IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA525/2019
[2020] NZCA 357

BETWEEN	IVAN DOUGLAS CARR Appellant
AND	THE QUEEN Respondent

CA147/2020

BETWEEN	STEVEN GEORGE ANDERSON Appellant
AND	THE QUEEN Respondent

Hearing:	20 May 2020
Court:	Cooper, Duffy and Edwards JJ
Counsel:	R M Mansfield for Appellants E J Hoskin for Respondent
Judgment:	25 August 2020 at 12 pm

JUDGMENT OF THE COURT

A The appeals against sentence are allowed.

B In respect of Mr Carr, the sentence of 10 years' imprisonment with an MPI of five years for the lead charge of aggravated robbery is quashed and a sentence of 10 years and six months' imprisonment with an MPI of five years and three months is substituted.

C The order that Mr Carr's sentence of six years' imprisonment for aggravated robbery be served cumulatively on the sentence for the lead charge is quashed. All sentences are to be served concurrently.

D In respect of Mr Anderson, the application for an extension of time to appeal is granted.

E The sentence of five years and 10 months' imprisonment imposed on Mr Anderson for the lead charge of robbery is quashed and a sentence of four years and 10 months' imprisonment is substituted.

F All sentences imposed on Mr Anderson are to be served concurrently.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] These appeals are from sentences imposed by Downs J in the High Court at Auckland in respect of aggravated robberies and related offending.[1]

[2] Mr Carr was sentenced on four charges of aggravated robbery, two of robbery, five of unlawful using or taking a motor vehicle, two of dishonest use of a document, one of demanding with menaces, one of aggravated assault and two of theft. The Judge took two of the aggravated robbery offences as the lead charges, sentencing Mr Carr to terms of 10 years and six years' imprisonment respectively, the sentences to be served cumulatively. The other offending attracted concurrent terms of between

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1 *R v Carr* [2019] NZHC 2335 [High Court judgment].

three months' and five years 10 months' imprisonment. There was an effective term of 16 years' imprisonment.

[3] Mr Anderson was sentenced at the same time on two charges of robbery and one of aggravated assault. He had been Mr Carr's accomplice in respect of the two robberies. The sentence imposed for the lead robbery charge was five years and 10 months' imprisonment. Eighteen-month terms were imposed in respect of the other two offences, to be served concurrently.

[4] It is contended on appeal that the Judge erred in adopting a global starting point of 18 years' imprisonment in respect of Mr Carr. Both appellants allege also that the Judge erred in failing to apply a reduction to reflect their upbringing and associated cultural and social deprivation, and that the end sentences imposed were manifestly excessive.

[5] Before dealing with the substance of the appeals, it is appropriate to describe the offending and the reasons the Judge gave for the sentences he imposed.

The offending

[6] The first incident in time occurred on 12 October 2017. Early in the morning of that day, Mr Carr and another unidentified person stopped next to a parked BMW in Hillcrest. It was outside the victim's home. Mr Carr and the other offender were wearing balaclavas. One of them confronted the victim with a hammer, demanding his wallet and grabbing his phone from his hand. The victim was dragged from the car and the BMW driven away. The wallet and phone, worth approximately $2,400, were stolen.

[7] The next incident again involved Mr Carr and an unidentified co-offender. On 30 October 2017 they went to a shopping centre in Glen Eden. At approximately 2.30 in the afternoon, they robbed an Armourguard cash van at gunpoint. Mr Carr had the gun. The Armourguard employee was chased around a corner where Mr Carr told him to drop the cash or be shot. He complied. Mr Carr then picked up the cash box, returned to the Armourguard van and banged on the window with the pistol.

He demanded that the driver get out of the vehicle, but he refused. Mr Carr then left with the co-offender and just over $11,000 in cash.

[8] The Judge emphasised the premeditated nature of this offending, observing that Mr Carr had been disguised and was wearing gloves.[2] Prior to the event, Mr Carr and the co-offender had watched the van at the shops, using a second car stolen that day, a Toyota, for that purpose. The Toyota was later found with its ignition and window broken. The BMW was also recovered, but the cash was not. There was video footage of the robbery, showing Mr Carr pointing the gun at the Armourguard employee and a woman who was by chance present at the time. The Judge also referred to an issue as to whether the gun was real. He found that it was but noted in any event that it looked like a pistol and that would be sufficient to commit the crime of aggravated robbery.[3] He accepted there was no evidence the pistol was loaded, but the victims would not have known that, and Mr Carr had clearly intended they believe otherwise.[4]

[9] The next offence was committed on 7 December 2017. On that day, an insurance assessor noticed a client's stolen Volkswagen outside Mr Carr's home. He called the police. A large tow truck arrived to remove the Volkswagen, but Mr Carr got into the car and drove it away. It was found abandoned later that day.

[10] Next, on 1 April 2018, Mr Carr stole a Subaru in Glenfield, intending to use it in a robbery which was later to take place on 5 April. He used a Visa payWave card taken from the stolen Subaru to buy food and items from a hardware store.

[11] On 3 April 2018, Mr Carr and another offender snatched a handbag sitting next to a woman on a park bench. The bag and its contents were valued at $500. Another bag was stolen from a car in Birkenhead. In it was a gold ring worth $200. The two offenders then travelled to central Auckland, where they stole a motorcycle from the Britomart area, valued at $10,000. None of the property was recovered.

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2 At [7].
3 At [8].
4 At [9].

[12] On 5 April 2018, a little after 1 pm Mr Carr and another offender robbed an Armourguard cash van outside a shopping mall in Milford. This robbery was premeditated and involved use of the Subaru motor vehicle stolen on 1 April. Mr Carr drove the Subaru, following the Armourguard van as it travelled around Milford. When it arrived at the mall, Mr Carr reversed the Subaru into the van. The co-offender left the car and confronted the Armourguard employee with a knife. The employee dropped to the ground and the co-offender took a cash case containing $34,000. The two offenders left in the Subaru, Mr Carr driving. The vehicle was later recovered, but the cash was not.

[13] About three and a half weeks later, on 29 April 2018, Mr Carr went to a motel in Takapuna with a co-offender. Mr Carr covered his face with the hood of a jacket or top. Wearing gloves, they went into one of the units, Mr Carr carrying a small axe. He demanded money and slapped one of the victims in the face and on the back of his head. The victim's mother then armed herself with a knife from the kitchen. Mr Carr seized another of the victims, using her as a shield and placed the axe against her neck, continuing to demand money. On this occasion, a handbag, cash, a gold watch and other items worth more than $6,500 were stolen. Mr Carr and the co-offender made off. None of the property was recovered.

[14] Next, on 4 May 2018, Mr Carr and Mr Anderson committed a series of offences which included another cash van robbery. First, Mr Carr stole a Mazda motor vehicle. At about 3.15 in the afternoon, they drove the Mazda along Queen Street. One of the two left the car and robbed a tourist of a camera bag and its contents. The victim's brother gave chase. He grabbed hold of the car's roof rack as they drove away, accelerating quickly, turning a corner and swerving left and right to dislodge him. The victim was thrown from the car and landed on the road.

[15] At about 4 pm on the same day, Mr Carr and Mr Anderson arrived at a branch of the Bank of New Zealand on Dominion Road. An Armourguard cash van was replenishing the ATM with cash. Mr Anderson was wearing a hooded top, pulled down over his face. He rushed toward the Armourguard employee and attempted to punch him. After a brief scuffle, Mr Anderson took the cash case. Both then left in the stolen Mazda, subsequently hiding it in a garage. On this occasion, some $280,000

was stolen and they divided it between them. They were apprehended later that afternoon. Both the Mazda and the money were recovered. The Judge commented that this cash van robbery was less sophisticated than the earlier ones, but it too had been planned.[5]

The sentences

[16] Having described the offending, the Judge then identified aggravating features, noting that all of them applied to Mr Carr, but only some to Mr Anderson. He said:[6]

> (a) Much of the offending was premeditated; indeed, two of the aggravated robberies were very well planned.
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> (b) Some offending involved dangerous weapons: a hammer, a pistol, a knife, a small axe.
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> (c) There was use of violence beyond that inherent to robbery or aggravated robbery.
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> (d) There was the targeting of vulnerable victims — particularly the Armourguard staff — in busy shopping centres, in daylight.
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> (e) Offending on bail. Mr Carr, you committed the Glen Eden aggravated robbery while you were on bail.
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> (f) The motel aggravated robbery was something like a home invasion.
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> (g) Much valuable property remains unrecovered.
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> (h) There are many victims. I assume some continue to suffer, especially psychologically. I say "assume" because, oddly, I have been given only one victim impact report. Why this is so remains unclear. This is unsatisfactory.
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> (i) All offending happened within only eight months. Its intensity and seriousness are standout features.

[17] The Judge accepted the Crown's contention that he should identify a starting point for each offence or set of offences, first considering each in isolation and then considering totality. He considered first the aggravated robbery of the BMW, describing it as a bad example of its kind. He described it as lying somewhere between "a bad street aggravated robbery and the aggravated robbery of a taxi driver."[7]

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5 At [18].
6 At [18].
7 At [24].

He thought it warranted a starting point of three and a half years' imprisonment, considered in isolation.

[18] The Judge noted that the parties agreed the "most serious offence set" comprised the Glen Eden aggravated robbery of the cash van by Mr Carr, including demanding with menaces of the second guard, and unlawful use of the stolen car.[8] He considered this offending warranted a nine-year starting point considered in isolation, that is, without reference to the previous set of offences.

[19] The Judge next addressed the Milford cash van aggravated robbery, and the other offences committed by Mr Carr between 1 and 5 April 2018. A knife had been used in the robbery and presented to the victim by Mr Carr's co-offender. It was a well-planned aggravated robbery committed at a busy shopping centre and the cash had not been recovered. Taking into account the other offending occurring over that time period the Judge considered a global starting point of seven and a half years' imprisonment would be appropriate.

[20] Turning to the aggravated robbery of the motel, the Judge said it was like a home invasion. The offending was again premeditated, had involved an intrusion into a "temporary dwelling" with a weapon, violence against an occupant and the threat of worse violence than actually occurred, by Mr Carr holding an axe to the neck of another occupant.[9] He adopted a six-year starting point, considering the offence in isolation.

[21] The next set of offences occurred on 4 May 2018 on Queen Street and Dominion Road. The Judge accepted that the robbery of the Queen Street tourist had been opportunistic, and that neither Mr Carr nor Mr Anderson had anticipated the actions of the victim's brother in taking hold of the car. However, driving away and trying to dislodge that person was seriously aggravating, risking severe injury possibly even death. In combination, the Queen Street offences in the Judge's view justified a starting point of at least three years' imprisonment. But those offences had been followed by a further robbery committed within 45 minutes, the third that

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8 At [25].
9 At [32].

Mr Carr had committed in respect of a cash van. The Judge inferred that the robbery had been planned, having regard to the fact that the stolen Mazda was used and the nature of the target. The robbery had involved actual violence, albeit at the lower end of the scale — Mr Anderson's punch did not connect. The victim was vulnerable by reason of his occupation and the offending occurred in a busy shopping area in daylight. The Judge considered that a five-year starting point was appropriate, recognising the vulnerability of the Armourguard personnel engaged in their lawful employment. He observed that the robbery was a "hairs-breadth away from an aggravated robbery".[10]

[22] The Judge then applied the totality principle. In the case of Mr Carr, he said that if he added the figures of the separate starting points identified together, he would arrive at 34 years' imprisonment. However, he observed:[11]

> The law requires a more humane and nuanced approach through operation of a principle called totality. The totality principle has two competing aspects. The first requires a Judge to ensure the sentence reflects the combined seriousness of *all* offences. The second requires a Judge to ensure the sentence is not disproportionality severe. The Court of Appeal has said the first aspect is particularly important when an offender commits multiple aggravated robberies, and stressed the maximum penalty applies to each offence.
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> (Footnote omitted.)

[23] He considered that a global starting point of 18 years' imprisonment would be appropriate. A higher starting point could be disproportionately severe, while a lower one would fail to reflect the totality of the offending.

[24] In Mr Anderson's case, the Judge took the Dominion Road robbery as the lead offence. He considered that the Queen Street offending (robbery and aggravated assault) in combination would warrant a starting point of at least three years' imprisonment. In the case of the Dominion Road robbery considered on its own, a starting point of five years was appropriate. Applying the totality principle as in the case of Mr Carr, the Judge adopted a global starting point of six years' imprisonment. It was necessary then to consider personal aggravating factors.

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10 At [37]. The charge was robbery, not aggravated robbery. The Judge noted that a five-year starting point would be half the available maximum.

11 At [38].

[25] The Judge did not accept the Crown's submission that there should be an uplift to mark Mr Carr's previous offending, on the basis that the starting point already involved a long term of imprisonment.

[26] However, in Mr Anderson's case he considered a six-month uplift was warranted because of his "very bad" record.[12] The offending before the Court constituted his second strike.[13] In 2014 he had committed a robbery and received a first strike warning and a sentence of two years and three months' imprisonment. The Judge noted that there were two aggravated robberies and an aggravated wounding in 1998 for which a three-year term of imprisonment had been imposed. Another aggravated robbery, together with kidnapping and rape, was committed in 2000 resulting in a sentence of 11 years' imprisonment. There were other offences of burglary and unlawful interfering with or taking cars. The six-month uplift adjusted the starting point for Mr Anderson to six and a half years' imprisonment.

[27] The Judge then considered the personal circumstances of the offenders set out in the cultural reports provided under s 27 of the Sentencing Act 2002. He noted that the author of the reports, Ms Turner, expressed the view that the respective experiences of Mr Carr and Mr Anderson demonstrated a linkage to the commission of the offences. He then continued:

> [60] An offender's background may arguably extend to what is described as systemic disadvantage, meaning longstanding deprivations that affect—and afflict—some groups, at least when that background informs the commission of the offence. However, this type of consideration has only a modest effect on sentence when the offending is serious. Indeed, it may have little application, if any. Frequently, other sentencing principles prevail, especially denunciation and community protection. Equally importantly, the law does not accept some groups may use violence — but not others. No other approach is conceivable.
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> [61] In any event, discounts in this context require care. Correlation and causation are not synonymous. Many people with disadvantaged backgrounds do not commit criminal offences let alone very serious ones like this, and many law abiding people remain so despite difficult lives. Excessive discounts in this context risk undermining the criminal law's precepts of human agency and choice. This is not to deny the importance of upbringing or circumstance; it is to maintain perspective.
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> (Footnotes omitted.)

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12 At [46].

13 Sentencing Act 2002, s 86C.

[28] The Judge indicated he was not satisfied there was sufficient linkage between the offending and the respective backgrounds of the appellants to warrant a discount. He acknowledged hardships that each had encountered, and their early exposure to the criminal justice system. However, these considerations could not explain robbery, let alone "serial aggravated robbery" as in the case of Mr Carr.[14] Further, the offending was "too serious for this factor to have purchase even if linkage existed".[15] He concluded by repeating an earlier observation that "many people with disadvantaged backgrounds do not commit criminal offences, let alone ones like this".[16]

[29] The Judge allowed both Mr Carr and Mr Anderson a discount of 10 per cent in respect of guilty pleas and admissions of facts. Mr Anderson had pleaded guilty to the two robberies and aggravated assault with which he was charged. Mr Carr had pleaded guilty to four charges in advance of trial at the same time as Mr Anderson and went to trial on the remaining 16 charges proffered against him, being acquitted on three. The 10 per cent discount was applied to all of the charges because although Mr Carr pleaded guilty to the offences he did only seven days before the trial and went to trial on the remaining charges, he made extensive admissions in respect of facts it would otherwise have been necessary to prove in respect of the charges that went to trial.

[30] The Judge considered that the intensity and seriousness of Mr Carr's offending meant that it was obviously a case for the imposition of a minimum period of imprisonment (MPI). He assessed the appropriate minimum term at 50 per cent. That issue did not arise in the case of Mr Anderson. Because it was a second strike offence he was obliged to serve the full term of imprisonment.[17]

[31] In the result, Mr Carr was sentenced to 16 years' imprisonment with an MPI of eight years. The Judge achieved that outcome by imposing sentences of 10 years' imprisonment for the Glen Eden aggravated robbery and a cumulative term of six years' imprisonment for the Milford aggravated robbery. The other offending attracted a range of sentences to be served concurrently. Minimum periods of

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14 High Court judgment, above n 1, at [62].
15 At [62].
16 At [63].
17 Sentencing Act, s 86C(4).

five years' imprisonment on the Glen Eden aggravated robbery and three years' imprisonment cumulative on the Milford aggravated robbery were imposed.

[32] Mr Anderson was sentenced to a term of five years and 10 months' imprisonment in respect of the Dominion Road robbery and 18-month concurrent terms of imprisonment in respect of the other offending.

[33] The result was as set out in a schedule appended to the sentencing remarks which we also attach to this judgment.

The appeals

Carr

Submissions

[34] Mr Mansfield submitted that the global starting point of 18 years' imprisonment adopted by the Judge was too high and has resulted in a manifestly excessive sentence being imposed. He did not challenge the individual starting points at which the Judge had arrived in respect of the offences. Rather, he contended that the Judge erred when undertaking his assessment of the totality of the offending. He submitted that the Judge had adopted an approach which was "too mathematical", instead of standing back and assessing the offending as a whole and comparing it to other similar cases.

[35] Mr Mansfield submitted that the offending involved the use of weapons to avoid resistance, rather than to actually cause physical harm, and that the Judge placed unnecessary focus on potential consequences as opposed to what in fact incurred. This error in approach led the Judge to determine that Mr Carr's offending could be distinguished from that of the offender in *Kite v R*, one of two cases to which the Judge referred.[18] Mr Mansfield submitted that although the offending in that case occurred over a lesser period of time and involved only three charges of aggravated robbery, it had some distinguishing features which could properly be said to make it more serious

[18] *Kite v R* [2007] NZCA 385.

than the present case. But he submitted that, as in that case, the appropriate starting point here should have been no more than 14 years' imprisonment.

[36] Mr Mansfield was also critical of the Judge's failure to take into account the content of the s 27 report in mitigation of the sentence. He argued that a reduction of 20 per cent in the sentence otherwise appropriate should have been allowed. He submitted that the report justified a conclusion that Mr Carr had had a disadvantaged background by reason of cultural disconnectedness from Te Ao Māori, exposure to family violence, parental separation, limited education, including exclusion and early exit from the education system with no formal qualifications, youth gang affiliation, early entry to the criminal justice system, alcohol and drug abuse, diminished earning capacity and adult gang affiliation. Mr Mansfield submitted that all of these considerations should have been taken into account by the Judge, and that he erred by not doing so.

[37] He claimed the Judge also erred when stating that even if a relevant nexus could be established between Mr Carr's background and his criminal conduct, the conduct was too serious for the relevant cultural factors to impact on the sentence. Mr Mansfield argued that excluding serious offenders from appropriate recognition for such considerations would undermine the notion that an individual's culpability may be less as a result of what they have been innocently exposed to in their upbringing.

[38] As a consequence, Mr Mansfield submitted that with the lowered starting point and 20 per cent reduction for the relevant cultural and personal considerations, the appeal should result in the sentence imposed in the High Court being quashed and replaced with a sentence of 10 years' imprisonment with an MPI of five years.

[39] For the respondent, Ms Hoskin submitted that the Judge had made adequate allowance for totality and had reduced what could have been a much longer sentence down to 18 years. This was proportionate to the gravity of the overall offending whilst giving effect to an established principle that there should be no discount for bulk offending. She submitted that the offending was not analogous to that in *Kite*. While the type of offending was comparable, the 14-year starting point adopted in *Kite*

was for three aggravated robberies only. In this case, there were four aggravated robberies, two robberies, an aggravated assault and a demanding with menaces. A higher starter point was plainly justified, and a differential of four years was easily explicable having regard to the additional offences committed by Mr Carr.

[40] Ms Hoskin also maintained that the Judge had not been wrong in his consideration of the potential for harm caused by the fact that weapons were involved. She submitted it was plain from the sentencing decision that Mr Carr was not sentenced on the basis of hypothetical scenarios. The fact that no one suffered significant physical harm was simply the absence of an aggravating feature, and not a factor reducing the seriousness of the offending.

[41] As to the s 27 report, Ms Hoskin submitted that Mr Mansfield's argument could be reduced to the proposition that a disadvantaged background could be relied on as automatically causative of subsequent criminal offending. She submitted this was wrong, referring to observations made by this Court in *Arona v R* to the effect that "s 27 rests on the premise that systemic deprivation affecting Māori generally is traceable to linkages between that deprivation, the offender and the offending".[19]

[42] Ms Hoskin referred to Mr Carr's long-standing gang involvement, methamphetamine addiction and choices that he had made as an adult. She argued that a causal nexus between his childhood deprivation and what had been a determined and persistent spree of offending was not easy to discern.

Discussion

[43] We accept that Mr Carr's offending was serious. The Judge identified its aggravating features in the passage we have quoted earlier.[20] All of those features were matters which were referred to in this Court's judgment of *R v Mako* as potentially characterising the gravity of aggravated robbery offending.[21] As was

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19 *Arona v R* [2018] NZCA 427 at [59].
20 Above at [16].
21 *R v Mako* [2000] 2 NZLR 170 (CA).

acknowledged in that case, the range of conduct constituting aggravated robbery is very wide:[22]

> In addition to the essential elements of the offence, in each case there will be features, themselves widely variable, that will contribute to or detract from the seriousness of the conduct and the criminality involved. It is the particular combination of these variable features which requires assessment for sentencing in each case.

[44] Although Mr Mansfield was critical of the Judge's emphasis on the risk of harm to the immediate victims of the offending and members of the public, as opposed to the actual harm caused, *Mako* recognised that potential danger arising from the conduct is properly to be taken into account. *Mako* also clearly justifies the Judge's approach of taking into account the fact there was multiple offending. That of course is necessary in applying s 85(1) and (2) of the Sentencing Act, enacted after the decision in *Mako* was delivered. However, it is worth noting that in this particular context, the Court said in *Mako*:

> [51] Multiple offending involving separate incidents, which is all too common, gives the criminality an added dimension which must be accorded full response on totality principles. In this respect, maximum sentences (against which all sentences must be kept in perspective) apply for each offence.

[45] Having said that, for a number of reasons, we consider that the global starting point of 18 years' imprisonment at which the Judge arrived was too high. First, we note that in *Mako*, having reviewed decisions that were then comparatively recent, the Court referred to starting points of 10 years' imprisonment as being appropriate in respect of "serious organised robberies having the attendant features of dangerous weapons, terrorising conduct or actual violence".[23] In this case, the starting point of nine years adopted for the Glen Eden aggravated robbery (subsequently uplifted to 10 years for totality reasons) placed the offending in that very serious category. Yet although the offending would have been frightening for those involved in it, there was no actual violence. Further, although a gun was used, the Judge accepted that there was no evidence it was loaded. The Judge made the point which is doubtless correct that those at whom the gun was pointed would not have known whether or not

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22 At [34].
23 At [28].

it was loaded. However, it has to be recognised that in *Mako*, higher starting points were contemplated where firearms were loaded, or actual violence used.[24]

[46] We do not think the constellation of features of the Glen Eden aggravated robbery justified the nine-year starting point taken by the Judge. We accept of course that there was actual violence in the case of some of the incidents. For example, in the case of the aggravated robbery of the BMW the driver was dragged from his car. In the case of the motel incident one of the victims was slapped in the face and on the back of his head, while an axe was placed against another victim's neck. And the other case of actual violence involved the victim hanging on to the roof of the car as it was driven away. Those cases of actual violence attracted, in the case of Mr Carr, sentences respectively of three years, five years and five months and 18 months.[25] While on the Judge's approach the totality of the offending had to be brought to account, it is worth noting that s 85(1) of the Sentencing Act requires that individual sentences must reflect the seriousness of each offence. In this case, we consider that the approach taken in fact inflated the seriousness of the Glen Eden aggravated robbery.

[47] The Judge was referred to two cases by counsel which he used as comparators. The first was *Kite v R* and the second *R v Shedden*.[26] These cases involved starting points of 14 and 20 years' imprisonment respectively. The Judge took the view that Mr Carr's offending was more serious than Mr Kite's, but less serious than that of Mr Shedden.

[48] Mr Kite was responsible for the planning and execution of three significant armed robberies in Auckland. In each case, he carried out a reconnaissance of the relevant area and the movements of security personnel. He arranged for the placement of stolen motor vehicles to be utilised in the robberies, and he recruited associates to carry them out armed with firearms. He remained nearby in another vehicle equipped with a police scanner. Once the robberies had taken place, he drove off, and met his associates at a predetermined point. The money was then divided

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24 At [54].
25 The latter event was prosecuted as an aggravated assault.
26 *Kite v R*, above n 18; and *R v Shedden* HC Auckland T024003, 12 December 2003.

between them and the stolen vehicles disposed of. This Court noted that in each case, the robberies had been carried out in busy commercial areas at times when significant numbers of people could be expected to be present. In each case, victim impact statements revealed that the security guards suffered significant and understandable psychological trauma. Overall, about $225,000 was stolen, of which only $4,161.45 was recovered. In addition to the three aggravated robberies, Mr Kite pleaded guilty to six charges of using and four charges of attempting to use documents to obtain a pecuniary advantage, as well as a charge of escaping from lawful custody. This Court held that a starting point of 14 years' imprisonment was within the range available to the Judge.[27]

[49] In *Shedden*, the offender was convicted of five aggravated robberies, discharging a firearm causing grievous bodily harm, six counts of unlawfully taking a motor vehicle, two counts of theft, and counts of aggravated burglary and possession of burglary instruments. He fired three shots directly at one of his victims, one of which found its mark. The victim was very badly hurt and continued to suffer ongoing pain. The events also had a devastating effect on his life. He developed depression, post traumatic stress disorder and was forced to resign from his job, move cities and take up lower paying employment. A starting point of 20 years' imprisonment was adopted. In setting that starting point, the Judge was influenced by the impact on the victim, both in terms of his physical injuries and the effect on his life. It was also significant that the shots were fired deliberately at the victim: the Court observed that, if the victim had died, Mr Shedden would have faced a murder charge.[28]

[50] These cases illustrate the variety of circumstances in which aggravated robberies take place. In the case of *Shedden*, there was very serious effect on the victim. But also in the case of *Kite*, the Court was able to refer to victim impact statements revealing that the victims had suffered "significant, and understandable, psychological trauma".[29] In the present case, while it can be inferred that the conduct was frightening (and there was actual violence in the cases ultimately considered less serious than the charge that attracted the highest penalty), there was only one victim

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27 *Kite v R*, above n 18, at [9].
28 *R v Shedden*, above n 26, at [15].
29 *Kite v R*, above n 18, at [1].

impact statement. The Judge described the absence of other statements as unsatisfactory, but it nevertheless meant that there was not the background of demonstrated effect on the victims that was before the Courts in the other cases referred to. In this case, the victim impact statement was from the person whose motorcycle was stolen.[30]

[51] There are other relevant decisions of this Court involving multiple cases of aggravated robberies. For example, in *Moke v R*, the offender pleaded guilty to six charges of aggravated robbery. He and two others targeted service stations in disguise and armed with a baseball bat and sawn-off shotgun. On various occasions they bound the attendants' arms and legs. On one occasion an employee was struck on the head with a baseball bat. He required hospital treatment. A starting point of 11 years' imprisonment which the Judge had adopted was considered appropriate.[31] Concurrent sentences of nine years' imprisonment which had been imposed in the District Court on the six charges of aggravated robbery were quashed. The Court imposed a sentence of eight years' imprisonment in respect of one of them and on the remaining five charges concurrent sentences of three and a half years' imprisonment were imposed.[32]

[52] In *Collett v R*, the offender pleaded guilty to four charges of aggravated robbery and four charges of unlawfully taking a motor vehicle.[33] In this case, the aggravated robberies were carried out at pharmacies to obtain pseudoephedrine-based products to manufacture methamphetamine. The Judge's starting point of 11 years' imprisonment was upheld in this Court.[34]

[53] In *Growden v R* there were three aggravated robberies committed between 30 September and 12 October 2004.[35] The offending was carried out against

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30 The offending, involving the theft of a motorcycle, was prosecuted as one of the unlawful taking of vehicles offences which collectively received a sentence of 18 months' imprisonment. The owner referred to the stolen motorcycle as his "pride and joy" in the victim impact statement.

31 *Moke v R* [2007] NZCA 110 at [18].

32 At [22]. It may be noted that Mr Moke was only 17 years of age at the time of the offending, which doubtless affected the final outcome. But a co-offender (who did not appeal) who was six years older, was sentenced to a total of 12 years' imprisonment on nine charges of aggravated burglary and one charge of kidnapping. In his case, the sentencing Judge fixed a starting point of 14 years' imprisonment.

33 *Collett v R* CA83/04, 30 August 2004.

34 At [24].

35 *Growden v R* CA67/05, 25 October 2005.

the occupants of campervans. Weapons and threats of violence were used, and the victims suffered physical injury and emotional harm. Two sustained injuries from being struck with a crowbar on the hands and arms as they defended themselves from blows to the head. A victim of the third aggravated robbery was struck in the face with a crowbar several times. While he did not sustain long-lasting injuries, he was hurt. In that case, this Court considered a starting point of 13 years' imprisonment, which had been adopted by the Judge, was appropriate.[36]

[54] In considering the present case in the context of the others we have mentioned, we are confirmed in our view that the Judge's global starting point of 18 years was too high. We consider a starting point of 14 years would have been sufficient to take into account the gravity of the overall offending. It need hardly be said that is a very long period for offending that was admittedly serious but in which no one suffered serious injury.

[55] We turn next to the matters which Mr Mansfield advanced on the basis of the s 27 report as personal considerations that should have been taken into account in reduction of the sentence.

[56] We refer first to the statutory context. Reports are now increasingly provided under s 27 of the Sentencing Act which contemplate sentencing courts considering, amongst other things, information about the "personal, family, whanau, community, and cultural background of the offender" and "the way in which that background may have related to the commission of the offence".[37] Some of this language reflects s 8(i) of the Sentencing Act, which prescribes as one of the principles of sentencing that the court must take into account "the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose". This in turn has an obvious connection with s 8(g), requiring the sentencing court to "impose the least restrictive outcome that is appropriate in the circumstances".

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36 At [49].
37 Sentencing Act, s 27(1)(a) and (b).

[57] Recently, in its guideline judgment in *Zhang v R*, this Court had occasion to address the impact of social, cultural and economic deprivation on sentencing in the field of methamphetamine offending.[38] What was said on that subject has obvious implications for sentencing in all cases, not just in relation to those arising under the Misuse of Drugs Act 1975.[39] Of relevance here, the Court observed:

> [159] First, ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability. Where these constraints are shown to contribute causatively to offending (whether associated with addiction or not), they will require consideration in sentencing.
>
> (Footnote omitted.)

[58] That paragraph in the judgment had footnote references to *Solicitor-General v Heta*, *Fane v R* and *Arona v R*.[40] It is significant that the Court in *Zhang* referred specifically to [50] of *Heta*. In the previous paragraph of his judgment in that case, Whata J had described s 27 of the Sentencing Act as reflecting a legislative policy that background considerations such as the presence of systemic deprivation might be relevant to individualised justice. He referred to the section as mandating and enabling Māori and other offenders to bring to the Court's attention information about, among other things, the presence of systemic deprivation and how it related to the offending, culpability and rehabilitation.[41] He then wrote:

> [50] The evidence of the presence of systemic deprivation (or social disadvantage more generally) on an offender need not be elaborate. The symptoms of systemic Māori deprivation are reasonably self-evident, including (among other things) intergenerational social and cultural dislocation of the whānau, poverty, alcohol and or drug abuse by whānau members and by the offender from an early age, whānau unemployment and educational underachievement, and violence in the home. Evidence from whānau about the offender's life is enough. But there must be some evidence identifying the presence of systemic deprivation in the offender's background and linkage to the offending. …

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38 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
39 See *Napia v R* [2019] NZCA 618 at [14].
40 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [50]; *Fane v R* [2015] NZCA 561 at [46]; and *Arona v R*, above n 19, at [59].
41 *Solicitor-General v Heta*, above n 40, at [49].

[59] That was followed by a reference to a passage in *R v Rakuraku* in which Williams J spoke about the effects of a childhood marred by poverty, violence, racism, dislocation and gang involvement.[42]

[60] It is significant that this reasoning was endorsed by the Full Court in *Zhang*. We consider this means that where a cultural report provided under s 27 of the Sentencing Act contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse including by whānau members, unemployment, educational underachievement and violence as features of the offender's upbringing such matters ought to be taken into account in sentencing. The reference to *Rakuraku* embraces what Williams J referred to as the "magnifying effect" where young men gather in the "brutalised and traumatised company" of other young Māori men in gangs.[43]

[61] Similar considerations were referred to in *Arona*, to which we were referred by Ms Hoskin.[44] In that case, however, the Court of Appeal concluded that the relevant cultural report did not offer systemic deprivation as an explanation for the offending. The Court said:

> [59] Apart from its failure to acknowledge that the appellants actually committed the offences, the report does not establish a nexus between Mr Arona's cultural background and the offending that might mitigate his culpability. As recently explained in *Solicitor-General v Heta*, s 27 rests on the premise that systemic deprivation affecting Māori generally is traceable to linkages between that deprivation, the offender and the offending. There may be cases in which the linkage appears self-evidently from the circumstances of the offence and the offender. This is not one of those cases. Some evidence, not necessarily elaborate, was needed to establish the connection.
>
> (Footnotes omitted.)

[62] In *Fane v R*, also referred to in *Zhang*, the Court concluded that a nexus between Mr Fane's cultural background and the offending had not been established, and consequently could not mitigate his culpability for the offending.[45] Mr Fane, after an argument with his father-in-law, fired a shotgun at close range, causing severe facial injuries. The incident arose in the immediate aftermath of a family argument.

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42 *R v Rakuraku* [2014] NZHC 3270 at [56]–[58].
43 At [58].
44 *Arona v R*, above n 40.
45 *Fane v R*, above n 40, at [46].

[63] The assessment of an appropriate allowance to recognise matters raised in s 27 report is a very fact specific exercise in each case as this Court emphasised in *Whittaker v R*.[46] In any event, the present case may be readily distinguished from both *Arona* and *Fane*. The cultural report prepared for Mr Carr described a disadvantaged life commencing when he was young. He grew up in poverty and started running away from home when his parents separated. As an adolescent, he associated with a criminal fraternity based on a North Shore "tinnie house" where others older than him and engaged in a life of crime were residing. He became affiliated to a youth gang, and subsequently to adult gangs. Peer group influences throughout his life were gang affiliated. The report writer identified a severe disconnection from Te Ao Māori, family violence, an incident of sexual abuse by a family member, an early exit from the education system and the absence of formal qualifications, affiliation with gangs, early entry to the criminal justice system, a first term of imprisonment at the age of 17 years, alcohol and drug abuse as well as methamphetamine addiction, and adult gang affiliation. The report also identified some potential for rehabilitation given Mr Carr's acknowledgment of the need for him to change in behaviour particularly for the sake of his children. As in *Moses v R*, we consider this merits some recognition.[47]

[64] Ms Hoskin contended that many of the matters raised in the s 27 report were too far in the past to be relevant to the conduct for which Mr Carr must now be held accountable. Mr Carr was 36 years of age when the offending began. While it is true that the report addresses aspects of Mr Carr's life when he was much younger, it is clear that his early life has contributed to the course his life subsequently took. Drug taking and early entry into the justice system continued to affect him. Recognition of a causal linkage between matters relied on in a s 27 report and the offending does not require the Court to be satisfied the matters are the proximate cause of the offending.

[65] We consider that the report gave a credible account of matters which might be considered to have impaired choice and diminished moral culpability so as to establish a causative contribution to offending, of the kind envisaged in *Zhang*. Where that is shown, we consider it must have an effect on the sentencing outcome. The focus of

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46 *Whittaker v R* [2020] NZCA 241 at [51].
47 *Moses v R* [2020] NZCA 296 at [70].

s 27 is on matters personal to the offender and while the gravity of the offending might temper the extent of any discount allowed for such considerations, that is a different proposition from saying there should be no allowance. We note in fairness to the Judge that this Court's judgment in *Zhang* had not been delivered when he sentenced the appellants.

[66] Nor is it appropriate to reason that because other people with disadvantaged backgrounds do not offend, legitimate references to deprivation affecting the life of an individual offender can be put on one side. We can agree with the Judge that "[e]xcessive discounts in this context" undermine what he described as the criminal law's precepts of human agency and choice.[48] Those observations obviously were intended to embrace s 7(1) of the Sentencing Act's reference to the purposes of sentencing, including holding offenders accountable, promoting a sense of responsibility and denouncing the conduct in which the offender was involved. But there is a clear difference between avoiding an excessive discount and deciding that there should be no discount at all. The latter conclusion might in its turn attract the criticism that the requirements of ss 7(1)(h) and 8(i) of the Sentencing Act had not been met. Section 7(1)(h) states that one of the explicit purposes of sentencing is to assist in the offender's rehabilitation and reintegration. Section 8(i) has been mentioned above.[49] When there is a link of the kind recognised in *Zhang* it would be wrong not to apply the provisions of the Act.

[67] We have concluded on the basis of the s 27 report that a discount would be appropriate in the circumstances of this case. In our judgment, an appropriate discount would be 15 per cent. Despite the significant matters canvassed in the report, the extent of the offending precludes a greater allowance.[50]

[68] This means that Mr Carr's appeal will be allowed, with appropriate adjustments to reflect the conclusions we have expressed above.

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48 High Court judgment, above n 1, at [61].

49 Above at [56].

50 Compare *Poi v R* [2020] NZCA 312 where two co-offenders were sentenced for one charge of aggravated robbery. The first offender, Mr Wilson, received a discount of 20 per cent for matters raised in the s 27 report. The second offender, Mr Poi, received a 25 per cent discount.

Anderson

[69] As we have noted earlier, Mr Anderson was Mr Carr's accomplice in the offending that occurred on 4 May 2018. The only issue pursued on appeal is the fact that as in the case of Mr Carr, the Judge declined to make any allowance in reduction of the sentence for matters covered in a s 27 report that had been produced about Mr Anderson. Mr Mansfield submitted that Mr Anderson should have had a discount of 20 per cent for the matters referred to in the cultural report. Ms Hoskin opposed that, for similar reasons to those that she advanced in respect of Mr Carr.

[70] We have read the s 27 report prepared about Mr Anderson. The author noted that Mr Anderson grew up in a two-parent household and in an environment that was stable. However, things changed when he went to intermediate school, and was expelled for being in possession of marijuana. The report identified cultural disconnectedness from his Cook Islands Māori heritage and noted his connection to his family and whānau weakened as his connection to his peer group strengthened. He engaged in theft from the age of 12 and joined the Crips gang at the age of 14. His conduct brought him before the Youth Court, and lead to him being placed in care and protection in youth justice residential facilities from the age of 15. He first went to prison in November 1998, aged 17. The author concluded that Mr Anderson's transition to adulthood had been impacted negatively by his peer group and community influences. Over the past 23 years, he has spent approximately 15 years in prison. The author of the report noted that during the years when he was in the community, he had been immersed primarily in a gang and criminal underworld and addicted to methamphetamine. The report also identified some prospects for rehabilitation, in that Mr Anderson was said to be aware of the need to make changes in his life, to include alcohol and drug treatment as part of a rehabilitative programme and to rebuild whānau relationships damaged by his methamphetamine addiction.

[71] As with Mr Carr, we consider that the s 27 report gave a credible account of matters which might be considered to have impaired choice and diminished moral culpability, with a resultant causative contribution to offending. We consider that a 15 per cent discount would appropriately recognise the corrosive effect of the anti-social relationships in which Mr Anderson has continually been involved.

This means that Mr Anderson's appeal will also be allowed, and an appropriate reduction allowed from the sentence.

Disposition

[72] As described above, the Judge took a global starting point for Mr Carr's offending of 18 years' imprisonment. To that he applied a 10 per cent discount for the guilty plea resulting in a term of 16 years' imprisonment designed to reflect the totality of the offending. The Judge then implemented those conclusions by fixing terms of 10 and six years' imprisonment respectively for the Glen Eden and Milford aggravated robberies, ordering that those terms be served cumulatively. He imposed appropriate terms in respect of all the other offending.

[73] For the reasons given above, our conclusion is that a global starting point of 14 years' imprisonment was appropriate. We have also concluded that there should be a discount of 15 per cent in respect of the matters referred to in the s 27 report. Adding this to the 10 per cent discount for the guilty plea results in an effective term of 10 years and six months' imprisonment.[51] The most straightforward way of implementing that outcome is to increase the sentence for the Glen Eden aggravated robbery to one of 10 years and six months' imprisonment, while directing that all sentences are to be served concurrently. This means that the sentence imposed in respect of the Glen Eden robbery, which is the most serious offence, will receive the penalty that is appropriate for the totality of the offending, in accordance with s 85(4)(a) of the Sentencing Act. In accordance with the Judge's decision we impose an MPI of five years and three months, being 50 per cent of the final sentence.

[74] In the case of Mr Anderson, he too is entitled to discounts totalling 25 per cent. In his case the global starting point was six years and six months' imprisonment, and it has not been suggested that be adjusted on appeal. But the combined discount of 25 per cent means that the sentence imposed on the lead offence (in his case, the Dominion Road robbery) must be reduced. The sentence will be adjusted to one of four years and 10 months' imprisonment, again on the basis contemplated for

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[51] We subtract the sum of the discounts from the starting point in accordance with the methodology summarised in *Moses v R*, above n 47.

concurrent sentences by s 85(4)(a) of the Act. As we have noted, because the Dominion Road robbery constitutes a stage-2 offence Mr Anderson must serve that sentence without parole.[52]

Result

Carr

[75] Mr Carr's appeal is allowed.

[76] The sentence of 10 years' imprisonment imposed in the High Court in respect of the Glen Eden aggravated robbery is quashed and a sentence of 10 years and six months' imprisonment is substituted. Mr Carr must serve an MPI of five years and three months.

[77] The order that the sentence for the Milford aggravated robbery be served cumulatively on the sentence for the Glen Eden aggravated robbery is quashed and it is directed that all sentences are to be served concurrently.

Anderson

[78] Mr Anderson's application for an extension of time to appeal is granted and the appeal is allowed.

[79] The sentence of five years and 10 months' imprisonment imposed in the High Court in respect of the Dominion Road robbery is quashed and a sentence of four years and 10 months' imprisonment is substituted.

[80] For the avoidance of doubt we confirm that the sentences imposed on Mr Anderson are to be served concurrently.

Solicitors:
Crown Law Office, Wellington for Respondent

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[52] Sentencing Act, s 86C(4).

Mr Anderson	
Charge	**Penalty**
Dominion Road robbery	5 years and 10 months
Queen Street robbery	18 months
Aggravated assault	18 months
Mr Carr	
Charge	**Penalty**
Glen Eden aggravated robbery	10 years
Demanding with menaces	3 years and 6 months
Milford aggravated robbery	*6 years cumulative on the Glen Eden aggravated robbery*
BMW aggravated robbery	3 years
Motel aggravated robbery	5 years and 5 months
Queen Street robbery	18 months
Dominion Road robbery	5 years and 10 months
Aggravated assault	18 months
Unlawful takings or use of vehicles (x 5)	18 months
Dishonest use of document (x 2)	3 months
Theft (x 2)	6 months
Minimum periods	
Glen Eden aggravated robbery	5 years
Milford aggravated robbery	*3 years cumulative on the Glen Eden aggravated robbery*