

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA342/2022
[2023] NZCA 29**

BETWEEN TEWE-LANCE TOKOTAHI
 WHAREWHITI
 Appellant

AND THE KING
 Respondent

Hearing: 16 February 2023

Court: French, Ellis and Churchman JJ

Counsel: J M Grainger for Appellant
 R K Thomson for Respondent

Judgment: 24 February 2023 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed. The sentence of two years and one month’s imprisonment is quashed and replaced with a sentence of intensive supervision for 12 months subject to the following special conditions:

- (a) To attend an assessment for Community Corrections Department Programme as directed by a Probation Officer. To attend and complete any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a Probation Officer;**
- (b) To attend and complete an appropriate programme, counselling or treatment to address offence related offending to the**

satisfaction of a Probation Officer. The specific details of the appropriate programme shall be determined by a Probation Officer; and

- (c) **Not to associate or have any contact with Mongrel Mob members or associates unless prior approved by a Probation Officer.**
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REASONS OF THE COURT

(Given by French J)

Introduction

[1] Following a guilty plea, Mr Wharewhiti was convicted in the District Court of aggravated robbery and sentenced by Judge O’Driscoll to a term of imprisonment of two years and one month.¹

[2] He appealed his sentence to the High Court but the appeal was dismissed by Mander J.² Mr Wharewhiti then sought and obtained leave to appeal to this Court.³

Background

[3] Mr Wharewhiti is a patched member of the Mongrel Mob. The victim of the aggravated robbery was a patched member of a rival gang, the Barbarian Stormtroopers.

[4] On the evening of 21 August 2021 Mr Wharewhiti was in the company of two other patched members of the Mongrel Mob, his older brother Mr Eru and a Mr Buchanan. They came across the victim who appeared to be alone in a carpark working on a motorcycle. The three men approached the victim and attacked him in an effort to remove his patch. Mr Wharewhiti along with Mr Eru struck the victim

¹ *R v Wharewhiti* [2022] NZDC 5244 [Sentencing notes].

² *Wharewhiti v R* [2022] NZHC 1367 [High Court decision].

³ *Wharewhiti v R* [2022] NZCA 629 [Court of Appeal leave decision].

repeatedly with punches and kicks aimed at the head and body. Mr Buchanan kept watch holding a glass bottle by its neck like a club.

[5] Associates of the victim arrived at the scene and attempted to thwart the attack by driving their vehicle towards the attackers. At this point, Mr Wharewhiti and Mr Eru were dragging the victim along the ground while continuing to strike him and remove his patch. After several more blows to the head and body, Mr Buchanan hit the victim with the bottle and the patch was removed. The three then fled the scene.

[6] When spoken to by the police, Mr Wharewhiti denied any involvement in the assault. The other two made no comment.

[7] Following a sentence indication, both Mr Wharewhiti and Mr Buchanan subsequently pleaded guilty to a charge of aggravated robbery. The Judge declined to give a sentencing indication to Mr Eru because he was facing trial on another unrelated charge of wounding with intent. That charge arose out of an incident that had taken place in July 2020 when Mr Eru had punched someone in the face numerous times causing extensive facial injuries. These included serious issues relating to the victim's eyes, requiring ongoing surgery.

Sentencing of Mr Wharewhiti and Mr Buchanan in the District Court

[8] Due to illness, Mr Buchanan and Mr Wharewhiti were not sentenced at the same time.

[9] In sentencing Mr Wharewhiti on 25 March 2022, Judge O'Driscoll adopted a starting point of three and a half years' imprisonment, relying on the decision of this Court in *R v Mako*.⁴ He then reduced that starting point by 17 months on account of personal mitigating factors, namely:

- (a) a three-month deduction for time spent on electronically monitored bail (EM bail);⁵

⁴ Sentencing notes, above n 1, at [29], citing *R v Mako* [2000] 2 NZLR 170 (CA).

⁵ At [39].

- (b) a six-month deduction for matters contained in a cultural report relating to Mr Wharewhiti's background and upbringing which it was accepted was causally linked to his gang membership and hence his offending;⁶ and
- (c) an eight-month deduction for the guilty plea.⁷

[10] Those adjustments resulted in an end sentence of two years and one month's imprisonment.⁸

[11] Mr Buchanan who like Mr Wharewhiti remained committed to the gang was also sentenced by Judge O'Driscoll.⁹ His sentencing took place a week later. The Judge adopted the same starting point of three and a half years' imprisonment but in Mr Buchanan's case applied an uplift of three months on account of the fact that the aggravated robbery occurred while Mr Buchanan was on bail.¹⁰ The Judge then applied discounts of three months for time spent on EM bail, ten months for matters in the cultural report and eight months for the guilty plea.¹¹

[12] Those reductions brought the sentence down to 24 months which meant Mr Buchanan was eligible for home detention. The Judge imposed a sentence of nine months' home detention and 200 hours community work together with a judicial monitoring condition.¹²

[13] The Judge concluded his sentencing notes by saying:

[34] I am fully conscious and aware that your co-offender, Mr Wharewhiti was sentenced to imprisonment and was not granted home detention. That was because he did not come within the auspices of a short term sentence of imprisonment. I am also aware that he has filed an appeal to the Court of Appeal and I have no doubt that your case now will be put before the Court of Appeal and there will be a disparity argument advanced in the Court of Appeal, but I have given you a greater discount than I gave Mr Wharewhiti because of the matters that are set out in your cultural report. I would invite,

⁶ At [40].

⁷ At [41].

⁸ At [42].

⁹ *R v Buchanan* [2022] NZDC 5742.

¹⁰ At [22].

¹¹ At [23]–[26].

¹² At [28]–[32].

if there is any appeal, for the two cultural reports to be examined because it is on that basis that I brought your sentence down to a period where I could consider home detention.

Mr Wharewhiti's appeal in the High Court

[14] The grounds of appeal were that the starting point was too high and that discounts should have been allowed for provocative conduct on the part of the victim and for Mr Wharewhiti's youth, he being aged 22 at the time of the aggravated robbery.

[15] Mander J held that having regard to the aggravating features of the offending — an extended group attack rooted in gang rivalry and involving actual violence including the use of a weapon to strike the victim's head — the starting point of three and a half years' imprisonment while perhaps stern was within range.¹³ He also held that the District Court Judge had been correct to reject a submission that a racist epithet used by the victim amounted to operative provocation.¹⁴

[16] As regards the issue of a discount for youth, Mander J noted there is no presumption in favour of such a discount which will depend on the nature of the offending and the circumstances of the particular offender.¹⁵ The offending in this case was, the Judge said, relatively serious, and the violence occurred not because of any youthful impulse but because of deliberate confrontation.¹⁶

[17] The Judge went on to say that one of the rationales for reducing a sentence because of an offender's youth is the potential for rehabilitation and the concern that prison will expose the young person to the influence of hardened criminals and gang members.¹⁷ However, although there were aspects of Mr Wharewhiti's personal situation which were in his favour such as a good employment record, family support and relatively minor previous offending, he remained committed to the gang.¹⁸ That meant, in the Judge's view, that he would allow his conduct to be regulated by the

¹³ High Court decision, above n 2, at [9]–[11].

¹⁴ At [13].

¹⁵ At [19].

¹⁶ At [19].

¹⁷ At [21].

¹⁸ At [21]–[22].

gang's norms and thus his rehabilitative prospects (whether considered on the basis of his age or more generally) appeared limited.¹⁹

[18] The Judge concluded that the District Court's refusal to extend credit for youth was not an error and dismissed the appeal.²⁰

[19] In dismissing the appeal, Mander J did not have the opportunity to consider the different sentencing outcome for Mr Eru. That was because the latter's sentencing only took place some four months later in October 2022.

Sentencing of Mr Eru

[20] It will be recalled that Mr Eru was facing trial on another unrelated charge of wounding with intent. He asked for a sentence indication in relation to both that charge and the aggravated robbery charge and was told the starting point for both would be a term of imprisonment of around six and a half years. He did not accept the sentence indication but he did later plead guilty to the wounding with intent charge. On that charge, he was sentenced by Judge Farish to eight months' home detention.²¹ Judge Farish was persuaded not to impose a custodial sentence because of a positive pre-sentence report. Mr Eru had, as the Judge later explained when sentencing him on the aggravated robbery charge, done "very, very well" on electronically monitored bail and had made a serious commitment to step away from the gang and live a better lifestyle.²²

[21] When Mr Eru was about halfway through the home detention sentence, he asked for a sentence indication on the aggravated robbery charge.

[22] The pre-sentence report in relation to the aggravated robbery charge was even more positive than the earlier one. It was described by Judge Farish as "glowing" and "one of the most positive" she had ever seen.²³ Mr Eru had handed in his gang patch, successfully completed programmes, maintained sobriety and done, the Judge said,

¹⁹ At [22].

²⁰ At [22] and [24]–[25].

²¹ *R v Eru* [2022] NZDC 6739.

²² *R v Eru* DC Christchurch CRI-2021-009-6506, 13 October 2022 at [4].

²³ At [6].

“everything that every[one] wanted [him to do].”²⁴ In light of the report, Judge Farish was persuaded to cancel the home detention sentence and impose a sentence of six months’ community detention for both the wounding offence and the aggravated robbery together with a sentence of 18 months’ intensive supervision.²⁵

The appeal before us

[23] In granting leave to bring this second appeal, this Court was persuaded that in the somewhat unusual circumstances a miscarriage of justice may have occurred.²⁶

[24] In particular, the leave Court considered there was an argument worthy of ventilation that the High Court had placed excessive weight on one statement in the pre-sentence report about being committed to the gang at the expense of other positive material.²⁷ Material that arguably should have justified discounts for rehabilitative prospects and youth thereby rendering Mr Wharewhiti eligible to be considered for home detention.²⁸

[25] Mr Wharewhiti was the youngest of the three offenders and the only one of them to be sentenced to imprisonment. His role in the offending was not more serious than the others, while unlike them his criminal history was limited. He did not have any alcohol or drug issues and had remained offence free for the eight months he had been on bail. He had worked continuously for the same employer since the age of 16 (some seven years) and was regarded as a loyal and hardworking employee. He had a supportive family and expressed remorse about the impact his offending had had on them, in particular his mother whose distress at his conduct he described as heartbreaking. He expressed the wish to be a good role model for his younger siblings.

[26] No doubt in light of those matters, the pre-sentence report had recommended a sentence of intensive supervision and community detention. The writer expressed the view that this would enable Mr Wharewhiti to participate in a rehabilitative

²⁴ At [3].

²⁵ At [11]–[12].

²⁶ Court of Appeal leave decision, above n 3, at [25].

²⁷ At [27].

²⁸ At [27].

treatment pathway, establish pro social links within the community and continue to support the possibility of ongoing employment.

[27] At the hearing before us, Ms Thomson for the Crown appropriately acknowledged that Mr Wharewhiti was in a difficult position and it was understandable that he might feel hard done by. However, in her submission, there had been no error in the Courts below. Discounts that were justifiably available to the other co-offenders were simply not available to Mr Wharewhiti and therefore the different outcomes were reconcilable and justified. She further submitted that unlike the other two, Mr Wharewhiti had made no particular steps towards rehabilitation.

[28] As will be apparent, there is some force in Ms Thomson's submissions.

[29] In our view this appeal essentially turns on an assessment of Mr Wharewhiti's prospects for rehabilitation. While this was considered by both the High Court and the District Court, some significant references in the cultural report appear to have been overlooked. In particular, it emerges from the report that the two brothers are very close, and that they did "everything together" including joining the gang at the same time following the death of their father. Their mother to whom Mr Wharewhiti is also close is described as anti-gang. She told the report writer about the influence Mr Eru has over his younger brother and suggested their close relationship was a factor in Mr Wharewhiti joining the gang. In the past when she had urged Mr Wharewhiti to leave the gang, his response was to say he could not leave his brother.

[30] The mother also reported that Mr Eru who at the time was living with her on home detention had taken off his patch and that this would set a positive example for Mr Wharewhiti. She was fearful that a prison sentence would only push the latter further into the gang's arms and was implicitly fearful that trying to leave the gang while in prison would be problematic.

[31] In fairness to the Courts below, while that information was before them, it has come into sharper focus for us because unlike those Courts, we have had the benefit of Mr Eru's sentencing.

[32] We note too that it appears Mr Wharewhiti joined the gang in around 2014. Despite this he had a stable work record and prior to 2021 had only one conviction for careless use of a vehicle. The offending escalated in 2021 which coincided with the breakdown of a relationship. As he acknowledged himself, that led to a deterioration in his behaviour due to associating more heavily with the gang in the absence of the support he had previously enjoyed. The offending and its consequences was however also said to have provided a wakeup call for him. He expressed a strong determination to avoid crime in the future and to turn his life around for the sake of his family and in particular his mother. He also expressed a willingness to participate in rehabilitation programmes.

[33] This and the other matters identified at [25] above was all material which in our view justified greater discounts for rehabilitative prospects and youth than those that were given. Only a slight increase in the discounts would have rendered Mr Wharewhiti eligible to be considered for home detention, a sentence which we consider is the sentence that should have been imposed.

[34] Time has however of course moved on. Mr Wharewhiti has already served close to 11 months of his prison sentence, making the imposition of a home detention sentence now inappropriate. Instead we have decided the sentence that best takes account of the time he has already served while facilitating his rehabilitation prospects is an intensive supervision order of 12 months duration which is subject to the following special conditions:

- (a) To attend an assessment for a community corrections department programme as directed by a probation officer. To attend and complete any counselling, treatment or programme as recommended by the assessment as directed by and to the satisfaction of a probation officer.
- (b) To attend and complete an appropriate programme, counselling or treatment to address offence related offending to the satisfaction of a probation officer. The specific details of the appropriate programme shall be determined by a probation officer.

- (c) Not to associate or have any contact with Mongrel Mob members or associates unless prior approved by a probation officer.

Outcome

[35] The appeal is allowed. The sentence of two years and one month's imprisonment is quashed and replaced with a sentence of intensive supervision for 12 months subject to special conditions set out at [34] above.

Solicitors:
Public Defence Service, Christchurch for Appellant
Crown Law Office, Wellington for Respondent