsistency may be unobjectionable.³⁸

²⁵ Section 232(4).

²⁶ *Sena*, above n 2, at [37].

²⁷ At [37].

²⁸ *B (SC12/13) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [68].

²⁹ At [68].

³⁰ At [68].

³¹ *Owen*, above n 1, at [13].

³² *B (SC12/13) v R*, above n 29, at [68].

³³ At [68].

³⁴ *R v Stewart* CA515/05, 15 August 2006 at [22].

³⁵ *Mahupuku v R* [2015] NZCA 510 at [36]-[37].

³⁶ *R v Irvine* [1976] 1 NZLR 96 (CA).

³⁷ *R v Foley* CA287/94, 24 July 1996.

³⁸ *B (SC12/13) v R*, above n 35, at [91]-[92] and [99].

21. However, a verdict will likely be unreasonable if a jury has accepted evidence in relation to one charge and rejected the same evidence in relation to another charge.³⁹ Similarly, a verdict will likely be unreasonable if a jury has accepted a defence in relation to one charge but not another.⁴⁰
22. In relation to alleged co-offenders or co-conspirators, it will generally be difficult to establish there were inconsistent verdicts. This will generally require the jury making different findings of guilt in light of the same evidence.⁴¹ Separate trials or key differences in the cases against each accused will mean that it is hard to establish there were inconsistent verdicts. A guilty verdict against an accused charged as a secondary party to an offence is not inconsistent with the acquittal of the principal where it is certain the offence took place, but the identity of the principal is not proved.⁴² However, a guilty verdict against a secondary party is unsustainable where the principal is acquitted on the basis that there is doubt as to whether the offence was committed.⁴³
23. The courts have left open whether inconsistent outcomes, such as a guilty verdict and a failure to reach a verdict, will render the guilty verdict unreasonable.⁴⁴

Position of Te Kāhui

24. If an applicant has already unsuccessfully raised unreasonable verdict(s) as a ground of appeal, Te Kāhui will assess the approach taken by the appeal court and any new evidence. The applicant should endeavour to show that the jury's verdict was unreasonable on the evidence, or that the Judge made an error in their assessment of the evidence to the extent that a miscarriage of justice has occurred. Any fresh evidence suggesting that a verdict was unreasonable should be provided as part of the application to Te Kāhui.
25. If the applicant has not previously raised this issue on appeal, Te Kāhui will consider the approach that the appeal courts would likely take to such an appeal (outlined above). This will help inform the wider "interests of justice" assessment that Te Kāhui must consider when deciding whether to refer a case back to the appeal court.⁴⁵
26. Te Kāhui will treat arguments that a verdict was unreasonable due to the honesty, reliability or credibility of a witness with the same caution as the appeal courts. While Te Kāhui faces the same disadvantage of the appeal court of having to rely on the written record of the trial, Te Kāhui also has investigative powers which may assist in determining whether a verdict was unreasonable.

³⁹ *R v Maddox* CA424/00, 1 March 2001 at [22]; *Martin v R* [2020] NZCA 84.

⁴⁰ *Vaigalepa v R* [2011] NZCA 168 at [8].

⁴¹ *Osland v R* [1998] HCA 75, (1998) 197 CLR 316.

⁴² *Stewart v R* [2011] NZSC 62, [2012] 1 NZLR 1 at [5].

⁴³ *Stewart v R* [2011] NZSC 62, [2012] 1 NZLR 1 at [6].

⁴⁴ *B (SC12/13) v R*, above n 35 at [29]; and *Kulimoenga v R* [2016] NZCA 129 at [22].

⁴⁵ Criminal Cases Review Commission Act 2019, section 17(1).

27. This Position Paper will not be applied in isolation. There may be other relevant considerations that affect the decision of Te Kāhui to accept or progress an application, including other Position Papers that may be applicable.

Assistance with preparing an application

28. Applications may be submitted by an applicant or their representative (such as a lawyer or support person).
29. If a potential applicant or their representative requires any assistance in preparing an application, or have any questions, Te Kāhui staff are available to help. The applicant and/or representative can contact Te Kāhui by:
 - a. Calling – 0800 33 77 88 (this is a freephone call, please call Monday to Friday, 9am-5pm)
 - b. Email – info@ccrc.nz
30. While an applicant does not need a lawyer to apply to Te Kāhui, they may wish to engage a lawyer to assist them with preparing their application. Legal Aid may be available to an applicant who wishes to engage a lawyer when applying to Te Kāhui. Applicants who wish to access Legal Aid should call the Ministry of Justice on 0800 2 LEGAL AID (0800 253 425) for assistance with making an application for Legal Aid.