IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA291/2023
[2024] NZCA 239

BETWEEN	LAYNE BRENT FORD Appellant
AND	THE KING Respondent

CA299/2023

BETWEEN	DYLAN LEWIS WHEELER Appellant
AND	THE KING Respondent

CA309/2023

BETWEEN	THOMAS GARY MARSHALL Appellant
AND	THE KING Respondent

Hearing:	16 May 2024
Court:	Mallon, Lang and Moore JJ
Counsel:	A J Bailey and R J T George for Mr Ford K H Cook and T D A Harre for Mr Wheeler E Huda for Mr Marshall A J Ewing and S M H McManus for Respondent
Judgment:	18 June 2024 at 3 pm

JUDGMENT OF THE COURT

The appeals are dismissed.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] The appellants are associated with the Mongols gang. On 10 July 2021 they travelled together from Christchurch to a property in Pareora, South Canterbury. They had with them a shotgun. The Pareora property was the home address of Jacob Geels, a person with associations to the Road Knights gang. The three appellants were on that property for a brief period, between about 1.38 pm and 1.41 pm. Shots were discharged with one of those shots hitting Mr Geels in the buttock area.

[2] The Crown alleged that the appellants had gone to the property to intimidate Mr Geels and, in the course of doing so, one of them had discharged the shotgun. The Crown accepted it could not prove which of the appellants had fired the shotgun. The appellants were charged with wounding Mr Geels with intent to cause grievous bodily harm on the basis of common unlawful purpose party liability.[1]

[3] The appellants stood trial before Judge O'Driscoll and a jury in the District Court at Timaru. The Crown called Mr Geels but he was uncooperative and refused to take the oath. He was discharged without giving evidence. The Crown case relied on evidence from witnesses who heard the gun shots or saw men on the property,

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1 Crimes Act 1961, ss 188(1) and 66(2).

as well as GPS tracking data for one of the appellants, evidence from CCTV stills of the appellants before and after the incident, and evidence obtained from the police scene examination of the Pareora property. None of the appellants had given police interviews. They put the Crown to proof and argued that the Crown evidence was unreliable, incomplete and did not establish the charge.

[4] The jury returned guilty verdicts on the charge against each of the appellants. They were each sentenced to six years and four months' imprisonment.[2] They now appeal their convictions and sentences. The conviction appeals are on the basis that the Judge erred by discharging Mr Geels from giving evidence, declining to direct the jury on self-defence, failing to direct the jury correctly on the requirements for common unlawful purpose party liability, and because the question trail provided to the jury enabled the jury to convict the appellants even if none of them had the shotgun. They also say the jury's verdict was unreasonable.

[5] On the sentence appeal the appellants contend that their sentences were manifestly excessive. The appellants say the eight-year starting point taken by the Judge was too high because it did not take into account that they each had to be sentenced on the basis that they were not the shooter. One of the appellants, Mr Ford, also says that the Judge wrongly declined to place any weight on his affidavit filed for sentencing in which he claimed the gun was fired to defend against a machete attack on him.

The Crown evidence

[6] The Pareora property had a house, a sleepout, caravans and other structures. Mr Geels lived in the sleepout. There was a yard in front of the house. To the side of the house was another yard (the back yard). The sleepout was at the rear of the back yard.

[7] At the time of the incident Mr Ford was subject to a sentence of intensive supervision. The sentence required him to be fitted with a GPS tracker, which automatically generated location or status data every 60 seconds. The tracker recorded

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2 *R v Wheeler* [2023] NZDC 9152 [sentencing notes].

Mr Ford's movements to and from the Pareora property. The tracker recorded that Mr Ford had stopped at a property on the same street as the Pareora property between 1.08 pm and 1.36 pm. This property was owned by a person associated with the Road Knights gang. Mr Ford was previously associated with the Road Knights and had previous links to the address. The tracker then showed that Mr Ford was present at the Pareora property between 1.38 pm and 1.39 pm. A flyover video was prepared from the GPS data and produced at trial. The defendants accepted they had travelled on this route. CCTV stills of the appellants before and after the shooting of Mr Geels showed that they had been wearing Mongols gang hoodies.

[8] Ms McMillan lived in the house at the Pareora property. She gave evidence that she was watching a movie in the bedroom of the house with her partner when she heard arguing outside. She heard Mr Geels saying: "Why the fuck did you turn up here?" She said the conversation that followed sounded "[a]ggressive". She looked out the side window of the house that had a view of the back yard. Mr Geels was standing on the grass outside the window. The photograph booklet produced to the jury showed that this area was at the opposite end of the sleepout and in the area close to the gate that led to the front yard. She saw Mr Geels in his boxers with three men who were "gang members". The three men were standing "quite close" to Mr Geels and were wearing "patched vests" that were "black with white sleeves".

[9] Ms McMillan said she told her partner, Mr Sutherland, that there was something going on outside. She then looked out the front window (that faced the front yard and the street) and saw the three men running out the front gate, getting into a parked car and taking off. She thought the men's vests had Mongrel Mob down the sleeves and on the back. She and her partner went outside. They saw blood everywhere and on Mr Geels. Mr Geels was hobbling around in front of the sleepout in the back yard.

[10] When Ms McMillan initially described what she saw when she first looked out the side window, she said that one of the men was holding what looked like a gun. When she later described looking out the front window she said the one who got into the front passenger seat was holding a long black gun. She explained that, when she first looked out the side window, she thought this was a machete. But when she saw

the men getting into the car she thought it was a gun. Ms McMillan did not hear any gun shots.

[11] Ms McMillan was cross-examined on her statement made to the police at the time. In this statement she said that: she first saw Mr Geels and a Mongrel Mob person on the back lawn by the gate; she then went to the big window that looked onto the street and saw three males running down the path. In this statement she had also said that "the Mongrel Mob guy had a machete in his right hand". At first she thought "it was a gun".

[12] In cross-examination Ms McMillan said that what she thought was one person, was in fact three people, and she was wrong that they were Mongrel Mob, but the events had just happened so quickly. She also confirmed that at some point she had seen Mr Geels chasing one of the men. She remembered seeing the three men get into the car with a gun. In re-examination she confirmed that she had seen three men with Mr Geels in the back yard. One was wearing a black vest with white sleeves but she could not remember what the other two were wearing.

[13] Mr Sutherland — Ms McMillan's partner — gave evidence confirming that he was in the bedroom with Ms McMillan. He was watching movies and feeling dozy from the night before when Ms McMillan told him there were gang members outside arguing. He told her not to get into it. He heard a bit of arguing and the next he heard was "crack, crack, crack", which "freaked [him] out". He heard the gate swing hard and he looked out the front door and saw three guys getting into a car and leaving in a hurry. He then heard Mr Geels yelling out to him that he had been shot. He was hobbling about in front of his sleepout, wearing boxers and bleeding.

[14] During cross-examination the Judge put to Mr Sutherland that his partner had told them there was "a" gang member outside arguing. Mr Sutherland could not remember what she had told him but he knew there was more than one person in the back yard.

[15] Ms Rowe was a next-door neighbour. She gave evidence that she was sitting in her doorway knitting when she heard two or three shots and Mr Geels calling out to

Mr Sutherland that he had been shot. She stood up and, through a gap in the fence, saw two men running towards the gate. She saw a third man who was paused in the gap for four or five seconds. He had a gun. It was about a foot and a half long. The man was raising and lowering it. She recalled another shot being fired by the man with the gun. He then spun around and exited the property.

[16] Other neighbours gave evidence. They heard shots but only saw the aftermath. When they heard the shots they jumped the fence into the Pareora property, tended to Mr Geels and called 111.

[17] The police arrived at the address to investigate. In the back yard they found a machete with its wooden handle broken off. It did not have visible bloodstains. In a caravan on the property the police found several firearms and ammunition. In the sleepout they found drugs, cash and ammunition. In the front yard were three fired .22 cartridge cases. The evidence was that these cartridge cases could not have been fired from the firearms found at the property.

Discharging Mr Geels

[18] The Crown had intended to call Mr Geels as its first witness. The Judge discharged him from doing so. One of the bases on which Mr Wheeler contended a miscarriage of justice had occurred was that the Judge erred by discharging Mr Geels. Full written submissions in support of this ground were made on his behalf and by the Crown in response. At the hearing Mr Wheeler's counsel advised that the ground was abandoned. We consider counsel's decision to abandon the ground was the correct one. We set out the relevant events and our reasons for why that is our view having considered the detailed written submissions.

[19] Mr Geels was charged in relation to drugs, cash, firearms and ammunition found at his property. On 2 November 2022 he was sentenced to one year and 10 months' imprisonment. He was serving his sentence at the time of trial in January 2023. Mr Geels attended the trial pursuant to an order to produce. When he was asked to take the oath or affirmation he answered "meh". The prosecutor then asked him to state his name to which he replied "[n]o comment". He gave the same

response to a series of other introductory questions from the prosecution. He gave the same answer when the Judge asked him if that was to be his answer to every question.

[20] The Judge then heard from counsel in chambers. The Crown submitted that the Judge should declare Mr Geels hostile and allow the Crown to put to him a number of comments that he had allegedly made to other witnesses. The Judge did not agree with this course, taking the view that Mr Geels was not at that stage a witness as he had not been sworn in. A brief adjournment for the Crown to take instruction was granted. During this adjournment the Crown served Mr Geels with a witness summons. The Judge was informed of this, but was of the view that it was clear that Mr Geels would not be cooperative and that the Crown should not be given a further chance to attempt to have him sworn in. The Judge discharged Mr Geels from giving evidence and indicated that what Mr Geels was alleged to have said to other witnesses could be the subject of an application to admit hearsay evidence.[3]

[21] Mr Geels had not given a formal written statement. Detective Constable Bourne had, however, spoken to Mr Geels in hospital in the afternoon after the shooting. The officer recorded Mr Geels as saying:

> He was in the back yard when he saw three people walk towards him until they got within three meters. One of them stepped aside and that's when he noticed one of them carrying what looked like a cutdown shotgun. When he saw the gun, he turned around and ran. As he ran a person fired three shots in his direction, one of which hit him. … It was less than 60 seconds from the time he first saw them to the time the shots were fired. Nothing had been said. They were all wearing black and white patches …He can't make a statement due to fears of retaliation.

[22] The hospital notes recorded Mr Geels as reporting that he had heard a commotion, gone outside to investigate, seen three men he had never met before and, as he turned to go inside, heard a loud bang and "realised he had pain in his right buttock and could feel a warm dripping down his leg".

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3 *R v Wheeler* DC Timaru CRI-2021-009-005356, 24 January 2023 (Minute No 2) at [18].

[23] Mr Sutherland's statement to the police referred to Mr Geels telling him he had been shot. In addition, Mr Sutherland said this:

> Sorry I just remembered something else. When [Mr Geels] came home yesterday. I asked who did it. He said it was the Mongols, someone he had beef with who wanted to take his bike. He didn't say his name. He mentioned something about him just getting out of jail. He said it was a standover for the bike, that's why he fought them off. He wasn't going to give up his bike.

[24] The Judge permitted the Crown to lead evidence from Mr Sutherland that Mr Geels said he had been shot and from other witnesses who heard Mr Geels say this.[4] The Crown did not lead anything else about what Mr Geels had said to the police, to the hospital staff or to Mr Sutherland.

[25] Mr Wheeler's concern, as set out in the written submissions, was that the appellants were deprived of the opportunity to test Mr Geels' evidence through cross-examination. Without this opportunity, he says that the defence was left to one that relied solely upon the Crown's onus to prove the charge to the beyond reasonable doubt standard. Mr Wheeler submits that the Judge ought to have utilised his power under s 165 of the Criminal Procedure Act 2011 to detain a witness refusing to give evidence. Under that power a person called as a witness and who could have been compelled to give evidence, who refuses to be sworn or to answer questions, may be detained in custody for seven days and this may be renewed for successive days until the person consents to answer questions or to be sworn.[5]

[26] We agree with the position advanced by the Crown in its written submissions that the Judge did not err by taking this course. The Judge had formed the view that the Mr Geels would remain uncooperative. We infer that this was why the Judge did not allow the Crown a second attempt to have him sworn in. This was against the background of Mr Geels never having given a formal statement and telling the police when he was in hospital that he feared retribution. Moreover, the option of detaining Mr Geels in custody was pointless. He was already detained in prison pursuant to his sentence for drugs and firearms found at the property. He was therefore hardly likely

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4 *R v Wheeler* DC Timaru CRI-2021-009-005356, 25 January 2023 (Minute No 3) at [21].
5 Criminal Procedure Act 2011, s 165(1), (3)(a), (5) and (6).

to change his mind about giving evidence if directed to come back after up to seven days in custody when he was already in custody.

[27] The Crown submitted that an alternative option would have been to treat Mr Geels as a witness with a direction that he give evidence without taking an oath and to declare him hostile. That would have then enabled the Crown to elicit from Mr Geels his statement to the police in hospital in circumstances where Mr Geels was unlikely to have responded to questions in cross-examination from counsel for the appellants. That would have left the jury with evidence of his statement to the police which provided no narrative that assisted the defence.

[28] We agree with the Judge that Mr Geels was not a "witness". Section 4 of the Evidence Act 2006 defines a witness as "a person who gives evidence and is able to be cross-examined in a proceeding". It is a necessary pre-condition to giving evidence that a person over the age of 12 years take an oath or affirmation.[6] It is the case that a Judge may grant permission to a person to give evidence without taking an oath or affirmation.[7] However, that would not have been appropriate in circumstances where there could be no confidence that the witness would cooperate by answering questions asked of him and in a truthful manner. This would make pointless the requirement for a Judge to inform the witness of the importance of telling the truth and not telling lies when such permission is granted.[8]

[29] Further, had the Judge taken the course suggested it would have enabled the Crown to introduce Mr Geels' statement to the police as evidence of the truth of its

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6 Evidence Act 2006, s 77(1). The position is different from *Kerr v R* [2017] NZCA 498 at [27]: three witnesses called by the Crown were sworn in and answered some questions but then became equally hostile to the prosecution and the defence. See Matthew Downs (ed) *Adams on Criminal Law — Evidence* (online looseleaf ed, Thomson Reuters) at [EA4.46.06]; and Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence Act and Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at [EV4.46.04].

7 Section 77(4)(a).

8 Section 77(4)(b).

contents and to cross-examine him on that statement as a hostile witness.[9] As the Supreme Court cautioned in *R v Morgan*:[10]

> [40] … Issues of fairness may arise when a witness is expected to be hostile and is called for the purpose of getting the unsworn statement before the jury. Unfairness may be present or exacerbated if the hostility of the witness results in the accused being unable sensibly to cross-examine on the statement.

[30] We agree with the Crown that there is no basis to think that Mr Geels would have been anything other than hostile in cross-examination as well as in evidence in chief. The Judge's decision to discharge Mr Geels rather than to declare him hostile was beneficial to the appellants because it protected them from admission of his statement to the police unless it met the reliability requirements of the hearsay provisions.[11] The police statement was not admitted through that avenue — the Judge permitted only Mr Geels' statements that he had been shot (which was not in dispute). Protecting the appellants from the police statement was not disadvantageous to the appellants — the statement provided evidence of a shooting involving three gang members and provided no narrative for the shooter acting in self-defence or defence of another.

[31] This ground of appeal was correctly abandoned.

Self-defence (and defence of another)

[32] At trial, the appellants were of the view that there was sufficient evidence to suggest that the firearm may have been taken from their vehicle, and used, only after Mr Geels had attacked Mr Ford with a machete. At the close of the Crown case, Mr Ford, supported by Mr Wheeler and Mr Marshall, asked that they be allowed to put self-defence or defence of another to the jury and for the Judge to direct on this. The Judge declined this application.[12] The appellants contend this was an error.

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9 The statement in such a case is not hearsay as defined in s 4(1) of the Evidence Act and the Judge may determine the witness is hostile and permit cross-examination under s 94 of the Evidence Act.

10 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 per Blanchard, Tipping, McGrath and Wilson JJ.

11 Evidence Act, s 18(1)(a).

12 *R v Wheeler* DC Timaru CRI-2021-009-005356, 31 January 2023 (Minute No 7) at [42].

[33] The foundation for self-defence or defence of another was the police scene examination which located the broken machete. The broken machete was found on the grass in the back yard close to the fence separating the front and back yards. There was no forensic evidence linking the appellants to the machete. When Mr Ford was arrested and taken into custody in relation to the shooting, marks were observed on his body and Mr Ford advised that they had been caused by a machete. Detective Hone, to whom Mr Ford had previously declined to make a statement about the shooting, was informed of this. Detective Hone went back to Mr Ford to speak to him about the marks on his body.

[34] Detective Hone gave the following evidence:

> Q. At about 8.40 am was Mr Ford provided with a top to wear by the authorised officer who was overseeing those in custody?
>
> A. Yes that's my understanding.
>
> Q. Were you at that point advised of a conversation that had taken place regarding some marks on Mr Ford's body?
>
> A. Yes I was.
>
> Q. And did he advise that he had some marks from a machete?
>
> A. That's what I was informed.
>
> Q. Did you go back and speak to Mr Ford about those marks?
>
> A. I did.
>
> Q. And did you ask him if he wanted to make a statement about those marks?
>
> A. I did.
>
> Q. Did he advise that he cannot make any statement?
>
> A. Correct.
>
> Q. Did you ask Mr Ford if you could photograph those marks?
>
> A. Yes I did.
>
> Q. And did that occur?
>
> A. Yes.
>
> Q. Did you then ask Mr Ford a number of other questions?

A. I asked another three questions.

Q. Was the first of those: "How did you get those marks?"

A. Yes.

Q. And was the answer: "Whatever marks are there are from that?"

A. Yep.

Q. Did you know what "that" meant?

A. I only assumed from the conversation that I'd been informed of that that was the machete.

Q. Did you then read back over your notebook and ask Mr Ford to sign it as being accurate?

A. I did.

Q. And did he do so?

A. Yes he did.

[35] The police photographs of the injuries were produced at trial. They showed two thin, horizontal, healing wounds on the side of Mr Ford's torso.

[36] The appellants submit that the Crown case left a significant void as to the events at the Pareora property between the arrival and departure of the appellants. They say that the evidence did not establish whether the appellants exited the vehicle at the same time, who entered the property first, when the firearm was taken from the vehicle and by whom, and the circumstances in which the shot which injured Mr Geels was discharged.

[37] They submit that several circumstances pointed strongly to the machete having been used in the incident, namely: it being found by itself in a relatively tidy yard; its proximity to the events Ms McMillan observed; its broken state, consistent with it having being used with force; Mr Ford's police statement; and Mr Ford's injuries. They further submit that several circumstances pointed to the machete having been used by Mr Geels, namely that: Ms McMillan saw Mr Geels chasing a male in the backyard which suggests that the male was trying to get away from Mr Geels; it was inherently unlikely that Mr Geels would chase the male without being armed; and the

machete was located near the gate that was the only exit point for the appellants from the back yard.

[38] In the Judge's reasons for declining to allow self-defence or defence of another to be put to the jury the Judge said:[13]

> [32] The only witness that saw and heard the verbal discussion did not see anything in Mr Geels' hands.
>
> [33] The only evidence from Ms McMillan was that she observed one of the Mongols carrying something that looked like a firearm.
>
> [34] There is absolutely no evidence that the complainant, Mr Geels was in possession of a machete and no evidence that he used the machete against Mr Ford or any of the other defendants.
>
> [35] A broken machete was found on the ground in the backyard of [the Pareora property]; but there is no evidence to connect Mr Geels with the weapon. Similarly, there is no evidence to connect the weapon with an attack on Mr Ford.
>
> [36] I note that there is a time gap of some six days between when the offending is alleged to have occurred and when the marks first became visible to the police after Mr Ford was arrested.
>
> [37] While [I] accept the defendant has a right to silence, he did make comment that the marks were caused by a machete.
>
> [38] While there is no onus or obligation on him to give details, he was given the opportunity to comment as to how and when and by who, he received those marks.
>
> [39] There is no evidence that Mr Ford fired a gun and shot Mr Geels in self-defence.
>
> [40] If one of the other defendants shot Mr Geels because Mr Geels was attacking Mr Ford, then there needs to be a plausible, credible narrative that one of the co-offenders shot Mr Geels because they were acting in self-defence.
>
> [41] There is no evidence by which it could be inferred that any of the defendants were acting in self-defence as opposed to discharging the firearm in pursuan[ce] of the common agreement to intimidate Mr Geels.
>
> [42] I do not think that there is a plausible and credible narrative to allow self-defence to be placed before the jury, for any of the defendants; and accordingly rule that self-defence could not be put to the jury.

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13 Minute No 7, above n 12.

[39] The appellants take issue with the Judge's reference to "plausible and credible" because the relevant test is "plausible or credible" as set out in this Court's decision in *R v Tavete*, relying on this Court's decision in *R v Kerr*, as follows:[14]

> The general principle is not in doubt. Self-defence should be put to the jury where, from the evidence led by the Crown or given by or on behalf of the accused, or from a combination of both, there is a credible or plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence.

[40] The appellants also submit that a "narrative" should not be required. They accept that there was an absence of a narrative that one of the appellants acted in self-defence (or defence of another) in discharging the firearm. However, they submit that all that was necessary was for the appellants to "point to material in the evidence which could induce a reasonable doubt".[15]

[41] We agree that the test is usually described as requiring a "plausible or credible" narrative rather than a "plausible and credible" narrative.[16] However, "plausible" and "credible" are synonyms so the use of "and" rather than "or" by the Judge was of no moment.[17] Further, we disagree that "narrative" is not properly part of the test. In fact, it was the language used by this Court in *Tavete*.[18] Narrative in this context does not mean an account from a witness that the shooting was in response to a threat or actual use of force. It simply means that there must be a proper basis in the evidence (Crown or defence) that could lead the jury to entertain the reasonable possibility that the appellants acted in self-defence (or defence of another).[19] The defence is not to be put to the jury if it would require the jury to speculate.[20]

[42] In this case the defence proposition was that Mr Geels was shot in response to him striking Mr Ford with a machete. The appellants submit that the location of the machete "is evidence it had been used whilst the appellant[s] were at the property."

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14 *R v Tavete* [1988] 1 NZLR 428 (CA), adopting *R v Kerr* [1976] 1 NZLR 335 (CA) at 340. See also *R v Wang* [1990] 2 NZLR 529 (CA) at 533.

15 *R v Kerr*, above n 14, at 340.

16 See for example: *R v Tavete*, above n 14, at 430–431; and *R v Wang*, above n 14, at 539.

17 See the entries for "plausible" and "credible" in Cambridge Dictionary English Thesaurus (online ed, Cambridge University Press).

18 *R v Tavete*, above n 14 at 340.

19 *R v Kerr*, above n 14, at 340.

20 See Downs *Adams on Criminal Law*, above n 6, at [CA48.17].

Further, they submit that "if the evidence did not exclude the possibility that Mr Geels may have been the one who used it, which clearly it did not, this itself constitutes evidence that Mr Geels may have used it". From there, the appellants say an inference can be drawn that Mr Ford's injuries were caused by Mr Geels and that Mr Geels was shot in response to this.[21]

[43] This reasoning involves speculation. The location of the machete does not indicate its use when the appellants were at the property. It is consistent with it possibly having been used when the appellants were at the property but it is also consistent with it not having been used when the appellants were at the property. Similarly, while the evidence did not exclude the possibility that Mr Geels had used the machete, nor did it exclude the possibility that he had not. In other words, these matters left a lacuna in the evidence about whether the machete had anything to do with the discharge of the firearm.

[44] No other evidence filled that lacuna. Mr Ford did not say to the police that his injuries were caused by Mr Geels, nor did he say when they were caused. No witness saw Mr Geels holding the machete or indeed any weapon. Ms McMillan was the only person who mentioned a machete, but she explained that what she first thought was a machete was a gun, and in any case it was one of the males that had come onto the property that had the weapon that she first thought was a machete. There was no evidence that the machete found lying on the ground had any connection with the incident. In these circumstances, the jury could only conclude there was a reasonable possibility of self-defence (or defence of another) by speculating to fill this lacuna.

[45] We therefore conclude the Judge was correct to decline to put self-defence (or defence of another) to the jury. We dismiss this ground of appeal.

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[21] The appellants submit that, in rejecting the appellants' application under s 147 of the Criminal Procedure Act, the Judge accepted that various inferences could be made on the Crown case. They say the Judge took the opposing view of the same kinds of inference the defence sought to draw in relation to self-defence (or defence of another). We consider whether the Crown case was sufficient to support the verdict under the unreasonable verdict ground of appeal discussed below.

Section 66(2) directions

[46] The appellants submit that the Judge's directions to the jury on the requirements for party liability under s 66(2) of the Crimes Act 1961 were in error. They refer to the Supreme Court's recent decision in *Burke v R*, which was delivered after the trial, and submit that issues identified as problematic in that case arise here.[22] Principally, the appellants submit that the common purpose element was pitched at a low level relative to the offence committed, the Judge failed to direct what "in the course of the common purpose" meant, and the knowledge of a weapon direction was given in the wrong order. They also raise other matters about the s 66(2) direction.

[47] As the Judge explained in summing up to the jury, the Crown accepted that it did not know who fired the shot that wounded Mr Geels. The jury needed to be satisfied beyond a reasonable doubt that one of the three appellants fired that shot, that the appellants formed a common purpose to assist each other to intimidate Mr Geels, and that each knew that wounding Mr Geels was a probable consequence of carrying out the common purpose. The Judge provided the jury with a question trail, explaining to the jury that it set out all the matters that the Crown was required to prove beyond a reasonable doubt.

[48] The question trail set out identical questions in relation to each of Mr Wheeler, Mr Ford and Mr Marshall. Taking the one for Mr Wheeler as an example, the questions were as follows:[23]

> **Questions**
>
> 1.1 Are you sure that on 10 July 2021 one of either Mr Wheeler, Mr Ford or Mr Marshall used a firearm to shoot Mr Geels?
>
> - If NO find Mr Wheeler NOT GUILTY on this charge.
> - If YES go to question 1.2
>
> 1.2 Are you sure that the shot from the firearm was the cause of the wound?

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22 *Burke v R* [2024] NZSC 37.

23 The first page of the question trail set out definitions for "wound", "grievous bodily harm", "intent", "intimidation" and "probable consequences". It also set out s 66(2) of the Crimes Act 1961.

Wound – see definitions

- If NO find Mr Wheeler NOT GUILTY on this charge.
- If YES go to question 1.3

1.3 Are you sure that the person who used the firearm, when they shot Mr Geels, intended to cause grievous bodily harm to Mr Geels?

Grievous bodily harm – see definitions

Intention – see definitions

- If NO then find Mr Wheeler NOT GUILTY on this charge.
- If YES go to question 1.4

1.4 Are you sure that there was a shared understanding or agreement between Mr Wheeler and at least one other to carry out something unlawful, namely, to intimidate Mr Geels?

Intimidation/Intimidating – see definition

- If NO then find Mr Wheeler NOT GUILTY on this charge.
- If YES go to question 1.5

1.5 Are you sure that Mr Wheeler had agreed to help at least one of the other defendants in the shared understanding or agreement and participate to achieve their common unlawful goal of intimidating Mr Geels?

- If NO then find Mr Wheeler NOT GUILTY on this charge.
- If YES go to question 1.6

1.6 Are you sure that the wounding with intent to cause grievous bodily harm was committed in the course of pursuing their common goal of intimidating Mr Geels?

- If NO then find Mr Wheeler NOT GUILTY on this charge.
- If YES go to question 1.7

1.7 Are you sure that Mr Wheeler knew, when he exited the vehicle, that one of the others was armed with a firearm?

- If NO then find Mr Wheeler NOT GUILTY on this charge.
- If YES go to question 1.8

1.8 Are you sure that Mr Wheeler knew at the time of exiting the vehicle that it was a probable consequence that the person with the firearm was going to cause grievous bodily harm in carrying out their common goal of intimidating Mr Geels?

Probable consequence – see definitions

- If NO then find Mr Wheeler NOT GUILTY on this charge.
- If YES go to question 1.9

1.9 Are you sure Mr Wheeler knew that it was a probable consequence that the person with the firearm intended to cause grievous bodily harm to Mr Geels in carrying out their common goal of intimidating Mr Geels?

- If NO then find Mr Wheeler NOT GUILTY on this charge.
- If YES then find Mr Wheeler GUILTY on this charge.

[49] It can be seen that question 1.4 asked the jury whether they were sure the appellants had a common purpose (the shared understanding or agreement) to intimidate Mr Geels. The appellants submit that this pitched the common purpose at a low level relative to the serious offence of wounding with a firearm that occurred. In accordance with *Burke*, this meant it was necessary for the jury to be sure that the shooting was carried out in the course of prosecuting the common purpose and, to be sure of that, it was necessary that the jury be sure that each appellant knew that one of them had a firearm (the knowledge of a weapon direction).[24]

[50] The appellants submit that this in turn meant that the knowledge of a weapon direction (question 1.7) should have been given before the direction that the shooting had to carried out in the course of prosecuting the common purpose (question 1.6). The appellants submit that it was an error to ask these questions in reverse order and this error was compounded by the Judge not giving any guidance as to what "committed in the course of pursuing" meant.

[51] We agree that, in accordance with *Burke*, because the common purpose was pitched at a low level (intimidation), it was necessary for the Judge to give a knowledge of a weapon direction, in this case a direction about each appellant's knowledge of a firearm.[25] Otherwise, an appellant potentially could be convicted of the wounding offence even if the use of the firearm was outside of the common

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24 *Burke v R*, above n 22, at [45(a)] per O'Regan, Williams and Kós JJ.

25 At [45(b)], [69]–[73] and [141]–[142] per O'Regan, Williams and Kós JJ. We note that the Crown case could instead have alleged that the common purpose was to intimidate Mr Geels armed with a firearm.

purpose. Knowledge of the weapon would also be relevant to whether the wounding was known by those appellants who were not the shooter to be a probable consequence of the prosecution of the common purpose.[26]

[52] We also agree that the knowledge of the weapon direction (given by the Judge at question 1.7) should have preceded the direction that the wounding had to be "committed in the course of pursuing" their common goal of intimidating Mr Geels (given by the Judge at question 1.6). The order of these questions gave rise to the risk the jury could have found question 1.6 was proven because the shooting took place at the same time as carrying out the common purpose of intimidating Mr Geels, rather than as part of the process of implementing the common purpose.[27] This risk might have been removed if the Judge had directed the jury as to what "committed in the course of pursuing" the common purpose meant. As in *Burke*, no such direction was given.[28]

[53] However, there the parallels with *Burke* end. In *Burke*, the jury had been given alternative pathways to a guilty verdict under s 66(2).[29] In one pathway the jury could convict the defendant on the basis that he knew his co-offender had a knife. In the other pathway the jury could convict the defendant on the basis that he did not know the co-offender had a knife. Under the pathway where the defendant did not know of the knife, compounded by the absence of an explanation of what "in the course of" meant, the jury may have convicted the defendant of manslaughter on the basis that it was sufficient that the stabbing that caused the victim's death was carried out at the same time as the common purpose to give the victim a "hiding".

[54] In contrast, in the present case, the Crown evidential case was clearly that the shotgun was part of the intimidation even though the common purpose direction (questions 1.4 and 1.5) referred only to the goal of intimidating Mr Geels. The Crown case was that one of the three appellants had openly carried the shotgun onto the

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26 At [48]–[49], [52], [54] and [75] per O'Regan, Williams and Kós JJ.
27 At [45(a)] and [74]–[77] per O'Regan, Williams and Kós JJ.
28 At [74]–[75] per O'Regan, Williams and Kós JJ.
29 The question trail in *Burke* is set out at [27] per O'Regan, Williams and Kós JJ.

Pareora property. The Crown closing emphasised this point. For example, the closing address included the following submissions:

> Simply by walking up to the property with each other with at least one of them wearing their patch, the Crown says that it is clear from that act or those actions that they were intending to intimidate Mr Geels. …
>
> …
>
> … His Honour will direct you that you may only conclude that Mr Geels being shot with intent to cause grievous bodily harm could only have been a probable consequence if you are satisfied beyond reasonable doubt that the defendant you are considering, the charge against, at that time, knew that one of their number was armed when they left the vehicle. …
>
> …
>
> … They turn up uninvited with the gun. Mr Geels was confronted three to one …
>
> …
>
> … [T]he Crown says that you can infer that one of the defendants brought the firearm onto the property. Firstly: [Ms] McMillan's evidence is crucial to this point. … [W]hen she first looked out the window she saw one of the defendants with what looked like a gun. …
>
> …
>
> … Given that we know that the defendants arrived at the property sometime between 1.38 pm and 1.39 pm and the 111 call was made at 1.41 pm the Crown says that you can infer from Ms McMillan's evidence that she saw the early stages of the confrontation. The Crown says that it follows that you can infer that the [firearm] was brought onto the property by one of the defendants.
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> …
>
> … [Y]ou can infer that the defendants brought the firearm onto the property for the purpose of intimidating Mr Geels. Given the short timeframe that these events occurred within, and the fact that Ms McMillan appears to have heard the start of the argument before she looked out and saw the three defendants with Mr Geels, the Crown says that it is clear that all three of the defendants were acting together.
>
> …
>
> … [A]ll three of the men were described as being quite close to each other by Ms McMillan. The Crown says that they all entered the property together to confront Mr Geels. They all returned to the vehicle after the shots were fired …
>
> …

> The next inference that the Crown asks you to draw on is that one of the defendants shot Mr Geels in the course of the common purpose. This is an inescapable inference. The three defendants came onto the property each with the purpose of intimidating Mr Geels and assisting each other with that purpose. They knew that a firearm was being brought onto the property. It was clear that one of the defendants shot Mr Geels during this confrontation. …

[55] Similarly, the closing address for Mr Ford submitted that "unless [the jury] can be satisfied they've arrived essentially I would say with an intention to get out, use the gun, or present it at least to intimidate, that's the end of the matter …". Consistent with this submission and the emphasis the Crown placed on the matter, the Judge directed that question 1.7 was an "important matter" and that "the Crown must prove beyond reasonable doubt that when each defendant exited the vehicle, that they knew that one of the others was armed with a firearm".

[56] This was not therefore a case where there was a risk that the jury might have convicted an appellant who did not know one of the others had taken a firearm onto the property (which would be relevant to whether the offence committed was outside the prosecution of the common purpose of intimidation). Rather, if the appellant knew the firearm was being taken onto the property as part of the common purpose to intimidate, then the offence was committed in the prosecution of the common purpose. In other words, on these facts, questions 1.6 and 1.7 had to be answered the same way.

[57] This meant that the jury did not need help with whether the gun had been fired "in the course of pursuing" the common purpose. As was said in *Burke*, "in most cases" it will be "obvious" that the offence in question has been committed in the course of carrying out the common purpose.[30] This was one such case. This meant that in this case it did not matter that question 1.7 was asked after question 1.6. The fact that the jury must have answered "yes" to question 1.7 to reach their guilty verdicts meant that there was no risk that the jury had answered question 1.6 "yes" for an appellant even if that appellant did not know one of the others had taken a firearm onto the property.

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30 At [74] per O'Regan, Williams and Kós JJ.

[58] The appellants raise three further matters about the Judge's directions. First, the appellants submit that question 1.7 did not direct the jury that they needed to be sure that the firearm was loaded. They submit that an unloaded firearm may be of equal utility in facilitating an intimidation as a loaded firearm but it would not follow that shooting Mr Geels was carried out in the course of the prosecution of the common purpose if an appellant believed the firearm was not loaded.

[59] We disagree that it was necessary that question 1.7 ask whether each appellant knew, when they exited the vehicle, that one of the appellants was armed with a loaded weapon. The question asked whether the jury was sure that the appellants knew when they exited the vehicle that one of them was "armed" with a firearm. We consider that "armed" indicates being ready to use the firearm as a weapon. (Compare, for example, what is conveyed by "armed with a shovel" in contrast with "carrying a shovel".) We accept the Crown's submission that someone who knows that someone else is armed with a firearm for the purposes of intimidation accepts the risk that it is loaded, at least absent a reason to think otherwise and here there was no reason suggesting otherwise.

[60] Secondly, the appellants submit that the question trail enabled the jury to convict all three appellants on the basis that none of them possessed the firearm. That is because question 1.7 was identical for all three of them. We agree that the question 1.7 should have been framed "… that *he or* one of the others was armed with a firearm".[31] However, the absence of the "he or" wording would not have caused the jury any difficulty. It was clear that the Crown case was that one of the appellants was holding the firearm and it did not matter who it was. On this basis, the jury did not need to be troubled by deciding who of the three had the firearm in answering this question. The key part of question 1.7 for each appellant was that they knew that one of them was armed with the firearm.

[61] Lastly, the appellants refer to the comments in *Burke* that:[32]

> [113] … The greater the gap between purpose and consequence, the less likely it is that the answer to that question [of whether the consequence was a probable result of the common purpose] is in the affirmative: "probable"

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31 Emphasis added. Compare this with the phrasing in the question trail (above at [48]) which omits "he or".

32 *Burke v R*, above n 22, at [113] and [121] per O'Regan, Williams and Kós JJ.

> should not be made to do the work of the merely possible. Of course, actual context will be very important.
>
> …
>
> [121] Put another way, the closer the association between the common purpose and the ultimate offence, the less additional evidence is required to connect the common purpose to its probable consequence.

[62] The appellants submit that, because the common purpose of intimidation required no physical violence to be inflicted, and because the Judge did not direct that it was necessary that the appellant know that one of the others had a loaded weapon, there was a risk that the jury would find that an appellant knew the wounding was a probable consequence simply because it was a possible consequence.

[63] We do not accept this submission. The Court's comments in *Burke* were made in the context of jury directions relating to whether a defendant was guilty of manslaughter as a party under s 66(2) where the principal had killed the victim with a knife. The Court was discussing the situation where a killing results from a violent act of a different and more serious kind. The circumstances in that case involved a principal, party and victim associated to the same gang where the principal and the party were tasked with punishing the victim for an internal gang matter. The directions permitted the jury to find a defendant guilty as a party to manslaughter on the basis of a common purpose to give the victim a "hiding" and without a requirement that the defendant knew the principal had a knife.

[64] In the present case, the directions required the jury to be sure that each appellant knew, when they exited the vehicle, that one of the appellants was armed with a firearm. In accordance with *Burke*, this knowledge of the weapon direction was necessary because the common purpose was pitched at a low level, that of intimidation, rather than intimidation with a loaded firearm for example. With the knowledge of the weapon direction, the gap between the common purpose and the wounding offence committed was bridged. Importantly, the directions correctly directed the jury that "probable consequence" required the jury to be sure that there was a real or substantial risk that the person with the firearm would cause grievous

bodily harm or that it could well happen that the person with the firearm would cause grievous bodily harm.[33]

[65] We dismiss this ground of appeal.

Unreasonable verdict

[66] The appellants submit that the guilty verdicts were unreasonable in light of the evidence. This submission is made on the basis that the primary witness was Ms McMillan and her evidence did not support the verdicts because it was incomplete and contradictory. Most significantly, the appellants place reliance on Ms McMillan's statement to the police that, when she first looked out the window, she saw Mr Geels with "the [one] mob guy". It is submitted that this evidence was fatal to the Crown's theory that the three appellants exited the vehicle at the same time.

[67] We disagree. As set out above, Ms McMillan's evidence at trial was that when she first looked out the window, she saw Mr Geels in his boxers with three men who were gang members.[34] When cross-examined about her statement to the police of having seen Mr Geels with "the mob guy", she said that what she thought was one person, was three people, but it just happened so quickly. In re-examination she confirmed that she had seen three men with Mr Geels in the back yard.

[68] The appellants submit that Ms McMillan's evidence of "what I thought was one person was three" can only be explained as after-the-fact construction. However, it was for the jury to assess Ms McMillan's credibility and reliability. It was open to the jury to accept her evidence that when she looked out the side window she saw Mr Geels and three men in gang clothing. That evidence was consistent with the evidence of the short time frame the men were on the property and Ms McMillan's evidence of then seeing the three men running out the front gate, getting into a parked car and taking off.

[69] This ground of appeal is dismissed.

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[33] At [11] and [88] per O'Regan, Williams and Kós JJ.
[34] See above at [8]–[12].

Sentence appeal

[70] In sentencing the appellants the Judge adopted a starting point of eight years' imprisonment.[35] With discounts for personal mitigating factors, they were each sentenced to six years and four months' imprisonment.[36] The appellants submit that the Judge's starting point was too high because it did not reflect their culpability as parties on a s 66(2) basis.

[71] The submission at sentencing was that, because the Crown could not prove which of the appellants was the shooter, they should all be sentenced on the basis that they were secondary parties. Further, as there was a marked difference between the purpose of the appellants (to intimidate Mr Geels) and the end outcome committed by the principal (a wounding, with a firearm, intending to cause grievous bodily harm), the appellants submitted their culpability as secondary parties was reduced relative to the (unknown) shooter. At sentencing, counsel for Mr Ford submitted that this lesser culpability warranted a 33 per cent reduction.

[72] In addressing this submission the Judge said he accepted that the appellants should not be treated as "equal principals".[37] The Judge went on to set out the basis on which he was sentencing the appellants as follows:

> [43] The first matter is to consider an appropriate starting point. Again I have said that you are equally culpable in my eyes for the purposes of sentencing. It is not clear, as I have said, who had the firearm but it is clear that the two that did not have the firearm knew about it. …
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> …
>
> [47] I accept that there was no evidence of an intention to shoot the complainant when you left Christchurch. All three of you left Christchurch in the vehicle and it is clear that the two who did not have the firearm were there clearly to back up and support the person who did have the firearm.

[73] The Judge went on to explain that he was making "an evaluative assessment of the aggravating features and [the appellants'] culpability".[38] He referred to the features of the offending and explained why he considered these features put the

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35 Sentencing notes, above n 2, at [53].
36 At [54]–[57].
37 At [32].
38 At [49].

offending at the at the top end of band two of *R v Taueki*.[39] The Judge then returned to the submission that a lesser starting point should be adopted because the convictions were on the basis of s 66(2), saying:

> [52] Mr Bailey [counsel for Mr Ford] in particular has submitted that I should consider a lesser starting point because s 66(2) was involved rather than s 66(1) and that you should all be treated as secondary parties rather than principal parties, although clearly one of you was the principal party.
>
> [53] Whatever the position is taking into account the purposes of sentencing as being holding you accountable, to denounce your conduct and to protect the community, taking into account the cases I have been given and taking into account all the matters that counsel have raised, I think that the appropriate starting point here for this offence is … eight years' imprisonment.

[74] The Judge's approach was therefore to sentence the appellants on the basis that they did not embark on the common purpose intending to shoot the victim, and that it was not known who pulled the trigger but the two that did not were there to back up and support the person who had the firearm. The Judge was of course aware that the basis for the jury verdicts was s 66(2). His approach was to evaluate the aggravating factors and the appellants' culpability and the purposes of sentencing in setting the starting point. This approach was consistent with this Court's reminder in *Orchard v R* that sentencing is not formulaic and requires an evaluation of the seriousness of the aggravating factors to establish a starting point that properly reflects the culpability of the offending.[40]

[75] The real question is whether the Judge's starting point was manifestly excessive for the combination of aggravating factors that it involved. Although it could not be said who had used the weapon, it was aggravating that the appellants all knew that one of them had the firearm that would be used for the purposes of intimidating Mr Geels, they all knew there was a real risk that the firearm would be used to cause grievous bodily harm, and the firearm was in fact used to discharge several shots one of which caused injuries to Mr Geels.

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39 At [49], referring to *R v Taueki* [2005] 3 NZLR 372 (CA).

40 *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [32], quoting *R v Taueki*, above n 39, at [30].

[76] Other aggravating factors included premeditation. As the Judge said, this was not a chance meeting.[41] The appellants all travelled from Christchurch to south of Timaru for the clear purpose of intimidation.[42] Further, there were three people involved in the intimidation, at least one of whom was wearing a gang patch or vest, and the confrontation was at the address where the victim lived.[43] As the Judge said, this was "pretty close" to a home invasion even if it did not technically qualify as that.[44] It was also aggravating that the intimidation had a gang element to it.[45]

[77] We agree with the Judge that this combination of aggravating features placed the offending at the top end of band two of *R v Taueki*.[46] That band has a range of five to 10 years for grievous bodily harm offending that features two or three aggravating features. The group nature of the confrontation at Mr Geels' home address, the gang element, the dangerous use of the firearm as part of that confrontation, and the fact that several shots were discharged place this near the top end. The Judge's starting point of eight years' imprisonment was available in light of these features.

[78] The only case specifically relied on by the appellants on appeal as indicating that the Judge's starting point was too high is *Fukofuka v R*.[47] That case involved an offender convicted of two counts of wounding with intent to cause grievous bodily harm for shooting two men outside a nightclub. The offender had left a nightclub and became involved in physical skirmish with others outside the nightclub. During the skirmish he was punched in the head and fell, where he was hit again. The offender got to his feet, retrieved a firearm and a few seconds later was firing shots as he went. He fired at least five shots, including shooting one person in the knee and another through the thigh. The sentencing Judge adopted a starting point of eight years' imprisonment. This Court considered this was "well within the available range".[48]

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41 Sentencing notes, above n 2, at [44].
42 At [47].
43 At [44], [49] and [51].
44 At [49].
45 At [51].
46 At [49], referring to *R v Taueki*, above n 39, at [38]–[39].
47 *Fukofuka v R* [2019] NZCA 290.
48 At [44].

[79] Relative to *Fukofuka*, we do not regard the eight year starting point in this case as out of range. Although there were two victims in that case, it did not involve the aggravating features of this case. Specifically, that case did not involve pre-meditated intimidation at the victim's home address, the gang element, nor the number of offenders as in the present case.

[80] The respondent referred us to *Nuku v R* and *Howard v R*.[49] In *Nuku* the offender was with a co-offender in a taxi and shot the taxi driver with a pistol taken from his co-offender's bag. A nine-year starting point was regarded by this Court as "generous" and a nine-and-a-half-year starting point would have been available.[50] In *Howard* the offender, knowing his co-offender was drunk and angry, handed his co-offender a gun during a fight after a party. The co-offender used the gun to shoot someone. This Court held that the appropriate starting point range for both offenders was nine to nine and a half years' imprisonment.[51] We agree with the respondent that neither case is directly on point but they indicate that an eight year starting point was not out of range in the present case.

[81] In sentencing the appellants the Judge referred to having considered several other cases involving grievous bodily harm and the use of a firearm.[52] The Judge referred to:

(a) *R v Taki*, where a nine-year starting point was taken for the shooter where the aggravating features were premeditation, use of a weapon, extreme violence and serious injury;[53]

(b) *R v Duncan*, where an 11-year starting point was taken for the shooter where the aggravating features were extreme violence by shooting at close range, premeditation, serious injury, the use of a weapon and an element of gang warfare;[54]

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49 *Nuku v R* [2019] NZCA 319; and *Howard v R* [2018] NZCA 633.
50 *Nuku v R*, above n 49, at [13].
51 *Howard v R*, above n 49, at [29].
52 See sentencing notes, above n 2, at [19]–[20].
53 *R v Taki* [2022] NZHC 1801 at [30].
54 *R v Duncan* [2012] NZHC 1814 at [25]. An accessory after the fact received a lower starting point: at [33].

(c) *R v Amohanga*, where a 10-year starting point was taken for the shooter where the aggravating features were use of a weapon, extreme violence involving shooting the victim at close range, serious injury, premeditation and entry onto the victim's property;[55] and

(d) *R v Huata*, where an 11-year starting point was taken for both the principal and the party where the aggravating features were use of a weapon, extreme violence, premeditation, serious injury, gang warfare and it was also relevant that the shooting was in public.[56]

[82] There are similarities with all of these cases and the present case, but this case is perhaps most similar to *Taki*.[57] That case involved a shooting at the victim's mother's house as the victim tried to run away after the defendant presented a firearm. Although *Taki* involved a more serious injury, it did not involve the element of group-gang violence at the victim's home. *Duncan*, which involved a shooting over the fence by the defendant following an argument with a member of another gang next door, is also similar, although that case involved a more serious injury — it was likely the victim would suffer a permanent disability.[58] The lower starting point in the present case relative to these cases therefore took account of the secondary party basis on which the appellants were convicted.

[83] Mr Ford also submits the Judge wrongly declined to place any weight on an affidavit he filed for sentencing purposes. That affidavit was intended to form the basis for a submission of reducing culpability on the basis that the shooting was excessive self-defence warranting a lower starting point than the one the Judge adopted.

[84] The affidavit evidence was as follows:

> 2. As the Court will likely appreciate given my affiliations/membership, I am bound by certain rules relating to giving evidence or making allegations against individuals.

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55 *R v Amohanga* [2021] NZHC 1121 at [16].
56 *R v Huata* [2012] NZHC 2735 at [13]. This starting point was upheld on appeal in *Huata v R* [2013] NZCA 470 at [22].
57 *R v Taki*, above n 53.
58 *R v Duncan*, above n 54, at [21].

3. However, I can confirm that neither I, nor either of my two co-defendants, took the machete which was located by the Police in the rear of the section at [the Pareora property] to that address on 10 July 2021. This machete was not in our car and nor was it handled by me or my two co-defendants at any stage whilst we were at the property that day.

4. As the Court may recall, when I was arrested by the Police six days after the incident the Police became aware of marks on my back when I was at the Christchurch Central Police Station. This occurred after I was required to remove the clothing that I was wearing when I was arrested so I could be stripped searched. After the Police became aware of, and interested in, these marks I told the Police that they were from a machete (as per the evidence Detective Constable Hone gave at trial). I also allowed the officer to photograph these marks. However, if I was not required to remove my clothing then the Police would not have become aware of the marks and I would not have informed the Police of them.

5. I can confirm that these marks were caused by the machete which the Police located at [the Pareora property]. I received these marks after being struck with significant force several times with this machete after I exited the vehicle and went into the property of [the Pareora property].

6. At the time I was struck by the machete no firearm had been discharged at or in the vicinity of [the Pareora property]. The firearm was only removed from our vehicle after the attack on me with the machete started. In addition, when I was attacked with the machete neither I, nor either of my two co-offenders, were in possession of any other weapon.

[85] The Judge's view about the affidavit was as follows:[59]

> [59] The issue for me is what I should do with that information or evidence in the form of the affidavit. You had your chance to give evidence at the trial. It was your decision; it was not the decision of your lawyers and it was not the decision of your gang. I intend to place no weight on the contents of the affidavit. I am not going to engage in what might have been trial matters during the course of the sentencing process now. You are in effect trying to raise self-defence and arguing that your culpability should be reduced because there was an element of excessive self-defence raised.
>
> [60] You have indicated, or the material before me indicates that you are going to appeal the decision. That is your right (and this may be a matter that you want to raise at a later stage) but again, I have found you equally culpable with the others and the jury were satisfied beyond reasonable doubt that if you did not have the firearm that you knew about the presence of the firearm. I found that at trial there was not credible evidence of self-defence to go to the jury. I made that ruling and I stick with that now.

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59 Sentencing notes, above n 2.

[86] Mr Ford submits that the Judge's approach was in error. He submits the fact that he exercised his right to silence at trial does not prevent him from giving evidence at sentencing. He submits he is entitled to give evidence providing it was not incompatible with the trial evidence.[60] He relies on this Court's decisions in *R v Allan* and *Archer v R* as support for this submission.[61] He also suggests that the Judge's approach was wrongly influenced by having refused to allow the jury to consider self-defence and the indicated likely conviction appeal. He suggests that if the Judge had allowed Mr Ford to rely on the affidavit at sentencing, that would have undermined his decision at trial not to allow the jury to consider self-defence.

[87] We respond to that last point first. We do not agree with that assessment of the Judge's approach. The Judge was not concerned about whether he erred in his trial ruling not to put self-defence to the jury. We consider the Judge's approach was simply that Mr Ford could have raised the matters in his affidavit at trial but did not. This meant that there was no evidence of self-defence to allow that to be considered by the jury, and sentencing was not the time to raise evidence that was properly part of the trial if it was going to be raised at all.

[88] Section 24 of the Sentencing Act 2002 provides:

> **24 Proof of facts**
>
> (1) In determining a sentence or other disposition of the case, a court—
>
> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
>
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
>
> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—
>
> (a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:

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60 Sentencing Act 2002, s 24.

61 *R v Allan* [2009] NZCA 439, (2009) 24 NZTC 23,815; and *Archer v R* [2017] NZCA 52.

(b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:

(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:

(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:

(e) either party may cross-examine any witness called by the other party.

…

[89] Section 24(1)(a) of the Sentencing Act permits the court at sentencing to accept as proved any fact that was disclosed by the evidence at trial. Section 24(1)(b) requires the judge to accept as proved all facts essential to a finding of guilt. Section 24(2) provides a process by which evidence may be given of a fact that is relevant to the determination of a sentence.

[90] In this case the jury's verdicts mean it was proven that each appellant knew when they exited the vehicle both that: one of them was armed with a firearm (question 1.7 in the question trail); and that it was a probable consequence that the person with the firearm was intentionally going to cause grievous bodily harm in carrying out their common purpose of intimidating Mr Geels (questions 1.8 and 1.9 in the question trail). This meant it had already been proven that Mr Ford knew when he exited the vehicle of the real risk that Mr Geels would be shot. This is contrary to Mr Ford's affidavit that the firearm was only removed from the vehicle after the attack on him with the machete started.

[91] This case is quite different from both *Allen* and *Archer*. In *Allen* the issue before the jury was whether the defendant intended to evade the payment of GST.[62] Although there was evidence at trial as to the amount of GST that was payable, for the

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62 *R v Allen*, above n 61.

purposes of a reparation order at sentencing further evidence contesting the trial evidence about that was permissible. This was because the further evidence could not have borne on the defendant's state of mind as to his intention to evade tax which was the issue at trial. The further evidence therefore did not undermine the jury's verdict.[63] In *Archer* a guilty plea was entered at the end of the Crown case.[64] Evidence of excessive self-defence or provocation sought to be adduced at sentencing did not undermine the guilty plea.[65]

[92] In this case there was no plausible nor credible evidence at trial that the appellants were acting in self-defence (or defence of another) when the shots were discharged. Pursuant to s 24(1)(b), the Judge was required to sentence the appellants on the basis that self-defence (or defence of another) was not a reasonable possibility. Pursuant to s 24(1)(a), for the purposes of sentencing the Judge was also entitled to take the view that it was not proven that the machete had anything to do with the discharge of the firearm. The affidavit evidence that the firearm had only been retrieved after the machete was used was contrary to the jury's answers to questions 1.7 and 1.8. Those questions required the jury to be sure that each appellant knew when they exited the vehicle that one of them was armed with the firearm and that there was a real risk that it would be used to cause grievous bodily harm.

[93] We conclude that the starting point for all appellants was available to the Judge. We also conclude that the Judge was not wrong to place no weight on Mr Ford's affidavit. The sentence appeal is therefore dismissed.

Result

[94] The appeals are dismissed.

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63 At [37].
64 *Archer v R*, above n 61.
65 At [29].