IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA96/2023
[2023] NZCA 519

BETWEEN	VINNIE HEREWINI Appellant
AND	THE KING Respondent

Hearing:	22 August 2023
Court:	Goddard, Whata and Downs JJ
Counsel:	G H Vear and S N Cameron for Appellant I S Auld for Respondent
Judgment:	26 October 2023 at 10.00 am

JUDGMENT OF THE COURT

A **The appeal against conviction for assault with a weapon is allowed. The conviction on that charge is set aside. A retrial on that charge is ordered.**

B **The appeal against conviction for aggravated robbery is dismissed.**

C **The appeal against sentence on the charge of aggravated robbery is allowed. The sentence is set aside. The proceeding is remitted to the District Court for resentencing.**

D **Any question of bail is to be determined by the District Court.**

REASONS OF THE COURT

(Given by Whata J)

[1] Mr Herewini was found guilty on one charge of aggravated robbery and one charge of assault with a weapon. He was sentenced to three years and six months' imprisonment. He appeals his conviction and sentence.

Facts (in summary)

[2] Mr Herewini and Mr Whiunui are associated with the Flaxmere chapter of the Mongrel Mob. On the morning of 7 October 2020, they drove to the Hastings KFC. On arrival, they saw James Rivers there, wearing a black hooded sweatshirt displaying Black Power insignia and a blue hat. Mr Herewini and Mr Whiunui left their vehicle to confront him. Mr Whiunui appeared to be armed with something similar to a tyre iron. Mr Rivers produced a knife. Mr Whiunui dropped what he was carrying and retrieved a golf club from his car. They faced off, Mr Herewini watching. Mr Whiunui struck Mr Rivers with the club. Mr Rivers lost his blue cap. Mr Herewini picked it up. Mr Whiunui then lost his balance and dropped the golf club.

[3] Mr Herewini bent down towards the club. Mr Rivers rushed towards him and collided with him. Mr Herewini says he was stabbed at this point. Mr Rivers took off, Mr Whiunui in close pursuit. Further violence unfolded. Mr Rivers was wrestled to the ground and Mr Whiunui had him in a chokehold. Mr Herewini struck Mr Rivers with the golf club and kicked him. The club snapped. Mr Herewini then grabbed Mr Rivers and removed the hoodie. He walked away. Mr Rivers, still in the chokehold, stabbed frenziedly over his shoulder, one stab landing just below Mr Whiunui's eye. Mr Rivers briefly freed himself, but the wrestling continued. Mr Herewini re-joined the fray until Mr Rivers was disarmed. Mr Herewini and Mr Whiunui then left with the cap, the hoodie and the knife.

[4] Mr Herewini and Mr Whiunui were charged with aggravated robbery and assault with a weapon. At trial the Crown claimed that they were bent on taking Mr Rivers' colours and succeeded in doing so. Mr Herewini claimed that they confronted Mr Rivers because he was in their gang territory, and they wanted him to leave. He also claimed that they were only acting in self-defence when they fought

with him, fearing they might be stabbed. The claim to self-defence was rejected as implausible by the trial Judge and withdrawn from the jury. They were found guilty on both charges.

The grounds of appeal

[5] Mr Herewini claims the trial miscarried because:

(a) An unfairly prejudicial recording of the incident including audio of a distraught female was played to the jury on multiple occasions.

(b) Mr Herewini was unfairly cross-examined on Mr Whiunui's statement.

(c) Incorrect directions were given on the elements of the aggravated robbery under s 235(b) of the Crimes Act 1961.

(d) Self-defence and defence of another were improperly withdrawn from the jury.

(e) The summing up lacked balance.

(f) The Judge departed from the conventional tripartite direction.

[6] The sentence is appealed on the basis that the starting point arrived at was too high when compared to similar cases, and the sentence lacks parity with the sentence received by Mr Whiunui.

[7] We address each of the appeal against conviction grounds separately before addressing whether overall the trial miscarried.

The recording

[8] The offending was recorded by individuals and CCTV from various angles, including by way of phone video that was later posted to Facebook. That video was played to the jury during the Crown opening, on five occasions during trial, and during the Crown closing address. In a pre-trial ruling, aspects of the video were excluded,

but not the accompanying audio in which a female witness to the melee can be heard speaking. The female refers to Mr Rivers as her brother. Throughout the recording the female can be heard in a highly distressed state, plainly fearing for Mr Rivers' safety and pleading for the fighting to stop.

[9] Ms Vear for Mr Herewini submits that this component of the audio recording should have been excluded as it was unfairly prejudicial to him and of little, if any, probative value. Mr Auld for the Crown responds that no objection was raised before or at trial to this component of the audio recording; and that the audio is relevant to the circumstances Mr Herewini believed existed at the time for the purpose of his claim of self-defence. While its probative value was slight, so was its prejudicial effect — the real prejudice arising from the video was the record of Mr Herewini's and Mr Whiunui's actions.

Assessment

[10] We agree with Mr Auld. The audio recording was relevant to the assessment of the circumstances as Mr Herewini believed them to be at the time. This was a highly violent confrontation involving great risk of harm to all involved. We accept that the audio recording would have evoked an emotional response from the jury, amplifying as it did the vulnerability of both Mr Rivers and his sister. But the true prejudice to Mr Herewini arises from the real time record of a highly violent encounter between him, Mr Whiunui and Mr Rivers. Any unfair prejudice arising from the audio was small, if any.

[11] This ground of appeal is therefore dismissed.

Cross-examination on Mr Whiunui's statements

[12] Mr Whiunui did not give evidence, but his DVD statement was admitted. In it Mr Whiunui made various statements that were the basis for the following questions put to Mr Herewini in cross-examination:

> And that's why you said to Charlie, to Mr Whiunui: "Is that a fuckin Black Power"?
>
> You told Mr Whiunui to get out of the car and "tell him to take that shit off"?

> Okay and whatever words you used, no uncertain terms, he was in the "wrong place wearing that shit"?

[13] Ms Vear submits that statements made by Mr Whiunui should not have been put to Mr Herewini as they had not been properly admitted pursuant to s 22A of the Evidence Act 2006. She contends that as the alleged offending was not in furtherance of a joint enterprise, the statements could not be admitted as evidence against Mr Herewini. It is also submitted that the reference to "tell him to take that shit off" had no evidential foundation whatsoever and should never have been put to Mr Herewini.

Assessment

[14] We dismiss this ground also. As Mr Auld noted, a prosecutor may put questions to a defendant derived from, or based upon, the content of a co-defendant's statement but the questions may not be referenced back to that source as if the statement was evidence against the defendant. As this Court said in *R v McKenzie*:[1]

> The proper dividing line is that questions derived from, or based upon, the content of a co-accused's statement may be asked. But such questions may not be referenced back to that source as if the statement was evidence against the accused.

[15] In this case, the prosecutor made no mention of the fact that his questions were derived from Mr Whiunui's statements. Furthermore, while Mr Whiunui's DVD statement was before the jury, the Judge clearly directed the jury that his statements could not be used as evidence against Mr Herewini. He said:

> … in a joint trial whatever one co-defendant says to the police is evidence only in the trial of that defendant, so that is only evidence for or against him. And what it means for you is that when you come, say, to consider the case, for example, say against Mr Herewini, you have to completely put out of your deliberations, your discussion, your thinking, whatever Mr Whiunui might have said to the police.
>
> Okay, and if you think about it for a moment, that only makes sense and it is only fair. Mr Herewini is not there at the time that Mr Whiunui is speaking to the police and he can't say "well, I don't agree with that" or "that's not right", so that is just a question of fairness. And actually, experience has taught us over many years that juries are absolutely capable of doing that. I mean, there has been hundreds, if not thousands of verdicts given in this country over the

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1 *R v McKenzie* [2004] 1 NZLR 181 (CA) at [37].

> years where to get to the verdict that they have, the jury have completely put out of their consideration what one co-defendant has said to the police.
>
> Okay, so that is the first. When you are listening to those interviews, it is only evidence in relation to the person who is being interviewed by the police.

[16] This direction was in substance repeated in the summing up.

[17] Finally, the claim that the statement "tell him to take that shit off" had no foundation belies the recorded evidence of what in fact unfolded — Mr Rivers' clothes were taken from him. The suggestion Mr Herewini encouraged Mr Whiunui to tell Mr Rivers to take his gang regalia off was not fanciful. It was also available to Mr Herewini to deny he said this, which he did.

Aggravated robbery directions under s 235(b)

[18] Mr Herewini was charged with aggravated robbery under s 235(b) of the Crimes Act. That section states everyone is liable to imprisonment for a term not exceeding 14 years who "being together with any other person or persons, robs any person".

[19] As stated by this Court in *Darling v R*:[2]

> [52] The aggravating feature of robbery under s 235(b) is the presence of two or more people. It is the collective element of a charge under this section that distinguishes the offence from aggravated robbery under s 235(a) and s 235(c). To prove the offence under s 235(b), the persons involved in the offending (of which there must be at least two) must be acting in concert and share a common intention to rob. Each must be complicit in the joint enterprise. As this Court explained in *R v Feterika*, that means if two or more persons are present and one robs without the others anticipating or willing that, aggravated robbery under s 235(b) will not have been proved.

[20] Ms Vear submits, in short, that the Judge wrongly suggested to the jury that s 235(b) liability was satisfied if Mr Herewini merely assisted or intentionally helped Mr Whiunui to steal the blue cap and hoodie. Particular emphasis is placed on the question trail which is said to have misdirected the jury insofar as it suggests assistance, rather than common intention, is sufficient to find guilt. Ms Vear placed

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2 *Darling v R* [2022] NZCA 504 (footnotes omitted).

some emphasis on the fact that the question trail did not follow the model specimen.[3] The question trail read:

> (a) Are you sure that Mr Herewini either stole or assisted Mr Whiunui to steal Mr Rivers' hoodie and/or cap?
>
> (b) Are you sure Mr Herewini either used violence or assisted Mr Whiunui to use violence in order to take Mr Rivers' hoodie and/or cap?
>
> (c) Are you sure that Mr Herewini and Mr Whiunui combined to both use violence to overcome resistance to the taking of Mr Rivers' hoodie and/or cap?

Assessment

[21] We disagree largely for the reasons advanced by Mr Auld. While the giving of assistance is identified by the Judge as an element of the offending both in the question trail and in parts of the summing up, the requirement to find that Mr Herewini and Mr Whiunui had to be acting in concert and with a common intention to rob was made very clear to the jury.

[22] First, the Judge gave a detailed direction during trial dealing with the essential elements of aggravated robbery:

> [9] So really the Crown will have a great deal of difficulty in proving charge 1 unless the Crown can satisfy you that this was a combined agreed effort to act together to dispossess him of his Black Power clothing.

[23] Second, while the question trail does not expressly refer to the requirement for a shared common intention, the reference in the question trail to "combined to both use violence to overcome resistance" plainly required the jury to find a shared common intention to rob.

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[3] Courts of New Zealand "Aggravated robbery where aggravating feature is two or more people (Section 235(b) Crimes Act 1961)" <courtsofnz.govt.nz>.

[24] Third, reinforcing this point, the Judge specifically told the jury in his summing up:

> [71] Now if you get to 1.3 you are asked are you sure that Vinnie Herewini and Charlie Whiunui combined to both use violence to overcome resistance to the taking of James Rivers' hoodie and/or cap because *robbery becomes aggravated robbery when two people acting together to combine to use their combined force to use violence to overcome resistance to property being taken.*
>
> (emphasis added.)

[25] Finally, the Crown and defence cases were advanced on the basis of a shared common intention, that is, on the defence case, to dispossess Mr Rivers of the knife and on the Crown case, to take Mr Rivers' colours. This was never a case of Mr Herewini simply assisting Mr Whiunui.

Withdrawal of self-defence

[26] In opening for Mr Herewini trial counsel claimed he was acting in self-defence. Trial counsel said:

> The next charge is a charge of assault with a weapon. The issue that we see and we raise at, from the very outset is whether or not what Mr Herewini was doing at the time or anytime in the unit was being done in either self-defence of himself or self-defence of another, Mr Whiunui.
>
> Now my friend spoke at some stage, he raised clearly a number of potential issues but one of the issues that he raised was the knife, the introduction of the knife. What we say to you is that it's going to be quite important that you pay particular attention and listen to the evidence on that point as to who is the likely person who has introduced that knife.

[27] The trial Judge directed the jury in relation to self-defence immediately after opening. He said:

> [10] Charge 2 will introduce the issue of self-defence. Assault with a weapon is simply the intentional application of force by one person to the person of another. And assault becomes assault with a weapon when you use any object with the intention that you would cause some bodily harm.
>
> [11] Again, in this case, what is it all about? In this case, again the focus will be who was the aggressor or aggressors. I will give you more formal direction about charge 2 later. But what I would suggest is that when you are listening to the evidence and you are assessing the evidence, have foremost in your minds, who is the aggressor here? Who has the opportunity to withdraw? Ask yourself who is pursuing the violence? Who is keeping the violence going? Who actually has got an opportunity to leave?

[28] The issue of self-defence was discussed in chambers, with the Judge indicating no one should assume that self-defence would be allowed to go to the jury. The Judge later said that Mr Herewini would need to provide evidence about self-defence, which he did.

[29] The thrust of Mr Herewini's evidence-in-chief was that they wanted Mr Rivers to leave, and he was fearful of what Mr Rivers would do with the knife. He watched the fight between Mr Whiunui and Mr Rivers, and when he went to pick up the golf club, he was stabbed. He "felt something" go in. The fighting continued and he became more concerned that Mr Rivers would stab Mr Whiunui, and used the golf club, kicked, and punched Mr Rivers to try to get him off Mr Whiunui and to dislodge the knife. In the process of trying to pull Mr Rivers off Mr Whiunui, the hoodie was removed.

[30] Under cross-examination, Mr Herewini admitted seeing the Black Power hoodie and telling Mr Whiunui to find a park. He maintained that their goal in confronting Mr Rivers was to get him to leave. He was the one attacked, and he tried to protect his friend. He was not aware that Mr Whiunui had something in his hand, and he denied having anything metal in his hand when he first got out of the car. He accepted that he could have easily walked back to the car at the start of the fighting, but he was worried because Mr Rivers was threatening to stab them. He agreed the footage showed he picked the blue hat up off the ground and said he was trying to pull Mr Rivers off Mr Whiunui when he grabbed the hoodie. He accepted that he kicked and punched Mr Rivers and hit him with the golf club, but said it was because he was trying to dislodge the knife he was using to stab Mr Whiunui. He also accepted he walked away with the hoodie but came back to help Mr Whiunui. He agrees he can be seen walking away with the hoodie in his hands and Mr Whiunui can then be seen holding the hoodie.

[31] After Mr Herewini gave evidence the Judge withdrew self-defence based on the following findings about what had happened:[4]

> [19] Whiunui struck Rivers possibly on two occasions but at the very least one full blow to the upper shoulder area of Mr Rivers with the golf iron. This

[4] The reasons were recorded in a decision delivered after trial: *R v Herewini* [2022] NZDC 24047.

occurred on the grassed area to the right of the main door as one looks at the scene in photograph 1. After a final swing when he was still in possession of the golf iron Mr Whiunui lost the golf iron which has landed on the grass area near Mr Herewini. Herewini has bent down to pick it up. Rivers has taken his chance at that point to flee. He has pushed passed Herewini as Herewini stood upright with the golf club. Herewini may have been wounded to his upper arm area by Rivers at that point. There is insufficient to say if he was wounded at that point that it was a deliberate stab by Rivers, who was moving quickly passed the area in front of the doors and to the left of the doors. Rivers has stumbled while moving quickly away and he fell to the ground. At that point he presented no threat. At this point there was another clear opportunity for the defendants to leave if they feared that Rivers presented a threat to them. Rivers was on the ground. However, rather than leave they both immediately pursued him. Whiunui tackled Rivers while Rivers was on the ground, restrained him and had him pinned against the side of the building and the ground. This was despite Rivers being in possession of a knife. Herewini ran immediately to join in. He was now armed with golf iron having discarded the item (probably a crescent) he had previously been armed with.

[20] While Whiunui had Rivers pinned and restrained Herewini repeatedly kicked, punched and clubbed Rivers. The force of the blows with the golf iron was sufficient to shatter and break the shaft. During this violence Whiunui was pulling at Rivers' hoodie.

[21] In the struggle that was ongoing Rivers has managed to free himself momentarily and moved free of Whiunui back a short distance to the right. He again has been wrestled by Whiunui who pulled Rivers' hoodie up over Rivers' head. Herewini assisted then in dragging Rivers away from Whiunui as Rivers has in the struggle ended up on top of Whiunui. The two defendants managed to pull the hoodie completely off Rivers and it came into Mr Herewini's possession.

[22] Extraordinarily for someone claiming to be acting defensively and focussed solely on using force to disarm Rivers with a knife Herewini having obtained possession of "the colours" walked away from the struggle between Whiunui and Rivers. At this point Whiunui is upright behind Rivers who is still on the ground but in a seated position. Whiunui has Rivers around the throat. This is a full forearm choking hold. Rivers, unable to see behind him, lashes out – upwards and backwards with the knife towards Whiunui. It should be noted that Whiunui suffered superficial cuts to his upper arms and left finger and a small but nevertheless serious wound to his left eye. This one serious wound was unquestionably caused when Whiunui was choking Rivers and Rivers lashed out, as described above, upwards and backwards.

[23] The footage then stops. The unidentified individual filming the ultimate Facebook footage stops filming at that point. It is clear from Mr Herewini's evidence that he re-entered the struggle at that stage. After 20 seconds Herewini and Whiunui are seen to walk in a direction left to right back across the carpark. They have various items with them including Rivers' hoodie, the golf iron shaft, the likely crescent earlier discarded and in all likelihood the knife. Rivers, topless, walks away to the right. He is not brandishing a knife at that point. The only reasonable inference is that he has been dispossessed of the knife in the 20 seconds that there is no footage.

[32] The Judge thus concluded:[5]

> [25] There was no plausible and credible narrative that:
>
> (a) The defendants believed on first confronting Rivers in the carpark and despite Rivers presenting a knife they needed to use force to defend themselves. If I was wrong in coming to that view and a reasonable possibility existed they did, then;
>
> (b) Their actions clearly show that at no point were they acting to defend themselves. They were at all times the aggressors and very violently so. If I am wrong on that and there was a reasonable possibility they were acting to defend themselves rather than be the aggressors then;
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> (c) No reasonable jury could possibly have concluded their actions and the force they used was reasonable given the multiple occasions they had to simply leave.

[33] The defence closed on the basis that this was "a gang territorial dispute" gone wrong. Mr Herewini is described as having three goals: first to get Mr Rivers to leave; second to get Mr Rivers off and away from Mr Herewini, and finally a common intention shared with Mr Whiunui to get the knife from Mr Rivers. The jury is told that Mr Herewini stuck to his version of events and a summary of that version is left with them. On the assault charge, counsel simply noted that the Judge had withdrawn self-defence.

[34] In summing up, the Judge provided questions on the assault charge as follows:

> (a) Are you sure that Mr Herewini intentionally applied force to Mr Rivers or assisted Mr Whiunui to apply force to Mr Rivers?
>
> (b) Are you sure that in the assault on Mr Rivers, Mr Herewini used a weapon or assisted Mr Whiunui knowing that he would use a weapon to assault Mr Rivers?

[35] The Judge explained to the jury that the defence case was that Mr Herewini had a singular purpose to dispossess Mr Rivers of the knife because of the threat of danger, and risk to health which the knife presented.

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5 *R v Herewini*, above n 4.

[36] The Judge also addressed the reasons for withdrawing self-defence. He said:

> [77] Members of the jury, I have directed you already that you are not to consider self-defence when looking at charge 2. Counsel seem to have some expectation that I would give you an explanation or give you my reasons for that. I do not propose to go into that in any detail at all, suffice it to say that any use of force has to be reasonable. And, that is an objective standard, that is what you would have decided was reasonable and, in deciding what would have been reasonable force, options that people have before they need to resort to force to defend themselves, other options they have, have to be considered and here, amongst the matters which I took into account in deciding that you did not need to consider or you are not to consider the issue of self-defence on charge 2, is that when the knife was presented and said to present the overarching concerning threat, Mr Herewini and Mr Whiunui, they had the option of leaving and they did not.

Submissions

[37] Ms Vear contends that the Judge was wrong to withdraw the defence of self-defence and defence of another. She notes that assault was described to the jury as either Mr Herewini being a party to Mr Whiunui's use of the golf club (by "aiding" him) or Mr Herewini's use of the golf club. She maintains that the footage shows Mr Herewini offered no active assistance when Mr Whiunui was striking Mr Rivers with the golf club. She submits there was sufficient credible evidence to support an inference that Mr Herewini was acting in defence of Mr Whiunui when he struck Mr Rivers, who was actively stabbing Mr Whiunui at the time.

[38] Ms Vear submits the Judge was wrong to find that the striking coincided with the removal of the hoodie — that occurred afterwards — and it is Mr Herewini's intention at the time of striking that is important. Furthermore, the fact that the Judge had to undertake a detailed review of the video footage on multiple occasions supports the conclusion that this issue should have been left for the jury. Ms Vear also says the Judge was wrong to approach self-defence on a collective basis, and that the Judge should have examined Mr Whiunui's claim to self-defence separately from Mr Herewini's claim to defence of another.[6] Finally, Ms Vear submits that the comments made in summing up went too far. She submits the Judge effectively discredited both defendants and removed their defence to the aggravated robbery

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6 Citing *R v Karaitiana* [2007] NZCA 47.

charge (that they wanted to disarm Mr Rivers) when he observed that they could have left at any time, and the force which was used was unreasonable.

[39] Mr Auld contends it was plainly available to the Judge to conclude that there was no plausible or credible self-defence narrative. There must be a narrative that gives it "an air of reality"[7] and there was none. Moreover, he says that even if Mr Herewini's evidence is accepted:

(a) Any violence was a response to the defendants' demand that Mr Rivers leave; they could have avoided the confrontation by not continuing their demands. There is no evidence to suggest Mr Rivers would have pursued them had they retreated. When Mr Rivers threatened violence, Mr Whiunui and Mr Herewini armed themselves and advanced on Mr Rivers. This demonstrates that they intended to escalate the confrontation to enforce their demands.

(b) Mr Herewini can be seen advancing on Mr Rivers in concert with Mr Whiunui — and at this point he committed the assault as a party under s 66(1)(a), and the assault with a weapon. When Mr Rivers attempted to flee, Mr Herewini joined Mr Whiunui in attacking him, with the clear purpose of removing Mr Rivers' hoodie.

[40] Mr Auld also submits that the Judge was correct to approach the case on the basis it was effectively a claim to collective self-defence, that is whether either defendant could provide a plausible narrative that they acted in defence of either themselves or one another. This is said to be the correct approach because they were charged as parties to the assault, so if the jury is satisfied that they were acting in the course of a joint attack, and Mr Whiunui could not provide a plausible narrative of self-defence, then Mr Herewini could not rely on self-defence or defence of another. Mr Auld submits that on the evidence there was no other plausible narrative than Mr Herewini and Mr Whiunui pursuing Mr Rivers to continue their assault and remove his hoodie. They were acting in concert in a joint attack, and it is implausible Mr Whiunui or Mr Herewini were acting in self-defence and that the force used was

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7 Citing *Fairburn v R* [2010] NZCA 44 at [38]; and *Pahau v R* [2011] NZCA 147 at [34].

reasonable. He also submits that even if self-defence should have been left to the jury, there was no miscarriage because the jury's verdicts on the aggravated robbery charge show that the defendants used force to give effect to the theft. They must inevitably have found the defence of self-defence disproved.

[41] As to the Judge's explanation about the withdrawal of self-defence, Mr Auld contends that the explanation given left open the defence to the aggravated robbery because he focused on whether there had been reasonable force, rather than their purpose for the violent engagement.

Assessment

[42] Mr Herewini was facing one charge of aggravated robbery (that is, he and Mr Whiunui together robbed Mr Rivers) and one charge of assault with a weapon. There can be no dispute that both he and Mr Whiunui were engaged in a violent melee with Mr Rivers. Mr Herewini's defence to both charges was three-pronged: they never intended to deprive Mr Rivers of his property, Mr Rivers was the knife wielding aggressor, and Mr Herewini was always acting in self-defence of himself or Mr Whiunui. The Crown case was that both defendants wanted to remove Mr Rivers' Black Power colours, and that they did so by way of joint attack on him.

[43] As this Court said in *R v Sila*:[8]

> [28] Self-defence should be left to the jury where the evidence raises a credible or plausible narrative which might lead the jury to entertain a reasonable possibility of self-defence: *R v Wang* [1990] 2 NZLR 529 at 534 (CA). In deciding whether there is a credible or plausible narrative, the judge must consider the matter on the view of the evidence most favourable to the accused: *R v Kerr* [1976] 1 NZLR 335 at 340 (CA).

[44] Defence of another is a separate defence and must also be left to the jury where there is credible evidence supporting it as a reasonable possibility. This Court in *R v Karaitiana* put it this way:[9]

> As this Court held in *R v Tavete* [1988] 1 NZLR 428, self-defence should be put to the jury when, 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

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8 *R v Sila* [2009] NZCA 233 at [28].
9 *R v Karaitiana,* above n 6, at [13].

> plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence. That principle clearly extends to defence of another and defence of a dwellinghouse. Where a defence which should, in accordance with this principle, be put is not adequately identified by the Judge, the conviction will generally be set aside (*R v A, B, C, D*, CA301/05, CA295/05, CA310/05, CA288/05, 11 April 2006).

[45] The violence in this case was recorded from various vantage points, including at close range. With the benefit of those recordings, and the evidence at trial, we have a clear appreciation of what happened. It is easy to see why the trial Judge was doubtful of the claim to self-defence or defence of another. On the totality of the evidence, the overwhelming inference is that Mr Whiunui and Mr Herewini wanted to secure Mr Rivers' colours and only left after they achieved their objective. There is also strong evidence that they both attacked Mr Rivers to achieve this goal.

[46] Nevertheless, we consider the Judge erred when he supplanted the role of the jury in making findings of fact as to what happened, including about:

(a) how many times Mr Whiunui struck Mr Rivers;

(b) whether Mr Rivers "took his chance to flee";

(c) when Mr Herewini was stabbed;

(d) whether Mr Rivers presented a threat;

(e) whether Mr Herewini had a clear opportunity to leave;

(f) the significance of Mr Rivers' actions when stabbing Mr Whiunui; and

(g) the significance of Mr Herewini's actions in leaving momentarily.

[47] Findings on these matters should have been left for the jury to make. Relevantly, Mr Herewini gave direct evidence that he did not want himself or Mr Whiunui to be stabbed, and it transpires both were in fact stabbed by Mr Rivers. Notably, Mr Herewini was largely inactive during the initial episode of violence between Mr Whiunui and Mr Rivers, and there is some support from the recordings

for his claim that he only became involved after Mr Rivers rushed at him and stabbed him. There is also some support from the recordings that he only struck Mr Rivers with the golf club when Mr Rivers was frenziedly stabbing at Mr Whiunui. Both provide a credible or plausible basis for a claim to self-defence or defence of another.

[48] In our view, therefore, whether Mr Herewini was acting in self-defence or in defence of Mr Whiunui were properly matters for the jury to assess. The reasonably serious injuries to both Mr Herewini and Mr Whiunui reinforce why the jury might have entertained a reasonable possibility of self-defence or defence of another in relation to the assault with a weapon charge.

[49] Contrary to Mr Auld's submission, we do not consider the fact the jury found Mr Herewini guilty of the aggravated robbery obviated the need to leave self-defence or defence of another with the jury on the assault charge. Unlike the aggravated robbery charge, the assault charge was specifically presented to the jury on the basis that Mr Herewini used a weapon or assisted Mr Whiunui knowing that he would use a weapon to assault Mr Rivers. It is the use of the weapon, not the common purpose to rob Mr Rivers, that is in focus on the assault with a weapon charge. Therefore, the fact they had already found him guilty of the aggravated robbery, which did not require proof of use of a weapon, was never determinative of the assault charge.

[50] Accordingly, we allow this ground of appeal.

Summing up — lack of balance

[51] Ms Vear contends that the summing up lacked balance by either favouring the Crown case or undermining the defence case. The following matters are emphasised:

(a) The Judge placed considerable significance on the video evidence and the Crown interpretation of it. The following is identified as an example:

> [44] Members of the jury, just while I am on that, to correct something, Mr Govender said to you there is no evidence that the hoodie was taken. That is wrong. There is evidence it was taken; it comes from Mr Herewini. And given that Mr Herewini gave evidence in court, that is evidence both for

> and against Mr Whiunui, and that Mr Herewini accepted to Mr Blaschke that Mr Whiunui had a hoodie, and that was not challenged by Mr Govender for Whiunui at all. Okay.

(b) The Judge took several opportunities to undermine defence counsel's closing remarks, noting the following examples:

> … I think Mr Willis might have said that if Mr Rivers had left, none of this would have happened. There is no obligation on Rivers to leave at all, in fact he should not have left.
>
> … Mr Willis I think might have said rightly or wrongly the defendants demanded that he leave. Well, members of the jury, it is not rightly or wrongly, it was wrongly he was told to leave.
>
> … Mr Willis made submissions to you about aggravated robbery and that you would want to get in quickly and do it quickly and get out fast and said that you would not have a talk about it beforehand. … So, it is the three elements the Crown have to prove, not that the Crown case has to meet any stereotypical notion of what an aggravated robbery might look like.

(c) The Judge only provided the Crown's perspective on some issues rather than adopting a traditional Crown/defence case analysis — noting the Judge's account of items taken was based on the interview with Mr Whiunui to the extent it supported the Crown case.

[52] Mr Auld responds that the Judge was correct to place the emphasis he did on the video evidence and to the extent that his interpretation tends to align with the Crown, that is because some aspects of the defence case were clearly inconsistent with an objective viewing of the footage. The Judge also gave the usual direction not to read anything into his comments. Mr Auld also submits that the Judge was entitled to comment about whether it was wrong for Mr Herewini to demand Mr Rivers leave, and that the Crown does not have to prove the robbery occurred in a stereotypical way. Furthermore, he submits while the direction about inferences may have been unnecessarily detailed, it did not prejudice the defence in any material way. Finally, he highlights that the Judge put the defence case to the jury that the force used was not for the purpose of taking the hoodie and cap, rather that it was for the purpose of taking the knife.

Assessment

[53] We have closely examined the summing up. We accept that aspects of the summing up favoured the Crown's narrative, including the following observations (summarised here):

(a) Mr Herewini and Mr Whiunui were wrong to demand that Mr Rivers leave.

(b) Mr Herewini had the hoodie and then left, so he was not engaged in attempting to take the knife off Mr Rivers at the time Mr Whiunui was stabbed in the eye.

(c) Mr Whiunui picked up the cap and can be seen carrying the hoodie, while Mr Herewini had the "broken shaft of the golf club" — this arguably suggested that the theft element of the robbery charge was proven.

(d) The suggestion there is enough evidence to draw the inference that there was further violence after Mr Rivers had been dispossessed of the knife, and that is when Mr Herewini and Mr Whiunui have left, with Mr Whiunui carrying the hoodie and possibly the knife, and then the cap.

(e) Counsel was wrong to say there was no evidence the hoodie was taken, noting that Mr Herewini accepted that Mr Whiunui had a hoodie — again this goes to the theft element of the alleged offending.

(f) The Crown is not confined to showing one purpose when proving a common intention to rob, so the jury might still find Mr Herewini and Mr Whiunui guilty even if they had some other purpose, for example dispossessing Mr Rivers of the knife.

[54] We agree that cumulatively references like this run the risk of suggesting the Judge is unimpressed with the defence. The references arguably discredit some of the

defence claims and support the Crown case in relation to the elements of the offending, including the alleged acts of theft and common intention to rob.

[55] But care must be taken not to extrapolate lack of balance from a number of specific observations that appear to favour the Crown case. These observations must be seen in context and in light of the summing up as a whole. The Judge made clear to the jury at the outset that the Crown carries the burden of proving guilt, and that what the jury makes of the evidence is "entirely" for them. At various parts of the summing up, the Judge highlighted the defence case, including that any violence used was not for the purpose of taking the hoodie, but to disarm Mr Rivers of the knife. The Judge also links the defence case to the video footage, noting for example the defence says the video footage of the movements of Mr Herewini and Mr Whiunui shows their intention to get the knife and in particular, having got the knife, they are content to leave. Furthermore, on the issue of common purpose, the Judge highlighted that:

> … If their only purpose was to disarm him and the taking of his hoodie and cap, was just something they did without thinking then the Crown would not have proved a robbery because the Crown would not have proved that they used violence to overcome resistance to the property being taken.

[56] Finally, it is important to note that the key observations made by the Judge, particularly about what the footage purports to show, are accurate and would have been obvious to the jury in any event. Therefore, to the extent those observations about the footage are prejudicial, it is because of the footage itself, rather than the Judge's comments about it.

[57] In the result, overall, we do not consider that the summing up lacked requisite balance. The jury was appropriately cautioned to arrive at its own conclusions on the evidence and the defence case was clearly stated and linked to the evidence where appropriate.

[58] This ground of appeal is dismissed.

The tripartite direction

[59] The Judge gave the following tripartite direction:

> [82] So, the consequences of him giving evidence and giving that evidence before you is that, in light of the admitted facts and in light of all the evidence in the case and in the context of the case you believe him, then that will be an answer to the Crown case on charge 1 and you would find him not guilty on charge 1.
>
> [83] If what he says in light of the admitted facts, in light of all the other evidence in the case, the video footage and the context of the case, if you think what he had to say to you, that he had no purpose in wanting to take the colours, if that leaves you in the position where you think well that reasonably might be true, then you would have a reasonable doubt and on charge 1 you would find him not guilty but if you reject his evidence and you do not believe him on that in light of all the evidence in the case, you cannot automatically say, well, we do not believe him so therefore he must be guilty.

[60] Ms Vear submits that by referring to "the admitted facts", "all the evidence" and "the context of the case", the Judge effectively undermined the purpose of the tripartite direction, namely, to emphasise the burden and standard of proof from the defendant's perspective. It was in effect an invitation to disregard and disbelieve Mr Herewini's evidence. It is said to suggest that given the gang context, Mr Herewini should not be believed and that the jury should instead rely purely on the video evidence.

Assessment

[61] We agree with Mr Auld that this ground has no merit. Whether the evidence of a defendant is accepted as true will always depend on the assessment of that evidence in light of the other evidence before the jury. The Judge's direction adds nothing prejudicial and does not detract from the core proposition, namely that if the jury believes a defendant's account, or believes it reasonably might be true, then they must find him not guilty.

[62] We also reject the contention that the tripartite direction suggests Mr Herewini is to be disbelieved because of the gang context. There is nothing on the face of the direction which supports such a proposition. Indeed, that proposition is not reconcilable with the express direction given by the Judge that the jury must not reason guilt from gang association.

[63] This ground of appeal is dismissed.

Overall assessment

[64] We turn then to examine whether the trial miscarried. A miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that created a real risk the outcome of the trial was affected.[10]

[65] We have found that the Judge ought not to have withdrawn the defences of self-defence and defence of another from the jury. We have also identified that aspects of the summing up appeared to favour the Crown case, but we were not satisfied that the summing up was unbalanced overall. The other grounds of appeal lack any evident merit and do not add to the evaluation.

[66] We are unable to say there is no real risk that the outcome of the assault with a weapon charge was affected by this. The entire defence case on the assault charge rested on self-defence or defence of another. Those defences should have been left to the jury. Therefore, the assault conviction must be set aside.

[67] Conversely, we are satisfied that there is no real risk the removal of the defences of self-defence and defence of another on the assault charge would have affected the outcome in relation to the aggravated robbery charge. The violence with the weapon was incidental to the key issue on the aggravated robbery charge, namely whether the defendants shared a common intention to take Mr Rivers' colours. By tying the removal of the defence to reasonableness of the force used, the defence case on the aggravated robbery charge remained alive, namely that they wanted Mr Rivers to leave and, in the process, needed to disarm him.

[68] Furthermore, in addition to the written record, we have had the benefit of real time video footage of the offending from a variety of vantage points. As already stated, the evidence as to joint purpose to take Mr Rivers' colours was overwhelming. In short, there is clear incontrovertible evidence that Mr Herewini and Mr Whiunui confronted Mr Rivers, dispossessed him of his hoodie and cap and left with those

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[10] Criminal Procedure Act 2011, s 232(4)(a).

items, that being their unmistakable purpose for their attack on him. We are, therefore, satisfied there was no risk whatsoever of a different outcome on the aggravated robbery charge irrespective of the shortcomings we have identified and, if necessary, we would have applied the proviso to the aggravated robbery charge on the basis we are sure of guilt on that charge.

[69] On that basis the appeal against the assault with a weapon conviction is allowed. The appeal against the conviction for the aggravated robbery is dismissed.

Sentence appeal

[70] Mr Herewini was sentenced to three years' and six months' imprisonment on the aggravated robbery charge, to be served concurrently with a two-year sentence for the assault with a weapon charge. In reaching this sentence, the Judge adopted a starting point of four years' imprisonment. He attached significance to the fact that this was gang violence, noting it was more serious than the violent offending in *Wharewhiti v R*, where a starting point of three years and six months was adopted.[11] A reduction of six months was allowed to acknowledge the time to trial and the fact that through that time Mr Herewini was meaningfully engaged in employment, without further offending. No further discount was allowed, the Judge rejecting any suggestion of remorse or rehabilitation or any other mitigating factor.

[71] Mr Herewini appeals the sentence on the basis that the starting point was too high, he should have been awarded greater discounts for background and rehabilitation efforts, and there was inequity in the way these factors were treated in comparison to Mr Whiunui, who received a sentence of community detention and intensive supervision. It is submitted that recognition should have been given to the steps taken by Mr Herewini to address the drivers of the offending, including the completion of drug and alcohol programmes, that he has been drug free for two years, and self-referred to an anger management programme. Ms Vear emphasised Mr Herewini's upbringing and how he had become involved in gangs at 13-years-old, at 17 years of age was coerced into participating in a home invasion, and how his time in prison had normalised violence for him.

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[11] *Wharewhiti v R* [2022] NZHC 1367.

[72] Mr Auld submits that a starting point of four years' imprisonment was within range, referring to the authority cited within *Wharewhiti*.[12] He submits the four year starting point is justified given that Mr Herewini was convicted on two charges. He says that there is nothing in Mr Herewini's background to justify a further discount, particularly as Mr Herewini had remained a senior member of the Mongrel Mob and based on the PAC report was not motivated to distance himself from the gang.

[73] Mr Auld also highlights the differences between Mr Whiunui's circumstances and Mr Herewini's position. Unlike Mr Herewini, Mr Whiunui had admitted he did not act in self-defence and there were significant personal mitigating circumstances for Mr Whiunui. In the result, Mr Whiunui's sentence for imprisonment was 33 months, unlike the 42 months received by Mr Herewini. It appears that the Judge made an error in the calculation of Mr Whiunui's sentence, reducing the nominal sentence to two years, which led to consideration of a community sentence. The Crown did not pursue an appeal in relation to the calculation error, taking into account Mr Whiunui's parole eligibility.

Assessment

[74] While it is not clear what effect the assault conviction had on the sentence for the aggravated robbery, the violence associated with the alleged assault with a weapon is likely to have been integral to the assessment of the gravity of the aggravated robbery offending. Indeed, Mr Auld sought to justify the four-year starting point on the basis Mr Herewini was convicted on both charges. Furthermore, the Judge appears to have relied on the decision of the High Court in *Wharewhiti* for the purpose of fixing the starting point. That sentence has since been overturned by this Court.[13] The present sentence therefore cannot stand. However, it is not sensible nor principled to re-sentence for the aggravated robbery without regard to the outcome of any retrial on the assault with a weapon charge if it is pursued. Mr Herewini ought not find himself facing sentencing twice for the same incident.

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12 At [10].
13 *Wharewhiti v R* [2023] NZCA 29.

[75] As a consequence, the sentence on the aggravated robbery is set aside, with sentence to be refixed pending any retrial on the assault with a weapon charge. If the assault charge is not pursued or if Mr Herewini is found not guilty, then he must be re-sentenced on the aggravated robbery charge with the salient facts either agreed or resolved through a s 24 fact finding hearing.[14]

Result

[76] The appeal against the conviction for assault with a weapon is allowed. The conviction on that charge is set aside. A retrial on that charge is ordered. However, the Crown may wish to consider the utility of pursuing this aspect of the matter given the appeal against the conviction for aggravated robbery is dismissed.

[77] The appeal against sentence on the aggravated robbery charge is allowed and the sentence is set aside. The sentence on this charge is to be determined by the District Court once the outcome is known in relation to the charge of assault with a weapon.

[78] Any question of bail pending retrial and re-sentencing is to be dealt with by the District Court.

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[14] Sentencing Act 2002, s 24.