NOTE: ORDER MADE IN THE HIGH COURT PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF WITNESSES PURSUANT TO SECTION 202 CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA663/2014
[2016] NZCA 343

BETWEEN	DILLIN PAKAI Appellant
AND	THE QUEEN Respondent

CA554/2014

BETWEEN	SHANE PIERRE HARRISON Appellant
AND	THE QUEEN Respondent

Hearing:	8 June 2016
Court:	Randerson, Harrison and Stevens JJ
Counsel:	K R Smith and C J Tennet for Appellant (CA663/2014) CWJ Stevenson and S J Gill for Appellant (CA664/2014) G J Burston for Respondent
Judgment:	20 July 2016 at 10.15 am
Reissued:	22 July 2016

JUDGMENT OF THE COURT

A The appeals against conviction are dismissed.

B The appeal in CA663/2014 against the minimum period of imprisonment is dismissed.

REASONS OF THE COURT

(Given by Harrison J)

Contents

Introduction

[1] Dillin Pakai and Shane Harrison were found guilty of murdering Alonsio Matalasi and of discharging a firearm with reckless disregard following a trial before Mallon J and a jury in the High Court at Wellington. Mr Pakai pleaded guilty before trial to two separate charges of recklessly discharging a firearm in a related incident. Both men were convicted and sentenced to life imprisonment. Mr Pakai was sentenced to a minimum period of imprisonment of 12 years and three months; Mr Harrison was sentenced to a minimum period of 13 years and three months.

[2] Messrs Pakai and Harrison appeal against their convictions on the primary grounds that the jury's verdicts were unreasonable, the Judge misdirected the jury, the prosecutor misconducted himself, and a miscarriage of justice arose from the admission of intercepted communications.

[3] Mr Pakai appeals against the minimum period of his sentence. The Solicitor-General's appeal against Mr Harrison's finite sentence was heard separately and is yet to be determined.

Facts

[4] The essential facts are largely undisputed. The issues primarily relating to the conviction appeals arise from a contest about one part of the relevant evidence and the availability of inferences from all the facts as a foundation for a defence of self-defence.

[5] In broad outline, on the evening of 22 August 2013 Messrs Harrison and Pakai drove to a flat occupied by Mr EE and his partner, Ms MN, in Jackson Street, Petone. Mr Harrison, who was then aged 44 years, was a member of the Mongrel Mob gang; Mr Pakai, then aged nearly 19 years, was also associated with that entity as a prospect seeking to prove himself for membership.

[6] Mr EE was separately associated with a different chapter of the Mongrel Mob. He was said to be a drug dealer. He was absent when Messrs Harrison and Pakai arrived at his flat. They spoke briefly with Ms MN before she left to use a phone elsewhere to contact Mr EE. She encountered Messrs Harrison and Pakai when returning. Mr Harrison advised her to tell Mr EE that they would be back later for some drugs. After their departure Ms MN discovered that some items had gone missing from her flat including her cell phone, methamphetamine pipe, some drugs and gang regalia.

[7] Mr EE was angry to learn of the theft of Ms MN's belongings when he returned home. By then Mr Harrison had left the Petone area. Mr EE contacted him by cell phone and demanded he bring back the stolen property. In anticipation of a confrontation with Messrs Harrison and Pakai, Mr EE assembled a posse of about seven men from the Jackson Street flats. One was Mr Matalasi. Mr EE armed himself with a butcher's knife. Others were armed with a cricket bat, crowbar, gib saw, machete and an ornamental samurai sword.

[8] On his return journey to Jackson Street Mr Harrison was timed driving his motor vehicle at 159 kilometres per hour along the Hutt Road. Mr Pakai was in the front passenger's seat with a cut-down .22 rifle and 46 rounds of ammunition. At one stage he leaned out of the front passenger's window and fired shots at a bread truck which was apparently impeding the progress of Mr Harrison's vehicle. These acts were the subject of the two recklessly discharging a firearm charges to which Mr Pakai pleaded guilty.

[9] Upon arrival at Jackson Street, Mr Harrison parked his vehicle in what is known as Car Park 1. He and Mr Pakai then confronted Mr EE and seven other men in Car Park 2 onto which Mr EE's flat faced. The two car parks run parallel and are separated by a block of low level flats on a relatively narrow strip of land. Mr Harrison invited Mr EE's associates to participate in a fight. He chose a young man in Mr EE's group who was apparently also a gang prospect. The young man dropped the bat he was carrying and punched Mr Harrison in the face, almost felling him. Mr Pakai then pulled out his pistol. After a brief period of deliberation, Mr Harrison directed Mr Pakai to shoot. Mr EE's group scattered.

[10] Messrs Harrison and Pakai pursued Mr EE's group out of Car Park 2 and east on to Jackson Street. Mr Pakai fired several shots at Mr EE's group. One witness saw horizontal flashes coming out of the barrel. She also heard the shooter inquire: "Do you want a fucking bullet cunt?" The Crown evidence was that Mr Pakai fired six shots in Car Park 2 — a full complement for a firearm with a capacity for five rounds in the magazine and one in the breach.

[11] Messrs Harrison and Pakai returned to Car Park 2 before entering Mr EE's flat. While they were there Mr EE slashed the tyres of Mr Harrison's car which remained parked in Car Park 1. As Mr Harrison left the flat and returned to his car somebody said "get them, they've run out of bullets". Mr EE's group pursued Messrs Harrison and Pakai to their car and attacked them. Mr Harrison got into the driver's seat and Mr Pakai entered the front passenger's seat intending to escape the scene.

[12] During the subsequent altercation Mr Harrison sustained a serious defensive machete wound to his hand and a separate machete laceration to his head. Mr EE attacked Mr Pakai with a broken butcher's knife through the open passenger door window. Other members of his group used an assortment of weapons to attack the car. On Mr EE's evidence all members of his group withdrew except for Mr Matalasi who was said to be attacking Mr Pakai with an ornamental samurai sword.

[13] Mr Pakai fired two shots while seated in the car in Car Park 1. The Crown's case was that he would have had to reload his gun for this purpose. Both shots were at close range to Mr Matalasi. One bullet passed through Mr Matalasi's right lung and aorta. Immediately afterwards a 111 emergency call was made from Mr Matalasi's cell phone but the caller said nothing to the operator. Mr Harrison was able to drive away despite his injuries which were initially believed to be life threatening and from which he lost consciousness after being admitted to hospital.

[14] Some days later the police intercepted a discussion between Messrs Harrison and Pakai when they were in custody in a prison van on the way to court. Its tenor was that Mr Harrison instructed Mr Pakai on the availability and elements of a legal defence of self-defence. He outlined its factual basis for Mr Pakai's benefit.

Conviction

Unreasonable verdicts

(a) Appeal case

[15] The Crown's case at trial was Messrs Pakai and Harrison were guilty as principal and secondary parties respectively of murdering Mr Matalasi, either by intending to kill him or by acting recklessly as to whether death ensued from shooting him.[1]

[16] Self-defence was the principal defence run by Messrs Pakai and Harrison at trial. Their first common ground of appeal is that the jury's verdicts on the murder

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1 Crimes Act 1961, s 167(a) and (b).

charge were unreasonable in excluding self-defence. It was submitted that a reasonable jury could not in the face of evidence about the severity of the attacks on Messrs Pakai and Harrison conclude that self-defence was unavailable to them. The jury, it was said, ought reasonably to have returned a verdict of not guilty on the ground that the killing was legally justified.

[17] Within this submission counsel contended that Mallon J failed to direct the jury adequately to treat as separate the events which occurred at Car Park 1 and Car Park 2. It was argued that an emphasis upon this separation established that by the time of the confrontation in Car Park 1 immediately preceding Mr Matalasi's death Messrs Pakai and Harrison were attempting to escape from Mr EE's group; and that Mr Pakai was forced to shoot to save the lives of himself and Mr Harrison.

[18] Before us Mr Smith for Mr Pakai subjected the evidence in support of the unreasonableness ground of appeal to careful scrutiny. In his submission it established by reference to the events in Car Park 1 that the window in the front passenger's door of Mr Harrison's car was jammed open; that Mr Pakai was first attacked by Mr EE using a broken knife to try and stab him in the neck before Mr EE left to assist with the attack on Mr Harrison; that Mr Pakai was exposed to an attack by Mr Matalasi using a samurai sword through the open window; and that Mr Pakai received a mark on his upper left chest (short of a skin-piercing cut) and two stab wounds — one to his upper left shoulder and the other to his lower left thigh — inflicted by Mr Matalasi with such force that they pierced two leather vests.

[19] Mr Smith also referred to what he said were the difficulties faced by Mr Harrison when attempting to drive away. His right hand was inoperable due to the machete injury. He was forced to use his left hand while still under attack by a third party. In his submission Mr Pakai had a right to defend himself. When faced with the risk to the lives of himself and Mr Harrison posed by Mr EE's group, Mr Pakai had no other reasonable options available to him but to shoot.

[20] Mr Stevenson for Mr Harrison supported this submission. He said that the actions taken by Mr Pakai could not on any objective view be anything but justifiable self-defence. His premise was that Mr Pakai's discharge of the firearm

was undoubtedly defensive in nature. The only issue that could possibly have been in contention before the jury was the reasonableness of the force used.

[21] In Mr Stevenson's submission the use of a firearm in the agony of the moment while facing a deadly attack with no means of escape could hardly be excessive. By reference to Mr EE's evidence, Mr Stevenson asserted that it would be difficult to contemplate a more obvious factual basis for self-defence. He sought to draw analogies between this case and others where appeals have been allowed on the ground of an unreasonable verdict.[2]

[22] Before addressing this ground of appeal we note that Mallon J's directions on self-defence were part of a comprehensive summing-up. Directions were required on many issues. The complexity of her task is reflected by the 25 questions set out in the jury question trail, deriving substantially from the number of charges, the defence of self-defence and liability for joint participation in offending.

(b) Self-defence

(i) Elements

[23] Our starting point is with the legal elements of the defence of self-defence. The criminal law justified Mr Pakai's use, in the defence of himself or Mr Harrison, of such force as it was reasonable to use in the circumstances as he believed them to be.[3] In accordance with settled authority,[4] Mallon J directed the jury to answer these three questions when considering self defence:

> (a) What were the circumstances as Mr Pakai believed them to be at the time he fired the shot that killed Mr Matalasi?
>
> (b) Given the circumstances in (a), are you sure Mr Pakai was *not* acting in defence of himself, or in defence of Mr Harrison, when he fired the shot that killed Mr Matalasi?
>
> (c) Given the circumstances in (a), are you sure that the force Mr Pakai used to defend himself, or to defend Mr Harrison, was *not* reasonable?

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2 *R v Munro* [2008] 2 NZLR 87 (CA); *Leonard v R* [2010] NZCA 171; and *R v Oates* (1997) 15 CRNZ 95 (HC).

3 Crimes Act, s 48.

4 *Stepanicic v R* [2015] NZCA 35 at [10].

[24] The first two questions are of a subjective nature; the third requires an objective inquiry against the standard of whether the force used was actually reasonable.[5] We shall address counsels' arguments by reference to, and in the same sequence as, those identified by Mallon J.

(ii) Circumstances as believed to be

[25] The defence of self-defence requires a plausible factual narrative that might lead the jury to entertain its reasonable possibility.[6] While there was no affirmative onus on Messrs Pakai and Harrison,[7] the entitlement to a complete acquittal often rests on the jury's acceptance of evidence about the defendants' actual beliefs.[8] In this case each defendant had exercised his right to remain silent when questioned by the police.[9] Neither gave evidence in his own defence at trial. That evidential vacuum was not necessarily fatal to the defence.[10] But as a consequence there was simply no direct evidence from either man of their states of belief when Mr Pakai fired the fatal shot.

[26] In the result, both Messrs Pakai and Harrison relied substantially on Mr EE's evidence for the factual foundation for their states of belief. His evidence and the medical evidence of the injuries suffered by Messrs Pakai and Harrison established that the two men had been attacked with weapons used by Mr EE and one or more of his associates before Mr Harrison drove away. Otherwise Mr EE's evidence was of limited assistance:

(a) As Mr Burston pointed out, the nature of Mr Pakai's wounds was arguably more consistent with being stabbed by Mr EE's broken knife than by the slashing motion of what Mr EE said was the ornamental sword being used by Mr Matalasi to strike Mr Pakai, throwing into question Mr EE's evidence that Mr Matalasi then assumed responsibility for the attack on Mr Pakai. Moreover, the police found

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5 *R v Wang* [1990] 2 NZLR 529 (CA) at 534.
6 At 533–534.
7 *R v Kerr* [1976] 1 NZLR 335 (CA) at 340.
8 *McNaughton v R* [2011] NZCA 588 at [57].
9 New Zealand Bill of Rights Act 1990, s 23(4).
10 *McNaughton v R*, above n 8, at [58].

the sword was bent to approximately 90 degrees, which the Crown submitted was consistent with an attack on the vehicle rather than on Mr Pakai personally. Mr EE's assumption that the sword "ended up bent" from an attack on Mr Pakai is arguably contrary to other evidence.

(b) Mr EE inflicted the stab wounds on Mr Pakai during an attack that lasted at least two minutes. He then said the attack "all just stopped automatically" but that Mr Matalasi was "just carrying on and carrying on". Significantly, when examined as to what Mr Matalasi was doing, Mr EE said: "I *think* he was attacking them with the … samurai sword".

(c) Mr EE's evidence did not speak for the circumstances as Mr Pakai believed them to be when he fired the shot; that is, in order to save the lives of himself and Mr Harrison or to save them both from serious harm he had no other reasonable option but to fire his pistol into Mr Matalasi's body. Apart from couching his evidence in the language of what he thought he saw, Mr EE did not assert that Mr Matalasi was actually striking or attempting to strike Mr Pakai.

[27] We add that at the end of the Crown case counsel for Messrs Pakai and Harrison submitted to Mallon J that there was insufficient evidence to go before the jury on the murder charge. The Judge rejected this argument. The transcript reveals that in the course of a lengthy exchange defence counsel appeared to accept that it was open to the jury to reject a defence of self-defence. Their concurrence is not binding. But it is a reliable guide for an appellate court on the strength of the respective defence cases as assessed by their counsel with the benefit of a detailed familiarity with the evidence and its presentation at trial.

[28] In the absence of any evidence from Mr Pakai, there was nothing to suggest that he believed he was under attack or at risk of serious harm at the moment he shot Mr Matalasi. Indeed, the Judge would have been entitled to draw this point to the jury's attention when summing up but did not do so. We are satisfied that the jury

acting reasonably could have found at the first stage of its inquiry that when he fired the fatal shot Mr Pakai did not believe he had no other option reasonably available to defend himself.

(ii) Purpose of self-defence

[29] It was also open to the jury to infer that Mr Pakai was not using force to defend himself or Mr Harrison. Mr Matalasi made his 111 cell phone call at a time when he was unable to speak due to the passage of a bullet through his right lung and aorta. The Crown led evidence that Mr Pakai fired two shots in Car Park 1. The audio recording discloses the sound of a second gunshot about 10 seconds after the call was initially received. If accepted, this evidence would show that Mr Pakai fired his gun again after Mr Matalasi had been hit, supporting a proposition that Mr Pakai was not using the weapon in self-defence but for an unrelated purpose. Even if Mr EE's evidence is accepted, it was plain that his group except for Mr Matalasi had withdrawn from the attack on Mr Harrison's vehicle when the fatal shot was fired.

[30] Other evidence was available to the jury that Mr Pakai did not shoot for the purpose of self-defence. We refer to Mr Pakai's random and reckless use of the firearm in the period leading up to his killing of Mr Matalasi. He was encouraged by Mr Harrison, who acted as chauffeur and shepherd to the young prospect throughout the offending. Twice in a short space of time Mr Pakai endangered human life without cause or justification, first by firing bullets at a bread truck on the motorway and later by firing six shots in and around Car Park 2 at Mr EE and his associates.

[31] It was open to the jury to conclude that Mr Pakai's use of the gun throughout the evening was gratuitously dangerous; that he was in a trigger-happy state; that he was indiscriminately using a lethal weapon on others regardless of whether or not his life or well-being were then at immediate risk; and that the fatal shot was one in a series of violent and aggressive acts directed at Mr EE's associates.

(iv) Reasonable force

[32] However, assuming for the purposes of argument that the jury could not reasonably have rejected the first two elements of the defence, we are satisfied that

when applying the criminal standard of proof the jury could reasonably have found that the force used by Mr Pakai was unreasonable in the circumstances.[11] In this respect, no objection is or could be taken to the Judge's direction on the third and objective stage of the inquiry. She directed that the threat faced by Mr Pakai would have had to be immediate and very serious in order that firing a pistol — a lethal weapon — at close range into the body of another person might be a proportionate response.

[33] Whether the force used was unreasonable is quintessentially a jury question.[12] On the evidence to which we have referred the jury had a sufficient foundation for concluding that it was unreasonable for Mr Pakai to shoot Mr Matalasi at close range in the body. It was open to the jury to find that Messrs Pakai and Harrison were not then in immediate danger of serious harm such that the only reasonable option available was to shoot Mr Matalasi using a lethal weapon; and that Mr Pakai's act was a disproportionate response to any risk being posed by Mr Matalasi. There was a very high risk that discharging the firearm in these circumstances would kill Mr Matalasi.

[34] The Judge did not fail to direct the jury adequately to treat separately the events at the two car parks. The Judge was careful to direct the jury that, even if it concluded Messrs Pakai and Harrison were the aggressors throughout their period in Car Park 2, the situation may well have changed when they returned to Car Park 1 and were under attack from Mr EE's group, such that their lives were at peril or were at risk of serious harm. This was a fair, indeed generous, direction. It is difficult to understand what more the Judge might have said. In any event, as we have just pointed out, the circumstances of Mr Pakai's use of the firearm in Car Park 2, encouraged and counselled by Mr Harrison, were directly relevant to the jury's evaluation of self-defence relating to his subsequent use of the same weapon in Car Park 1.

[35] In summary, there was sufficient evidence available to the jury to answer all three questions within the self defence inquiry adversely to Messrs Pakai and

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11 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13]–[14].

12 *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 (HL) at 137 per Lord Diplock.

Harrison, thereby providing a proper basis for a finding that the Crown had excluded the defence to the necessary criminal standard of proof beyond reasonable doubt. There was no evidence of the circumstances as they — not others — believed them to be. There was evidence to support findings that Mr Pakai was not acting for the purpose of defending himself and Mr Harrison; and that the force used was unreasonable. We are not satisfied that the jury acted unreasonably in excluding the joint defence of self-defence.

Directions

[36] Mr Smith submitted that the Judge misdirected the jury on self-defence in omitting to include any direction as to youth, in directing too narrowly on reasonableness, and in failing to allow for verdicts of manslaughter on a finding of unreasonable force in circumstances that would otherwise qualify as self-defence.

[37] We can deal with this submission shortly. Its basis was that a direction on youth was relevant to whether the force used was reasonable because the test is not fully objective. However, the inquiry into the reasonableness of the force used is, as we have explained, solely objective; reasonableness remains the rigid touchstone against which a jury measures the conduct of a defendant in his or her perceived circumstances. The Judge made this plain to the jury. Mr Pakai's relative youth might only have been relevant to the first step in the inquiry; that is, the circumstances as he subjectively believed them to be. But, without a factual narrative as to the state of Mr Pakai's belief when he fired the fatal shot, there was nothing relating to his youth on which the Judge could direct.

[38] It is not easy to follow Mr Smith's challenge to the Judge's direction on reasonableness. Mallon J said this:

> To decide if the force is reasonable you need to consider the perceived imminence and seriousness of the attack or threatened attack. You are looking at whether the defensive action taken was reasonably proportionate to the perceived danger. You can also consider whether Mr Pakai had other reasonable options open to him and whether he would have been aware of those options and whether he had time to take those options. But you have to look at the imminence of the threat and the danger it poses as Mr Pakai understood the circumstances to be at the time.

[39] Mr Smith simply submitted that a more detailed direction as to the exigency of the situation was required. We reject that proposition. The Judge had with clarity summarised the competing cases on this point. In our judgment the direction was a model of its kind; if anything, it was generous to Mr Pakai. She directed the jury "to take the view most favourable" to him with the reminder that it was "judging the force that was used, not the outcome". She also observed that "the events happened quickly and therefore quite possibly with very little time to assess the best way to stop the attack and to get out of Car Park 1".

[40] Without explaining why we should adopt this course, Mr Smith also invited us to depart from this Court's recent affirmation in *R v McNaughton* that the common law of New Zealand does not recognise a partial defence of excessive force.[13] It is an absolute answer to his submission that the Judge should have directed the jury that a verdict of manslaughter was open if it found the force used was unreasonable.[14]

[41] It is also material that when the opportunity arose at the end of Mallon J's summing-up, Mr Pakai's counsel did not raise any objections to the Judge's directions on this aspect of the case. To the contrary, his junior counsel, Mr Tennet, complimented her on the question trail which mirrored the essential elements of the summing-up.

Prosecutorial misconduct

[42] Counsel made four complaints about prosecutorial misconduct.

[43] First, Mr Stevenson submitted that Mr Burston acted improperly in his closing address by attempting to derail the jury's proper analysis of the evidence and suggesting conclusions which were not reasonably available in order to achieve guilty verdicts. Mr Stevenson focussed on Mr EE's evidence. He was said to be the only eyewitness to the final and fatal stages of the altercation leading to Mr Matalasi's death. In counsel's submission, the prosecutor improperly attempted

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13 *R v McNaughton* [2013] NZCA 657, [2014] 2 NZLR 467 at [70].

14 Leave to appeal was refused but without reference to the substance of this Court's conclusion: *McNaughton v R* [2014] NZSC 44.

to impeach the evidence of Mr EE (a witness called by the Crown) that at the time of the shooting Mr Matalasi was the only person attacking the car. Mr Stevenson's proposition was that the Crown's case was fatally compromised because Mr EE's evidence contradicted its thesis of murder.

[44] Mr Stevenson focussed on these passages from Mr Burston's closing:

> Aside from the 111 call the other evidence about what happened in the car park only comes from Mr EE as saying what happened to the men in the car. He said that at the time Mr Matalasi was shot the attack on the car and the people in it had stopped effectively and that it was only Mr Matalasi who was carrying on attacking [Mr Pakai]. Well the Crown simply says be careful when you consider Mr EE's evidence about this point. You might think Mr Pakai's wounds were clearly caused by Mr EE's stab wounds with the broken knife and that those wounds weren't caused by an ornamental samurai sword that had been bent effectively in half when it had been used to attack the car. … You might think that the reason that Mr Pakai focussed on being stabbed, which the Crown says was clearly by Mr EE, was because, in fact, Mr Matalasi never posed an imminent threat to Mr Pakai at all with that bent imitation sword. That wasn't what was causing the injuries that he received. All of the injuries he received to the arm, the scratch, through two layers of vest and hoodie and the wound to his leg, they, you might think, were clearly caused by Mr EE trying to stab him in the neck with the knife as Mr EE was describing, not by Mr Matalasi with that bent sword.

[45] Mr Stevenson submitted that the prosecutor had without a proper basis suggested a Crown witness had deliberately given false evidence favourable to the defendant;[15] and that the Crown needed to brief an expert to lay an evidential foundation for suggesting that Mr EE's evidence should be disbelieved because Mr Pakai's wounds could not have been caused by the ornamental sword.

[46] We reject this submission. It is well settled that a party calling a witness cannot impeach his or her credit without having a witness declared hostile.[16] However, Mr Burston was not seeking to impeach Mr EE's credit. It is always open to a prosecutor to point to inconsistencies between the evidence of a witness called by him/her and other evidence, or to point to issues upon which the evidence might unreliable; provided the prosecutor has an evidential basis for inviting the jury to reject or be cautious about an explanation, he or she is not acting improperly.[17]

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15 *R v Eagles* [2004] 2 NZLR 468 (CA) at [22]–[25].

16 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730 at [84]; Evidence Act 2006, s 37(4)(a).

17 *Sungsuwan v R*, above n 16, at [85]–[87]; Evidence Act, s 37(4)(b).

[47] We are in no doubt that the prosecutor had a proper evidential basis for his submission. He was entitled to invite the jury to consider Mr EE's evidence on one critical aspect with care given its apparent inconsistency with other evidence. And the Crown was not required to call expert evidence about the cause of damage to the ornamental samurai sword. Juries are entitled to use their collective common sense to draw inferences from proved facts. What an expert witness — if one existed — might have said about the cause of the bending was unlikely to be substantially helpful.

[48] These issues are determined on the facts. In simple terms, there was no evidence of an injury to Mr Pakai consistent with slashing from the sword applied with such force that it bent. It was open to the jury to find instead that his injuries were consistent with stab wounds from the knife used by Mr EE.

[49] Second, Mr Smith suggested that Mr Burston acted improperly in making this closing submission to the jury:

> But remember that your decision is important not only to the defendants, it is also important to Mr Matalasi's family, and to the community on behalf of whom you sit in judgment in this case.

[50] In Mr Smith's submission this observation was an invitation to the jury to base its decision on sympathy or prejudice. While he accepted the Judge expressly directed the jury against resorting to sympathy or prejudice, Mr Smith said the damage was done by then.

[51] We reject this submission. The prosecutor was simply pre-empting an anticipated defence submission about the importance of the jury's decision to the defendants. There was nothing improper in what he said. Moreover, in his closing, which followed the prosecutor's address, Mr Smith devoted some time to countering Mr Burston's proposition. He spoke at length about the importance of the jury's verdict to the defendants. The Judge also gave a standard warning to the jury against being influenced by sympathy or prejudice. The effect of Mr Burston's comments would have been swamped by what was said subsequently by defence counsel and the Judge. This submission is without merit.

[52] Third, Mr Smith also complained about the Crown's conduct in leaving an image of Mr Matalasi's body on a large screen television facing the jury for a lengthy period of time. He said it could have given rise to reactions of grief and sympathy in the jury's minds.

[53] Mr Burston observed that the trial transcript does not record any exchanges between the Judge and counsel on this point or expressions of concern by the Judge herself. He conceded that a photograph of Mr Matalasi was possibly placed on the screen and inadvertently left there after a witness was taken to the next point in evidence. However, there was no evidence of the duration of this excessive screening — it may well have been little more than fleeting.

[54] Even if this event occurred, it cannot possibly have had any adverse effect on the jury. The post-mortem examination photographic booklet was produced and included admissible photographs of Mr Matalasi's body. Defence counsel raised no objection to them. The possible effect of any inadvertence in leaving an image of Mr Matalasi on the screen for an unusually extended period would have been spent quickly in the context of a complex trial involving multiple issues. This submission was also without any merit.

[55] Fourth, Mr Stevenson submitted that Mr Burston improperly referred in his closing to a laugh (apparently by Mr Harrison) heard on an audio recording of Mr Matalasi's 111 call as he lay dying. Mr Burston said this:

> Third, you might think you can hear a unique and a strange sounding laugh during the second half of the audio. Have you heard that laugh in another recording played in the evidence in this trial?

[56] Mr Stevenson pointed to the absence of any voice identification evidence from an expert to support that submission.[18] He said that it was improper and might have led the jury into assuming it could make its own reliable comparative identification.

[57] We agree with Mr Stevenson that the submission should not have been made. But again it was only fleeting, and any damage was cured by a full direction from the

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[18] Evidence Act, s 46.

Judge. She confirmed that the Crown had not led any voice expert evidence and that Mr Burston's submission was not voice identification evidence; and she said the jury was not well placed to make a voice comparison in the absence of such evidence. It was an unequivocal rejection of the prosecutor's submission.

Intercepted communications

[58] As noted, at trial the Crown relied on two audio recordings of conversations between Messrs Harrison and Pakai in a prison van while they were being conveyed between Rimutaka Prison and the District Court. In closing Mr Burston submitted that they established Mr Harrison was coaching Mr Pakai about how to lie in presenting the prospective defence of self-defence when both men knew that the shot was not fired in self-defence but in a continuation of their aggression against Mr EE and his associates.

[59] The police van communications were intercepted in accordance with a surveillance device warrant issued by Simon France J in the High Court on 13 September 2013 upon an application pursuant to s 49 of the Search and Surveillance Act 2012. The Crown applied before trial for a ruling that the evidence was admissible. Neither Mr Pakai nor Mr Harrison opposed the application. In a decision delivered on 16 September 2014 Mallon J ruled in the Crown's favour.[19]

[60] Mr Stevenson now submits that the warrant should never have been issued. He justifies the earlier failure to oppose the admissibility of the evidence as inadvertence. In his submission there were no reasonable grounds when the warrant was issued "to believe that the proposed use of the surveillance device will obtain evidence that is evidential material in respect of the offence".[20]

[61] Mr Stevenson concedes that there was an objective and credible basis for the Crown to think that an interception device in the van may disclose a conversation which would be evidence of the crime of murder. However, that was not enough; there was, he said, no objective or credible basis for believing that an interception device would actually provide such material.

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19 *R v Harrison and Pakai* [2014] NZHC 2246.

20 Search and Surveillance Act 2012, s 51(a)(ii).

[62] This submission is misconceived. Mr Stevenson's argument relies on the leading authorities on the meaning of "reasonable grounds to believe", which was the test for issuing a search warrant under s 198 of the Summary Proceedings Act 1957.[21] However, as Mr Burston submitted, a search warrant focuses on finding an item that is reasonably believed to be in existence already whereas a surveillance device warrant authorises the capture of a prospective event. The High Court Judge must be satisfied that there are reasonable grounds to believe the forecast communication will occur; and, if so, that it will include relevant evidential material. The exercise requires a predictive assessment of future possibilities based on information then available.

[63] In this case Simon France J had information that (1) both Messrs Harrison and Pakai had been charged with serious offending and remanded in separate wings of Rimutaka Prison without an opportunity to confer since being charged; (2) both men were members of the same Mongrel Mob chapter, with Mr Harrison being 24 years Mr Pakai's senior; (3) a gang code of silence applied which extended to Mr EE and Ms MN; and (4) Mr Pakai had already attempted to influence evidence that might be given at trial by his partner. We are in no doubt that these circumstances provided more than reasonable grounds to justify the warrant, as subsequent events proved.

[64] We add that it was too late on appeal for Mr Harrison to challenge the warrant itself. The evidence obtained from its application was led at trial in accordance with Mallon J's ruling. Mr Harrison's challenge on appeal was limited to an argument that the admission of unlawfully obtained evidence led to a miscarriage of justice. Apart from our conclusion that the evidence was lawfully obtained, we are not satisfied that its admission caused a miscarriage.

Party liability

[65] Mr Stevenson submitted that Mallon J erred in two principal respects when directing the jury on Mr Harrison's liability as a secondary party to the two offences.

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[21] *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [213].

[66] First, Mr Stevenson submitted the Judge failed to adequately put Mr Harrison's defence to the Crown case that he was liable as a secondary participant under s 66(2) of the Crimes Act 1961. The common unlawful purpose alleged by the Crown was taking a loaded firearm to Jackson Street to confront Mr EE and his associates and to use it if necessary in that confrontation, or to demand property with an intention to steal it by force or threat, or use violence against Mr EE.

[67] Messrs Harrison and Pakai denied acting in accordance with an unlawful common purpose. Their counsel submitted that their response to Mr EE's phone call and return to Petone was for an innocent purpose — they wanted to return the stolen cell phone but instead were lured back by Mr EE into an ambush — and that Mr Harrison, who was in a cooperative mood and in good spirits, was met with aggression and violence when he returned. According to Mr Stevenson, the Judge failed to refer to this explanation when summing up to the jury.

[68] The Judge said this about Mr Harrison's defence in summing up:

> Counsel for Mr Harrison submits that he was not the aggressor, that he did not say or do anything to encourage the firing of it, whether at Car Park 2 or Car Park 1. Counsel says that Mr Harrison and Mr Pakai arrived at an ambush. Mr EE was amped up, possibly because of the methamphetamine he said he had taken that day. Mr Gill refers to the music being up loud to pump the boys up, that Mr EE had gathered the boys, they each had weapons and Mr EE was expecting Mr Harrison to turn up with a bunch of other Rogue members. The defence says that that was the situation that Mr Harrison and Mr Pakai walked into, that Mr Harrison was personally unarmed, that he was struck heavily, whether that was with the bat or by a punch, and that having found themselves in that situation, outnumbered, that Mr Harrison was intending to make his escape.

[69] We are in no doubt that the Judge discharged her obligation to fairly sum up the nature of Mr Harrison's defence.[22] It had been fully and forcefully conveyed in Mr Gill's closing. Mallon J was not bound to repeat its every detail including the submission about an intention to return the phone or Mr Harrison's convivial mood. What the Judge made plain was the essence of the defence case that Messrs Harrison and Pakai did not want or expect a confrontation; and that they walked into an ambush where they were heavily outnumbered by Mr EE and his associates.

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[22] *R v Shipton* [2007] 2 NZLR 218 (CA) at [33].

[70] We note again that when the opportunity arose at the conclusion of the summing-up counsel did not raise any complaint about the adequacy of the Judge's direction on the defence case or how it had been summarised.

[71] Second, Mr Stevenson submitted that the Judge failed to explain to the jury that if it found Mr Pakai guilty of murder as the principal, on the basis that he was acting defensively but the force used was excessive, it would have to find first that the killing was not done in the prosecution of a common unlawful purpose. In terms of knowledge of the probable consequences of the prosecution of the unlawful purpose, the Judge was required to spell out to the jury that a finding of excessive force by Mr Pakai could not be a known probable consequence for Mr Harrison.

[72] In our judgment this submission confuses two separate questions. Mr Stevenson does not take issue with the Judge's direction that in this context the word "prosecute" meant "to do something in the course of implementing the common unlawful purpose". The question is whether there was sufficient evidence for the jury to conclude that Mr Harrison must have contemplated Mr Pakai would use the firearm to shoot and kill Mr EE or one of his associates as a probable consequence of carrying out the common unlawful purpose. The law does not require the Crown to prove that Mr Harrison's knowledge of that consequence extended to the use of excessive force when carrying out the common purpose and acting in self-defence.[23]

[73] Again it is significant that counsel did not raise this issue with the Judge at the conclusion of her summing-up.

Sentence

[74] Mr Pakai accepts his sentence of life imprisonment.[24] But he contends that the minimum period imposed of 12 years and three months was manifestly excessive. In support of the sentence appeal Mr Tennet relied on the grounds that the minimum term did not properly represent Mr Pakai's culpability and there was a

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[23] *R v Te Moni* [1998] 1 NZLR 641 (CA) at 650–651.
[24] *R v Harrison and Pakai* [2014] NZHC 2705 at [20].

failure to give a proper discount for youth. Mr Tennet did not pursue a third ground advanced in his written synopsis of disparity with Mr Harrison's starting point.

[75] On the first ground, Mr Tennet submitted that the Judge erred in setting a starting point of 13 years' imprisonment by taking into account Mr Pakai's culpability within the wider context, including associated offending, instead of the fact that Mr Pakai was under attack when the gun was fired; that Mr Pakai's defensive conduct in response to an attack was a factor going to his overall culpability; and that by comparison with sentences imposed in other cases a starting point of 10 years would have better reflected Mr Pakai's culpability.

[76] We are not satisfied that the Judge erred. She was entitled to take into account all the relevant circumstances of Mr Pakai's offending. The entire sequence commenced with the intrusion into Ms MN's home and Messrs Harrison and Pakai's return with a modified rifle and ample ammunition, as well as the discharge of the firearm recklessly into another vehicle. This offending was significant. It justified appropriate recognition in the starting point. The Judge was also entitled to take into account Mr Pakai's gratuitous and dangerous use of the firearm in Car Park 2 when firing six rounds in the direction of others. Messrs Harrison and Pakai were the originating aggressors. The jury rejected self-defence. In these circumstances the starting point of 13 years was if anything generous.

[77] On the second ground, Mr Tennet submitted that the Judge applied an inadequate discount of nine months against the starting point on account of Mr Pakai's youth. He emphasised that Mr Pakai was aged 18 years at the time of offending and his brain was at an immature stage of development. In Mr Tennet's submission Mr Pakai's youth should have attracted a discount of 18 months.

[78] Mallon J considered this issue carefully.[25] She referred to the leading authority in this Court,[26] as well as two comparative sentences imposed in the High Court where discrete discounts of two years and 18 months were allowed for

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[25] At [19].

[26] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [76]–[77].

youth following convictions for murder.[27] We are satisfied that the Judge was best placed to assess the effect, if any, of Mr Pakai's youth on his culpability. She also weighed in the balance Mr Pakai's lack of remorse and his previous convictions. While the amount of the discount might have been less than in some other cases, we are not satisfied that the Judge erred.

[79] In any event our focus is on the end minimum period of 12 years and three months' imprisonment. We are not satisfied that it was excessive.

Result

[80] The appeals against conviction are dismissed.

[81] Mr Pakai's appeal against the minimum period of imprisonment is dismissed.

Solicitors:
Crown Solicitor, Wellington for Respondent

[27] *R v Herewini* [2013] NZHC 2570; *R v Churchis* [2014] NZHC 2257.