NOTE: HIGH COURT ORDER PERMANENTLY SUPPRESSING DETAILS OF ADDRESSES OF WITNESSES UNDER S 140 CRIMINAL JUSTICE ACT 1985 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA826/2011
[2013] NZCA 366

BETWEEN	WAIMIRIRANGI TAUARIKI Appellant
AND	THE QUEEN Respondent

Hearing: 31 July 2013

Court: Harrison, Panckhurst and Ronald Young JJ

Counsel: B L Sellars for Appellant
M D Downs and M L Wong for Respondent

Judgment: 13 August 2013 at 10.45 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Ronald Young J)

Introduction

[1] Ms Tauariki was convicted in October 2011 of the July 2010 murder of Preva Shortland. Ms Tauariki admitted killing Ms Shortland but said she acted in self-defence. In this appeal against conviction she says that in summing up the trial Judge, Potter J, failed to refer to the three requirements of self-defence and wrongly said that Ms Tauariki (for self-defence to apply) must have been acting to defend herself based on a belief she would suffer bodily harm or death.

[2] The relevant facts were summarised by the Judge at sentencing in this way:[1]

> [4] As I have said, Preva Shortland was a 29 year old mother of three young children.
>
> [5] On 10 July 2010, a birthday celebration was held for Steven Maihi at his home address of .... The deceased attended with her partner, Pepa Leavea, who is Steven Maihi's cousin. Ms Tauariki, a niece of Maia Maihi (who is Steven Maihi's wife), was also present. It was known to family members that Pepa Leavea and Ms Tauariki had had an affair in 2007 or 2008. Since the affair there had been conflict between Ms Tauariki and the deceased.
>
> [6] At the party alcohol was consumed. During the evening a verbal argument developed between Ms Tauariki and the deceased, which escalated into a physical fight involving punching and them pulling each other's hair. Mr Leavea also punched Ms Tauariki during this altercation. They were separated. Ms Tauariki went into the house. She was seen sitting on a bed in the dark. Shortly after midnight, Ms Tauariki walked outside the house. She said to the deceased: "Yep I fucked him you fucking bitch". The pair began fighting again. They fell to the ground and continued fighting for a short period. During the fight Ms Tauariki stabbed the deceased twice with a knife, a 32 cm long kitchen knife with a 20 cm blade. She stabbed her once in the shoulder and again into the chest, into the heart of the deceased.
>
> [7] Ms Tauariki removed the knife and concealed it. The deceased stood up but soon collapsed to the ground. She was unable to be revived by others at the address, or by police or ambulance staff. Immediately after the fight Ms Tauariki walked through the house to the rear, discarded the white jacket she was wearing and made her way into neighbouring properties. She hid the knife in the garden next to a wooden gate in a neighbouring property at .... She hid by a boundary fence opposite the property but was spotted by police. When questioned by police she admitted being in a fight.
>
> (Addresses deleted.)

[3] Ms Tauariki had a different version of the facts, in particular, the events which occurred immediately before the stabbing. She made a statement to the police and gave evidence at trial. She said that after the initial disagreement with Ms Shortland she had gone inside the house. When she came outside she agreed that she had used the words referred to by the sentencing Judge.[2]

[4] The deceased Ms Shortland attacked her, threatened to kill her and then she and Ms Shortland fought. During the fight Ms Tauariki said she saw Ms Shortland reach for something in the garden. She said she did not know what Ms Shortland

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1 *R v Tauariki* HC Auckland CRI-2010-092-11776, 29 November 2011.

2 At [6] of the sentencing decision, set out at [2] above.

was reaching for but she was afraid that she would use it to hurt her. Ms Tauariki reached for the object and in her words "used it" on Ms Shortland. She said that she did not realise at the time that it was a knife.

[5] The Crown case was that this was not self-defence. Their case was that Ms Tauariki had obtained the knife, concealed it in the garden, provoked the fight with Ms Shortland and when that happened had retrieved the knife and stabbed Ms Shortland.

The appellant's case

[6] The appellant referred to this Court's approved direction to a jury where self-defence is raised in *R v Sarich*:[3]

> [35] The format approved by this Court in *R v Li* CA140/00 28 June 2000 for directing a jury on the application of the test for self-defence was that suggested by Tipping J in *Shortland v Police* HC INV AP74/95 23 April 1996:
>
> > In summary, on this approach the jury is asked to consider first what the accused believed the circumstances to be, from his or her point of view. The second question is whether, bearing in mind that belief of the accused about what was happening, he or she was acting in self-defence (again considered from his or her point of view). The last question is whether, given that belief, the force used was actually reasonable.
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> [36] The *Shortland* formula has subsequently been approved in *R v Hackell* CA131/02 10 October 2002, *R v Bridger* [2003] 1 NZLR 636 (CA) and *R v Reyland* CA439/03 13 July 2004.

[7] In *R v Reyland* this Court noted that the formulation previously approved was not compulsory.[4] The important point was that a judge in summing up should:[5]

> ... draw to the jury's attention the need to assess both the self defence limb and the reasonable force limb of s 48 in the light of the circumstances as the accused saw them.

[8] The Judge provided an issues sheet for the jury. Page one began by identifying the four elements that the Crown must prove in a murder where

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3 *R v Sarich* CA407/04, 16 May 2005.
4 *R v Reyland* CA439/03, 13 July 2004.
5 At [17].

self-defence is raised; that the accused killed the deceased; that the homicide was culpable; that the accused did not act in self-defence; and that the accused acted with murderous intent.

[9] The issues sheet then noted that Ms Tauariki did not deny she had caused the death of Ms Shortland. The sheet then posed the question "Was the stabbing an unlawful act?" It said:

> The stabbing would be justified and therefore not unlawful, if:
>
> - It was delivered by Ms Tauariki to defend herself against bodily harm or death; and
>
> - It involved no more force than, in the circumstances as Ms Tauariki believed them to be, it was objectively reasonable to use.
>
> If the Crown has failed to exclude self-defence, the Crown has failed to establish culpable homicide. Your verdict will be **not guilty**.
>
> If the Crown has excluded self-defence (that is, has proved that it is not a reasonable possibility that Ms Tauariki was acting in self-defence), Ms Tauariki is guilty of at least **manslaughter**. Proceed to question (3).

[10] Ms Sellars submits that the above portion of the issues sheet was a direction to the jury about self-defence. She says that this direction did not refer to the subjective requirements of self-defence identified in *R v Sarich*. This part of the issues sheet did not make it clear to the jury, that when considering self-defence, they must first assess what Ms Tauariki believed the circumstances to be. Given that assessment, they should then consider whether from her point of view she was acting in self-defence and whether given those circumstances reasonable force was used.

[11] Thus, Ms Sellars submits this part of the issues sheet failed to draw to the jury's attention the need to assess both the self-defence limb and the reasonable force limb in light of the circumstances as she believed them to be. This direction was, therefore, seriously deficient and caused a miscarriage of justice, Ms Sellars says.

[12] The second ground of complaint relates to the reference to bodily harm or death in the first bullet point of the issues sheet above.[6] There, the Judge said that

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[6] Set out at [9] above.

the killing would be justified and not unlawful if Ms Tauariki had stabbed Ms Shortland to defend herself "against bodily harm or death".

[13] Ms Sellars says that such a direction wrongly limited the jury by directing them that they could only consider self-defence if the fear was of an attack which would cause bodily harm or death. She says that it did not need to be established that there was a fear of bodily harm or death for her actions to be in self-defence.

[14] Thus, counsel submitted that when Ms Tauariki was cross-examined and she said that she thought she might be "hurt" by the use of the object by Ms Shortland, the jury might have thought that was insufficient to raise self-defence. This was an error by the Judge in her summing up and this caused a miscarriage of justice.

Decision

The three elements of self-defence

[15] We are satisfied that considered overall the summing up properly explained self-defence to the jury. We are satisfied that if the three pages of the issues sheet are considered together with the summing up that the jury could have been in no doubt as to what they were required to do when considering self-defence.

[16] The bullet points at page one of the issues sheet were under the heading – "Was the stabbing an unlawful act?" The bullet point comments, therefore, were not concerned about identifying the ingredients of self-defence but about whether the stabbing was an unlawful act.

[17] Thus, the comment in the first bullet point (at [9] above) was no more than the Judge telling the jury that Ms Tauariki was entitled to be acquitted if the killing was in self-defence because no unlawful act would have been committed. This was correct.

[18] In the two paragraphs after the second bullet point the Judge summarised the connection between an unlawful act and self-defence.

[19] The second bullet point (at [9] above) was unnecessary given the Judge was attempting to explain the relationship between an unlawful act and self-defence. But it was an accurate account of the objective aspect of self-defence and made it clear this was to be assessed in the circumstances that Ms Tauariki believed them to be.

[20] Page three of the issues sheet dealt with self-defence for the jury. We set it out in full:

> **Self-Defence**
>
> **Section 48 Crimes Act** –
>
> > Everyone is justified in using, in defence of himself or another, such force as, in the circumstances as he believed them to be, it is reasonable to use.
>
> **NOTE**
>
> 1. Self-defence is a defence to both murder and manslaughter.
>
> 2. The burden of proof remains on the Crown. Therefore the Crown must exclude self-defence, that is the Crown must prove that the accused did not act in self-defence.
>
> **Steps** –
>
> (1) What did the accused believe the circumstances to be at the time she stabbed Preva Shortland? (a subjective assessment)
>
> (2) In those circumstances (as the accused believed them to be) was the accused acting to defend herself against bodily harm or death?
>
> (3) Was the force the accused used reasonable, given what she believed were the circumstances at the time? (an objective assessment)

[21] In her summing up to the jury, the Judge referred to page three of the issues sheet. She said:

> [52] Page 3 is important. It contains the definition of self-defence and it contains separately the steps that you need to go through in determining the issue of self-defence and I will come back to that also but that is what the three pages comprise.

[22] Shortly after in her summing up the Judge returned to page three of the issues sheet and self-defence. She reiterated what the Crown must prove to establish that the appellant did not act in self-defence. She confirmed that there were three steps

the jury needed to take in reaching their determination about self-defence. The Judge then said:

> [55] I have noted there that self-defence is a defence to both murder and manslaughter and that the burden of proof remains on the Crown. Therefore the Crown must exclude self-defence, that is the Crown must prove that the accused did not act in self-defence when she stabbed Preva Shortland. There are three steps that you need to take in reaching your determination:
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> (a) What did the accused believe the circumstances to be at the time she stabbed Preva Shortland. That is a subjective assessment. What was going on in her mind. And you look at all the evidence to determine that, all the relevant evidence.
>
> (b) In those circumstances (as the accused believed them to be) was the accused acting to defend herself against bodily harm or death.
>
> (c) Was the force the accused used reasonable given what she believed were the circumstances at the time. That is an objective assessment.

[23] The Judge then explained in detail what each of the three steps required and she referred to the case for the Crown and the case for Ms Tauariki with respect to each of the three steps.

[24] We are satisfied, therefore, that when considering these detailed directions the jury could have been in no doubt at all how they were to approach self-defence and what the Crown had to establish to negate it. The Judge's directions were precisely in accord with this Court's decision in *R v Sarich*.

[25] We are satisfied that at page one of the issues sheet the Judge was not attempting to describe self-defence. That was left for later in the issues sheet. The Judge was only trying to draw to the jury's attention the fact that the stabbing would be justified and not unlawful if the Crown could not negate self-defence.

[26] The second bullet point at page one of the issues sheet[7] was unnecessary in that it provided some detail as to self-defence. But it was an accurate summary of part of the requirements of self-defence. Most importantly, both page three of the issues sheet and the Judge's oral directions clearly, repetitively, and accurately

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[7] At [9] above.

identified the law on self-defence. We are satisfied there was no miscarriage arising from this aspect of the summing up.

Bodily harm or death

[27] As to the second ground of appeal this complaint is based on the content of page one and page three of the issues sheet. In both page one and page three of the issues sheet the Judge said the stabbing would be in self-defence if Ms Tauariki was defending herself against bodily harm or death.

[28] Ms Sellars' submission is that the Judge was wrong to restrict self-defence to those cases where the threat was of bodily harm or death, especially given Ms Tauariki said in evidence she feared being "hurt" only.

[29] We are satisfied that the use of the term "bodily harm or death" was the Judge adopting what Ms Tauariki had said about the circumstances under which she came to use the knife that evening. This was to ensure the jury were focused on the facts of this case when they came to consider self-defence.

[30] Ms Tauariki made statements to the police and gave evidence at trial. In her statements to the police she stressed that she thought she was going to be seriously hurt or killed by Ms Shortland if she did not defend herself. She used words such as "seriously hurt", "seriously injured" or "killed". She said that Ms Shortland had told her that she was going to kill her during the fight shortly before she stabbed Ms Shortland.

[31] In both evidence-in-chief and cross-examination, Ms Tauariki stressed that she believed that Ms Shortland was capable of carrying out her threat to kill her and that she feared Ms Shortland would use the weapon that she believed that Ms Shortland was reaching for.

[32] The Judge's comments, therefore, about fear of bodily harm or death simply reflected the defence case at trial and Ms Tauariki's evidence. It was her statement and evidence of her particular fear of Ms Shortland that she said led her to use the knife. And so when the Judge referred to the circumstances as Ms Tauariki believed

them to be and whether or not she was acting to defend herself against bodily harm or death, the Judge was paraphrasing Ms Tauariki's language.

[33] We are satisfied, therefore, that the Judge was doing no more than tailoring the summing up to the facts of this case. As counsel for the respondent said, there was no fear that the jury in interpreting the requirements under s 48 of the Crimes Act 1961 would believe a fear of grievous bodily harm was a minimum requirement.

Summary

[34] We are satisfied that the Judge's summing up, considered overall, fairly identified the elements of self-defence and explained these to the jury based on the facts of the case. The Judge made no error in doing so. The appeal against conviction will be dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent