IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA502/2023
[2024] NZCA 433

BETWEEN	NICHOLAS NODA Appellant
AND	THE KING Respondent

Hearing:	31 July 2024
Court:	French, Jagose and Grice JJ
Counsel:	C G Farquhar and C C White for Appellant H G Clark for Respondent
Judgment:	11 September 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal against sentence is allowed.

B The sentence of four years and 10 months' imprisonment is quashed and a sentence of four years and one month's imprisonment is substituted.

REASONS OF THE COURT

(Given by Grice J)

Introduction

[1] Mr Noda appeals against a sentence of four years and 10 months' imprisonment on one charge of aggravated robbery[1] imposed in the District Court at Manukau on 2 August 2023.[2]

[2] The aggravated robbery involved Mr Noda and two co-defendants. The co-defendants were sentenced separately.

Grounds of appeal

[3] Mr Noda's appeal is advanced on two grounds.[3] Both relate to trial counsel error.

[4] The first ground is that trial counsel failed to advise Mr Noda that a report under s 27 of the Sentencing Act 2002 relating to cultural and background matters (a s 27 report) could be commissioned and put before the sentencing Judge. Ms Farquhar, Mr Noda's appeal counsel, submits this would likely have resulted in a further discount being applied to his sentence.

[5] The second ground is that trial counsel did not advise Mr Noda that the police summary of facts (SOF) referred to him using a hammer to hit one of the complainants. The sentencing Judge took Mr Noda's use of a hammer into account as an aggravating factor.[4] On appeal, Mr Noda denies he used a hammer and said had he been aware of that allegation, he would have disputed it.

[6] Ms Farquhar seeks leave to adduce fresh evidence on appeal, namely a s 27 report attached to an affidavit of Mr Noda. The Crown has filed an affidavit of Ms Stoikoff, Mr Noda's Public Defence Service (PDS) lawyer when Mr Noda entered

---

1 Crimes Act 1961, ss 235(b) and 66. The conviction appeal was abandoned. This Court retains jurisdiction to determine the sentence appeal: *Tule v R* [2023] NZCA 543 at [10]–[13].

2 *R v Noda* [2023] NZDC 16172 [Decision under appeal]. Mr Noda had not accepted an earlier sentence indication: *R v Faolua* DC Papakura CRI-2021-092-6454, 20 September 2022 [Sentencing indication] at [15].

3 The appellant in his grounds of appeal memorandum put the first and second grounds in this order. However, in his submissions he addressed them in the reverse order.

4 Decision under appeal, above n 2, at [11].

a guilty plea.[5] Both Mr Noda and Ms Stoikoff were cross-examined at the hearing before us.

Approach on appeal

[7] Sentence appeals are governed by s 250 of the Criminal Procedure Act 2011. A first appeal court must allow the appeal if satisfied that, for any reason, there is an error in the sentence imposed on conviction and a different sentence should be imposed.[6] The court retains no discretion in the event that these criteria are not satisfied, and must dismiss the appeal.[7] If the appeal is allowed, the court may set aside the sentence and impose another sentence that it considers appropriate, vary the sentence, or remit the sentence back to the court that imposed it for reconsideration.[8]

[8] When considering whether a different sentence should be imposed, the court will have regard to the end sentence, rather than the process by which it was reached. It is appropriate for the court to intervene where the sentence being appealed is "manifestly excessive" and is not justified by the relevant sentencing principles.[9] It must be shown that there has been an error made by the sentencing Judge.[10] Typically the court cannot tinker with a sentence imposed where that end sentence is nevertheless in range.[11]

The sentencing notes

[9] Judge Moses set out the facts in his sentencing notes:[12]

> [2] The brief facts are that one of the victims, Mr [Munroe], lived at an address in Manurewa with his sister, his partner, his mother and her partner. The victim Mr Robertson was friends with Mr [Munroe] and lived in a garage on the property. The other victim, a Mr Howard, was Mr Robertson's uncle.

---

5 In cases where an appellant alleges trial counsel error, affidavits concerning this ground of appeal do not require leave to be adduced. See Court of Appeal (Criminal) Rules 2001, r 12A; and *Mohamed v R* [2023] NZCA 143 at [38].
6 Criminal Procedure Act 2011, s 250(2).
7 Section 250(3)
8 Section 251(2).
9 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [31]–[35].
10 At [27].
11 At [36].
12 Decision under appeal, above n 2.

> [3] You along with two others knew each other. You did not know the first three victims who I had referred to before but one of your co-defendants was related to a Mr Rewha who is one of the victims.
>
> [4] On 17 July one of your co-defendants was driven to another co-defendant Mr Faolua's address to have drinks. Mr Faolua texted a female associate with a message which was a request asking whether the person knew of any house where illegal drugs were sold. The associate agreed so show [sic] three such places. Mr Wirepa then texted an associate indicating that he was about to rob someone. A short time later you all left the address with Mr Rewha and picked up a female associate and drove to Mr [Munroe]'s address. Mr [Munroe] and Mr Robertson were in the garage at the time. Mr Robertson was asleep.
>
> [5] Around 8 pm your co-defendant Mr Faolua walked up to the house carrying a firearm wrapped in a jumper. He and you went inside the garage and closed the door behind you. Mr Wirepa kept watch on the street outside. Mr Rewha remained in the vehicle.
>
> [6] Once Mr Faolua entered the garage he pointed the firearm at Mr [Munroe] and asked: "Where's the money, where are the drugs?" Mr [Munroe] attempted to explain they did not have anything but Mr Faolua used the firearm to repeatedly demand money and drugs. He punched Mr [Munroe] three times to the head, hit him to the side of the head with the butt of the firearm. He woke Mr Robertson up and hit him in the nose with the firearm causing Mr Robertson's nose to bleed. You then picked up a hammer which was in the garage and used it to hit Mr [Munroe] in the jaw. At one point during the incident Mr Howard arrived intending to return a car part to Mr Robertson. You and Mr Faolua threatened Mr Howard and forced him to stay in the garage. During the incident there were items taken from Mr [Munroe], namely a Galaxy phone and the hammer. Mr Howard had cigarettes and cash taken from him.
>
> [7] A little later Mr [Munroe]'s sister arrived home, she went to the garage to talk to her brother. When she opened the door you and Mr Faolua walked out past her. She then saw her brother had blood pouring from his head and down his arm and she turned around and yelled at you both: "What have you done to my brother?" You and Mr Faolua fled with Mr Wirepa in a white van.

[10] The Judge did not accept Mr Noda's explanation set out in the provision of advice to courts (PAC) report that he got into the vehicle with his co-defendants without knowing why he was going to the address.[13] His Honour determined that the aggravating factors of the offending were premeditation, the fact it was a home invasion, the involvement of three people in the robbery, the use of firearms and violence, and the fact that property was stolen.[14] In terms of violence, the Judge noted that Mr Noda hit Mr Munroe in the jaw with a hammer.[15]

---

13 At [10].
14 At [10]–[11].
15 At [11].

[11] The Judge at sentencing had before him: the victim impact statements; the PAC report; three letters of support submitted by Ms Bruce (Mr Noda's partner), Mr Te Whatu (Mr Noda's uncle), and Mr Simo'o (Mr Noda's employer); as well as Mr Noda's submissions.

[12] The Judge adopted a starting point of seven and a half years' (90 months') imprisonment that was not increased for Mr Noda's previous convictions.[16]

[13] The Judge noted that Mr Noda was only 25 years of age at the time of the offending.[17] The writer of the PAC report described Mr Noda as having a good upbringing based on information supplied. His Honour acknowledged that Mr Noda had taken some steps to address his alcohol and drug use, which "appear[ed] to have been a major factor behind what occurred in [his] involvement in this offending".[18] The Judge also noted that despite an adjournment being granted so Mr Noda could undergo treatment and attend alcohol and drug counselling sessions, he had not completed any such programme.[19] A 10 per cent discount was allowed for youth, limited rehabilitative steps taken, and remorse.[20]

[14] An additional five per cent discount was applied for the effect that alcohol and drug addiction may have had in relation to the offending.[21]

[15] The discounts came to a combined total of 35 per cent, including a 20 per cent guilty plea discount.[22] That total was rounded up to a 32-month discount, taking the end sentence to 58 months' (or four years and 10 months') imprisonment. The Judge was satisfied that this was the least restrictive sentence that could be imposed, taking into account the purposes and principles of the Sentencing Act.[23]

---

16 At [13].
17 At [15].
18 At [14].
19 At [14].
20 At [15].
21 At [15].
22 At [13].
23 At [17].

Further evidence

[16] Ms Farquhar sought leave to adduce further evidence on appeal. The further evidence includes, as exhibited to an affidavit by Mr Noda, a s 27 report written by Ms Tara Oakley, dated 7 January 2024. The s 27 report further attaches an alcohol and drug clinical assessment report written by Ms Tiffany Shirtliff (the AOD report). As mentioned, the Crown adduced an affidavit of Ms Stoikoff, and both Mr Noda and Ms Stoikoff were cross-examined at the appeal hearing.

[17] In the s 27 report, Ms Oakley canvasses several factors as causative of Mr Noda's offending:

(a) Mr Noda has a diagnosed alcohol and substance use disorder. He was raised by a single mother, who was a methamphetamine addict. His father was in prison and generally absent from Mr Noda's life. His grandmother attempted to care for him, but Mr Noda's grandfather was a violent alcoholic who gave Mr Noda alcohol and would beat him. He says he was drunk at the time of the offending and was seeking drugs. Therefore, Mr Noda is highly vulnerable to negative influences due to his background.

(b) Mr Noda has had suicidal ideations since he was 11 years old, with at least two serious attempts to die by suicide while he lived overseas, which resulted in his admission into an inpatient mental health unit for two months.

(c) Mr Noda was subjected to blows on the head as a child and may have cognitive processing or learning disorders.

(d) The use of substances, criminal behaviour and violence have been normalised in Mr Noda's life. Mr Noda's grandfather and most of his family were affiliated with gangs.

(e) Mr Noda has Māori whakapapa but is severely culturally deprived, with little knowledge of his whakapapa. Ms Oakley says that, had Mr Noda

> been allowed connection with the mana of his ancestry, his life would likely look very different today.

[18] Ms Oakley also notes that Mr Noda is sincerely remorseful of his offending and has "huge potential". He strives to be a good role-model for his younger brothers, has made progress in his ability to express himself, and has become open to therapy.

Law and analysis of further evidence on appeal

Law on admissibility of s 27 report

[19] We now consider admissibility of the s 27 report (including the AOD report) that is exhibited to Mr Noda's affidavit.

[20] The Court of Appeal in *Greening v R* adopted the approach set out by the Supreme Court in *Berkland v R* in relation to the admission of newly prepared s 27 reports on appeal, treating it as fresh evidence.[24] The Court in *Greening* noted:[25]

> [17] Section 27 of the Sentencing Act envisages that those called by the offender to address the court will speak on the offender's background and how that may have related to the offence, the availability of community and family support, and alternative resolution processes and sentencing outcomes. The section does not treat this information as evidence. It provides rather that the sentencing court must consider the information unless that is inappropriate or unnecessary for some special reason. The court may give the information such weight as it thinks appropriate.

[21] The Court confirmed that leave is required to introduce a s 27 report on appeal. The assessment to be made by the appellate court is whether it is "fresh, why it was not adduced at sentencing, its cogency for sentencing purposes, and the risk of a disproportionate outcome should it be excluded".[26] Furthermore, the Court of Appeal in *Mark v R* noted that in sentence appeals if the evidence sought to be adduced is both credible and fresh it should be admitted, unless the court is satisfied it would have had no effect on the sentence.[27]

---

24 *Greening v R* [2023] NZCA 432 at [19]–[20]; and *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

25 *Greening*, above n 24 (footnotes omitted).

26 At [19], citing *Berkland,* above n 24, at [174].

27 *Mark v R* [2019] NZCA 121 at [16].

Analysis of admissibility of s 27 report

[22] Ms Clark, counsel for the Crown, notes that other material such as letters of support and oral submissions by whānau can be put before the court for sentencing, and it is not a requirement that a professional report address background and cultural issues personal to the defendant. The Crown opposes the admission of the s 27 report on the basis that it is not fresh, but acknowledges that it is open to this Court to admit it on grounds that Mr Noda was not advised of the option of obtaining such a report.

[23] While part of the information contained in the s 27 report is not fresh — that is, the information concerning Mr Noda's background, which was in existence at the time of the sentencing — the analysis in the report is not evidence. The reason the s 27 report was not prepared for sentencing is that Mr Noda was not advised of the option of obtaining one. Furthermore, the report is credible, having been prepared by an independent professional who interviewed Mr Noda and his mother, grandmother, and partner. It is also cogent. It details Mr Noda's background including his cultural deprivation, the normalisation of violence and crime due to exposure from a young age, and his mental health difficulties. These factors link to his offending. There is a risk of a disproportionate sentencing outcome in terms of the discounts allowed if the s 27 report were excluded.

[24] We are satisfied that the s 27 report is admissible as fresh evidence.

[25] We deal with the appeal grounds in the order in which they appear in the appellant's memorandum confirming the grounds of appeal, dated 21 December 2023.

Failure to obtain report under s 27 of the Sentencing Act

[26] Mr Noda says was he not advised by his lawyer of the possibility of obtaining a s 27 report. He also points to the fact that his co-defendants, Mr Faolua and Mr Wirepa, received discounts of 15 per cent and 25 per cent respectively based on information in their s 27 reports.[28]

---

[28] *R v Faolua* [2023] NZDC 2258 at [15(b)]; and *R v Wirepa* [2023] NZDC 29358 at [17].

[27] Mr Noda's affidavit outlines his meetings with his lawyers leading up to his sentencing. He dealt with several different PDS lawyers in the period from being first charged on 5 August 2021 until his sentencing on 2 August 2023.

[28] Ms Stoikoff, Mr Noda's PDS lawyer at the time he entered the guilty plea, had reviewed the relevant PDS files and found no reference to any advice given to Mr Noda concerning a s 27 report. However, she located a memorandum to the Court prepared by the PDS lawyer then acting for Mr Noda dated 30 November 2022. That memorandum advised the Court of the likely change in Mr Noda's plea from not guilty to guilty. Nothing on the PDS file indicates that Mr Noda was aware that a s 27 report might be prepared, nor does it appear that any were steps taken to obtain such a report. Ms Stoikoff says she did not mention the option of obtaining a s 27 report with Mr Noda when she met and advised him on the guilty plea on 1 December 2022.

[29] Following that discussion, Mr Noda signed the document instructing the entry of guilty plea and this was entered on 1 December 2022.

Analysis of the information in the s 27 report on the sentencing outcome

[30] As mentioned, the sentencing Judge applied a total of 35 per cent in discounts. These were made up of discrete discounts for the guilty plea (20 per cent); youth, limited rehabilitation, and remorse (10 per cent); and alcohol and drug addiction contributing to the offending (five per cent).[29] This brought the sentence down to down to 58 months or four years and 10 months' imprisonment.

[31] Ms Farquhar submits the factors raised in the s 27 report justify a further 15–20 per cent discount, in addition to the 35 per cent discount applied by the sentencing Judge. Ms Clark suggests that any discount should be tempered by the seriousness of the offending and the fact that the alcohol and drug addiction factor have already been recognised.

[32] In cases in which s 27 reports have attracted discounts, the discounts for s 27 factors contributing the offending vary considerably. They are generally in the range

---

[29] Decision under appeal, above n 2, at [15].

of five per cent to 20 per cent. Discounts as high as 30 per cent have been allowed, but only in rare cases.[30]

[33] Mr Noda's two co-defendants, unlike Mr Noda, had accepted sentence indications given by Judge Forrest. They were subsequently sentenced by her. Each had obtained a s 27 report which the Judge relied upon in determining their final sentences.

[34] Mr Faolua, one of the co-defendants, was sentenced to three years and eight months' (44 months') imprisonment on 8 February 2023. A starting point of eight years and two months' (98 months') imprisonment was adopted there.[31] Mr Faolua received a 15 per cent discount for matters referred to in his s 27 report (as well as five per cent each for addiction contributing to the offending, youth and remorse).[32] From the comments of the Judge, the main factors which led her to apply the 15 per cent discount included his father going to prison when he was young, negative familial influences, and exposure to alcohol, drugs, and crime.[33] In addition, at a young age, when Mr Faolua was particularly vulnerable, he suffered the loss of a close friend whose family had provided a safe place for him.[34]

[35] Another co-defendant, Mr Wirepa, whose role in the offending was seen to be of a much lower level than that of Mr Noda and Mr Faolua, was sentenced to 11 months' home detention on 8 March 2023.[35] A starting point of five years' (60 months') imprisonment was taken.[36] Mr Wirepa received a 25 per cent discount for factors raised in his s 27 report.[37] Her Honour said the report was "sobering" and "a difficult report to read".[38] The Judge identified cultural disconnection; poverty; exposure to violence, alcohol and drugs; and lack of parenting as factors directly contributing to both the defendant's alcohol issues and the offending.[39]

---

30 See *McCaslin-Whitehead v R* [2023] NZCA 259 at [55]; and *King v R* [2020] NZCA 446 at [28].
31 *Faolua*, above n 28.
32 At [15].
33 At [10]–[14].
34 At [13].
35 *Wirepa*, above n 28.
36 At [8].
37 At [17].
38 At [9] and [12].
39 At [17].

[36] The Judge sentenced Mr Noda in the belief that he had had a good upbringing.[40] That was on the basis of a somewhat sanitised and ultimately misleading picture given to the pre-sentence report writer by one member of Mr Noda's family. We are satisfied that with the benefit of the s 27 report, the Judge would have allowed a further discount for the additional factors raised in that report.

[37] We accept Ms Farquhar's submission based on the s 27 report that the offending can be linked to Mr Noda's disadvantaged upbringing, cultural deprivation, and poor mental health, as well as the drug addiction which was taken into account The additional factors should in our view be recognised by way of a further adjustment to the sentence imposed. We consider the appropriate discount here is a further 10 per cent, to be applied to the starting point. This, together with guilty plea discount (20 per cent); the discrete youth, limited rehabilitation, and remorse discounts (10 per cent) and that for alcohol and drug addiction (five percent), reflects an appropriate level of total discount. That total of 45 per cent applied to the starting point (of seven and a half years' or 90 months' imprisonment), rounding down, results in an end sentence of 49 months' or four years and one month's imprisonment.

[38] While the AOD report (adduced as fresh evidence) by Ms Shirtliff indicated that Mr Noda has an alcohol and methamphetamine use disorder, we are satisfied that Mr Noda's drug and alcohol addiction was appropriately recognised by the sentencing Judge with a five per cent discount. We do not consider the AOD report justifies a further discount for that factor.

[39] We conclude that while no fault can be attributed to the sentencing Judge,[41] a different sentence should be imposed as the sentence appealed is manifestly excessive.

[40] We therefore allow the appeal on this ground.

Use of the hammer

[41] Mr Noda says he was not aware that by pleading guilty he was accepting he used a hammer in the attack. He says that fact should have been disputed. The issue

---

40 Decision under appeal, above n 2, at [15].
41 A similar outcome was reached in *Archer v R* [2017] NZCA 52 at [23].

at the heart of this ground of appeal is that Mr Noda says he was not advised by his lawyers of the hammer allegation, which was viewed as an aggravating factor on sentencing. Mr Noda says he has comprehension difficulties, therefore he was reliant on his lawyers to bring the allegation to his attention. Mr Noda says none of his PDS lawyers advised him of the hammer allegation nor did he see a summary of facts.

[42] Ms Farquhar in argument also alleges that Mr Noda did not know his co-defendant was carrying a firearm.

Instructions document

[43] Ms Stoikoff had a face-to-face discussion with Mr Noda and his partner on 1 December 2022. She says she carefully went through an instruction document with Mr Noda that had been prepared by another PDS counsel. That document is headed "NICHOLAS NODA – instruction for a jury trial set down to start on 5/12/2022" and contains a summary of the allegations against Mr Noda. It includes an assessment of the police evidence and refers to matters that the sentencing judge might take into account, including an earlier sentencing indication and the sentencing indications of the two co-defendants. She assumed that the option of a obtaining a s 27 report had been discussed with Mr Noda by one of his previous PDS lawyers.

[44] The instructions document includes a summary of the allegations taken from the SOF, commencing with the statement "The allegation against me is...". It includes the following statements:

(a) "Mr Faolua went into the garage, carrying a firearm wrapped in a jumper…".

(b) "Mr Faolua demanded drugs and hit both complainants a number of times with the butt of the firearm. I picked up a hammer and hit the first complainant in the jaw."

[45] The document goes on to summarise the evidence to be called by the Crown and states that "I understand that the above evidence is sufficient for the Crown to

prove the charge". It also includes an acknowledgment that Mr Noda understands that if he went to trial he would "likely be found guilty".

[46] The document concludes with a statement that Mr Noda has considered the advice and instructs that a guilty plea be entered on his behalf. Immediately before Mr Noda's name, signature and date is written "I also accept the Crown Summary of facts".

[47] Ms Stoikoff is an experienced defence counsel and gave evidence on appeal. She disagreed with Mr Noda's suggestion that the interview (including signing the instructions document) was no longer than five minutes. She says it would have been at least 15 minutes and particularly remembers discussing the health of Mr Noda's partner, who was present at the interview. Mr Noda did not dispute that his partner's health was discussed. Further we did not receive any evidence from the partner upon which we can rely.[42] Ms Stoikoff also noted the suggestion that she was under time pressure is incorrect, as she had nothing else on that day.

[48] Ms Stoikoff further stated that she habitually goes through the "instructions" document with her clients before allowing them to sign it. She said that young men in particular, like Mr Noda, may not want to admit that they cannot read or do not understand the document. Therefore, she said she invariably reads the document aloud to the client line by line and does not let them read it themselves. Ms Stoikoff says she checks to make sure the client understands the instructions document by asking whether the statements in it are right (or words to that effect), and makes any corrections, additions, or deletions as appropriate. She said she did that with Mr Noda on 1 December 2022 before she let him sign the instructions document.

[49] Mr Noda signed the instructions document in front of Ms Stoikoff stating he accepted the SOF and authorised her to enter a guilty plea on his behalf.

[50] Mr Noda, when cross-examined said that he could not remember Ms Stoikoff reading the document out to him, but that if the allegation concerning the hammer had

---

[42] An affidavit by Mr Noda's partner was filed but counsel for Mr Noda advised us that it was not to be relied on. The partner did not appear at the appeal hearing.

been read, he "probably would have remembered that". He says he did not see the SOF.

[51] It is relevant that the hammer allegation was also referred to in Mr Noda's police interview and in the sentence indication given in September 2022.[43]

Police interview

[52] The allegation that Mr Noda used a hammer was set out in the initial charging document laid by the police prior to the first call on 5 August 2021.

[53] Mr Noda was interviewed by a police officer on the morning he was arrested, 5 August 2021, and a brief outline of the facts was put to him, including that a firearm and a hammer had been used in the aggravated robbery. The audio-visual recording of the interview indicates that Mr Noda had no difficulty comprehending the officer's questions and responding appropriately. This was particularly evident in a discussion at the end of the interview concerning an airgun and a toy gun that had been found in the search of Mr Noda's home. Those items had nothing to do with the aggravated robbery and Mr Noda was quick to ensure the officer understood that. In response to questions, he described those items in detail and gave explanations as to why they had been found at the address.

Sentencing indication

[54] The fact that Mr Noda injured a victim with a hammer was referred to by the Judge twice during the sentence indication in September 2022.[44] Mr Noda was present throughout the sentence indication, but he claims he did not hear the Judge say that. This is in contrast to Mr Noda's assertion that he would have objected to Ms Stoikoff if she had mentioned hammer allegation when she advised him on 1 December 2022.

[55] Ms Farquhar points out inconsistencies in the Crown evidence and says the only person who alleged that Mr Noda used a hammer is Mr Munroe, the victim. He claimed that Mr Noda hit him in the jaw with the hammer. The equivocal evidence,

---

43 Sentencing indication, above n 2, at [4] and [8].
44 At [4] and [8].

says Ms Farquhar, presented the opportunity for Mr Noda's lawyer to negotiate an amendment to the SOF or request a disputed facts hearing under s 24 of the Sentencing Act.

[56] If reference to the hammer in the SOF were deleted, Ms Farquhar says a starting point of six and a half years would have been appropriate. She relies on Court of Appeal authority suggesting that a lesser degree of participation in an aggravated robbery can result in a discount of one or two years from the starting point adopted for principal offenders.[45]

[57] Ms Farquhar also submits that Mr Noda played a lesser role in the aggravated robbery, excluding the alleged hammer attack allegation. She also submits there is no evidence on which the Court could infer that Mr Noda knew about the concealed firearm carried by Mr Faolua and therefore could have anticipated the level of violence that ensued.[46]

Analysis

[58] While Mr Noda may have some limitations in his comprehension, he was not hesitant in seeking clarification if he did not understand a question when giving evidence before us.

[59] Ms Stoikoff located a copy of the original SOF on the PDS file which contains a handwritten note instruction indicating a disputed fact. The note did not relate to the hammer. The handwriting has not been identified but given the note on the document it appears that at some stage feedback on the SOF had been obtained from Mr Noda.

[60] We are satisfied that Mr Noda was aware of the allegation that he injured a victim with a hammer as well as the allegation that a co-defendant was armed with a firearm before he was sentenced. The hammer allegation was also referred to in the original charging document. The fact that these allegations formed part of the facts

---

45 Citing, *Mau v R* [2021] NZCA 106 at [27]; *R v Royal* [2009] NZCA 65; and *Edwards v R* [2013] NZCA 349.

46 This would be consistent with such a finding being made in respect of Mr Wirepa, who received a five-year starting point on the basis that he was unaware of the firearm: see *Wirepa*, above n 28.

upon which the Judge would sentence Mr Noda, we are satisfied, was clearly pointed out by Ms Stoikoff on 1 December 2022.

[61] We also note that Mr Noda confirmed in cross-examination before us that he knew there was a firearm due to the charge being aggravated robbery. He knew of that allegation at the time he entered the guilty plea, he was in the car with the co-defendants and was present when the firearm was produced and used to hit the victims. In addition, the involvement of the firearm was one of the allegations set out in the signed instructions document.

[62] We dismiss the appeal in relation to this ground of appeal.

Result

[63] For these reasons:

(a) The appeal against sentence is allowed.

(b) The sentence of four years and 10 months' imprisonment is quashed and a sentence of four years and one month's imprisonment is substituted.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent