IN THE COURT OF APPEAL OF NEW ZEALAND

CA544/2014
[2015] NZCA 615

BETWEEN	CALEB AFAMASAGA Appellants
AND	THE QUEEN Respondent

CA565/2014

BETWEEN	JOSHUA MAKALIMA Appellant
AND	THE QUEEN Respondent

CA566/2014

BETWEEN	KEVIN BANABA Appellant
AND	THE QUEEN Respondent

Hearing:	21 July 2015
Court:	Stevens, Heath and Collins JJ
Counsel:	P K Hamlin and E Burton for Mr Afamasaga M N Pecotic for Messrs Makalima and Banaba M D Downs for Respondent
Judgment:	18 December 2015 at 11.00 am

JUDGMENT OF THE COURT

A Mr Afamasaga's appeal against conviction and sentence is dismissed.

B Mr Banaba's appeal against conviction and sentence is dismissed.

C Mr Makalima's appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Heath J)

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Introduction

[1] Following a trial in the High Court at Auckland before Woolford J and a jury, Mr Caleb Afamasaga and Mr Kevin Banaba were each found guilty on one charge of murder and another of wounding with intent to cause grievous

bodily harm. Mr Joshua Makalima was found guilty of manslaughter, arising out of the same events.

[2] Mr Edgar Laloni and Mr Sosaia Laloni were charged with being accessories after the fact to murder. They helped Mr Afamasaga flee the scene and tampered with evidence. They were each found guilty. Another associate, Mr Samuel Lachmaiya, pleaded guilty before trial to one charge of being an accessory after the fact to murder and one of unlawfully possessing a firearm. No appeals are brought against the convictions of the Laloni brothers and Mr Lachmaiya.

[3] On 22 July 2014, after the High Court trial had been completed, Messrs Banaba, Makalima, Edgar Laloni, Sosiana Laloni and Lachmaiya each pleaded guilty, in the District Court, to one representative charge of selling the Class C controlled drug, cannabis. Those offences formed part of the sentencing in the High Court.

[4] Including those imposed for the cannabis offending, the effective end sentences were:[1]

(a) Mr Afamasaga was sentenced to life imprisonment, with a minimum period of imprisonment of 14 years.

(b) Mr Banaba received a life sentence, with a minimum period of imprisonment of 11 years.

(c) Mr Makalima was sentenced to 10 years and four months' imprisonment, with a minimum period of imprisonment of four years and two months.[2]

A first strike warning was given in respect of each of the appellants.

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1 *R v Afamasaga* [2014] NZHC 2142 at [43], [61] and [62].

2 The minimum period was fixed by reference only to the sentence of eight years and four months' imprisonment imposed on the manslaughter conviction.

Grounds of appeal

[5] Messrs Afamasaga, Banaba and Makalima each appeal against their convictions and the sentences imposed.

[6] Mr Afamasaga challenges his convictions on two broad grounds. He contends that a miscarriage of justice arises because Woolford J:

(a) failed to direct the jury adequately on self-defence; and

(b) wrongly admitted evidence that was unfairly prejudicial to Mr Afamasaga's defence or, alternatively, misdirected the jury about the way they might use it.

[7] Mr Afamasaga appeals his sentence on the ground that the minimum period of imprisonment imposed was manifestly excessive.

[8] Mr Banaba and Mr Makalima advanced their conviction appeals on different bases. Both assert that the jury's verdicts were unreasonable, because they are insupportable on the evidence adduced. In addition, Mr Banaba contends that his convictions should be set aside on the grounds that inconsistent verdicts were given in respect of Mr Makalima and himself. It is also submitted for both appellants that the trial Judge should have directed the jury on the defence of withdrawal, as neither Mr Banaba nor Mr Makalima was present when the victim was killed.

[9] On their sentence appeals:

(a) Mr Banaba challenges the length of the minimum period of imprisonment.

(b) Mr Makalima contends that the duration of both the finite sentence and the minimum period of imprisonment are manifestly excessive.

A killing in Ranui

Background

[10] Mr Banaba and Mr Makalima are patched King Cobra gang members. Mr Afamasaga, the Laloni brothers and Mr Lachmaiya were, at the time of the events that led to their convictions, all prospects for the gang. At about 9 pm on 16 December 2012, the six men met at the home of Mr Lachmaiya in Universal Drive, Henderson, and planned a means by which the leader of a rival group, Mr Daniel Turner, would be shot. Their alleged motive was to seek retribution for events that had occurred earlier, and had brought shame, humiliation and embarrassment onto their group.

[11] The plan was carried into effect at around 11 pm on 18 December 2012, when Mr Afamasaga shot Mr Turner at 7 Afton Place, in Ranui. Three bullets were fired, another of which struck Mr Jasen Mataio, who was with Mr Turner, in the leg.

[12] Mr Banaba and Mr Makalima were convicted on the strength of the Crown case that they incited, encouraged and counselled Mr Afamasaga to shoot Mr Turner.[3] Mr Banaba's conviction for murder reflects that the jury must have considered he not only knowingly encouraged or incited Mr Afamasaga to shoot Mr Turner, but did so with the awareness that Mr Afamasaga would shoot with murderous intent. His conviction for wounding Mr Mataio was based on the fact that serious injury to another was a known probable consequence of any action on the part of Mr Afamasaga to shoot Mr Turner.[4] Mr Makalima, on the other hand, was convicted only of manslaughter. The difference between these verdicts forms the basis of a ground of appeal and is discussed below. First, however, it is necessary to describe the plan in more detail.

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3 Crimes Act 1961, s 66(1).
4 Section 66(2).

The plan

[13] The Laloni brothers lived at 7 Afton Place. In the early hours of 16 December 2012, two people, Mr Patrick Hurae and Mr Manase Holani, visited 7 Afton Place in response to Mr Hurae's perception that Edgar Laloni had called him "a nark". That related to an historical event involving a car theft. There was an altercation at Afton Place. The Laloni brothers were hurt.

[14] The Crown alleged that an attack by members of a rival gang on the two prospects was seen as nothing less than an attack on the gang itself; the more so because the gang was operating a drug-dealing business from 7 Afton Place. As a result, when more senior members of the gang learnt of the incident, it was decided to strike back.

[15] Text messages sent by Mr Makalima to Mr Afamasaga and others on the afternoon of 16 December suggested a need for revenge. At 2.48 pm Mr Makalima texted (in translated form), "Nobody goes over to another Cobra's house, that's asking for a big bullet." At 2.59 pm he enquired of Mr Edgar Laloni, "Who, tell me bro, so we can fucking kill them."

[16] That same day Mr Afamasaga, Mr Edgar Laloni and others travelled in two vehicles to Mr Hurae's family home in Longburn Road. This, the Crown said, was a "show of strength", evidenced by the presence of at least one patched member, Mr Makalima.

[17] Occupants of Longburn Road gave evidence that during this incident Mr Afamasaga made a threat to shoot at the Hurae house. In fact, no assault took place. It was instead agreed that the two groups would go to Kingsdale Reserve for a "one-on-one stepping out". That occurred on the evening of 16 December. Mr Makalima stepped forward for the King Cobras, and Mr Turner for the other group.

[18] The confrontation at the park did not go well for the King Cobras — they were outnumbered and forced to retreat, chased by Mr Turner, Mr Mataio

and other members of the rival group. When giving evidence, Mr Afamasaga acknowledged that this event was embarrassing.

[19] Following that incident, the Crown contended that the dynamics of the situation changed. No longer was the initial altercation at 7 Afton Place a primary motive for retribution. Rather, the gang had to respond forcefully to its own display of weakness. That was the context in which Mr Banaba and Mr Makalima met with the four prospects at Universal Drive.

[20] In the hours leading up to the meeting, Mr Turner had sent threatening text messages to what was called the "D up" (short for "dial up") telephone, which was used as a communal means of communication by those involved with the King Cobras. Primarily, it appears that cellphone was used for the purpose of the cannabis business. By communicating in that way, Mr Turner was making a point to the gang as a whole. The text messages were read out at the meeting.

[21] The outcome of the Universal Drive meeting was a plan to shoot Mr Turner. That was evidenced through the steps taken subsequently by Mr Afamasaga to gather ammunition for a .22 rifle to which he had access. A crude code was used for communications within the gang: for example, at 9.58 pm on 16 December 2012, Mr Afamasaga sent a text to Mr Banaba saying that he was "getting fuel for the lawnmower so that I can fire it up". Mr Makalima was not particularly vigilant about using this code. The same evening he sent Mr Afamasaga a text asking, "You get any bullets?"

[22] The Crown called evidence about the inner workings of the gang, in particular the relationship between patched members and prospects. In closing, counsel for the Crown described it as "almost akin to a military-like relationship". The prospects were to do as they were told by the patched members. Here, the two patched members were Mr Banaba and Mr Makalima. For example, after the incidents of 16 December, Mr Afamasaga was directed to stand on "guard duty" to watch over the house at 7 Afton Place in case there was a response from the Turner group.

[23] Critical to the Crown's case were text messages that passed between Mr Afamasaga, Mr Banaba and Mr Makalima on 17 December 2012. The most damning messages occurred in the evening, while Mr Afamasaga was sourcing ammunition. They show the men preparing to attack the rival gang. The plan was to go to Mr Turner's house and "mow it up", as a step on the way towards shooting Mr Turner himself. Mr Afamasaga and Mr Makalima had the following conversation:[5]

Time	**Sender**	**Recipient**	**Message**	
17:18:40	A	M	Getn amo frm tat. Da bloods r in 4 war	*I am getting ammo from Te Atatu. The Bloods are in for war.*
17:19:18	M	A	Swt mayn , dn get da cripz an we go head huntng hahaha	*Sweet man, then get the Crips and we can go head-hunting hahaha.*
17:20:41	A	M	Al of tha days	*All of the days. [Assent]*
17:34:31	M	A	U got bulets wen u gna go shoot	*Have you got bullets, when are you going to go shoot?*
17:40:00	A	M	As sn as I get them	*As soon as I get them.*
...				
19:13:23	A	M	Im at hme ready 2 rol uso	*I'm at home ready to roll bro.*
19:13:51	M	A	K , who takn u up?	*Ok, who is taking you up?*
19:14:28	A	M	E	*Edgar Laloni.*
19:15:32	M	A	Swt du ur thang , afta dat get new fika	*Sweet, do your thing, after that get a new phone.*
19:16:09	A	M	K	*Ok.*

[24] During the same period Mr Banaba and Mr Afamasaga exchanged the following messages:

Time	**Sender**	**Recipient**	**Message**	
17:40:21	B	A	Wea u	*Where are you?*

[5] The text message translations are our own. We have relied on the evidence where there is ambiguity in meaning.

17:40:57	A	B	Tat souf getn da fuel uso	*Te Atatu South getting the fuel, bro.*
17:41:26	B	A	Ok wh u wf?	*Ok, who are you with?*
17:42:03	A	B	My m8 frm tat	*My mate from Te Atatu.*
...				
18:09:29	A	B	Yup and il sort owt that otha rubbish uso. Got heapsa fuel nw 4 da lawnmowa	*Yes, and I'll sort out that other rubbish bro. I have heaps of fuel now for the lawnmower.*
18:10:45	B	A	Yeahyah solid uso.cut it real low.	*Yes, great work bro. Cut it real low.*
18:12:09	A	B	I wil. Chop it ryt dwn so it wnt grow 4 lng time.	*I will. Chop it right down so it won't grow for a long time.*
18:12:33	B	A	Shot	*Good work.*

[25] However, a problem arose in the execution of the plan because there were children present at the house at which Mr Turner had been located. The text messages between Mr Afamasaga and Mr Banaba continued:

Time	**Sender**	**Recipient**	**Message**	
20:50:11	A	B	Nd me 2 do anifng? Theas kids in dz house shal I stil mow da lawns? ...	*Need me to do anything? There's kids in D's [Turner's] house, shall I still mow the lawns? ...*
20:51:53	B	A	Oh dam btr 2s0rt dat btch owt 2line hm up f kidz r thea	*Oh damn, better to sort that bitch out to line him up if kids are there.*
20:52:36	A	B	K	*Ok.*
20:53:01	A	B	He stays n da garage thea tho	*He stays in the garage there though.*
20:53:58	B	A	Oh yp mow tht up 4 th mean tme.c f we geta bite bk	*Oh yep, mow that up for the mean time. See if we get a bite back.*
21:00:01	A	B	K uso	*Ok bro.*

[26] There is no evidence that Mr Turner's garage was in fact "mown up" on 17 December. Rather, the plan evolved later in the evening. Mr Makalima

asked Mr Afamasaga how they would "get" Mr Turner. Mr Afamasaga replied that he was going to use a female associate, Ms Brittany Bayne, to "set up" Mr Turner. The following conversation took place between Mr Afamasaga and Mr Banaba:

Time	Sender	Recipient	Message	
21:58:32	B	A	Up2cobra	*What are you up to, Cobra?*
21:59:12	A	B	In tat cobra. Wit dat bitch he tryna slang sum sht 2 hur. Yeyah	*In Te Atatu Cobra. With that bitch [Brittany Bayne], he [Turner] is trying to slang some shit to her. Yeah.*
21:59:59	B	A	Shot cobra.sting that ufa let him knw whats up.	*Nice one Cobra. Sting that "ufa", let him know what's up.*
22:00:41	A	B	Da snake bite sting da poket first then da lah haha	*The snake bite stings the pocket first "then da lah".*
22:02:47	B	A	Hahahah.do it cobra..	*Hahaha do it Cobra.*
22:03:38	A	B	Al of da days	*All of the days. [Assent]*

[27] The next development occurred on 18 December when, during the day, the window of a van belonging to Mr Turner's parents was smashed in the driveway of their home. An attack of that type was known to be likely to provoke a response from Mr Turner. It did.

[28] Mr Turner suspected Edgar Laloni was responsible, so later that day he and Mr Mataio went to the Afton Place address. Mr Turner smashed the windows of a car with an axe. Sometime after that, a number of people associated with the King Cobras gathered at 7 Afton Place. It was anticipated that Mr Turner might return later that night.

[29] The group at Afton Place was on edge. Most had withdrawn to the lounge, at the back of the house. A .22 rifle, with a full magazine of five bullets, had been stored in a bedroom that had a good view over the driveway.

Mr Afamasaga was at the house. However, Mr Banaba and Mr Makalima were not. Mr Banaba was on Franklin Road in Ponsonby with his family looking at Christmas lights.

[30] Around 11 pm, a vehicle driven by Mr Hurae was seen in the cul-de-sac. The vehicle was parked near to 7 Afton Place. Mr Turner and Mr Mataio, together with another person, Mr Shiumani Sami, were in the vehicle. Mr Sami went to another house. Mr Turner, still seemingly angered by the attack on his parents' vehicle, got out of the car and walked towards the Laloni residence.

[31] By this time Mr Afamasaga was in the darkened bedroom with the gun, about 10 to 12 metres away from where Mr Turner was standing. As Mr Turner walked up the driveway, Mr Afamasaga deliberately shot at him. A bullet pierced his heart, and he died at the scene. Two other bullets were fired. One hit Mr Mataio, who had alighted from the car to help Mr Turner. He was shot in the leg. The third bullet was never found.

[32] Mr Afamasaga gave evidence that he shot at Mr Turner and Mr Mataio in self-defence. He said he was scared of Mr Turner, a large man with a formidable reputation, and feared for his life. Although it was dark, Mr Afamasaga thought he saw a pistol in Mr Turner's hand. He said that he had fired three shots in self-defence. The jury must have rejected that contention.

[33] Text messages sent in the hours and days after Mr Turner died showed Mr Banaba giving instructions to members of the group. For example, a couple of hours after he had been informed of what had occurred at 7 Afton Place, he text Mr Afamasaga that it was "best to stay off the road" and that Mr Afamasaga should "go back and sleep" at his place, and that Mr Banaba would call him in the morning.[6] On 21 December 2012 he texted Mr Lachmaiya the following instructions:

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[6] These texts were sent between 1.02 am and 1.05 am on 19 December 2012.

Time	Sender	Recipient	Message	
14:06–14:09	B	L	G u gt da thngs dat U had tht goez n da fanga	*Bro, did you get the things that you had that go in the "fanga"?*
	L	B	Shd I get rid of em	*Should I get rid of them?*
	B	L	U neda chuk it n da sea. Asap	*You need to chuck it in the sea. Asap.*

[34] In late January 2013, a ceremony took place at which Mr Afamasaga was made a patched member of the King Cobras. The next day Mr Afamasaga, Mr Banaba and Mr Makalima were arrested. Police executed a search warrant at Mr Makalima's home in Henderson and recovered a patched King Cobra jacket in a new condition. A wallet belonging to Mr Afamasaga was also found at the address, giving rise to an inference he had stashed his belongings there.

Mr Afamasaga: conviction appeal

Competing contentions

[35] Mr Hamlin, for Mr Afamasaga, submits that a miscarriage of justice occurred because there were deficiencies in Woolford J's summing-up. Mr Hamlin advances four specific criticisms of the summing-up on the topic of self-defence:

(a) The Judge did not tailor the direction to the specific circumstances of the case.

(b) The Judge erred in directing the jury that discharge of a firearm in self-defence had to be "absolutely necessary to be reasonable".

(c) The Judge did not direct correctly on the topic of "retaliation".

(d) The Judge inappropriately interspersed judicial comment when summarising the defence case.

[36] Mr Hamlin similarly criticised the Judge's answer to a jury question regarding the test for self-defence, saying the Judge correctly stated the law but failed to tailor his directions to the facts. He also submitted that the Judge erred in admitting text messages from a co-accused, Mr Makalima, to a third party, particularly a message that said, "And then Chucky gonna shoot Big D" ("Chucky" referred to Mr Afamasaga, and "Big D" to Mr Turner). Finally, Mr Hamlin contended that the Judge had illegitimately admitted a gang patch and jacket and permitted inappropriate cross-examination on a patching ceremony.

[37] Mr Downs, for the Crown, submitted that the Judge had made no error in either his initial directions to the jury on self-defence, or in answering the jury question. So far as the evidential issues are concerned, Mr Downs contended that the limited purpose for which the text message was admitted and the specific direction given by the Judge that it could be used only against Mr Makalima militated against a finding that its admission had caused a miscarriage of justice.

[38] So far as the gang patch and evidence about the patching ceremony are concerned, Mr Downs pointed to the Crown's theory of the case. That involved the proposition that Mr Afamasaga had earned the patch by carrying out the killing. He submitted that the evidence was relevant to that issue.

The Judge's directions on self-defence

[39] The circumstances in which self-defence may absolve a person from conviction on a charge of murder are set out in s 48 of the Crimes Act 1961:

> **48 Self-defence and defence of another**
>
> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

[40] Woolford J directed on the question of self-defence by reference to the question trail he had distributed to the jury.[7] He said:

> [52] So after Question 1, the question trail moves directly on to the issue of self-defence which, if not disproved by the Crown, will result in a complete acquittal for Mr Afamasaga, Mr Banaba and Mr Makalima. This is therefore a crucial issue in the trial. I have set out in the introductory notes to the question trail the definition of self-defence and more than one counsel has read that to you. It is s 48, which provides: "Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use". The first point to note is that, self-defence having been raised by the defence, the Crown has to prove beyond reasonable doubt that Mr Afamasaga was not acting in self-defence. Remember what I said earlier about the burden of proof remaining on the Crown throughout the trial. So it is with self-defence. The Crown has to disprove it.
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> [53] Secondly, the definition of self-defence contains both a subjective element and an objective element. I will explain this further when I go through the questions with you, but the subjective element relates to the circumstances as Mr Afamasaga believed them to be, whereas the objective element comes into the equation when you are considering the reasonableness of the force used by Mr Afamasaga.
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> [54] The first question relating to the issue of self-defence is Question 2. It reads: "What were the circumstances as Mr Afamasaga believed them to be at the time he shot Mr Turner?" You will note that I direct you that in deciding this issue you should take the view that is as favourable to Mr Afamasaga as you believe is reasonably possible. This is the subjective element of self-defence. However, the fact that the test is subjective does not mean that Mr Afamasaga's statements as to his beliefs must be taken at face value or accepted uncritically. In determining the circumstances as he believed them to be, you are entitled to take into account the actual circumstances which existed on the night in question for the purpose of analysing Mr Afamasaga's assertions as to his state of mind at the time. As the Crown submitted, it is what he honestly believed, not what he pretended he believed. You will note that this is the only question in the question trail to which there is not a yes or no answer.

[41] The Judge then outlined to the jury the Crown's version of events and the defence evidence of what had occurred between 16 and 18 December 2012. Having done so, he contextualised the defence contentions in this way:

> [57] … the defence paints a very different picture of the events of the previous two days. Ms Pecotic [who acted for Mr Afamasaga at trial] submits that the King Cobras are really a disorganised bunch of boys who cannot pick each other up in time and are often running out

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7 The relevant parts of the question trail are set out at para [45] below.

of petrol. In particular, Mr Afamasaga can talk the talk, but does not walk the walk – in other words, he is either lying in the text messages or never carries any plan through. In fact, Ms Pecotic submits that the escalating conflict was not really about gangs at all, as Mr Fa'ao was a Crip judging by his tattoo 'CGK'.

[58] It was at Kingsdale Reserve that Mr Afamasaga first encountered Daniel Turner, who was a foot higher than him and twice as broad. Mr Afamasaga was supposed to step out for a one on one with him, but he was too scared to do so. When he had the opportunity to do so he ran for his life. He did not know how sore his legs would be after running so fast, which was an indication of his degree of fear. There were then threatening text messages from Mr Turner. Everyone was worried. Sam Lachmaiya was a new father and the baby was only one or two months old.

[59] Ms Pecotic acknowledges that there was a meeting at Universal Drive that evening, but the agreement made in that meeting to obtain ammunition was only for protection. All the subsequent text messages are explained by Mr Afamasaga on the basis of a plan put forward by him to rip Mr Turner off in a false drug deal which, in any event, he did not intend to carry through. Again, Ms Pecotic submits he was talking the talk, but not walking the walk.

[60] When Mr Turner turned up unexpectedly at 7 Afton Place on the evening of 18 December 2012, Mr Afamasaga was as scared as he had ever been in his life. He said he thought he saw a pistol in Mr Turner's hand.

[61] Now you heard that Mr Turner had a conviction for presenting an imitation firearm in relation to an incident in 2008, some four years before his death. You are entitled to know Mr Turner's background, but remember he is not here to give an explanation. So it is important not to reason that just because he did present an imitation firearm four years previously that he must have had possession of a pistol on the evening of 18 December 2012 and fired it. However, if you think that there is a similarity between the agreed summary of facts to which Mr Turner pleaded guilty and the present case, you can take the prior conviction into account for the purposes of assessing the evidence relating to Mr Turner's actions when he approached the house at 7 Afton Place on the evening of 18 December 2012. But be careful before attributing too much weight to it. It is just one of many factors to be put into the mix. I suggest that the evidence of the eye witnesses that night and the forensic evidence is of much more importance. There is also no evidence that Mr Afamasaga knew of Mr Turner's conviction at the time, but you have heard about the disclosure obligation on the part of the Police, so it would have been provided to the defence prior to trial.

[62] As to the circumstances as Mr Afamasaga believed them to be, Crown counsel and defence counsel focused on a number of what they said were key issues. First was the number of shots which might indicate whether Mr Turner had a pistol and secondly, the movements of Mr Turner and Mr Mataio. Crown counsel submits that there were only ever three shots, while defence counsel submits that there were

> five or six. Accounts also vary about the movements, in particular, of Mr Mataio. These are all matters for you, but I suggest you start with the forensic evidence, including the lack of any bullet strikes on the house and the blood trail as well as the blood which was identified as coming from Mr Turner and Mr Mataio.
>
> [63] Then look at the evidence of the eye or ear witnesses against the background of the forensic evidence.

[42] Woolford J proceeded to direct on how the jury should approach the question whether the Crown had satisfied them beyond reasonable doubt that Mr Afamasaga was not acting either in defence of himself or another when he shot Mr Turner. The Judge concluded his initial comments on that topic by saying:

> [64] … This question is important in this case because actions taken solely by way of retaliation or out of revenge cannot be justified as self-defence.

[43] Woolford J continued:

> [65] In this regard, *the Crown submits that Mr Afamasaga was clearly not acting in defence of himself or another at the time he shot Mr Turner. He was shot in accordance with the plan hatched two days earlier. Mr Turner was clearly using aggressive language, but he was 10 to 12 metres away from Mr Afamasaga, who was in an elevated darkened room. The question might be asked "what immediate threat did Mr Turner pose?" Sure, Mr Afamasaga's heart was pounding, but his moment had arrived. According to the Crown, the triggerman was about to earn his patch*. The Crown submits that Mr Afamasaga did not fire a warning shot or shots. *Mr Afamasaga could only have shot Mr Turner in the chest if he had deliberately aimed at him*. When Mr Afamasaga says he had the rifle hard up against the side of the house for all three shots, he is lying to you, according to the Crown.
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> [66] On the other hand, *Ms Pecotic submits that Mr Afamasaga picked up the rifle and put it out the window only in order to try and scare Mr Turner away from the house. He had no intention to shoot or kill anyone*. Ms Pecotic submits that Mr Afamasaga thought he was pointing the rifle away from Mr Turner when he had his arm hard up against the side of the house. Mr Afamasaga only fired when he thought he heard a shot, and then in panic. Ms Pecotic also submits that Mr Turner could have advanced up the pathway and into the line of fire from the rifle but Mr Afamasaga did not see him.
>
> [67] Question 4 of the question trail then reads: "Given those circumstances, has the Crown satisfied you beyond reasonable doubt that the force Mr Afamasaga used to defend himself or another was not reasonable? If "yes" (and you are sure that the force Mr Afamasaga used to defend himself was not reasonable), go to Question 5. If "no"

> find Mr Afamasaga, Mr Banaba and Mr Makalima not guilty of both murder and manslaughter". Go to Count 2 in Question 15. So if you do answer no to Question 4, the Crown will not have satisfied you that Mr Afamasaga was not acting in self-defence. He, Mr Banaba and Mr Makalima are then entitled to be found not guilty of both murder and manslaughter. As I have mentioned, self-defence is a complete defence and results in an acquittal.
>
> [68] *Whether the force used was reasonable, will require consideration of the perceived imminence and seriousness of the attack or anticipated attack, whether the defensive reaction was reasonably proportionate to the perceived danger and whether there were alternative courses of action of which Mr Afamasaga was aware. In the context of lethal or deadly force, reasonableness requires that the force be absolutely necessary. In other words, discharging a firearm must be absolutely necessary to be reasonable*.
>
> [69] *As to the reasonableness of the force used, the Crown submits that there was an immediate alternative course of action available and that was to walk out the back door rather than seek out confrontation. This would have been more in accordance with one's protective instincts. In any event, the Crown submits that the discharge of a firearm was not a reasonable response to the danger posed by Mr Turner, a drunken abusive individual on the front lawn*.
>
> [70] On the other hand, the defence submits the force used by Mr Afamasaga was clearly proportionate to the threat posed by Mr Turner. In that regard, *Ms Pecotic submits that the law says you can retaliate. But if one's motive is solely retaliation, then that is not quite correct. The law says you can respond to an attack or perceived attack, but only if one's primary motive is to defend oneself and then only if reasonable force is used*. Ms Pecotic also submits that you can also use force pre-emptively. However, *the threat has to be imminent or immediate and no alternative available*. The defence submits that no alternative was available as Mr Afamasaga did not know who was in the Subaru motor vehicle when he walked past the back door to the bedroom in the front of the house. When he realised it was Mr Turner, it was too late for him to escape, according to the defence. Ms Pecotic submits that the force used was reasonable as Mr Afamasaga thought he heard a shot and he only responded by shooting in a direction clearly away from Mr Turner, or so he thought.
>
> (Emphasis added)

[44] The directions given to the jury on self-defence, and the Judge's subsequent answer to a jury question on that topic, must be read in conjunction with the question trail he provided to the jury. That document began by setting out relevant statutory provisions dealing with "culpable homicide", manslaughter, murder, self-defence, parties, wounding with intent to cause grievous bodily harm, threatening to kill or do grievous bodily harm, and accessories after the fact to murder.

[45] In dealing with the question of self-defence, the question trail asked, in relation to Mr Afamasaga:

> **Self-defence**
>
> 2) What were the circumstances as Mr Afamasaga believed them to be at the time he shot Mr Turner?
>
> *In deciding this issue, you should take the view that is as favourable to Mr Afamasaga as you believe is reasonably possible.*
>
> 3) Given those circumstances, has the Crown satisfied you beyond reasonable doubt that Mr Afamasaga was not acting in defence of himself or another when he shot Mr Tumer?
>
> If "yes" - Go to Question 5.
>
> If "no" (and you think it is reasonably possible that he was acting in defence of himself or another at that time) - Go to Question 4.
>
> 4) Given those circumstances, has the Crown satisfied you beyond reasonable doubt that the force Mr Afamasaga used to defend himself or another was not reasonable?
>
> If "yes" (and you are sure that the force Mr Afamasaga used to defend himself was not reasonable) - Go to Question 5.
>
> If "no" - find Mr Afamasaga, Mr Banaba and Mr Makalima not guilty of both murder and manslaughter. Go to Count 2 and Question 15.
>
> **Caleb Eli Afamasaga**
>
> 5) Has the Crown satisfied you beyond reasonable doubt that, when he shot Mr Turner, Mr Afamasaga intended to kill Mr Turner?
>
> If "yes" - find Mr Afamasaga guilty of murder.
>
> …

Analysis

(a) Introductory comments

[46] Section 48 of the Crimes Act states the law of self-defence in deceptively simple terms.[8] The idea that underlies the section is that the use of a proportionate degree of force to respond to an attack (or a threatened attack) will excuse someone from criminal liability. The test requires a two-stage enquiry by a jury:

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[8] Section 48 is set out in full at [39] above.

(a) The first step is an enquiry into the circumstances that the defendant believed confronted him or her at the relevant time. That question is viewed subjectively, from the perspective of the responder.

(b) The second is a judgment on whether the force actually used by the responder was reasonable, in the circumstances as the responder believed them to be. That question must be approached in an objective manner.

[47] There is no challenge to the way in which the Judge left the question of onus of proof. He emphasised throughout that the Crown was required to disprove self-defence; or, in other words, to rule out the reasonable possibility that Mr Afamasaga acted in self-defence. The jury, as representatives of the community, make their own assessment of the degree of force that is appropriate to respond to a particular threat or act. As the Judge properly emphasised, a threat has to be "imminent or immediate [with] no alternative available" for a pre-emptive strike to amount to self-defence.[9]

(b) The criticisms of the summing-up

[48] We now turn to Mr Hamlin's criticisms of the Judge's summing-up, which we have already set out.[10] As to the first, Mr Hamlin submitted that it was necessary for the Judge to explain in detail the factors relevant to the circumstances faced by Mr Afamasaga at the time he fired the fatal shot. Mr Hamlin contended that the way in which the Judge put the defence to the jury undermined Mr Afamasaga's case. It is submitted that Woolford J "ought to have set out, in a single, cohesive summary, the circumstances faced by [Mr Afamasaga] at the time of the shooting".

[49] A trial Judge is not required to set out the circumstances as a responder believes them to be, unless (perhaps) there is no dispute about them. Here

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9 See generally *R v Wang* [1990] 2 NZLR 529 (CA) at 536 and *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 at [54].

10 Above at [40]–[43].

there was a dispute. In that situation, the Judge's obligation is to summarise the essence of the competing cases and to highlight material evidence that the Judge believes the jury needs to consider.[11] That is the basis on which we approach this issue.

[50] We are satisfied that the Judge directed the jury correctly on the elements of the defence of self-defence and the need for the Crown to exclude the reasonable possibility that Mr Afamasaga acted in that way.

[51] Woolford J proceeded to identify the nature of the Crown contentions. He followed that with a summary of the defence contentions. In undertaking the latter exercise, it is clear that the Judge sought (appropriately) to correct what he regarded as incomplete submissions made by trial counsel for Mr Afamasaga in relation to the use of a firearm in self-defence and the relevance of retaliation. On balance, the jury were well able to understand the competing views on which they were being asked to make decisions.

[52] The extent to which the Judge is required to contextualise the evidence relevant to the question of self-defence involves matters of degree. The trial Judge was much better placed than are we to assess relevant trial dynamics and the need (or otherwise) for the jury to hear a detailed repetition of the defence case in the summing-up. The trial started on 26 May 2014. The Judge did not sum up until 1 July 2014. We cannot hope to replicate his knowledge of the atmosphere of the trial at the time he directed the jury. We are satisfied that the Judge made no error in the way in which he contextualised the circumstances with which Mr Afamasaga was confronted.

[53] The next criticism concerns the Judge's direction on the discharge of a firearm in the context of self-defence. Complaint is made about the way in which the Judge put this point in the context of the need for the jury to determine whether the defensive force used was reasonable. Although we have already set out the relevant paragraph, we repeat it for ease of reference:[12]

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11 As an illustration of the principle, see *McGhee v R* [2012] NZCA 345 at [18].

12 See [43] above.

> [68] Whether the force used was reasonable, will require consideration of the perceived imminence and seriousness of the attack or anticipated attack, whether the defensive reaction was reasonably proportionate to the perceived danger and whether there were alternative courses of action of which Mr Afamasaga was aware. In the context of lethal or deadly force, reasonableness requires that the force be absolutely necessary. In other words, discharging a firearm must be absolutely necessary to be reasonable.

[54] When analysed, Woolford J was saying no more than, in assessing the reasonableness of the response, the jury was required to consider whether there were other options available that would make the use of lethal force unreasonable. That approach is consistent with what this Court said in both *R v Wang* and *Leason v Attorney-General*.[13]

[55] Indeed, in the context of the situation with which Mr Afamasaga was faced, it is difficult to see how a jury could have concluded that such force was reasonable, or even to have had a reasonable doubt on that topic. Mr Afamasaga was inside the house, in what Woolford J described as "an elevated darkened room" some 10 to 12 metres away from where Mr Turner was standing when the shot was fired.[14] He had ample opportunity to withdraw, if he genuinely thought Mr Turner had arrived with a gun. We are satisfied that the Judge did not misdirect the jury on this issue.

[56] The third complaint is that the Judge directed incorrectly on the issue of "retaliation". The issue was whether self-defence was available if Mr Afamasaga had acted to retaliate for what had gone on before. Woolford J told the jury that "actions taken solely by way of retaliation or out of revenge cannot be justified as self-defence".[15]

[57] That direction was correct. There is an important difference (to which the Judge was drawing attention) between a reasonable response to a perceived imminent threat (on the one hand) and the use of force in an endeavour to exact retribution for something that happened previously (on the other). While questions of degree might arise where the events giving rise to retaliation occur

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13 *R v Wang*, above n 9, at 536; and *Leason v Attorney-General*, above n 9, at [54].
14 See [65] of Woolford J's summing up, set out at [43] above.
15 See [64] and [70] of Woolford J's summing up, set out at [42]–[43] above.

in close proximity to the alleged use of self-defence, that was not the case on the evidence the jury heard. Shooting at Mr Turner to retaliate for what had happened over the preceding days could not excuse or justify Mr Afamasaga's actions.

[58] Nor is there any merit in the suggestion that the Judge interspersed his own observations to undermine the defence case. While it is true the Judge made comments during the course of his summaries of the defence cases, they were to correct submissions that had unwittingly misstated the effect of certain evidence, or submissions containing errors in the way in which a legal principle was expressed. The Judge was entitled to make such comments.

(c) The response to the jury question

[59] After retiring to consider their verdicts, the jury returned with a question about self-defence. The question was perceptive. It read:

> Is self-defence composed of two elements:
>
> (1) defendant was acting in defence of self and/or others; and
>
> (2) defendant used reasonable force in doing so and do both have to be proved or only one for self-defence to be applied.

[60] Woolford J gave a relatively full response to the question. He emphasised that there was no burden on the defence to prove self-defence; he explained the way in which Questions 3 and 4 of the question trail reflected the elements of self-defence;[16] and he made it clear that the Crown had to prove that Mr Afamasaga was not acting in defence of himself or another and that the force he used was not reasonable. He concluded by saying that if the Crown was able to prove either of those elements beyond reasonable doubt it had disproved self-defence.

[61] Mr Hamlin submitted that the Judge's response was inadequate. This submission turned on his earlier argument that, in directing the jury on the issue of self-defence, Woolford J had failed to tailor his direction to the facts of

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[16] Set out at [45] above.

the case. Mr Hamlin argued that the question demonstrated the jury's lack of clarity after the summing-up, and that the Judge's failure to refer to the relevant evidence again in his answer meant the earlier omission was not corrected.

[62] We have already rejected that argument in respect of the summing-up. For the same reasons, we do not agree that the Judge was required to do more to contextualise the evidence on self-defence in his answer to the jury question. The jury sought clarity on what had to be disproved to negate the availability of the defence, and the Judge provided that clarification. We consider counsel's criticism of the way in which the Judge answered the jury's question is unjustified.

(d) Evidential complaints

[63] The next ground of appeal concerns the admission of text message evidence. The question is whether text messages sent between various participants were admissible against others, and if not, did the Judge adequately instruct the jury on what use they could make of them.

[64] During the course of the trial, Woolford J was asked to rule on whether certain text messages were admissible against all defendants under the co-conspirators' rule.[17] Mr Hamlin complains that the Judge failed to deal adequately with particular messages sent by Mr Makalima to a third party, Ms Fifita. It appears that Ms Fifita was someone whom Mr Makalima wished to impress, in an endeavour to establish a romantic liaison. The Judge ruled that those text messages were admissible only against Mr Makalima.[18]

[65] Mr Hamlin submits that these messages were emphasised by the Crown during the trial, prejudicially affected Mr Afamasaga, and could not meaningfully have been separated in the minds of the jury so far as the person against whom it could be used was concerned. Two messages were identified as the "most prejudicial".

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17 See generally *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1, particularly [24]–[29].

18 *R v Afamasaga* HC Auckland CRI-2013-090-475, 20 June 2014 (Ruling (No 13) of Woolford J) at [15] and [23]–[24].

[66] The first was sent at 2.26 pm on 16 December 2012 by Mr Makalima to Ms Fifita, saying (in translated form): "Chucky gonna go shoot the dudes that came last night". Ms Fifita responded: "Oh my god, why?" Mr Makalima texted back: "For coming to Afton". The reference to "coming to Afton" must have been to the events that preceded the clash on Kingsdale Reserve. The second was the message to which we have already referred, sent at 5.16 pm on 17 December 2012, in which Mr Makalima told Ms Fifita that "Chucky" was going to shoot "Big D". Obviously, if the jury had used this text message against Mr Afamasaga, that would have been highly prejudicial to his defence.

[67] We have reviewed the evidence to which Mr Hamlin referred us, the closing address of counsel for the Crown and the Judge's summing-up to determine whether there is any risk to the safety of the verdicts returned against Mr Afamasaga on the grounds that the jury was inappropriately influenced by these messages.

[68] Woolford J was careful to explain to the jury how they could use the messages. He said:

> [115] One final direction on the use of these text messages. There are a number of messages between one of the defendants charged with Count 1 and a third person, such as Rose Fifita and Edgar or Sosaia Laloni. Virtually all of these are before around 9.00 p.m. on 16 December 2012 and are therefore only admissible against the defendant who sent it, not against the other two defendants. There are, however, a few text messages after 9.00 p.m. on 16 December between one of the defendants and a third person, such as Rose Fifita and Edgar Laloni.
>
> [116] An example, which has been referred to often by counsel, is the text message at 5:16 p.m. on 17 December 2012 between Mr Makalima and Ms Fifita "Yeah an dn chuky gna shoot big d". This is just 18 hours before the shooting. However, I direct you that this message and all others between Mr Makalima and Ms Fifita are only evidence against Mr Makalima and not Mr Afamasaga and Mr Banaba because the Crown does not allege Ms Fifita was part of the joint criminal enterprise to shoot Mr Turner and also the messages were not in furtherance of the conspiracy. They are best interpreted as Mr Makalima trying to impress Ms Fifita with whom he was trying to form a romantic attachment.
>
> …

> [118] Now those directions may seem rather artificial, but it is important you follow them in order to ensure a fair trial for all the defendants. If you have any difficulties please come back to me with a question. But remember that in general text messages between two of the defendants in the relevant time period are admissible against a third defendant, but any text messages between Mr Makalima and Ms Fifita are not to be used as evidence against the other two defendants.

[69] We consider that the Judge dealt adequately with this issue. As Mr Hamlin submitted, the only alternative was to sever the trials to ensure that the jury did not use against a particular defendant text messages that were inadmissible against him. This was not a case in which severance was appropriate. We do not consider that there is any real risk of unsafe verdicts or a miscarriage of justice against Mr Afamasaga on the evidential point.

[70] Mr Hamlin's complaint about the admission of the gang patch and evidence about the patching ceremony cannot succeed. While it might be argued that it was unnecessary to produce the patch itself in evidence, it cannot be said that introduction of that exhibit caused a miscarriage of justice. So far as the evidence about the patching ceremony was concerned, that was relevant to the Crown's contention that Mr Turner was killed as part of a rival gang dispute. While that proposition was hotly contested by the defence at trial, on the evidence it was open to the jury to conclude that a motive for the killing sprang from that source.

(e) Outcome

[71] For those reasons, all grounds on which Mr Afamasaga advanced his conviction appeal fail.

Mr Afamasaga: sentence appeal

[72] Mr Afamasaga was sentenced for murder and wounding with intent to do grievous bodily harm. The end sentence was life imprisonment for the killing, with a minimum period of imprisonment of 14 years, plus a concurrent sentence of seven years' imprisonment for the wounding. The only challenge is to the minimum non-parole period.

[73] In sentencing, Woolford J rejected a Crown submission that the murder of Mr Turner came within the scope of s 104 of the Sentencing Act 2002, so that a minimum period of imprisonment of 17 years or more was justified. Having explained the background, Woolford J did not consider that "the murder was calculated in the cold-blooded and exceptional manner required by s 104 … and evident in cases cited by the Crown". Similarly, the Judge did "not consider the planning was of such length to trigger s 104".[19]

[74] Against that background, Mr Hamlin submits that the minimum term of 14 years' imprisonment is manifestly excessive, and that an appropriate term would be in the range of 10 to 12 years. He refers to a number of authorities to support that proposition.[20]

[75] We do not propose to analyse those authorities. We agree with the Judge's assessment that, while Mr Afamasaga shot Mr Turner in reaction to Mr Turner's arrival at Afton Place, the text messages disclose "a high level of premeditated targeting" of Mr Turner, for previous indiscretions against Mr Afamasaga and his associates.[21] The way in which Mr Afamasaga had positioned himself, with the loaded .22 rifle, in an elevated room directly above the driveway also demonstrates a willingness to use the gun against a human target, if necessary.

[76] Mr Afamasaga's failure to react by withdrawing from the window when Mr Turner approached the doorway of 7 Afton Place strongly suggests Mr Afamasaga deliberately chose to shoot Mr Turner. A murder of that type certainly justified a minimum period of imprisonment of 14 years.

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19 *R v Afamasaga*, above n 1, at [36].

20 *R v Bucknall* CA248/01, 18 December 2001; *R v Hallett* [2013] NZHC 1757; *R v Rewiri* HC Rotorua CRI-2006-063-2149, 22 February 2008; *R v Moala* HC Auckland CRI-2006-092-461, 12 December 2007; *R v McNaughton* HC Nelson CRI-2009-042-4391, 4 February 2011; and *R v Mills* HC Palmerston North CRI-2009-054-3808, 16 June 2010.

21 *R v Afamasaga*, above n 1, at [42].

Party liability: legal principles

[77] Because neither Mr Banaba nor Mr Makalima was present when the shooting occurred, the Crown had to satisfy the jury that each was a party to both the murder of Mr Turner and the unlawful wounding of Mr Mataio.

[78] Party liability is governed by s 66 of the Crimes Act:

> **66 Parties to offences**
>
> (1) Every one is a party to and guilty of an offence who—
>
> (a) actually commits the offence; or
>
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or
>
> (c) abets any person in the commission of the offence; or
>
> (d) incites, counsels, or procures any person to commit the offence.
>
> (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

[79] To establish that Mr Banaba and Mr Makalima were parties to the murder of Mr Turner, the Crown relied on s 66(1). It contended that both had encouraged, incited and counselled Mr Afamasaga to shoot Mr Turner.

[80] In contrast, the Crown relied on s 66(2) to establish party liability for the wounding of Mr Mataio. The Crown case, as summarised by the Judge in summing-up, was that Mr Banaba and Mr Makalima were guilty, as parties, to the wounding of Mr Mataio "because they formed a common intention with Mr Afamasaga to prosecute an unlawful purpose … an agreement … to shoot Mr Turner". In terms of s 66(2), Mr Banaba and Mr Makalima were liable for any offence committed that was known to be a probable consequence of the prosecution of that common purpose.

Mr Banaba and Mr Makalima: conviction appeals

Unreasonable verdicts

[81] The primary issue raised by Ms Pecotic on behalf of Mr Banaba and Mr Makalima is that the verdicts returned against them were unreasonable. In *R v Owen* the Supreme Court said:[22]

> [13] We return to the decision of the Court of Appeal in *Munro*. We propose to discuss the main judgment in that case only to the extent necessary for present purposes. We would endorse the following aspects of the decision in *Munro*:
>
> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[82] In taking that approach, the Supreme Court endorsed a number of observations made by this Court in *R v Munro*.[23] In particular, this Court had said: "A verdict will be deemed unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt."[24]

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22 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37.
23 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.
24 *R v Owen* , above n 22, at [15], referring to *R v Munro*, above n 23, at [87].

[83] There is clear evidence to indicate that, at least from the time at which the six members of the King Cobras met at Universal Drive around 9 pm on 16 December 2012, Mr Banaba and Mr Makalima incited or encouraged Mr Afamasaga to shoot Mr Turner. The text messages set out as part of the factual narrative earlier in this judgment[25] provide a sufficient basis for a jury to infer that a plan to shoot was on foot, and that Mr Banaba and Mr Makalima were actively encouraging and inciting Mr Afamasaga to carry out that plan. Mr Afamasaga was sourcing ammunition for a gun. There was talk of "war" and going "head hunting". Mr Afamasaga was asked, "When are you going to go shoot?" and when he said he was ready to roll, Mr Makalima told him, "Sweet, do your thing." Mr Afamasaga told Mr Banaba he had heaps of fuel for the lawnmower — it is not disputed that this was a reference to ammunition for a gun — and Mr Banaba counselled him to "cut it real low".

[84] When the time came to "mow up" Mr Turner's house, that step of the plan had to be abandoned due to the presence of children. However, the men were not deterred from their goal and instead looked for a new means of achieving it. Mr Makalima asked, "How are we going to get Big D?" Mr Banaba instructed his prospect to "sting" Mr Turner. For the case against Mr Makalima, there were the additional text messages that he sent to Ms Fifita, including the message that said, "And then Chucky gonna shoot Big D".[26]

[85] The defence case at trial was that there was only ever a plan to rip Mr Turner off in a fake drug deal. That was rejected by the jury, and understandably so — many of the text messages simply do not make sense if the scheme was only one of defrauding Mr Turner. On appeal, Ms Pecotic argued that the guilty verdicts were insupportable because, whatever was planned on 16 and 17 December, discussion of the plan ceased at that point and the actual killing of Mr Turner occurred in circumstances that were not foreseen by anyone. Counsel submitted there was no evidence that Mr Banaba

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25 At [23]–[26] above.

26 These text messages were admissible only against Mr Makalima. See the Evidence Act 2006, s 27; the co-conspirators' rule did not apply to these messages as they were sent to a third party and not in furtherance of the conspiracy.

or Mr Makalima knew that Mr Turner would be shot on the night of 18 December; they did not know Mr Turner would go to Afton Place.

[86] However, although s 66(1) requires proof that a defendant has in fact aided or encouraged the principal offender, it does not stipulate a requirement that the assistance or encouragement remain operative until such time as the offence is committed. The actus reus is complete when the actual incitement or encouragement occurs, provided the principal subsequently commits the relevant offence.[27] Therefore it does not matter that the plan was carried out in a manner that was not specifically foreseen by the parties. The plan was to shoot Mr Turner. That is what in fact occurred on the night of 18 December. Mr Banaba and Mr Makalima had already played their role by encouraging their prospect, Mr Afamasaga, to shoot the victim.

[87] Once it is accepted that there is sufficient evidence of a plan to shoot Mr Turner, and that Mr Banaba and Mr Makalima encouraged or incited Mr Afamasaga in that plan, none of the claims of unreasonable verdicts can stand. We are satisfied that Mr Banaba's convictions for murder and for wounding were open to the jury (wounding another clearly being a probable consequence of a plan to shoot a primary target).

[88] For the same reasons there was also sufficient evidence for Mr Makalima's lesser conviction. A party will be liable as an aider and abettor to a charge of murder only if he or she assisted the principal offender with the knowledge that the principal offender would act with murderous intent.[28] Mr Makalima's verdict of manslaughter means the jury must have been satisfied beyond reasonable doubt that:

(a) Mr Makalima said or did something that helped or encouraged or incited Mr Afamasaga to shoot Mr Turner, knowing and intending that it would help or encourage or incite him to do so.

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[27] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [116].
[28] *Edmonds v R* [2011] NZSC 159, [2012] 2 NZLR 445 at [25].

(b) The Crown could not prove beyond reasonable doubt that Mr Makalima either knew that Mr Afamasaga intended to kill Mr Turner or to cause serious bodily harm in circumstances that would establish murderous intent.

[89] On the evidence, we consider that conclusion was open to the jury, for reasons on which we will elaborate when we discuss a further ground of appeal raised by Ms Pecotic for Mr Banaba — that his convictions for murder and wounding were inconsistent with Mr Makalima's conviction for lesser offending. Ms Pecotic submits the jury's verdicts cannot stand together, and that this indicates a miscarriage of justice has occurred.

Inconsistent verdicts

[90] We do not accept there is any reason to question the safety of Mr Banaba and Mr Makalima's convictions on the basis of inconsistency. The jury's verdict of manslaughter in respect of Mr Makalima demonstrates that they were not satisfied beyond reasonable doubt that Mr Makalima either knew that Mr Afamasaga intended to kill Mr Turner or to cause serious bodily harm in circumstances that would establish murderous intent. The critical distinction, so far as Mr Makalima is concerned, is between his knowledge that Mr Afamasaga intended to kill Mr Turner on the one hand, as opposed to merely shooting him on the other.

[91] As Mr Downs for the Crown pointed out, the suggestion of inconsistent verdicts rested on a claim of factual, rather than legal inconsistency. That distinction was drawn by a majority[29] of the Supreme Court in *B (SC12/2013) v R*.[30] For the majority, Arnold J said:

> [68] The majority judgment in *MacKenzie* went on to identify six general propositions drawn from the authorities. These propositions, which are largely echoed in the New Zealand authorities, are as follows:

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29 McGrath, Glazebrook and Arnold JJ.

30 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.

(a) There is a distinction between cases involving legal inconsistency and those involving factual inconsistency. Legal inconsistency occurs when two verdicts cannot, as a matter of law, stand together. Examples are where a jury convicts a person of both an attempt to commit an offence and the completed offence or as the thief and the receiver of the same property on the same occasion. Factual inconsistency occurs where, given the evidence, two verdicts cannot stand together.

(b) Factual inconsistency can arise either between verdicts involving the same accused or between verdicts involving different persons charged in connection with related events. In *R v Pittiman* the Supreme Court of Canada said that it will often be more difficult for an appellant in a multiple accused case to establish inconsistency as there is likely to be greater scope for differing verdicts in such cases.

(c) In relation to factual inconsistency arising from "guilty" and "not guilty" verdicts on a multiple count indictment against one defendant, the test is one of "logic and reasonableness". As the Court of Appeal said in *R v Irvine*:

> The question which we must ask ourselves is whether the acquittal on count one, in all the circumstances of this particular case, renders the verdict of guilty in respect of count two unsafe, in the sense that no reasonable jury could have arrived at different verdicts on the two different counts.

(d) Courts are reluctant to conclude that that [sic] jury verdicts are inconsistent, both because the jury's function must be respected and because there is general satisfaction with the way juries perform their role. If there is some evidence to support the verdict said to be inconsistent, an appellate court will not usurp the jury's function by substituting its view of the facts for that of the jury. We note in this connection that the Court of Appeal emphasised in *R v O (No 2)* that any reasonable explanation for the difference between the two verdicts "must be found in the evidence properly used". The Court said:

> It will not be a reasonable explanation if it depends on a use of evidence or a process of reasoning which the law does not permit.

In addition, the majority judgment in *MacKenzie* acknowledged that an appellate court "may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries". The Court of Appeal accepted this view in *R v H*, a case to which we will return.

(e) There will be cases where the different verdicts returned by a jury represent "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the

> performance of the jury's duty". In such cases an appellate court will intervene. Hard and fast rules are not possible; rather, the assessment must be made on a case by case basis. In *R v Pittiman*, the Supreme Court of Canada said that inconsistent verdicts may be held to be unreasonable "when the evidence on one count is so wound up with the evidence on the other that it is not logically separable".
>
> (f) The obligation to establish inconsistency rests with the person challenging the conviction. Where inconsistency is established, the court must make such consequential orders as the justice of the case requires.
>
> The High Court of Australia returned to the topic of inconsistent verdicts in *MFA v R* and confirmed the principles articulated in *MacKenzie*.
>
> (Footnotes omitted)

[92] In our view, there was sufficient evidence on which the jury was entitled to find Mr Makalima guilty of manslaughter but not guilty of wounding with intent while still finding Mr Banaba guilty on both the murder and wounding charges.

[93] There was a proper foundation to make such a finding based on evidence from a clinical psychologist of difficulties in Mr Makalima's cognitive functioning due to a brain injury. The nature and extent of that injury had already been the focus of a pre-trial application in which the question was whether Mr Makalima's mental impairment affected his fitness to stand trial.[31] While determining that Mr Makalima was fit to stand trial, Brewer J referred to Mr Makalima as having suffered, on 30 July 2010 (nearly two and a half years before the shooting), "a significant brain injury due to oxygen deprivation resulting from a heart attack".[32] Similar observations were made by Woolford J when sentencing Mr Makalima.[33]

[94] For someone with a brain injury of the type suffered by Mr Makalima, the jury is likely to have considered that while he understood Mr Turner would be shot, he may not have appreciated the fact that it was likely to cause him death. The text message sent to Ms Fifita on 17 December 2012 saying

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31 *R v Makalima* [2014] NZHC 854.
32 At [18].
33 *R v Afamasaga*, above n 1, at [46].

"Chucky gonna shoot Big D" supports his knowledge of the former. Unguarded text messages sent by Mr Makalima that directly refer to what he believed was to happen all referred to shooting Mr Turner, rather than killing him. We consider the manslaughter verdict was open to the jury on the basis that Mr Makalima's cognitive functions were such that he understood he was encouraging and helping Mr Afamasaga to shoot Mr Turner but did not understand that it would necessarily result in death. Woolford J left that possibility to the jury in his question trail, an approach with which we agree. Evidence to that effect was before the jury.

[95] In our view, Mr Makalima's conviction for manslaughter only does not raise any concern about inconsistency of verdicts. His position could properly have been distinguished by the jury from that of Mr Banaba.

Withdrawal

[96] Ms Pecotic also submitted that Woolford J erred by failing to direct the jury to consider whether Mr Banaba and Mr Makalima had withdrawn from the plan to shoot Mr Turner. She submitted that the text messages showed that the initial plan was to shoot Mr Turner's house, and when that could not occur the plan changed to one of ripping off Mr Turner in a drug deal. After 17 December and before the fatal shooting, there were no further text messages about Mr Turner, and no evidence that Mr Banaba and Mr Makalima were aware of the events that were unfolding at 7 Afton Place. In those circumstances she submitted the Judge should have put the possibility of withdrawal before the jury.

[97] We do not accept this argument. The defence case at trial was not run on the basis of withdrawal. There is no suggestion the trial Judge was invited to direct on that defence. Nor did counsel for either Mr Banaba or Mr Makalima attempt to advance a credible narrative in support of withdrawal. The closest that defence counsel came to putting withdrawal before the jury was an opaque (and purely hypothetical) reference in the closing address by

Mr Banaba's lawyer. This was understandable, because the threshold for an effective withdrawal by a party to criminal offending is set high.

[98] Delivering the judgment of a majority of the Supreme Court in *Ahsin v R*, McGrath J discussed the scope of the defence of withdrawal.[34] Having surveyed existing New Zealand and overseas authority, McGrath J identified two requirements for the defence to apply:[35]

(a) First, there must be conduct, whether words or actions, that demonstrates clearly to others withdrawal from the offending.

(b) Second, the withdrawing party must take reasonable and sufficient steps to undo the effect of his or her previous participation or to prevent the crime.

[99] McGrath J gave some examples of what would constitute an effective withdrawal:[36]

> Some actions will be relevant to both the first and second requirements of the defence. For example, clear communication to the other participant(s) of withdrawal from offending may both demonstrate withdrawal and be a step towards prevention of the offence, on the basis that it may dissuade the principal from continuing on the criminal activity alone. Likewise, a clear and communicated countermand revoking earlier instruction, encouragement or advice, will often clearly convey that the party is withdrawing his or her participation and, at the same time, be a step directed at undoing the effect of a prior command or support.

[100] With regard to those comments, the evidence on withdrawal in this case did not reach the standard required by *Ahsin*. The facts put forward by Ms Pecotic in support of her submission do not establish an evidential foundation for the defence to be put to the jury.[37] Mr Banaba and Mr Makalima, as senior patched members of the King Cobras, had actively encouraged and incited Mr Afamasaga, a gang prospect, to shoot Mr Turner. To absolve themselves of

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34 *Ahsin v R*, above n 27, at [134].
35 At [134].
36 At [134].
37 See *Baker v R* [2015] NZCA 306 at [69]–[79]; and *Uhrle v R* [2015] NZCA 412 at [82]–[90] for a discussion of the requirement that the facts disclose a credible narrative for withdrawal before it is put to the jury.

criminal liability for those actions, they would have had to communicate clearly their withdrawal from the plan and have taken steps to undo their previous actions, such as give "a clear and communicated countermand" revoking their earlier encouragement. On the evidence, the most that can be said is that the parties agreed that the tactic of shooting up Mr Turner's home was no longer a viable means of reaching their ultimate goal, and it was agreed to use Brittany Bayne to do so instead. That falls well short of establishing a credible narrative for a defence of withdrawal.[38]

Mr Banaba: sentence appeal

[101] Woolford J considered together the minimum terms of imprisonment to be imposed for Mr Afamasaga and Mr Banaba.[39] We have already upheld the minimum period of 14 years' imprisonment imposed in respect of Mr Afamasaga.[40] We now consider the appropriateness of that part of the sentence, so far as Mr Banaba is concerned.

[102] The Judge assessed that Mr Afamasaga's culpability was greater than that of Mr Banaba. As a result, Mr Banaba received a minimum period of imprisonment of 11 years. For Mr Banaba, Ms Pecotic contended that an uplift of one year on the minimum period of 10 years was manifestly excessive in the circumstances of this case.

[103] Ms Pecotic drew attention to the following factors:

(a) Mr Banaba was not present at the time of the shooting.

(b) Mr Banaba did not obtain the gun or the ammunition.

(c) Mr Banaba had no text communications with Mr Afamasaga in a period of about 24 hours before the killing.

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[38] Furthermore, the text messages sent by Mr Banaba after the shooting show he was actively engaged in covering Mr Afamasaga's tracks. Such conduct is inconsistent with an argument that he withdrew from the offending or that the plan was otherwise abandoned.

[39] *R v Afamasaga*, above n 1, at [27]–[43].

[40] See [72]–[76] above.

(d) Mr Makalima was found guilty of manslaughter, and Mr Banaba's role was less active than his.

(e) Mr Banaba should be treated for sentencing purposes in the same manner as Mr Makalima.

[104] Two of those points can be put to one side immediately. For the reasons we have given, there were proper grounds on which the jury was entitled to find Mr Makalima not guilty of murder, but guilty of the lesser crime of manslaughter. Once that proposition is accepted, Mr Makalima's conduct is judged in the context of an available maximum sentence of life imprisonment, but one in respect of which there is no obligation to impose a minimum term of imprisonment.

[105] In sentencing Mr Banaba, the Judge accepted counsel's submission that his culpability called for a lesser minimum term of imprisonment.[41] The factors on which he relied in relation to Mr Banaba were:[42]

(a) Mr Afamasaga instigated the plan to shoot Mr Turner to respond to his earlier humiliation at Kingsdale Reserve.

(b) Mr Banaba was "the most senior" member of the group from whom Mr Afamasaga sought guidance. That was supported by the fact that Mr Banaba was a patched member of the gang.

(c) Mr Afamasaga, albeit with Mr Banaba's encouragement, took active steps to obtain the ammunition and the gun.

(d) Notwithstanding that Mr Banaba's last pre-shooting contact with Mr Afamasaga was some 24 hours before Mr Turner died, the plan to shoot remained on foot.

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41 *R v Afamasaga*, above n 1, at [38], applying observations made by Miller J in *R v McNaughton* [2012] NZHC 815.

42 *R v Afamasaga*, above n 1, at [39]–[40].

(e) The messages of encouragement and support for Mr Afamasaga did not disclose the same level of culpability as that of the principal offender.

[106] An uplift of only one year from the mandatory term of 10 years' imprisonment cannot be gainsaid in the context of a plan designed to use lethal force towards another person. We see no basis to interfere with the minimum term of 11 years. It was not manifestly excessive. The sentence appeal is dismissed.

Mr Makalima: sentence appeal

[107] On the manslaughter charge, Mr Makalima was sentenced to a term of imprisonment of eight years and four months. On that sentence, a minimum non-parole period representing 50 per cent of the finite term was imposed; namely, four years and two months. A cumulative sentence of two years' imprisonment was imposed for the cannabis selling. That made the total finite sentence one of 10 years and four months' imprisonment.

[108] After referring to Mr Makalima's mental impairment, some positive character references and submissions from both counsel, Woolford J said:[43]

> [51] Mr Makalima, in my view your culpability for the death of Mr Turner is relatively high. I refer to the text message you sent to Ms Rose Fifita on 17 December saying "[y]ea an dn chuky gna shoot Big D". Chuky is a reference to Mr Afamasaga, while Big D is a reference to Mr Turner. Later on you texted Mr Afamasaga saying "G hw we gna get big d". In my view the text messages clearly indicate your knowledge and involvement in the plan to shoot Mr Turner, even if you did not know Mr Afamasaga either intended to kill or cause serious bodily injury to Mr Turner. You actively encouraged Mr Afamasaga with texts such as "Swt do ur thang, afta dat get new fika". Fika means a telephone.
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> [52] For those reasons I do not consider that you were far removed from the planning of the shooting. While you were not the leader of the plan nor its executor, you knew what was going on and actively engaged in it. In those circumstances, limited weight can be placed on the fact that you were not present at Afton Place on the night of the shooting. Given your involvement in the preceding two days, serious injury to Mr Turner would ordinarily be foreseeable and therefore

[43] *R v Afamasaga*, above n 1, at [51] and [52].

> some assistance can be provided by reference to the guidelines set in *R v Taueki*.

[109] The Judge referred to *R v Challis* and *Pahau v R* as comparator cases.[44] *Challis* involved a drive-by shooting of a baby girl in the context of rising tensions between rival gangs. In that case, this Court upheld a starting point of 10 years' imprisonment for persons who were in the back seat of the car but aware of a gang confrontation involving planned retaliation. They were also aware that the principal offender was carrying a gun.[45]

[110] Woolford J considered that Mr Makalima's culpability should be assessed in a similar manner to that of the backseat passengers in *Challis*. He took a starting point of nine years' imprisonment.[46]

[111] Counsel for Mr Makalima on sentencing accepted that the cannabis selling charge came within band 3 of *R v Terewi*.[47] That attracts a starting point of at least four years' imprisonment. The Judge considered Mr Makalima and Mr Banaba controlled the cannabis operation and received "the lion's share of the profit". A sentence of three and a half years' imprisonment was said to be justified. Allowing for a generous credit for the guilty plea to the cannabis charge, a cumulative sentence of two years and nine months' imprisonment was considered appropriate. That was reduced to an uplift of two years for totality purposes.

[112] In reaching an end sentence, Woolford J described Mr Makalima's "mental impairment" as one giving rise to "slow thought processes".[48] It was "difficult for [Mr Makalima] to recollect events and sustain concentration". Overall, the Judge considered that the "mental impairment combined with … relative youth was an operative factor in [Mr Makalima's] decision to aid and encourage Mr Afamasaga to shoot Mr Turner", but took the view that the jury

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44 *R v Challis* [2008] NZCA 470; and *Pahau v R* [2011] NZCA 147.

45 *R v Challis*, above n 44, at [9] and [11].

46 *R v Afamasaga*, above n 1, at [54]. The Judge added that that starting point was consistent with what would have been appropriate in a case of wounding with intent to do grievous bodily harm falling within band 3 of *R v Taueki* [2005] 3 NZLR 372 (CA) at [41].

47 *R v Terewi* [1999] 3 NZLR 62 (CA).

48 *R v Afamasaga*, above n 1, at [60].

had already given weight to that in convicting Mr Makalima of manslaughter. A credit of eight months was given "to reflect … youth, previous good character, positive character references and prospects for future rehabilitation".[49] The Judge considered that a minimum period of imprisonment representing 50 per cent of the manslaughter sentence was appropriate.

[113] In our view, the finite sentence imposed for the manslaughter and cannabis offending was within range. The nature of the offending was such as to require a stern response. We do not consider that the offending could be properly denounced without the imposition of a minimum period of imprisonment in excess of the usual one-third. In fixing the minimum period at 50 per cent of the finite term imposed on the manslaughter conviction, the Judge did not stray beyond appropriate limits.

Result

[114] For those reasons, all appeals against conviction and sentence are dismissed.

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[49] At [61].