

**NOTE: ORDER MADE IN THE HIGH COURT PROHIBITING
PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR
IDENTIFYING PARTICULARS OF WITNESSES PURSUANT TO
SECTION 202 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.**

IN THE SUPREME COURT OF NEW ZEALAND

**SC 110/2016
[2017] NZSC 27**

BETWEEN DILLIN PAKAI
Applicant

AND THE QUEEN
Respondent

SC 111/2016

BETWEEN SHANE PIERRE HARRISON
Applicant

AND THE QUEEN
Respondent

Court: William Young, Arnold and Ellen France JJ

Counsel: K R Smith for Applicant SC 110/2016
C W J Stevenson for Applicant SC 111/2016
A J Ewing for Respondent

Judgment: 8 March 2017

JUDGMENT OF THE COURT

**A The time for filing the applications for leave to appeal is
extended.**

B The applications for leave to appeal are dismissed.

REASONS

[1] The applicants were convicted of the murder of Alonsio Matalasi following a jury trial before Mallon J. Mr Pakai was convicted as the principal, having fired the fatal shot from a sawn-off .22 rifle, and Mr Harrison as a party (the Crown relied on both s 66(1) and s 66(2)). The main defence run at trial was self-defence.

[2] The Court of Appeal rejected the applicants' appeals against conviction.¹ The applicants now seek leave to appeal to this Court on the following common grounds:

- (a) The guilty verdicts were unreasonable, principally because self-defence could not be excluded.
- (b) The prosecutor improperly impeached the evidence of a Crown witness, Mr EE, contrary to s 37(4) of the Evidence Act 2006.

In addition:

- (c) Mr Pakai argues that the Court of Appeal approached the question of self-defence as though there was an evidential onus on him.
- (d) Mr Harrison argues that if Mr Pakai committed murder because, although acting defensively, he used unreasonable force, this could not be in the prosecution of an unlawful purpose in terms of s 66(2), nor would Mr Harrison have known it was a probable consequence. The trial Judge ought to have explained this to the jury.

The grounds raised are not said to raise any issue of general or public importance. Rather, it is claimed that there is a risk of a substantial miscarriage of justice.

[3] By way of general background, Mr Harrison, who was 44 and a senior member of the Mongrel Mob, and Mr Pakai, who was almost 19 and a gang prospect, drove to the flat of Mr EE, who was associated with a different chapter of the Mongrel Mob. Once there, they asked to see Mr EE. His partner, Ms MN, went

¹ *Pakai v R* [2016] NZCA 343 (Randerson, Harrison and Stevens JJ).

to telephone him. Mr Harrison and Mr Pakai then left, saying they would return. After they had left, Ms MN discovered that some of her property was missing.

[4] When Mr EE returned to his flat he was annoyed to learn of the theft of Ms MN's property and called Mr Harrison, demanding its return. Anticipating a confrontation, Mr EE gathered a group of about seven men who were armed with various items such as a knife, machete and ceremonial samurai sword. Mr Harrison and Mr Pakai drove back to the flat. On their way, Mr Pakai leaned out of the passenger's front seat window and fired a number of shots from the sawn-off .22 rifle at a passing truck.

[5] When they arrived at the flat, Mr Harrison challenged a member of Mr EE's group to a fight. The man punched Mr Harrison in the face, after which Mr Harrison told Mr Pakai to shoot. Mr EE's group scattered, pursued by Mr Pakai firing shots. He apparently discharged the rifle's magazine.

[6] Mr Harrison and Mr Pakai then got back into their car to leave. (An attempt had been made to disable the car by slashing its tyres.) Several of Mr EE's group ran to the car and attempted to attack the occupants. Mr Matalasi was outside the front passenger window wielding an ornamental samurai sword. Mr Pakai, who had reloaded the rifle, shot Mr Matalasi in the torso and killed him. Mr Harrison then drove off. In the fracas, Mr Harrison had suffered a serious wound to his hand from fending off a machete, while Mr Pakai suffered only a scratch and two small puncture wounds.

[7] Several days later, the police intercepted a conversation between Mr Harrison and Mr Pakai in which Mr Harrison told Mr Pakai about the elements of self-defence and the facts necessary to its application.

[8] The applications for leave were filed out of time. The Crown has advised that it does not oppose an extension. Accordingly, the time for filing the applications for leave to appeal is extended.

[9] We do not consider that a substantial miscarriage of justice may have occurred as a result of any of the grounds raised:

- (a) As to the first ground, the Court of Appeal conducted a careful review of the evidence, which led it to the conclusion that it was open to the jury to find that the Crown had excluded self-defence beyond reasonable doubt. Despite counsel's submissions, nothing is raised which casts doubt on the Court of Appeal's analysis.
- (b) As to the second ground, the Crown did not improperly impeach EE's veracity by inviting caution about aspects of EE's evidence by reference to other evidence in the case.²
- (c) As to the third ground, we agree with the Crown that the Court of Appeal did not place an evidentiary burden on Mr Pakai. Indeed, as the Crown points out, the Court of Appeal's statements were to the opposite effect.³ The Court correctly said that there had to be a plausible factual narrative that might lead the jury to decide that self-defence was a reasonable possibility and acknowledged that it was not fatal to the defence that neither appellant made a statement to police or gave evidence at trial.
- (d) As to the final ground, we agree with the reasoning of the Court of Appeal.⁴

[10] In the result, we:

- (a) extend time for the filing of the applications for leave to appeal; and
- (b) dismiss the applications for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

² See *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.

³ *Pakai*, above n 1, at [25].

⁴ At [71]–[72].