IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-Ā-KAHU ROHE

CRI-2015-063-3678
[2018] NZHC 93

THE QUEEN

v

GEORGE ROBERT JOLLEY
ROBERT JULIAN DASHWOOD
CRAMER TANA MCMEEKING
CHADWICK TAMAHOU MATAPUKU
CHRISTOPHER JOHN JOLLEY

Sentencing:	9 February 2018
Counsel:	C H Macklin and A D Hill for Crown S N B Wimsett and S Teppett for George Jolley S J Lance for Robert Dashwood A T I Sykes and E A Whiley for Cramer McMeeking L Te Kani and D H Hall for Chadwick Matapuku M M Dorset and G Fairbrother for Christopher Jolley
Judgment:	9 February 2018

SENTENCING NOTES OF KATZ J

Solicitors:	Gordon Pilditch, Crown Solicitor, Rotorua A Sykes & Co, Barrister and Solicitors, Rotorua Bennion Law, Wellington L L Te Kani, Ahuriri Chambers, Rotorua Families Matter Law Practice, Rotorua
Counsel:	S N B Wimsett, Barrister, Auckland S Teppett, Lorne Street Chambers, Auckland S J Lance, Barrister, Auckland M M Dorset, Ahuriri Chambers, Rotorua G Fairbrother, Ahuriri Chambers, Wellington

Introduction

[1] George Jolley, Robert Dashwood, Cramer McMeeking, Chadwick Matapuku, and Christopher Jolley, you were each found guilty following trial by jury on one or more charges arising from an altercation that took place on Turner Drive, Western Heights, on 11 December 2015. You now appear before me for sentence.

Facts

[2] You are all members, associates or supporters of the Mangu Kaha chapter of the Black Power gang. In the lead-up to the offending, there were rising tensions in Rotorua between Mangu Kaha and the Mongrel Mob. Those tensions escalated when a young woman and her partner moved into a house at 109 Turner Drive, which Mangu Kaha considered to be within its territory. The young woman's father or his associates appear to have been connected to the Mongrel Mob.

[3] A couple of days before the altercation on 11 December, someone smashed several windows of the Turner Drive property. The tenants decided to move out, so as not to risk any further attacks. The young woman's father and several of his associates helped with the move which took place on 11 December 2015. They began loading furniture and other items onto a trailer parked at the address.

[4] While they were doing that, a vehicle driven by a Mangu Kaha member drove slowly past, apparently scoping out the scene. Shortly afterwards at least two vehicles (one of them a van) full of Mangu Kaha members and associates arrived. Other Mangu Kaha members possibly arrived on foot. In total, 20 to 30 Mangu Kaha members and associates descended on 109 Turner Drive, many of them carrying weapons. They congregated along the fence line. The jury found that all five of you were part of that group. Further, with the exception of Christopher Jolley, the jury found that all of you shared the common objective of causing grievous bodily harm (that is, really serious harm) to one or more of the people who were at 109 Turner Drive Turner Drive.

[5] The Mangu Kaha group started hitting the property's steel fence with their weapons and calling out threats and abuse. A standoff ensued between the Mangu

Kaha group and the occupants of the house. At least two of the occupants of the house had armed themselves with axes to defend themselves. An axe was thrown towards your group in an apparent attempt to try and scare you away.

[6] Christopher Jolley, you were armed with a metal pole. Mr Matapuku, you were armed with a hockey stick. Mr McMeeking, you were armed with a steel baseball bat. This forms the basis of your respective convictions for possession of an offensive weapon.

[7] Mr McMeeking, you ran onto the property and vandalised a vehicle that was parked there. You jumped up and down on its bonnet and smashed its windscreen and windows with your baseball bat. Those actions resulted in your conviction for intentional damage.

[8] George Jolley, you then stepped forward, holding a shotgun. You aimed the shotgun at the head of one of the men on the property, Wade Pereira, and pulled the trigger. You were about 20 metres away at the time. The jury have found that when you shot Wade Pereira, you intended to kill him. It is for that reason you have been found guilty of attempted murder. Shotgun pellets hit Wade Pereira in the head and neck, and he was seriously injured as a result. Another occupant of the property was hit with shotgun pellets in the arm. After taking your first shot you aimed the firearm at another occupant of the property. Fortunately the gun mis-fired.

[9] Mr Dashwood, you then grabbed the gun and fired a further shot towards the occupants of the property. Your shot, however, did not hit anyone. These actions form the basis of your conviction for discharge of a firearm with reckless disregard for the safety of others.

[10] After the shots were fired your group fled the scene, some in vehicles and some on foot. George Jolley and Chadwick Matapuku, you fled on foot and were found by police not long afterwards, hiding in the basement area of a vacant house on Upland Road. This forms the basis of your convictions for being unlawfully in a building.

Approach to sentencing

[11] In sentencing each of you today, I must have regard to the purposes and principles of sentencing set out in the Sentencing Act. I must hold you accountable for the harm you have caused and I must promote in you a sense of responsibility for that harm. I must denounce your conduct and deter you and others from committing this type of offending. I must also consider the need to protect the community and to provide for the interests of the victims of your offending. At the same time I must take into account any prospects you may have of rehabilitation. I must impose the least restrictive sentence appropriate in the circumstances.

[12] I will consider the gravity of your offending, including your individual levels of culpability, and the seriousness of your offending in comparison with other cases. So far as possible, I must impose a sentence that is consistent with sentences imposed in other similar cases. I have reviewed a significant number of sentencing decisions relevant to each of you, including those relied upon by your counsel.

Christopher Jolley

[13] Christopher Jolley, I am going to deal with your sentencing first. You have been convicted of being in possession of an offensive weapon, namely a metal pole, in circumstances that prima facie showed that you intended to use it to commit an offence involving bodily injury or the threat or fear of violence.

[14] There was no evidence at trial that you actually used the pole. Rather, you lent support to the wider Mangu Kaha group through your armed presence at the scene.

[15] At the time of the incident you lived next door to 109 Turner Drive. The jury must have accepted that it was a reasonable possibility that you had simply joined in once you saw what was happening, rather than being part of any premeditated attack on the occupants of the property. It is presumably for that reason that you were found not guilty of the charge of participation in an organised criminal group.

Starting point

[16] The maximum sentence for possession of an offensive weapon is three years' imprisonment.[1] Your offending, however, is towards the lower end of the scale. Having considered the sentences imposed in a number of similar cases,[2] and having carefully considered the submissions of the Crown and your counsel, Ms Dorset, it is my view that a starting point of four months' imprisonment is appropriate.

Personal aggravating and mitigating factors

[17] You have a number of previous convictions. However, I do not consider that your criminal history warrants any uplift to your sentence. Nor, however, are there any personal factors that warrant a reduction in your sentence.

Sentence

[18] On the charge of possession of an offensive weapon, you are accordingly sentenced to four months' imprisonment, with no release conditions. You may stand down.

Participation in an organised criminal group

[19] I am now going to address the charge of participation in an organised criminal group, as the remaining four of you have each been convicted of that offence. For three of you it is your most serious conviction. The maximum penalty is ten years' imprisonment.

[20] This charge is not easy to explain. Essentially the Crown was required to prove, and did prove, a number of different things. In particular, the jury found:

(a) First, that each of you shared the Mangu Kaha group's objective of causing grievous bodily harm (that is, really serious harm) to one or more persons at 109 Turner Drive. In other words, before you went to

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1 Crimes Act 1961, s 202A(4).

2 Including *R v Tran* CA394/02, 12 June 2003; *R v Bell* CA119/01, 19 June 2001; *Hill v Police* HC Invercargill CRI-2008-425-17, 1 July 2008; *Hubert v Police* [2016] NZHC 2587 and *R v Busby* CA211/01, 26 September 2001.

Turner Drive, the group you were a part of had decided to go there to cause really serious harm to the occupants. The jury rejected the possibility that, for example, you may have simply intended to frighten the occupants to scare them away from your territory.

(b) Second, each of you participated in the group, and lent your support to it, by going along to the property and behaving in a threatening way. Some of you did significantly more than that.

(c) Third, each of you were sure that when you went to Turner Drive that your conduct there would contribute to some form of criminal activity occurring.

(d) And fourth, each of you knew that such criminal activity would contribute to achieving the group's shared objective of causing grievous bodily harm to one or more of the people at Turner Drive.

[21] The maximum sentence for the offence of participation in an organised criminal group was increased by Parliament from five years' imprisonment to 10 years' imprisonment in 2009. This reflects the seriousness with which Parliament views organised criminal activity, including gang-related criminal activity. When I sentence each of you for this offence, I am not sentencing you simply for whatever you did when you arrived at Turner Drive. That conduct is the subject of separate, individual, charges. Rather, you are being sentenced for your contribution to, and support of, the group's criminal objectives, and the overall offending by group members on 11 December 2015, in pursuit of those objectives. You each bear some responsibility for that, because you supported and participated in the organised criminal attack on 109 Turner Drive.

[22] You were involved in a serious and premeditated attack on the occupants of a private home in a residential street in Rotorua. During the confrontation, a firearm was discharged twice. Serious gang warfare could easily have broken out, during

which innocent bystanders could have been seriously injured. Neighbours and others who witnessed the events unfold must have been terrified.

[23] Mr Matapuku, Mr McMeeking and Mr Dashwood, there is no evidence that any of you knew that a firearm was being taken to the scene. Although this is a relevant factor, I do not believe it is as significant as some of your counsel suggest. You were part of a group that, to your knowledge, intended to cause grievous bodily harm to the occupants of 109 Turner Drive. You may have envisaged that harm being caused by baseball bats, metal poles, and other weapons, rather than firearms, but the fact remains that the group objective was to cause really serious harm to those at Turner Drive. That the occupants were not ultimately attacked with the weapons you and others took to the scene does not appear to have been due to any particular restraint or change of heart on your part. Rather, the occupants of the house armed themselves with axes when you arrived. This appears to have deterred your group from going onto the property to attack the occupants, as originally intended.

[24] As has been stated in previous cases, the willingness of people such as yourselves to be the foot soldiers for gangs and to provide the numbers when needed, is what allows gangs to undertake their criminal activities.[3] On this occasion your attack was brazen, occurring in broad daylight on a residential street with numerous innocent bystanders around, some of whom gave evidence at trial. The ability of Mangu Kaha to mount such an attack is largely due to the significant number of foot soldiers, such as the four of you, who were willing to participate. Without the force in numbers that you helped provide, it is unlikely that the attack would have ever taken place.

Starting point

[25] Mr Matapuku, Mr McMeeking and Mr Dashwood, participation in any organised criminal group is the most serious charge that each of you faced. I am going to treat it as the lead offence for each of your sentences. Once I have determined what an appropriate sentence for each of you is on this charge, I will then consider what

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3 *Te Kahu v R* [2012] NZCA 473 at [31]. See also *R v Tamati* [2012] NZHC 221 at [40].

adjustments, if any, need to be made to your overall sentence to reflect the totality of your offending.

[26] There have now been a number of cases where defendants have been convicted of participation in an organised criminal group in the context of gang-related altercations. In one case, a starting point of five years' imprisonment was seen as appropriate for a ringleader in an altercation between the Mongrel Mob and Black Power where a Black Power gang member was shot and seriously injured.[4]

[27] Another case, *R v Te Kahu*, involved an internal Mongrel Mob power struggle, which led to a shootout between Mongrel Mob members.[5] Mr Te Kahu and his co-defendant, Mr Mita, were not involved in the actual shoot-out, nor were they involved in the planning and preparation for it. They did, however, attend the scene with others and stand outside the gang pad to lend support and weight of numbers to the attackers who entered the gang pad armed with firearms. Mackenzie J adopted a starting point of three and a half years' imprisonment for both Mr Te Kahu and Mr Mita. That starting point was upheld on appeal, with the Court of Appeal noting that the defendants had been prepared lend their weight as foot soldiers and the success of the planned raid was in part dependent on there being sufficient numbers to undertake it.[6] A more culpable offender, who was directly involved in the shoot-out, received a starting point of six and a half years' imprisonment on this charge.[7] A six year starting point was adopted for other defendants involved in the same shoot-out, who also played a key role in the gunfight, handled firearms and fired shots themselves (although that starting point also appears to have also taken into account other lesser offences that were also committed).[8]

[28] In another case, a starting point of two years and three months' imprisonment was adopted for the defendant's provision of support to members of the Mongrel

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4 *R v Raroa* [2012] NZHC 1280. I note that the defendant underwent a retrial. Gilbert J sentenced the defendant exactly as he had been by Lang J at first instance (see *R v Raroa* [2013] NZHC 3436).

5 *Te Kahu v R*, above n 3.

6 *Te Kahu v R*, above n 3, at [31].

7 *R v Tamati*, above n 3, at [19].

8 *R v Waihape* [2012] NZHC 198 at [21]-[22].

Mob.[9] He provided support over the course of several days, in circumstances where the Mongrel Mob sought to retaliate against the Tribesmen for an assault against a Mongrel Mob member. The defendant was not seen at any of the incidents of violence that occurred over the period. It was considered that this demonstrated that he was on the fringes of the group.

[29] There is no evidence that any of you were involved in the planning or organisation of the attack. I therefore propose to treat each of you as essentially foot soldiers for the purposes of the organised criminal group charge. I will consider what each of you did at the scene separately, in the context of the other charges you have each been convicted of.

[30] With reference to the various previous cases I have just referred to, I have concluded that your participation as foot soldiers in the organised attack on 109 Turner Drive warrants a starting point on this charge of three years and six-months' imprisonment, which is the same starting point that was adopted in the *Te Kahu* case.

[31] I reject Ms Sykes' submission on behalf of Mr McMeeking that your culpability is significantly less than the two defendants in the *Te Kahu* case. Although there is no evidence that you knew that the attack on Turner Drive would involve the use of firearms or a firearm, each of you all shared the group's objective that the occupants of Turner Drive would be caused grievous bodily harm.

[32] Mr Matapuku, Mr Dashwood and Mr McMeeking, you presumably believed that that harm would be caused by the use of weapons such as baseball bats, hockey sticks and metal poles. Mr Jolley, you took a firearm to the scene, and must also have been aware of at least some of the weapons that others were openly carrying. The willingness of each of you to arm yourselves in pursuance of the common objective of causing grievious bodily harm suggests that, from the outset, you were willing to take a more active role in the confrontation than the two defendants in *Te Kahu*, who stood, unarmed, in the yard outside while the main offenders entered the gang pad. Further, the jury found you had actual knowledge that your conduct in attending the scene would contribute to criminal activity occurring there. In *Te Kahu* the offenders

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9 *R v Ngaheu* HC Rotorua CRI-2009-063-697, 14 December 2011.

were convicted on the basis that they were reckless as to whether or not their conduct would contribute to criminal activity occurring. Accordingly, although your case is not on all fours with *Te Kahu*, overall I consider your culpability to be similar to the defendants in that case.

Chadwick Matapuku

[33] Mr Matapuku, I am now going to consider your sentence. In addition to being convicted of participation in an organised criminal group, you were also found guilty of being in a building unlawfully and possession of an offensive weapon, namely a hockey stick.

[34] For the reasons I have already outlined, I have concluded a starting point of three and a half years' imprisonment on the charge of participation in an organised criminal group is appropriate. The issue is whether I should uplift that to reflect your conviction for possession of an offensive weapon. I have decided that an uplift is not appropriate. A starting point of three years and six months' imprisonment appropriately reflects your overall culpability. Your sentences in respect of your two other convictions will therefore run concurrently.

[35] The maximum penalty for the charge of being in a building unlawfully is three months' imprisonment.[10] In my view a concurrent sentence of one month's imprisonment is appropriate.

[36] As noted earlier in relation to Christopher Jolley, possession of an offensive weapon carries a maximum term of three years' imprisonment.[11] Having considered a range of comparable cases, I have concluded that a concurrent sentence of four months' imprisonment is appropriate in respect of this charge.

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10 Summary Offences Act 1981, s 29(1)(a).
11 Crimes Act 1961, s 202A(4).

Personal mitigating factors/discount for restrictive bail terms

[37] Mr Matapuku, you have 65 previous convictions. I do not propose to uplift your sentence as a result although, as your counsel acknowledged, such an uplift would potentially be available, in the exercise of my discretion.

[38] On the other hand, there are no personal mitigating factors that warrant a discount to your sentence. I accept Mr Te Kani's submission that there are positive aspects of your pre-sentence report. You show a greater degree of insight into your offending and the harm it could have potentially cause, and did cause, than a number of your co-defendants. I hope that during your sentence you are provided with meaningful opportunities for rehabilitation. It is also encouraging to hear that you have strong whanau support, particularly from your father.

Sentence

[39] Mr Matapuku, on the charge of participation in an organised criminal group you are sentenced to three years and six months' imprisonment.

[40] On the charge of possession of an offensive weapon you are sentenced to four months' imprisonment, to be served concurrently.

[41] On the charge of being in a building unlawfully you are sentenced to one month's imprisonment, to be served concurrently.

[42] You may now stand down.

Cramer McMeeking

[43] Mr McMeeking, I now turn to consider your offending. You have been convicted of three charges — possession of an offensive weapon, intentional damage, and participation in an organised criminal group.

Other offending/totality

[44] I have already determined that an appropriate starting point on the lead charge of participation in an organised criminal group is three years and six months' imprisonment. I now turn to consider what, if any adjustments need to be made to that starting point in your case.

[45] After you arrived at Turner Drive you went onto the property and vandalised a vehicle that was parked there. You urged others to follow you onto the property, but they were reluctant to do so. Your actions in running onto the property and smashing up the vehicle contributed to the escalating tensions. You were much more than just a passive bystander. You played an active role in the altercation. Your behaviour could easily have triggered all-out gang warfare between the two groups.

[46] The maximum penalty for the intentional damage charge is seven years' imprisonment.[12] Having considered a number of comparable cases,[13] I have concluded that the appropriate sentence for this charge, on a standalone basis, would be one year and six months' imprisonment. Adjusting for totality, however, an increase of six months to your starting sentence of three years and six months' imprisonment is appropriate.

[47] On the charge of possession of an offensive weapon, namely a baseball bat, the appropriate sentence is one of four months' imprisonment, to be served concurrently. No separate uplift is warranted for this offending.

Personal mitigating factors/discount for restrictive bail terms

[48] I do not propose to apply any uplift for your previous convictions.

[49] There are no personal mitigating factors that warrant a discount in my view, although I do note that your pre-sentence report has a number of positive aspects. The

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12 Crimes Act 1961, s 269(2)(a).

13 *Shaw v Police* HC Timaru CRI-2008-473-20, 21 August 2008; *R v Butler* [2008] NZCA 287; *Tahiri v Police* HC Dunedin CRI-2010-412-23, 4 August 2010 and *R v McCallum* HC Wanganui CRI-2008-083-2794, 12 February 2010. I note that Mr McCallum appealed his conviction but he was unsuccessful, see *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1.

suggested sentence of home detention, however, is simply not available in light of the guidance provided by the previous case law on the organised criminal group charge, which I have already outlined.

[50] Ms Sykes seeks a discount of six months for the ten months or more you spent on bail on a 24-hour curfew. The Crown pointed out that you have previously received a one month discount for time spent on restrictive bail conditions when you were sentenced for related offending. In the circumstances I am prepared to give you a five month discount, which is possibly on the generous side.

Sentence

[51] Mr McMeeking, on the charge of participation in an organised criminal group, you are sentenced to three years and seven months' imprisonment.

[52] On the charge of intentional damage, you are sentenced to one year and six months' imprisonment, to be served concurrently.

[53] On the charge of possession of an offensive weapon you are sentenced to four months' imprisonment, to be served concurrently. You may now stand down.

Robert Dashwood

[54] Mr Dashwood, I now turn to consider your sentence. First, however, it is necessary to give you a warning under the Three Strikes Legislation, as your conviction for reckless discharge of a firearm is a three strikes offence. *[Judge delivers first strike warning]*.

[55] The Crown submit that I should take the lead offence as reckless discharge of a firearm, and then uplift that for totality, to reflect your conviction for participation in an organised criminal group. I propose, however, to take your offence of participation in an organised criminal group as the lead charge and consider what adjustments need to be made for totality, to reflect your behaviour once you arrived at the scene. Nothing turns on the exact sentencing approach I take, however. The end sentence would be the same regardless of which of those two charges I take as the lead charge.

Other offending/totality

[56] Your starting point is three years' and six months' imprisonment on the charge of participation in an organised criminal group.

[57] After you arrived at the scene, you deliberately fired a shotgun towards at the occupants of the house. In doing so you further escalated an already extremely tense situation. You took hold of the shotgun after it had jammed when George Jolley attempted to fire a second shot, and you fired a second shot yourself.

[58] Although you fired only one shot, you did so from a fairly close range (about 20 metres) and with a weapon that has a wide blast radius. You used a firearm on a residential street and aimed it towards a residential dwelling. The outcome could have been very different. Your conduct was reckless in the extreme. Not only could you have hit one of the men that you were actually targeting, but you could also have hit one of the women who were at the house helping pack up. Indeed, as far as you knew, there could well have been children in the house. More than one child has died or been seriously injured in New Zealand as a result of firearms being recklessly discharged at residential dwellings in gang-related altercations.

[59] The fact that your offending occurred in the context of what, in essence, was gang warfare, is a further aggravating feature. Although you may not have been involved in planning or organising the attack, once at the scene you were much more than just a passive bystander. You took a lead role in the offending that occurred that day.

[60] The maximum penalty for the offence of reckless discharge of a firearm is seven years' imprisonment.[14] I have considered a number of broadly comparable cases that involved starting points ranging from three to five years' imprisonment.[15] Considering the facts of your case relative to these other cases, I have concluded that the appropriate starting point on the charge of reckless discharge of a firearm, if I was sentencing you on a standalone basis for that charge, would be three years' and six

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14 Crimes Act 1961, s 198(2).

15 *R v Gunbie* HC Auckland CRI-2005-044-1951, 16 May 2006; *Gathergood v R* [2010] NZCA 350; *R v Hines* CA12/99, 12 March 1999; *Katene v R* [2010] NZCA 394; *R v Templeton* CA460/05, 6 July 2006 and *R v Hakeke* [2013] NZHC 865.

months imprisonment. Increasing your overall sentence by that amount would, however, offend the totality principle. Given the seriousness of your offending, however, an uplift of eighteen months to your starting sentence of three years and six months is warranted.

Personal aggravating and mitigating factors

[61] I do not, however, propose to uplift your sentence further to reflect your previous criminal history. On the other hand, there are no mitigating factors that warrant a specific reduction in your sentence, although I accept your counsel's submission that there are some positive indications in the two references that I have been provided with. You clearly have some real strengths, including as a father. Hopefully your strengths will come to the fore and result in you focusing your efforts on rehabilitation, and leaving your gang life behind.

Sentence

[62] Mr Dashwood, on the charge of participation in an organised criminal group you are sentenced to five years' imprisonment.

[63] On the charge of recklessly discharging a firearm you are sentenced to three and a half years' imprisonment, to be served concurrently. You may now stand down.

George Jolley

[64] Finally, Mr George Jolley, I come to your sentence. You have been convicted of attempted murder, participation in an organised criminal group, and being unlawfully in a building.

[65] The charge of attempted murder is a serious violent offence that falls within the three strikes regime. You have been given a first strike warning for previous offending and, as a result, it is now necessary for me to give you a second-strike warning which I will give you now. *[Judge gives second strike warning]*.

Starting point

[66] Mr Jolley, the lead, or most serious, offence in your case is that of attempted murder. The maximum penalty for attempted murder is 14 years' imprisonment.[16]

[67] You fired a shot at the victim's head, from a relatively short distance away, causing serious injury to one victim (who was hit in the face and neck with shotgun pellets) and also injuries to a second victim, who was hit in the arm with shotgun pellets. I note, and accept, Mr Wimsett's submission that the fact that birdshot was used is relevant to assessing your culpability, in that birdshot is significant less likely to cause lethal injuries than some other forms of ammunition.

[68] There must have been at least some degree of premeditation involved in your use of the firearm. The overall confrontation itself was clearly premeditated, involving the co-ordinated arrival of between 20 and 30 Mangu Kaha members and associates at the scene. You came along armed with a loaded shotgun. The fact that your offending occurred in a gang warfare context is a further aggravating feature.[17]

[69] The Court of Appeal decision of *R v Taueki* is the tariff case for grievous bodily harm offending, it is also often referred to as a useful reference or cross-check when setting the starting point for attempted murder. Obviously, however, attempted murder is more serious in that it involves an intent to kill.

[70] In my view your offending falls within band three of *Taueki* in that it encompasses three or more of the aggravating features referred to in *Taueki* where the combination is particularly grave.[18] Band three offending merits a starting point of between nine to 14 years' imprisonment. *Taueki* gives the following as an example of band three offending:[19]

> *Serious concerted street attack*: An episode of street violence where multiple attackers set upon a victim in a premeditated attack, using weapons which they have brought to the scene for the purpose, and where serious and lasting injuries are inflicted on the victim will call for a starting point in the lower to middle range of Band 3. Where the victim is particularly vulnerable, or the

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16 Crimes Act 1961, s 173(1).
17 *R v Taueki* [2005] 3 NZLR 372 (CA) at [31(k)]. See also s 9(1)(hb) of the Sentencing Act 2002.
18 At [31] and [40].
19 *R v Taueki,* above n 19, at [41(a)].

> attack has "hate crime" aspects to it, a higher starting point would be required. Where the victim is left with injuries which will have an ongoing impact on his or her enjoyment of life, a starting point at the top end of Band 3 will be called for.

[71] This example bears some resemblance to the present offending.

[72] I have also considered a number of broadly comparable cases of attempted murder, that involved a range of starting points.[20] Mr Wimsett relied in particular on two cases, one of which is almost 30 years old and another is almost 25 years old. They both involved starting points of below ten years' imprisonment. Although I have had regard to those cases, I have given greater weight to the guidance provided by more recent case law and also the guidance provided by *Taueki*. Taking all of those cases into account I have concluded that an appropriate starting point for your sentence on the charge of attempted murder is 10 years' imprisonment.

Other offending/totality

[73] I accept the Crown's submission that some uplift to that is appropriate to reflect for your conviction for participation in an organised criminal group.[21]

[74] I reject Mr Wimsett's submission that uplifting your sentence to take account of that charge necessarily involves an element of double counting. As I have already explained, the criminality inherent in the organised criminal group charge differs from each person's individual culpability for their behaviour after they had arrived at 109 Turner Drive. Each defendant's sentence on the organised criminal group charge reflects the fact that they were willing to, and did, lend their support to the group's overall criminal objectives. Courts have previously accepted that where substantive offences have been committed in addition to the offence of participating in an organised criminal group, a separate sentence will be appropriate because the organised criminal group charge is directed to criminality which is different in its ingredients and nature from the various substantive charges. It is not directed towards

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[20] *R v Nicol* [2014] NZHC 2110; *R v Vaioletti* [2013] NZHC 3358; *Marsters v R* [2011] NZCA 505; *R v Hone* HC Napier CRI-2007-020-1518, 30 July 2008; *R v Savage* [2014] NZHC 1802; *R v Allen* CA7/88, 23 June 1988 and *R v McDonnell* (1993) 10 CRNZ 454 (CA).

[21] See *Mark v R* [2016] NZCA 22; *R v Couper* [2013] NZHC 1576 and *R v James* [2013] NZHC 2006.

the particular acts of an individual, but rather towards the contributions of a group of individuals to criminal activity of the group.[22]

[75] In my view, an uplift of one year in respect of the organised criminal group charge appropriately reflects the totality of your offending. As with Mr Matapuku, a concurrent sentence of one month imprisonment on the charge of being unlawfully in a building is appropriate for that offence, no separate uplift being required for that offending.

Personal aggravating or mitigating factors

[76] Mr Jolley, I do not propose to uplift your sentence for your previous criminal history, although I note that it does include a number of convictions for assault. An uplift would be available, in my discretion. Part of the reason I have elected not to uplift your sentence for your previous criminal history is in recognition of the issues of social and economic and deprivation which Mr Wimsett referred to in his submissions and which I will come back to shortly. I accept that those matters will have significantly contributed to you becoming entrenched in the gang lifestyle with all the consequences that entails.

[77] In terms of mitigating factors, Mr Wimsett has provided me with a cultural report that has been prepared for you, pursuant to s 27 of the Sentencing Act. Frankly, it makes sad reading. The report writer, Denis O'Reilly, states that you view Mangu Kaha as your whānau, particularly as you are following your father's example. Your father is (or was previously) a Mangu Kaha member himself and is currently in prison. The report states that you come from a deeply deprived background and were expelled from school at a young age. You were surrounded by violence and drug related activity and crime as you grew up. Your community and social networks are all based around the gang.

[78] Mr Wimsett submitted that I should reduce your sentence by 10 per cent to reflect cultural factors, including in particular your inequality of opportunity which,

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[22] *Lasike v R* HC Auckland CRI-2004-044-7103, 13 April 2006 at [51]. See also *R v Mitford* [2005] 1 NZLR 753 (CA).

he submits has fuelled your life of crime. He further submitted that your prospects of rehabilitation warrant a discount.

[79] I acknowledge the deprivation that you have suffered, which has no doubt contributed to your adopting a gang lifestyle and associated life of crime. The issue of whether such factors, in themselves, warrant a discrete sentencing discount is, however, a contentious one. In *Mika v R*[23] the Court of Appeal rejected the proposition that the sentencing Judge should have discounted a sentence by 10 per cent, from an otherwise appropriate starting point, to reflect Mr Mika's Maori heritage and the associated social and economic disadvantages he had suffered. The Court's view, in essence, was that some form of generic or global discount in respect for such factors was of such fundamental and far-reaching importance that it could only be sanctioned by Parliament. I am guided by that decision in reaching a similar conclusion in this case although, as I have noted, I have had some regard to those factors in declining to uplift your sentence in light of your extensive criminal history.

[80] Mr Wimsett also submitted, and this submission was supported by a number of other counsel, that a discount should be afforded pursuant to s 9(2)(fa) of the Sentencing Act to recognise the fact that all the defendants consented, on the final day of trial, to proceeding with a jury of nine. If they had not done so it is likely that there would have been a mis-trial and a further trial would have had to take place. This situation arose because over the weekend, during the course of jury deliberations, a juror was approached at her home and offered a bribe of $5,000 to acquit the defendants or at least ensure a hung jury. Those extraordinary circumstances, possibly unprecedented in New Zealand, resulted in that juror being discharged on the unanimous request of all counsel.[24] All parties, including the eight defendants, agreed to proceed with nine jurors. I suspect there were many reasons why the defendants' preference was for the trial to continue to a conclusion rather than seek a mis-trial and have a further trial at a later date. One of the reasons may have been that I had indicated that there would likely be a very lengthy delay until a new date could be found for a further four week trial. That may have been of some concern given that a number of defendants were in custody or on restrictive bail terms. Whatever the

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23 *Mika v R* [2013] NZCA.

24 Two jurors had previously been discharged, for unrelated reasons.

reasons, overall I have not been persuaded that a discrete discount should be given for this particular factor.

[81] I have also not been persuaded that any specific discount is warranted for your prospects of rehabilitation. You have an extensive offending history. Your pre-sentence report indicates that you lack insight into your offending, you have demonstrated a total lack of remorse, and you have a significant history of non-compliance with community-based sentences. Given those factors your rehabilitation prospects are simply not sufficient at this stage to justify a separate sentencing discount.

Minimum period of imprisonment

[82] Finally, I have briefly considered the issue of whether a minimum period of imprisonment should be imposed. I accept counsel's submission, however, that there would be no point in my doing so given that under the three strikes regime you will be required to serve your full sentence without parole, in any event.

Sentence

[83] Mr Jolley please stand.

[84] On the charge of attempted murder, you are sentenced to 11 years' imprisonment.

[85] On the charge of participation in an organised criminal group, you are sentenced to three years and six months' imprisonment, to be served concurrently.

[86] On the charge of being unlawfully in a building, you are sentenced to one months' imprisonment, to be served concurrently. You may now stand down.

Katz J