NOTE: ORDER PROHIBITING PUBLICATION OF NAMES AND IDENTIFYING DETAILS OF THE APPLICANT'S PARTNER AND THEIR CHILD AND PROHIBITION ON THE PUBLICATION OF INFORMATION THAT MAY LEAD TO THE IDENTIFICATION OF THE LOCATION OF THE APPLICANT OR HIS PARTNER OR THEIR CHILD.

IN THE SUPREME COURT OF NEW ZEALAND

SC 123/2017
[2018] NZSC 15

BETWEEN	MICHAEL THRIFT MURRAY Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and Glazebrook JJ
Counsel:	R M Lithgow QC and E A Hall for Applicant J C Pike QC for Respondent
Judgment:	23 February 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] In August 2014, the applicant was one of a number of men involved in a street brawl. This was between, on the one hand, the applicant and some of his associates (including his brother) and, on the other, a group of people who were members of, or associated with, a gang known as the Head Hunters. In the course of these events the applicant returned to his house (which was nearby) and equipped himself with a weapon. This was referred to at trial as a sickle but would have been better described as a long-handled billhook. When the applicant returned to the fracas, one of the Head Hunters, Connor Morris, was standing over his brother who had been knocked to the

ground. The applicant struck Mr Morris on the back of his head with the billhook and thereby killed him. The applicant was subsequently charged with murder. At his trial, his primary defence was that, in striking the deceased, the applicant was acting in defence of his brother and thus was entitled to an acquittal. There was also an issue as to whether he had acted with murderous intent.

[2] The applicant was found guilty at trial of murder and his later appeal against conviction was dismissed.[1] He now seeks leave to appeal to this Court and, in support of this application, has proposed three grounds of appeal: (a) prejudice to the applicant associated with pre-trial publicity and fears of retribution; (b) whether the Judge should have left excessive defence of another to the jury as a partial defence; and (c) alleged errors in the summing up.

[3] The case attracted considerable publicity; in large measure because of the identity of the deceased's partner who was well-known to the media. As well, members of the Head Hunters were present at the trial. The Judge thus had to be alert to the possibility of prejudice to the applicant associated with: (a) public sympathy for the deceased's partner and perhaps the deceased; and (b) the possibility of retaliation by the Head Hunters should there be an acquittal. The Judge addressed all of this both when the jury was empanelled and in his summing up and as well, he also dealt with one issue which arose during the trial. Nothing tangible has been pointed to by the applicant to suggest that the jury was, in fact, affected by publicity or fear of retaliation. This aspect of the case was carefully reviewed by the Court of Appeal. It does not involve a question of public or general importance and there is no appearance of a miscarriage of justice.[2]

[4] At trial, the Judge was not invited to, and did not, direct the jury that they should find the applicant guilty of manslaughter if his defence of another was rejected only on the basis that the force he used was excessive. Counsel for the applicant says that this was an error.

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1 *Murray v R* [2017] NZCA 467 (Harrison, Brown and Clifford JJ).
2 Supreme Court Act 2003, s 13(2); Senior Courts Act 2016, s 74(2).

[5] In *R v Howe*,[3] the High Court of Australia held that where a plea of self-defence to a charge of murder fails because, although the defendant thought the force used was necessary, the jury considered it to be unreasonable, the proper verdict is manslaughter. *Howe* was followed by the Supreme Court of Ireland in *People (Attorney-General) v Dwyer*[4] and was affirmed by the High Court of Australia in *Viro v R*[5] in 1978. Under the approach adopted in *Viro*, it was an element of the defence that the defendant had considered the force used reasonably proportionate to the danger faced, an approach which limited the practical scope of the partial defence.[6] To the contrary effect – that is in rejecting a partial defence – are the decisions of: (a) the Privy Council in *Palmer v R*;[7] (b) the House of Lords in *R v Clegg*;[8] and (c) the Supreme Court of Canada in *R v Faid*.[9] In Australia, *Howe* and *Viro* were overruled by the High Court in *Zecevic v Director of Public Prosecutions (Vic)*.[10]

[6] Whether excessive self-defence or defence of another should be recognised as a partial defence falls to be determined in the very particular context of the Crimes Act 1961, especially Part 3 (dealing with matters of justification and excuse) and including s 62 (which addresses the use of excess force in language not indicative of a partial defence). Also material is the legislative history of s 48 which was introduced to give effect to the recommendations of the Criminal Law Reform Committee which specifically addressed the use of excessive force but did not recommend that it be specifically provided for.[11] The topic has also been addressed by the Law Commission, albeit in the context of domestic violence, which likewise did not recommend that such a defence be recognised.[12] Instead it suggested that there be a sentencing discretion for murder.[13] Also material is that, as recommended by the Law

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3 *R v Howe* (1958) 100 CLR 448.
4 *People (Attorney-General) v Dwyer* [1972] IR 416 (SC).
5 *Viro v R* (1978) 141 CLR 88.
6 In the context of s 48 of the Crimes Act 1961 at least, a jury which accepted that it was reasonably possible that the defendant had used no more force than he or she thought reasonably proportionate to the danger faced, would presumably also conclude that it was reasonably possible that the force used was therefore reasonable and thus that an acquittal was required.
7 *Palmer v R* [1971] AC 814 (PC).
8 *R v Clegg* [1995] 1 AC 482 (HL).
9 *R v Faid* [1983] 1 SCR 265.
10 *Zecevic v DPP (Vic)* (1987) 162 CLR 645.
11 Criminal Law Reform Committee *Report on Self-Defence* (November, 1979).
12 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001).
13 At 26.

Commission, murder no longer carries a mandatory sentence of life imprisonment[14] and, as well, there is the abolition of the partial defence of provocation.[15]

[7] Unsurprisingly, there is a wealth of New Zealand authority which is inconsistent with the recognition of excessive self-defence as a partial defence, most recently *McNaughton v R.*[16]

[8] Whether excessive self-defence should be recognised as a partial defence obviously raises what, in a sense, is a question of public or general importance, but the applicant's prospects of obtaining reform of the law through judicial development are too slight to warrant the grant of leave to appeal.

[9] The complaints by counsel about the summing up are largely the same as those advanced to the Court of Appeal. As that Court noted, the summing up of the Judge has to be assessed as a whole and, of course, in light of the question trail which the Judge gave to the jury. The complaints do not give rise to a question of public or general importance and there is no appearance of a miscarriage of justice.

[10] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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14 Sentencing Act 2002, s 102(1).
15 Crimes (Provocation Repeal) Amendment Act 2009, s 4.
16 *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467.