

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2019-090-5558
[2021] NZHC 2880**

THE QUEEN

v

MAHIA TAMIEFUNA

Hearing: 22 October 2021
Appearances: D A McGivern for Crown
S J Gray for Defendant
Judgment: 22 October 2021

SENTENCE OF PAUL DAVISON J

Solicitors:
Crown Solicitor, Auckland

Introduction

[1] Mahia Tamiefuna, on 30 July 2021 at the conclusion of your Judge-alone trial, I found you guilty and convicted you of the aggravated robbery of Mr Jung Rae Lim committed on 2 November 2019. You now appear before the Court this morning to be sentenced for that aggravated robbery.¹

[2] At your trial there was no dispute about the events of the robbery and what the two offenders who entered Mr Lim's house did and what they took away with them. The only issue was whether the Crown could prove that you were one of the two men involved. By my verdict I was satisfied beyond reasonable doubt that you were one of the two men involved in the robbery and I accordingly found you guilty.

Your offending

[3] I shall first address the circumstances of your offending.

[4] Just after 6.00 am on the morning of 2 November 2019 you and your co-offender arrived by car together outside Mr Lim's residential address in Swanson. You and your co-offender then drove down the driveway to his house at the end of what was a shared driveway. Mr Lim was asleep at the time. You both entered his house through a kitchen window. Once inside, you rummaged through an unoccupied bedroom before entering Mr Lim's bedroom which woke him up. You demanded that he hand over the keys to his Hyundai car and various other items including cash and a mobile phone. In the course of making these demands, one of you struck Mr Lim on his shoulder with an open hand, to make him hurry up and comply with your demands.

[5] When you were unsuccessful in locating Mr Lim's wallet you and your co-offender departed, taking his car keys, mobile phone and digital camera. One of you drove away in the vehicle you had arrived in, and the other in Mr Lim's Hyundai, which is valued at \$47,000. Your arrival and departure in the driveway was captured and recorded on a high definition CCTV camera which recorded movement of anyone or any vehicle passing along the driveway.

¹ Crimes Act 1961, s 235(b), maximum period of imprisonment: 14 years'.

[6] At one stage during the course of the robbery you left Mr Lim's house and walked out along the driveway to the roadside and to a second vehicle containing some associates which had also arrived at around the same time as you and your co-offender and which had parked on the roadside near the entrance of the driveway. After apparently communicating with the occupants of that second car you walked back along the driveway to Mr Lim's house and as you went you were recorded on the CCTV camera.

Victim Impact

[7] Mr Lim has provided a written victim impact statement which I have read. Mr Lim, who is an elderly man who was living alone in his house, was traumatised by the events. For a lengthy period after the home invasion he was unable to sleep and felt constantly on edge when alone in his house and in his room. Although the loss of his vehicle and other items was covered by insurance, along with his phone he lost personal information and photographs which cannot be replaced.

[8] Mr Tamiefuna the effects of your offending on the victim are significant and enduring and the way in which your home invasion offending occurred and the stand-over behaviour used to intimidate Mr Lim and get him to co-operate with your demands are factors which aggravate the offending and inform my assessment of the gravity of your offending.

Crown submissions

[9] The Crown submits that the sentence to be imposed on you should: hold you accountable for the harm you have caused to the victim and the community; promote in you a sense of responsibility for, and acknowledgment of that harm; denounce your conduct; deter you and others from committing the same or similar offences; and also protect the community from you.² Mr McGivern for the Crown submits that the sentence imposed should account for the gravity of the offending, and the seriousness of the type of offence compared with other types of offending. He further submits that the Court should take into account the desirability of consistency in sentencing

² Sentencing Act 2002, s 7.

levels, and impose on you the least restrictive outcome appropriate in the circumstances.³

[10] The Crown also notes that as the offence of aggravated robbery is a serious violent offence under s 86A of the Sentencing Act, and a stage two offence,⁴ pursuant to s 86C of the Sentencing Act where a long-term sentence (being a sentence of more than 24 months imprisonment) is imposed the Court must order that the offender serve the full term of the sentence imposed.⁵

[11] Mr McGivern refers me to the Court of Appeal guideline or tariff decision in relation to aggravated robbery: *R v Mako*.⁶ He submits that applying the guidelines in that case would result in the Court adopting a starting point of between six and seven years' imprisonment. The Crown says that the following six aggravating factors are present to a moderate degree: planning and preparation; unlawful entry into a dwelling place; multiple participants; violence; property stolen; and the impact on the victim.

[12] The Crown submits that your offending, Mr Tamiefuna, is aggravated by entry into a dwelling which requires further consideration in terms of the sentence in light of *Mako*'s reference to the "home invasion provisions". Although those provisions have since been repealed, s 9(1)(a) of the Sentencing Act requires the Court to take any offending which involves unlawful entry into or unlawful presence in a dwelling house, into account as being an aggravating factor when sentencing the offender. In *Tiori*, the Court of Appeal stated the appropriate approach:⁷

is to assess the starting point by comparing the sentences in other similar cases in this Court since the home invasion provisions were repealed.

[13] Mr McGivern also refers to *Poi v R* where the Court observed that "[s]tarting points upheld or imposed by this Court in recent years for aggravated robberies with an element of home invasion have generally ranged from six and a half years to ten

³ Sentencing Act 2002, s 8.

⁴ Mr Tamiefuna was convicted of Aggravated Robbery on 16 December 2015, and on that date given a first warning pursuant to s 86B(1)(a).

⁵ Sentencing Act 2002, s 86(c) (4)

⁶ *R v Mako* [2000] 2 NZLR 170 (CA) at [57] and [58].

⁷ *Tiori v R* [2011] NZCA 355 at [15].

years’ imprisonment.⁸ Mr Tamiefuna your offending lacks several of the features commonly found in aggravated robberies involving home invasion that have resulted in starting points of at least seven years’ imprisonment. In your case no weapons were used and the level of violence involved was of a low level. The Crown accordingly submits that a starting point of between six and seven years’ imprisonment is appropriate and Mr McGivern refers me to two analogous cases in support.⁹

[14] Turning to personal factors, the Crown notes that you have 24 previous convictions, with 14 relevant to the present offending: three convictions for aggravated robbery (one in 2015 and two in 2011); one for burglary (2011); three for theft (2019, 2014 and 2012); and other offences such as unlawfully getting into a motor vehicle (2014 and 2012) and unlawfully interfering with a motor vehicle (2014), and being unlawfully in an enclosed yard (2014) and receiving (2014 and 2013). The Crown says that this history represents a largely uninterrupted period of similar offending – only interrupted by time you have spent in custody. The Crown submits that a period of 15 to 20 per cent of the adopted starting point, or approximately 12 months’, would be an appropriate uplift to take account of your previous offending.

[15] As regards mitigating factors, the Crown acknowledges the position you have taken by admitting the evidence relating to the events of the robbery and limiting the dispute at your trial to the issue of whether the Crown could prove that the identity of one of the offenders was you and as a result of the position you took, the length of the trial was significantly reduced and it was unnecessary for the Crown to call other than one witness, thereby alleviating the complainant particularly from the anxiety of giving evidence, and reducing the cost incurred by the Crown and the time required by the judicial system. While the Crown notes the distinction between your position which limited the issues in dispute at your trial, and the entering of a guilty plea, it nevertheless accepts that as a result of you having adopted that position some of the policy considerations outlined by the Supreme Court in *Hessell* that warrant a discount have been engaged.¹⁰ The Crown also refers me to the Court of Appeal decision in

⁸ *Poi v R* [2020] NZCA 312 at [17].

⁹ *Stratton-Pineaha v R* [2020] NZCA 50 and *Ngerengere v Police* HC Wellington CRI-2010-485-51, 8 July 2010.

¹⁰ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [45]; see also at [65].

Mains v R,¹¹ and the somewhat similar situation there to yours where a decision to await a final determination of the admissibility of evidence was a determinate in relation to the entering of a plea. In that case the Court of Appeal allowed approximately 10 per cent discount in recognition of the appellant's pre-trial offer to plead to amended charges.¹² The Crown says that in recognition of the position adopted at trial by you Mr Tamiefuna and the reduction of the length of your trial and the avoidance of the need for the involvement of witnesses other than a single prosecution witness, a discount of up to 10 per cent may be appropriate.

Defendant's submissions

[16] Mr Tamiefuna, your counsel Ms Gray, submits that I should adopt a starting point between five years and five years, six months' imprisonment. While the Court of Appeal in *R v Mako* indicated that home invasion offending generally requires a minimum starting point of seven years' imprisonment, she submits that your offending calls for the adoption of a lower starting point. She submits that your offending is less serious than the offending in the cases of *Stratton-Pineaha v R*,¹³ *Tereora v R*,¹⁴ and *Peke-Meihana v R*¹⁵ as those cases involved the offenders threatening the victims in ways which caused them to fear for their lives, as well as having aggravating factors including the carrying of weapons, applying physical force and concealing of the offenders' identities. Ms Gray submits that your offending Mr Tamiefuna, is more similar to the offending that arose in the case of *Marsh v R*,¹⁶ where a starting point of three years and six months' imprisonment was adopted, and she submits that your offending did not have the hallmarks of a home invasion and involved less serious aggravating factors than occurred in the other cases that she cited and which I have just mentioned.

[17] Ms Gray accepts that your prior relevant convictions are an aggravating factor which are appropriately taken into account by an uplift of the sentence. She submits that an uplift of between six and nine months' imprisonment is appropriate.

¹¹ *Mains v R* [2016] NZCA 290.

¹² At [26].

¹³ *Stratton-Pineaha v R* [2020] NZCA 50.

¹⁴ *Tereora v R* [2015] NZCA 120.

¹⁵ *Peke-Meihana v R* [2019] NZHC 642.

¹⁶ *Marsh v R* [2019] NZCA 220.

[18] Ms Gray further submits that you should also receive a discount of 25 per cent of the adopted starting point to account for the cultural and personal background factors detailed in Ms Turner's s 27 report. Those factors include an upbringing which involved disconnection from your culture; a dysfunctional upbringing as a child in foster care; exposure to and use of drugs and alcohol from a young age; using drugs and alcohol to cope with bereavement; disconnection with any family leading to gang affiliation; and institutionalisation from a young age.

[19] Ms Gray also submits that you should also receive a 15 per cent discount under s 9(2)(fa) of the Sentencing Act 2002 for shortening and reducing the cost of the trial and proceedings by electing a judge-alone trial following an unsuccessful appeal against a pretrial ruling on admissibility. She says that your 'not guilty' plea was based upon the issue of whether the roadside photographs of you taken by the police were admissible as evidence against you, and that you significantly simplified the trial process by electing a judge-alone trial instead of proceeding with what would have otherwise been a lengthy jury trial.

Approach

[20] Mr Tamiefuna I shall take a two-step approach to your sentencing.¹⁷ With reference to the aggravated robbery tariff case of *Mako*,¹⁸ and analogous cases, and the aggravating and mitigating features of your offending, I will first determine the appropriate starting point having regard to my assessment of the gravity of your offending. I will then adjust that starting point to take account of your personal circumstances.

[21] In sentencing you I must have regard to and apply the statutory purposes and principles of sentencing.¹⁹ The sentence I shall impose is for the purpose of holding you accountable for your offending and for the harm you have caused.²⁰ The sentence will also denounce your conduct and protect the community.²¹ I will have regard to the gravity of your offending and take into account the effect it has had on your victim,

¹⁷ *Moses v R* [2020] NZCA 296 at [46].

¹⁸ *R v Mako*, above n 6.

¹⁹ Sentencing Act 2002, ss 7 and 8.

²⁰ Sentencing Act 2002, s 7(a)(a).

²¹ Section 7(1)(e) and (g).

Mr Lim.²² The final sentence imposed on you is required to be the “least restrictive” that is appropriate in the circumstances of your offending, while consistent with appropriate sentencing levels.²³

[22] As the Crown has correctly noted, aggravated robbery is a “serious violent offence” pursuant to s 86A of the Sentencing Act 2002, and following your prior conviction for the offence of aggravated robbery on 16 December 2015, on which occasion you received a first warning, you are now being sentenced for a second-stage offence, aggravated robbery, and pursuant to s 86C of the Sentencing Act, you must serve the sentence I impose on you without parole.²⁴ I will return to this at the end of my sentencing remarks.

Personal background factors

[23] Mr Tamiefuna, you chose not to co-operate with Corrections in their attempts to interview you and prepare a pre-sentence report which would set out the details of your background and personal circumstances and would also address other matters relevant to your sentencing.

[24] Your counsel has however provided the Court with a s 27 cultural report prepared by Ms Shelley Turner²⁵ a director of Specialist Reports Limited. The report is dated 2 January 2020 and was prepared in relation to your sentencing in the District Court on some unrelated charges.²⁶

[25] The report provides some detail of your background. Your biological mother is Māori, and your biological father Tongan. Your mother was 16 years old when you were born. You have never met your biological father. You were fostered from birth and raised by your foster parents in what appears to have been a caring and loving household. You describe your foster father as a disciplinarian who encouraged you to stay true to yourself and work hard to get ahead in life. He however introduced you

²² Sections 8(a) and (b).

²³ Section 8(g).

²⁴ Section 86C(4)

²⁵ MCom(Hons), BA, Dip Māori Art.

²⁶ Mr Tamiefuna pleaded guilty to assault on a person in a special relationship; unlawfully taking a motor vehicle; driving in a reckless manner; and failing to stop when followed by red and blue flashing lights.

to cannabis use when you were just 13 years old. You were expelled from school in year 12 because of your cannabis use. At age 16 you left home to go to live with your biological mother who until then you had never met. While living with your mother your alcohol use escalated. It appears that having found your mother she effectively rejected you, and as a result of your disconnection with any family you began associating with members of the local Crips gang. That led to you joining the gang and in turn to your criminal offending. Your alcohol and drug abuse became progressively worse.

[26] You had already accumulated a number of criminal convictions for offending including theft and burglary before you were first sentenced to imprisonment for aggravated robbery in 2011. While in prison on another sentence in 2013 you learned of the death of your younger brother and later that year your foster father died in his sleep unexpectedly. You were profoundly affected by the deaths of your younger brother and your foster father. Their deaths led you to intensify your alcohol and drug abuse and you accumulated further convictions for dishonesty offending including receiving and theft. You were introduced to methamphetamine by a woman who you were in a relationship with and in December 2015 you were convicted of what was then your third aggravated robbery offence for which you were sentenced to imprisonment and given a first-strike warning. Following your release from prison you continued to offend and were sentenced to imprisonment in 2019 following convictions for assault with the intent to injure and theft. From this brief review and summary of your offending it appears that you had not been out of prison for more than a few months before you committed the aggravated robbery of Mr Lim in early November 2019 for which you are being sentenced today.

[27] In her s 27 report Ms Turner says that having served your first term of imprisonment aged 18, your path to adulthood has been moulded by your time in prison. You say that jail has influenced you and is “pretty much why I am who I am today”.

[28] Referring to your previous offending rather than the aggravated robbery offending for which you are being sentenced today, Ms Turner says that you accepted responsibility for that offending and that you are motivated to make amends to your

foster mother and to build a relationship with your five-year-old son, and stay clean in the future and out of prison.

[29] Ms Turner reports that although you identify as both Māori and Tongan you have no connection to either te ao Māori or your Tongan heritage. Ms Turner identifies cultural disconnectedness, Whānau dysfunction, grief and loss trauma, gang affiliation, substances, education and unemployment, relationship dysfunction and institutionalisation as factors that have all contributed to your history of criminal offending. However she appropriately observes that the extent to which your background mitigates your culpability is a matter for the Court to decide.

[30] Mr Tamiefuna, I have read the letter that you have written to the Court. In it you apologise for your actions and the distress your offending has caused. You say that receiving a second strike warning has motivated you to reflect on the decisions you have made in the past. You say that you recognise the negative influences people around you have had on your decision making, and you acknowledge that you must be accountable for your own behaviour, and in the future surround yourself with people who can support you to make positive decisions about how to live. You say that you are determined to make changes to avoid further prison time which is time away from your family and loved ones.

Starting point

[31] I now turn to consider and determine the appropriate starting point in your case. The Court of Appeal's guideline decision for sentences for aggravated robbery in *Mako* says that where offending involves forced entry to premises by night by a number of offenders seeking money, drugs or other property, the use of violence against victims, and where weapons are brandished even if no serious injuries are inflicted, a starting point of seven years or more is appropriate. And where a private house is entered the starting point would be increased to around ten years pursuant to the then applicable home invasion provisions of the Sentencing Act.²⁷ However, since *Mako* was decided the home invasion provisions of the Sentencing Act have been

²⁷ *R v Mako*, above n 6, at [58].

repealed, and in accordance with the Court of Appeal's comments in *Poi*²⁸ and *Tiori*²⁹ the sentencing Court should also have regard to analogous cases where home invasion is an aggravating factor of the offending when deciding the appropriate starting point. Mr Tamiefuna, your offending is somewhat unusual compared to many cases of aggravated robbery as in your case no weapons were used and the level of violence involved, that of striking Mr Lim with an open hand on his shoulder, was low level violence which did not cause any injury. It was however obviously done to intimidate and frighten Mr Lim to get him to co-operate with your demands, and it was effective as that is what he did. And the presence of the two of you in his house and in his bedroom in the early hours of the morning demanding his car and belongings would obviously have been terrifying for him notwithstanding that no weapons were carried or used.

[32] I have accordingly had regard to the cases cited to me by counsel, and in particular I find the case of *Stratton-Pineaha* provides a useful benchmark. The facts of that case are broadly similar apart from the use of a knife by one of the offenders to threaten the victim as to what would happen if he went to the police, which is a significant aggravating factor not present in your offending and which distinguishes that case from yours. The starting point adopted in that case was seven years' imprisonment which was upheld on appeal.³⁰

[33] The case of *Ngerengere* involved offending that was more serious than yours. In that case a group of four men pushed into a private dwelling to steal from the occupants. It was known that there would be someone inside. One of the offenders had a fence paling which was used to threaten the victim. Another located a meat cleaver in the kitchen and used it to threaten the victim by holding it near his throat. The offenders went around the house looking for items to steal and attempted to kick open a locked door. Fearing for his safety the victim provided the offenders with the keys to his car, which was valued at approximately \$3,600 and the offenders also took his cell-phone valued at approximately \$200. While the value of property stolen in the robbery was significantly less than the value of Mr Lim's Hyundai, the offending

²⁸ *Poi v R*, above n 8, at [17].

²⁹ *Tiori v R*, above n 7, at [15].

³⁰ *Stratton-Pineaha v R*, above n 9, at [14].

in that case was aggravated by the presence of four co-offenders.³¹ In that case a six year starting point was not disturbed on appeal.³²

[34] Your offending has only broad similarity to the offending in the case of *Marsh* which Ms Gray referred me to as both cases involved an aggravated robbery in a dwelling house.³³ In that case the victim was a drug dealer. An offender and a female associate had gone to the victim's residential address ostensibly to purchase drugs and the victim let them in. While the victim was engaged in a conversation with the man, the female associate let two other men into the residence. The victim became concerned and went to another nearby apartment in the complex and was followed there by two offenders. They were asked to leave and refused. The victim knew he was going to be robbed. One of the offenders stood over him and threatened him with a clenched fist. Half a gram of methamphetamine, \$50.00 cash, a cell phone and a sports bag were stolen. The Court of Appeal observed that the sentencing Judge was entitled to take into account that the robbery had occurred in a private dwelling house, and that there was premeditation as regards the method used by the offenders to gain access to the residence. The Court of Appeal found that the four years and nine months starting point adopted by the sentencing Judge was excessive and explained that because of the particular circumstances of the offending including the limited value of the property stolen, they found that a starting point of three and a half years' imprisonment more accurately reflected the seriousness of the offending.

[35] In my view your offending is significantly more serious than the offending in *Marsh*. In *Marsh* the victim permitted the first two offenders to enter his residence as he was expecting to sell them some drugs. The offending in that case can be readily distinguished from your offending as it did not involve a forced entry to premises in the early morning when the occupant was asleep, and the value of the property stolen from Mr Lim was considerably more than the "limited value of property taken" in *Marsh*.

³¹ *Ngerengere v Police*, above n 9.

³² At [15].

³³ *Marsh v R*, above n 16.

[36] Ms Gray also referred me to the case of *Tereora v R*³⁴ in which the defendant and two other men dressed wearing balaclavas over their heads smashed a window and broke into the complainant's residence when no one was at home. While they were inside the home the 51 year old complainant returned to his house and was seized by the intruders, dragged inside, tied up with his hands behind his back, and made to lie face down on the floor. The offenders then threatened the complainant, and reference was made to their possession of a firearm, although it was not clear whether in fact the offenders actually had a firearm in their possession. The offenders demanded money and searched through the house. They took the complainant's wallet, car keys, cigarettes and cell phone, and left the complainant on the floor with his hands tied.

[37] In the High Court the sentencing Judge adopted a starting point of six and a half years' imprisonment. The Court of Appeal noted that since the tariff decision of *Mako*, that the increased maximum penalties for home invasion offending in the Sentencing Act had been repealed, and pursuant to s 9(1)(b) of the Act it was clear that home invasion is to be treated as an aggravating factor, and observing that the principle expressed in *Mako* that home invasion may warrant an uplift is to be given effect by employing the orthodox approach of comparing the offending to similar cases.

[38] Referring to the offending, the Court of Appeal in that case said that what had begun as a burglary had quickly escalated into an aggravated robbery in a manner for which the offenders were well prepared when entering the premises. The Court of Appeal then said:³⁵

[28] That said, *Mako* cautions sentencing courts about the need for flexibility in selecting an appropriate starting point in order to properly and proportionately address particular features whether alone or in combination, of the relevant offending. In this case, weapons are talked about by the assailants at the address but not produced. We can infer that the offenders were not in fact armed but tried to give the impression they were. Further, although this became in substance a home invasion, it did start out as a routine burglary, albeit with the offenders aware of and prepared for, the risk of detection and confrontation.

³⁴ *Tereora v R*, above n 14.

³⁵ *Tereora v R*.

[39] The Court of Appeal said that while those features would have reduced the starting point from a much higher level within the *Mako* guideline, it could not be said that the six and a half year starting point adopted by the sentencing Judge was too high. Adding, that on the contrary, the Court considered that starting point to be at the very bottom of the available range.³⁶

[40] I agree with the Crown that the gravity of your offending Mr Tamiefuna was aggravated by:

- (a) The obvious premeditation and planning involved. While you and your co-offender went into Mr Lim's house another vehicle containing your associates was waiting at the roadside. It was clearly a planned enterprise that you had embarked on.
- (b) The offending involved the forced entry of a private dwelling. It being a place where the occupant was entitled to expect privacy and security. Any offending which involves unlawful entry of a dwelling is aggravated by being an intrusion of the occupant's privacy and security and I consider this to be a significant aggravating factor of your offending.
- (c) The involvement and presence of two male offenders was inherently intimidating and clearly frightening to Mr Lim and your presence as a pair ensured that he co-operated as was intended.
- (d) The offending did involve violence in the striking of Mr Lim's shoulder. While the degree of violence was not high, it was no doubt effective and was a means of intimidating Mr Lim by demonstrating that you were willing to resort to physical violence if he did not cooperate with their demands.
- (e) The value of the items taken in this aggravated robbery was significant. The Hyundai was valued at \$47,000. While the value of the cell phone,

³⁶ *Tereora v R*, above n 14, at [29].

camera, wallet and cash at around \$1500 collectively was not a large amount, the loss of the cell phone caused Mr Lim to lose irreplaceable photographs of sentimental value.

- (f) The effect of the offending on Mr Lim is also an aggravating factor. He is an elderly man who was living alone and the offending has clearly traumatised and unsettled him and has a lasting and enduring effect upon his sense of privacy and security.

[41] Taking those aggravating factors into account and having particular regard to the significant aggravating factor of the offending involving a forced entry to a private home,³⁷ I find that the cases of *Stratton-Pineaha* and *Tereora* provide the most assistance by way of comparison, and I consider your offending Mr Tamiefuna to be less serious than the offending in *Stratton-Pineaha* which can be distinguished by the threatening use of a knife that was a feature of the offending, and your offending is similar but of less gravity to the offending in *Tereora* where three offenders had set out to commit a burglary of an unoccupied residence and had physically restrained, bound and threatened the occupant of the address when he returned, including referring to having a weapon with them which it appears they did not in fact have. While the force used in that case was significantly greater than was the case in your offending Mr Tamiefuna, the value of the items taken in that case were of comparatively low value compared to the value of the items taken by you and your co-offender, and the circumstances of the entry of the house were also less serious in that that was an intended burglary of an unoccupied address, as compared to your offending which was breaking into a house to commit a robbery early in the morning when the occupant was asleep, and you knew it to be occupied.

[42] Taking all the aggravating factors into account and comparing the gravity of your offending with the cases involving comparable offending, I consider that the appropriate starting point to be adopted for your offending Mr Tamiefuna is one of six years' imprisonment.

³⁷ *R v Mako*, above n 6, at [58], *Tiori v R*, above n 7, at [15].

Personal circumstances

[43] I now turn to consider whether overall the crime is aggravated or mitigated by your particular personal circumstances such that the sentence to be imposed should be higher or lower than the starting point.³⁸

[44] Starting with your personal aggravating factors, I note that at 28 years old you have an extensive history of relevant previous convictions. Four of your previous convictions are directly relevant to the present offending, being three previous convictions for aggravated robbery; and one for burglary, as well as the other offending, which is more broadly related. To take account of that previous offending I will uplift the starting point by twelve months, thereby taking account of the aggravating feature of your offending being a further instance of aggravated robbery from which it appears that those previous sentences for that type of offending have not deterred you from offending again. That takes the adjusted starting point to seven years' imprisonment.

[45] Turning to your personal mitigating factors and background, Ms Gray submits that a discount of 25 per cent should be allowed in relation to those personal background factors. I accept that your childhood involved you in being confronted by some significant challenges. Although you were not raised by your biological mother, you were brought up and cared for in a secure and loving environment as a young child by your foster mother and by your foster father. However, when you were in your mid-teens you sought to establish a relationship with your biological mother and were rejected by her. You never knew your biological father, and at that point in your life it appears that you experienced a profound sense of disconnection with anyone who you considered were your family members. Alcohol and drugs have played a large part in your life from a young age. You were introduced to the use of cannabis at the age of around 13 years and you have also suffered the additional trauma of losing your brother, who died whilst you were in prison and in circumstances where you had not seen him for some time, and the death of your foster father unexpectedly. The Crips gang that you became associated with became effectively your substitute family, and your offending has institutionalised you within the Prison system, and you identify

³⁸ *R v Mako*, above n 6, at [34].

that prison incarceration is - why you are, who you are today. Ms Turner's report contains a detailed and helpful description of your background. While the matters she has identified are not such as to be immediately causative of your offending they nevertheless do demonstrate the nexus between the events and factors which contributed to you making decisions which inevitably led to your criminal offending.³⁹ In my view recognition of these factors warrants a 15 per cent discount from your sentence.

[46] You have also taken steps to reduce the scope of the dispute and duration of your trial. While the position you took did not go to the extent of entering a plea of guilty, nevertheless, your co-operation resulted in a shorter and more focussed trial than would have otherwise been the case, and the Crown only needed to call one witness to give evidence in person. This Court regularly recognises efforts to reduce trial duration and your particular co-operation engages the policy factors discussed by the Supreme Court in *Hessell*⁴⁰ leading to the more effective operation of the criminal justice system. In recognition of your co-operation, I consider that a further 10 per cent discount is appropriate in your case.

[47] Finally, Mr Tamiefuna, I note from the letter that you wrote to the Court that you say you have developed an insight into the causes of your offending and that you now recognise the negative and destructive influences of people who you were associating with that led you to become involved in criminal offending at an early age. Whether or not you have the mental strength and commitment to follow through with those insights and put them into practice and put into practice also the lessons that you were given by your foster mother as father which they tried to instil in you as a young boy is now entirely up to you. If having come to the realisation of what has brought you before the Court today, you do not follow through with the resolve to rid yourself of the negative and destructive manner of living and the associates with whom you have been involved, and you return to your life of crime and criminal associates then you will only have yourself to blame in the future. However, to encourage you to press on and work hard to build on your insights and understanding, and in recognition of

³⁹ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [162].

⁴⁰ *Hessell*, above n 10, at [45].

the motivation and indications that you have set out in your letter, of your wish to be a better person, I will also allow a further five per cent discount of your sentence.

[48] Therefore applying a total 30 percent discount to the starting point of seven years (84 months) produces an end sentence of four years, eleven months (59 months') imprisonment.

Effect of s 86C of the Sentencing Act 2002

[49] Mr Tamiefuna, you are being sentenced, as you know, for a "stage-2" offence under the three-strikes regime given your 2015 conviction for aggravated robbery for which you received a first-strike warning. Where an offender receives a determinate sentence of imprisonment following conviction for a stage-2 offence, under section 86C(4) of the Sentencing Act, I must order that you serve the full term of the sentence without parole.

[50] But for the application of this section, s 86C, I would not have imposed a minimum period of imprisonment meaning that you would have been eligible to be considered for parole after serving the standard one-third of your sentence of imprisonment.

Sentence

[51] Mr Tamiefuna, please stand.

[52] On the charge of aggravated robbery, I sentence you to four years and eleven months' imprisonment, which pursuant to s 86C(4) of the Sentencing Act, is to be served without parole.

[53] You may now stand down.

Paul Davison J