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IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA445/2023
[2023] NZCA 601

BETWEEN	THE KING Appellant
AND	TANA ORMSBY-TURNER Respondent

Hearing:	6 November 2023
Court:	Katz, Mander and Osborne JJ
Counsel:	I A Auld and T C Didsbury for Appellant K R Pascoe and S Hunt for Respondent
Judgment:	29 November 2023 at 10.00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence on appeal is granted.

B The appeal is allowed.

C The sentence of 12 months' home detention is set aside and substituted with a sentence of two years and 10 months' imprisonment.

D Mr Ormsby-Turner must surrender himself to the Prison Director at Mt Eden Corrections Facility (or such other location as may be directed by Corrections in writing) to commence his sentence of imprisonment by

2.00 pm on Friday 1 December 2023. The current sentence of home detention is to continue in effect until that time.

REASONS OF THE COURT

(Given by Katz J)

Table of Contents

Introduction

[1] Tana Ormsby-Turner (Tana) and his older brother Turanganui John Ormsby-Turner (TJ) attacked a prospect for a rival gang, Rei Marshall. TJ stabbed Mr Marshall once in the torso with a large hunting knife. Tana struck Mr Marshall on the head multiple times with a hammer, fracturing his skull.

[2] Tana and TJ were initially both charged with murder. After pathology findings revealed that the knife wound had caused Mr Marshall's death, the murder charge against Tana was withdrawn. Tana then pleaded guilty and was convicted in the High Court of one charge of wounding with intent to cause grievous bodily harm[1] and one charge of being an accessory after the fact to murder.[2] Cooke J sentenced Tana to 12 months' home detention.[3] Tana is now 17 years of age and was 16 at the time of the offending.

[3] TJ pleaded guilty to Mr Marshall's murder. He was sentenced to life imprisonment with a minimum period of imprisonment of 10 and a half years.[4]

[4] With the consent of the Solicitor-General, the Crown appeals Tana's sentence on the basis that it is manifestly inadequate and wrong in principle.[5] The key issues raised by the appeal are:

(a) whether the starting point of seven and a half years' imprisonment adopted by the Judge adequately reflects the seriousness of the offending and Tana's culpability;

(b) whether the discounts applied for guilty pleas, time spent on electronically monitored bail (EM bail), youth, prospects of rehabilitation, remorse and cultural factors were excessive or wrong in principle; and

(c) whether the end sentence adequately reflects the seriousness of the offending.

[5] Because this is a Crown appeal, the accepted approach is that the sentence will only be increased if it is manifestly inadequate or based upon a wrong principle. The Court will be reluctant to interfere with the sentence if this would cause injustice to the offender. Further, if the appeal is allowed, the sentence should only be increased

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1 Crimes Act 1961, s 188(1).
2 Sections 71 and 176.
3 *R v Ormsby-Turner* [2023] NZHC 1817 [Sentencing notes].
4 *R v Ormsby-Turner* [2023] NZHC 406.
5 Criminal Procedure Act 2011, s 246(1) and (2).

to the level which accords with the lowest range of appropriate sentences for the relevant offending.[6]

Application to admit further evidence on appeal

[6] The Crown seeks leave to adduce further evidence on appeal in the form of two affidavits by employees of the Department of Corrections. The first affidavit concerns events which occurred after Mr Ormsby-Turner was sentenced. It records that Mr Ormsby-Turner enquired about having items held by police returned to him, including his Mongrel Mob patch. We are satisfied that this affidavit is fresh, credible and cogent and we admit it accordingly. The second affidavit concerns the Department's approach to managing young people who are serving sentences of imprisonment. This affidavit is credible and cogent, but not fresh. The Crown has provided a reasonable explanation, however, as to why that evidence was not provided to the sentencing Court. We therefore admit that affidavit also.

The offending

[7] The following summary of the offending is largely based on the police summary of facts (which was agreed for sentencing purposes) and the description of the offending in the sentencing notes.

[8] At the time of the offending, TJ was president of the West Coast chapter of the Mongrel Mob and Tana was a prospect for the gang. A third co-offender, Hamiora Laupama (who was convicted of being an accessory after the fact to murder), was also a patched Mongrel Mob member.

[9] Mr Marshall, who was aged 23 at the time of his death, was a young father. He was also a prospect of the rival Uru Taha gang. One of Mr Marshall's family members, however, was a member of the Mongrel Mob. On 3 August 2023, Mr Marshall arrived, together with that family member, at the family member's residence. Tana, TJ and Mr Laupama were sitting outside the address in a vehicle, as they had come to pick up Mr Marshall's family member to go and "tax" someone who owed TJ

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6 *McCaslin-Whitehead v R* [2023] NZCA 259 at [29]–[32].

money. (Gang taxing is a form of extortion and/or retribution, often involving the violent taking of property or money from a victim in lieu of payment of alleged debts.) TJ and Tana became agitated when they saw Mr Marshall arrive at the address due to his affiliation with the Uru Taha gang and the fact there had been issues between the Uru Taha gang and the Mongrel Mob.

[10] Tana and Mr Laupama went into the house to pick up Mr Marshall's family member. While inside, Tana was handed a bag containing a semi-automatic shotgun and a semi-automatic high-powered rifle. He then left the house via a back door. Mr Laupama left the house through the front door.

[11] Meanwhile, Mr Marshall was going in and out of the house putting food into his car which he was going to take to his mother. He crossed paths with Mr Laupama outside and they exchanged words. Mr Marshall and Mr Laupama walked towards one another, and Mr Marshall took a swing at Mr Laupama, but missed.

[12] TJ was initially behind Mr Marshall but moved to a position in front of him and stabbed him once in the torso with a large hunting knife. There is no evidence that Mr Marshall tried to fight back. Rather, he screwed up his face in pain, held his side, and moved backwards.

[13] Tana, who was armed with a hammer, then attacked Mr Marshall, striking him multiple times on the head. Based on Mr Marshall's injuries (which were to the back of his head) we assume that he was likely attacked from behind. Mr Marshall fell to the ground, but Tana continued to assault him with the hammer.

[14] Mr Marshall's family member came out of the house and intervened to stop the attack. He and Mr Marshall's partner then drove Mr Marshall to hospital, but Mr Marshall was pronounced dead not long after arrival.

[15] Meanwhile, TJ instructed Mr Laupama and Tana to get rid of their vehicle and several items, including Mr Marshall's hat and TJ's knife. They did so, throwing the items into a stream. TJ, Tana and Mr Laupama subsequently removed the clothing they had been wearing, which Tana then took outside and burned. They also dumped

the bag containing the firearms, hid the vehicle they had been in, and took steps to coordinate their stories. TJ was bragging about how he had stabbed Mr Marshall, and Tana was bragging about how he had hammered him.

[16] Pathology findings confirmed that Mr Marshall died because of the stab wound inflicted by TJ. In relation to the injuries caused by Tana's assault with a hammer, the findings were that:

> The head injuries inflicted by Tana involve multiple lacerations to the back of the head of the deceased and two fractures; one to the inner table, right occipital bone and the other a basal skull fracture. There was also blunt force trauma to the right neck with associated subcutaneous haemorrhage.
>
> The fractures to the base of the skull of the deceased, in themselves can be responsible for death. However, the deceased did not suffer a "severe" basal skull fracture (ie on both sides which would have caused a "hinge" fracture) which are easily identifiable as causing death. The stains that had been taken from the deceased's brain show no positive beta-APP staining, which means it is equivocal as to whether the head injuries would have caused death in isolation from the fatal stab wound.
>
> In the scenario we have in this case, it is likely that the short period of time between the injury and death did not allow the changes to occur in the brain that would have picked up beta-APP stains.
>
> It is entirely possible that the head injuries did contribute to death, as injuries like this have been known to result in death. However, it is entirely possible that they did not contribute to death, as injuries like this are also known to be survivable.

[17] In summary, Mr Marshall died relatively quickly from the stab wound. While it is possible that the head injuries inflicted by the hammer could have contributed to his death, this is no more than a possibility. The murder charge was therefore appropriately withdrawn. If Mr Marshall had not suffered a fatal stab wound, it is not known whether his head injuries would have resulted in death, but it is possible that they would have.

Further background

[Redacted]

[18] [Redacted]

[19] [Redacted]

Events in the lead-up to sentencing for the present offending

[20] On 12 September 2022, Tana was granted electronically monitored (EM) bail. Tana pleaded guilty in December that year. One of the original conditions of Tana's bail was "[n]ot to associate or have contact directly or indirectly with other person/s namely any gang members." Subsequently, on 17 April 2023, the relevant bail condition was amended to "[n]ot to associate or have contact directly or indirectly with the co-offender/s namely any gang members."

[21] A Provision of Advice to Courts report (PAC report) was prepared on 3 March 2023. It assessed Tana as being at medium risk of reoffending "given he is clearly [being] influenced by older members of his family", and as being at a high risk of harm to others. The offending-related factors were identified as peers and associates, and violence. The report writer noted that Tana had complied with his EM bail and that this indicated "he is capable of complying with a sentence of Home Detention". The Report further noted that a co-offender had received a sentence of home detention (presumably Mr Laupama, who was not a participant in the assault, and was only convicted of being an accessory after the fact) and also noted Tana's age, before recommending a sentence of home detention.

[22] On 14 March 2023, Tana spoke to TJ over the telephone twice. As TJ was in prison, his phone calls were being recorded by the Department of Corrections. The phone calls reveal that Tana had recently received a Mongrel Mob back tattoo and, further, that he had been associating with various gang members including the person who had tattooed him; other "dogs" who commented on his tattoo; a Mongrel Mob member who left to start up a new chapter; and a patched member he saw at the gas station. It is apparent from the content of the discussions between TJ and Tana that Tana was committed to continuing his involvement with the Mongrel Mob and is deeply immersed in gang culture. Indeed, it can be inferred that Tana may have earned elevated status in the gang because of his offending. Tana's parents were both present for at least parts of the phone calls.

[23] A report on Tana's personal background was prepared by Dr Jarrod Gilbert, Dr Ben Elley, Rose O'Connor and Danielle Moore in April 2023, pursuant to s 27 of

the Sentencing Act 2002 (the s 27 report). The s 27 report stated, based on information provided by Tana, that Tana had now left the Mongrel Mob gang and that he told the report writers that:

> It turns out I'm just lucky. I left before I was eventually patched. Because prospects get to leave a lot easier than patched members. They're real hard out on their leaving. They find it quite offensive. I'm just lucky I got out before it got any worse.

[24] Tana further told the report writers that he did not have tattoos, gang or non-gang related, as he was scared of tattoo guns. He said that his brother TJ was right when he had said gang life is not for him (Tana). Tana told the report writers that the offending had changed him for the better, as he was now intent on leading a gang-free and more prosocial life.

[25] A psychological report was prepared by Dr James Knight on 19 April 2023. Tana also told Dr Knight he had ended his association with the Mongrel Mob. He elaborated, in quite specific terms, by stating that: "The Mob said they would bill me $13,000 for leaving, and I had to take a hiding as well." Tana told Dr Knight, however, that he was "happy with his decision to leave the Mongrel Mob". Tana further reflected that:

> It's been a shit journey, but I feel like I can be myself now, I thought I could be like my big brother, but we are completely different people, he went way deeper into that life than me.

Tana's mother supported Tana's account, telling Dr Knight that: "The Mob don't know where Tana is at the moment, but I'm worried what will happen if they find out."

[26] Not long afterwards, on 8 May 2023, Tana became a fully patched member of the Mongrel Mob. As the Judge noted, this may have been a consequence of the current offending.[7] Tana was living at his family home, on EM bail, at the time.

[27] A further PAC report was prepared on 26 June 2023. The report recorded that Oranga Tamariki had advised that Tana had been fully compliant with his bail

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7 Sentencing notes, above n 3, at [38].

conditions since he was released on EM bail on 12 September 2022. A sentence of home detention was again recommended.

[28] The following day, 27 June 2023, police executed a search warrant at Tana's EM bail address as a result of information received. They seized two vests with Mongrel Mob patches, and a t-shirt and two sweatshirts with Mongrel Mob insignia on them, from Tana's wardrobe. The police also took photographs of Tana's Mongrel Mob full back tattoo.

[29] Following the police search, defence counsel obtained a further report from Dr Knight (dated 11 July 2023). Dr Knight acknowledged it was possible that Tana had lied to him when he had claimed to have left the Mongrel Mob. Dr Knight noted, however, that this did not invalidate everything Tana had told him.

Sentencing decision

[30] The Judge commenced the sentencing process by referring to Goddard J's minority concurring decision in *Diaz v R*,[8] where Goddard J observed that, although the sentence appeal in that case was being allowed on the basis of a conventional sentencing approach, a possible alternative approach to youth sentencing would be as follows:[9]

> ... the court should begin by asking whether a sentence of home detention or imprisonment is the least restrictive outcome that is appropriate in the circumstances, or whether some less restrictive option is appropriate. If no less restrictive option is appropriate, so the choice is between home detention and imprisonment, the court would then ask whether a compelling justification has been made out for imposing a sentence of imprisonment rather than a sentence of home detention.

[31] Cooke J applied this possible alternative approach when sentencing Tana, ultimately concluding that home detention was the least restrictive option that was appropriate, as it was the sentencing outcome that would best facilitate Tana's rehabilitation.[10] At the conclusion of his analysis, the Judge stated that:[11]

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8 At [29].
9 *Diaz v R* [2021] NZCA 426 at [61].
10 Sentencing notes, above n 3, at [30] and [44].
11 At [44].

> That outcome is also available on a conventional sentencing approach. Applying the discounts on the starting point the cultural factors by themselves could justify a 15 per cent discount on top of the 25 per cent discount for the guilty plea, and approximately 30 per cent for youth rehabilitation potential and remorse. That would allow this sentence to be two years from the starting point of seven years (adjusted given the EM bail period after the previous detention).

[32] Given that Goddard J's observations in *Diaz* were obiter (and represented a minority view in that case, in any event), Cooke J was, of course, required to follow a conventional sentencing approach. Nothing turns on the issue, given Cooke J's view that the same outcome could be reached either on a conventional approach or by applying the alternative approach suggested in *Diaz*. Cooke J's focus on the alternative *Diaz* approach, however, means that he provided limited reasoning in support of the level of discounts he suggested were appropriate. To some extent, however, the Judge's reasoning can be inferred from his discussion as to why home detention was the least restrictive sentencing outcome in this case.[12]

[33] The conventional approach is that a young person who is sentenced in the District Court or High Court (rather than the Youth Court) must be sentenced in accordance with the purposes, principles and aggravating and mitigating factors in the Sentencing Act.[13] Youth may, however, be taken into account as a mitigating factor,[14] as we discuss further below. In *Dickey v R* this Court noted that there were no outer limits to the discount for youth in current sentencing practice, but discounts of 10 to 30 per cent were common.[15]

[34] Viewed through the lens of a conventional sentencing approach, the Judge:

(a) adopted a starting point of seven and a half years' imprisonment (reduced from eight years to reflect that Tana was responding to a fight, and was under his brother's "significant influence");[16]

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12 At [30]–[44].
13 *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [74].
14 At [82]–[83].
15 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [175].
16 Sentencing notes, above n 3, at [18].

(b) deducted six months for the 10 months Tana had spent on restrictive EM bail and the one month spent on remand in a youth justice facility;[17]

(c) deducted 25 per cent for Tana's guilty pleas;[18]

(d) deducted 15 per cent for cultural and personal background factors;[19] and

(e) deducted 30 per cent for youth, rehabilitation potential and remorse.[20]

[35] The end result was a sentence of two years' imprisonment, which was converted to 12 months' home detention with 12 months of standard post-detention conditions.[21]

Was the starting point too low?

[36] *R v Taueki* is the guideline judgment for serious violent offending involving the infliction of grievous bodily harm.[22] This Court observed in *Taueki* that:

> [26] GBH [grievous bodily harm] offences can vary substantially in seriousness in terms of both the level of culpability of the offender and the extent of the consequences for the victim. However, it must be recognised that any GBH offence involves very serious offending. This is reflected in the 14-year maximum term. An offender will be convicted only if he or she has acted with an intention of inflicting really serious harm to the victim, and has actually caused harm of that gravity, or wounded, maimed or disfigured the victim. …
>
> [27] Almost all GBH offences will involve a high degree of criminality (and significant injury to the victim) which will require the imposition of a term of imprisonment. …

[37] The Court in *Taueki* identified a number of factors which will bear on the assessment of the appropriate starting point, but emphasised that a sentencing judge

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17 At [22].
18 At [23].
19 At [44].
20 At [44].
21 At [44] and [49].
22 *R v Taueki* [2005] 3 NZLR 372 (CA).

needs not only to identify such factors, but also to evaluate the seriousness of a particular factor.[23] The Court identified three sentencing bands, as follows:

(a) band one (3–6 years), which will be appropriate for offending involving violence at the lower end of the spectrum of grievous bodily harm offences;[24]

(b) band two (5–10 years), which will be appropriate for grievous bodily harm offending which features two or three of the aggravating factors identified by the Court;[25] and

(c) band three (9–14 years), which would normally encompass serious offending which has three or more of the aggravating features identified by the Court, where the combination of aggravating features is particularly grave.[26]

[38] Here, the Judge identified five aggravating factors — serious injury, use of a weapon, attack to the head, multiple attackers and gang associations — but noted that the overlap in those factors must be taken into account.[27] He concluded that the offending fell within band two of *Taueki* and adopted a starting point in the middle of that band (seven and a half years' imprisonment).[28]

[39] We identify the following aggravating factors in Tana's offending:

(a) *Extreme violence*: Tana's attack was not prolonged. However, in our view multiple hammer blows to the head, of sufficient force to fracture a person's skull, constitutes extreme violence.

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23 At [30].
24 At [34] and [36].
25 At [34] and [38].
26 At [34] and [40].
27 Sentencing notes, above n 3, at [16], citing *Flavell v R* [2011] NZCA 361 at [22]; *Diaz v R*, above n 9, at [29]; and *Ta'akimoeaka v Police* [2018] NZHC 68 at [23]–[24].
28 Sentencing notes, above n 3, at [15]–[18].

(b) *Serious injury*: Serious injury was caused, which could potentially have been fatal if Mr Marshall had not first died from the stab wound inflicted by TJ.

(c) *Use of a weapon*: Tana attacked Mr Marshall with a hammer. This Court noted in *Taueki* that the use of a lethal weapon is a serious aggravating factor.[29]

(d) *Attacking the head*: The attack was to the head. As noted in *Taueki*, attacks on the head of a victim can have particularly serious consequences.[30]

(e) *Multiple attackers*: There were two attackers. Mr Laupama was also present but there is no evidence that he struck the deceased.

(f) *Vulnerability of the victim*: This is not a situation where the victim suffered from a disability, or was a child. Nor was there a significant disparity in size or strength between the attacker and the victim. However, the victim had already been stabbed (whether Tana knew that or not) and once he was on the ground he was in a highly vulnerable position and largely defenceless.

(g) *Gang context*: Where serious violence is perpetrated by members of a criminal gang, that is a further aggravating feature.[31]

[40] We acknowledge that there is some overlap in these factors. For example, the gang context and the fact that there were multiple attackers are inextricably linked. Similarly, the use of a weapon, plus an attack to the head, will often result in serious injury.

[41] Notwithstanding there was some overlap in the above factors, this was clearly very serious offending. Mr Marshall was unarmed, whereas both attackers were

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29 *R v Taueki*, above n 22, at [31(d)].
30 At [31(e)].
31 At [31(k)].

armed. There is no evidence that Mr Marshall actually hit any of the three offenders. Although he took a swing at Mr Laupama following their verbal altercation, he missed. Tana launched an extremely violent attack on Mr Marshall (who had already been stabbed) with a hammer. Tana struck multiple blows to the back of Mr Marshall's head, with sufficient force to fracture Mr Marshall's skull and cause very serious injuries that could potentially have been fatal. Tana continued the attack once Mr Marshall was on the ground.

[42] Taking into account that the aggravating factors overlap to some extent, we place this offending at the upper end of band two or lower end of band three in *Taueki*. The number of aggravating factors, and their severity, warrants a starting point of at least eight and a half years' imprisonment (taking into account the conservative approach taken to Crown appeals). We note that this is also the mid-point of the range of eight to nine years' imprisonment that defence counsel submitted was the appropriate starting point in their High Court sentencing submissions. Such a starting point is consistent with this Court's decisions in *Heke v R*,[32] *Hutchinson v R*,[33] *Lake v R*,[34] and *R v Feterika*.[35] The case of *R v Hita*, on the other hand, involved injuries that were significantly less serious than those inflicted in this case.[36]

Was the discount for time spent on EM bail within the available range?

[43] Tana's EM bail conditions prohibited him from associating or having any contact with gang members or his co-offenders.

[44] Immediately prior to the sentencing hearing, the Judge heard submissions regarding the allegations that Tana breached his EM bail conditions by speaking to TJ on the phone and having a Mongrel Mob member present in his home to give him his back tattoo. The Judge certified the bail breaches.[37] He directed, however, that the breaches should not form part of Tana's criminal record on the basis that there was a "reasonable excuse" for the bail breaches, given Tana's youth and the overwhelming

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32 *Heke v R* [2019] NZCA 256.
33 *Hutchinson v R* [2013] NZCA 16.
34 *Lake v R* [2017] NZCA 39.
35 *R v Feterika* [2008] NZCA 127.
36 *R v Hita* CA505/05, 29 November 2006.
37 *R v Ormsby-Turner* HC New Plymouth CRI-2022-043-937, 12 July 2023 [Minute of Cooke J].

influence of his brother on his life and his association with the gang. Further, the Judge said, there was no evidence that Tana had initiated the matters that gave rise to the breaches.

[45] Subsequently, as part of the sentencing process, the Judge was required to consider the appropriate level of sentence discount to reflect the time that Tana had spent on EM bail (10 months) and custodial remand in a youth justice facility (just over one month). The Judge observed that an allowance is usually made at sentencing for time spent on restrictive EM bail, "with an allowance of 50 per cent not being uncommon but not being the upper limit". The Judge concluded that a six-month deduction was appropriate in this case.[38]

[46] On appeal, the Crown submitted that Tana should not have received a credit for the periods when he was in material breach of his bail conditions.[39]

[47] In the circumstances, the Judge's six-month discount was generous. A four-month discount may have been more appropriate. We do not propose, however, to interfere with the exercise of the Judge's discretion on this issue, particularly given this is a Crown appeal.

Were the discounts for cultural and personal background, remorse, youth, and rehabilitative potential within the available range?

[48] As noted above, the Judge deducted 30 per cent for youth, rehabilitative potential and remorse, and 15 per cent for the cultural and personal background factors set out in the s 27 report.[40] The Crown submitted that the overall 45 per cent reduction for these factors was excessive, particularly given that the underlying factors overlap significantly.

[49] Given that the Judge's primary focus was assessing whether imprisonment or home detention was the least restrictive outcome appropriate in the circumstances, he did not separately identify the specific features of the s 27 report that would justify a

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38 Sentencing notes, above n 3, at [22].
39 Citing *Paora v R* [2021] NZCA 559 at [60].
40 Sentencing notes, above n 3, at [44].

15 per cent discount. We accept the Crown submission that the personal mitigating factors in this case overlap significantly, which is evident in the Judge's general analysis. For example, the key aspect of Tana's background that the Judge identified as mitigating was the influence of his brother and the Mongrel Mob.[41] This influence, however, also forms part of the Judge's assessment of Tana's rehabilitative potential,[42] and indeed was taken into account in setting the appropriate starting point.[43] We will therefore consider the potential mitigating factors in turn, before reaching a view as to the appropriate global level of discount, taking into account any areas of overlap.

Personal and cultural background

[50] The information relating to Tana's personal background is set out in the s 27 report and Dr Knight's first report. We summarise the relevant information below, based on those reports.

[51] Tana is of Ngāti Maniapoto descent. He feels a strong connection to his whakapapa but says he would like to explore it more. He spent his childhood both in New Plymouth and in a small rural community in Te Rohe Pōtae, the King Country, where his father worked on dairy farms. Tana loved the farm life as a child, especially being close to his cousins who also lived in the area. He reported that his whānau were well provided for materially and food-wise, even though he was aware that money was sometimes tight.

[52] Tana reported that he always felt loved and cared for by his parents. Although his mother is a "loving mum", he said that she was a heavy drinker who used to go out partying a lot. His mother acknowledged this. Tana's father, on the other hand, did not drink alcohol. He was, however, a strict disciplinarian who used to hit Tana regularly. Tana's view is that this physical discipline was justified, as he "fucked up a lot during [the] time [when he was] growing up". Tana said of his father that "I loved him more than I was scared of him." Tana remembered his parents arguing a lot, but said he was not aware of any physical violence taking place between them.

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41 At [34]–[35] and [40].
42 At [33]–[34] and [40]–[43].
43 At [18].

Tana remains close to his family, and says they remain a strong source of support for him.

[53] Tana "enjoyed everything" about primary school, where he had good friends and good teachers. He said that "everything was good there". Unfortunately, things changed markedly once he started attending high school in New Plymouth. Tana became friends with some older boys, with whom he formed what he described as a "little youth gang".

[54] At around this time Tana's father had a heart attack and stroke which rendered him bedridden for a period and unable to work. It was a difficult time for the family and Tana's father said that the children started "rampaging" without his discipline. Tana reported that by the age of 13 he was smoking cannabis daily, drinking and fighting, missing classes and "being a bit of a menace in the school". Tana was asked to leave high school part-way through his first year.

[55] By this time, Tana was regularly engaging in fights with other street gangs and building up considerable "street cred" as a fighter. He reported, however, that his parents always kept the door open for him and his father "was trying to put [him] [o]n the right path" but Tana "wasn't listening to him".

[56] Tana did not grow up around gangs (although he said that his older brother TJ did). When TJ joined the Mongrel Mob, their parents initially "disowned him in a way". They also tried to prevent Tana from associating with his brother. At some stage, however, TJ moved back into the family home and Tana began spending a lot of time with him and his fellow Mongrel Mob members. Tana looked up to his brother and wanted to emulate him. Tana reported, however, that TJ was not keen for him to become involved with the gang and instead "put [Tana] in a good direction", by encouraging him to stop smoking cigarettes and cannabis, to take up fitness training, and get back into schoolwork. Nevertheless, Tana began prospecting for the gang when he was 14.

[57] The key aspect of Tana's background on which the Judge placed reliance for sentencing purposes was the "overwhelming" influence of his brother TJ.[44] This influence, in turn, had led to Tana becoming a gang prospect. The Judge also noted that the report writers had indicated that Tana had been socialised by other delinquent peers and that, given his background, a life within the gang was predictable.[45]

[58] We acknowledge that coming under the influence of an older sibling who is a gang member, or coming under the influence of delinquent peers, will almost inevitably increase the risk of a young person becoming a gang member or associate. This in turn may result in them becoming enmeshed in a life of antisocial behaviour and criminal activity from which they will likely find it difficult or impossible to extricate themselves.

[59] Here, Tana clearly came under the negative influence of his older brother, who was a senior gang member, at a formative time in his youth. He also fell in with antisocial peers when he was a young teenager. It cannot be overlooked, however, that Tana's childhood up until that time was largely positive, more so than that of many (if not most) of the offenders who come before the courts. Tana was raised mostly in a rural environment with hardworking parents who were able to meet his material needs. More importantly, their love and support for their son was never in question. Tana was also close to his extended whānau and enjoyed spending time with his cousins. He enjoyed primary school. His childhood (at least until the age of 11 or 12) appears to have been a happy one.

[60] We acknowledge that Tana's childhood had some negative aspects, including the use of physical discipline, and excessive drinking and partying by one parent. But there is nothing to suggest that this is causatively linked in any significant way to Tana subsequently becoming a gang associate, or to the current offending. Indeed, Tana's parents tried to steer him away from gang influences. The influence of his older brother was significant, and contributed causatively to Tana becoming a gang associate, even though TJ apparently tried to discourage Tana from pursuing a gang

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44 At [18] and [40].
45 At [34].

life. Ultimately, however, TJ's influence eclipsed that of Tana's parents (particularly given Tana's father's health issues). Tana's admiration for his brother and his wish to emulate him proved too powerful and this set him on the path to gang life. We do not accept, however, that Tana's trajectory into gang life was in any way inevitable as a result of his childhood or upbringing. This was not a case, for example, where gang membership or association provided a form of brotherhood or whānau support that was otherwise missing from Tana's life. Tana is intelligent, came from a loving and supportive family, and was discouraged by both his parents and his brother from becoming a gang associate. His ability to exercise free agency was not entirely compromised, although his youth no doubt had a significant influence on the poor decisions he made (as discussed further below).

[61] Some discount to reflect Tana's background can be justified. Given, however, that the key relevant factor is the influence of Tana's brother, this is inextricably linked with his youth, which made him acutely susceptible to such influence. Having regard to the totality of Tana's background circumstances, both positive and negative, it is our view that the appropriate level of discount for personal background (if considered in isolation from other mitigating factors, such as youth) would be modest.

Remorse

[62] Sentencing discounts are available to offenders who are genuinely remorseful. The Crown submitted, however, that allowing discounts, on the basis of a rehabilitative approach, for remorse (or the offender's prospects of rehabilitation) in circumstances where an offender has attempted to mislead the court to achieve a favourable sentencing outcome brings the administration of justice into disrepute. On the other hand, Ms Pascoe (counsel for Tana) submitted that Tana is genuinely remorseful and conveyed his remorse to both the writers of the s 27 report and Dr Knight, as recorded in their reports.

[63] As far as we are aware, Tana has not written to either the court or Mr Marshall's whānau expressing remorse. The Judge noted that Tana had expressed remorse to Dr Knight, who believed his remorse was genuine.[46] We note, however, that this

[46] At [35] and [42].

assessment appears in Dr Knight's first report, prior to him learning that Tana had lied to him about his ongoing gang involvement. What Tana told the report writers regarding his remorse, and their assessment of his sincerity on that issue, must be treated with considerable caution in such circumstances. We note in this context that Tana has been described as "intelligent" by the writers of the s 27 report and "very intelligent" by the provider of an educational programme that Tana had engaged in while on EM bail.[47]

[64] On the basis that actions sometimes speak louder than words, it is helpful to look at the surrounding circumstances to assess the sincerity of Tana's remorse.

[65] On a positive note, Tana expressed a willingness to engage in a restorative justice process with Mr Marshall's whānau, despite Tana finding such a prospect challenging. That process did not proceed, apparently because Mr Marshall's whānau declined to participate once they learned that Tana had become a patched Mongrel Mob member while awaiting sentencing.

[66] Other evidence weighs against a finding of genuine remorse. This includes Tana's behaviour following the attack (as set out at [15] above); his decision to become a patched gang member and get a Mongrel Mob tattoo while awaiting sentencing (despite knowing that this would make it extremely difficult to ever leave the gang); his ongoing associations with gang members (including his brother) in breach of his EM bail conditions; his conversations with his brother in prison (the contents of which do not suggest remorse); his lies to the report writers regarding having left the gang; and his request following sentencing for the return of his Mongrel Mob patch.

[67] Taking all of these matters into account, in our view the evidence does not support the conclusion that Tana is genuinely remorseful at a level that would justify a sentencing discount.

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[47] The Judge also observed that Tana was "obviously an intelligent young man": at [43].

Youth

[68] Tana's youth, on the other hand, does warrant a sentencing discount. First, we note Dr Knight's opinion that, at the time of the offending, Tana's "level of maturity and his comprehension generally and specifically regarding the magnitude of his actions" would have been in most respects that of a relatively normal 16-year-old. A normal 16-year-old, however, is not an adult. It is now well recognised that there are age-related neurological differences between young people and adults.[48]

[69] Youth discounts also recognise that young people may be more vulnerable or susceptible to negative influences and outside pressures, and have greater difficulty regulating their behaviour and impulses.[49] Here, we accept that Tana's youth made him acutely susceptible to the influence of his brother and other gang members. As Dr Knight explained:

> At a time of emotional vulnerability in his life (around the age of 12 or 13) Tana developed a strong association with the Mongrel Mob. He became a prospect for that gang at age 14. Tana described the culture of the Mongrel Mob as being one in which prospects were expected to follow orders and display blind and unquestioning loyalty to the gang.

[70] Further, the offending appears to have been highly impulsive. Tana told Dr Knight that he heard sounds and ran inside, and that he thought Mr Laupama "was getting [a] hiding, I thought he was losing the fight". Tana ran inside, picked up a hammer, and assaulted Mr Marshall in what Dr Knight described as a "state of extreme emotional arousal" in circumstances where he believed it was his duty as a gang prospect to assist Mr Laupama.

[71] Youth discounts also recognise that young people have greater capacity for rehabilitation.[50] For reasons we discuss further below that factor that can carry only limited weight here.

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48 *Dickey v R*, above n 15, at [86]; *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79 at [28]; and *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

49 *Churchward v R*, above n 48, at [77(a)]; and *R v Slade* [2005] 2 NZLR 526 (CA) at [43].

50 *Dickey v R*, above n 15, at [80]; *Churchward v R*, above n 48, at [77(c)]; *Overton v R* [2011] NZCA 648 at [28]; and *R v Wilson* [1989] 2 NZLR 308 (CA) at 311.

[72] Overall, it is our view that a discount for youth is appropriate in this case to reflect age-related neurological differences; Tana's youth-related susceptibility to negative influences (specifically that of his older brother); and his youth-related impulsivity and difficulty in regulating his behaviour.

Rehabilitative prospects

[73] The Crown submitted that home detention for serious violent offending cannot be justified, in this case, because there is nothing to suggest that Tana is in any way committed to rehabilitation, or that he will make serious rehabilitative progress.

[74] It is apparent from Cooke J's sentencing notes that the key driver of the home detention sentence was the Judge's view that Tana's rehabilitative prospects were the most important consideration, and such prospects were best served by a sentence of home detention rather than a sentence of imprisonment.[51] The Judge was concerned that a sentence of imprisonment would "likely irretrievably prejudice any chance of [Tana] avoiding descending into an entrenched criminal lifestyle".[52]

[75] The Judge's view was that Tana had "had no real alternative but to live life associated with the gang", particularly because of his brother's influence. The Judge accepted, however, that Tana "would like a life away from the gang" and considered that because TJ will be in prison for a minimum of 10 and a half years, he will no longer have an overwhelming influence on Tana.[53]

[76] The Judge noted that Tana had "not been honest" with the report writers regarding his ongoing gang involvement.[54] This did not mean, however, that everything Tana had said was untrue.[55] The Judge noted that the two PAC reports had recommended home detention.[56] Reports from the providers of educational programmes that Tana had engaged in while on EM bail said he was compliant and making good progress, and described him as "honest, open, respectful and very

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51 Sentencing notes, above n 3, at [44] and [47].
52 At [33].
53 At [40].
54 At [39] and [42].
55 At [40].
56 At [37].

intelligent".[57] The Judge said he was not prepared "to go against the general views reached by the report writers … and conclude that there is no prospect of rehabilitation".[58]

[77] The key evidence in favour of a finding that Tana has reasonable rehabilitative prospects if sentenced to home detention is the feedback received from the providers of educational programmes that Tana engaged in while on EM bail. In particular, the Judge summarised a report from Number Twelve Youth Hub as follows:[59]

> You [Tana] are described as honest, open, respectful and very intelligent. You have attained 39 NCEA credits and are working on your driver's licence. It is reported that your facilitator has spoken highly of you and your contribution to the programme, as did other young people who are said to have described you as inspirational and having the potential to go somewhere in life.

[78] In addition, as the Judge noted, the two PAC reports also recommended home detention. Somewhat less weight can be given to those reports, however, as the writers were not aware at the time of Tana's ongoing Mongrel Mob associations (and indeed increased commitment to the gang) and believed that he had been fully compliant with his EM bail conditions.

[79] The evidence we have set out above which weighs against a finding of genuine remorse also tends to suggest that Tana's rehabilitative prospects are currently poor. This includes Tana's behaviour following the attack (as set out at [15] above); and his ongoing association with the Mongrel Mob (as set out at [66] above).

[80] Ultimately, Tana's prospects of rehabilitation are inextricably linked to his willingness to move on from his gang associations and find a more prosocial support network. Following the offending, a number of factors combined to give Tana an opportunity to do this. TJ's imprisonment removed his daily presence and influence from Tana's life. Being required to live at his father's remote rural home on EM bail with a condition not to associate with gang members gave him an opportunity (indeed an obligation) to not associate with gang members. The educational programmes he

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57 At [36] and [40].
58 At [43].
59 At [36].

was supported to attend provided him with positive educational and social opportunities. Nevertheless, during this period, Tana significantly increased his commitment to the gang by getting a back tattoo and becoming a patched member (with the consequence that it will now be very difficult for him to leave the gang). Such conduct suggests, unfortunately, Tana is not currently motivated towards his own rehabilitation.

[81] A further factor that is relevant to Tana's rehabilitative prospects is the suitability of his home detention address (at which his father appears to live full-time, and his mother part-time). While Tana's parents are clearly prosocial in some respects, it is of note that they facilitated Tana speaking to his brother in prison and his mother supported his claim to Dr Knight that he had left the gang. Tana received his Mongrel Mob tattoo and became a patched member while on EM bail at the family home, which is now his home detention address. The Judge found that while on EM bail at that address "it [had] been very difficult for [Tana] to avoid the influences of the Mongrel Mob".[60] There is accordingly little basis for confidence that home detention at the current address will significantly advance Tana's rehabilitation. Tana's apparent lack of remorse is a further factor which supports the conclusion that, at present, his rehabilitative prospects are somewhat limited.

[82] Taking all of these matters into account, it is our view that Tana's prospects of leaving the Mongrel Mob and adopting a more prosocial lifestyle are currently very low, regardless of whether he is sentenced to imprisonment or home detention. That is not to say that he has no rehabilitative prospects. He is obviously an intelligent young man with clear potential. He is not beyond redemption. Unfortunately, however, there is currently little to indicate that Tana is motivated towards his own rehabilitation, or that his home detention environment will be conducive to rehabilitation.

Conclusion as to the appropriate discount for personal mitigating factors

[83] Given that the personal mitigating factors in this case overlap considerably and were not analysed separately by the Judge, we will consider the appropriate discount for the relevant factors on a global basis.

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[60] Minute of Cooke J, above n 37, at [4].

[84] For the reasons we have set out above, it is our view that:

(a) There are many positive features of Tana's home life and upbringing, including supportive and loving parents. The key negative feature is that, at a time of vulnerability when Tana's father was very unwell, Tana became acutely susceptible to the negative influence of his older brother, a senior gang member. This led to Tana becoming a gang prospect, with all the negative consequences this entails. This warrants a modest discount.

(b) The evidence does not support the conclusion that Tana is genuinely remorseful to an extent that would justify a sentencing discount.

(c) A discount for youth is appropriate to reflect age-related neurological differences, as well as other youth-related factors such as Tana's susceptibility to negative influences (specifically that of his older brother) and his impulsivity and difficulty in regulating his behaviour.

(d) Tana's rehabilitative prospects are currently poor, given that he significantly increased his commitment to the Mongrel Mob while on EM bail pending sentencing. While there are clearly some rehabilitative prospects, particularly given Tana's age, at present there are few signs that he is seriously committed to rehabilitation. Nor does his home detention environment appear to be conducive to rehabilitation. Only a small discount can therefore be justified for Tana's rehabilitative prospects.

[85] There is significant overlap between these personal mitigating factors. Most notably, the key relevant personal background factor, as the Judge noted, is the negative influence of Tana's older brother. Similarly, one of the key justifications for a youth discount is Tana's susceptibility to such negative influences, due to his youth. The increased rehabilitative potential of young people is one of the justifications for a youth discount. There is therefore some overlap between any discount to reflect Tana's youth and any discount for rehabilitative prospects.

[86] In our view the appropriate global discount for the various personal mitigating factors we have identified, taking into account the degree of overlap, is 30 per cent, rather than the 45 per cent afforded by the Judge.

Conclusion as to the appropriate sentence

[87] For the reasons set out above, we consider that the sentence for Tana's offending should have been arrived at by taking a starting point of at least eight and a half years' imprisonment, and applying the following discounts:

(a) 25 per cent for guilty pleas (the guilty plea discount was not challenged on appeal);

(b) 30 per cent for personal mitigating factors; and

(c) six months for time spent on EM bail and custodial remand in a youth justice facility (as noted above, we consider this discount was generous but do not propose to interfere with it on appeal).

[88] The above starting point and discounts result in an end sentence of three years and four months' imprisonment. Based on our assessment of the appropriate starting point and discounts, home detention is not an available sentencing option.[61] This raises the issue of whether it would be appropriate to now substitute a sentence of imprisonment for the current home detention sentence. We turn now to consider that issue.

The appropriate appellate response

[89] The Supreme Court recently observed in *Philip v R* that where a Solicitor-General's appeal seeks to substitute a term of imprisonment for a non-custodial sentence, the usual practice of the courts is to take a conservative approach.[62] Specifically, the court will be "reluctant to interfere if this would cause

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[61] Pursuant to s 15A(1)(b) of the Sentencing Act 2002, an offender may only be sentenced to home detention if the court would otherwise sentence them to short-term sentence of imprisonment (defined for the purposes of the Act as a sentence of two years or less).

[62] *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [42].

injustice to the offender".[63] This is especially so where the offender has been complying with the conditions imposed as part of the community-based sentence. This is because of the harsh effect of substituting a term of imprisonment.[64] This factor will not, however, always result in the non-custodial sentencing being left undisturbed.[65] In some circumstances substituting a sentence of imprisonment will be justified. One example is where "an error in principle warrants reconsideration of the entire sentencing exercise, and a sentence of imprisonment is the inevitable consequence of correcting that error".[66]

[90] Recently, in *Wiwarena v R*, this Court acknowledged that the substitution of a sentence of imprisonment for a sentence of home detention can be seen as unfair, especially in relation to a young offender.[67] Nevertheless, the Court found that the appellant's offending was of such a serious nature that home detention was simply not an available option, commenting further that "[a] non-custodial sentence cannot be artificially reached by setting a low starting point and applying overly generous discounts."[68] This Court declined the application for leave to bring a second appeal insofar as it related to the High Court's substitution (on a Crown appeal) of a sentence of imprisonment for one of home detention.[69]

[91] Turning to the present appeal, the Judge's view was that the dominant sentencing purpose was rehabilitation, and that view drove the sentencing outcome. A rehabilitative focus will often be appropriate when sentencing young offenders. Here, however, Tana's prospects of making significant rehabilitative progress while serving a sentence of home detention appear to be poor. Further, a sentence of home detention is not available in any event, given our assessment of the appropriate starting point and discounts. Nevertheless, it would be open to this Court to simply indicate what the appropriate sentence is, while leaving the home detention sentence undisturbed, as Ms Pascoe invited us to do.

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63 At [43], citing *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 550.
64 At [43].
65 At [43].
66 *R v Fidow* [2013] NZCA 209 at [47]. See *R v Donaldson*, above n 63, at 550; and *Solicitor-General v Kaokao* [2019] NZHC 2352 at [37].
67 *Wiwarena v R* [2023] NZCA 384 at [42].
68 At [43].
69 At [44]–[46].

[92] We are not persuaded that such a course is appropriate in the circumstances of this case. This was very serious violent offending. Leaving the home detention sentence undisturbed would, in our view, be inadequate to meet the relevant purposes of sentencing. In addition to rehabilitation, these include the need to hold the offender accountable for the harm done to the victim and the community; promoting in the offender a sense of responsibility for, and an acknowledgment of, that harm; denouncing the conduct in which the offender was involved; deterring the offender or other persons from committing the same or a similar offence; and protecting the community from the offender.[70]

[93] On the issue of accountability, we acknowledge that Mr Marshall's whānau see that as a key factor here. The victim impact statement of one of Mr Marshall's siblings explains their view of the concept of accountability, from a Te Ao Māori perspective, as follows:

> Throughout this heinous process we're continually reminded of how you and your brother want to uphold your mana — that this process seems to be driven by instilling mana for the two of you.
>
> However, I struggle to understand your comprehension of mana.
>
> Mana isn't just about doing things that make you feel safe; it is also about accountability.
>
> We are all whānau of te ao Māori; we have just as much, if not more, right to have tikanga upheld.
>
> We are the victims left behind when you were involved in the attack on our brother.
>
> Our mana needs and deserves to be upheld through tikanga and promoting accountability.

[94] The writer goes on to explain how whakawhanaungatanga, kawa, kōrero, and whakapapa all interact to promote accountability, and asserts that Tana has failed to display any of these values and has ignored "the real, human costs of his actions". The victim impact statement further explains that:

> In te ao Māori, when you do wrong, you carry shame.
>
> Shame for yourself and for your whānau, and you work to restore what is Tika.

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[70] Sentencing Act, s 7(1)(a), (b), (e), (f), (g) and (h).

[95] In conclusion, it is our view that the sentence of 12 months' home detention was manifestly inadequate and was not in proportion with the gravity of the offending. A sentence of imprisonment should be substituted. Based on our assessment of the correct starting point and discounts, the appropriate sentence is one of three years and four months' imprisonment.

[96] Tana was presumably inducted into his present sentence of home detention shortly after his sentencing on 12 July 2023. On that basis he will have served just over four and a half months of his sentence by the time this judgment is delivered. In our view it is appropriate to allow a credit of six months' imprisonment for this factor.[71] That period must be deducted from the final sentence, resulting in an end sentence of two years and 10 months' imprisonment. We point out, however, that the effective sentence for this offending remains three years and four months' imprisonment.

Result

[97] The application for leave to adduce further evidence on appeal is granted.

[98] The appeal is allowed.

[99] The sentence of 12 months' home detention is set aside and substituted with a sentence of two years and 10 months' imprisonment.

[100] Mr Ormsby-Turner must surrender himself to the Prison Director at Mt Eden Corrections Facility (or such other location as may be directed by Corrections in writing) to commence his sentence of imprisonment by 2.00 pm on Friday 1 December 2023. The current sentence of home detention is to continue in effect until that time.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Appellant
Nicholsons Lawyers, New Plymouth for Respondent

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[71] Applying a similar approach to that taken in *R v Tamatea* [2012] NZCA 443 at [29] and *R v Pene* [2010] NZCA 387 at [20]–[21].