

**IN THE HIGH COURT OF NEW ZEALAND  
ROTORUA REGISTRY**

**CRI 2009-063-001915**

**QUEEN**

v

**TOSH MARLEY TE TOMO**

Hearing: 30 October 2009

Appearances: A F Pilditch and L L Owen for the Crown  
N J Utting for the Prisoner

Judgment: 30 October 2009

---

**SENTENCING NOTES OF WYLIE J**

---

Solicitors:  
Crown Solicitor, P O Box 740, Rotorua 3040  
O'Sullivan Clemens, P O Box 646, Rotorua 3040

[1] Mr Te Tomo, you appear for sentence today having pleaded guilty to one charge under the Crimes Act 1961, and to two charges under the Arms Act 1983. The details are as follows:

- a) Participation in a criminal group, namely the Murupara Chapter of the Mongrel Mob. That is an offence pursuant to s 98A of the Crimes Act 1961. The maximum penalty for this offence is 5 years' imprisonment.
- b) Unlawful possession of a firearm, namely a double barrelled 12 gauge shotgun. This is an offence pursuant to s 45(1) of the Arms Act 1983. The maximum penalty for this offence is 4 years' imprisonment, or a \$5,000 fine.
- c) Unlawful possession of explosives, namely nine 12 gauge shotgun cartridges. Again this is an offence pursuant to s 45(1) of the Arms Act 1983. The maximum penalty for this offence is also one of 4 years' imprisonment, or a \$5,000 fine.

[2] Your guilty plea to these charges was entered before committal but following a depositions hearing on 10 July 2009 in the Rotorua District Court.

### **Relevant facts**

[3] You reside in Murupara and you are an associate of the Murupara Chapter of the Mongrel Mob.

[4] On or about Monday 26 January 2009, a number of members of the Kawerau Chapter of the Mongrel Mob travelled to Murupara in order to attend a tangi. Representatives of other chapters of the gang also attended the tangi which concluded on 27 January 2009. After the tangi had ended, you and other members of the gang remained in Murupara to continue socialising.

[5] At about 8.15pm on the evening of 27 January 2009, there was an incident between two gang members and two other Murupara residents who were associated with a rival gang, the Tribesmen. The two members of the Mongrel Mob were assaulted, and their vehicle was stolen. One of the victims of the assault told other members of the Mongrel Mob gang what had happened. As a result, you and other members of the Mongrel Mob gathered together and various members armed themselves with a variety of weapons. You and the others got into vehicles to go and search for the people involved in the incident.

[6] You and the other members of the gang drove around Murupara in convoy, eventually stopping at an address at 43 Matai Street. That property was occupied by an associate member of the Tribesmen gang. A number of members of the Mongrel Mob alighted from their vehicles and approached the house. They used weapons that they had brought with them to smash windows, and to damage vehicles parked at the address. They also forced entry and smashed up personal property belonging to the occupants. The male occupant of the address had to flee over the back fence to avoid being assaulted. His female partner and infant child also had to flee from the address, fearing for their safety.

[7] There is nothing before me to suggest that you went onto the property at 43 Matai Street – although you have accepted that you were present, and that you went there for a fight with members of the Tribesmen gang.

[8] Members of the group then moved to 10 Matai Street. There they found three brothers, all of whom had been involved in the earlier incident. Members of the Mongrel Mob began to smash windows in the house, and vehicles parked in the driveway. One of the brothers was set upon and assaulted by a number of Mongrel Mob members. The vehicle of another of the brothers was taken by a Mongrel Mob member, reversed out of the driveway smashing through the front fence, and then driven at speed up the side of the house. Two of the brothers had been chased to the back of the house. One of them – Jordan Herewini – was run over by the driver of the vehicle. Mr Herewini subsequently died of his injuries.

[9] Again there is no evidence suggesting that you attended at 10 Matai Street.

[10] As part of their enquiries into these events, on 17 February 2009 the Police executed a search warrant at your address in Murupara. They found the double barrelled shotgun in the wardrobe in your bedroom. In a chest of drawers, secreted inside a woollen beanie, they found nine 12 gauge shotgun cartridges.

[11] You were spoken to by the Police on 18 February 2009. You admitted having gone to 43 Matai Street on 27 January 2009; you said you had gone there at the direction of a gang leader to fight with the residents at that address. You also admitted that the shotgun and ammunition were yours.

[12] You do not hold, nor have you ever held an arms licence.

### **Criminal history**

[13] You did not, at the time of the offending, have a criminal record.

### **Pre-sentence report**

[14] I have received two full pre-sentence reports from the Department of Corrections.

[15] You are an 18 year old male, who identifies as being of Tuhoe descent. Prior to your offending, you were residing in your family home at Murupara with your parents and siblings. You described your family as being supportive of you. You were raised in Murupara, and you told the Probation Officer that you have had a good upbringing. You were expelled from school at the age of 15 years following an incident involving the Deputy Principal. Prior to that incident, you had been in trouble at school due to gang factions in Murupara.

[16] You advised the Probation Officer that you are a patched member of the Mongrel Mob. You joined the gang at the age of 15 years, apparently because you considered that you were picked on by members of the Tribesmen gang. You described the gang as being "one big family". The Probation Officer reported that, at interview, you presented as being proud of your involvement and stance in the gang.

[17] You have had some work experience. You have worked in the kiwifruit industry, in forestry and as a scaffolder. In recent times you have been reliant on your parents for financial support. In the past you have been in receipt of a benefit.

[18] It seems that you are a binge drinker on occasion, and that you smoke cannabis on a daily basis.

[19] Your mother was spoken to by the Probation Officer. She advised that she has never wanted you to be part of the Mongrel Mob gang and that she has attempted to stop you having any role in the gang. Her attempts have unfortunately been to no avail.

[20] When you were questioned about your offending, you largely agreed with the summary of facts. You stated that you had limited recall of the events. When questioned whether you had any remorse, you stated “yeah, a little bit for Jordon, he shouldn’t have died”. You justified the offences by stating that the Tribesmen members should have left you alone, and that they had brought it upon themselves. You reported that you acted out of a desire for revenge. You justified the firearms offences, saying that the gun and the ammunition were necessary for your own protection. You are reported as saying that you are “still tight” with the Mongrel Mob.

[21] Key factors identified as contributing to your offending are your use of alcohol and drugs, your propensity for violence, your supportive attitude and entitlement towards offending, your unhelpful lifestyle balance, and your criminal associates.

[22] You did advise that you were willing to undertake alcohol and drug counselling and education, and the Probation Officer reported that you are keen to attend the departmental Tikanga programme which seeks to integrate traditional Māori cultural values, philosophies and knowledge into the everyday life of Māori offenders.

[23] You were assessed as being at low risk of re-offending, but it was noted that that risk will elevate while you continue to justify your offending, and while you remain an active member of the Mongrel Mob. The Probation Officer also noted that your motivation to attend counselling and participate in the Tikanga programme may be fuelled by your current predicament and by your desire to stay out of prison.

[24] You have consented to a sentence of electronically monitored home detention.

[25] The Probation Officer, however, recommended a sentence of imprisonment. He made that recommendation given the seriousness of your offending, your lack of remorse, and the justification you have advanced for your offending.

### **Submissions**

[26] I have received helpful submissions from Mr Pilditch on behalf of the Crown, and from Ms Utting on your behalf.

[27] Mr Pilditch submitted that the charge of participation in the criminal group is a discrete offence from the two firearms offences. He initially submitted that cumulative sentences were appropriate to reflect the fact that the offences for which you are being sentenced are different in kind, and that they occurred on two separate occasions. Today in oral submissions, he accepted that concurrent sentences may be more appropriate.

[28] Mr Pilditch addressed the purposes and principles of sentencing, making particular reference to s 7(a), (b), (e) and (f). He also referred me to s 8(a), (b), (e), (g) and (h).

[29] He referred to two authorities which provides some guidance in relation to the appropriate starting point for your sentencing. They are *R v Mitford* [2005] 1 NZLR 753, and *R v Church* [2008] NZCA 272. By reference to those authorities, he submitted that a starting point in the region of 2½ years' imprisonment is appropriate in relation to the charge of participation in a criminal group to reflect your level of

involvement. He then submitted that there are aggravating factors in relation to the offending. In particular, he noted that the offending involved actual and threatened violence, that it involved unlawful entry into a dwelling, and that the house and personal property of the occupants were badly damaged. He accepted that there is no evidence that you attended at 10 Matai Street, where the Herewini brothers were assaulted and where Jordon Herewini suffered his fatal injuries. However he submitted that the nature of the charge to which you have pleaded guilty involves an element of contribution to criminal activity, including the criminal activity which occurred at 10 Matai Street. He also submitted that there was premeditation on your behalf, in that you and your fellow gang members gathered together, armed yourselves, and set out with the intention of seeking revenge for the events that had occurred earlier.

[30] Mr Pilditch then dealt with the charges under the Arms Act. He referred me again to authorities – *Roberts v Police* (1995) 10 CRNZ 451, and *Hastie v Police* HC PN AP 56/977, Gendall J. In light of those authorities, he submitted that an appropriate starting point for this offending should be in the region of 12 months' imprisonment. Again he submitted that there are aggravating features – namely accessibility of the firearm and the presence of the ammunition. He also noted that it is a grave concern that the firearms and the ammunition were located just a few weeks after the murder of Mr Herewini, when there was widespread fear of further gang violence in Murupara.

[31] Mr Pilditch accepted that there are no aggravating features personal to you, because you had at the time no previous criminal record. He also accepted that there are mitigating factors, in particular your age, and your early guilty plea.

[32] In summary, he submitted that a starting point on the first charge should be one of 2½ years' imprisonment, and that on the firearms charges, the appropriate starting point is 12 months' imprisonment. He submitted that the Court needs to take into account both the aggravating features of your offending, and your early guilty plea in determining the end sentence. He also acknowledged that there may be some need for a downward adjustment for totality purposes. He addressed the issue of home detention, and submitted that while it may be within the range of the options

open to the Court if the ultimate sentence is one of less than 2 years' imprisonment, it would not adequately deter and denounce your offending. He also referred to the nature of your offending and to the comments made by the Probation Officer in the pre-sentence report.

[33] Ms Utting adopted written submissions which had been prepared by Mr Foote. She took little issue with the Crown's submissions, although she did emphasise that there was no evidence that you were armed and that there was no evidence that you attended at 10 Matai Street. She submitted that the sentencing should proceed on the basis that your behaviour contributed to the offences which occurred at 43 Matai Street, but not to those which occurred at 10 Matai Street. She emphasised that you have no previous convictions, and she noted your age – you were only 17 years old at the time of the offending. She noted that others were clearly much more involved than you were.

[34] She also referred to *R v Mitford*. She sought to distinguish that case, and submitted that a lower starting point was appropriate in your case due to your limited involvement and your personal circumstances.

[35] She also sought to distinguish both *Hastie* and *Roberts*.

[36] She submitted that taking into account the mitigating circumstances – namely your age, and your early guilty plea – that an end sentence of something less than 2 years' imprisonment was appropriate. On that basis she submitted that consideration should be given to a sentence of home detention. She noted that an end sentence of home detention could also involve a sentence of community work.

### **Principles and purposes of sentencing**

[37] I have considered the principles set out in ss 7 and 8 of the Sentencing Act 2002. I have had regard to the need to hold you accountable for your offending, the need to promote in you a sense of responsibility for and acknowledgement of your offending, and the need to denounce the conduct in which you were involved. I am also mindful of the need to deter others from committing the same or similar



offences. I have taken into account the gravity of your offending including your degree of culpability and I have considered the seriousness of this type of offence and the general desirability of consistency in the appropriate sentencing levels with similar offenders committing similar offences.

### **Analysis**

[38] I agree with Mr Pilditch that the lead offence for sentencing purposes is that of participating in an organised criminal group.

[39] There is no tariff case in relation to such offending but there are a number of decisions which do assist.

[40] I refer first to *R v Church* HC WN CRI 2008-085-2762, 23 May 2008, Ronald Young J. That case involved gang violence between Black Power and Mongrel Mob members in Wanganui. After an incident at a rugby league match, Mongrel Mob members gathered together and went to confront the Black Power members. They went to a Black Power house. It was entered and the occupants were assaulted. Vehicles driven by Mongrel Mob members were used to try run over Black Power members. The violence culminated in a 2 year old girl being shot and killed while she slept. Three Mongrel Mob members were sentenced on the charge of participation in an organised criminal group. The Crown accepted that they had no idea that there was a firearm in one of the vehicles. However they got into the vehicles knowing that they were heading towards a Black Power house, and that a gang confrontation was going to occur. In the High Court, Ronald Young J considered that the appropriate starting point for each offender was 3 years' imprisonment. The Court considered that the appellant – Mr Church – had made a deliberate decision to involve himself in the intended activity, knowing that a violent confrontation would follow. His starting point was reduced to 2½ years' imprisonment to recognise that he was involved on the periphery of the events. The Court of Appeal – [2008] NZCA 272 – upheld the sentence in the High Court, stating that it was within the acceptable range. Home detention was not considered appropriate given the need to deter and denounce Mr Church's offending.

[41] In *R v Smith* HC WN CRI 2008-085-2762, 13 June 2008, Ronald Young J was sentencing another prisoner for participation in a criminal group, and for various other offences, including the possession of ammunition. The participation charge arose out of the same incident as the *Church* case. He adopted a starting point of 2½ years. Two months were added to the starting point to reflect amongst other things the charge of possession of ammunition. A one month concurrent sentence was given for possession of the ammunition.

[42] In *R v Mitford* CA 248/04, Mitford, along with a Mr Epapara and another went to a house demanding “compensation” from the owner. Apparently the owner’s sons had made what were considered inappropriate comments to a Black Power member. When compensation was refused, the owner was assaulted and told to find the money. Mr Epapara was a close associate of the Black Power gang. After attending a party, he, along with three others, decided to visit Mongrel Mob members to extract retribution for an earlier shooting. They drove to two houses where Mongrel Mob members lived. They entered the first house, assaulted the victim and robbed him of his patch. At the second house, they induced the victim to come to the door, and then shot him. Both Mr Mitford and Mr Epapara both pleaded guilty to participating in organised criminal groups. The starting point adopted in Mr Mitford’s case was one of 2 years’ imprisonment. His role during the visit to the house was to observe one of his co-offenders in making demands and punching the victim. The Court of Appeal upheld the starting point adopted by the Judge. Again home detention was dismissed as being an inappropriate sentence given the need to deter offences of this kind. In Mr Epapara’s case, a starting point of 3 years’ imprisonment was adopted. The High Court Judge had accepted that Mr Epapara’s role in the offending was peripheral, but noted the wide scope of s 98A. The Court of Appeal upheld this starting point. It commented as follows:

[61] ... Offending under s 98A with the objective of committing serious violent offences will tend to be viewed more seriously than offending with the objective of obtaining material benefits ...

[43] In *R v Wharewaka* HC AK CRI 2004-092-4373, 28 April 2005, Baragwanath J was sentencing various Black Power members and associates for drug related offending. One member had pleaded guilty to participating in an organised criminal

group and to unlawful possession of a firearm. The object of the group was to obtain benefits from the manufacture of methamphetamine and the sale and cultivation of cannabis. His Honour adopted a starting point of 18 months' imprisonment on the firearms charge, and imposed a cumulative sentence of 8 months' imprisonment for the charge of being involved in an organised criminal group.

[44] Having read these various cases and considered the same, in my judgment a starting point for sentence of 2½ years is appropriate in your case in relation to the charge of participation in a criminal group. The criminal group you participated in came together intending to seek revenge against Tribesmen members and with the intent of committing serious offences against them. In my view your offending is similar to that of Mr Epara in *Mitford* and to that of the offender in the decisions of *Church* and *Smith*. You deliberately participated in a criminal group, and you and your fellow Mongrel Mob members set out to find rival gang members with the intention of exacting retribution on them, and knowing that a violent confrontation would result.

[45] I agree with Mr Pilditch that there are aggravating features to your offending. You were part of a group that armed itself with weapons. The weapons were used to cause damage to the property at 43 Matai Street. I accept there is no evidence that you personally had a weapon, but nevertheless, you were part of a group which armed itself, and set out to achieve a criminal purpose. Further, members of the group unlawfully entered the property at 43 Matai Street. Again there is no evidence that you actually entered the property. Nevertheless, that was the intent of the group that you participated in. Finally there was clear premeditation. You and your fellow gang members banded together and set out to attack the people you considered were responsible for earlier events. These factors justify an uplift in the appropriate starting point.

[46] Further, in my view the starting point needs to be increased to take into account the two offences under the Arms Act. I do not accept Mr Pilditch's written submission that those charges should attract cumulative sentences. While I accept that in a broad sense, the offending is different in kind, the facts suggest that you were in possession of the firearms and ammunition as a consequence of your

membership of the Mongrel Mob. I prefer to adopt the approach taken in *Church*, where the sentencing Judge was dealing with similar facts.

[47] Taking into account the aggravating features of your offending, and the firearms charges, I adopt as my starting point a sentence of 3 years' imprisonment.

### **Aggravating and mitigating features personal to you**

[48] There are no aggravating circumstances personal to you that I am aware of.

[49] There are three mitigating circumstances – first your age, secondly the fact that you have not previously offended, and thirdly your relatively early guilty plea. Those pleas were not, however, entered immediately. They were only entered at the conclusion of the depositions hearing and before committal.

[50] In the circumstances and having considered the very recent decision of the Court of Appeal in *R v Hessel* [2009] NZCA 450, I discount your sentence by one third, to recognise your guilty pleas, your age, and the fact that this is your first appearance before the Court.

### **Sentence**

[51] Mr Te Tomo will you please stand.

[52] On the charge of participating in an organised criminal group, you are sentenced to a term of 2 years' imprisonment. On the charge of being in unlawful possession of a firearm, you are sentenced to a term of 6 months' imprisonment, to be served concurrently. On the charge of being in unlawful possession of explosives – namely ammunition – you are sentenced to a term of 4 months' imprisonment, again to be served concurrently.

## **Home detention**

[53] I have considered whether or not a sentence of home detention is appropriate.

[54] In particular I have considered the hierarchy of sentences provided for in the Sentencing Act 2002 – s 10A. I have also considered the decisions of the Court of Appeal in *Church* and in *Mitford*. In my view, a sentence of home detention would not adequately denounce the conduct in which you were involved, and would not be a sufficient deterrence. It can be said that the community is rightly affronted by gangs who take the law into their own hands and it cannot and should not be expected to put up with it. Participating in an organised criminal group is a serious offence. The community is entitled to expect that such behaviour will be denounced in strong terms.

[55] In the circumstances, I decline to order home detention.

## **Conclusion**

[56] Mr Te Tomo, this is, if not the first time, one of the few times you have appeared before the Courts. You are a young man and your life is largely ahead of you. I hope that you will reflect on the sentence of imprisonment I have imposed and why it has been imposed. I also hope that you will reflect on your association with the Mongrel Mob. I trust that you will gain some insight into your offending and I urge you to change your ways and the company you keep. If you do not do so, I expect that you will offend again sooner rather than later. I urge you to try and avoid that.

[57] You may stand down.

---

Wylie J