IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2023-404-305
[2023] NZHC 1967

BETWEEN	GEORGE MO'UNGA Appellant
AND	THE KING Respondent

Hearing: 10 July 2023

Appearances: E Priest for the Appellant
D Becker for the Respondent

Judgment: 26 July 2023

JUDGMENT OF BECROFT J
[As to appeal against sentence]

This judgment was delivered by me on 26 July 2023 at 4pm pursuant to r 11.5 of the High Court Rules

~~Registrar~~/Deputy Registrar

A. Tila-Muagututia
Deputy Registrar
High Court

Solicitors/Counsel:
Blackstone Chambers, Auckland
Meredith Connell, Auckland

The appeal

[1] Mr George Mo'unga appeals his sentence of two years and six months' imprisonment. The sentence was imposed on 9 June 2023 in the Auckland District Court by Judge Gibson in respect of two charges arising from an unprovoked, violent incident in central Auckland.[1]

[2] The charges are:

(a) with intent to injure, wounded a named person.[2]

(b) with intent to injure, assaulted an unknown person.[3]

[3] He has now served over one month of his prison sentence.

[4] The grounds for his appeal, strongly advanced by Ms Priest, are:

(a) a starting point of three years six months' imprisonment was too high;

(b) no uplift ought to have been imposed for his previous convictions and even the two-month uplift imposed in this respect was unsupportable;

(c) the Court ought to have given a full 25 per cent discount for Mr Mo'unga's early guilty plea and was in error in only allowing a 20 per cent reduction;

(d) the Court erred by not giving any reduction for Mr Mo'unga's genuine remorse, having recognised that it existed; and

(e) the Court failed to make an adjustment to the starting point to reflect "totality", given that Mr Mo'unga had been sentenced to imprisonment over a year earlier for unrelated offending — for which Mr Mo'unga was on bail at the time of this offence. That prison sentence, it is submitted, should have been taken into account in this sentencing resulting in a further downward adjustment.

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1 *R v Mo'unga* [2023] NZDC 11676 [Sentencing Notes].
2 Crimes Act 1961, s 188(2); maximum penalty seven years' imprisonment.
3 Section 193; maximum penalty three years' imprisonment.

[5] Ms Priest submits the compounding effect of all these errors means that the end sentence was manifestly excessive. If the Court reduces this sentence to two years imprisonment or less, she seeks leave for Mr Mo'unga to apply for home detention.

The facts

[6] Mr Mo'unga was part of a group of four men, in Quay Street, central Auckland (the Viaduct Basin) at 11.15 pm on 5 August 2022. What ensued was all captured on CCTV.

[7] He and his friends engaged with the victim and his four friends outside Gourmet Burger & Brew Kitchen. This exchange appeared pleasant and friendly. Mr Mo'unga and his friends shook hands with the victim's group and left. Some moments later they returned.

[8] Immediately Mr Mo'unga punched one of the victim's friends, an unknown complainant. That is the basis of the assault with intent to injure charge.

[9] One of Mr Mo'unga's associates then picked up a glass bottle and threw it at the same unknown complainant. As a result, the victim's friends got up and left the table.

[10] The victim, however, remained seated and appeared to try to calm everybody down. One of Mr Mo'unga's associates then punched the victim once to the head. Mr Mo'unga then punched the victim twice to the head.

[11] Another of Mr Mo'unga's associates then picked up a large wooden sandwich board and threw it at the victim's head who was still seated at the time. The sandwich board connected with the victim's head.

[12] Mr Mo'unga then dragged the victim from the table and onto the pavement, stomping on his head once.

[13] Another of Mr Mo'unga's associates pulled out a sawn-off rifle and fired one shot in the direction of members of the public. He then tucked the sawn-off rifle down the front of his pants. Mr Mo'unga and his three friends were located and arrested by the Police a short time later.

[14] I note that none of Mr Mo'unga's group were charged as parties to the offending of the other. They each faced charges in respect of their own actions.

Victim impact

[15] The victim, aged 55, suffered serious injuries including a cheek fracture, a jaw fracture, a fracture to the left orbital eye socket, a bilateral nose fracture and concussion. He was an innocent bystander, subjected to an unprovoked attack with gratuitous violence.

[16] He informs the Court, through his victim impact statement, that his physical recovery took several months. He notes that the attack has taken an enormous toll on him mentally. He reports that day-to-day living was difficult, he had trouble sleeping and had terrifying flashbacks about the incident. As it was a completely unprovoked attack, it has made him feel vulnerable when out-and-about and he now feels less safe in general, even when out with friends.

The District Court decision appealed against

[17] Judge Gibson remarked, accurately, that these facts could have justified a more serious charge but accepted that he must sentence Mr Mo'unga on the charge he actually faced. He noted several aggravating factors:

(a) Serious injuries to the victim. The Judge noted "[t]the level of injury to [the victim] was a significant matter and is a significant sentencing factor."[4]

(b) The attacks were to the victim's head, "principally by [Mr Mo'unga], but also by another offender".[5]

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4 Sentencing Notes, above n 1, at [7].
5 At [6].

(c) "[T]he fact that multiple attackers were involved in the general fracas".[6]

(d) That the 55-year-old victim "... was vulnerable, he was seated and was trying to calm things down" when after being punched by Mr Mo'unga and then "hit with a board in the head and [Mr Mo'unga] dragged him off his seat and then stomped on his head."[7]

(e) The Judge also did not accept Ms Priest's submission that this was a spontaneous assault. He noted that "[Mr Mo'unga] returned as a group to attack the complainant and the other men who were seated and drinking, and [Mr Mo'unga] took the lead in attacking the victim and one of his friends. So, this was clearly a premeditated attack".[8]

[18] The Judge observed there were a number of aggravating factors "certainly far more than three".[9] Therefore, the Judge concluded that the offending fell within band 3 as described in *R v Nuku.*[10] The Judge noted this band provides for sentences of between two years' imprisonment to the statutory maximum of seven years' imprisonment where there are three or more of the aggravating factors identified in *Nuku.*

[19] The Judge assessed the Crown's starting point [I infer in respect of the totality of Mr Mo'unga's offending] of three years' imprisonment as being too low, given that cases relied upon by the Crown did not have injuries as serious as here. Similarly, the Judge did not accept the defence suggestion of a starting point for the more serious offence of between 18 to 21 months' imprisonment with an uplift of three to six months for the less serious charge. The Judge felt that all the cases referred to by the defence, including *Mangi v R* and *Wynd v R*, as well as *Hetherington v Police,*[11] were not as serious as this offending.

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6 At [6].
7 At [6].
8 At [10].
9 At [7].
10 *R v Nuku* [2012] NZCA 584, [2013] 2 NZLR 39; and *R v Taueki* [2005] 3 NZLR 372 (CA).
11 *Mangi v R* [2018] NZHC 2732; *Wynd v R* [2013] NZHC 1270; and *Hetherington v Police* [2015] NZHC 1829.

[20] The Judge concluded that the starting point should be three years and six months' (42 months) imprisonment.

[21] He uplifted the sentence by a further two months given that Mr Mo'unga was on bail at the time of this offending on a firearm charge. He also uplifted the starting point by a further two months for his limited previous offending, but which did involve violence. The Judge increased the starting point to 46 months' imprisonment.

[22] The Judge gave what he regarded as a generous discount of 20 per cent for Mr Mo'unga's guilty plea, noting it was entered in February 2023 to a lesser charge than which he originally faced. I note that this is agreed to be an error — the guilty plea was, in fact, entered on 5 December 2022.

[23] The Judge specifically declined to allow a deduction for youth given that Mr Mo'unga was 24 at the time, and 25 at the time of sentencing. He noted that in all respects Mr Mo'unga was "really an adult ... and [his brain] certainly would have been developed enough for [him] to know that what [he] was doing not only was wrong, but to be able to fully appreciate [his] own culpability and the risk of excessive violence that [he] visited on the complainant."[12]

[24] However, the learned Judge was prepared to allow a 15 per cent reduction for all the reasons set out in the comprehensive report obtained under s 27 of the Sentencing Act 2002. It not only set out significant background factors, disadvantage and abuse, but also established "a suitable nexus to the offending".[13]

[25] The Judge noted that Mr Mo'unga had expressed his remorse and regret for what happened to the complainant in a clear and grammatically correct letter and accepted "that probably is correct".[14] But he gave no separate discount for remorse, as it was part of the discount for pleading guilty. The Judge acknowledged that Mr Mo'unga seemed to have come to some realisation that he was on the wrong path and if Mr Mo'unga continued on it, he would be facing longer and longer prison sentences which would only serve to alienate him from his family and young child.

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12 At [14].
13 At [15].
14 At [17].

[26] The Judge concluded by emphasising that this form of offending "is all too prevalent in Auckland at the moment and deterrent sentences are required which at this point, are really only prison sentences."[15] Applying the deductions to the 46-month starting point, the Judge sentenced Mr Mo'unga to two years and six months' imprisonment.

Did the Judge employ the right mathematical approach in calculating the final sentence?

[27] In this case, the Judge uplifted the 42-month starting point to one of 46 months. It was from that 46-month figure that he subtracted the various sentence deductions for specific personal mitigating factors. As explained below, this is not the approach directed by the Court of Appeal. In defence of the Judge, that is not an uncommon process employed in the District Court. It has the advantage of simplicity if only because in practice the uplift is invariably expressed in months (so there is an easily calculated higher sentence) and the deductions then expressed in percentages which are totalled into one global percentage reduction.

[28] The Court of Appeal in *Moses v R*, set out the following as the proper approach:[16]

> [46] A two-step methodology should be used:
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> (a) the first step, following *Taueki*, calculates the *adjusted starting point*, incorporating aggravating and mitigating features of the offence;
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> (b) the second step incorporates all aggravating and mitigating factors personal to the offender, together with any guilty plea discount, which should be calculated as a percentage of the adjusted starting point.

[29] In the next paragraph the Court of Appeal goes on to stress that "the court fixes all second-step uplifts and discounts by reference to the adjusted starting point under this methodology".[17] So, what the Judge should have done here, according to *Moses,*

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15 At [19].
16 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 (emphasis added).
17 At [47].

was to subtract the deductions from the 42-month starting point, not the 46-month figure, and then add the four-month uplift.[18]

[30] It might be that the use of the words "adjusted starting point" in *Moses* is causing some confusion. This is a relatively new phrase. In some cases, clearly there has been a (mistaken) understanding that the "adjusted starting point" results from the uplifts for personal aggravating factors such as offending while on bail or previous convictions being added to the starting point. In my experience, it is this very misunderstanding which appears to have contributed to the widespread District Court practice of subtracting discounts for personal mitigating factors from the "starting point" of the sentence *plus* any uplifts for personal aggravating factors. I note that there was another appeal before me on the same day that I heard the present appeal, where this identical issue arose.

[31] A possible reason for this confusion lies in the use of the term "adjusted starting point". In *Moses,* the "adjusted starting point" is that which results after an analysis of all the circumstances of the case — including the aggravating and mitigating factors of the offending. That assessment is often guided by the existence of any relevant guideline judgments or comparative case law. In essence, what *Moses* terms the "adjusted starting point", previous cases have referred to as the "starting point". For instance, in *R v Mako* the starting point is explained this way:[19]

> 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. Once the seriousness of the particular combination of features is assessed and a *starting point* reached, it will be necessary to consider whether overall the crime is aggravated or mitigated by the offender's particular personal circumstances such that the sentence to be imposed should be higher or lower than the *starting point*. We emphasise, to dispel any doubt, that in this context a *starting point* is the sentence considered appropriate for the particular offending (the combination of features) for an adult offender after a defended trial

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18 This methodology was confirmed in *Gray v R* [2020] NZCA 548 at [31].

19 *R v Mako* [2000] 2 NZLR 170 (CA) at [34] (emphasis added).

[32] Similarly, in *R v Taueki* the Court defined the starting point in the following way:[20]

> [28] Setting the appropriate *starting point* for sentencing will involve an assessment of a number of features which add to or reduce the seriousness of the conduct and the criminality involved. As this Court noted in *Mako* at [34], it is the particular combination of those variable features which requires assessment for sentencing in each case. And at [35], the Court went on to say:
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> > [T]he task of placing the particular combination of features comprising an offence in its proper relative position on the scale of seriousness is a matter of judgment calling for the careful exercise of the sentencing discretion. Features of the offending requiring assessment cannot be exhaustively listed.

[33] Despite the Court of Appeal in *Moses* attempting to provide the following clarification about the meaning of an adjusted starting point, it seems some misunderstandings have arisen:[21]

> [6] In *Taueki* the Court accordingly established a two-step methodology founded on the idea of a *starting point*. At the first step the sentencing judge establishes a provisional sentence or starting point based on the circumstances of the offending. The Court defined the starting point as the sentence considered appropriate for the particular offending by an adult offender after a defended trial. We use the term "adjusted starting point" to signify that it incorporates all aggravating and mitigating features of the offending. At the second step the judge tailors the adjusted starting point to the offender, incorporating their personal aggravating and mitigating circumstances to reach the appropriate end sentence. By separating the circumstances of the offence from those of the offender the methodology permits comparison among starting points for similar offending.

[34] Another aspect of the apparent misunderstanding is that the term "adjusted starting point" perhaps suggests the existence of a prior starting point that needs to be *adjusted*. For most offences the adjusted starting point will simply be the "starting point" established by an analysis of all the aggravating and mitigating factors of the offence. So, it is perhaps wrongly assumed that the "adjustment" is the result of applying the uplifts for aggravating personal factors.

[35] I have taken some time to set out the proceeding explanation because I consider that there is clearly some misunderstanding about the application of the *Moses* methodology. There is no criticism of the District Court Judge in all of this. Where

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20 *R v Taueki*, above n 10, at [28] (emphasis added).

21 *Moses v R*, above n 16 (footnotes omitted, emphasis added).

the "adjusted starting point" is under three to four years, the end sentence will not differ greatly — as was the case here. But, as will become clear, the application of the correct methodology will have a significant effect on the final sentence of some defendants.

[36] Leaving aside the reasons why *Moses* is not always being followed correctly, the short point is that because it is authority from the Court of Appeal it must be followed in lower courts. And there is a logic to the methodology — it ensures that defendants who receive uplifts for personal aggravating factors do not illegitimately obtain a benefit by that uplift being reduced by the application of a discount to it.

[37] With respect, the proper methodology in this case was to subtract the 35 per cent reduction the Judge allowed from the 42-month figure, not from the uplifted 46-month figure. Had the Court done so, the sentence would have been calculated as follows:

(a) The start point of 42 months would be reduced by 35 per cent to reflect the discounts provided to Mr Mo'unga. 35 per cent of 42 months is 14.7 months, which I would round to 15 months for the benefit of the defendant. Subtracting that 15 months from the 42 month figure results in 27 months.

(b) The total 4-month uplift should then have been applied to the resulting 27-month sentence.

(c) An end sentence of 31 months imprisonment, or two years and seven months' imprisonment, should have been reached. This is a month longer than the sentence of two years and six months imprisonment that was calculated by the Judge.

[38] I observe that alternatively the four-month uplift could have been added to the 42 months to make 46 months. Then subtracting the 15-month discount from that 46-month figure would still result in the same 31-month sentence. Whichever of the two mathematical approaches is taken, the end result will always be the same. What matters is that the reduction for personal mitigating factors is calculated as a

percentage of the "adjusted starting point" (here the 42-months) — not as a percentage of the uplifted 46-month figure. I also observe that the *Moses* methodology (if there are uplifts) will always result in a longer final sentence being reached than the approach used by the District Court Judge here, and often in the District Court. That is because the percentage reductions for personal mitigating factors would be applied to a larger figure. And the more so as the sentence length increases.

[39] In any event, the Crown is not seeking to have this Court "correct" and increase the sentence. However, if I conclude there are errors in some of the component parts of this sentence, resulting in increased deductions, I must follow the methodology set out in *Moses* to calculate any new sentence.

Approach on appeal

[40] Section 250(2) of the Criminal Procedure Act 2011 states that a court must allow a sentence appeal if satisfied that:

(a) for any reason, there is an error in the sentence imposed on conviction; and

(b) a different sentence should be imposed.

[41] In any other case, the Court must dismiss the appeal.[22]

[42] As has been emphasised by the Court of Appeal, the proper approach on a sentence appeal is as follows:[23]

> [14] This Court must allow the appeal if it is satisfied that for any reason there was an error in the sentence imposed on conviction and a different sentence should be imposed. The focus is on the sentence imposed, rather than the process by which it is reached. The Court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles. To this end the concept of a "manifestly excessive" sentence is well-engrained and there is no reason not to use it.

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22 Criminal Procedure Act 2011, s 250(3).

23 *Campbell v R* [2022] NZCA 579 (footnotes omitted).

[43] The meaning of manifestly excessive, however, is not conceptually vague and "instinctive" and should not be considered in a vacuum. It will involve close analysis of the component parts of the sentencing methodology undertaken by the sentencing judge. The Court of Appeal in *Tutakangahau v R* noted:[24]

> It is simply a means of examining the significance of the error to decide whether a different sentence should be imposed. The claim that a sentence is manifestly excessive (or inadequate) is inevitably premised on the contention of a prior error which often will involve questions such as whether the starting point is too high given the facts, or of incorrect discounts or as to a parity with co-offenders.

[44] Generally, there will be an error if the sentence is manifestly excessive, or involved an error in law or principle, is plainly inappropriate, or proceeded on a materially wrong or mistaken understanding of the facts.

[45] An appellant must point to such an error, either intrinsic to the Judge's reasoning, or as a result of additional material submitted on the appeal, which vitiates the sentencing decision.[25] I remind myself that because an appeal focusses on the correction of error, it is not "a second shot at sentencing".[26]

[46] Home detention is a focus of this appeal. Home detention is a sentence that is an alternative to a short-term sentence of imprisonment.[27] The Court must be satisfied that the purposes for which that sentence is being imposed cannot be achieved by a less restrictive sentence.[28]

[47] As to the challenges facing a sentencing Judge in deciding whether to impose a prison sentence, or a sentence of home detention, the Court of Appeal, has observed that:[29]

> ... the judge must make a considered and principled choice between the two forms of sentence, recognising that both serve the principles of denunciation and deterrence, and identifying which of them better qualifies as the least restrictive sentence to impose taking into account all the purposes of sentencing.

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24 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32].
25 *R v Shipton* [2007] 2 NZLR 218 (CA); and *Te Aho v R* [2013] NZCA 47 at [30].
26 *Polyanszky v R* [2011] NZCA 4 at [17].
27 Sentencing Act 2002, s 15A(l)(b).
28 Section 15A(l)(a).
29 *Fairbrother v R* [2013] NZCA 340 at [30]–[31] (footnote omitted).

> [31] Sometimes, as this Court said in *R v D* (CA 253/2008), that can prove a very difficult exercise of judgment; and "the closer one gets to the dividing line, the more difficult it becomes to articulate reasons for preferring one approach to the other"...

Was there an error in fixing the "adjusted starting point"?

The aggravating features

[48] Ms Priest, in her comprehensive submissions, noted that in cases such as this, each aggravating feature and their extent must be carefully analysed. In her view, the Judge took a "too broad brush approach" by simply listing the aggravating features. Ms Priest's submissions involved an extremely detailed analysis of these factors and what she submitted were the Judge's errors in failing to carry out that analysis himself.

[49] With respect to Ms Priest, it seems to me that the sentencing Judge for at least some of the aggravating features, such as the nature and seriousness of the injuries, the vulnerability of the victim and the partially premeditated nature of the offending, provided more detail than Ms Priest was prepared to concede. In any case, in the context of a busy District Court sentencing list, Ms Priest criticism borders on a counsel of perfection.

Should the attack to the head factor and the seriousness of the injuries be collapsed into one aggravating factor?

[50] That being said I accept the Court must be careful to recognise the potential overlap between some aggravating features. For instance, in this case, the aggravating feature of an attack to the head and the aggravating factor of the seriousness of the injuries do, to some extent, overlap, given that injuries that flow from an attack to the head will often be serious. In fact, Ms Priest submitted that here they should be collapsed into one aggravating factor.

[51] In this case, however, I accept the Crown's submission that there was not such significant overlap between those two factors, that would require them to be collapsed into one. The attack to the head that included two punches by Mr Mo'unga and a stomp to the head while the victim was lying on the ground, is properly regarded as a

separate aggravating factor. Equally, the injuries are serious and, while inherent in the ingredients of the charge, are significant and deserving of separate recognition in their own right. The Judge was correct to see them as separate aggravating features.

Victim vulnerability?

[52] Regarding vulnerability, I accept this aggravating feature usually relates to a victim's intrinsic vulnerability because of his/her age, disability, or other medical features etc. Ms Priest emphasised this was not the case here, although she accepted that a victim could be rendered vulnerable by the actions of an offender.

[53] I agree with the Crown that in this case there was a small degree of vulnerability right from the start of the attack. This was because, just as the Judge mentioned, the victim was seated, and remained seated, at a table while he was attempting to de-escalate the situation, with Mr Mo'unga and his colleagues standing close by him. I agree with Mr Becker "that a person who is seated, by virtue of their very position, is less capable of defending themselves and is therefore more vulnerable to attack". That vulnerability increased when Mr Mo'unga dragged him from the table onto the ground.

[54] I accept the Crown's submission that it is proper to consider the victim here as being vulnerable, at least to a moderate degree. This was because he was disabled (to some extent) by Mr Mo'unga's punches to his head and then dragged to the ground where he was virtually rendered defenceless and exposed to whatever Mr Mo'unga wanted to do to him.

[55] Despite Ms Priest's earnest submissions to the contrary, I am of the view that the victim being rendered vulnerable in this case is properly to be regarded as an aggravating feature in its own right, though not to a high degree.

Spontaneous or pre-meditated offending?

[56] Similarly, it is not appropriate, in my view, to call Mr Mo'unga's offending "spontaneous". On the other hand, it cannot be said there was significant pre-planning

and premeditation. But this is not a case where punches flew from the start. Mr Mo'unga and his group had an initial friendly exchange with the victim and his group. They all shook hands. Moments later they came back and Mr Mo'unga and his group immediately engaged in violence.

[57] I agree with Mr Becker that an inference can safely be drawn that Mr Mo'unga's group must have talked to each other about what would occur. There must be an element of premeditation in this offending — in contrast to a situation where violence erupts at the very first meeting. The premeditation may be to a low to moderate degree, but premeditation there is, certainly justifying recognition as a separate aggravating feature.

Multiple attackers

[58] This was also an attack by multiple offenders, which stands as a separate aggravating feature. The Crown accepts that Mr Mo'unga and his associates were not charged as parties in respect of each other's offending. Nevertheless, I agree with Mr Becker that it would be artificial to describe what happened as a series of separate, independent, or "one-off" assaults. Mr Mo'unga's actions took place as part of a continuous incident. Equally, it would be artificial to say he was not aware of his associate throwing a sandwich board at the victim, nor that he would have been unaware of an associate punching the victim to the head before Mr Mo'unga attacked him.

[59] Ms Priest submitted that it was inappropriate for the Judge to have described this as a "pack attack" — something that it was alleged the sentencing Judge had said but is not recorded in the sentencing notes. I am not sure I agree with Ms Priest's submission on this point. Viewed objectively, I consider that the attack could be described as such. The crown's view is that this was self-evidently a "pack attack" and is correctly described as such.

[60] Leaving that description to one side, in principle I cannot see why, just because Mr Mo'unga and his group were not charged as parties to each other's offending, the aggravating feature of there being multiple attackers at the same time, cannot be relied

upon. Certainly, it means that Mr Mo'unga cannot be sentenced on the basis of the actions of others — and this is clear. And the Judge did not do so. He simply, and in my view correctly, identified that there were multiple attackers involved. It is clear that Mr Mo'unga must have known this and been aware of what his associates were separately doing. In the Crown's view, with which I agree, the assaults by the different men were continuous, three of them took turns in assaulting the victim and this was clearly an attack on a lone individual by a group of people.

Conclusion as to aggravating factors

[61] In respect of this part of the argument I accept that there were five aggravating features as listed by the Judge. Two of them, particularly the attack to the head and the serious nature of the injuries and their extent are separate aggravating features that should not be collapsed into one. There is also the reality of there being multiple attackers. There is also victim vulnerability, as I have described, and an element of premeditation.

The correct band and starting point

[62] In short, I accept that whether the attack on this victim is properly characterised as being at the upper end of band 2, set out in *R v Nuku*, which justifies an up to three-year starting point (as Ms Priest contends) or at the lower end of band 3, which envisages a two to seven year starting point (as the Crown supports) does not significantly affect the sentence. That is because either band would justify a three-year starting point for the attack on the named victim. Given the number and seriousness of the aggravating features, the Judge did not err in concluding that this serious attack fell at the lower level of band 3. I agree with him.

[63] Ms Priest was clear that based on the three cases she relied upon — *Mangi*, *Wynd*, and *Hetherington* — which she regarded as "like-for-like", the sentence should have been in the region of two years' imprisonment.[30] In particular, she referred to the case of *Wynd* which was a serious, vicious, prolonged attack leaving the victim

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30 Above n 11.

unconscious with a scalp wound necessitating seven stitches. A bottle was also used.[31] There, a starting point of two years nine months (which could have been higher) was upheld on appeal. In Ms Priest's view that was a more serious case then here.

[64] The Judge specifically addressed this issue, and, in his view the current offending was more serious, given the nature and extent of the injuries, the involvement of multiple attackers, and a vulnerable victim. That is a matter of judgment. I do not think it can be said he is in error in that assessment.

[65] When pressed, Ms Priest reluctantly accepted that two years and six months' imprisonment would have been at the top end of an appropriate starting point for the wounding charge by itself. She also accepted that up to a further six months could have been imposed for the additional assault charge. In her view, anything over a three-year sentence, in totality, was manifestly excessive.

[66] After some consideration, I conclude that in these circumstances, a three year and six-month global starting point is justified. It may be firm, but it is within the permitted range that the cases allow.

Was the uplift for previous convictions justified?

[67] Ms Priest does not dispute the two-month uplift for offending while on bail. It is unobjectionable.

[68] During the submissions I thought that Ms Priest was on stronger ground in respect of her argument against the further two-month uplift for Mr Mo'unga's previous offending, and that was my indication to her.

[69] That offending, now about four years old, consists of six offences that are all family violence related. There is a 2018 conviction for male assaults female; a 2019 conviction for assaulting a person in a family relationship; and 2019 convictions for offending on the same day of assault on a person in a family relationship, threatening behaviour involving a weapon, and threatening language. Mr Mo'unga was sentenced

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[31] *Wynd v R*, above n 11.

at the same time for all of this offending to 18 months intensive supervision — which he breached within about six months.

[70] There is a danger with any uplift such as this, for prior offending that resulted in a non-custodial sentence, that it effectively converts that sentence to one of imprisonment and that it might be considered as sentencing a person twice for the same offence. This was Ms Priest's concern. In her view, the uplift was disproportionate and excessive, and it was not relevant nor relative to the previous convictions.

[71] The Judge noted Mr Mo'unga's limited criminal history, but he commented that it involved violence that justified an uplift. I accept the Crown's view that this two-month uplift was not manifestly excessive given that most of Mr Mo'unga's previous convictions are for family violence which is taken seriously and that this offending represents a clear escalation that creates a need for a greater deterrent response. The Judge made clear that the uplift was necessary in response to the relevant aspects of Mr Mo'unga's conviction history. This uplift can also not be said to be disproportionate. A sentence of intensive supervision is a serious sentence at the same level as community detention and below only home detention and imprisonment,[32] and that in these circumstances an uplift on an end point of prison for escalating violence, now in public, is not disproportionate.

[72] On reflection, I do not think the Judge was in error in his approach to the uplift. The uplift was modest. Some judges may not have imposed it. But others might have done. That doesn't mean Judge Gibson was in error in so doing. It is a matter of legitimate judicial discretion. I have reached the conclusion that I would be fiddling or tinkering if I interfered.

[73] It is also worth noting what happened when Mr Mo'unga was sentenced about three weeks after this offending to 18 months imprisonment for his role in the firearm discharge offence — for which he was on bail at the time of this offence. The sentencing judge uplifted the starting point there by three months taking into account the very same previous family violence related offences as here, together with the fact

[32] See s10A of the Sentencing Act.

of Mr Mo'unga offending while on a sentence of intensive supervision. On appeal of that sentence, where Ms Priest advanced the same arguments as here, the uplift was regarded as perfectly appropriate.[33] In terms of consistency of appeal decisions, it would be inappropriate to interfere with the even shorter uplift in the present appeal.

[74] I also observe that at the time of this offending, Mr Mo'unga must have already pleaded guilty to the firearm charge and been convicted, given the sentencing was only three weeks later. (Obtaining the requisite reports and preparing for sentencing would have taken longer than those three weeks). So, the current offending almost certainly took place in the context of Mr Mo'unga having been recently convicted of a serious firearm charge. But I place no weight on that factor.

Should there have been a 25 per cent reduction for the guilty plea?

[75] Mr Mo'unga initially faced a wounding with intent to cause grievous bodily harm charge carrying a 14-year maximum. At an early stage in the progression of this case in the District Court, Ms Priest indicated that there were significant difficulties with disclosure. In her case management memorandum to the Court, she made clear that late disclosure was preventing the resolution of the case. In that memorandum, she sought to preserve the 25 per cent discount until the material could be analysed.

[76] In fact, soon after disclosure was received, the Crown reduced the charge to the present charge to which Mr Mo'unga pleaded guilty on the 5 December 2022 not, as the Judge mistakenly believed, some time in February 2023.

[77] The Judge proceeded on the basis that there was a six-month delay in the guilty plea, although noting it was entered to a lesser charge than that with which Mr Mo'unga was originally charged. The Judge stressed that normally Mr Mo'unga would not be entitled to seek a 25 per cent discount for a plea entered that late and this would not have been a difficult charge to prove because it was on CCTV. But he did allow what he regarded as a generous discount of 20 per cent.

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[33] See *Mo'unga v Police* [2022] NZHC 3013.

[78] In fact, if Mr Mo'unga had pleaded guilty earlier as suggested by the Judge, it would have been to a charge carrying a 14-year maximum with significantly longer imprisonment at stake. In fairness to Mr Mo'unga, he was entitled to challenge the appropriateness of the initial charge, particularly the mens rea element, rather than plead guilty to it. This is exactly what Ms Priest endeavoured to do, in the end successfully. As soon as the charge was reduced, appropriately in Ms Priest's view, the guilty plea was entered.

[79] The extent of any guilty plea discount will depend on a close examination of the circumstances. Here, I agree with Ms Priest that it is not fair to penalise Mr Mo'unga for failing to enter a guilty plea for a much more serious charge — which with respect, would not necessarily have been proved by the CCTV footage. Amongst other things, the charge depended on the correct level of intent, an issue on which the CCTV footage could not have been conclusive.

[80] The Crown accepted that in these circumstances, a full 25 per cent discount would be justified. The Crown suggested, but faintly, that Mr Mo'unga could have pleaded guilty to the less serious second charge, but in argument accepted that the charges should fairly be considered as being a "job lot". I concluded that the Judge was in error in the circumstances in not allowing a full 25 per cent discount.

[81] The Crown notes that it would have been preferable, of course, if Ms Priest had expressly written to the Crown indicating Mr Mo'unga's willingness to plead to the charges as now laid. In the end, I do not think that should be held against the defence, particularly given the agreed problems with full disclosure.

Should there have been a separate reduction for remorse?

[82] It appears that Judge Gibson accepted that Mr Mo'unga displayed genuine remorse in his letter to the Court but, nevertheless, decided not to give any reduction for it. He said that the remorse "is reflected, of course, in the discount you get for pleading guilty."[34]

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34 Sentencing Notes, above n 1, at [17].

[83] Remorse is a quite separate mitigating factor set out in the Sentencing Act, and it is distinct from the discount provided to recognise a guilty plea.

[84] The Crown is right to suggest that in many cases simple remorse, expressed by way of letter will be subsumed in the guilty plea reduction. The remorse must be something more than the bare acceptance of responsibility that is inherent in the plea. It is appropriate that the courts look for tangible and demonstrable evidence of remorse.

[85] In *Hessell v R,* the Supreme Court clarified that:[35]

> Remorse is not necessarily shown simply by pleading guilty. Sentencing judges are very much aware that remorse may well be no more than self-pity of an accused for his or her predicament and will properly be sceptical about unsubstantiated claims that an offender is genuinely remorseful. But a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse. Where remorse is shown by the defendant in such a way, sentencing credit should properly be given separately from that for the plea.

[86] Similarly, the Court of Appeal explained in *Moses v R* that:[36]

> Remorse is a personal mitigating factor that may justify a discount separately from any guilty plea discount. Remorse is a question of fact and judgement. The defendant bears the onus of showing that it is genuine, meaning that it qualifies as remorse and he or she actually experiences it. Remorse need not be extraordinary to earn a discount, but it does require something more than the bare acceptance of responsibility inherent in the plea. Courts look for tangible evidence, such as engagement in restorative justice processes.

[87] Here, there is a long and detailed letter that is consistent with a sincerely remorseful attitude. Mr Mo'unga's cultural report also indicates that he was willing to participate in a restorative justice process that he understood would take place. The report records his willingness to apologise to the victim of his offending and to express his apologies and regret for his actions. The report notes that Mr Mo'unga wanted to emphasise to the victim that he did not deserve it and that "no one should feel they will be attacked when they are going out to have a drink".

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35 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].
36 *Moses v R*, above n 16, at [24] (footnote omitted).

[88] Mr Mo'unga has also completed five separate courses while on remand, which is consistent with remorse for his offending. Certificates of completion have been provided to the Court.

[89] All of these factors, in my view, justify a separate five per cent discount for remorse. With great respect the Judge erred in not providing such a reduction.

Should there have been a totality discount?

[90] Ms Priest's argument here needs some unpacking. About 13 months before the present offending, Mr Mo'unga was involved in an incident along with three others involving the discharge of a firearm, where two bullets were fired from a car into a domestic dwelling house in Raetihi. Four adults and two young children were sleeping in the house. There is no evidence that it was Mr Mo'unga who fired the shots but he, along with others, nevertheless pleaded guilty to charge of discharging a firearm within intent to intimidate the occupants of a dwelling house. He was on bail for that charge (and as I observed previously had likely already pleaded guilty to it) at the time of the present offending. He was sentenced to 18 months' imprisonment in respect of that offending — 18 days after having committed these two offences. The sentence was upheld on appeal.[37] On that sentence, Mr Mo'unga was automatically released from prison after nine months, about three weeks or so before his sentencing for this offending.

[91] Ms Priest's submission is that the present charges, which were otherwise unrelated to the firearms charge, are nonetheless linked to it because they occurred while he was on bail for the firearm charge. In Ms Priest's view, the Judge should have stepped back and considered what should have been the appropriate total sentence in respect of both the firearm charge and these charges, on the basis that they could and should have been sentenced at the same time.

[92] Several things can be said against that submission.

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[37] See *Mo'unga v Police*, above n 33.

(a) First, the current offences and the firearm charge are utterly unrelated and unconnected with the firearm offence that took place 13 months earlier.

(b) Second, Mr Mo'unga and his then counsel, not Ms Priest, elected to have the firearms charge dealt with at a sentencing on 23 August 2022 without any request for an adjournment to enable it to be resolved along with these charges.

(c) Third, the sentence for the firearm charge had been completed nearly a month before the sentencing for this offending, albeit that this sentencing was slightly delayed.

[93] Ms Priest relied on the case of *Haywood v R* in support of her "totality" argument.[38] That case, however, is quite different. It involved a sentence for unrelated charges of aggravated burglary and assault which were being imposed cumulatively on an existing sentence still being served relating to the supply of methamphetamine. Here, the firearm sentence had been well and truly served and completed and there was no question of any cumulative sentence being imposed on it.

[94] Nevertheless, in reliance on *R v Fissenden,* Ms Priest submitted that where there are successive sentencing hearings for unrelated events, the fact that the first sentence had been served by the time of the second sentence, is not a bar for the application of the totality principle.[39] When that case was located after Ms Priest mentioned it during argument, and produced to the Court, it related to a quite different factual situation from this. In that case there had been historic sexual offending in the early 1980s which only came to light in mid 1990s. However, there had been similar sexual offending in the early 1980s, apparently after the offending which had more recently come to light, to which the defendant confessed at the time and was then sentenced. Upon sentencing about 12–15 years later, for the similar sexual offending but which had actually occurred first in time, there was a legitimate question as to what would have been the sentence if the defendant had been sentenced for both offences at the same time. That again, is quite a different situation from here.

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38 *Haywood v R* [2015] NZCA 551.
39 *R v Fissenden* CA 364/95, 21 February 1996.

[95] On close analysis of the present circumstances, I do not think it is appropriate for the totality principle to be engaged. Indeed, I am told that when Judge Gibson was asked to do so, he refused the request, although this is not mentioned in the sentencing remarks.

[96] The practical hurdles facing a sentencing Judge in a situation such as this, if Ms Priest's submission is to be accepted, are significant. They include the need to have access to the original summary of facts, sentencing notes, pre-sentence reports and any other relevant material. In busy sentencing courts, that adds considerably to the sentencing process. That, of course, is not a decisive argument because there may be situations when a Judge has an obligation to take totality principles into account.

[97] In my view, this is not one of those cases. This is primarily because the earlier offending was quite unrelated, it occurred over a year earlier, it was separately sentenced with the consent of the defendant, and the sentence had already been served at the time of the current offending. In that respect, the case is on all fours with *Skipper v R*, which was referred to by Counsel late in their arguments before the Court where the "totality" argument was rejected.[40]

[98] I accept that *Skipper* makes clear that the totality principle is not limited to sentencing on a single occasion for multiple offences. Also, that it has been held to apply where there are successive but proximate sentencings for unrelated events.[41] The Court of Appeal also noted that:

> [35] We accept too, that in principle the mere fact that the first sentence has been served by the time of the second sentencing is of itself an automatic bar to application of the totality principle, although it may tell against it.

[99] But in my view, *Skipper,* given the factual similarity to this case, puts the final nail into the coffin of the argument requiring Judge Gibson to have invoked the totality principle.

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40 *Skipper v R* [2011] NZCA 250.
41 Above n 40.

Conclusion

[100] The "adjusted starting point" of 42 months' imprisonment stands.

[101] The two-month uplift for offending while on bail stands. So too does the two-month uplift for Mr Mo'unga's previous convictions for violent offending.

[102] However, there was an error in failing to provide the full 25 per cent reduction for the early guilty plea.

[103] The 15 per cent reduction for all the factors emerging in the cultural report stands.

[104] There was also an error in failing to provide a separate discount for remorse. A discrete five per cent reduction is granted to recognise Mr Mo'unga's evident remorse.

[105] On that basis, following the approach in *Moses,* the total deductions from the 42-month starting point, should have been 45 per cent. That is total reduction of 18.9 months.

[106] From the 42-month starting point, when 18.9 months is deducted, the result is 23.1 months. I would round that down to 23 months. I then apply the four-month uplift for offending while on bail and previous convictions. That results in an end sentence of 27 months, or two years three months' imprisonment.

[107] By a fine margin, I conclude the original sentence must be considered to be manifestly excessive. I also conclude that a different sentence should be imposed, of two years three months' imprisonment. A three-month difference from the original sentence of 30 months is not tinkering and will be significant for Mr Mo'unga.

A different result if the District Court methodology is used

[108] For the sake of transparency, I need to say that if I had used the methodology employed by the Judge Gibson in this case, the end sentence would have been

decisively more advantageous to Mr Mo'unga because it would have opened the door to consideration of home detention.

[109] The 45 per cent total deductions would be from the 46-month total starting point (the starting point plus the uplift) which would be 20.7 months. When that is deducted from the 46 months, the result is 25.3 months which I would round down to 25 months, or two years one month imprisonment.

[110] At that stage, it would be unduly mechanistic, overly mathematical, and unfair not to impose a two-year sentence.[42] If the incorrect methodology had been used, then such a sentence could have been justified as being within the permissible sentencing range for the end point on this appeal. On that basis, having concluded that there was an error in the original sentence, I would have concluded that a two-year sentence should be imposed instead.

Home detention?

[111] The whole point of Ms Priest's argument was to achieve a new end sentence of two years or less which would allow for consideration of home detention. Even if this appeal had resulted in such a sentence, I need to be clear that I would not have granted leave to apply for home detention for the following reasons.

[112] The circumstances of this offending and the aggravating features are troubling. Serious harm was caused to the victim. This was an unprovoked attack, involving gratuitous violence on an innocent member of the public apparently enjoying a social occasion with his friends in the Viaduct Basin. And it was an incident that he clearly tried to de-escalate and defuse. Instead, he suffered very serious injuries with long-standing psychological effects.

[113] In these circumstances, I would not have considered it appropriate to grant leave to apply for home detention. I accept that at age 25, given Mr Mo'unga's background, home detention may have offered better opportunities for his rehabilitation. That, however, is outweighed in my view, by the need to ensure there

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[42] See *Heemi v R* [2022] NZHC 2141 at [61]–[64] for further discussion on this point.

is appropriate denunciation, deterrence and accountability for this offending. Of course, those purposes can, in many cases, be better served by home detention. However, in this case I would have concluded that the least restrictive sentence consistent with a balanced assessment of the principles and purposes of sentencing would be one of imprisonment.

[114] It is a crystal-clear inference from the Judge's sentencing notes that in his view, "given the prevalence of violent street crime in Auckland at the moment" as he said, that a deterrent sentence requiring fulltime imprisonment was necessary. By inference, he would not have imposed home detention given the need for denunciation and deterrence and to hold the defendant accountable. He meant that these purposes and principles of sentencing could only be served by the least restrictive sentence in the circumstances, which was one of imprisonment — I would have entirely agreed.

[115] And that is without even taking into account Mr Mounga's earlier involvement in the firing of two shots from a handgun into a dwelling house for which he was sentenced (just after this offending) to 18 months' imprisonment. Surely that would have ruled out home detention beyond any shadow of a doubt.

Result

[116] The appeal is successful to the extent that the original sentence of two years six months' imprisonment is quashed and replaced by a sentence of two years three months' imprisonment.

Becroft J