IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA316/2024
[2024] NZCA 521

BETWEEN	IZRAEL IZIAH MITCHELL HUATA Appellant
AND	THE KING Respondent

Hearing: 4 September 2024

Court: Cooke, Collins and Grice JJ

Counsel: W R Hawkins for Appellant
M J R Blaschke for Respondent

Judgment: 16 October 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for an extension of time to bring an appeal against conviction is granted.

B The appeal against conviction is allowed. The conviction for aggravated burglary (CRN: 23019001583) is set aside and a conviction for burglary is entered.

C The appeal against sentence is allowed in part. The sentence of two years and two months' imprisonment for aggravated burglary (CRN: 23019001583) is set aside and a sentence of two years and two months' imprisonment to be served cumulatively on the other sentences imposed by the District Court on 24 April 2024 is imposed for the substituted charge of burglary.

D The four-year minimum period of imprisonment is set aside. A minimum period of imprisonment of two years is imposed on the sentence for aggravated burglary (CRN: 23019001578), and a minimum period of imprisonment of one year is imposed on the sentence for burglary. The minimum periods of imprisonment are to be served cumulatively.

E The appeal against sentence is otherwise dismissed.

REASONS OF THE COURT

(Given by Grice J)

Introduction

[1] Mr Huata was sentenced in the Napier District Court on 23 April 2024 to nine years and two months' imprisonment, with a minimum period of imprisonment (MPI) of four years, after being convicted on a number of charges.[1] He appeals against his sentence in relation to the following Crown charges: aggravated robbery, assault with intent to injure (representative), burglary, aggravated burglary, assault with a weapon, unlawful possession of a firearm, and common assault. At the same time, Mr Huata was sentenced on a number of Police charges. No appeal has been filed in respect of the Police charges.

[2] Mr Huata says that the Judge erred in his approach by taking into account the aggravating features of the offending and the offender at the end of the sentencing exercise, effectively nullifying the totality principle and resulting in an end sentence that was manifestly excessive. The Crown submits that there was no error in the sentencing methodology, and that in any event, it is the end sentence that is critical, not the manner in which it was reached. The Crown nevertheless identifies two "technical" errors in the sentence which it invites the Court to correct on appeal.

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1 *R v Huata* [2024] NZDC 9190 [Sentencing notes].

Background

[3] The Crown offending relates to three separate incidents in November 2022, December 2022, and January 2023 respectively.[2] The Police charges, which are not under appeal, were dealt with by the Judge as a discrete fourth group of offences.[3]

[4] Mr Huata had pleaded guilty to the Police charges.[4] Those charges related to incidents occurring on 11 December 2022 (careless driving, driving while disqualified (third and subsequent), and an excess blood alcohol charge) and 5 October 2022 (a further charge of driving while disqualified (third and subsequent). In addition, Mr Huata was convicted on a breach of bail and a breach of his intensive supervision sentence imposed on 23 August 2022, by failing to report.[5]

November 2022 offending

[5] The first set of Crown charges relates to offending on 22 November 2022, for which Mr Huata was charged with aggravated robbery and assault with intent to injure. Mr Huata pleaded guilty to both charges.[6]

[6] That offending involved a sustained and unprovoked attack on an intellectually disabled man, who was out for a walk at about 10.00 am in Napier. Mr Huata leapt out of a vehicle in which he had been a passenger and confronted the man. Mr Huata was bare chested and showing his gang tattoos. He punched the man in the face, causing his mouth to bleed. The man ran away and Mr Huata chased after him, saying he wanted a "hug". When members of the public intervened, Mr Huata took an empty glass bottle from the car and continued to chase the man, who then cowered in a foetal position. Mr Huata kicked him and attempted to take the man's belt bag, while punching the victim in the head. He then smashed the glass bottle over the man's head and dragged him across the footpath. Members of the public again tried to intervene. Mr Huata continued to punch the man in the head, and when he was finally stopped by a member of the public, he took the bag and a sweatshirt and left the scene in the

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2 Sentencing notes, above n 1, at [1]–[4]. We have relied on the Judge's sentencing notes in setting out the factual background to the offending.
3 At [49].
4 At [49].
5 At [26].
6 At [2].

car. The victim required medical attention for wounds to his mouth and scalp, as well as for grazing and bruising. The Judge referred to the incident as a "violent, … callous attack … on this vulnerable person."[7]

December 2022 offending

[7] The second set of Crown charges arose from events in Hamilton which took place on 4 December 2022. Mr Huata pleaded guilty to one charge of burglary in relation to these events.[8]

[8] The offending occurred in the course of a "gang taxing" while Mr Huata was on bail, and before he had been apprehended for the November offending. Mr Huata and three gang associates went to an address in the mid-afternoon. Initially, a female occupant answered the door to two of Mr Huata's co-defendants, and declined their request for money. The third co-defendant then joined them at the front door and they entered the address. The other occupants of the house locked themselves in a room as Mr Huata and his co-defendants began searching the house, under the direction of the fourth co-defendant. The locked door was kicked down, the room was searched, and a number of items were taken, including a tablet, a silver watch, cash, an iPhone, and another phone. The CCTV hard drive which had been operating at the property was also removed and taken. As the police arrived, Mr Huata and his three co-defendants left the address in his vehicle at high speed.

January 2023 offending

[9] The third set of Crown offending occurred on 18 January 2023. Mr Huata was found guilty at trial on charges of common assault, unlawful possession of a firearm, aggravated burglary, and assault with a weapon.[9] He was acquitted on a charge of discharging a firearm.[10]

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7 At [13].

8 At [3]. This burglary charge has been incorrectly recorded in the District Court records as an aggravated burglary. The administrative error apparently arose due to the entry of a charge reference relating to an earlier charge of aggravated burglary.

9 Sentencing notes, above n 1, at [2].

10 At [25].

[10] This offending related to a transaction that Mr Huata had entered into with the victim, a mechanic to whom Mr Huata had taken a vehicle for dismantling for parts. The car body was left on the victim's front lawn for some time, and he eventually sold it. Mr Huata believed the victim owed him money for the car body. When confronted, the victim offered some money to Mr Huata in order to keep the peace. Dissatisfied with that proposal, Mr Huata threatened the victim, punching him while he was sitting in a car.

[11] Later that night, Mr Huata went to the victim's address with an associate, and entered the backyard area through a closed gate. Mr Huata was disguised, carrying a concealed cut down double-barrelled shotgun and checked that he could not be seen by the CCTV cameras. When the victim came to the back door, Mr Huata encouraged him out into the yard outside the coverage of the cameras. Mr Huata then confronted the victim, swearing at him, accusing him of stealing the car, and saying that he owed him money. The associate joined them in the yard, and Mr Huata pointed the shotgun at the face of the victim, who pushed it to one side. Mr Huata struck the victim in the face with the stock of the firearm and cut his nose, causing bleeding. The victim's partner came out and told Mr Huata to get off the property and that she was calling the police. Mr Huata and his associate left in his car.

Sentencing decision

[12] Judge Earwaker noted that it was a relatively complicated sentencing process, and chose to deal with each set of offending separately, by calculating a starting point for each set, indicating he would then look at the totality of the offending and make adjustments as required.[11]

Starting points

[13] The Judge considered the aggravating features of the November 2022 offending included the vulnerability of the victim, sustained and serious violence, use of a weapon, and taking property.[12] The Judge also emphasised the profound impact of the offending on the victim, leaving him afraid to walk on the streets by himself and

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11 At [33].
12 At [34].

having difficulty sleeping.[13] A starting point of four years' imprisonment, based on *R v Mako*, as suggested by both Crown and defence counsel, was adopted for this offending by the Judge.[14]

[14] Turning to the December 2022 offending, the Judge noted it was important to maintain parity with Mr Huata's co-defendants, who had already been sentenced.[15] A starting point of three and a half years' imprisonment was taken, as the offending was serious and involved gang taxing.[16]

[15] The aggravating factors in relation to the January 2023 offending were: premeditation, two defendants acting together, the presence of a weapon, the use of disguises, entering the premises of a residential home (albeit Mr Huata did not go inside), the link to gang activity, and the injury to the victim.[17] The Judge considered that, although less serious than the home invasion cases referred to by the Crown, this still represented serious offending and warranted a starting point of five years' imprisonment.[18]

[16] The sum of those starting points was 12 and a half years' imprisonment.[19]

Discounts for guilty pleas

[17] The Judge then applied discounts for guilty pleas for the sets of charges to which the appellant had entered guilty pleas. For the November 2022 offending, he applied a 20 per cent guilty plea discount to the starting point of four years, reaching an end point of three years and two and a half months' imprisonment (38 and a half months).[20] For the December 2022 offending, the Judge also applied a 20 per cent discount of three and a half years' imprisonment, leading to an end point of two years and nine and a half months' imprisonment (33 and a half months).[21] No discount was

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13 At [35].
14 At [36], citing *R v Mako* [2000] 2 NZLR 170 (CA).
15 Sentencing notes, above n 1, at [42].
16 At [42].
17 At [37].
18 At [41].
19 At [43].
20 At [45].
21 At [47].

applied to the five year starting point for the January 2023 offending, as those charges went to trial.[22]

[18] In relation to the Police charges, a 20 per cent discount for the guilty plea was deducted from a starting point of 12 months' imprisonment, leading to a sentence of nine and a half months' imprisonment.[23]

[19] This resulted in a total starting point, for the three sets of Crown offending and the Police charges, adjusted for guilty plea discounts, of 11 years and nine and a half months' imprisonment (141 and a half months).[24]

Totality

[20] The Judge then made a downward adjustment for totality of just under two years, leaving a total of nine years and 10 months' imprisonment (118 months).[25]

Other discounts

[21] The Judge then turned to assess other discounts. He applied a discount of 15 per cent to recognise cultural and background issues outlined in a report tendered under s 27 of the Sentencing Act 2002. This was applied to the "adjusted starting point" of nine years and 10 months for the total offending, resulting in an "end sentence" of eight years and four months' imprisonment.[26]

Uplifts for aggravating factors and final sentence

[22] The Judge then applied an uplift of six months (to the total of eight years and four months) for Mr Huata's criminal history, taking the sentence to eight years and 10 months' imprisonment.[27] A further uplift of four months was applied to reflect that

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22 At [48].
23 At [49].
24 At [50].
25 At [51].
26 At [57].
27 At [59].

the offending took place while Mr Huata was on bail.[28] This resulted in a total end sentence of nine years and two months' imprisonment.[29]

Apportionment of sentences

[23] The Judge then apportioned the final sentence of nine years and two months as follows.

(a) For the November 2022 offending: three years' imprisonment for aggravated robbery; with a concurrent sentence of 12 months' imprisonment for assault with intent to injure.[30]

(b) For the December 2022 offending: two years and two months' imprisonment for burglary.[31]

(c) For the January 2023 offending: four years' imprisonment for aggravated burglary; with concurrent sentences of six months' imprisonment for assault, two years' imprisonment for unlawful possession of a firearm, and three years' imprisonment for assault with a weapon.[32]

(d) For the Police charges: concurrent sentences of one month's imprisonment for driving with excess breath alcohol charge, nine months' imprisonment for each of the driving while disqualified charges, two months' imprisonment for the breach of supervision and breach of bail charges, and a conviction and discharge for the careless driving charge.[33]

[24] The Judge applied an MPI of four years to mark the seriousness of the offending, and in light of Mr Huata's history of offending.[34] He also made a firearms

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28 At [60].
29 At [60].
30 At [71] and [75].
31 At [71].
32 At [71]–[73].
33 At [74].
34 At [64]–[65].

prohibition order under s 39A of the Arms Act 1983 and disqualification from driving orders.[35]

Approach on appeal

[25] Mr Huata appeals his sentence under s 244 of the Criminal Procedure Act 2011. This Court must allow the appeal only if it is satisfied that there is an error in the sentence imposed and that a different sentence is appropriate.[36] Generally the court on appeal will not disturb a sentence based on the methodology applied, unless that has led to a sentence that is manifestly excessive.[37]

The appeal

[26] Mr Huata does not take issue with the discrete starting points adopted for each set of offending, nor the 20 per cent guilty plea discounts on the sets of offending to which he had pleaded guilty. He also does not dispute the quantum of the uplifts for previous convictions and offending whilst on bail, nor does he take issue with the amount applied for personal discounts.

[27] Mr Huata's appeal is concerned with the effect of the uplifts. Mr Hawkins, for Mr Huata, submits that these were applied at the end of the sentencing exercise, rather than being applied to the total starting point adjusted for guilty plea discounts. He contends that this resulted in a final sentence that was manifestly excessive.

[28] Mr Blaschke, for the Crown, says that the Judge's approach was consistent with the sentencing steps prescribed in *Moses v R*,[38] and the adjustment made for totality was applied by the Judge at the correct stage of the process. Where guilty plea discounts were available, those had been calculated by reference to the starting point prior to it being adjusted for other personal factors or totality. Mr Blaschke says counsel had discussed the approach with the Judge prior to the sentencing. He

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35 At [67] and [74].
36 Criminal Procedure Act 2011, s 250(2)
37 *Ripia v R* [2011] NZCA 101 at [15]; and *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
38 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [45]–[49].

emphasises that the ultimate question is whether the overall sentence was appropriate, rather than the process that led to it.

Analysis

[29] The two-step approach to be applied in sentencing was established by this Court in *Moses* as follows:[39]

> (a) the first step is to calculate the adjusted starting point, incorporating all the aggravating and mitigating features of the offence;
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> (b) the second step is to incorporate all the aggravating and mitigating factors personal to the offender, together with any guilty plea discount, which should be calculated as a percentage of the adjusted starting point.

[30] The rationale for this approach is to ensure that any adjustments for factors personal to the offender, including the guilty plea discount, are made to the starting point calculated by reference only to the offending. That approach ensures any guilty plea percentage discount is not diminished by being applied to a sentence that has already been discounted for other factors.[40] This Court in *Moses* noted that a quantified percentage discount for a guilty plea to the adjusted starting point helped achieve transparency in the end sentence. It also reflected the fact that the guilty plea discount "is justified in substantial part by systemic and social considerations distinct from the offender's personal circumstances".[41]

[31] Here, the sentencing Judge applied the guilty plea discount separately to each adjusted starting point for the sets of offending which properly attracted a discount, as required by *Moses.*

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39 At [46].
40 At [42], citing *R v [R]* [2018] NZDC 4473; and *R (CA217/2018) v R* [2018] NZCA 582.
41 *Moses v R*, above n 38, at [47].

[32] When sentencing on multiple charges, the totality of the sentences must be considered to ensure that the offender's overall culpability for their conduct as a whole is reflected in the final sentence. Section 85 of the Sentencing Act provides:

> **85 Court to consider totality of offending**
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> (1) Subject to this section, if a court is considering imposing sentences of imprisonment for 2 or more offences, the individual sentences must reflect the seriousness of each offence.
>
> (2) If cumulative sentences of imprisonment are imposed, whether individually or in combination with concurrent sentences, they must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.
>
> (3) If, because of the need to ensure that the total term of cumulative sentences is not disproportionately long, the imposition of cumulative sentences would result in a series of short sentences that individually fail to reflect the seriousness of each offence, then longer concurrent sentences, or a combination of concurrent and cumulative sentences, must be preferred.
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> (4) If only concurrent sentences are to be imposed,—
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> (a) the most serious offence must, subject to any maximum penalty provided for that offence, receive the penalty that is appropriate for the totality of the offending; and
>
> (b) each of the lesser offences must receive the penalty appropriate to that offence.

[33] We accept the Crown submission that *Moses* does not deal with the totality principle, other than to note that there is no guideline judgment on the topic.[42] That decision was largely concerned with promoting "transparency of analysis and principled consistency of outcome".[43] The approach of separating the aggravating and mitigating factors personal to the offender from the circumstances of the offence itself ensures that comparisons can be made among starting points for similar offending.[44]

[34] The rationale for the totality principle is that the total period of imprisonment imposed should not be "wholly out of proportion to the gravity of the overall offending".[45] Whilst the Court in *Moses* did not consider the issue of when

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42 At [35].
43 At [49].
44 At [6], citing *R v Taueki* [2005] 3 NZLR 372 (CA) at [43]; and *Zhang v R* [2019] NZCA 507; [2019] 3 NZLR 648 at [134].
45 Sentencing Act 2002, s 85(2).

adjustments should be made for totality, in practice the totality assessment is often made at the end of step two in the sentencing process.[46]

[35] Nevertheless, there are not infrequent examples of cases where the adjustment has been made after setting the adjusted starting point at step one. For instance, in *Polaapau v R*, this Court held on appeal that totality should have been considered after the sentencing Judge had added together the starting points for the various offending to arrive at the final adjusted starting point.[47] The Judge had fallen into error by not assessing the issue of totality overall once she had structured that adjusted starting point for the sentence.[48] A discount of 50 per cent was applied for personal mitigating factors after the totality adjustment.[49] The justification for considering totality at the end of step one is that adjustments made at step two should reflect factors personal to the offender.

[36] In his written submissions, Mr Hawkins says that the Judge ought to have applied an uplift at step one to incorporate "the aggravating features [of] the offending and the offender", raising the starting point of 12 and a half years' imprisonment to 13 and a half years' imprisonment, and then adjusted that figure down by two years for totality, to reach an overall adjusted starting point of 11 and a half years' imprisonment at step one. Then, at step two, the Judge should have applied a global discount of either 15 or 20 per cent for Mr Huata's guilty pleas, together with a 15 per cent discount for personal mitigating factors, resulting in an end sentence of either seven years and six months' or eight years and two months' imprisonment.[50]

[37] Two points arise in relation to the appellant's proposed methodology. First, the uplift of one year for aggravating factors, which the appellant suggests should be made to the 12 and a half year sum of the starting points for each set of offending, presumably is intended to represent the 10 month uplift made by the Judge for previous

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46 See *R v Taylor* [2007] NZCA 258 at [61].

47 *Polaapau v R* [2020] NZCA 227 at [42]. Other examples of the totality adjustment being made before considering personal factors include *Jacobson v R* [2023] NZHC 1358 at [14]; *R v Levett* CA437/05, 20 March 2006 at [17]; *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312 at [57]; and *R v Tamatea* [2012] NZCA 443 at [19].

48 *Polaapau v R*, above n 47, at [44].

49 At [45].

50 A calculation error is apparent in the appellant's submissions, as the 11 and a half year adjusted starting point has been converted to 141 months, however it ought to be 138 months.

convictions (six months) and offending while on bail (four months).[51] The *Moses* methodology suggests that, as those are aggravating factors relating to the offender, the adjustment should be applied at the second step, not the first step. Adding an uplift at the first stage for a factor personal to the offender obscures the real starting point for the offending alone.

[38] Secondly, as the appellant recognises, the guilty plea discount applies only to the sets of offending to which Mr Huata pleaded guilty. Applying a global guilty plea discount to a sum which has been adjusted for aggravating factors personal to the offender does not apply that discount to the starting point for the offending only. The process set out in *Moses* was designed to avoid this situation.

[39] If a two-year totality adjustment was made at the end of step two of the *Moses* methodology, following discrete applications of guilty plea discounts to the applicable charges and global adjustments for personal aggravating and mitigating factors, an end sentence of approximately 106 months (eight years and 10 months' imprisonment) is reached — four months less than the final sentence imposed by the Judge.

[40] The Judge was not in error in applying the totality principle prior to adjusting for personal aggravating and mitigating factors. The multiple groups of offending provided a rationale for applying the totality principle at that stage, in order to take account of the overall gravity of the combined offending, before moving to assess Mr Huata's personal factors. The starting point for the sentence on each set of offending was transparent, as was the total end sentence for the offending, meeting the requirement under the Sentencing Act not to inappropriately impose a series of short sentences that individually fail to reflect the seriousness of each offence.[52] In addition, the percentage discounts for the guilty pleas were applied to the relevant sets of offending and were not watered down in the manner cautioned against in *Moses*.

[41] However, the process adopted by the Judge did deviate from the *Moses* methodology in that the 15 per cent discount for personal factors was applied to a term

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51 It appears the respective uplifts of six and four months have been mistakenly calculated together to equal 12 months.

52 Sentencing Act, s 85(3).

of imprisonment that had already been discounted for the guilty pleas. The personal factor discount was therefore slightly less than if it had been applied to the initial starting point.

[42] In reviewing the sentencing calculations, we also detected an inconsistency in the manner in which the Judge apportioned the final overall sentence of nine years and two months' imprisonment. The sentence was apportioned over the three sets of Crown offending only and not over the Police offending.[53] The Judge instead imposed concurrent sentences on each of the Police charges.[54] The end result was still the intended final sentence of nine years and two months' imprisonment. But the imposition of concurrent sentences on all the Police charges was inconsistent with the Judge's earlier approach, which was that the four sets of offending — being the three sets of Crown offending and the Police offending — were added cumulatively to achieve the overall starting point. While making the four sets of offences cumulative may have been the better approach because the Police charges were unconnected in kind to the Crown charges, the end point remains the same whichever route is taken.

[43] The issue in sentencing "is not whether an applicable guideline judgment is followed but whether the sentence is a just one in all the circumstances".[55] When answering that question, the judge "should stand back and consider the circumstances of offence and offender against the applicable sentencing purposes, principles and factors".[56] Nevertheless, the sentencing Judge should normally follow the *Moses* methodology. This ensures consistency and transparency and ensures that proper weight is accorded to the adjustments for guilty pleas and personal factors.

[44] So, the Judge made an error in departing from the *Moses* methodology. He also made an error in the manner in which he imposed he MPI which we deal with below. However, the critical question is whether the final sentence imposed is manifestly excessive, rather the process by which the final sentence is arrived at.[57]

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53 Sentencing notes, above n 1, at [71]–[73].
54 At [74].
55 *Moses*, above n 38, at [49].
56 At [49].
57 See *Wairea v R* [2012] NZCA 423 at [16]; *Ripia v R*, above n 37; and *Tutakangahau v R*, above n 37.

Approaching the appeal in this way is particularly important when the sentencing process is complex, as it was here.

[45] The three sets of offending which were the subject of Crown charges were serious and justified the sentences imposed for each. Indeed, no issue is taken with the Judge's analysis and conclusions in relation to the separate sets of offending. Taken together with the Police offending, and the Judge's adjustment for totality, we consider the sentence was appropriate in light of the gravity of the offending as a whole. No issue is taken with the discounts for personal mitigating factors, nor for the 10-month adjustment for Mr Huata's criminal history and offending while on bail. We consider those were appropriate. The end sentence of nine years and two months' imprisonment overall was not manifestly excessive. It was well within the range available to the sentencing Judge.

Other issues

Correction of conviction record

[46] The Crown points to an error in the District Court record in relation to the December 2022 offending. Mr Huata's updated criminal history and the sentencing orders record that a conviction has been entered for aggravated burglary, rather than burglary, for which the appellant was sentenced and indicated that he had entered a guilty plea. The relevant warrants and orders issued following sentencing record the conviction as one of aggravated burglary, described as "committing burglary with a weapon (firearm)".

[47] Mr Huata and his co-offenders were originally charged with aggravated burglary due to the alleged presence of a firearm, however all pleaded guilty to burglary as part of a resolution.[58] The entry of a guilty plea on 4 December 2022 to the charge of burglary under s 231(1) of the Crimes Act 1961 is recorded in the written submissions of both Crown and defence counsel at sentencing. The Judge sentenced

[58] The amended Crown charge notice dated 17 October 2023 added burglary as an alternative charge to aggravated burglary.

Mr Huata on a charge of burglary, not aggravated burglary, as is apparent from the sentencing notes.[59]

[48] The administrative error appears have come about due to the guilty plea being incorrectly recorded against the reference number of the original aggravated burglary charge (CRN: 23019001583), rather than the alternative burglary charge to which Mr Huata pleaded guilty (CRN: 23019502326). The error was perpetuated in subsequent orders and warrants issued, with the result being that the more serious charge now appears on Mr Huata's criminal history record.[60]

[49] In the course of the appeal hearing, Mr Hawkins, on behalf of Mr Huata, sought leave, which is granted, to appeal the wrongly recorded conviction for aggravated robbery and for it to be substituted with the lesser charge of burglary to which Mr Huata had pleaded guilty. The Crown offered no opposition to the leave application nor to the allowing of the appeal on this point.

[50] To allow the record of conviction to stand without correction in a timely manner would be a miscarriage of justice. Accordingly, the appeal against Mr Huata's conviction for aggravated burglary on 4 December 2022 is allowed.[61] In substitution, Mr Huata is convicted on the lesser charge of burglary on that date, having entered a guilty plea and been sentenced on that charge.[62]

Minimum period of imprisonment

[51] As indicated above, the Judge imposed a global MPI of four years' imprisonment. Where an offender has received a sentence of more than two years' imprisonment, the court has discretion to impose an MPI that exceeds the standard non-parole period, if satisfied that it is necessary to meet any of the purposes listed under s 86(2) of the Sentencing Act. Section 86 relevantly provides:

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59 Sentencing notes, above n 1, at [3].

60 The Ministry of Justice, Criminal and Traffic History record for Mr Huata presently records a conviction entered in the Napier District Court on 24 April 2024 for committing a burglary with a weapon (firearm) on 4 December 2022, with a sentence of imprisonment (cumulative) imposed on 24 April 2024 of two years and two months' imprisonment, with a non-parole period of four years, cumulative on 2319001578.

61 Criminal Procedure Act, ss 232(2)(c) and 233(2).

62 Sections 233(3)(c) and 234(3)-(5).

> **86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment**
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> (1) If a court sentences an offender to a determinate sentence of imprisonment of more than 2 years for a particular offence, it may, at the same time as it sentences the offender, order that the offender serve a minimum period of imprisonment in relation to that particular sentence.
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> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:
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> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
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> (b) denouncing the conduct in which the offender was involved:
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> (c) deterring the offender or other persons from committing the same or a similar offence:
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> (d) protecting the community from the offender.
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> …
>
> (4) A minimum period of imprisonment imposed under this section must not exceed the lesser of—
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> (a) two-thirds of the full term of the sentence; or
>
> (b) 10 years.
>
> …

[52] As Mr Blaschke pointed out, the imposition of a four-year MPI by reference to the overall end sentence of nine years and two months' imprisonment is impermissible. An MPI must be imposed on a particular determinative sentence of more than two years imprisonment.[63] It cannot be calculated and applied by reference to the total sum of a number of cumulative sentences. Furthermore, given that the longest sentence imposed by the Judge on any single offence was four years' imprisonment, and an MPI cannot exceed two thirds of a given sentence,[64] a single minimum period of four years could not be accommodated by any individual sentence in this case.

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63 *Davy v R* [2014] NZCA 505 at [5]; *Tereroa v R* [2015] NZCA 120 at [44]–[45]; and *Singh v R* [2022] NZCA 140 at [29]–[30].

64 Sentencing Act, s 86(4)(a).

[53] Despite the Judge's signed order, Mr Huata's updated Criminal and Traffic History records an MPI of two years and six months against the four-year sentence for aggravated robbery, and four-year MPIs are recorded against the three-year sentence for aggravated robbery as well as the sentence of two years and two months for burglary (incorrectly recorded as aggravated burglary). There is no doubt that the Judge was in error when he failed to impose the MPI on particular sentences, and that error has been compounded by the recording of the MPI against offences in a manner not directed by the Judge.

[54] The four-year MPI is not challenged on appeal. But, as this Court noted in *Singh v R*, "[w]here the sentence does not comply with s 86(1), the appellate court should make its own assessment".[65] The court is able to consider the full ambit of the offending, including short-term sentences, when considering whether an MPI is necessary.[66] It can also take account of the full ambit of the offending when fixing the percentage value of the MPI to be imposed on long-term sentences.

[55] Even when there are no standout features in the index offending, such as unusual callousness or vulnerable victims, the cumulative effect of all sets of offending may set a case apart.[67] As the Judge noted, the November 2022 offending involved aggravating factors including a vulnerable victim, sustained and serious violence, the use of a weapon, and the taking of property.[68] The effect of the offending on the victim was also profound.[69]

[56] However, it is the combination of offending that satisfies us that an MPI is necessary. The unprovoked attack in November was quickly followed by two further incidents of violent offending. In addition, Mr Huata was serving an eight-month period of intensive supervision which had been imposed following convictions on two aggravated robbery charges in August 2022. Mr Huata also has a range of convictions for violent offending, burglary, driving, and breaches of court orders.[70] The combination of the index offending and the "offending narrative" required the

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65 *Singh v R*, above n 63, at [31].
66 At [30].
67 *Tereroa v R*, above n 63, at [51]–[52].
68 Sentencing notes, above n 1, at [34].
69 At [35].
70 At [27] and [28].

sentencing court to denounce and deter the offending, as well as provide extra protection for the community, through the imposition of the MPI.

[57] The Judge rejected the Crown's submission at sentencing seeking an MPI of 50 per cent of the sentence, or four years and seven months. We consider it appropriate to adopt the total four-year MPI intended by the Judge. However, this must be divided across the individual sentences apportioned by the Judge.[71]

[58] The Parole Act 2002 provides that where cumulative sentences are imposed, they form a "notional single sentence" for the purposes of calculating the non-parole period to be applied to that sentence.[72] Section 84(4) of that Act specifies that:

> The non-parole period of a long-term notional single sentence is the total obtained by adding together all the non-parole periods of every sentence that makes up the notional single sentence.

[59] This means that the total MPI will be determined by adding together the MPI imposed on each sentence, together with the statutory non-parole period of any sentence on which no MPI is imposed.[73]

[60] The Crown submitted that the MPI of four years could simply be divided over the aggravated robbery and the aggravated burglary. However, that would lead to a situation where Mr Huata would be subject to a non-parole period of four years to account for the MPI, and a further statutory non-parole period on the remaining burglary charge for which an MPI was not imposed, effectively resulting in a total non-parole period of approximately four years and nine months.[74]

[61] Mr Hawkins has correctly identified that an overall minimum period will be the sum of the MPIs imposed plus any applicable statutory non-parole periods. He has suggested that the total four-year minimum period should be allocated as follows:

(a) an MPI of two years on the sentence of four years' imprisonment for aggravated burglary (January offending);

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71 The MPI is part of the sentence under appeal.
72 Parole Act 2002, ss 4 and 75.
73 See *Opetaia v R* [2013] NZCA 434 at [27].
74 We have rounded up the total of one-third of two years and two months from 8.666 to 9 months.

(b) an MPI of one year on the sentence of three years' imprisonment for aggravated robbery (November offending); and

(c) an MPI of one year on the sentence of two years and two months' imprisonment for burglary (December offending).

[62] Given that the proposed one-year MPI on the sentence for aggravated robbery is the equivalent of the statutory one-third non-parole period, it is unnecessary to impose any MPI in relation to that offence.[75] However, we agree with Mr Hawkins that an allowance must be made for the statutory non parole period. We therefore impose an MPI of two years on the charge of aggravated burglary, and an MPI of one year on the charge of burglary, consistent with the suggestion that an MPI attaches to those two offences. The MPIs are to be served cumulatively. When added to the one-year statutory non-parole period on the sentence of three years for aggravated robbery, this amounts to a total minimum period of four years' imprisonment.

Result

[63] The application for an extension of time to bring an appeal against conviction is granted.

[64] The appeal against conviction is allowed. The conviction for aggravated burglary (CRN: 23019001583) is set aside and a conviction for burglary is entered.

[65] The appeal against sentence is allowed in part. The sentence of two years and two months' imprisonment for aggravated burglary (CRN: 23019001583) is set aside and a sentence of two years and two months' imprisonment to be served cumulatively on the other sentences imposed by Judge Earwaker on 24 April 2024 is imposed for the substituted charge of burglary.

[66] The four-year minimum period of imprisonment is set aside. A minimum period of imprisonment of two years is imposed on the sentence for aggravated burglary (CRN: 23019001578), and a minimum period of one year is imposed on the

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75 See *Tan v R* [2023] NZCA 446 at [111].

sentence for burglary. The minimum periods of imprisonment are to be served cumulatively.

[67] The appeal against sentence is otherwise dismissed.

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