IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA690/2017
[2018] NZCA 469

BETWEEN	JESSE-JAMES WINTER Appellant
AND	THE QUEEN Respondent

CA96/2018

BETWEEN	NICHOLAS ANDREW HANSON Appellant
AND	THE QUEEN Respondent

Hearing:	29 August 2018
Court:	Miller, Mallon and Gendall JJ
Counsel:	A J Bailey and E Huda for Appellant Winter A G James for Appellant Hanson S K Barr for the Respondent
Judgment:	31 October 2018 at 3.30 pm

JUDGMENT OF THE COURT

A Mr Winter's application for an extension of time to appeal his sentence is granted.

B Mr Winter's appeal against conviction is dismissed.

C Mr Winter's appeal against sentence is dismissed.

D Mr Hanson's appeal is dismissed.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] Mr Winter and a co-defendant, Mr Kumar, were convicted as parties on two charges of wounding with intent to cause grievous bodily harm and one charge of male assaults female following a jury trial in the Christchurch District Court before Judge O'Driscoll.[1] Shortly before trial, two other co-defendants, Mr Hanson and Ms McGrath, pleaded guilty to these charges for their involvement in the group assaults.

[2] Mr Winter appeals against his conviction on two grounds. First, the trial Judge wrongly admitted a prejudicial text message sent by Mr Hanson. Secondly, the trial Judge erred in failing to provide the jury with an included lesser offence for their consideration. Mr Winter also seeks to appeal against his sentence of eight years' imprisonment.[2] He says that, because of delay in the prosecution of the trial and the appeal, he was unable to undertake a rehabilitation programme which impeded his parole prospects and this should lead to a reduction in his sentence.

[3] Mr Hanson appeals against his sentence of 10 years and nine months' imprisonment. This included a cumulative sentence of two years and three months' imprisonment for firearms and other charges which arose when he was apprehended on the group offending.[3] He contends the cumulative sentence was too high, having

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1 Crimes Act 1961, ss 66(2), 188(1) (maximum penalty 14 years' imprisonment), and 194(b) (maximum penalty two years' imprisonment).

2 *R v Hanson* [2017] NZDC 27289 at [87]. Mr Winter also appeared for sentencing on unrelated cannabis offending but received no additional term for this.

3 This cumulative sentence was for possession of utensils for methamphetamine (Misuse of Drugs Act 1975, s 13; maximum one year's imprisonment and/or $500 fine); unlawful possession of firearms (Arms Act 1983, s 45(1); maximum penalty four years' imprisonment and/or $5,000 fine); unlawful possession of explosives (ammunition) (Arms Act, s 45(1); maximum penalty four years' imprisonment and/or $5,000 fine); and unlawfully taking a motorcycle (Crimes Act, s 226(1); maximum penalty seven years' imprisonment). This was accompanied by breach of release conditions, breach of bail and the review of supervision on which Judge O'Driscoll ordered a concurrent sentence of three months' imprisonment and a review of the sentence of supervision on those charges.

regard to totality. He also appeals the 60 per cent minimum period of imprisonment imposed on his sentence of eight and a half years' imprisonment for the group assaults.

[4] Mr Winter did not file an appeal against sentence when he first filed his notice of appeal in November 2017. It appears he first indicated an intention to appeal his sentence in his submissions filed just before the hearing of this appeal. He thus needs an extension of time to appeal. We address this issue from [65] below.

The background

[5] As described by the Judge at sentencing, the genesis of this offending was an argument between Ms McGrath and Daniel Hatcher, who were in a relationship, on Sunday morning, 30 August 2015. Mr Hatcher went to visit a friend at a house-bus in the Northwood area of Christchurch, where his friend's mother and her partner (Mr Ambrose) lived. Ms McGrath knew where Mr Hatcher had gone and was sending him texts in the course of the day.

[6] The Crown case was that, at the instigation of Ms McGrath, a plan was developed to go to the house-bus that night to seriously assault Mr Hatcher. Ms McGrath first recruited Mr Hanson. He went to Ms McGrath's house in Hornby and joined with Ms McGrath in making threats to Mr Hatcher via text messages and phone calls. Ms McGrath also sent text messages to other persons inviting them to "smash Dan". Later in the day Mr Winter and Mr Kumar, with whom Mr Hanson had been in contact, joined in the plan. All three men were associated with the Bandidos gang. Mr Winter was Ms McGrath's half-brother and a flatmate of Mr Hanson's.

[7] A text message placed Mr Kumar as being on the way to Ms McGrath's Hornby address at 7.52 pm. Text messages and cellphone polling data put Mr Winter at this address at around 9.54 pm. The four of them travelled in Ms McGrath's car from her Hornby address to the house-bus in Northwood. Mr Hanson had a knife or knives with him. The group were in the vicinity of the house-bus at around 10.20 pm. At that stage Mr Ambrose and his partner were socialising with other guests: Mr Williams and Ms Spencer. Mr Hatcher was no longer there, having left with his friend at around 8.30 to 9 pm.

[8] Mr Hanson knocked on the door of the house-bus. Mr Ambrose came to the door and told Mr Hanson that Mr Hatcher was not there. What happened next is described by the Judge at sentencing as follows:[4]

> [10] What then appears to have happened is what I would describe as a frenzied attack by you Mr Hanson. You initially attacked Mr Ambrose. You cut him across his nose, Mr Williams came to the door. Mr Hanson you stabbed Mr Ambrose in the shoulder, neck, arm and hand as well as his face. Mr Ambrose was kicked. Mr Hanson you then stabbed Mr Williams in the forehead and I am also satisfied that Mr Williams was kicked and punched by both you Mr Kumar and Mr Winter during the incident. Ms Spencer was also assaulted and at some time her thumb was cut.
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> [11] The four of you then left the address and went back to Ms McGrath's address. …

[9] Mr Ambrose suffered the most serious injuries. He sustained deep wounds to his shoulder and the bridge of his nose, and an array of other wounds and lacerations to his face, neck, forearm and hand, and some bruising to his arm and body. He was required to undergo an emergency operation. The physical, emotional and financial consequences are ongoing. Mr Williams sustained a deep laceration on his forehead which required seven stitches, a superficial laceration to the back of his head, several lacerations to his hand which required seven stitches, and sore ribs and bruising. He found the violence traumatic and is very apprehensive after dark. Ms Spencer was treated at the scene for a gash to her hand and bruising to her thigh. She too has ongoing emotional effects from the attack.

[10] The Crown contended Mr Winter and Mr Kumar were parties to the wounding with intent to cause grievous bodily harm to Mr Ambrose and Mr Williams under s 66(2) of the Crimes Act 1961. It was alleged they had agreed with Ms McGrath and Mr Hanson to carry out a serious assault on Mr Hatcher, and the wounding with intent to cause grievous bodily harm of Mr Ambrose and Mr Williams was a probable consequence of carrying out that common intention.

[11] Mr Kumar accepted he travelled with others to the house-bus. His defence was that he did not agree with the others to carry out an unlawful act or to help with that and he did not know Mr Hanson had a knife. Mr Winter said he travelled with the

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4 *R v Hanson*, above n 2.

group but remained in the car when the others walked up to the house-bus. He also advanced the same defences as Mr Kumar.

[12] A key issue at trial was whether Mr Kumar and Mr Winter were aware that Mr Hanson had a knife. Amongst the text messages was a message from Mr Hanson to his girlfriend, sent at 7.13 pm on the evening of the assaults, saying "Arming up to dn wht we do" (meaning "Arming up to do what we do"). Following attempts by Mr Hanson to contact Mr Kumar by phone, at 7.52 pm Mr Kumar sent a text message to Mr Hanson that he was "On my way homie". Mr Winter sent a text message to his girlfriend at 9.01 pm, saying he was going on a "mish". There were no messages from Mr Kumar or Mr Winter about knives or weapons, no evidence that either of them had taken a knife with them to the house-bus, and no evidence that either of them had used the knife in the assaults.

[13] The Crown's case was circumstantial. The police had arrived at Ms McGrath's house in Hornby about 23 minutes after receiving a 111 call reporting the violence at the house-bus. Ms McGrath and Mr Kumar were in the driveway in a car, with the headlights on, as though they were about to leave. There was a fire in the backyard in which a t-shirt was being burned. Mr Kumar told the police he had just met Ms McGrath and they were on a Tinder date, which was later established to be a lie. The police found a knife in Ms McGrath's handbag. Inside the house the police found three knives in the kitchen sink, and an empty kitchen knife block in full view on the sofa in the lounge. Forensic testing found DNA from the three victims on the knives found in the sink and blood on Mr Kumar's jeans. Mr Winter was not apprehended until six weeks later. Text messages on his phone showed he had tried to set up a false alibi for the evening. When interviewed about his involvement he denied knowing Mr Hanson, denied he had sent the messages on his cell phone and denied knowing a person, who was in fact his girlfriend, to whom messages had been sent.

[14] The Crown contended the text messages and phone data showed Mr Kumar and Mr Winter were present at the house before they set off for the house-bus in Northwood. Given the knife block was in plain view in the lounge, and they had travelled to the house-bus in the same car, the Crown argued they must have known

that knives were being taken and that Mr Hanson was armed when he first engaged in the attack on Mr Ambrose.

Conviction appeal: the text message

District Court ruling

[15] At a pre-trial hearing on 14 February 2017, when all four defendants were to stand trial, the Judge tentatively indicated that all the phone and text messages were admissible against the authors of them (under s 27(1) of the Evidence Act 2006), and their admissibility against others would depend on the evidence at trial and be the subject of directions to the jury.[5]

[16] The trial was scheduled to commence on 3 July 2017. On 23 June 2017, Mr Hanson and Ms McGrath pleaded guilty to the charges. The Crown alerted the Court that this changed the basis on which their phone and text messages were admissible. The Crown sought a ruling that they were admissible under s 22A of the Evidence Act. This presented challenges for the start of the trial because there were hundreds of text messages and phone calls. However, the first trial ended in a mistrial due to a juror conduct issue.[6] A new trial commenced on 10 July 2017 by which time the Judge had been able to give his ruling.

[17] Section 22A of the Evidence Act provides that a hearsay statement is admissible against a defendant if:

> (a) there is reasonable evidence of a conspiracy or joint enterprise;
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> (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and

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5 As subsequently recorded in *R v Kumar* [2017] NZDC 14861 at [10]–[13], the Judge considered it would be preferable to hear the evidence before determining whether the three conditions under s 22A of the Evidence Act 2006 were met. This was particularly so because there was the prospect of reluctant witnesses who might give evidence at variance to their formal written statements.

6 At [24].

(c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

[18] The Judge considered there was reasonable evidence of a joint enterprise to cause violence to Mr Hatcher. This included the evidence of animosity between Ms McGrath and Mr Hatcher; Mr Hanson making contact with Mr Kumar and Mr Winter; Mr Winter and Mr Kumar going to Ms McGrath's address; all four travelling together to the address where Mr Hatcher was believed to be; the presence of all four defendants at the house-bus; the attempt to locate Mr Hatcher in the house-bus; the use of violence to three people at the house-bus; and travelling from the scene together.[7]

[19] The Judge considered there was reasonable evidence that Mr Kumar was a member of the joint enterprise. This included a phone call made by Mr Kumar to Mr Hanson; Mr Kumar's admission that he was going to Ms McGrath's address shortly after the call; Mr Kumar being located at Ms McGrath's address around 23 minutes after the violence at the house-bus; and Mr Kumar fitting evidence that one of the males at the house-bus was Indian and wearing a blue t-shirt with stripes.[8]

[20] The Judge considered there was also reasonable evidence that Mr Winter was a member of the joint enterprise. This included Mr Winter's text and phone messages and phone calls to Mr Hanson; Mr Winter's text messages and phone calls to Ms McGrath; the text message from Mr Winter to his girlfriend that he was going on a "mish"; cellphone polling data, which showed Mr Winter's phone travelling from the vicinity of Ms McGrath's house to the vicinity of the house-bus and travelling back to Ms McGrath's house, consistent with the timing of the offending; and evidence that two males, in addition to Mr Hanson, had inflicted the violence.[9]

[21] As to whether hearsay statements were made in furtherance of the joint conspiracy, the Judge referred, in particular, to *Kayrouz v R* that:[10]

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7 At [60]–[68].
8 At [69]–[70].
9 At [70].
10 *Kayrouz v R* [2014] NZCA 139 at [35] (footnotes omitted).

> … statements made during the conspiracy will be admissible when they are "part of the natural process of making the arrangements to carry out the conspiracy". … That evidence would be admissible when it could be said that it "showed the enterprise in operation". In contrast, merely incidental statements even if they refer to the conspiracy or aspects of it are not admissible if they are not intended to advance or further the common purpose of the conspiracy.

[22] The trial Judge ruled that the text message, "Arming up to dn wht we do", sent by Mr Hanson to a third party, was admissible against Mr Kumar and Mr Hanson. In the Judge's view, this was an action done in furtherance of the joint enterprise to inflict violence on Mr Hatcher.[11]

The Judge's directions to the jury

[23] For the jury to convict Mr Kumar and Mr Winter as parties to the wounding with intent charges, the jury needed to be sure that inflicting really serious injury to someone other than Mr Hatcher was the probable consequence of their common intention to inflict a serious assault on Mr Hatcher. In summing up, the Judge directed the jury they could only be sure of this if Mr Kumar and Mr Winter knew, at the time they engaged with the victims at the house-bus, that Mr Hanson was "armed".

[24] The Judge referred to Mr Hatcher's evidence that he had received threats from Mr Hanson and Ms McGrath saying they were going to stab and cut him. He also referred to the "Arming up to dn wht we do" text from Mr Hanson sent at 7.13 pm. He reminded the jury of the evidence about the knives and knife block found at Ms McGrath's house.

[25] The Judge discussed that the Crown invited the jury to infer that Mr Kumar and Mr Winter knew that Mr Hanson was taking a knife with him to the house-bus. He explained that the Crown contended it was a reasonable inference that there would have been a discussion about the knife, especially because of where the knife block had been seen at the Hornby address a short time after the violence on the house-bus occupants. He summarised the defence contentions that Mr Hanson and Ms McGrath may have hidden the knives; Mr Ambrose and Mr Williams had not initially seen the knives (implying it was initially concealed); a witness had described Mr Kumar as

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[11] *R v Kumar*, above n 5, at [85].

being in shock during the incident; and it was not a safe inference that Mr Winter had ever left Ms McGrath's car when it was parked near the house-bus.

[26] The Judge discussed some other matters and then gave directions on the text messages between Mr Hanson and Ms McGrath, messages sent by them to others, and messages received by them from others. He said these text messages were relevant to whether Mr Hanson and Ms McGrath formed a common intention to carry out something unlawful and whether Mr Kumar and Mr Winter agreed to participate. The Judge then referred to some of the messages the Crown relied on to show this common intention. This included the "arming up" text. He said the jury could use this to show a common intention with Mr Hanson and Ms McGrath and, if the jury found Mr Kumar and Mr Winter joined the common intention at a later stage, the text could be used to prove a common intention on all of the parties to carry out a serious assault.

[27] The Judge then said:

> I direct you, however, that the texts cannot be used by you to prove knowledge that Mr Kumar and Mr Winter had any knowledge of the knife in the possession of Mr Hanson. That must be proved in some other way such as the Crown inviting you to draw the inference about the possession of the knife by Mr Hanson from the presence of the knife box.

Submissions on appeal

[28] Mr Winter submits the Judge erred in admitting the "arming up" text message. He says that the *action* of "arming up" may have been in furtherance of the joint enterprise, but the focus under s 22A is on whether the *statement* was made in furtherance of the joint enterprise. He says it was not: it was not a statement to advance the group's objectives; it was not in the nature of Mr Hanson trying to reassure a participant in the joint enterprise; it was not sent to a participant in the joint enterprise; it did not involve Mr Hanson attempting to recruit into the joint enterprise the person to whom he sent the text message; and the text message did not assist the enterprise.

[29] Mr Winter submits the text had little probative value for the purpose for which the Judge directed it was relevant — whether there was a common intention to inflict serious violence. He submits its probative value was outweighed by the risk of unfair

prejudice. This was particularly because the jury were aware the defendants had gang connections as part of the evidence about the connection between the parties. The admitted facts included that Mr Winter was a probationary member of the Bandidos gang, Mr Hanson was a prospect of that gang, and Mr Kumar was a friend of both of them. Mr Winter says the risk of prejudice that arises in such cases needs to be carefully managed. The jury may have reasoned that the reference to "we" in the text ("arming up to dn wht we do") referred to the Bandidos gang, and was evidence that it was customary for Mr Hanson and the gang to arm himself with a knife when violence was contemplated.

Our assessment

[30] The "arming up" text was from Mr Hanson to his girlfriend when she had been asking where he was. It was made before Mr Winter and Mr Kumar had agreed to assist Ms McGrath and Mr Hanson. It was not made to enlist them, or to instruct them or to advance their objectives. If it was admissible, it was only as evidence of the joint enterprise in operation at a time when Mr Winter and Mr Kumar were not part of that enterprise. As to such statements, this Court observed in *R v Messenger*:[12]

> [21] A theory of ratification, however, may allow a statement made by a co-conspirator before a person joined the conspiracy to be admitted in order to prove the origin, character and object of the conspiracy but not the person's participation in the conspiracy … when a person decides to join a conspiracy after its inception, he or she is taken to have accepted the plan as it has developed and the steps that have already been taken towards arranging the intended unlawful acts. He or she is thus taken as impliedly ratifying the steps already taken by the co-conspirators in furtherance of the common purpose.

[31] The Judge's directions to the jury followed this approach. The text was admissible to prove what the object of the joint enterprise was. It was not admissible to prove what Mr Winter's participation in the joint enterprise was: that is, whether he intended to assist the joint enterprise to carry out a serious assault on Mr Hatcher knowing that Mr Hanson was carrying a knife. The risk of unfair prejudice was that the jury would use the text as evidence that Mr Winter knew Mr Hanson had a knife when he involved himself with the violence. The Judge's directions specifically dealt with that risk. He made it clear that the Crown relied on the evidence about

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12 *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779.

the defendants having travelled from Ms McGrath's house to the house-bus in the one vehicle and that the knife block was found sitting on Ms McGrath's sofa shortly after the violence occurred.

[32] In our view it is debatable whether the text was "in furtherance of the joint enterprise". It could have been viewed as an incidental text to a third party rather than in furtherance of the conspiracy. Some judges might have ruled the text message as inadmissible against Mr Winter and Mr Kumar on this basis. Others might have taken the approach the Judge did here. In our view it was open to the Judge to take the view he did. We consider the Judge appropriately dealt with any unfair prejudice arising from the text through the direction he gave. We note that had Mr Hanson not pleaded guilty, there could be no question that the text was admissible against him. The Judge would have made a similar direction about it not being evidence that Mr Winter knew about the knife. The jury would be expected to follow that direction. There is no reason to expect the jury not to have followed the Judge's direction here.

[33] We therefore dismiss this ground of appeal.

Conviction appeal: included offence

The submission

[34] Mr Winter contends the Judge erred in not providing an included lesser offence for the jury to consider on the wounding with intent charges. The Crown case depended on the jury being sure that Mr Winter knew Mr Hanson was armed with a knife. Mr Winter submits the jury should have been directed to consider an offence of injuring with intent to injure (s 188(2)) or assault with a weapon (s 202C) if they were not sure that Mr Winter knew about the knife.

[35] He notes that for the jury to convict him of those charges they needed to be sure of five things:

(a) Did Mr Hanson commit the offence of grievous bodily harm?

(b) Was there a shared understanding or agreement to seriously assault Mr Hatcher?

(c) Did Mr Winter agree to help the others participate in seriously assaulting Mr Hatcher?

(d) Did the wounding occur in the course of pursuing the agreement?

(e) Did Mr Winter know the offence of wounding was a probable consequence of carrying out the joint agreement?

[36] Mr Bailey, Mr Winter's counsel, acknowledges the Crown case on the first four of those questions was extremely strong. He says the fifth element, as to Mr Winter's knowledge and foresight, was the crucial and finely balanced issue.

[37] Mr Bailey says the jury's assessment of this was in the context of the following factual background: Mr Winter had attempted to involve himself and assist with a serious assault against Mr Hatcher; three innocent members of the public were injured as a result (one very seriously and another extremely seriously); Mr Winter and Mr Kumar jointly assaulted (by kicking and punching) one of those innocent members of the public (Mr Williams) after he had been knocked to the ground; Mr Winter was a probationary member of the Bandidos gang; he was a friend of and lived at the same address as Mr Hanson (a gang prospect), and Mr Hanson's step-father (the Bandidos president); and the Bandidos gang customarily "arm up" to "do what we do".

[38] Against that background Mr Bailey says the jury would have had a natural reluctance to acquit Mr Winter and, by failing to provide an alternative offence, the Judge placed the jury in an "all or nothing" position.

The law

[39] Section 143 of the Criminal Procedure Act 2011 provides:

> **Included offences**
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> If the commission of the offence alleged (as described in the enactment creating the offence or in the charge) includes the commission of any other

> offence, the defendant may be convicted of that other offence if it is proved, even if the whole offence in the charge is not proved.

[40] An included offence is one where, on proof of all the ingredients of the major offence, the defendant must necessarily have committed the lesser offence.[13] It has been held, for example, that injuring by an unlawful act is necessarily included in wounding with intent or injuring with intent,[14] and assault using a knife is necessarily included in wounding with intent to injure if the wound was caused by a knife.[15]

[41] A trial judge's obligations to put an alternative included charge to the jury, as discussed in *R v Mokaraka,*[16] was summarised in *McDonald v R* as relevant to the issues in that case, as follows:[17]

> (a) The mere fact that an included charge is possible does not mean it must be put to the jury. It is a matter of discretion for the trial judge;
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> (b) There must be a live issue as to whether no more than the elements of the lesser charge will be proved. This is a threshold question. The jury must be squarely confronted with the possibility that all of the elements of the lesser charge are proved on the evidence without any of the elements of the principal charge;
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> (c) Once this inquiry is cleared, the following circumstances tell against putting the included charge: the lesser charge is trifling whereas the principal charge is very serious such that the lesser charge could distract the jury; the question of included charges is raised too late in proceedings such that prejudice results to one party in the way the trial is conducted; the inclusion of the lesser charge provides a pretext for the jury softening its verdict where, if it discharged its duty, it could only find the accused guilty on the principal charge or not guilty;
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> (d) The judge's discretion to put the included charge is broad. An appellate court will not intervene unless it is satisfied that the jury may have convicted the accused out of reluctance to see him or her "get away" with disgraceful conduct.

[42] In *Mokaraka* the Court had said that, it followed from the last of these points, "there may be cases — we think few — in which the trial Judge will need to take the

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13 *R v Norris* (1988) 3 CRNZ 527 (HC) at 529.

14 *R v Garr* (1909) 28 NZLR 546 (CA) at 548; and *R v Carr (No 2)* [1995] 2 NZLR 339 (HC) at 342.

15 *R v Morgan* [2005] 1 NZLR 791 (CA) at [13].

16 *R v Mokaraka* [2002] 1 NZLR 793 (CA).

17 *R v McDonald* [2007] NZCA 142 at [11]. The Supreme Court, in declining leave to appeal, noted that counsel did not suggest that the principles from *R v Mokaraka* should be reconsidered: *McDonald v R* [2007] NZSC 66 at [3].

initiative".[18] Particularly if the jury raised the possibility, the Court would need "to give serious consideration to an included charge or, depending upon the circumstances, a warning …" that they should not be reluctant to acquit because they regard the defendant as guilty of an offence but not the offence the prosecution has limited itself to.[19] The Court also said that the trial judge "… is obliged to put an included charge to the jury only if necessary in the interests of justice".[20]

[43] The offending in *Mokaraka* involved a group of five who entered a house occupied by three elderly woman and a middle-aged man. Two of the group had climbed through the window. One of them was armed with a knife. The other (Mr Te Hira) went to the back door and let in three further men. Two of the group repeatedly assaulted the male occupant. Two of the group held the three women. Members of the group repeatedly asked where "the drugs" were.[21] They ransacked the house and stole various items of property.

[44] Mr Ti Hira was charged with aggravated burglary on a s 66(2) basis. That offence is committed if a person committing a burglary has a weapon. It was subject to a maximum imprisonment term of 14 years. In contrast, a burglary without a weapon carried a maximum imprisonment term of five years. The key trial issue was whether Mr Ti Hira knew that one of the group had a knife.[22]

[45] Shortly after the closing addresses, the jury asked the Judge whether it was possible for them to consider a lesser charge. The Judge declined to allow the jury to consider the lesser alternative available on the evidence. On appeal this Court considered Mr Ti Hira's conviction should be quashed. The Court was left with a real concern that Mr Ti Hira could have been wrongly convicted of aggravated burglary due to the jury's reluctance to see him escape any sanction for his participation in a serious case of unlawful entry with criminal intent.[23]

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18 *R v Mokaraka*, above n 16, at [19].
19 At [19].
20 At [14].
21 At [4].
22 At [25].
23 At [34].

[46] In contrast, the Court in *McDonald* did not have to assess the scope of the broad discretion it described nor how an appellate court should assess whether the jury may have convicted the defendant out of reluctance to see him or her "get away" with disgraceful conduct. This was because there was no proper evidential basis for the alternative scenario which would have founded the included charge.[24]

[47] Mr Bailey, on Mr Winter's behalf, provided submissions about the position in the United Kingdom, Canada and Australia.[25] He submits that these jurisdictions take a different approach to the New Zealand position, and he invited us to reconsider that position.

[48] Focussing on the United Kingdom position, there are two key differences. First, it is not a matter of broad discretion for the trial judge to direct the jury on an included offence when one of the elements of the offence charged is in doubt but the defendant is plainly guilty of some offence.[26] The trial judge must do so where there is an obvious alternative offence which is raised by the evidence.[27] While it may suit either side not to have the included charge put to the jury for tactical reasons, the trial judge has a responsibility to do so in the interests of justice because:[28]

> In any criminal prosecution for a serious offence there is an important public interest in the outcome … The public interest is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to

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24 *R v McDonald*, above n 17, at [13].

25 United Kingdom: *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154; *Von Starck v The Queen* [2000] 1 WLR 1270 (PC); *R v Abdi Aziz Ali* [2006] EWCA Crim 2906; and *R v Hodson* [2009] EWCA Crim 1590. Canada: *R v Sarrazin* 2011 SCC 54, [2011] 3 SCR 505. Australia: *James v R* [2014] HCA 6, (2014) 253 CLR 475.

26 There is a seriousness threshold. For example, it has been said this does not apply to summary proceedings: *R v Coutts*, above n 25, at [23] per Lord Bingham.

27 *R v Coutts*, above n 25, at [23] per Lord Bingham, [62] per Lord Hutton, and [100] per Lord Mance. Lord Rodger at [84] considers this is subject to not undermining the fairness of the trial. See also *Von Starck v The Queen* , above n 25, at 1275: "But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury".

28 *R v Coutts*, above n 25, at [12] per Lord Bingham.

> achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge.

[49] Secondly, where an obvious included offence is not put to the jury, an appellate court's intervention is not subject to being satisfied that the jury may have convicted out of a reluctance to see a defendant "get away" with disgraceful conduct. The failure to put an obvious included offence raised by the evidence is a material misdirection rendering the conviction unsafe. The reason is that:[29]

> There is no reliable means by which an appellate court can … measure whether or how a jury may react to an unnatural limitation of the choices put before it. One is entitled to assume that juries go about their task in the utmost good faith, but the concern is with the subconscious as well as conscious reactions. … as a matter of human experience, a choice of decisions may be affected "by the variety of choices offered, particularly when … a particular choice [is] not the only or inevitable choice".

[50] The United Kingdom's position on when an included offence should be put to the jury is neatly summed up as follows:[30]

> Where … an obvious alternative verdict presents itself in respect of some more than trifling offence and can without injustice be left for the jury to consider, the judge should in fairness ensure that this is done …

[51] The submissions for Mr Winter invited us to reconsider the New Zealand approach particularly in light of the United Kingdom position. As Mr Bailey says, the New Zealand approach to limit appellate intervention to cases where the jury may have convicted out of a reluctance to see a defendant get away with disgraceful conduct is derived from dicta in *R v Maxwell*.[31] As is discussed in *R v Coutts*, two lines of authority developed: some which followed that dicta and some which did not.[32] *R v Coutts* held that this dicta should no longer be followed.

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29 *R v Coutts*, above n 25, at [99] per Lord Mance citing the reasoning of Callinan J in *Gilbert v The Queen* (2000) 201 CLR 414 at [101].

30 *R v Coutts*, above n 25, at [100] per Lord Mance.

31 *R v Maxwell* [1990] 1 WLR 401 (HL) at 408 per Lord Ackner.

32 *R v Coutts*, above n 25, at [46]–[60] per Lord Hutton.

[52] We consider it is not appropriate for a divisional court to review the existing position in New Zealand. The differences in approach do not concern the key principle that an included offence must be put to the jury when, despite the tactical decision of trial counsel, it is in the interests of justice to do so. For the reasons we go on to explain, Mr Winter's appeal does not require an assessment to be made on the areas where there are differences.

What happened at the trial

[53] We are advised that, at the end of the aborted first trial, Mr Winter's trial counsel invited the prosecutor to consider a plea to a charge under s 188(2). That did not eventuate. However, at some point during the trial, Mr Winter's trial counsel also raised with the Judge the concern that the jury may improperly convict the appellant on the grievous bodily harm charges unless an alternative lesser charge was offered to them for consideration. Whilst no formal ruling was given, the Judge did not accede to that request.[33] Absent any record, we do not know the Judge's reasons for this. As the Judge issued formal rulings on other matters arising in the trial, we infer that inclusion of a lesser included offence being put to the jury did not assume sufficient importance in the trial to cause the trial Judge to consider the matter in any detail.

[54] The Crown had pitched its case on an all or nothing basis. If the jury were not sure that Mr Winter knew about the knife or knives, they could not convict him. The Crown's closing address therefore focused on why the jury should conclude that Mr Kumar and Mr Winter must have known about the knife.

[55] This was also the focus of Mr Winter's trial counsel's closing address to the jury. Near the outset of that address he said:

> They are not being charged with trying to get involved in something that was unlawful. They are not being charged with getting involved in something which is unlawful and it leading to unfortunate significant consequences to some victims. They are getting charged with participating in an activity and the Crown say they knew the sort of consequences that did happen were going to happen and, importantly, the Crown must — and you will be told this tomorrow in black and white — the Crown must prove, in relation to

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[33] There is no transcript covering this discussion. The Crown advises there is nothing in the case on appeal that records an application and counsel has not been able to identify any informal note that might assist with identifying the relevant part of the hearing to be transcribed.

> Mr Winter, that he knew a knife or knives were being taken to the scene. If you can't be sure of that then forget about everything else we've heard, you will be directed to find the charges not proved against Mr Winter.

[56] He finished with this:

> When you look at it, members of the jury, and when you have clearly in the back of your mind that Mr Winter must have known that the knives being taken to the scene, before you can go on to consider everything else, you're not going to be near there. It would be very unfair if you say well let's just find him guilty 'cos he might have been up to something or probably was up to something no good or wanted to be up to something no good. It would be equally unfair if you say he's got some connection with the Bandidos gang, for whatever that's worth. People aren't guilty by just association in this country and it would be a very sad day if it came to that. The verdicts you should return for Mr Winter are ones of not guilty. Thank you.

[57] The trial Judge directed the jury "in the strongest possible terms" to put aside any prejudice from feelings they might have about violence, drugs and gangs or sympathy towards the complainants. He provided the jury with a question trail. He directed them to acquit the defendants if the Crown had not proven the elements of the charges. He directed they could only conclude the infliction of really serious harm to someone other than Mr Hatcher was a probable consequence if they knew "at the time of engagement with" the victims that Mr Hanson was armed.

[58] It is apparent the jury were focused on this issue. During deliberations the jury sought clarification on when exactly the "point of engagement" was and whether it was, for example, at the point when the stabbing commenced or the initial contact at the door. The jury were directed this was at the stage that Mr Hanson asked for Mr Hatcher and was told by Mr Ambrose that Mr Hatcher was not there.

Our assessment

[59] Mr Winter (and Mr Kumar) were charged as parties on a joint enterprise liability basis to offending Mr Hanson (and Ms McGrath) had already admitted to. Section 66(2) of the Crimes Act allows the possibility of a conviction on an included lesser charge, rather than the charge on which the principal offender(s) are convicted. It provides that the members of the joint enterprise are "a party to every offence committed by any of them … if the commission of that offence was known to be the probable consequence". In other words, if wounding with intent to injure or assault

with a weapon is an offence included within wounding with intent to cause grievous bodily harm, then Mr Hanson has committed those offences, and Mr Winter will be a party to those included offences if he knew that was a probable consequence of the prosecution of their common purpose.

[60] We accept that assault with a weapon is included within wounding with intent to cause grievous bodily harm where a knife has been used to inflict the wounding.[34] In this case, the interests of justice did not require that it be put to the jury. For Mr Winter to have been convicted as a party to this offending he would need to have had knowledge of the knife. If he had that knowledge, then he was properly convicted as a party to wounding with intent to cause grievous bodily harm.

[61] We also accept that wounding with intent to injure is included within wounding with intent to cause grievous bodily harm.[35] If Mr Hanson wounded the victims with intent to cause grievous bodily harm, he had also wounded them with intent to injure them (grievous bodily harm being a very serious "injury"). However, in this case there is the complication that the wounding occurred to people who were not the target of the common plan. It is conceivable that someone other than the target may be wounded in a plan to carry out serious injury to the target, if a member of the joint enterprise is armed with a knife. But if Mr Winter, as a member of the joint enterprise, did not know that one of their number has a knife, could the jury have been sure that he knew as a probable consequence that someone other than the target would be wounded? In our view that would not be a safe inference. It was the knife that elevated the risks of the enterprise and the potential for others to be harmed in carrying out the enterprise.

[62] We consider it is reasoning along these lines that is likely to have been in the Judge's mind in not taking up defence counsel's suggestion of putting wounding with intent to injure to the jury. This is consistent with the Judge's ruling that the jury had to be sure Mr Winter knew about the knife. As he put it to the jury in his summing-up:

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34 Crimes Act, ss 188(1) and 202C.
35 Section 188(1) and 188(2).

> You could only conclude that the infliction of really serious injury to *someone other than Mr Hatcher* was a probable consequence of the common intention or the carrying out of the common intention to seriously assault Mr Hatcher if … Mr Winter … knew at the time of engagement with Mr Ambrose, Mr Williams and Ms Sinclair that Mr Hanson was armed. If you are satisfied beyond reasonable doubt that … Mr Winter knew that Mr Hanson was armed, that may be a relevant factor as to whether the defendants knew that serious injury in the form of a wounding with intent to cause grievous bodily harm *to others* was a probable consequence of the commission of the common purpose. If you are not satisfied beyond reasonable doubt that … Mr Winter [knew] that Mr Hanson was armed, you could not conclude that the *wounding of the two strangers in this case*, Mr Ambrose and Mr Williams, was a probable consequence of the commission of the common purpose.
>
> (Emphasis added).

[63] Absent knowledge of the knife, there was no specific evidence as to the level of violence to someone other than Mr Hatcher that Mr Winter should have anticipated as a probable consequence. This left assault as a potential alternative.[36] That was so trifling in the context of this group violence that it was not required to be put to the jury in the interests of justice. The United Kingdom approach requires putting obvious alternatives to the jury, not any alternative at all.

[64] We therefore dismiss this ground of appeal.

Mr Winter's sentence appeal

Basis for appeal

[65] Mr Winter sought an extension of time to appeal his sentence. This is on the basis that considerable delay between his arrest and his sentencing caused prejudice to the determination of his release on parole.

[66] Mr Winter was in custody from the date of his arrest. His parole eligibility date was 17 June 2018. On 20 June 2018 Mr Winter appeared before the Parole Board. The Parole Assessment Report prepared for that hearing did not support Mr Winter's release until he had satisfactorily completed a Medium Intensity Rehabilitation Programme. The Report also stated that he had not been able to engage in that programme because of his undetermined appeal against conviction. The Parole Board

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[36] This was the Judge's view about the assault on Mr Williams' partner. On this charge the Judge directed the jury that knowledge of the knife was irrelevant.

considered it premature to consider parole and the matter was deferred for nine months.

[67] Mr Winter seeks a reduction in his sentence because of this. He seeks an extension of time because he says it was not until the delay between his sentencing and the hearing of the appeal that the delay in the final disposition of the charge became undue. In the circumstances, we grant the necessary extension and consider the argument on its merits.

The law

[68] Everyone who is charged with an offence has the right to be tried without undue delay.[37] This applies to the time that elapses between arrest and final disposition, including any appeal.[38] A reduction in sentence may be an appropriate remedy for undue delay in some circumstances.[39]

Was there undue delay?

[69] Mr Winter was arrested on 16 October 2015. On 19 August 2016, a trial date for 13 February 2017 was set. This was adjourned to 3 July 2017 on Mr Hanson and Ms McGrath's application. As discussed above, the first trial ended in a mistrial, but a second trial commenced on 13 July with guilty verdicts returned on 19 July 2017. Sentencing took place on 29 November 2017. Mr Winter's conviction appeal was filed on 30 November 2017 and heard on 29 August 2018.

[70] In summary, there were 20 and a half months between Mr Winter's arrest and his trial, four and a half months between his trial and sentencing, and nine months between sentencing/filing his appeal and the hearing of his appeal. While shorter timeframes are desirable, that is not always possible. For example:

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37 New Zealand Bill of Rights Act 1990, s 25(b).

38 *Williams v R* [2009] NZSC 41, [2009] 2 NZLR 750 at [10].

39 In *R v Manawatu* (2006) 23 CRNZ 833 (CA) at [28] the position was left open. In *Williams*, above n 38, the trial Judge had reduced the defendant's sentence because of delay. In rejecting an appeal that a stay was the appropriate remedy, the Supreme Court commented that where an accused is convicted after being on bail pending trial, a reduction in sentence is likely to be the appropriate remedy: at [18]. Where an accused is in custody, the time will count towards the service of the term of imprisonment.

(a) The adjournment of the February 2017 trial date occurred when a supplementary ESR report, identifying Mr Hanson's DNA on one of the knives, became available close to that date. It appears the report had not been completed earlier because it was first necessary to obtain suspect compulsion orders. Mr Winter and Mr Kumar opposed the orders. The orders were granted at a pre-trial hearing in December 2016.

(b) An issue arose after trial and before sentencing about access to medical records for one of the victims.

(c) On 25 May 2018 counsel filed a joint memorandum requesting a direction that Mr Winter and Mr Hanson's appeal be heard together.[40] An issue arose about whether this Court had jurisdiction to hear Mr Hanson's appeal. This was resolved with this Court's minute dated 25 June 2018.

[71] At least some of the delays were therefore for Mr Winter's benefit or in his interest. We consider Mr Winter has not shown that his right to a trial without undue delay was breached. We dismiss his sentence appeal.

Mr Hanson's sentence appeal

[72] Mr Hanson's sentence appeal concerns the cumulative sentence of two years and three months' imprisonment he received and the minimum period of imprisonment of 60 per cent.

The cumulative sentence

[73] On 8 October 2015, the police executed a search warrant at Mr Hanson's address in connection with the group offending at the house-bus on 30 August 2015. They found: a used methamphetamine pipe in Mr Hanson's wardrobe; two pump-action shotguns, both with their serial numbers ground off and one cut down to

[40] This was also sought for Mr Kumar's appeal. However his appeal was not pursued.

form a pistol grip; and 103 shotgun shells in various locations in the garage and around the property.

[74] On the same day, following a report of a stolen motorbike, Mr Hanson was found attempting to remove a battery from that motorbike. He was searched and found to be in possession of a .22 rifle, approximately 34 rounds loaded into two magazine clips, and 39 unused shotgun cartridges.

[75] He was charged with unlawful possession of firearms and ammunition, possession of a methamphetamine utensil and unlawfully taking a motor vehicle arising from these searches. The Judge regarded the firearms offending as serious.[41] Mr Hanson had possession of more than one firearm in different locations and access to ammunition. The firearms were obviously intended for illegal purposes. The Judge considered that looking at all of the charges together, on a totality basis, an appropriate sentence was three years' imprisonment. He discounted this by 25 per cent for Mr Hanson's early guilty plea.[42] That brought the sentence down to two years and three months. He considered a cumulative sentence, on the eight and a half years' term for the group violence, was appropriate because the firearms charges were different in nature and kind. He considered this did not breach the totality principle "[t]aking into account the nature and seriousness of the charges".[43]

[76] Mr Hanson submits a cumulative sentence of no more than 12 months was appropriate with reference to cases where the firearms charges are an aggravating feature of drugs offending.[44] The Crown acknowledges that in cases of this kind uplifts of 12–18 months are common.[45] The Crown submits a different approach is appropriate when the firearms and other offending are unrelated in time, place and circumstances to the group violence.

[77] We accept the Crown's submission. The charges arising from the 8 October 2015 searches were unrelated in time, place and circumstance. It was

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41 *R v Hanson*, above n 2, at [45].
42 At [46].
43 At [47].
44 *Crutchley v R* [2015] NZCA 473; *Slape v R* [2015] NZHC 2637; and *Bidois v Police* [2017] NZHC 589.
45 *Mills v R* [2016] NZCA 245 at [18].

appropriate to assess a sentence for them on a totality basis, to impose that sentence cumulatively on the sentence for the group violence and to check that this did not offend the totality principle. This is the approach the Judge took. The cumulative sentence imposed was at the stern end of the available range, as was the sentence for the group violence. However, as the Judge said, this was serious offending.

[78] We therefore dismiss this ground of Mr Hanson's sentence appeal.

Minimum period of imprisonment

[79] Mr Hanson submits the minimum period of imprisonment should have been 50 per cent and not 60 per cent. He says that, although he has a lengthy list of previous convictions, the Judge took that into account in imposing a six month uplift on the starting point for the group violence. He says his history of violent offending is limited and is comparable to Ms McGrath's and Mr Winter's. The Judge imposed neither an uplift nor a minimum period of imprisonment on their sentences. He says the Judge's approach created some disparity with them. Although he had the primary role in inflicting the violence, that warranted no more than a 50 per cent minimum period.

[80] We accept that amongst Mr Hanson's 45 previous convictions his convictions for violent offending are relatively limited in number:

(a) 30 April 2015: common assault (four months' imprisonment);

(b) 15 June 2013: male assaults female (community work and supervision);

(c) 14 December 2008: injuring with intent to injure (two years' imprisonment); and

(d) 29 August 2008: common assault (community work and intensive supervision).

[81] However, he also has convictions for possession of a knife (2013), threatening behaviour (2012) and possession of an offensive weapon (2012). Moreover, his conviction history displays a persistent disregard of authority, court orders, and the

property of others. Amongst other things, he has convictions for failing to stop for police, failing to provide a blood specimen and failing to provide his details when apprehended on driving offences. He has several convictions for unlawfully taking motor vehicles, thefts and burglaries. He also has several convictions for failing to comply with court orders.

[82] The pre-sentence report writer described Mr Hanson's offence history as suggesting a high likelihood of reoffending which was unlikely to reduce unless Mr Hanson successfully addressed his significant alcohol and drug abuse and his sense of entitlement. The group violence on 30 August 2015 was his most violent offending to date and occurred when Mr Hanson had been under the influence of alcohol and drugs.

[83] The Judge imposed a minimum period of imprisonment because the offending involved serious violence and Mr Hanson had a high likelihood of reoffending and a very high risk of harm to others.[46] Having regard to the need to protect the community, a minimum period of imprisonment of 60 per cent was open to the Judge.

[84] It was open to the Judge to differentiate Mr Hanson from Ms McGrath for the reasons he gave. She had not offended since 2009, had not committed similar offending and was assessed as being at a low risk of reoffending.[47] It was also open to the Judge to differentiate Mr Hanson from Mr Winter for the reasons he gave. Mr Winter had a shorter list of previous convictions, his last offence was in 2011 or 2012 and he was not the instigator of the group violence.[48]

[85] We therefore dismiss this ground of Mr Hanson's sentence appeal.

Result

[86] Mr Winter's application for an extension of time to appeal his sentence is granted.

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46 *R v Hanson*, above n 2, at [50].
47 At [63].
48 At [70].

[87] Mr Winter's appeal against conviction is dismissed.

[88] His appeal against sentence is dismissed.

[89] Mr Hanson's appeal against sentence is dismissed.

Solicitors:
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