IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2020-044-000915
[2021] NZHC 2918

THE QUEEN

v

RIKI WIREMU NGAMOKI
PAUL SIMON TULILOA

Hearing:	29 October 2021 (via VMR)
Appearances:	David Wiseman for the Crown Anoushka Bloem for Riki Ngamoki Gary Gotlieb for Paul Tuliloa
Sentence:	29 October 2021

SENTENCING REMARKS OF MOORE J

Introduction

[1] Riki Ngamoki and Paul Tuliloa appear for sentence having each pleaded guilty to a charge of injuring with intent to injure.[1]

[2] Mr Ngamoki is also being sentenced for an assault on a prison officer.[2]

Procedural background

[3] Both defendants are, and at all material times were, inmates at Auckland's maximum security prison at Paremoremo.

[4] Mr Ngamoki's and Mr Tuliloa's offending relates to the same victim, a fellow inmate, Mr Cesar Su'a.

[5] The circumstances in which the offending occurred involved a second victim, Mr Lee, who was fatally injured, and two other offenders, Mr Lisiate and Mr Telefoni.

[6] Messrs Lisiate, Telefoni, Ngamoki and Tuliloa were jointly charged with the murder of Mr Lee and the assault on Mr Su'a. Mr Lisiate pleaded guilty to the murder charge on 19 May 2021. With the intervention of COVID-19 he is yet to be sentenced.

[7] At the start of their trial before me on 24 May 2021. Messrs Telefoni, Ngamoki and Tuliloa pleaded guilty to the joint charge of injuring Mr Su'a with intent to injure him. The jury acquitted Mr Telefoni of murder but found him guilty of manslaughter. He is yet to be sentenced.

[8] The jury acquitted Messrs Ngamoki and Tuliloa of any form of culpable homicide.

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1 Crimes Act 1961 s 189(2). Maximum penalty five years' imprisonment.

2 Summary Offences Act 1981, s 10. Maximum penalty six months' imprisonment or a fine not exceeding $4,000.

Remote participation and VMR

[9] One of the challenges which the Court faces when undertaking a sentencing using the Virtual Meeting Room platforms under the current COVID-19 Alert Level 3 restrictions, is maintaining a stable connection for all participants involved in the sentencing process. Where multiple defendants are to be sentenced by remote connection there are often capacity issues which are not present when sentencing is undertaken in person and in Court. These complications relate to the need to accommodate not only the defendants and their counsel, but also their whānau and supporters, as well as the Crown, victims, victim vupport, and the media. For this reason, Mr Ngamoki and Mr Tuliloa are being sentenced separately from Mr Lisiate and Mr Telefoni.

[10] While it will be necessary to refer to the actions of the other defendants in order to explain the index offending and the involvement of each defendant, the jury by its verdicts explicitly rejected that Messrs Ngamoki and Tuliloa were in any way connected to or responsible for the events which led to Mr Lee's death. Mr Ngamoki and Mr Tuliloa must therefore be sentenced on the basis that the events surrounding the attack on Mr Su'a represented a separate event to that which surrounded the death of Mr Lee. That is the basis on which I shall now proceed.

Facts

[11] On the afternoon of 5 March 2020, Messrs Lee, Su'a, Lisiate, Telefoni, Ngamoki and Tuliloa, with two others, were present in Yard 5. It was their one hour of daily allocated exercise time. The events which followed were captured by the prison's CCTV cameras. This footage, and what the jury made of it, was the focus of the evidence presented at the trial by all parties. As the trial Judge, I have watched the footage in question many, many times, both at the pre-trial hearing stage and also during the course of the evidence.

[12] The CCTV reveals that at 2:33 pm, Messrs Lee and Su'a were walking together up and down the long axis of the yard. They had been doing so, with others, for some several minutes before the initial attack commenced. Approaching them from the opposite direction were Messrs Telefoni and Lisiate who were walking together. As

Mr Lee passed Messrs Telefoni and Lisiate, Mr Telefoni delivered a single punch to Mr Lee's head, causing him to immediately fall backwards onto the concrete surface. Mr Su'a attempted to intervene but Mr Ngamoki, quickly followed by Mr Tuliloa, commenced their attack on him.

[13] Mr Su'a was knocked to the floor. In that position Messrs Telefoni, Ngamoki and Tuliloa, in various combinations, kicked him continually.

[14] When Mr Su'a attempted to crawl to Mr Lee, Messrs Telefoni, Ngamoki and Tuliloa twice pushed Mr Su'a to the ground, kicking and punching him. Each delivered at least one kick to the head.

[15] The entire attack lasted approximately one minute before Corrections staff entered and detained all inmates. Mr Lee died at the scene. Mr Su'a refused medical treatment and declined to make a statement to the Police.

[16] As noted, Mr Ngamoki is also to be sentenced for assaulting a prison officer. This offending took place on 2 September 2020, six months after the previous offending. Mr Ngamoki was being escorted by prison officers to his cell at Auckland Prison when he punched out at one of the officers striking him, apparently, more than once, on the ear causing a laceration. It took some effort on the part of the officers to restrain the defendant during which the complainant officer suffered a broken finger.

Approach to sentence

[17] The formula for sentencing in this country is well settled. It requires me to first identify the relevant principles set out in the Sentencing Act 2002 ("the Sentencing Act"). Then I must set the starting point for the offending by reference to the aggravating and mitigating features of the offending before considering the defendants' personal circumstances and how those may have the effect of increasing or reducing the notional sentence to arrive at a final sentence. Finally, I need to stand back and consider the sentence as a whole and satisfy myself as to whether there is a need to adjust the sentence on account of totality.

[18] This last principle is of significance in this case because the usual course when sentencing a serving prisoner for offending committed within the prison is to direct that the sentence imposed is to be served cumulatively on the sentence the prisoner was subject to at the time of the offending. It is important to ensure in doing so, the sentence is proportionate and not excessive.

Purposes and principles of sentencing

[19] In sentencing Messrs Ngamoki and Tuliloa, I must also bear in mind the purposes and principles of the Sentencing Act. Justice requires a careful balancing of these factors, however there is firm authority for the prioritising of the principles of deterrence and denunciation in cases when sentencing for violent offending which took place in a prison environment.[3] The Court of Appeal has observed that re-offending while in prison, particularly violent offending, must have significant consequences for the offender "notwithstanding that the outcome is a lengthy period of imprisonment".[4]

[20] That noted, I must also take into account of the need to protect the community, to provide for victims' interests, to assist in the offender's rehabilitation where possible and to impose the least restrictive outcome appropriate.

Legal principles

[21] Injuring with intent to injure carries a maximum penalty of five years' imprisonment. There is no tariff guideline judgment for this offending. That is because this sort of offending typically occurs in widely different circumstances and contexts. Reference to the serious violence criteria set out in the Court of Appeal's guideline judgment in *R v Taueki*[5] may be appropriate.[6]

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3 *Papa v R* [2020] NZHC 80 at [35], citing *Kepu v R* [2011] NZCA 104; *Tryselaar v R* [2021] NZCA 353.
4 *R v Connelly* [2010] NZCA 52 at [31].
5 *R v Taueki* [2005] NZCA 174; [2005] 3 NZLR 372.
6 *Murray v R* [2013] NZCA 177 at [20].

[22] There the Court of Appeal set out three sentencing bands which reflect the seriousness of the offending indexed to the number of aggravating features present.[7] The Court listed the various aggravating factors.

[23] In *Nuku v R* the Court of Appeal provided guidance on how the three bands could be adapted in their application to lesser charges.[8]

[24] Band one covers offending with few aggravating features, that is with a relatively low level of violence, and where the offender's culpability is at such a level that the offending could have been reflected in a less serious charge. A sentence short of imprisonment may be appropriate.[9]

[25] Band two is appropriate where three or fewer nominated aggravating features are present. A starting point of up to three years will be appropriate.[10]

[26] Band three includes offending featuring three or more of the *Taueki* aggravating factors. To be included in this band, the offending would require a particularly serious combination of factors often involving high-level or prolonged violence. A starting point ranging from two years up to the statutory maximum is available.[11]

Starting point

[27] In considering the appropriate starting point in this case, I must consider the features of the offending to determine where on the spectrum of seriousness the index offending sits.

[28] I must also take into account the importance of observing parity between co-offenders.

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7 *R v Taueki* [2005] NZCA 174; [2005] 3 NZLR 372.
8 *R v Nuku* [2012] NZCA 584, [2013] 2 NZLR 39 at [37].
9 At [38].
10 At [38].
11 At [38].

[29] In a situation where Mr Ngamoki and Mr Tuliloa were both significantly involved in a joint attack, albeit in different ways and at different times and combinations across the relevant minute or so, I agree with the Crown that attempting to draw any real or effective distinction between the culpable actions of each man would be to engage in an exercise in futility. For that reason I propose to deal with both defendants together in recognition of the fact that no matter how the culpable events are viewed, this was a joint attack in which each offender was actively involved in assaulting Mr Su'a to achieve their common purpose which was to injure him. Whether that was to frustrate his ability to go to Mr Lee's aid as he was attacked by Messrs Lisiate and Telefoni, or, as advanced by the defence at trial, in retribution for his gang affiliations or simply because he and/or Mr Ngamoki wanted to fight, counts for little for present purposes.

[30] The Crown submits an appropriate starting point for both defendants is in the vicinity of three years. To that, the Crown submits, that in respect of Mr Ngamoki, an uplift of the order of five months' imprisonment is appropriate for the assault on a prison officer. Uplifts of three months are submitted appropriate to account for each of the defendants' personal aggravating features.

[31] Mrs Bloem, for Mr Ngamoki, submits a starting point of 18 months' imprisonment is appropriate with an uplift of four months to reflect the assault on the prison officer.

[32] In relation to discounts, Mrs Bloem submits three are engaged. A 10 to 15 per cent discount should be made for cultural considerations, a 10 to 15 per cent discount for youth, and a 20 per cent discount for Mr Ngamoki's guilty pleas.

[33] She properly acknowledges that any sentence should be served cumulatively to Mr Ngamoki's current sentence.

[34] Mr Gotlieb, for Mr Tuliloa, submits a starting point of 12 months' imprisonment is appropriate. He submits further that discounts between 30 and 50 per cent should be available for rehabilitation prospects, remorse, youth and cultural

considerations. That is said to include a 10 to 15 per cent discount for Mr Tuliloa's guilty plea.

[35] Mr Gotlieb notes that Mr Tuliloa's prison sentence expired in January 2021. He has been in custody on remand for over eight months as a consequence. Due to the nature of his previous offending, Mr Tuliloa is subject to an Extended Supervision Order ("ESO") for a period of 10 years. For the first 12 months after his release Mr Tuliloa will be subject to intensive supervision and will reside at a facility in Hamilton where he will participate in rehabilitation designed to address his offending.

[36] In setting the starting point and by reference to the aggravating factors as drawn from *Taueki* and *Nuku,* I consider the following are engaged on the facts as I find them:

(a) *attacking the head*: I consider this factor to be present to a moderate to serious degree. Mr Su'a was kicked and punched in the head several times by both defendants. Targeting a victim's head, particularly when kicking to the head is involved, carries the obvious potential for very serious, even life-threatening injuries. In such cases, the Court will treat the conduct in a similar fashion to the use of a weapon;[12]

(b) *multiple attackers*: I consider this factor to be present to a high degree. Messrs Ngamoki and Tuliloa were relentless in their pursuit and attack of Mr Su'a, although I do accept that at times both Mr Telefoni and Mr Lisiate also engaged violently with Mr Su'a. This was far from an even contest. Mr Su'a is of a slight build. His attackers were considerably larger, a point alluded to by defence counsel in their addresses to the jury. Furthermore, considering Mr Lee was knocked unconscious immediately after Mr Telefoni's punch and remained motionless lying on his back from that point, he never presented as a risk to the others who must have known that given the movements around that part of the yard. This left Mr Su'a unassisted in a relatively

[12] Flavell v R [2011] NZCA 361 at [22].

confined space to face the four men who each engaged violently with him. In that sense Mr Su'a was well out-numbered at all times; and

(c) *extent of violence*; I consider this factor to be present to a moderate degree. Mr Su'a was kicked and punched consistently during the attack. The attack was sustained, albeit measured in just a minute or so.

[37] The Crown submits that two other aggravating factors are present. These are the seriousness of the injury and vulnerability of the victim. For the reasons which follow I cannot agree that these are separate aggravating features.

[38] First, as for the seriousness of Mr Su'a's injuries, it is simply impossible for me to properly determine the level of harm suffered by Mr Su'a. After the attack and following the intervention of Corrections staff, Mr Su'a attempted to assist Mr Lee. The footage at that time reveals him moving freely and with no evident or obvious injuries. While it is apparent, he was distressed by the obviously perilous state of Mr Lee's condition, it cannot be inferred from the CCTV evidence that he was suffering from any lasting injuries. Certainly, he declined medical assistance. That may be unsurprising given the inter-gang context of the offending, but if the injuries were of a more serious nature it might be expected some medical assistance would have been given. For that reason it is also unsurprising Mr Su'a has chosen not to co-operate with the investigators. I have not seen any medical notes, reports or other evidential sources which might assist in assessing the effects of the assault. The Crown refers to a stab wound on Mr Su'a's arm, but as is acknowledged, this was inflicted by Mr Lisiate using the shank and not by either of the defendants, who were not armed. Furthermore, the jury's verdict strongly suggests they were not satisfied either man knew Mr Lisiate was armed.

[39] Secondly, I do not consider the vulnerability of the victim to be an aggravating factor present here. Mr Su'a was not inherently vulnerable. He was not unconscious or debilitated in any way at the relevant time. I accept there was a size disparity and I accept he was outnumbered, but those are features I have already taken into account elsewhere. Furthermore, the vulnerability inherent in being a prisoner is accounted for by the s 9 aggravating factor.

[40] It has been suggested by the defence that the impulsive nature of the attack should constitute a mitigating feature of the offending. While I accept it is implicit in the jury's verdict that the attack on Mr Su'a was not pre-planned to assist Mr Lisiate in his attack on Mr Lee, this feature amounts to an absence of an aggravating factor, that is pre-meditation. It is not a mitigating feature of the offending.

[41] I have read and considered the cases referred to me by the Crown,[13] Mrs Bloem[14] and Mr Gotlieb.[15] I have also considered a number of cases which my own research has uncovered. From these I consider the index offending fits within band two of *Nuku* where the presence of three or fewer aggravating factors justifies a sentencing range of up to three years' imprisonment. In my assessment the weight to be attached to the three aggravating factors, justifies a starting point of two years.

[42] In coming to that conclusion I am supported by the caselaw. For example, I consider the current offending to be slightly less serious than that in *R v Hammond*[16] and *R v Hamilton*.[17] In Hammond, one of the two assailants punched their victim and knocked him to the ground, where they both continued to punch him. When the victim's friends removed him and took him to safety in a nearby house, the two assailants followed them. The attack fractured the victim's jaw, causing enduring and significant injury. In *Hamilton* five assailants attacked another inmate. Mr Hamilton kicked the complainant in the head and torso. One of the assailants, not Mr Hamilton, used a shank on the victim to cause life threatening injuries. Mr Hamilton briefly covered a CCTV camera during the attack. He taunted prison officers as they came to intervene and as his co-offenders squirted shampoo on the floor, Mr Hamilton tipped water onto the ground. Mr Su'a did not suffer life-threatening injuries or enduring injuries, there were fewer assailants than in *Hamilton* and the defendants in this case did not obstruct the prison officers when they entered the room. I consider this offending is more serious than the offending in *R v Penewi*[18] where Mr Penewi's role

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13 *Hammond v R* [2021] NZHC 1064; *R v Hamilton* [2019] NZHC 956.
14 *R v Mead* [2019] NZHC 3065; *R v Penewi* [2019] NZHC 479; *Papa v R* [2020] NZHC 80.
15 *R v Leota* DC Waitakere CRI-2008-090-006646, 24 April 2000; *R v Moa* [2013] NZHC 3041.
16 *Hammond v R* [2021] NZHC 1064.
17 *R v Hamilton* [2019] NZHC 956.
18 *R v Penewi* [2019] NZHC 479.

was significantly less than that of his co-assailants who severely assaulted a fellow inmate.

[43] In Mr Ngamoki's case, both the Crown and the defence accept an uplift is appropriate to account for the offending against the prison officer. The Crown says six months. Mrs Bloem says four months. This was an entirely separate episode of discrete offending. The assault in question was not trifling. The victim was an officer assaulted in the line of duty with no obvious provocation. He was injured. The offending took place while the defendant was a sentenced prisoner. I am satisfied that when viewed in its totality an uplift of six months is warranted to account for this charge.

Personal aggravating features

[44] First, I shall deal with those personal factors relevant to each defendant which are aggravating.

Offending while subject to sentence and criminal history

[45] Section 9 of the Sentencing Act requires me to consider the fact that each defendant was subject to sentence when the offending took place. This is an aggravating feature.[19] Although the legislation does not specify whether this aspect should be considered as an aggravating feature of the offending or offender, I consider it is most appropriately considered in the context of the latter. That is because it sits independently of the offending and is a circumstance peculiar to an assessment of the offender's circumstances.

[46] At the time of the offending Mr Ngamoki was subject to a four year sentence. Mr Tuliloa was subject to a sentence of six years and three months.

[47] Mr Ngamoki has two 2016 convictions for assault with intent to injure which I am told relate to the same incident and a 2015 conviction for assault. More relevant are the convictions for which he received the sentence he was serving at the time of the index offending. In March 2017 he was sentenced to a total of four years'

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19 Sentencing Act 2002, s 9(1)(c).

imprisonment for offending including three charges of kidnapping, assault with intent to rob and two charges of assault with intent to injure.

[48] Mrs Bloem submits an uplift of two months' imprisonment would be appropriate to account for Mr Ngamoki's criminal history.

[49] Mr Tuliloa has two previous convictions for common assault and robbery arising out of events in 2012. In respect of the index offending he was in prison after being sentenced in August 2014 to six years and three months' imprisonment, being concurrent sentences imposed for rape, burglary and unlawful sexual connection.

[50] Mr Gotlieb submits the 2012 convictions are irrelevant and too aged to be taken into account. As for the more recent offending he submits this was committed in an entirely different contextual setting and, as a consequence, no uplift of any sort is warranted. With respect, I cannot agree. While the 2012 offending adds little, the more recent offending is of an intrinsically violent nature and cannot be completely discounted. Mr Gotlieb submits that because Mr Tuliloa served the entire sentence and will be subject to a 10 year ESO on his release, that to impose any uplift would be to further punish him for offending he has already served time for.

[51] Again, I cannot agree. That will necessarily be the case for many if not most uplifts on account of previous convictions.

[52] I agree with the Crown that a relatively modest three month uplift for both defendants is appropriate.

Personal mitigating features

[53] Next, I turn to the defendants' mitigating personal factors. I will first discuss their personal circumstances as reported in the PAC reports, before considering the discounts available to them both, and individually.

[54] I note the Crown makes submissions in respect of only two factors; the guilty pleas and the defendants' youth.

Personal circumstances – Mr Ngamoki

[55] Mr Ngamoki is 22 years of age and of Māori descent. As a child he moved frequently, changing and swapping between schools, homes and caregivers. He is said to be close to his mother and sister, and although they have previously visited him in prison, they cannot do so currently because they reside in Dunedin.

[56] Mr Ngamoki has had little education, something he considers to be a consequence of "constantly moving around" as a child. While in prison he has been studying through the Open Polytechnic and reports spending much of his time reading. Mr Ngamoki has not previously been employed.

[57] He has a significant criminal history, commencing in the Youth Court. He has spent the majority of his teenage and adolescent years incarcerated. The PAC report notes that he is associated with the Killer Beez gang, but did not confirm his membership.

Personal circumstances – Mr Tuliloa

[58] Mr Tuliloa is 25 years of age and of Samoan descent. He is the youngest of four siblings and claims he speaks with his mother and sister on a weekly basis. The PAC report writer noted that Mr Tuliloa considers his family relationships very important.

[59] Mr Tuliloa reports having been subjected to violence while growing up. The writer considered Mr Tuliloa to have a level of insight into his offending, and noted he wishes to engage in programmes that target his consequential thinking and impulse control.

[60] He has never been employed, but has obtained a forklift licence while in prison, and he has participated in brick and block, joinery and agricultural programmes.

[61] Mr Tuliloa has also been incarcerated from a young age. He was first detained in juvenile centres prior to his first sentence of imprisonment. He confirmed he was a patched member of the Killer Beez gang.

Guilty pleas

[62] Messrs Ngamoki and Tuliloa's guilty pleas are mitigating features warranting discount. Both entered guilty pleas on the charge of assaulting Mr Su'a on the morning of trial. Mrs Bloem submits Mr Ngamoki should be entitled to a 20 per cent discount for his plea, given a case management memorandum document filed on 4 June 2020 indicating his intention to plead guilty. This was then confirmed via email with Crown counsel on 15 April 2021. Mr Gotlieb accepts Mr Tuliloa's plea did not come at the earliest of opportunity and submits a 10 to 15 per cent discount is appropriate.

[63] The Crown submits, and I agree, that given the timing of the pleas, and the fact they were made in the face of an all but insuperable case, the pleas can properly be characterised as late justifying discounts of no more than 10 per cent.

Youth

[64] Mr Ngamoki was 20 years old at the time of the offending. Mr Tuliloa was 23. Mr Gotlieb does not make submissions as to a specific discount value. Mrs Bloem submits a discount between 10 and 15 per cent is appropriate. The Court of Appeal in *Churchward v R* recognised youth as a factor relevant to sentencing.[20] Such a discount recognises not only the profound negative impacts incarceration can have on youth, but the age-related neurological differences between young people, specifically their impulsivity.[21] Elements of impulsivity are evident in the offending before the Court today.

[65] Mr Tuliloa sits at the upper end of the age bracket for which a youth discount might be given, and I consider a five per cent discount appropriate.

[66] Mr Ngamoki was well within the age group for which a youth discount would be considered possible. I consider a seven per cent discount appropriate for him.

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20 *Churchman v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [76].
21 At [77].

Rehabilitation prospects

[67] Mrs Bloem submits that Mr Ngamoki has expressed a willingness to complete rehabilitation programmes when he is able to. His status as a maximum security inmate currently prevents that. Mr Ngamoki has been completing NZQA courses through the Open Polytechnic and hopes to study and work as a barber when released. He aspires to open his own salon in Dunedin with the intention of helping other young males struggling on similar pathways.

[68] I received written references in support of Mr Ngamoki from family members and friends. They speak of Mr Ngamoki as being a "loyal friend", a "decent person" and a "loving and kind young man". It is significant that these supporters care for you, Mr Ngamoki, they believe that you have started to, and are capable of, making better decisions for yourself, and that you do have the potential to succeed in your future endeavours.

[69] I do not have before me evidence of successful rehabilitative endeavours, and I acknowledge that is partly because of Mr Ngamoki's status as a maximum security prisoner. However, he is young, reportedly motivated to make change for himself, and he has the support of whānau and friends. I consider on the material before me, a discrete discount of five per cent is appropriate.

[70] For Mr Tuliloa, Mr Gotlieb submits that at 25 years of age Mr Tuliloa has good prospects of rehabilitation. Mr Tuliloa's ESO means that upon release he will be subject to 12 months' intensive supervision. Mr Tuliloa says he wishes to engage in programmes that target his consequential thinking and impulse control but has been on custodial remand since the current charges were laid and so has not had the opportunity to participate.

[71] Regrettably, I cannot accept the submission Mr Tuliloa has good prospects of rehabilitation. The ESO was made by Jagose J on 28 June this year.[22] In making the orders he did, the Judge quoted from the health assessors' reports, where Mr Tuliloa

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[22] *Chief Executive of the Department of Corrections v Tuliloa* [2021] NZHC 1559.

was described as having "poor engagement with and response to treatment".[23] Jagose J also stated that Mr Tuliloa had been "exited from programmes and opportunities by reason of his reactive conduct".[24] The fact an order was ultimately made means that the Court considered the risk of Mr Tuliloa reoffending on release so high that there was a real and serious need to protect the community through the imposition of an ESO. I cannot give any discount for rehabilitation in the light of this finding.

[72] I pause to touch here on Mr Gotlieb's submission that Mr Tuliloa's background and support systems would warrant a discount. Although treated as a separate mitigating factor by Mr Gotlieb in his submissions, I consider the crux of the submission to go to Mr Tuliloa's prospects of rehabilitation. Mr Gotlieb submits a discount should be available in light of Mr Tuliloa having grown up subjected to violence, and to account for the support systems he will have on release. The majority of the submission is focused on the latter point. Mr Gotlieb submits Mr Tuliloa intends to attend church with his family when he transitions into the community, and that his mother and sister will assist in his rehabilitation while he is subject to the ESO. I have no independent evidence before me in support of such submissions. Mr Gotlieb acknowledges Mr Tuliloa's mother and sister were not interviewed for the PAC report. Irrespective of whether this submission is treated as part of Mr Tuliloa's prospects of rehabilitation or discretely, I do not accept a discount is available.

Remorse

[73] Mrs Bloem submits that Mr Ngamoki requested a restorative justice referral, which was not opposed by the Crown. Predictably, the victim was unwilling to participate and so no conference took place. Mrs Bloem submits Mr Ngamoki's willingness should be taken into account. I accept the Sentencing Act requires that. However, I note the PAC report writer commented that "no particular remorse was offered by Mr Ngamoki". While I acknowledge an attempt to engage with restorative justice can be indicative of remorse, I do not accept that in the particular circumstances of this case Mr Ngamoki's gesture warrants a discrete discount.

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23 At [16].
24 At [25].

[74] Mr Gotlieb submits Mr Tuliloa's remorse is reflected in his guilty plea prior to trial. It is well accepted that a discrete discount for remorse must be separate and more than what is inherent in a guilty plea. The PAC report records Mr Tuliloa as having expressed remorse for the offending. Mr Tuliloa advised that seeing the CCTV footage of the offending was very upsetting for him, and an incentive to change his attitude and behaviours. There is no independent evidence of remorse before me beyond the plea and self-reporting in the PAC report. Again, I do not consider a discount available here.

Mr Ngamoki's cultural report

[75] I was provided with and have read a report prepared under s 27 for the purposes of sentencing. Evidence of social, cultural or economic deprivation "that has a demonstrative nexus with the offending" can be considered as mitigating in the course of sentencing.[25]

[76] The report writer interviewed several members of Mr Ngamoki's family, as well as Mr Ngamoki himself. She concluded that Mr Ngamoki's history was suggestive of systemic deprivation. Mr Ngamoki experienced dislocation from his whanau, disordered parental attachments, antisocial role modelling and a dysfunctional childhood which has contributed not only to his gang affiliation, but his offending.

[77] I consider a discount of 10 per cent appropriate in light of the nexus between the deprivation suffered by Mr Ngamoki and his offending.

Summary

Mr Ngamoki

[78] The starting point for your offending is two years. That is uplifted by six months for the assault on the prison officer and three months for your criminal history. Discounts are available for your personal mitigating features. For your guilty plea, a

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[25] *Kreegher v R* [2021] NZCA 22, (2021) 29 CRNZ 622 at [44], citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [162].

discount of 10 per cent, for your youth, a discount of seven per cent, for your rehabilitative prospects a discount of five per cent, and for your cultural deprivation, a discount of 10 per cent.

[79] That results in an end sentence of 23 months, or one year and 11 months' imprisonment.

Mr Tuliloa

[80] Mr Tuliloa, the starting point for your offending is two years. That is uplifted by three months for your criminal history. Discounts are available for your personal mitigating features. For your guilty plea and youth, discounts of 10 and five per cent respectively.

[81] That results in an end sentence of 22 months, or one year and 10 months' imprisonment.

Totality

[82] Finally, in respect of Mr Ngamoki, because any sentence I fix will be served cumulatively on the sentence to which he is already subject to, I must consider the principle of totality. I must not impose a sentence which may be appropriate when viewed in isolation, but is excessive to the point of being crushing when viewed in its totality.

[83] Mr Ngamoki is serving a sentence of six years and three months' imprisonment. He is due to appear for a parole hearing on 13 November 2021. Mrs Bloem submits any sentence should be reduced by six months to account for totality and to prevent any sentence being wholly out of proportion to the gravity of Mr Ngamoki's overall offending.

[84] The purposes and principles of sentencing have to be balanced, and while there is a need to promote rehabilitation where possible, deterrence and denunciation are also important. On my assessment and standing back and looking at the sentence in

its totality, I do not consider either of the sentences to be excessive or crushing such that an adjustment for totality is needed.

Sentence

[85] Mr Ngamoki you are sentenced to 23 months' imprisonment cumulative on your current sentence.

[86] Mr Tuliloa you are sentenced to 22 months' imprisonment.

[87] Stand down.

Moore J

Solicitors:
Crown Solicitor, Auckland
Mrs Bloem, Auckland
Mr Gotlieb, Auckland