IN THE COURT OF APPEAL OF NEW ZEALAND

CA286/01
CA294/01

THE QUEEN

V

DAMIAN HINGAIA MOKARAKA
WAYNE KAURI TE HIRA

Hearing:	21 November 2001
Coram:	McGrath J Fisher J Baragwanath J
Appearances:	P L Borich for Mokaraka P J Boylan and T M Thompson for Te Hira K Raftery and S A Mandeno for Crown
Judgment:	17 December 2001

JUDGMENT OF THE COURT DELIVERED BY FISHER J

Introduction

[1] A District Court jury found the appellants, Mr Mokaraka and Mr Te Hira, guilty on one charge of aggravated burglary. They were sentenced to 10 years imprisonment. They now appeal against conviction and sentence.

[2] The case involves the principles applicable to included charges, scientific hearsay, and similar facts. The principal ground of appeal against conviction is that the trial Judge erred in declining to put to the jury the possibility of a lesser included charge, namely entering with intent. In addition Mr Mokaraka challenges the admission of hearsay expert evidence as to his fingerprints and evidence as to his earlier offending. Both appellants contend that the sentence was excessive.

Factual background

[3] At 10 p.m. on 14 September 2000 three elderly women and a middle-aged man were at home in their dwellinghouse. There were no drugs in the house. Someone knocked on the door. Given the hour, the occupants wisely ignored it. There was then a knock at the window. A man outside called out that he had children in his car which had broken down. One of the elderly women opened the window to pass out a portable telephone. The visitor seized the window, pulled it wide open, and climbed into the house. He was armed with a knife. A second man, acknowledged to have been the appellant Mr Te Hira, followed him through the window. Mr Te Hira went directly to the back door where he let in three further men.

[4] The intruders repeatedly asked where "the drugs" were. Two repeatedly assaulted the male victim while doing so. While two of the intruders held the three elderly victims the others ransacked the house. No drugs were found but various items of property were taken. These included cash, telephones, a bicycle, a watch, and the male victim's car. The victims were heavily traumatised with long-term emotional repercussions.

[5] Fingerprints taken at the scene were traced to Mr Mokaraka and Mr Te Hira. They were confronted with this evidence in videotaped police interviews. Mr Mokaraka denied entering the house. He explained that while he indulged in robbing tinnie houses (houses used to sell cannabis and other drugs) he did not "do home invasion stuff". Confronted with the fingerprint evidence he initially denied having entered the house but then went on to explain the presence of his prints. His

explanation was that he had taken cannabis in a burglary of the same house two months earlier.

[6] In his interview Mr Te Hira admitted that he had been one of the intruders on the night in question. He said that he had been with four other men since earlier in the day. The others had said that they were going to a house to recover cannabis. He went along, thinking that they were entitled to the cannabis. At the house one of the occupants opened the window and the first member of the group climbed through it. To Mr Te Hira's surprise the others in the group threw him through the window as well. His reaction was to run to the back door and open it. He stayed there because he was too afraid to do anything else. He insisted that he did not know that any weapon was going to be taken on the expedition, did not plan to use one, and did not see one.

District Court proceedings

[7] Prior to trial Mr Mokaraka objected to the admission of that part of his statement concerned with his stealing cannabis from tinnie houses. The Judge ruled that the evidence was admissible on the basis that it revealed "a broadly similar modus operandi" and that the present occasion involved "a botched tinnie house raid where the offenders simply got the wrong address." He ruled out some references to periodic detention and to lying in front of a jury.

[8] At the trial itself the Crown called witnesses as to the sequence of events and identification of fingerprints in the house as those of the two appellants. It produced the videotaped police interviews and a letter Mr Te Hira wrote to his partner while in custody on remand. In it he had said "Honey, you wrote me in your letter that you think it's your fault I'm in here. Don't even think like that my darling, I'm in here cause of my own actions. You didn't say to me hurry up and get in that van. It was me, I wanted to go because we might have hit the jackpot."

[9] Neither appellant gave evidence. The principal issue in relation to Mr Mokaraka was whether it had been proved that he was there on the night in question. He called alibi evidence from his father to the effect that he was elsewhere

on the night. The principal issue in relation to Mr Te Hira was whether he knew that one of the members of the group would be carrying a knife.

[10] After closing addresses, and while counsel were in chambers with the Judge, the jury sent three questions to the Judge:

1. What is the actual charge both men are facing.
2. Are they facing charge separately or together.
3. Is it possible for us to consider a lesser charge.

[11] The Judge heard submissions on the following morning and then declined to leave a lesser alternative to the jury. His grounds were that it was too late to make such a change; that the refusal would not deny Mr Te Hira the opportunity to have his defence considered; that the lesser charge was not a live issue in the case of Mr Mokaraka; that where there were jointly charged accused it would be inappropriate to deal with them differently; that the way in which the case was presented prevented the lesser charge from being treated as a live issue; that the suggested lesser charge of entering with intent under s 242 of the Crimes Act 1961 could be regarded as "rather trifling"; and that the lesser charge could have distracted the jury from considering the real point in the case.

Included charge principles

[12] The principal ground of appeal was that the Judge ought to have left to the jury the included alternative of entering a building with intent to commit a crime therein. As to included charges s 339(1) of the Crimes Act provides:

> Every count shall be deemed divisible; and if the commission of the crime charged, as described in the enactment creating the crime or as charged in the count, includes the commission of any other crime, the person accused may be convicted of any crime so included which is proved, although the whole crime charged is not proved; or he may be convicted of an attempt to commit any crime so included.

[13] In applying s 339, a number of principles are now well-established. A lesser crime is "included" for present purposes if the way in which the crime is defined in the statute, or the way in which it is expressed in the indictment, necessarily includes

the commission of the lesser crime: *R v King* (1900) 19 NZLR 409 (CA); *R v Lamb* [1959] NZLR 232 (CA).

[14] The mere fact that an included charge in that sense is *possible* does not mean that it *must* be put to the jury. Whether it is put to the jury is a matter of discretion for the trial Judge: *R v Collier* (CA81/96, 13 August 1996) adopting *R v Fairbanks* (1986) 83 Cr App R 251, 255. The Court is obliged to put an included charge to the jury only if necessary in the interests of justice.

[15] In any given trial there is a threshold requirement before the subject of included charges needs to be considered at all: there must be a live issue as to whether no more than the elements of the lesser charge will be proved. The question of lesser verdicts need not be addressed if it simply does not arise on the way in which the case was presented to the Court: *Fairbanks*, supra at 255. As was said in *R v Maxwell* (1988) 88 Cr App R 173, 178 (this passage approved on appeal (1990) 91 Cr App R 61 at pp 67-68) "the Judge should always use his powers to ensure, as far as practicable, that the issues left to the jury fairly reflect the issues which arise on the evidence". The question is whether the evidence raises the very real possibility that all the elements of the included charge will be established without the additional elements required for the major charge. The jury must have been squarely confronted with that possibility.

[16] Even where that threshold is surmounted, there can be circumstances that count against putting the included charge. One is a situation in which the principal charge is so grave, and the lesser alternative so trifling, that the latter could needlessly distract the jury from the real point of the case: *R v Fairbanks* supra at 343. Another could be a situation in which the question of included charges was raised so late that a party could have been prejudiced by the way in which the trial had been conducted up to that point: *R v Carr* [1995] 2 NZLR 339 at 343. Another would be any legitimate Crown concern that the inclusion of the lesser alternative might provide the jury with a pretext for softening the verdict in circumstances where, if they discharged their duty, they could only find the accused guilty on the more serious charge or not at all.

[17] Conversely, an included charge is more likely to be favoured in cases where the jury might otherwise convict out of a reluctance to see the accused get clean away with what on any view was disgraceful conduct: *Collier* supra at p5 adopting *R v Maxwell* supra (HL) at p68. That concern is likely to be heightened if the jury itself asked whether there was a lesser alternative (*R v Bergman and Collins* (1996) 2 Cr App R 399 at 407), especially if the Judge then failed to give them an appropriate warning. Following a jury inquiry of that kind the Judge should generally remind the jury that the prosecution having decided to limit the indictment to the greater charge, the result of failure to prove any of the necessary elements of the greater charge must inevitably be an acquittal notwithstanding an admission or clear evidence that a less serious offence had been committed: *R v Maxwell, supra* (HL) at p 66.

[18] In the end there remains a broad discretion to be exercised by the trial Judge in the light of the particular circumstances of the particular case. The aim is to ensure that the issues left to the jury reflect those that fairly arise on the evidence without unnecessary distractions. It is not for an appellate Court to intervene unless satisfied that the jury may have convicted out of a reluctance to see the defendant get away with what, on any view, was disgraceful conduct.

[19] It follows from the last point that there may cases – we think few - in which the trial judge will need to take the initiative. It may not always be sufficient to wait for an application by counsel, whether for the Crown or the defence, particularly if the jury itself has raised the possibility of a lesser alternative. In some circumstances a jury inquiry of that kind might be regarded as an indication that the jurors would be reluctant to acquit an accused whom they see as clearly guilty of a lesser offence. The trial judge will then need to give serious consideration to an included charge or, depending upon the circumstances, a warning along the lines mentioned.

[20] We did not understand counsel to differ over the foregoing principles. The dispute involved their application to the facts of this case to which we now turn.

Application of included charge principles to Te Hira

[21] The threshold requirement was to show that the choice between all the elements of the greater charge, and only the elements of the included charge, was a live issue in the trial. The charge jointly faced by the appellants in this case was that:

> On or about 14 September 2000, at Auckland, being together with persons unknown while unlawfully entering a building namely a dwelling house situated at 71 Kelvin Road with intent to commit a crime therein had weapons with them.

[22] The charge was based on s 240A(1)(a) which materially provides that a person is guilty of aggravated burglary punishable by imprisonment for a term not exceeding 14 years who "while … unlawfully entering, any building … with intent to commit a crime therein, has any weapon with him ..." That is to be compared with s 242 which materially provides that a person is liable to imprisonment for a term not exceeding five years who "unlawfully enters … any building … with intent to commit any crime therein." It is common ground that unlawful entering with intent in terms of s 242 is an included offence for present purposes. It is essentially the offence of aggravated burglary stripped of the element that the offender was carrying a weapon.

[23] The first question is whether the case was presented to the jury on the basis that the choice, or an important choice, lay between the possibility of all the elements of aggravated burglary and only the elements of unlawful entering with intent. The Crown case was that in terms of s 66(2) of the Crimes Act, members of the group had formed a common intention to enter the building without the permission of the occupiers for the purpose of stealing drugs therein and to help each other in that exercise. That would have constituted the offence of unlawful entering with intent. The additional element required for aggravated burglary was prior knowledge of the probability that at least one member of the group would be carrying a weapon.

[24] It was common ground that Mr Te Hira had entered the building on the night. What remained were the questions whether, when he entered –

[a] His entry was voluntary;

[b] He knew that the entry was without the express or implied consent of the occupiers;

[c] He had the intent of stealing drugs once in there; and

[d] He knew that at least one member of the group would be carrying a weapon.

[25] We are satisfied that in Mr Te Hira's case the only realistic issue at trial was whether he knew that one of the group would have a weapon. It is true that there was never any formal admission in respect of the other elements of the offence but it would be difficult to argue that they were seriously in contention.

[26] In his video interview Mr Te Hira said that in going along with the others to take cannabis from the house he assumed that the house belonged to them and that when they arrived the others unaccountably threw him through the window. He agreed that his immediate reaction was to open the back door, which allowed the others into the house, but claimed that he did so, and remained at the house, only because he was too frightened to do anything else.

[27] The difficulties faced by that inherently implausible account included the notion that it would require five people to fetch cannabis from a house belonging to one or more members of the group, the sequence on arrival (knock on front door, knock on kitchen window, conversation about car with the children in it), the notion that Mr Te Hira was involuntarily "thrown" through a window with a sill two metres above the ground, the evidence that the second person through the window asked where the drugs were before going to the back door and inviting the others in, the evidence that of the group of five, two detained the male occupant while the other three searched the house, and a subsequent letter by Mr Te Hira to his partner stating that he was in prison because of his own actions and that he "wanted to go because we might have hit the jackpot in one of those houses".

[28] It would scarcely have been realistic to suggest that Mr Te Hira was anything other than a willing participant in a planned burglary. The only real question was

whether he knew that someone would be carrying a knife. Certainly that seems to have been the view taken by counsel and the trial Judge. We were informed that that is the way that counsel addressed the jury. It seems no coincidence that it was immediately after the addresses that the jury asked whether it was possible for them to consider a lesser charge. And having explained the law relating to parties in his summing up the Judge went on to say:

> Of course Mr Te Hira, in this case as you have heard, has said that he did not know anything about the knife and that is a matter for you as the jury to decide on because that is one of the ingredients of course of this count. Mr Mokaraka says "I wasn't even there". That is what his defence is.

[29] We are prepared to assume for present purposes that at least the dominant issue in Mr Te Hira's case was not whether the ingredients of unlawful entry with intent were satisfied but whether he knew that one of the members of the group would probably have a weapon. Applying the principles discussed earlier, that satisfied the threshold requirement for putting an included charge to the jury. We move to the other considerations referred to.

[30] We do not see this as a case where the principal offence was so grave, and the alternative so trifling, that unlawful entry with intent would have been a needless distraction. With or without a weapon, an offence involving the entry of five men into a house at night through a combination of deception and force for the purpose of stealing once inside could not have been anything other than a serious offence. On conviction it would be likely to attract a substantial term of imprisonment.

[31] Although the question of an included charge was not raised until a very late stage of the trial, there was no suggestion that earlier notice might have affected the way in which the case was conducted up to that point.

[32] The fact that the jury specifically inquired into the possibility of a lesser alternative was not determinative in itself. However, it certainly heightened the risk that the jury would be reluctant to see a man who had chosen to participate in serious criminal offending escape sanctions altogether on the basis that he did not know about the knife.

[33] There was no response to that risk in the summing-up. Certainly the Judge properly identified the elements of aggravated burglary and told the jury that all elements would need to be proved before they could find Mr Te Hira guilty. From a logical viewpoint, that precluded a finding of guilt if the jury found that one of those elements – knowledge of the knife – had not been proved. However, as we perceive it, the reason for requiring that in certain cases an included charge be put, or a special warning given, is not the strict logic of the situation. The concern is that in some circumstances a jury might illogically convict on the major charge rather than see a seriously culpable man walk free. Whether that concern prompts an included charge, or merely an adequate warning in the summing up, is a judgment that must be exercised having regard to the circumstances of each individual case.

[34] In this case we are left with a real concern that Mr Te Hira could have been wrongly convicted of aggravated burglary due to the jury's reluctance to see him escape any sanction for his participation in a serious case of unlawful entry with criminal intent. It follows that Mr Te Hira's appeal against conviction must be allowed and a new trial ordered.

[35] It is not appropriate for us to give any direction as to the manner in which the retrial should be conducted. Whether an included count should be put to the jury, and whether the jury is to receive specific warnings on this aspect from the Judge in his or her summing-up, must be determined in the light of the evidence and argument presented at that trial.

Application of included charge principles to Mokaraka

[36] In Mr Mokaraka's case the real issue at trial was identity: had the Crown proved that he was one of the intruders? The Crown contended that he was, based upon his palm print in the house and his admission that he was in the habit of "ripping off tinnie houses" for drugs and that he had burgled that house for that purpose on another occasion. Mr Mokaraka denied that he was there and produced alibi evidence in support.

[37] The possibility that Mr Mokaraka may have been there, but oblivious to the weapon, was not raised by anybody. Of course, it was for the Crown to prove all elements of the offence including Mr Mokaraka's possession or knowledge of the weapon. But it could not be suggested that aspect was one of the "live issues" in the sense demanded for the purpose of included charge principles. There are no grounds for concern that Mr Mokaraka's conviction may have stemmed from the jury's view that he was guilty of unlawful entry with intent and that they were prepared to overlook the weapons element rather than see him go free. In his case this ground of appeal fails.

Evidence of peer review

[38] The Crown called an expert to identify the fingerprints found in the house. The expert's opinion was that the prints were those of Mr Te Hira and Mr Mokaraka. Her evidence-in-chief included the following:

> Is there peer review? Yes there is. I may make the original identification. Another expert checks this. Our team leader checks this also before the memo is released. When the file is coming to Court this is checked again by myself and checked again by another expert. So in total, four experts have checked the identifications.
>
> …
>
> So the process is that you make your observations and make a determination, is that right? That's correct.
>
> And then four other fingerprint experts also look at the prints and make their observations and determinations, is that right? That's correct.

[39] In cross-examination the expert was asked about the possibility that she might have been mistaken in her conclusions, to which she replied that that was why they had "peer review". She agreed that the "peer review people" were not expected to give evidence in the trial. In re-examination counsel for the Crown asked for the name of the peer reviewers. After discussion with the Judge in chambers, counsel for the Crown elected not to call them. In summing up the Judge said this:

> Just while on the question of the palm print, I want to mention to you that there was some suggestion that the methodology of obtaining

> comparisons of the palm prints relied somewhat on peer review. Of course, unless you get all the people along who compared the prints you can only rely on what the finger print technician herself said. If you do not bolster up her evidence by her evidence to say that others also made the comparison about the finger prints, you have got to rely on her evidence alone not what others might have done and you cannot conclude that if there was a peer review system therefore she must be right. You just put that completely to one side and rely upon the quality of her evidence alone, forgetting what other people might have done because that is not relevant unless you have got them along here in Court.

[40] We accept Mr Borich's submission that the "peer review" evidence was hearsay. There could have been no purpose in adverting to the fact that three other scientists had checked the identifications made by the witness other than to imply that they supported her conclusions. It is disingenuous to suggest that such evidence is not hearsay. Evidence is no less hearsay when the assertion by the absent speaker is implied rather than expressed.

[41] We would not want it to be assumed that because it was hearsay the evidence was inadmissible. Scientific conclusions are frequently the result of team activity. It is conceivable that there is, or should be, a common law exception to the hearsay rule in circumstances where a conclusion is expressed by an informed and responsible member of a scientific team and where the opposing party has not objected to evidence in that form after adequate prior notice. That possibility not having been argued before us, we make no further comment upon it.

[42] In the present case we are satisfied that no miscarriage of justice could have been caused by this evidence, technically admissible or not. The Judge made it abundantly clear that the jury was to confine its attention to the observations and opinions of the expert who actually gave the evidence. Further, Mr Mokaraka did not seriously dispute the presence of his prints in the house. He sought to explain them by referring to an earlier burglary of the same house. This ground of appeal fails.

Evidence of discrete conduct

[43] Before the trial counsel for Mr Mokaraka objected to the admission of some of his client's video interview. Mr Mokaraka had said that:

> I rip off tinnie houses … but I don't do the home invasions like that … I go to gang members' houses. I take it off gang members, I don't take it off no elderly ladies … you know or people that just from off the streets. I go straight to the tinnie houses where I get the addresses and I drive up to the addresses, go in, buy a tinnie, go back to the car and then go back in there and take the whole lot off them. That's what I do … I don't go and do home invasion stuff.

[44] Confronted with the evidence that his palm print was found inside the house, he said that he had not done "the home invasion" but that he had been there "months before that" when he "took a room full of weed" from a bedroom of the house. On that occasion "just me and my little mate went there and we could smell it. Then I threw my mate through the window. He opened up the door and I went in, ripped all the weed out." In response to further questions he said that this was in July. The home invasion was in September.

[45] In this Court Mr Borich did not object to evidence of Mr Mokaraka's statement that he had entered the house to steal cannabis two months before the night of the charge. He renewed his objection to the reference to stealing drugs from tinnie houses and gangs in general. The Judge and counsel understandably discussed this evidence in terms of "similar facts". As is noted in the New Zealand edition of *Cross on Evidence*, para 13.1, the expression "similar fact" itself is apt to mislead because it suggests a unifying theme which the cases do not in fact possess. The expression is little favoured in the United States. As was said by this Court in *R v Accused (CA247/91)* [1992] 2 NZLR 187, 191-192:

> We do not consider that it matters which description is used. While the description "similar facts" and the associated one "strikingly similar" have been used in New Zealand in the past, largely in deference to English authority, and will no doubt continue to be used as convenient labels, the real question is always whether, as a matter of common sense, the evidence is sufficiently supportive of the prosecution case to justify allowing it to go to the jury notwithstanding any illegitimate prejudicial effect that it might have.

[46] The point is illustrated by *R v Thompson* [1918] AC 221 where the appellant, who was charged with acts of gross indecency with boys, adduced evidence in support of an alibi. Whoever had committed the offence made an appointment to meet the boys three days later. It was established that the appellant met the boys at the appointed time and place and gave them money. Evidence that at that time he was carrying powder puffs associated with indecent acts, and that he had indecent photographs of boys in his rooms, was held to be admissible. The photographs could have been relevant only on the basis that they demonstrated an indecent interest in boys in general.

[47] Cases of this kind show that the real concern is not with similarity of facts per se but with the relevance of discrete conduct – "discrete" in the sense that the conduct in question did not form part of the sequence or transaction with which the charge is concerned. Discrete conduct evidence is relevant if conduct of a particular nature on a discrete occasion would make a fact now in issue in the trial more likely. If relevant in that sense, it will be admitted if the probative value outweighs any prejudice inherent in the knowledge that the accused was capable of such conduct on the discrete occasion.

[48] Since *Director of Public Prosecutions v P* [1991] 2 AC 447 it has been clear that there are no arbitrary limits upon the purposes to which such evidence can be put so long as it is logically relevant to guilt. Nor does there necessarily have to be anything in the nature of a "striking similarity", "characteristic signature", or "a similarity in the detail of the evidence of each which goes beyond the commonplace". To establish relevance all that it is necessary to show is that the existence of evidence that a man has acted in a particular way on the discrete occasion significantly increases the likelihood that he committed the offence alleged on the current occasion. Usually the link will be that conduct on the discrete occasion demonstrates a propensity, and that someone with such a propensity would be significantly more likely to have acted in the manner alleged than a person drawn at random from the community (see *R v Sanders* (2000) 18 CRNZ 393 (CA) and *R v Tulisi* (2000) 18 CRNZ 418 at pp 421-422). Of course that goes no further than to establish relevance. The real battleground is not usually relevance but the much more difficult exercise of balancing probative value against prejudicial effect.

[49] Those preliminary observations can be important in view of the difficulties that can arise if the exercise is seen as purely one of deciding how similar the facts on one occasion are to the facts of another (see, further, *Rosemary Pattenden:* "Similar Fact Evidence and Proof of Identity"(1996) 112 LQR 446). In the present case there were obvious differences between the conduct to which Mr Mokaraka was admitting ("ripping off tinnie houses") and a home invasion at night involving deception of an elderly woman and forced entry. The alleged features in common were limited to acting with others in order to steal cannabis plant from houses.

[50] We do not think it helpful to measure that evidence against preconceived labels such as "strikingly similar" or "characteristic signature". Whether the discrete conduct is relevant in a case like this one starts with a comparison between any propensities the discrete conduct might suggest and the propensities to be expected of a person chosen at random from the community. Mr Mokaraka had effectively admitted that he was the kind of person who would combine with others to steal cannabis from houses. The proportion of people in the community who would act in that way is small. The material fact in issue in the trial was whether Mr Mokaraka was one of those who had combined with others in an attempt to steal cannabis from a house. One does not need to descend into statistics. On any common sense view of the matter, the chances that he was the one involved were far higher than would be the case for a person chosen at random from the community. We have no doubt, therefore, that the evidence was relevant.

[51] The next question is whether probative value outweighed prejudice. It was accepted that the jury were always going to hear of Mr Mokaraka's admission that two months earlier he had carried out a burglary of the same house to steal cannabis. Given that the jury would hear that evidence anyway, we do not think that the probative value of his admission about tinnie houses was particularly high. Equally, once the jury heard about his willingness to commit a burglary for cannabis, the additional prejudice stemming from his activities in relation to tinnie houses must have been low.

[52] Ultimately there was a discretion to be exercised by the trial Judge. Many Judges would have excluded the tinnie house evidence but we are not prepared to say

that its admission was outside the scope of the Judge's discretion. Nor do we consider that any miscarriage of justice could have resulted. Mr Mokaraka's third and final ground of appeal against conviction fails.

Appeal against sentence

[53] Mr Mokaraka was convicted of aggravated burglary in the sense that he unlawfully entered a building with intent to commit theft therein while having a weapon with him or being a party to the carrying of such weapon. Because this was a home invasion the primary maximum of 14 years imprisonment pursuant to s 240A(1) of the Crimes Act was subject to an increase of a further five years pursuant to ss 17C(1)(p) and 240A(2).

[54] The Judge found that Mr Mokaraka and other members of his group mistakenly believed that the victims' house was a drug house and that they conceived and carried out a plan of "ripping off drugs". The Judge rejected the submission that Mr Mokaraka did not know that a weapon would be used. He considered that Mr Mokaraka was as culpable as the other members of the group, having been involved in the planning of the offending and the intimidation which took place. The Judge noted that the three elderly victims were severely traumatised by the invasion to their home. All described feelings of fear, nervousness, and loss of confidence. Their lives were turned upside down by the offending. The male victim was physically assaulted with physical discomfort for several days after. His property was stolen, his life threatened, and his personal confidence undermined.

[55] In the District Court the defence did not dispute the Crown's submission that an appropriate starting point was the leading aggravated robbery authority, *R v Mako* [2000] 2 NZLR 170 (CA). The Judge noted the circumstances of the offending, particularly the home invasion. He noted that Mr Mokaraka's previous convictions included theft, breach of periodic detention, possession of cannabis, burglary, and assault. He had a substance abuse problem, criminal associates, and little motivation to change. His risk of re-offending was assessed as high. Relying upon *Mako*, the Judge took 10 years imprisonment as the starting point. He noted Mr Mokaraka's youth (21 years) but went on to note what he described as "significant aggravating

features" in the form of planning and premeditation and the presence of a weapon, along with the violence and intimidation. Having decided that the mitigating and aggravating features balanced each other, the Judge imposed the term of 10 years imprisonment.

[56] In this Court the first ground of appeal against sentence was that *Mako* was inappropriate as the starting point. Mr Borich submitted that it was wrong in principle to approach an aggravated burglary sentencing by reference to an aggravated robbery precedent when the Crown had elected not to charge the accused with aggravated robbery. He candidly acknowledged that at first instance he had accepted *Mako* as an appropriate precedent, but he had since come to a different conclusion. He rightly submitted that a prisoner is to be sentenced only for the crimes of which he has been convicted. In support he cited *R v Newman* [1997] 1 VR 146, applying *R v De Simoni* (1981) 147 CLR 383. Delivering the principal judgment of the Court of Appeal of the Supreme Court of Victoria in *Newman*, Winneke P said at p151:

> Although it has been said that the application of the principle sometimes requires a sentencing Judge to adopt an artificial and, at times, quite unrealistic view of the facts … it seems to me that, in a case like the present, the matter is very much in the hands of the Crown. If it desires the Judge to have the flexibility, in imposing sentence, of dealing with the offender for aggravating circumstances which in themselves amount to a discrete and serious offence, then it is within the Crown's capacity to shape its presentment accordingly.

[57] In the peculiar circumstances of this case there was little distinction to be drawn between aggravated burglary and aggravated robbery sentencing purposes. To prove aggravated burglary the Crown had to show that the unlawful entry was made with the intention of committing a crime therein. It would have been sufficient to show that the intended crime was the theft of cannabis. But given the interaction with the occupants before entry, the intended theft was obviously going to require violence or threats of violence to prevent or overcome resistance. So in terms of s 233 of the Crimes Act, the plan was to carry out a robbery, not merely a theft. Robbery becomes aggravated robbery when effected with others. On any view of the matter, the intruders were going to be acting with others. So, in substance, the intended crime was aggravated robbery.

[58] In Mr Mokaraka's case the principal issue was whether he was one of the intruders. If so, the Crown had to show the aggravating feature that converted unlawful entry into aggravated burglary. Aggravated burglary required knowledge that a weapon would be involved. For the reasons outlined earlier, it might have been easier to show aggravated robbery. The aggravating element there would have been no more than that the intruders were acting together. But what is clear is that the facts that had to be proved for the purposes of aggravated burglary were no less culpable than those which would have been required for aggravated robbery.

[59] We do not see this as a case in which, having been found guilty of aggravated burglary, Mr Mokaraka was effectively sentenced for committing the additional act of aggravated robbery. Nor do we see it as a case in which the Judge was applying *Mako* on the basis that Mr Mokaraka had actually committed an aggravated robbery. Rather, the type of aggravated burglary which Mr Mokaraka had committed made *Mako* a useful guide on the basis that aggravated robbery sentences represented a close and useful analogy in this particular case.

[60] The Judge pointed out that in *Mako* at para 58 the Court of Appeal had said this:

> Forced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims, where weapons are brandished even if no serious injuries are inflicted would require a starting point of seven years or more. Where a private house is entered the starting point would be increased under the home invasion provisions to around 10 years.

Those comments are equally apt in the present case, as were the *Mako* references to youth and prospects of rehabilitation. We think that a starting point of 10 years for an aggravated burglary of this type was entirely appropriate.

[61] Mr Borich's second submission was that having taken 10 years as an appropriate starting point, the Judge went on to duplicate the aggravating factors by revisiting some of the features inherent in any home invasion aggravated burglary of this type. We agree that at least some of the features described by the Judge as aggravating – planning and premeditation over a period of hours, presence of a

weapon, and violence and intimidation – will commonly be present in serious home invasion cases of this type. On the other hand, the Judge was not moved to increase the sentence beyond 10 years on that account. He saw a balance between those features and those which he described as matters of mitigation. We cannot say that there were any significant mitigating features either. No significant discount could be made for the fact that he was 21 years of age, had a degree of support from his family and partner, and had a substance abuse problem, particularly when regard is paid to his previous convictions and high risk of re-offending. No case has been made out that the sentence was manifestly excessive.

Result

[62] Mr Te Hira's appeal against conviction is allowed. His conviction is quashed and a retrial ordered. Mr Mokaraka's appeals against conviction and sentence are dismissed.

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