IN THE SUPREME COURT OF NEW ZEALAND

SC 97/2017
[2017] NZSC 180

BETWEEN	TYSON-TAINUI RUKUWAI TE TOMO Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	W C Pyke for Applicant M J Lillico for Respondent
Judgment:	28 November 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant and an associate became involved in a confrontation with two other men which resulted in the death of one of those men. This occurred on and around a residential property in which the applicant and his associate lived. There was a gang background in that the applicant and his associate were affiliated to the Mongrel Mob while the deceased was associated with Black Power.

[2] In the course of the confrontation, the applicant and his associate introduced a sawn-off slug gun (unloaded) and swords. They were disarmed by the deceased and his associate first of the slug gun and then of the swords.[1] The applicant then picked

[1] The position in relation to the swords is not clear. This narrative is taken from the sentencing remarks of the trial Judge: *R v Te Tomo* [2015] NZHC 2671 (Hinton J) at [4]. The Court of Appeal judgment indicates that the applicant's associate was disarmed of the sword and that the applicant then dropped his sword: *Te Tomo v R* [2017] NZCA 338 (Winkelmann, Brewer and Peters JJ)

up a .22 calibre rifle from the house. He walked out and fired a "warning" shot into the air. He had difficulty reloading and, on his evidence, ran back into the house where he reloaded the rifle. He then walked out with the rifle at chest height. The deceased at this point was hiding behind a power box which was on the boundary of the property. The applicant advanced to within about 10 feet of the deceased and shot him in the head.

[3] At the applicant's trial for murder, his defence was that he had not intended to fire the rifle. Self-defence was disavowed. Following the closing addresses, the trial Judge (Hinton J) heard from counsel as to whether she should sum up on self-defence and, in the end, decided not to.

[4] The applicant's appeal against conviction was presented on the basis that the Judge should have directed on self-defence.[2] The applicant and his friend were confronted by two older and more powerful men, one of whom was a patched member of Black Power. There was evidence to the effect that they (that is, the deceased and his friend) were calling for additional gang support and that this was understood by the applicant.

[5] The applicant's argument was carefully assessed by the Court of Appeal.[3] That Court was of the view that there was no credible narrative to support the claim that the applicant believed that he faced an imminent threat to life. Most of the physical aggression had come from the applicant and his associate.

[6] Apart from one "minor incursion", neither the deceased nor his friend had attempted to enter the house.[4] Immediately before the shooting, the applicant was advancing on the deceased, who was shielding himself behind the power box. There was no imminent threat to the applicant or his friends. And the applicant in his evidence had not asserted that he believed he had to shoot the deceased to protect himself and his friends, other than a somewhat circular suggestion that the deceased might have seized the rifle and used it to shoot him. The Court thus concluded that

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[CA judgment] at [8].

2 CA judgment, above n 1, at [1].

3 At [30]–[38].

4 At [31].

there was no credible narrative to support the view that the applicant may been acting in defence of himself or others.

[7] The applicant's proposed appeal to this Court is based on the same arguments as were addressed by the Court of Appeal. It is not suggested that the approach of the Court of Appeal was wrong as a matter of principle and accordingly no question of general or public importance arises. And, having regard to the careful analysis of the facts given by the Court of Appeal, there is no appearance of a miscarriage of justice.

[8] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent