IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA99/2021
CA79/2021
CA122/2021
CA153/2021
CA400/2021
CA114/2021
CA119/2021
[2022] NZCA 479

BETWEEN	FRANK AMADEUS MILOSEVIC SLOBODAN RAHOROI MILOSEVIC STARLIGHT WHETUMARAMA MANUEL LAWRENCE TE KIRA KEITH PRYOR IRENE RAKI RAIHA TAWERA Appellants
AND	THE KING Respondent

Hearing:	30 and 31 March 2022
Court:	Clifford, Lang and Mallon JJ
Counsel:	W T Nabney for Frank Amadeus Milosevic G A Walsh for Slobodan Rahoroi Milosevic M J James for Starlight Whetumarama Manuel A M Simperingham and D A Berry for Lawrence Te Kira C D Bean and A Bean for Keith Pryor R E Webby for Irene Raki N M Dutch for Raiha Tawera F R J Sinclair, Z A Fuhr and T R Simpson for Respondent
Judgment:	12 October 2022 at 3.00 pm

JUDGMENT OF THE COURT

A **Mr F Milosevic and Mr S Milosevic's appeals against conviction are allowed in part. Their convictions for money laundering are quashed. Their appeals against conviction are otherwise dismissed.**

B **Mr F Milosevic's appeal against sentence is allowed in part. We substitute his sentence of 17 years and six months' imprisonment with a 50 per cent MPI with one of 16 years and six months' imprisonment with a 50 per cent MPI.**

C **Mr S Milosevic's appeal against sentence is allowed in part. We substitute his sentence of 15 years and nine months' imprisonment with a 50 per cent MPI with one of 14 years and nine months' imprisonment with a 50 per cent MPI.**

D **Ms Raki and Ms Tawera's appeals against conviction and sentence are allowed. Their convictions for money laundering are quashed.**

E **Mr Manuel's appeal against conviction and sentence is dismissed.**

F **Mr Pryor's application for an extension of time to appeal is granted, but his appeal against conviction and sentence is dismissed.**

G **Mr Te Kira's appeal against sentence is dismissed.**

REASONS OF THE COURT

(Given by Clifford J)

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Introduction

[1] On 13 November 2020, following an eight-week jury trial, the appellants were convicted on a range of methamphetamine and cannabis offending, and associated money laundering, charges. They were sentenced by Judge Mabey KC in the District Court at Tauranga on 11 and 12 February 2021. These are appeals against conviction and sentence.[1]

Background

Offending

[2] The charges the appellants faced arose out of a police operation called "Operation Notus" conducted from August 2017 to March 2018 (the Operation). The Operation resulted in the arrests of more than 50 people. The Crown decided to group the various people charged for hearing over three separate trials. A number of people pleaded guilty. In the trial before Judge Mabey, there were eight defendants who went to trial, seven (the appellants) were convicted, one was acquitted.

[3] The Crown's case at trial was that Mr Frank Milosevic, the president of the Kawerau chapter of the Mongrel Mob, and his son Mr Slobodan Milosevic were the leaders of a methamphetamine and cannabis business involving, as relevant, some 2.5 kg of methamphetamine and some 400 cannabis plants.[2] Whilst Mr F Milosevic was president, the Crown asserted Mr S Milosevic was his "right hand man". The Crown also alleged, by reference to expert accounting evidence of a Ms Clay, that approximately $510,000 was laundered by the Milosevics and their partners, Ms Raki and Ms Tawera.

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1 For completeness, we record some appellants have sought extensions of time to appeal. The required extensions were granted in a minute of Miller J on 3 May 2021 for all appellants except Mr Pryor. Mr Pryor's appeal was filed approximately four months out of time. The Crown does not oppose the application for an extension of time, having not been prejudiced by the late filing. We accordingly grant Mr Pryor an extension of time to appeal.

2 We shall refer to Mr Frank Milosevic as "Mr F Milosevic" and Mr Slobodan Milosevic as "Mr S Milosevic". When referring to them both, we will simply say "the Milosevics".

Convictions and sentences

[4] The details of the charges the appellants faced at trial and their convictions and sentences are as follows:

(a) Mr F Milosevic (CA99/2021) faced 20 charges involving methamphetamine, cannabis and money laundering offences, was found guilty of 16 of those charges and was sentenced to 17 years and six months' imprisonment, with a minimum period of imprisonment (MPI) of eight years and nine months.[3]

(b) Mr S Milosevic (CA79/2021) faced 20 charges of methamphetamine, cannabis and money laundering offences, was convicted on 19 of those charges and was sentenced to 15 years and nine months' imprisonment with an MPI of seven years and 10 months.[4]

(c) Ms Raki (CA114/2021), Mr F Milosevic's partner, faced and was convicted on two charges of money laundering and was sentenced to two years and six months' imprisonment.[5]

(d) Ms Tawera (CA119/2021), Mr S Milosevic's partner, faced and was convicted on three charges of money laundering and was sentenced to 12 months' home detention followed by nine months' post-detention conditions.[6]

(e) Mr Manuel (CA122/2021) faced 15 charges, principally in relation to dealing, possession and supply of some 120 ounces of cannabis as well as some minor methamphetamine offending, was convicted on 14 of those charges and sentenced to three years and four months' imprisonment.[7]

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3 *R v Milosevic* [2021] NZDC 2318 [Mr F Milosevic sentencing notes].
4 *R v Milosevic* [2021] NZDC 2363 [Mr S Milosevic sentencing notes].
5 *R v Raki* [2021] NZDC 2567 [Ms Raki sentencing notes].
6 *R v Tawera* [2021] NZDC 2601 [Ms Tawera sentencing notes].
7 *R v Manuel* [2021] NZDC 2528 [Mr Manuel sentencing notes].

(f) Mr Pryor (CA400/2021) faced and was convicted on six dealing charges; three each relating to cannabis and methamphetamine and was sentenced to six years and nine months' imprisonment.[8]

(g) Mr Te Kira (CA153/2021), who was one source of the Milosevics' methamphetamine, faced and was convicted on four charges in relation to the offer, supply and possession for supply of methamphetamine and was sentenced to four years' imprisonment.[9]

[5] All except Mr Te Kira appeal their convictions and sentences. Mr Te Kira only appeals his sentence. Ms Tawera's counsel now says that, since she has served her one year of home detention, her sentence appeal is moot and as such we need not consider it.

Conviction appeals

[6] A number of the appellants raise similar challenges to their convictions:

(a) The Milosevics, Mr Manuel, Ms Raki and Ms Tawera all say the way the Judge (i) conducted their trials, particularly by interfering adversely to their interests during the taking of the evidence of Detectives Scott, Waugh and Sowter, Ms Clay and Mr F Milosevic himself, and (ii) summed-up favourably to the Crown, resulted in a miscarriage of justice.

(b) The Milosevics, Ms Raki and Ms Tawera challenge:

(i) the Judge's decision declining severance of the money laundering charges;

(ii) the Judge's decision allowing amendment of the terms of the money laundering charges after the close of the Crown's case; and

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8 *R v Pyror* [2021] NZDC 2409 [Mr Pryor sentencing notes].
9 *R v Te Kira* [2021] NZDC 2607 [Mr Te Kira sentencing notes].

(iii) the admissibility of Ms Clay's expert accounting evidence.

(c) Mr S Milosevic, Mr Manuel, My Pryor and Ms Raki and Ms Tawera all say the Judge erred in ruling their counsel could not "cross-examine" — as they put it — Mr F Milosevic.

[7] In addition:

(a) Mr F Milosevic he says he was wrongly denied access to a computer whilst in prison on remand. That inhibited his ability to adequately prepare his defence, given the prosecution case relied on thousands of intercepted audio calls and text messages.

(b) Mr S Milosevic says:

(i) a glossary of terms (exhibit B) of commonly used drug codes was wrongly allowed as evidence:[10] and

(ii) evidence of telephone calls between Mr S Milosevic and a Mr Blair Boyes (in relation to transactions and discussions around firearms) should not been included as having no probative value and being unfairly prejudicial.

(c) Ms Raki complains she was not able to engage the services of an expert accountant because she only received Ms Clay's financial analysis six weeks before the trial began. Whilst the police had provided an earlier brief from a Detective Shallcross, Ms Raki says Ms Clay's evidence was different in terms of complexity, quantum and configuration.

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[10] Mr Manuel also advances this argument: his submissions were filed jointly with Mr S Milosevic's and are dealt with accordingly.

The trial

[8] Those grounds of appeal need to be placed in the context of the trial as a whole. In summary:

(a) This was a long trial, lasting some eight weeks (21 September to 13 November 2020). Evidence was taken over 24 sitting days resulting in a transcript, including the Judge's challenged interventions and his many — as is commonplace in a trial of this nature — exchanges with counsel, that runs to 2,250 pages.

(b) The prosecution case involved a total of 35 witnesses, 10 of whose evidence was read by consent, took a total of 18 sitting days and produced 1,597 pages of transcript. The Crown's evidence fell into three main categories:

(i) The first, and by far the largest, comprised intercepted text messages being read into the record, intercepted telephone conversations being played and the significance of call data obtained by production orders from telephone companies being explained.

(ii) The second comprised evidence gathered by the police during what is known as the "termination" phase of the Operation where relevant premises are searched, suspects arrested and evidence, such as of drugs and firearms, obtained.

(iii) The third comprised financial evidence on which the money laundering charges were based.

(c) The defence case occupied six sitting days between 23 October and 2 November. Mr F Milosevic gave evidence and/or was cross-examined on each of those days. The gist of Mr F Milosevic's evidence was that the terms the police said were code words concealing drug dealing were not code words at all: rather Mr F Milosevic and his

family were active breeders of farm animals and hunters and fishers: the intercepted communications recorded the arrangement and the details of a large number of exchanges with family, friends and associates where produce was either sold or given away. Mr Nabney, counsel for Mr F Milosevic, called two further witnesses who supported Mr F Milosevic's narrative.

(d) Counsels' closing addresses occupied four sitting days, between 3–9 November; the Judge began his summing up on 10 November; and finally, the jury returned and convictions were entered on 13 November.

[9] The Judge, as was necessary, played an active role throughout the trial. Considerable judicial housekeeping was involved to keep the trial moving forward within its scheduled sitting period. Numerous evidential issues were dealt with. The Judge was at pains to ensure the jury were kept informed and to explain to them, in appropriate concrete and direct terms, the legal process that was unfolding. The Judge also paid particular attention to ensuring the jury were not overwhelmed or confused by the large volumes of written material produced by the Crown, particularly the texts of intercepted telephone conversations, text messages and call data that was used to put those intercepted communications into evidence. Taken overall, in our view the way the Judge conducted the trial, and dealt with counsel and the jury, reflected his considerable experience with trials of this nature and was efficient and appropriate.

[10] At the same time, it is fair to say the Judge took a robust approach with counsel from time to time. But that is not unusual or necessarily inappropriate as defence counsel do, occasionally, need to be moved on.

[11] One example will suffice. At one point defence counsel objected to Crown evidence of an accused, when spoken to by the police, having repeatedly declined to answer their questions. Defence counsel was concerned that such repeated references could be "significantly prejudicial" for his client. The following exchange occurred, beginning with the Judge:

Q. … It's not prejudicial at all. It's your client asserting his rights which he's just been given and it's not like a situation where someone is sitting on a video and being cross-examined. There is no prejudice at all. In fact I would have thought from your point of view it's your client standing on his rights and making it absolutely clear that he doesn't want anything to do with the police.

A. Well the difficulty I have with that Sir is that lay people like juries —

Q. *Well you leave the lay people like juries to me … [t]hat's a ruling I've made and we'll have the jury back please*.

(Emphasis added.)

Conviction appeals

Overview

[12] We address the drug offending and the money laundering conviction appeals separately.

[13] In the case of the drug offending convictions, we deal first with Mr F Milosevic's complaint about inadequate computer access as that relates principally to his ability to respond to the drug charges. We then consider the specific and the more general challenges to the methamphetamine and cannabis convictions, as regards the glossary of terms, the evidence of Mr Boyes, the Mr F Milosevic "cross-examination" ruling, the Judge's interventions and his summing up.

[14] We then consider the money laundering conviction appeals as based on the severance ruling, the claim of partiality as regards Ms Clay, the Judge's interventions during Ms Clay's evidence, the Judge's agreement to the amendment of the charges after the Crown's closing and the Judge's summing up.

[15] That order approximates that in which the matters those challenges are based on occurred during the trial.

Drug offending

Inadequate computer access — Mr F Milosevic

[16] On the first day of trial Mr F Milosevic applied for a stay on the basis the limited access he had had to computer facilities meant he had not been able to adequately prepare his defence. The Judge dismissed that application, issuing a written decision that day.[11] The summary of events we set out below is largely taken from that decision.

[17] When his trial began in September 2020 Mr F Milosevic had been in custody since he was arrested and charged in March 2018. Disclosure had taken place progressively throughout that period, including in September and December 2019 by way of (i) a draft transcript of intercepted audio calls and (ii) an MP4 player loaded with audio files.

[18] Mr Nabney then requested Mr F Milosevic be provided access to a computer to review the 2,212 audio files of intercepted conversations to which he was a party. Mr F Milosevic needed to analyse the intercepted communications in order to properly instruct Mr Nabney. That could only occur if he had access to a computer.

[19] When, after two years, prison authorities had not granted that request, Mr Nabney commenced judicial review proceedings against the Chief Executive of the Department of Corrections in March 2020. Those proceedings were settled in June 2020: by agreement, Mr F Milosevic was to have access to a computer.

[20] In early July 2020, some two-and-a-half months before trial, Mr F Milosevic — then in Waikeria Prison — was provided access to a computer. But the promised access, between 8.30 am and 4.00 pm Monday to Friday, never eventuated. By 24 August access had been reduced to between 8.30 am and 2.00 pm two days a week.

[21] Then, and as Judge Mabey explained in his decision declining the stay application:

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11 *R v Milosevic* [2020] NZDC 19129.

> [36] What happened next in terms of prison management is inexplicable on the face of it, and for which no explanation has ever been given.
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> [37] Mr [F] Milosevic was progressing in Waikeria Prison carrying out the analysis necessary for the preparation of his defence when on the 28 August he was again transferred to Springhill.
>
> [38] The transfer was 3 ½ weeks before his trial. It was done at a time when Waikeria authorities were fully aware of the work that Mr [F] Milosevic was doing in preparation for the trial and when Waikeria was facilitating his rights.
>
> …
>
> [41] Upon transfer to Springhill Mr [F] Milosevic understandably requested access to a computer. That was flatly denied without reason by Springhill management. That denial has never been explained despite the fact that Springhill knew from earlier correspondence of Mr Nabney's attempts to have computer access for his client and the extent of the disclosure that required analysis by Mr [F] Milosevic.

[22] By that point, that is by 28 August 2020, Mr F Milosevic had analysed 1,611 files covering the period from October 2017 to 2 February 2018. He was still to analyse 601 files covering the period from 2 February 2018 to 21 March 2018. Denied further computer access until the weekend before his trial commenced, Mr F Milosevic made no further progress.

[23] In dismissing Mr F Milosevic's stay application, the Judge acknowledged the application "is not only understandable it is entirely appropriate".[12] He recognised the need for Mr F Milosevic to process the remaining 611 files, comprising 12 hours of audio time. But he considered there was an alternative remedy to a stay: namely, for Mr F Milosevic to have a computer in prison over the weekend of 26–27 September.[13] The Judge reserved the possibility of having some shorter days in the second week of the trial to allow Mr F Milosevic additional computer time.[14] The Judge said he would review the position on Monday 28 September, noting: "If, despite the efforts of all concerned, Springhill has not facilitated Mr [F] Milosevic's rights over the coming weekend I will hear Mr Nabney again".[15]

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12 At [47].
13 At [69] and [71].
14 At [74].
15 At [75].

[24] It was not until 28 September that the prison was ready to provide the computer. The Judge recorded his understanding of what had taken place over the weekend in a minute of 30 September, concluding:[16]

> [19] As of the morning of Wednesday, 30 September Mr [F] Milosevic was not in a position to properly instruct his counsel on the intercepted audio communications from 2 January 2018 on. He needed more time.

[25] The Judge adjourned the trial for the rest of the day to help Mr F Milosevic catch up. Mr F Milosevic returned to Springhill at 2.00 pm and was offered a laptop. However, he said he wished to have "compound time", which he did, and he was then provided with the computer after dinner.

[26] The next day the Judge issued a further minute, stating his disappointment that Mr F Milosevic had "deliberately avoided the opportunity that I had given him" and wasted the time that could have been spent on the computer.[17] The Judge raised the matter with Mr Nabney, stating "there would be no further leeway given to [Mr F Milosevic] by way of down time or court adjournment".[18] He went on:

> [10] Mr Nabney appreciated the position and said that he had been speaking to his client that morning. He acknowledged that Mr [F] Milosevic did choose to have recreational time on his return and that the computer was given to him after dinner lockdown.
>
> [11] However, Mr Nabney explained that Mr [F] Milosevic had stayed up until the early hours of the morning listening to the balance of the intercepts and was now "up to speed" such that the trial could continue without further interruption.

[27] The trial recommenced that day, and Detective Robinson introduced intercepted communications covering the period 9 January 2018 to 21 March 2018: that is, the period of time covering communications of which Mr F Milosevic may not have by that point undertaken his analysis.

[28] Towards the end of that day, Mr Nabney advised the Judge he had to attend a High Court sentencing the following day (Friday 2 October) and could not be sure when he would return to the trial. Mrs Nabney would be in Court. She was, however,

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16 *R v Manuel* DC CRI-2018-070-1285, 30 September 2020 (Trial Minute 4 of Judge Mabey KC).
17 *R v Manuel* DC CRI-2018-070-1285, 1 October 2020 (Trial Minute 6 of Judge Mabey KC) at [4].
18 At [9].

not in a position to cross-examine Detective Robinson. The Judge was not prepared to pause the trial as the Detective had to return to Nelson at 4.00 pm on the Friday. The Detective's evidence concluded on the Friday morning. Mrs Nabney did not cross-examine her.

[29] Mr F Milosevic had access to computer facilities until the conclusion of his trial. Although there is no exact record of the hours he had with the computer, before us he gave evidence that he would use the laptop after each trial day, listening to the remaining calls and finishing late into the night. Three weeks after Detective Robinson finished giving her evidence, Mr F Milosevic gave evidence. His evidence referred to and played calls from each of the months from October 2017 to March 2018: that is, the entire period of intercepted communications.

[30] As that narrative establishes, the difficulties Mr F Milosevic was experiencing on remand in gaining access to computer time were directly raised by Mr Nabney, were taken seriously by the Judge and were, to the best of the Judge's ability, addressed within the constraints of a long and complex trial.

[31] Given the increased reliance on digital records in courts generally, and in the criminal justice system in particular, the need for prisoners to have proper computer facilities to access those records is becoming increasingly self-obvious. On appeal, however, the issue is not whether Corrections lived up to the undertakings it made or whether it provided Mr F Milosevic with what he considered he needed. Nor is the question whether the access that was provided was as effective as this Court has said is desirable.[19] Rather, the question is whether, at the end of the day, Mr F Milosevic was accorded adequate time and facilities to prepare a defence so that his trial was a fair one.[20]

[32] In that context, before us Mr Nabney fairly acknowledged that at the time of trial and when preparing for the appeal he had not become aware of any instance where Mr F Milosevic had been unable to draw to his attention matters material to his defence. Nor has anything of that nature been drawn to our attention by

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19 See *Greer v R* [2003] NZCA 82.
20 Criminal Procedure Act 2011, s 232(2) and (4).

Mr F Milosevic in his own evidence on this appeal. We are satisfied, accordingly, that Mr F Milosevic was provided, between his legal representation and the access to a computer he had whilst on remand, a sufficient opportunity to prepare a defence so as not to render his trial unfair.

The glossary of terms

[33] As part of Detective Sergeant Sowter's expert evidence in relation to drug matters, the Crown proposed to record in a schedule the various terms the officer would refer to as commonly known code words used in drug offending. Defence counsel objected to the jury being given the schedule. They did so on the basis that putting it before the jury would be unfairly prejudicial because it would objectify the officer's evidence and support the proposition that various of those words, as used by the defendants in intercepted communications, were code words for drug dealing. The schedule would have the unfair effect of closing the jury's mind to the explanation of the communications the defence would advance.

[34] The Judge did not agree. He ruled:[21]

> [15] I do not consider there is any prejudice that would accrue to the defendants if the schedule is produced. When it is produced I will direct the jury as to the purpose of the detective's evidence and how they may use it, including the schedule to be produced. I will make clear that he is not giving evidence that the defendants are talking about drugs as that is a matter for their determination. It is however important that they are aware of drug terminology as that is not within their general knowledge and it will be substantially helpful to them to hear the detective's evidence.
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> [16] At the end of the trial I will give a similar direction.

[35] The Judge did just that. Before the schedule was distributed to the jury he provided an extensive direction, including the following comments:

> The detective has just produced the document as exhibit 1 and which you'll get a copy of is a glossary of terms. Now he's just been through at some length various terms that [Crown counsel] asked him about and there was a lot of them, wasn't there? I fully expect that many of those terms won't even come up in the evidence about these eight defendants. The detective is a man who has been in the police for a long time and he's familiar with some terms but his evidence is directed at assisting you in dealing with the case against these defendants. He's able to give the evidence he has because that would be

[21] *R v Manuel* [2020] NZDC 19234.

> substantially helpful to you to understand things that would not be in your general knowledge and so he can talk to you about it but what the detective is not doing is telling you that if any of these words crop up in any of the texts or communications you heard involving the defendants, that those words are about drugs. He can't tell you that. …

[36] He made similar comments in his summing up.

[37] We are satisfied that direction more than adequately dealt with any potential unfair prejudice and focused the jury's mind on what the purpose of the evidence was and how it might be properly used.

Mr Boyes' evidence — Mr S Milosevic

[38] At a relatively early stage of the Crown case evidence of intercepted telephone calls between Mr S Milosevic and a Mr Blair Boyes, relating to the purchase of a firearm, was introduced. Mr S Milosevic says that evidence was not relevant because he was not facing firearms charges. Moreover it was prejudicial, given the implicit assertions of gang involvement in drug trafficking and associated firearm use.

[39] The admissions made pursuant to s 9 of the Evidence Act 2006 contained the following agreed statement of fact:

> On 2 November 2017, Blair Boyes sold the defendant Slobodan Milosevic a Tikka 300WSM rifle, scope rail, and two boxes of ammunition having used his staff discount to purchase the items at Whakatane Hunting and Fishing for a total price of NZD$4,900.
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> On or before 8 December 2017, Blair Boyes sold the defendant Slobodan Milosevic a magazine for the Tikka 300WSM, two 30-shot magazines for an AR-15 semi-automatic rifle, and nine boxes of 20 round Prvi Partizan .223 ammunition which he purchased using his staff discount for NZD$180.

[40] Prior to trial, the Crown had successfully applied to lead evidence of Mr Boyes's conviction for the supply of that firearm and ammunition to Mr S Milosevic.[22] The Crown opened its case on the basis that Mr S Milosevic's cash purchase of firearms from Mr Boyes illustrated the Crown's expert evidence about the use of cash and firearms by drug dealers. During the trial the jury were played the intercepted calls in which firearms and methamphetamine transactions were

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[22] *R v Manuel* DC CRI-2018-070-1285, 16 September 2020 at [5].

both discussed. However, the Crown ultimately resolved not to lead the evidence of Mr Boyes's conviction.[23] The firearms transactions between Mr S Milosevic and Mr Boyes received little attention from the Crown in closing, nor from the Judge in summing up.

[41] The defence explanation of the intercepted communications on which the charges were based was provided by Mr F Milosevic. The gist of that evidence was that the family were keen fishers and hunters, and also farmed stock albeit on a relatively small scale. The intercepted communications involved dealing not in drugs but in the range of produce those activities produced. In that context, we do not see prejudice in the fact that the evidence included the purchase by Mr S Milosevic — by his own account a keen hunter — of these firearms and associated paraphernalia.

The Mr F Milosevic "cross-examination" ruling

[42] Prior to Mr F Milosevic giving evidence, the Judge directed he would, pursuant to s 93 of the Evidence Act, prevent other defence counsel asking "leading questions in cross-examination of [Mr F Milosevic] calling for a yes/no answer".[24] Section 93 gives a Judge discretion to take that approach in the interests of justice where a party is cross-examining a witness who has the same or substantially the same interest as the cross-examining party. The Judge ruled that was the case as regards Mr F Milosevic and each of the other defendants. The argument on appeal was that this had unfairly prevented counsel for the other defendants cross-examining Mr F Milosevic.

[43] We are satisfied that was not the case. The prohibition was not on cross-examination, but on leading questions. It would have been perfectly possible for defence counsel to have questioned Mr F Milosevic on relevant matters without the use of leading questions. This ground of appeal was simply misconceived.

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[23] See *R v Manuel* DC CRI-2018-070-1285, 1 October 2020 [Pre-trial applications decision] at [116]–[117].

[24] *R v Manuel* DC CRI-2018-070-1285, 29 October 2020 (Trial Minute 12 of Judge Mabey KC) at [3].

The Judge's interventions

[44] In the context of the challenges to the convictions for drug offending, the principal focus of this aspect of the appellants' arguments were interventions the Judge made during Mr F Milosevic's evidence. We deal with those first. The appellants also raised concern with a small number of interventions during the evidence of Detectives Scott, Waugh and Sowter. The exchanges the Judge initiated on those occasions were manifestly innocuous, and we need deal with them only briefly.

Mr F Milosevic

[45] Mr F Milosevic complains about seven interventions the Judge made during his cross-examination by the prosecutor, principally concerning the intercepted communications. His contention is that the Judge reinforced, and indeed appeared to have preferred, the prosecution arguments.

[46] The relevant principles are well established. In *Tahere v R*, this Court said:[25]

> [A] Judge may not intervene so as to cause a reasonable observer to think the court partial as between the parties. Interventions may convey that appearance where they indicate that the Judge has become an advocate, or that the evidence for a party on a controversial point ought to be believed, or not … but the number of interventions matters less than their impact on the parties' cases and any impression they convey to the reasonable observer about the judge's attitude towards the parties.

[47] To similar effect is the following observation of this Court in *M v R*:[26]

> [C]onsiderable caution is required when a judge is considering questioning, in the course of cross-examination, a defendant who has elected to give evidence in a criminal trial.

[48] As that case discusses, s 100(1) of the Evidence Act provides that the Judge may ask a witness any question that in the Judge's opinion "justice requires".[27] In the context of a criminal jury trial, in deciding if justice requires it, the Judge should take into account:[28]

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25 *Tahere v R* [2013] NZCA 86 at [31] (footnotes omitted).
26 *M v R* [2015] NZCA 183 at [38], citing *R v Molioo* [2008] NZCA 333; *Holland v R* [2010] NZCA 279; *Beckham v R* [2012] NZCA 290; and *Tahere v R*, above n 25.
27 *M v R*, above n 26, at [32].
28 At [33].

(a) the defendant's right to a fair trial;

(b) the separate roles of the judge and jury, with the judge having responsibility for questions of evidence, procedure and the law and the jury having sole responsibility for determining the facts;

(c) the need to let counsel pursue their examination and cross-examination of witnesses in accordance with their professional responsibilities and their obligations under the Evidence Act; and

(d) the possibility that judicial questioning could cut across a defence which a defendant wishes to rely on but which may not be apparent to the Judge.

[49] We consider the matters raised by the appellants in that light.

[50] The first intervention complained of took place when the prosecutor suggested certain calls and texts were disguised communications about drugs and could not be explained, as Mr F Milosevic contended, as being about foods of various kinds. In the course of his cross-examination the prosecutor referred to a call (introduced by the defence) in which Mr F Milosevic spoke openly, to a kaumātua, about providing crayfish:

Q. Because we've seen that where there's an innocent purpose to a visit you're happy to talk about it with someone?

A. No.

Q. When you're talking with the kaumātua about setting up some crayfish and getting some out and getting them ready it's friendly Frank, isn't it, correct?

A. I don't know what you – what that question, what's that question?

Q. When you are talking with the kaumātua –

A. I was talking with [Mr Manuel]. Where, where's the kaumātua? Do I have to read that one too?

Q. Well it's one of the calls you've put in front of us Mr Milosevic when you're talking about crayfish.

A. Okay.

Q. So all friendly Frank open and clear, isn't it, when you're talking to people outside the gang?

A. Yeah, I don't understand your question.

THE COURT

Q. What Mr Jenson is saying is that you have introduced phone calls where you are talking to certain people about such things as crayfish and anyone listening to the call would think that you were being helpful and co-operative and willing to deal with whoever you're talking to about crayfish. Mr Jenson is saying to you but on other calls it's different and he'll explain to you what he means by that I'm sure.

A. Explain.

CROSS-EXAMINATION CONTINUES: MR JENSON

Q. So you accept what his Honour has just said that there are calls when you're talking to other people about crayfish you're friendly, co-operative, open?

A. Yeah, yeah.

Q. But when you're talking with your fellow gang members that's when the code and the unspoken stuff kicks in doesn't it?

A. No. What code?

[51] Later, the prosecutor challenged Mr F Milosevic about another call said to be about crayfish where the word crayfish was never mentioned. Mr F Milosevic appeared to change his position on whether the transaction might also have involved whitebait. When asked about that suggestion he answered "Maybe, yeah, maybe" and "I'd say probably just, just crayfish on this one, yeah. It's so long ago".

[52] At this point, the Court intervened:

THE COURT

Q. Mr Milosevic, do you accept that if you had used the word crayfish and [Mr Manuel] had to use the word crayfish then you would be sure today what you were talking about?

A. Um, most of the time he was coming over he was coming over for crayfish so I just –

Q. No, no, I'm asking you this. If the word crayfish was used, then you'd be able to say to Mr Jenson: "Oh yes it's about crayfish" because that word would be there. Does that make sense?

A. Yeah.

Q. Many of these calls that Mr Jenson is asking about and which the jury have heard don't use the words crayfish or whitebait they use other words or no words at all?

A. Yeah, just numbers.

Q. So why then when you talk to some people such as a kaumātua up the coast who needs crayfish do you say "crayfish" and why then when you talk to other people do you not mention crayfish or whitebait for example?

A. Yeah, well, um, that's, um, old, old fella there rung up, I think referring to, um, Sonny, Sonny Rua.

Q. No, no, why when you talk to people who you say you're selling crayfish and whitebait to why not use those words? That's all I'm asking.

A. Oh, okay.

Q. That's all I want to know.

A. Didn't really need to use those words because I already knew what they were after.

Q. But do you understand that what Mr Jenson is putting to you is that sometimes words used such as a half or a G in some conversations or an elbuck in other conversations are drug terms, do you understand that is what Mr Jenson is putting to you?

A. Yeah, I understand, um yeah, yeah.

Q. Okay, and you're saying he's wrong, those drug terms, some of which were mentioned by Detective Sowter are not drug terms when you use them?

A. Well yeah if you look inside the dictionary the word specifically says a crayfish is a crayfish, a half is a half.

[53] Some time later the prosecutor asked if there was a single message in which "whitebait" was referred to in conversations with one particular associate.

[54] The following exchange then occurred:

[CROSS-EXAMINATION CONTINUES: MR JENSON]

Q. Is there a single message where you actually refer to whitebait with Mr Pryor?

A. Whitebait?

Q. Mmm?

A. Ah, I dunno, probably no.

THE COURT

Q. Mr Milosevic I'll ask you again. Why not use the word *whitebait* if you're talking about whitebait. I'm sure that everyone in the courtroom would be interested in your answer?

[55] In our view in those exchanges the Judge is cross-examining Mr F Milosevic and in doing so, is assisting the prosecutor's line of questioning. The Judge does not ask just one question, he pursues the point and asks questions that (at the very least) risk conveying the impression that he does not believe Mr F Milosevic's explanation.

[56] Mr F Milosevic then gives his answer and the Judge persists with one more question. The Judge should not have intervened in this way in what was a key aspect of Mr F Milosevic's defence:

A. Yeah, because I already knew what he was after. He come over home.

Q. But you do appreciate, don't you, that the prosecution are suggesting that the reference to an LB is drug talk for a pound of cannabis. You understand that. I just need to make sure that you're aware of the case that's been put to you?

A. Yeah, fully.

Q. You're on board with that?

A. Yeah.

[57] The second intervention concerned a phone call in which the Crown alleged the Milosevics had purchased methamphetamine from Mr Te Kira but had returned it to him due to its poor quality. Mr F Milosevic claimed that conversation had been about beef, not methamphetamine. He said that beef was inside a freezer at the gang pad, which the police should have taken photographs of but did not, or had but had not disclosed. The following exchange between the Judge and Mr F Milosevic then occurred:

Q. If you had those photographs of meat in the freezer would me or the members of the jury be able to determine if the meat in the photographs was supplied by Mr [Te Kira]? If so how would we do it?

A. Yeah, yous wouldn't but at least it'll go with my, my, um, my story that I'm telling that that's where the cow was.

Q. Yes, but you're complaining about not having photographs of the pad freezer and –

A. Yeah, 'cos there were crays in there too.

Q. – its contents. I'm asking you would those photographs show us where the meat came from?

A. Ah, no.

[58] Whether or not such photos would show where the meat came from was not the point. The point was the presence of meat, if photographed, would support the general proposition of the family dealing in meat. The Judge was again, entering the arena unnecessarily.

[59] The third intervention concerned a conversation which the Crown alleged showed the Milosevics had sought new sources of methamphetamine. Mr F Milosevic said that conversation had initially concerned a purchase of cows and had moved on to obtaining a kilo of gold, for the manufacture of gang rings, for $100,000. Mr F Milosevic confirmed to the prosecutor he was in fact talking about gold. The Judge then intervened and asked Mr F Milosevic on two occasions where the $100,000 was coming from. Again, this was not the Judge's role.

[60] The fourth intervention concerned a conversation in which the Crown said Mr F Milosevic had been organising the harvest of cannabis. Mr F Milosevic rejected that assertion and said he had been organising a tangi. Mr Jenson challenged him as to why, according to the conversation, the so-called tangi would have to have been kept secret. Mr F Milosevic said he did not understand the question. The Judge then put the proposition to Mr F Milosevic that a tangi was not something "you would want to keep secret". Mr F Milosevic accepted that. Again, the defence says the Judge was doing the prosecutor's job. We agree. The intervention was unnecessary, but harmless in and of itself.

[61] The next intervention complained of occurred during cross-examination of Mr F Milosevic as to the source of the large amounts of cash he appeared to have at his disposal. Mr F Milosevic explained that "when I was working I was earning 120 k

a year". The prosecutor then had Mr F Milosevic explain it had been six or seven years since he earned that amount of money, that at the time it had been paid into a bank account and it had not been hidden under his bed for later use. When Mr F Milosevic suggested he had, in fact, "put a bit away" the prosecutor asked him rhetorically:

> Q. *Just give us a straight answer for once Mr Milosevic*. Are you saying to this jury that this cash is somehow the source of you drawing money out and hiding it under the bed?
>
> (Emphasis added.)

[62] The exchange continued in like manner, the Judge intervening a short time later in the following terms:

> Q. … What Mr Jenson is talking to you about is where all the cash came from that you and your partner were spending and putting into the bank. You must understand that and I'm wanting to make clear that you do understand it. Do you understand that Mr Jenson is questioning about the money laundering charges?
>
> A. Yeah, I understand that.
>
> Q. Right.
>
> A. But, um, which, which years is he talking about.
>
> Q. Well he will tell you that. *But I suggest to you that straight answers might be in your best interest[s]*.
>
> (Emphasis added.)

[63] These interventions were unnecessary, beyond the Judge's role as referee, and risked conveying that the Judge believed Mr F Milosevic was not giving truthful evidence in his defence.

[64] Two further, similar, interventions were criticised. In the first the Judge had probed Mr F Milosevic about the amount of money he would make from selling whitebait during a good season. The second explored Mr F Milosevic's explanation as to the source of a $30,000 deposit used in the purpose of a property by a family member. Those questions continued, to a limited extent, the line of challenge the prosecutor had been exploring by trying to clarify the somewhat confusing answers Mr F Milosevic was giving to the prosecutor's questions.

[65] Mr F Milosevic submits the net effect of these interventions was that the Judge reinforced and drew attention to the Crown position he was unreliable. The interventions were unnecessary, given the significant cross-examination of him over a number of days, and did nothing other than to bolster the Crown case. Before this Court, Mr Nabney, who was also Mr F Milosevic's trial counsel, candidly accepted he did not get the feeling at trial the Judge was taking sides and that he did not object to those interventions during the trial. He said their cumulative effect, however, was not apparent until he reviewed the transcript.

[66] The Crown submits the Judge's interventions were unobjectionable. Some were merely to clarify the issues and preserve the focus as Mr F Milosevic had seemed to be confused at certain stages of the questioning. In particular, some of the Judge's interventions assisted Mr F Milosevic to appreciate how the questions related to the allegations against him and gave him the opportunity to clarify his position. In particular, the "best interests" intervention in context meant "direct answers to the direct questions from the prosecutor". It did not, the Crown submit, imply the previous answers Mr F Milosevic had given were dishonest.

[67] Considering these issues we first observe the task facing the defence was not straight forward. In a trial such as this, based on allegedly coded intercepted communications, the problem is that the "innocent explanation" the defence seeks to advance tends, as a matter of common sense, to be confounded by the disjunction between that innocent explanation advanced and the circumstances of the multitude of communications in which the alleged code words are used. The repeated use of "code words" can get to the point where the code words cease to have any particular significance, other than evidencing the participants in the intercepted communications were concealing their true purpose. The repetition of asserted innocent explanations can tend to confirm that, particularly where — as here — a defendant faces effective cross-examination.

[68] It is important, in that context, that the Judge does not go beyond their role as referee and, in effect, put themselves in a position where the jury could well consider the Judge had the same attitude to the defendant in the witness box as the prosecutor

did. Nor, as the Crown submitted, can the Judge's questions properly be characterised as objectively clarifying for the jury materially confusing evidence.

[69] That said, this was a reasonably long trial, and experienced counsel did not at the time raise any objection as to the propriety of the Judge's interventions. Impressions that can be taken from a close analysis of a transcript may not be those which arise in the court-room itself. Moreover, and as we go on to discuss, the Judge's summing up of the Crown case on the drug dealing charges was balanced and fair. He put the gist of the defence case to the jury on those charges on a number of occasions clearly and without in any way indicating partiality. He emphasised to the jury the facts were for them. In that context, we have concluded that these criticised interventions did not result in the trial of the defendants on the drug dealing charges being unfair.

Detectives Scott, Waugh and Sowter

[70] During re-examination the prosecutor asked Detective Scott whether there was a trend as to how "club fees" paid by Mongrel Mob members were dealt with. The Detective said that would depend on the "structure of that gang whether it be the president or someone else underneath them". An exchange then occurred between the Judge and the witness about the various possibilities. Mr F Milosevic objected to that "intervention" only to draw a contrast. This was the only instance during the long trial when the Judge intervened during the Crown's evidence in relation to him. That changed when he came to give his evidence. We agree with the Crown's submission this "intervention" was entirely innocuous and did not signal partiality.

[71] Mr Tomlinson, trial counsel for Mr S Milosevic and Mr Manuel, cross-examined Detective Waugh about evidence she had given that the last one or two digits of a phone's IMEI number could differ, depending on whether the number had been taken from the phone itself or provided by the telco provider.[29] He suggested that difference could create problems for identifying a particular phone. The Detective rejected that proposition, saying she was "happy that that's the same IMEI number".

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[29] An "International Mobile Equipment Identity" (IMEI) number is a 15-digit number unique to each device, analogous to a phone's fingerprint.

Mr Tomlinson replied, "I'm pleased that you're happy detective thank you", in effect cutting the officer off. The Judge then addressed Mr Tomlinson, noting the Detective was basing her opinion on her experience and expertise. The Crown chose not to re-examine the Detective. The Judge himself returned to the point, confirming with the Detective her evidence was based on her experience of the same phone having two IMEI numbers because the last two digits differed.

[72] The defence argues the Judge undermined the cross-examination. The Crown responds that the Judge elucidating the basis for the Detective's evidence was a legitimate course for him to take. The Judge did ask questions the prosecutor could have asked in re-examination. But those questions allowed the Detective to clarify the basis of her opinion. To that extent the questions were favourable to the Crown, but not impermissibly so: a Judge's questions clarifying evidence may incidentally help or hinder a party's case.[30]

[73] Mr Manuel complains about a minor comment by the Judge during Mr Tomlinson's cross-examination of Detective Sowter. Mr Tomlinson noted it was accepted a phone number was mistakenly attributed to Mr Manuel's phone, when in fact it was an automated Vodafone number. When asked how he knew that the Detective said he would have to check an email chain which, he thought, had come directly from Vodafone. The Judge intervened to ensure the email in question would be made available to the Court and the jury. The complaint was the Judge acted partially by circumventing the process provided for the admission of hearsay evidence under the Evidence Act.

[74] The Crown says that exchange merely conveyed the Judge's preliminary view that the email could be admissible as a business record.[31] To do so did not communicate bias. We agree. Moreover, the significance of the point, as the Crown submits, lay in the original police error, rather than the way in which the error had been confirmed.

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30 *Tahere v R*, above n 25, at [28]–[30].

31 Section 19(1)(c) of the Evidence Act allows a hearsay statement contained in a business record to be admissible if the Judge considers that "undue expense or delay" would be caused if the person responsible for the creation of the record was required to be a witness.

The Judge's summing up

[75] A Judge's summing up must be fair and balanced. It must identify the fundamental facts in issue, be balanced in the treatment of rival contentions and leave the jury in no doubt the facts are for them and not for the Judge.[32] A Judge must put forward the defences an accused has properly raised. Not every argument put by counsel needs to be relayed to the jury, and a Judge need not play down the prosecution case in order to give artificial balance to the defence.[33] In terms of that balance, this Court has observed there will often be greater focus on the Crown case, reflecting the fact the prosecution bears the burden of proof and leads most of the evidence.[34] In *Giles v R* this Court observed:[35]

> [47] It is very rare indeed for an appeal to be allowed on the basis of an unbalanced summing up. Given the oral nature of the process, detailed analysis of the transcript of what the Judge said has the tendency to over-emphasise the significance of any infelicities. As well, juries can be expected to approach their task conscientiously and in particular to form their own views on factual issues. This after all is what juries are told to do by judges – and in a way which is almost always far more explicit and unequivocal than the expression of the alleged judicial preference for one side or the other. As well, judges are entitled, within limits, to express a view on the merits of a case or on some of the issues of fact which the jury must address. …

[76] Taken overall, the adequacy of a Judge's summing up must be assessed in the context of the trial as a whole, the issues that arose, and the case against each defendant.

[77] That context for our purposes can be best understood through the lens of the way the prosecution and defence dealt with the Milosevics and the Crown charges in their closing addresses to the jury.

[78] The prosecution structured their closing on what they described as the three "arcs" of the Crown case: the evidence of (i) methamphetamine dealing and (ii) cannabis dealing as reinforced by (iii) Ms Clay's evidence of significant funds available to the Milosevics and their partners from sources Ms Clay could not identify,

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32 *Keremete v R* CA247/03, 23 October 2003 at [18].
33 *R v Accused (CA125/87)* [1988] 1 NZLR 422 (CA); and *R v Hoko* (2003) 20 CRNZ 464 (CA).
34 *Guthrie v R* [2011] NZCA 202 at [14].
35 *Giles v R* [2010] NZCA 254 (footnote omitted).

that is "unexplained funds". The presence of those unexplained funds supported the Crown's case of commercial dealing in methamphetamine and cannabis. Within that overall approach, the prosecution took the jury through the evidence relating to each of those three "arcs", principally by reference to intercepted communications in the case of the first two and based on Ms Clay's analysis as regards the unexplained funds. The unifying proposition for the prosecution involved the evidence of drug dealing and contrasting what were the known, legitimate, sources of income — limited though they were — with the evidence of the Milosevics' access to significant funds which were spent supporting a lifestyle that was, put simply, beyond their legitimate means.

[79] For their part, the defence counsel emphasised the lack of any "real" evidence and the "circularity" of the Crown case. Notwithstanding the long period of surveillance, hardly any illicit drugs were found when the Operation was terminated. The intercepted communications themselves proved little: they only had significance on the basis of the police's assertions — without direct evidential support — that the defendants were speaking in code about drugs. There was a similar circularity in the money laundering charges: the Crown argument seemed to be the cash was evidence of the drug dealing and the drug dealing explained the cash. Within that framework, defence counsel also took the jury through relevant intercepted communications emphasising their proposition the evidence was insufficient to support guilty verdicts.

[80] The Judge approached his summing up in what is now the established orthodox method. The defence challenges to the summing up focus on the part where the Judge addresses the jury on the elements of the charges, the evidence relating to those charges and what the prosecution and the defence say the jury may draw from that evidence.

[81] The Milosevics and Mr Manuel all criticised the Judge's summing up as having given unfair emphasis and support for the Crown's case and for undermining the defence's case. They expressed that general proposition in slightly different ways.

[82] The proposition for Mr S Milosevic and Mr Manuel was that the Judge's method — which they described as summarising the Crown case, then summarising the Crown case for each charge, followed by the defence case for each charge before,

finally, referring back to the Crown case for some of the charges — was neither fair nor balanced. A similar proposition was advanced by Mr F Milosevic, namely the Judge had given the overall impression he considered the Crown case superior to anything that had been offered on behalf of the defendants. Ms Tawera and Ms Raki endorsed those general criticisms.

[83] We do not accept those propositions. We note that not one of these experienced counsel raised any concerns with the Judge at the time as to the adequacy or fairness of his summing up: if, as is asserted, such an overall impression of partiality was given, it would be surprising if the point had not been raised. Moreover, we do not think those propositions are a fair characterisation of this part of the Judge's summing up. The Judge began his discussion of the individual charges and the evidence relating to them at [35] of his 288-paragraph summing up. He finished that analysis at [274]. He first gave a very brief overview of the Crown case ([37] to [39]) before going through all of the charges, starting with charges 5, 56, 58 and 59 involving methamphetamine the Crown alleged the Milosevics obtained from Mr Te Kira. The approach he took in doing so was reflected throughout the balance of this part of his summing up.

[84] The Judge began with the Crown propositions ([40] to [49]), then turned to those for the defence: by Mr Nabney ([50] to [53]), Mr Tomlinson ([54] to [60]), and Mr Simperingham, counsel for Me Te Kira ([61] to [67]). Our assessment is that the Judge fairly presented the defence cases. He did comment on some aspects of defence submissions, particularly where the defence had pointed to evidence they said should have been, but was not, before the jury. That is a not uncommon defence submission. It is commonplace, and appropriate, for the Judge to advise the jury not to speculate about evidence that is not before them, nor as to the reasons why that might be.[36]

[85] Hence, in response to Mr Tomlinson's submission that little was known about the people alleged to be on the other side of the Milosevics' drug dealings, the Judge said that submission needed to be treated with "a degree of realism" and "common

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[36] See for example *R v Smith* [2008] NZCA 371 at [25]–[28].

sense". Was it likely, the Judge asked, that the police would be able to get evidence from someone who had purchased drugs from an alleged drug dealer by incriminating themselves? Importantly, the Judge went on:

> [57] But the most important thing is this. The defence rightly say to you, you do not guess and speculate and I have said that to you but it cuts both ways. You do not guess and speculate about what might have been here if the police had have done something or got this witness to say something or done something differently. Because that is in the realms of guess work as well. Your decision is based upon the evidence you do have and your assessment of whether on that evidence the Crown has satisfied you beyond reasonable doubt.

[86] In our view, there can be no criticism of the approach taken by the Judge. Inevitably, there was more prosecution evidence for the Judge to refer to than defence evidence. That does not mean the summing up was unbalanced, nor that the Judge was denigrating the defence case as a matter of overall impression.

[87] Moreover, the Judge emphasised in plain terms on a number of occasions the facts were for the jury to decide and that they needed to be sure in order to convict.

[88] For Mr F Milosevic, Mr Nabney drew our attention to two particular instances of comments made by the Judge which supported his contention as to the overall impact of the summing up. When the Judge began his discussion of the cannabis cultivation charges, which he did after addressing a number of the methamphetamine charges, he observed:

> [82] The Crown case is that in addition to the methamphetamine division of the family enterprise there was a cultivation and distribution of cannabis division as well. …

[89] That was the Crown case, and we do not see why the Judge can be criticised for so explaining to the jury. Similarly, the Judge summarised the prosecution's response to Mr F Milosevic's evidence that conversations said by the Crown to involved cannabis did, in fact, involve crayfish. The Judge observed:

> [107] … Mr [F] Milosevic says in his evidence it was about crays but that is not a word that came up on the discussions and that comes back to Mr Jenson's submission if it is a spade why not call it a spade but if it is a drug you might want to be careful about that.

[90] Again that is a fair statement of a Crown submission made on more than one occasion and was, we sense, inevitable given Mr F Milosevic's evidence. The jury had, by then, seen and heard that evidence for themselves and, as jurors, were the ones who were to assess its significance, as the Judge repeatedly emphasised.

[91] We are accordingly not persuaded that the appellants' criticisms of the Judge's summing up, when taken alone or considered together, can be sustained. Accordingly, we dismiss each of the appellants' challenges to their convictions on drug offending charges.

Money laundering

Overview

[92] As outlined, the Milosevics and their partners challenge their money laundering convictions on the basis the Judge erred when he:

(a) declined their application for severance;

(b) failed to exclude Ms Clay's evidence and in the way he intervened whilst Ms Clay was giving her evidence, particularly when cross-examined by Ms Webby;

(c) granted the Crown's application to amend the wording of the money laundering charges after the Crown had closed its case; and

(d) summed up in respect of those charges.

[93] As always, the determinative issue on an appeal against conviction is not whether the Judge made what can be said to be errors or mistakes on one or more occasions. Rather the question is whether, taken overall and making a legally robust assessment, the appellant received a fair trial.[37] Hence, and by way of example, evidence may have been admitted by the Judge erroneously, but it is the effect of that

[37] Criminal Procedure Act, s 232(2)(c) and (4).

evidence in the context of the trial as a whole that determines whether a conviction appeal will succeed, not the mere fact of that error.[38]

[94] Similarly, and of relevance here, a decision not to grant severance may be one which, on a pre-trial appeal could be reversed.[39] But, by the same token, when challenged in the context of an appeal against conviction the assessment may be that the fair trial risks which can accompany the trying of multiple charges at once had not in fact eventuated, so that the appellate court could properly find the resulting convictions were not unsafe.

[95] Bearing that in mind, we now consider the various grounds of appeal. We first summarise the Judge's decisions, interventions and parts of his summing up at issue, before turning to our assessment.

The severance decision

[96] When charges were first laid in March 2018 only two involved money laundering: one each against Ms Raki and Ms Tawera. Both charges were laid on a particular and not representative basis. Both were expressed similarly, save as to dates, namely that:

(a) Ms Raki had, between 24 November 2015 and 26 May 2017 at Kawerau, jointly offended with Mr F Milosevic in respect of cash in excess of $140,000 that was "the proceeds of a serious offence" by engaging in money laundering transactions, knowing that all of the cash was the proceeds of the serious offence.

(b) Ms Tawera had, on 8 March 2017 at Kawerau, jointly offended with Mr S Milosevic in respect of funds of $120,000 that was "the proceeds of a serious offence" by engaging in money laundering transactions, knowing that all of the funds was the proceeds of the serious offence.

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38 See *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 at [78]; and *Ogden v R* [2016] NZCA 214 at [24] and [27].

39 Criminal Procedure Act, ss 217(2)(f) and 221.

[97] There are obvious difficulties with the very general wording of both those particular charges:

(a) in Ms Raki's case, given the period of time involved and the necessary implication of multiple transactions;

(b) notwithstanding the "jointly offended" wording, neither of the Milosevics were at that point charged with money laundering; and

(c) less obviously, the terms of the charges did not account for the possibility, expressly provided for in s 243(2) of the Crimes Act 1961, that the defendants knew merely "part" (rather than "all") of the funds involved in a money laundering transaction was the proceeds of an offence.

[98] Around the same time as those charges were laid, the Commissioner of Police commenced civil proceedings against the Milosevics and their partners under the Criminal Proceeds (Recovery) Act 2009. Initially without notice restraining orders, then on-notice restraining orders and finally "value protection" sale orders were made against various properties.[40] We do not know whether the final stage of the process — the making of forfeiture orders — has yet been reached. As best as we can tell those proceedings and orders were based on evidence from Detectives Watt and Shallcrass.

[99] Detective Shallcrass also provided a formal written statement in support of the money laundering charges. The Detective's analysis covered the couples' financial affairs between January 2011 and September 2017. As is customary for proceeds of crime proceedings, the point of the evidence was to establish, based on records of financial and other transactions, that there was an unexplained gap between the couples' recorded income and expenditure which, as a matter of inference, could only be explained as having come from ill-gotten gains.

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[40] See *Commissioner of Police v Milosevic* [2019] NZHC 202; *Commissioner of Police v Milosevic* [2019] NZHC 1554; and *Commissioner of Police v Milosevic* [2020] NZHC 2164.

[100] The Crown had signalled in a trial callover memorandum in November 2018 its intention was to rely on additional financial evidence at the trial of the money laundering charges. That evidence was provided by Ms Clay in July 2020 based on, as we understand it, an analysis also prepared for the civil proceedings. Around the same time, the Crown informed the Milosevics they would also face money laundering charges along with Ms Raki and Tawera.

[101] Before we turn to the Judge's decision declining severance, a brief explanation of the relevant aspects of the civil recovery of proceeds regime is necessary. Section 3(2) of the Criminal Proceeds (Recovery) Act describes the purpose of the regime the Act establishes as being to:

> (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
>
> (b) deter significant criminal activity; and
>
> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and
>
> (d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.

[102] In *Wu v Commissioner of Police*, this Court explained the types of forfeiture orders that may be made under that Act:[41]

> [3] To eliminate the chance of profiting from criminal activity, the Act provides two main types of civil orders forfeiting respectively tainted assets and property more generally. The first, an assets forfeiture order, must be made by the High Court where it is satisfied on the balance of probabilities that the assets in question are tainted.[42] Assets are tainted where they have been acquired or derived wholly or in part from significant criminal activity.[43] The owner of those assets need not have been responsible for, or even aware of, that activity. The second, a profit forfeiture order, must be made where the High Court is similarly satisfied the owner of the assets in question has knowingly benefited from significant criminal activity, even though those assets are not themselves tainted.[44] …

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41 *Wu v Commissioner of Police* [2022] NZCA 65 (footnotes in original).
42 Criminal Proceeds (Recovery) Act 2009, s 50(1).
43 Section 5(1).
44 Section 55(1).

[103] So the standard of proof for forfeiture is the (civil) balance of probabilities. For the regime's provisions for without and with notice restraining orders, the standard is the lower requirement of being satisfied on "reasonable grounds".[45] We also note the owner of assets to be forfeited as "tainted" need not be aware of the taint.[46] Nor does there need to have been a conviction for the relevant significant criminal activity.[47] It is in that context that the evidence provided by Detective Shallcrass and Ms Clay on the money laundering charges was originally prepared.

[104] But in a criminal trial the context is importantly different to that of civil forfeiture proceedings.

[105] Not only is satisfaction of the elements of the charges required to meet the criminal standard of proof beyond reasonable doubt, but also the Crown must establish to that same standard the funds being laundered were the proceeds "of an offence" and the defendants knew that as alleged here, or as is also possible, were reckless as to that possibility.[48] We note for completeness, however, that the "offence" from which the proceeds are said to have derived need not have resulted in a charge or a conviction.[49]

[106] On 15 September 2020, a week before trial, the Crown laid a revised Crown Charge Notice. The particular charges Ms Raki and Ms Tawera had individually faced were replaced by a total of five, representative, charges:

(a) Mr F Milosevic and Ms Raki jointly faced two representative charges. The first related to "46 individual cash deposits" made between 1 December 2015 and 28 March 2018 into accounts controlled by them (neither the amounts deposited, nor the depositors were particularised in the Charge Notice). The second related to specified cash purchases, particularised in schedule Y of the Charge Notice, made by them between 18 February 2016 and 20 December 2016, in each case knowing *all* of the funds were the proceeds of an offence.

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45 Criminal Proceeds (Recovery) Act, ss 24 and 25.
46 *Wu v Commissioner of Police*, above n 41, at [44].
47 Criminal Proceeds (Recovery) Act, ss 15 and 16.
48 Crimes Act 1961, s 243(2).
49 Section 243A. Whilst that is also the position in the civil context, the implications of that fact are less significant in the criminal context than in the civil.

(b) Mr S Milosevic and Ms Tawera jointly faced three representative charges, all relating to the period 1 December 2015 and 28 March 2018, comprising electronic transfers from Ms Anita Crosby; cash deposits from Ms Anita and Ms Symphony Crosby; and specified cash purchases, in each case again knowing *all* of the funds involved were the proceeds of an offence. The Crown case against them was that they jointly used "a mechanism" to procure Ms Crosby to make the electronic transfers and for Ms Crosby and her daughter to make the cash deposits through their bank in Hamilton.

[107] As can be seen, the period of alleged money laundering offending was wider than that of the alleged drug offending. The drug offending in respect of the Milosevics was alleged, across 35 charges, to have occurred between November 2016 and March 2018: although all but six of those charges involved offending after the Operation commenced in August 2017. Of those six charges involving pre-Operation allegations:

(a) One was laid against each of the Milosevics jointly for the cultivation of cannabis between November 2016 (nine months before the Operation commenced) and April 2017. The jury acquitted them of that charge.

(b) One was laid on a representative basis against Mr F Milosevic for supply of methamphetamine to a particular individual between May 2017 and February 2018. The jury acquitted him of that charge.

(c) Four were laid on a representative basis against Mr S Milosevic involving the sale of cannabis and methamphetamine after July 2017 (a month before the Operation commenced). Mr S Milosevic was convicted of those charges.

[108] Therefore, the jury only convicted Mr S Milosevic of drug offending from July 2017, and Mr F Milosevic from August 2017.

[109] That is of some significance. Ms Clay analysed a range of source material, mostly obtained through production orders, relating to the defendants' financial affairs. She concluded that there was a "gap" of some $510,000 between known and apparently legitimate sources of income and recorded expenditure. The Crown case at trial proceeded on the general basis that total unexplained amount was the subject of the money laundering charges as the proceeds of the charged drug offending. As the Crown put it in closing:

> … it's all of the evidence in the trial that points in that direction, doesn't it, and in fact having gone through all that evidence again, reviewed it in detail over the last day and a half at least, we might consider ladies and gentlemen that we're now at the point where we can safely drop the term "unexplained" from this cash source and simply to conclude that to the extent that we can't identify the cash source from our assessment of the evidence, there's clearly only one source for that money, *the proceeds of this criminal offending, this drug offending*.
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> …
>
> What there is evidence of is of significant drug dealing for profit which does explain and is consistent with the amount of unexplained cash which brings us to those money laundering charges, ladies and gentlemen and we start with charge 64 in relation to Ms Tawera and Mr Milosevic.
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> (Emphasis added.)

[110] But as Ms Clay's cash availability statements show, that simply could not have been the case.

[111] Rather, the source of a considerable part of the unexplained amount can be seen as reflected by transactions, whether cash deposits, bank transfers or cash purchases, which occurred before the Operation began and before the bulk of the charged drug offending occurred.

[112] It is, because of the way the evidence was presented at trial, difficult to be precise as to amounts. However, in the case of Mr S Milosevic and Ms Tawera, their money laundering charges are based on cash deposits or bank transfers initiated by the Crosbys at, the Crown alleged, their direction and their own cash purchases. The general proposition would appear to have been that the Crosbys were used as a conduit whereby cash generated by drug offending could covertly find its way to Mr S Milosevic and Ms Tawera and, hence, to — as the Crown would put it — the

"family business". By reference to the list of such transfers and deposits contained in Ms Clay's evidence, a simple arithmetical calculation shows that by the time the Operation commenced, of a total sum of $158,000 involving the Crosbys, some $106,000 had already been "laundered". In the case of cash purchases all but a small number took place after the start of the Operation, that is, contemporaneously with the alleged drug offending.

[113] The position with the money laundering charges faced by Mr F Milosevic and Ms Raki is not as clear. As noted, as regards the deposits alleged to constitute money laundering transactions neither the amounts nor the identities of the depositors were specified in the Crown Charge Notice. Of the 46 deposits referred to, the cash availability statement would appear to show that some 34 had taken place before the start of the Operation, and the amount of those 34 deposits would appear to be approximately $160,000 of the total of $164,000. For their cash purchases, schedule Y showed five of the eight cash purchases had taken place before the start of the Operation. That is, some $99,000 of the $104,000 involved in those purchases had been spent before the start of the Operation.

[114] So, of the total money laundering charges involving $510,000 the relevant transactions involving at least $205,000 had taken place before the Operation commenced. If our analysis of the cash availability statement is accurate, the money involved would come to $365,000.

[115] As can be seen, the money laundering allegations were predominantly targeted at transactions that occurred before the conduct comprising the drug offending allegations. Whether those complexities were understood by defence counsel in September 2020, when the Crown reformulated the charges, is unclear.

[116] Notwithstanding that, in response to that reformulation, the couples applied for the five representative charges to be severed. That application was unsuccessful and the trial proceeded on the basis of the five representative charges alleging all of the funds involved were and were known to be the proceeds of criminal offending.[50]

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50 *R v Manuel*, above n 22, at [7].

[117] The Milosevics argued that the delay in laying those charges, just one week prior to the trial, itself created unfairness for them. Up till the Crown's advice in late July 2020, they had not thought they were going to be charged for money laundering. All four argued there simply had not been enough time to properly review and respond to Ms Clay's lengthy and complex evidence. For Ms Raki, Ms Webby emphasised the fact she had been unable to retain expert accounting advice in the time available. Ms Raki and Ms Tawera also pointed to the prejudice for them of facing a trial involving drug offending with which they were not charged.

[118] The Judge was not persuaded the timing of either the presentation of Ms Clay's evidence or the laying of charges against the Milosevics made severance appropriate. The Judge reasoned all defendants had from the outset been aware the trial of the charges against them would involve an analysis of their financial dealings.[51]

[119] As the Judge put it:

> [76] The Crown case against all defendants is that they are involved in drug dealing. Drug dealing produces money. For the four defendants now the subject of money laundering charges there was always going to be evidence of their financial situation.
>
> [77] In defending the money laundering charges Ms Tawera and Ms Raki would need to confront that evidence.

[120] The Judge was also satisfied that the Crown evidence disclosed prior to Ms Clay's analysis becoming available — that is the intended evidence of Detective Shallcrass — provided a basis for responding to the charges of money laundering. The Judge reasoned:

> [86] The response to the elements of a charge of money laundering can be a challenge as to whether a given defendant dealt with property, whether it was the proceeds of crime or as to mens rea involving belief or recklessness.
>
> [87] All of those challenges were open to Mr [F] Milosevic on the intended evidence of Detective Shallcrass regardless of whether the formal elements of a money laundering charge were at issue in the trial. …

[121] That is the case. As the Judge observed later, to take the position there would be no "active defence" ran the risk of falling foul of counsels' cross-examination

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[51] Pre-trial applications decision, above n 23, at [71].

duties.[52] Failure to cross-examine may result in a judicial direction to the jury as to the weight they should attach to any unchallenged evidence.[53]

[122] But we think it unlikely the defence application was premised on a complete inability to challenge Ms Clay's evidence, rather that to do so adequately — in the context of fair trial rights — justified severance.

[123] The Judge went on to say:[54]

> … As noted, one way or another [Mr F Milosevic] was required to respond to the Shallcrass evidence to avoid a Crown submission, and judicial direction, that the unchallenged evidence would justify an inference that the unexplained cash source was the proceeds of drug dealing.

[124] Whether or not the Judge could go as far as that anticipated judicial direction is a matter we return to when considering the challenges to his summing up.

[125] As for the difficulties presented by alleged complexities of Ms Clay's evidence compared to that of Detective Shallcrass, the methodology adopted by the witnesses was the same. That is, it was just a matter of arithmetic. That Ms Clay was an accountant did not change that. The Judge went on:

> [97] Furthermore, no expert can address the elements of money laundering. That is for the defendants who are in the best position to provide an innocent explanation for what is said to be an unexplained cash source. Only they know where the funds came from.

[126] More generally, the Judge reasoned concurrent trials of the drug and money laundering charges was the orthodox approach:

> [106] To try the money laundering allegations separately the Crown would be required to bring evidence to prove beyond reasonable doubt that the property the subject of those charges was the proceeds of an offence. That would require recalling a very significant proportion of the evidence relating to the drug dealing allegations faced by Frank and Slobodan Milosevic.
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> [107] The Crown would be required to effectively re-run the drug dealing trial against them both.

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52 At [91], citing *Browne v Dunn* (1983) 6 R 67 (HL). See further Evidence Act, s 92.

53 See *Farmer v R* [2019] NZCA 430 at [16]–[17]; *Khalid v R* [2020] NZCA 489 at [36]; and *Semmons v R* [2021] NZCA 135 at [27]–[30].

54 Pre-trial applications decision, above n 23, at [87].

[127] That reality, the Crown submits, demonstrated the interests of justice would not be served by severance.[55]

Interventions — cross-examination of Ms Clay

[128] Ms Webby's cross-examination of Ms Clay can be seen to reflect two aspects of the money laundering charges as originally laid:

(a) First, that they were particular, not representative, charges. The replacement of the particular charges with representative charges affected the Crown's task. It now no longer had to prove particular charges, noting again the difficulty for the Crown in that context created by the wording of a single particular charge against Ms Raki covering an 18-month period. The Crown was only required to satisfy the jury beyond reasonable doubt that the offence had occurred *at least once* during the representative, 27-month, period.

(b) Secondly that the Crown asserted each of the defendants knew "all" of the funds involved in a particular transaction were the proceeds of an offence. It remained the position, until the amendment of the wording of the charges once evidence had concluded, that on at least one occasion, or on each occasion — if the jury was satisfied there were more than one — the defendants knew "all" of the allegedly laundered funds were the proceeds of an offence. On that basis, if the jury could not be sure the defendants knew all of the cash involved in the alleged money laundering transactions were proceeds of offending, the charges would not have been made out.

[129] In that context, Ms Webby repeatedly put to Ms Clay that particular transactions alleged to involve money laundering could as easily have involved — as to all or part — funds from a legitimate source.

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55 At [108].

[130] It was not clear to us, either from the written or oral submissions, whether the significance of the change in basis of charging from particular to representative had informed that aspect of Ms Webby's cross-examination. Whether it did or did not, that does not in our view undermine her core objection to the Judge's interventions. The gist of the Judge's criticised interventions was to point out the obvious answer to Ms Webby oft-repeated proposition was that Ms Clay had no way of knowing one way or the other.

[131] Ms Webby's submission can be considered by reference to one example of that type of intervention. Ms Webby questioned Ms Clay about deposits of $240 in notes and $603.50 in coins into a bank account belonging to Mr F Milosevic and Ms Raki's teenage child in December 2015. Ms Webby put to Ms Clay the proposition those deposits represented savings in a piggy bank which, in Ms Webby's words, "would be a legitimate source of cash being a piggy bank, wouldn't it?". Ms Clay did not agree, saying that "maybe it was money in a piggy bank, however, it had to come from somewhere". The Judge intervened:

> Ms Webby, I have to interrupt you again. They could fall out of the sky. That's the point. The witness is saying: "I have attributed cash to the analysis from an unknown source." You're saying "assume", you're saying to the witness "assume" which is all she can do is that [sic] the two deposits in 25 August '15 and December '15 were from the child's piggy bank where he might have been cutting lawns, doing firewood, he might have been doing any number of things and he's gone and put money in the bank or his mum has. All those things are possible but the witness can't give you an indication as to where the source came from. She's simply saying: "I don't know what the source is" and you're saying: "Well it could have been a legitimate source." She would answer: "Yes it could have been but it might not have been either." So there's no point in asking the question …

[132] On appeal, Ms Webby submits in those remarks the Judge adopted the Crown's position, and the intervention did not allow an alternative hypothesis to be put before the jury. The Judge effectively answered questions for the witness. The proposition that Ms Clay was not to know about various possibilities as to the source of the monies, which the Judge appeared to accept, undermined the defence Ms Webby was building, namely that Ms Clay could have and should have made inquiries as to where the money had come from, but she did not. Ms Webby argued that, taken further, that proposition effectively "reversed the onus of proof" because it required the defence to

prove the various possible legitimate sources of money because Ms Clay was "not to know".

[133] The Crown submits all the "interruptions" made by the Judge during Ms Clay's evidence simply reflected the nature of the cross-examination, which involved detailed questions about individual transactions and their supporting documentation. It was unsurprising the Judge would intervene to clarify where necessary. Further, the Judge rightly considered there was no value in Ms Clay's answers as to the hypothetical sources Ms Webby advanced.

[134] We agree that, in general terms, Ms Clay's evidence was based on her review of various banking and other transaction documents obtained pursuant to production orders, and was carried out on an arithmetic basis. As was explained to the jury, where Ms Clay identified funds potentially having a legitimate source, she put them into what she called "the money box". Then Ms Clay debited the money box with all the expenditure she had, in the same way, identified. A deficit at the end of it meant the source of proven expenditure was "unexplained". That is, we note, unexplained to Ms Clay by the information she was relying on.

[135] Ms Clay herself was not, however and as the Judge realised, in a position to give evidence as to whether or not that unexplained source was a crime.

[136] The nature of the Judge's interventions during Ms Webby's cross-examination of Ms Clay reflected the view he took in his consideration of the defence application for severance. As set out at [125], and repeated here, the Judge said:

> [97] Furthermore, no expert can address the elements of money laundering. That is for the defendants who are in the best position to provide an innocent explanation for what is said to be an unexplained cash source. Only they know where the funds came from.

[137] That remark may in fact be true. However, it takes on a legal significance in the context of the Judge's interventions and his summing up. Put simply, just because Ms Clay's evidence is that she does not know of a legitimate source of funds does not necessarily mean those funds are the proceeds of an offence. Furthermore, the greater the extent to which Ms Clay acknowledges that fact, and more so if she recognises

relevant circumstances are consistent with an innocent explanation, then the greater — fairly obviously — the difficulty there is for the Crown proving the funds are the proceeds of an offence and that the defendants knew "all" of the funds involved in one or more of the impugned transactions were so derived.

[138] Seen in that context, we think there is force in Ms Webby's submission that the Judge's interventions during her cross-examination of Ms Clay did unfairly undermine the defence case.

The late amendment of the charge

[139] As first laid by the Crown and as reformulated by the Crown in the Crown Charge Notice of 15 September 2020, the money laundering charges were laid on the basis the appellants knew that "all of the funds" involved in the alleged money laundering transactions were the proceeds of an offence.

[140] After all the evidence was concluded on 2 November, and prior to the prosecution and defence closings, the Judge discussed his question trail with counsel. The Judge phrased that question trail based on the Crown's description so that the jury had to be satisfied "all of the funds" involved in a particular transaction on a given occasion were the proceeds of an offence.

[141] When the question trail was under consideration, defence counsel Mr Tomlinson sought reinforcement that proof would be required on that basis.

[142] The Judge was not sure why the Crown had not adopted the wording of the section "all or part" but said that it raised potential complications.[56] It was conceivable the jury could be compelled to acquit notwithstanding a conclusion that part of the funds involved in an individual transaction were the proceeds of an offence.[57] As the Judge recorded, Mr Tomlinson said "that the Crown had elected to use the word all and could not now deviate from it".[58] At that point the Judge would appear to have observed that he could see "no prejudice at all" to the defence if

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56 *R v Manuel* [2020] NZDC 22535 at [12].
57 At [13].
58 At [15].

the Crown now applied to expand the wording to all or part.[59] Over the defence objections the Crown did so, and the Judge granted that application.[60]

The Judge's summing up

[143] In summing up the Judge noted the Crown case on the money laundering charges relied on inferences. He explained that if the jury accepted the Crown case the Milosevics were drug dealing, they could look at the money in the bank accounts, the cash purchases, the couples' means, and the absence of any income, to infer the cash relied upon in the money laundering charges "has come from drug dealing".

[144] In taking the jury through each of the charges in detail, the Judge discussed first those laid against Mr S Milosevic and Ms Tawera, and then those against Mr F Milosevic and Ms Raki.

[145] The charges against Mr S Milosevic and Ms Tawera alleged money laundering occurred between 1 December 2015 and 28 March 2018. He said the 1 December 2015 date was "significant" but did not at that point explain, however, why it was a significant date, nor that it was over a year-and-a-half before the Operation commenced.

[146] As regards the Crosby money, the Judge noted the jury did not actually have to prove, in a strict legal sense, what the "offence" from which the proceeds are said to have derived was, nor the identity of the offender. He said:

> [232] This is where you will bring your attention to a number of things to do with this charge. We know the money came into the bank account from Ms Crosby but for you to determine this issue of whether it is all or part from an offence *you are going to have to get to grips with the entire Crown case*… you would have to be satisfied beyond reasonable doubt that the Crosbys were the pipeline for drug dealing money to come into bank accounts …
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> (Emphasis added.)

[147] Addressing the attacks on Ms Clay's evidence, in particular that from Mr Tomlinson as to why she did not enquire with businesses who received cash from

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59 At [16].
60 At [18].

Mr S Milosevic and Ms Tawera, the Judge said it was for the jury to decide "whether the challenge to Ms Clay was effective in undermining her reliability to the point that you do throw the baby out with the bath water as Mr Jensen cautioned you not to do". He then reminded the jury of aspects of Ms Tawera's defence, in particular noting she had only received a fraction of the Crosby money, and was not herself a Mongrel Mob member.

[148] The Judge then turned to the charges against Mr F Milosevic and Ms Raki. He referred in particular to Mr Nabney's submission that the money laundering period exceeded the intercept period. The Judge said, which we set out more fully below,[61] that there was "nothing in that" submission. The Judge also referred to Ms Webby's submissions and addressed her challenges to Ms Clay's evidence, and reminded the jury of the Crown submission that "[Ms Clay] may have got a few things wrong in her analysis but she did not put the money in the bank … She did not buy the van. She did not hand the money over for the Raptor. Those payments are a matter of fact, the issue is where did they come from".

Our assessment

[149] We consider it unfortunate that the Crown elected to lay money laundering charges against the Milosevics at such a late stage. By the time they were introduced counsel for the Milosevics would have been in the final stages of preparing for a lengthy drugs trial. The fact that they were required at such a late stage to confront additional charges that contained different elements to the drugs charges imposed a heavy burden on defence counsel. Given the lateness of the application we consider the Judge would have been justified in requiring those charges to be severed if the Crown wished to proceed with them. As the charges against the Milosevics were laid jointly with their respective partners, a decision to sever would necessarily have applied to Ms Raki and Ms Tawera as well.

[150] The introduction of the charges was complicated by the fact that the bulk of the money laundering transactions pre-dated the alleged drug offending that was the subject of charges to be determined at the trial. The Judge was required to tell the jury

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61 See below at [155].

that to convict on any of the money laundering charges they had to be sure that the cash involved was from the proceeds of an offence. It was, of course, enough for the jury to convict on the basis of at least one money laundering transaction alleged to have taken place after the Operation commenced. The drug offending as charged — relating in the most part to post-Operation conduct — was clearly relevant to the money laundering charges.

[151] In our view, however, the Judge had to go further. He was required advise the jury that, in order to convict on the basis of a money laundering transaction that occurred before the commencement of the Operation, they had to be sure the funds in question were derived from other offending with which the defendants have never been charged.

[152] The Crown did not make this point clear when closing to the jury. As noted above at [109], the Crown said in closing:

> … it's all of the evidence in the trial that points in that direction, doesn't it, and in fact having gone through all that evidence again, reviewed it in detail over the last day and a half at least, we might consider ladies and gentlemen that we're now at the point where we can safely drop the term "unexplained" from this cash source and simply conclude that to the extent that we can't identify the cash source from our assessment of the evidence, there's clearly only one source for that money, *the proceeds of this criminal offending, this drug offending.*
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> (Emphasis added.)

[153] The jury needed to be reminded that it was not that simple. The drug offending that was the subject of charges before the jury could not have been the source of the whole of the funds said to have been laundered. Given the manner in which the Crown had closed its case, the Judge was required to draw this issue to the attention of the jury.

[154] The Judge summarised the Crown case as follows:

> [218] Mr Jenson said to you generally on the money laundering as between the two couples and the five charges that you are going to have to deal with is that Ms Clay is the cornerstone of the Crown case. You have got her evidence, you have got the booklet she produced analysing the financial position of both couples, Frank and Irene, Slobodan and Raiha, and her total analysis reveals substantial cash available to both. I am telling you that when you can come

> to look at the individual charges, Frank and Irene, you cannot just do that in a vacuum and ignore what is happening at Slobodan and Raiha's. The Crown case is this is a drug-involved family where their personal relationships are intermingled, they are a team and that all evidence is relevant.
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> [219] Mr Jenson says the defence cross-examined Ms Clay on the basis there might have been errors and on the occasions when that was established she put her hand up and said that's fine, I'll take that out Mr Jenson's submission is that no amount of tinkering around the edges with the figures and taking a bit out here and a bit out there overcomes the remaining substantial quantities of cash which she says is an unexplained cash source. The Crown says a fully explained cash source, drugs.

[155] The Judge subsequently turned to the money laundering charges faced by Mr F Milosevic and Ms Raki. He referred to submissions made by counsel for Mr F Milosevic, which we briefly mentioned earlier, as follows:

> [256] Mr Nabney representing Mr Frank Milosevic makes this point. He said it's a long period and it exceeds the intercept period. But there's nothing in that. The money laundering charges go back to 1 December 2015. We know the intercept started in October 2017 to the end of March 2018. The intercepts relate to the drug offending but on the back of that Ms Clay was asked to analyse documents that the police got under warrants for a longer period as they wanted to look further back.
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> [257] Now I do not think Mr Nabney was saying the money laundering period should synchronise with the intercept period, but if you thought that it is not correct anyway. The money laundering period is the money laundering period and [Ms] Clay's analysis covers that period. It is what you make of the analysis in determining where what she says is an unexplained cash source came from.
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> …
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> [260] Mr Nabney says, coming back to the intercept period, the difference is only $9,000 and for that period that's not a lot of money and could be explained by innocent sources but as I emphasised to you, you are not limited to the intercept period, you are limited to the entire money laundering period which is much longer and you view it as that. You look into that period and you make an assessment of what [Ms] Clay comes up with and ask yourself: "Has the Crown satisfied us beyond reasonable doubt on the elements of the money laundering allegations?"

[156] In neither of these passages did the Judge tell the jury they could only convict on transactions that pre-dated the Operation if they were sure the funds in question were derived from earlier drug offending with which the defendants have never been charged.

[157] Further, that the jury acquitted the Milosevics of the charge of cultivation alleged to have occurred between November 2016 and April 2017; and also acquitted Mr F Milosevic of the specific charge of supplying methamphetamine between May 2017 and February 2018, undermines the proposition that the jury was in fact sure that uncharged drug offending had taken place prior to the commencement of the Operation.

[158] We are also mindful of the late amendment, after the close of evidence, to the terms on which the money laundering charges were laid originally and around which the defence had clearly structured their case. That late change could only have compounded the confusion as regards the evidence, or rather lack of it, of the criminal offending on which the majority of the money laundering charges were based.

[159] For those reasons, given the issues involved in the severance decision and because of the way this trial unfolded, we are not persuaded the money laundering convictions can be regarded as safe. We therefore quash those convictions.

Sentence appeals

[160] Section 250(2) of the Criminal Procedure Act 2011 provides that this Court must allow an appeal against sentence if it is satisfied there is an error in the sentence and that a different sentence should be imposed. Otherwise, the appeal must be dismissed.

[161] As this Court confirmed in *Tutakangahau v R*, the focus is on whether the sentence imposed is within range rather than the process by which the sentence was reached.[62] Ultimately, we have to consider whether the sentences imposed were manifestly excessive.[63]

[162] In terms of methamphetamine offending, this Court's judgment in *Zhang v R* describes a two-stage approach to sentencing.[64] The first stage sets the starting point by reference to the quantity of methamphetamine involved and also by reference to

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62 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
63 At [35].
64 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [10].

the offender's role. Quantities are set out in different bands, and roles are categorised broadly as "lesser", "significant" or "leading".[65] The second stage addresses any mitigating and aggravating circumstances relevant to the offender.[66]

Mr F Milosevic

[163] The Judge, in sentencing Mr F Milosevic, noted his offending involved some 2.4 kg of methamphetamine, at least 400 cannabis plants and the money laundering.[67] He considered Mr F Milosevic had abused the mana that attached to his role as "president of your club".[68]

[164] On the methamphetamine charges, the quantity and Mr F Milosevic's leading role brought him within band five of *Zhang v R*. That band, for quantities greater than 2 kg, attracts starting points between 10 years' to life imprisonment. The Judge adopted a starting point of 15 years' imprisonment.[69] He uplifted that after accounting for totality by 18 months for the cannabis offending, and a further 12 months for the money laundering offending. He reached an end sentence of 17 years and six months' imprisonment.[70] A 50 per cent MPI was imposed, which Mr Nabney at sentencing accepted as being at the upper limit. That MPI was necessary to hold Mr F Milosevic accountable, to denounce and to deter his conduct.[71]

[165] On appeal, Mr Nabney submits that, given the quantity of methamphetamine involved was only slightly above the cusp of band 5, a starting point of 12 years' imprisonment on the methamphetamine charges was appropriate. Whilst he acknowledges he accepted at sentencing that a 50 per cent MPI could have been imposed, he refers to *Tran v R*, a decision of this Court released after sentencing, which considered that the accountability and denunciation objectives were fully achieved in that case by the imposition of a high finite sentence.[72] He also refers to *Paora v R* where a starting point two years higher than that for Mr F Milosevic was adopted in

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65 At [125]–[126].
66 At [136].
67 Mr F Milosevic sentencing notes, above n 3, at [4].
68 At [15].
69 At [26].
70 At [41].
71 At [45]–[47].
72 *Tran v R* [2021] NZCA 464 at [48]–[49].

a case involving 300 grams more methamphetamine and where there was also a conviction of conspiracy to deal in ephedrine, which could have been made to produce more methamphetamine.[73]

[166] We do not consider those cases assist Mr F Milosevic:

(a) First, *Tran* is clearly distinguishable. Whilst this Court adopted a 19-year starting point where 109.6 kg was involved, Mr Tran had a much more limited role than Mr F Milosevic. Mr Tran was a "willing pair of hands" with no organisational role, not the head of the operation.[74]

(b) Secondly, we consider Mr F Milosevic's sentence is consistent with *Paora*. Mr Paora, like Mr F Milosevic was a leading gang member. We consider the two-year difference in starting points properly reflects the higher level of offending in Mr Paora's case. Certainly we do not consider that higher level of offending justifies a five-year difference which Mr Nabney would have us adopt.

[167] The 12-year starting point Mr Nabney submits is appropriate has been applied in circumstances less serious than the present case. Such a starting point was adopted by this Court in:

(a) *Martin v R*, where a person had manufactured just 600 grams of methamphetamine in a solo operation;[75] and

(b) *Hall v R*, a case in which one of the appellants had a leading role in the manufacture of just over a kilogram of methamphetamine.[76]

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73 *Paora v R* [2021] NZCA 559.
74 *Tran v R*, above n 72, at [18].
75 *Martin v R* [2020] NZCA 318 at [10], [24] and [26].
76 *Hall v R* [2020] NZCA 183 at [12]–[13] and [31].

[168] Furthermore, in *Chai v R* Kós P, writing for this Court, made the following observations which are of assistance in the present case:[77]

> … the quantity here, two kilograms, is right on the cusp of bands four and five. So that means, for instance, that the ringleader of a supply chain concerned with say 1.95 kilograms might expect a starting point near the band four top of 16 years. A person in the chain with an unequivocally lesser role (but the same 1.95 kilograms) might expect 10 years (up from the eight year starting point, because the band starts at only 500 grams). Logically, someone in between (i.e. significant role and 1.95 kilograms) might expect between 12 and 14 years. A further 50 grams, taking the offender into band five, should make no very appreciable difference to those numbers.

[169] Against that background, we consider Mr F Milosevic's starting point was well within range.

[170] We also consider the MPI imposed was appropriate. Mr Nabney again referred to *Tran* where this Court, as mentioned, quashed an MPI of just under 50 per cent.[78] But in that case, Mr Tran had no previous convictions, was young and, again, had a much more limited role. In cases of commercial methamphetamine dealing, and absent special circumstances that are not present here, the imposition of an MPI is appropriate because of the purposes of holding an offender accountable, denunciation, protection of the community and deterrence.[79] Those purposes required, in our view, the MPI imposed, which we consider to have been entirely orthodox.[80]

[171] We therefore dismiss Mr F Milosevic's challenges to his sentence, except in one respect. As we have allowed the appeal against conviction in respect of the money laundering charges, we remove the 12-month uplift applied in respect of those charges.

[172] Mr F Milosevic's sentence appeal is therefore allowed in part. We substitute his sentence to one of 16 and a half years' imprisonment and maintain the 50 per cent MPI.

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77 *Chai v R* [2020] NZCA 202 at [20]; cited with approval in *Wellington v R* [2020] NZCA 277 at [15].

78 *Tran v R*, above n 72, at [21] and [59].

79 *Chai v R*, above n 77, at [39]; and *Zhang v R*, above n 64, at [171].

80 See *Paora v R*, above n **Error! Bookmark not defined.**, at [68].

Mr S Milosevic

[173] The Judge, in sentencing Mr S Milosevic, noted his offending involved some 2.5 kg of methamphetamine, at least 400 cannabis plants, and the money laundering.[81] Mr S Milosevic was his father's "right hand man".[82] There was no basis to distinguish Mr S Milosevic from the role Mr F Milosevic had, apart from the fact Mr F Milosevic had abused his position as a leader within the community.[83] Notwithstanding that the Judge adopted the same starting point on the methamphetamine charges of 15 years' imprisonment. He also adopted the same uplifts for the cannabis and money laundering offending, to reach 17 years and six months' imprisonment.[84]

[174] Unlike for Mr F Milosevic, however, the Judge applied a 10 per cent discount for Mr S Milosevic's lack of previous convictions. Therefore an end sentence of 15 years and nine months' imprisonment, with a 50 per cent MPI, was reached.[85]

[175] On appeal, Mr Walsh submits Mr S Milosevic's end sentence should have been in the region of 9–11 years' imprisonment, with no MPI because Mr S Milosevic had no previous convictions.

[176] First, he submits the 15-year starting point on the methamphetamine charges was too high. Mr S Milosevic's role was different from his father's. It was not leading. He only played a "significant" role in the management of the operation and had not abused a position of trust and leadership in the community. A 12- to 13-year starting point was appropriate.

[177] Secondly, Mr Walsh submits the Judge erred in refusing to apply a discount for matters raised in Mr S Milosevic's s 27 report. Whilst that report spoke of Mr S Milosevic's happy upbringing, from an early age gangs were a normal part of his life. There was a nexus between that background and his offending. His background impaired his decision-making ability and moral culpability. A 10 per cent discount was warranted.

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81 Mr S Milosevic sentencing notes, above n 4, at [6]–[8].
82 At [12].
83 At [22].
84 At [23]–[25].
85 At [26]–[28].

[178] Given our earlier conclusion that the starting point adopted in respect of Mr F Milosevic was within range, and that the quantities involved are similar, role is the determinative factor here.

[179] As the Crown acknowledges, Mr F Milosevic was more senior than Mr S Milosevic within the gang hierarchy. However, we accept the submission that the two effectively ran the operation as a joint enterprise. Whilst Mr S Milosevic may have been more operationally involved than his father, the number of the indicia of leading role in *Zhang* were engaged.[86] In particular, he:

(a) directed and organised the buying and selling of methamphetamine on a commercial scale;

(b) had substantial links to, and influence on, others in the chain; and

(c) had an expectation of substantial financial gain.

[180] Whilst Mr F Milosevic may have abused his position of trust within the community, in our view that is insufficient to distinguish the Milosevics' roles. Accordingly, it was open to the Judge to adopt the same 15-year starting point in respect of both men.

[181] In support of his submissions regarding the s 27 report, Mr Walsh referred to *Carr v R* and *Poi v R*.[87] However, those cases are distinguishable. They both involved severe deprivation and disadvantage from an early age. Here, and as Mr S Milosevic acknowledges, there is no suggestion Mr S Milosevic suffered childhood deprivation, lack of care or affection. Indeed, according to the report writer, Mr S Milosevic said he had a happy upbringing, free from violence and poverty. He also attested to his strong connections to tikanga Māori and marae in the Whakatāne area.

[182] Whilst we accept that, to some extent, normalisation of gang culture has been a feature of Mr S Milosevic's life, we also note Mr F Milosevic did not want him to

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86 *Zhang*, above n 64, at [126].
87 *Carr v R* [2020] NZCA 357; and *Poi v R* [2020] NZCA 312.

join the gang. In that context, we consider Mr S Milosevic's gang involvement was more the product of his own decision-making, rather than familial pressure. As this Court has previously recognised, a s 27 discount may not be warranted where an offender cannot show a strong linkage between systemic deprivation in their background and their poor decisions as an adult.[88]

[183] In terms of the imposition of the 50 per cent MPI, we recognise the position is slightly different from that of Mr F Milosevic because Mr S Milosevic was a first-time offender. In *Zhang v R*, the Full Court dealt with first time offenders of previous good character, Mr Yip (who had a leading role in the attempted import of 60.9 kg) and Mr Zhang (who had a significant role in the import of 17.9 kg). This Court considered MPI's were necessary in both cases. This Court emphasised that "knowing participation in substantial, commercial scale of drug offending with potentially extremely serious social consequences" required an MPI. Otherwise, release after serving a third of one's sentence would send an "unacceptable message" to those participating or minded to participate in commercial scale dealing.[89]

[184] Despite the greater quantities involved in those cases, that principle would appear to be one of general application. *Paora*, described earlier, involved some 2.691 kg of methamphetamine and an appellant who had no prior convictions for drug dealing. This Court considered the 50 per cent MPI imposed in that case was "entirely orthodox" given the nature of that offending.[90]

[185] Against that background we think it was open to the Judge to impose the 50 per cent MPI.

[186] We dismiss Mr S Milosevic's challenges to his sentence, except we again remove the 12-month uplift applied in respect of the money laundering charges.

[187] Mr S Milosevic's sentence appeal is therefore allowed in part. We substitute his sentence to one of 14 years and nine months' imprisonment and maintain a 50 per cent MPI.

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88 *Tufui v R* [2020] NZCA 568 at [68]; and *Purua-King v R* [2020] NZCA 61 at [8] and [9].
89 *Zhang v R*, above n 64, at [263] and [308].
90 *Paora v R*, above n **Error! Bookmark not defined.**, at [68].

Mr Pryor

[188] Mr Pryor was sentenced in respect of approximately 80 grams of methamphetamine, placing him in band two of *Zhang*. That band, for quantities between five and 250 grams, attracts starting points between two and nine years' imprisonment.[91] The Judge adopted the Crown submission that a starting point of six years' imprisonment, together with an uplift of 18 months' for the cannabis offending, was appropriate.[92] Mr Pryor and his partner, who had earlier pleaded guilty and was sentenced, played significant roles.[93] The Judge then applied a 10 per cent discount for Mr Pryor's remorse and prospects for rehabilitation, to reach an end sentence of six years and nine months' imprisonment.[94]

[189] On appeal, Mr Bean submits the starting point was too high. He accepts the quantity involved and the characterisation of Mr Pryor's role as significant, but says Mr Pryor was not a gang member. He was, in essence, a first-time offender with drugs and an entrepreneurial criminal willing to deal with gang members. That placed him in the middle of the range between "head of the snake" and "housewife dealer", as described in *Zhang*.[95] A starting point of four years' imprisonment was appropriate.

[190] We do not accept those submissions, given the quantity involved and the significant role Mr Pryor played. In *Royal v R*, this Court considered (putting other non-methamphetamine offending to one side) a starting point of four years' imprisonment would have been appropriate in a case involving possession for supply of much less methamphetamine (15.6 grams) where the appellant had played a significant role.[96] Moreover, in *Pou v R*, this Court considered a starting point between 7–7.5 years imprisonment would have been appropriate in a case involving supply of 27 grams to a vulnerable young person and possession of a further 22 grams.[97]

[191] Against that background, Mr Pryor's starting point of six years' imprisonment cannot be said to be out of range. He played a significant role as a prolific drug dealer

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91 *Zhang v R*, above n 64, at [125].
92 Mr Pryor sentencing notes, above n 8, at [9]–[10].
93 At [10].
94 At [20].
95 *Zhang v R*, above n 64, at [51].
96 *Royal v R* [2020] NZCA 129 at [20].
97 *Pou v R* [2020] NZCA 160 at [79]–[82].

and engaged in a number of deals with multiple customers over a several-month timeframe for financial reward.

Mr Te Kira

[192] Mr Te Kira was sentenced in respect of some 135 grams of methamphetamine, of which he had facilitated the supply to Mr S Milosevic, placing him — like Mr Pryor —in band two of *Zhang*. Accounting for Mr Te Kira's role as between lesser and significant, the Judge reached a starting point of four years and nine months' imprisonment.[98] In respect of a further possession of methamphetamine charge, the Judge then applied a 6-month uplift.[99]

[193] The Judge applied discounts of six months for matters raised in Mr Te Kira's cultural report, a further six months to account for his rehabilitation prospects, and a further three months to account for the 30 months he had spent on EM bail.[100] The Judge rejected the submission that discounts should have been applied for addiction and remorse. He could not see any evidence of addiction, and whatever remorse Mr Te Kira expressed was "too little too late" given he defended the charges.[101] An end sentence of four years' imprisonment was imposed.[102]

[194] On appeal, Mr Simperingham submits a sentence of less than two years' imprisonment was appropriate because the following discounts — totalling approximately 75 per cent — should have been made:

(a) Five per cent for remorse: Mr Te Kira's decision not to plead guilty was the result of pressure he felt from his co-offenders, the Milosevics, who were not only gang members but also members of his partner's wider whanau.

(b) 20 per cent for rehabilitation and addiction: Mr Te Kira's rehabilitative efforts included engagement with the Man Up/Destiny Church

98 Mr Te Kira sentencing notes, above n 9, at [12].
99 At [13].
100 At [23], [29] and [31].
101 At [24] and [26]–[28].
102 At [32].

programs whilst on EM bail. From August 2019, he has been drug-free. His marriage and birth of first biological child in 2019 marked a turning point in his life to leave his criminal past behind him.

(c) 20 per cent for personal circumstances and his cultural report: Mr Te Kira's parents died of heart attacks when he between 11 and 13 years old. His sense of abandonment led him to the gang environment and early use of cannabis and methamphetamine. That background provided important context for his offending.

(d) Just over 30 per cent (or 20 months) for the 30 months he spent subject to EM bail (which included exceptions to attend work, rehabilitative programs and church). Other than two minor, alcohol-related breaches, he otherwise complied with his conditions.[103] Mr Simperingham emphasises the restrictions to Mr Te Kira's liberty. In particular, he could not properly grieve with his whanau when his whangai mother and brother died.

(e) If, applying those factors, a sentence of 14 months' imprisonment was reached, home detention should have been imposed. However, as Mr Te Kira has already served over a year in prison, this Court should release Mr Te Kira on time served.

[195] We are unable to accept those submissions. In terms of rehabilitation and the matters raised in Mr Te Kira's cultural report, we consider the 12-month discount applied for those factors was sufficient. We do not think the circumstances demonstrate the need for specific further discounts to have been given for remorse or addiction.

[196] Finally, any credit to be given for time spent on EM bail is an evaluative decision to be made having regard to the restrictiveness of EM bail conditions in each case.[104] We find the Crown's submissions instructive on this point:

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[103] The Crown disputes this: it says Mr Te Kira breached bail nine times.
[104] *Paora v R*, above n **Error! Bookmark not defined.**, at [53].

> The respondent understands that for seven months (December 2019 to July 2020) Mr Te Kira was subject only to a limited night-time curfew (between 12 am and 4 am). The rest of the time he was subject to a 24/7 curfew, but was granted, as his counsel describes a "plethora of variations" including for: multi-night stays at marae for family birthdays and tangis, attendance at commercial driving courses, accompanying his pregnant partner to her medical appointments, his child's birth, regular visits to see his mother while she was critically unwell, job interviews, the Man Up programme, trips to Auckland to attend Destiny Church conferences, and a five day Christmas trip with his partner and family. From August 2018, his bail was also varied to enable him to attend regular employment, on average for about ten hours a day, five to seven days a week.

[197] In those circumstances, we do not consider Mr Te Kira's time on EM bail to have been so restrictive that a further discount, over and above the three months the Judge gave, was warranted.

[198] For all those reasons, we dismiss Mr Te Kira's sentence appeal.

Mr Manuel

[199] Mr Manuel was sentenced primarily for his cannabis offending, which involved some 120 ounces (or 3.4 kgs). The Judge adopted a starting point of three years' imprisonment by reference to category two of *R v Terewi*.[105] Category two encompasses small-scale cannabis offending with a commercial purpose, generally attracting a starting point between two and four years' imprisonment.[106] The Judge uplifted that by six months in respect of a small amount of methamphetamine, 12 months for firearms and ammunition charges, and three months for Mr Manuel's previous convictions.[107] The Judge applied a 30 per cent discount for Mr Manuel's personal and cultural background, to reach an end sentence of three years and four months' imprisonment.[108]

[200] On appeal, Mr James only takes issue with the starting point for the cannabis offending. A starting point of two-and-a-half years would have been appropriate, before any uplifts or discounts, to reach an overall end sentence of three years' imprisonment.

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105 Mr Manuel sentencing notes, above n 7, at [2]–[5]; and *R v Terewi* [1999] 3 NZLR 62 (CA).
106 *R v Terewi*, above n 105, at [4].
107 Mr Manuel sentencing notes, above n 7, at [6], [12] and [13].
108 At [26] and [30].

[201] As the Judge acknowledged, "[i]t may be that there has been a shift in judicial attitudes" to the application of *Terewi*.[109] For instance, a three-year starting point was considered to be appropriate in *McLaine v R*, a case from this Court in 2000, where police found significantly less cannabis (35.5 grams, or 1.23 ounces), cash and other paraphernalia.[110] Similarly, in *Reardon v R* this Court upheld a three-and-a-half year starting point in a case involving the sale of two "tinnies" to an undercover officer for $20 each, four further "tinnies" at the appellant's address and other evidence of a small scale operation.[111]

[202] However, we are satisfied the three-year starting point was not manifestly excessive. Mr Manuel was frequently dealing in significantly higher commercial amounts. He was found in possession of clear indicia of drug dealing and it is plain he was assisting a reasonably significant commercial enterprise.

[203] Mr Manuel's sentence appeal is dismissed.

Result

[204] Mr F Milosevic and Mr S Milosevic's appeals against conviction are allowed in part. Their convictions for money laundering are quashed. Their appeals against conviction are otherwise dismissed.

[205] Mr F Milosevic's appeal against sentence is allowed in part. We substitute his sentence of 17 years and six months' imprisonment with a 50 per cent MPI with one of 16 years and six months' imprisonment with a 50 per cent MPI.

[206] Mr S Milosevic's appeal against sentence is allowed in part. We substitute his sentence of 15 years and nine months' imprisonment with a 50 per cent MPI with one of 14 years and nine months' imprisonment with a 50 per cent MPI.

[207] Ms Raki and Ms Tawera's appeals against conviction and sentence are allowed. Their convictions for money laundering are quashed.

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109 At [5]. See also *R v Smyth* [2017] NZCA 530 at [17].
110 *McLaine v R* CA355/2000, 30 November 2000.
111 *Reardon v R* CA459/2003, 19 April 2004.

[208] Mr Manuel's appeal against conviction and sentence is dismissed.

[209] Mr Pryor's application for an extension of time to appeal is granted, but his appeal against conviction and sentence is dismissed.

[210] Mr Te Kira's appeal against sentence is dismissed.

Solicitors:
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