IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA571/2022
[2023] NZCA 176

BETWEEN	DANIEL GARY FRENCH Appellant
AND	THE KING Respondent

Hearing:	29 March 2023 (further submissions received 30 March 2023)
Court:	Cooper P, Lang and Downs JJ
Counsel:	A J Bailey for Appellant M G McClenaghan and J E Lancaster for Respondent
Judgment:	17 May 2023 at 11.00

JUDGMENT OF THE COURT

A The application to recall the conviction appeal judgment is declined.

B The appeal is allowed and the sentence of three years' imprisonment for manslaughter is set aside. A sentence of two years six months is substituted, to be served cumulatively on the sentences imposed in the conviction appeal judgment.

REASONS OF THE COURT

(Given by Cooper P)

[1] This is an appeal against a sentence of three years' imprisonment imposed by Osborne J after the appellant, Daniel French, pleaded guilty to a charge of

manslaughter.[1] It is said that the sentence, to be served cumulatively on previous sentences for other offending totalling seven years and two months' imprisonment, resulted in a sentence that, considered overall, was manifestly excessive.

[2] The manslaughter charge was laid following a successful appeal by Mr French from his conviction for murdering the deceased Luke Sears, a patched member of the King Cobras gang.[2] We will call this the conviction appeal judgment.

[3] In order to address the arguments on appeal, it is necessary to set out the unusual background of the case.

Background

[4] Mr French was one of three defendants at the trial. His conviction was as a party to a murder committed by a co-defendant Alistair Cochrane.[3] Mr Sears had been demanding money from Mr French and threatening him in the days leading up to the fatal incident in which Mr Sears was shot by Mr Cochrane. Mr Sears had assaulted Mr French in two incidents on the day before the shooting and had also threatened him with a pistol. A further altercation the following day led to the homicide.

[5] The circumstances of the murder and the role of the defendants in it were addressed by this Court in its judgment of 20 December 2021 allowing Mr French's appeal.[4] Near the beginning of the judgment the Court set out a narrative of events, which it based on the sentencing notes of the trial judge, Gendall J. We can adopt that narrative for present purposes:[5]

> **Narrative of events**
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> [8] Mr French was involved in a large-scale cannabis growing operation at a property in Selwyn, Canterbury. He also had a firewood business and at the relevant time was in the process of setting up a pet shop business in

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1 *R v French* [2022] NZHC 2470 [Osborne J's sentencing notes].
2 *Sullivan v R* [2021] NZCA 702 [conviction appeal judgment].
3 *R v Cochrane* [2020] NZHC 1485 [Gendall J's sentencing notes]. The third defendant, Ms Sullivan was not charged with murder; she faced five charges of unlawful possession of a firearm and one charge each of unlawful possession of ammunition and attempting to obstruct the course of justice by providing false information to the police. Her appeal against conviction was dismissed (conviction appeal judgment, above n 2, at [134]).
4 Conviction appeal judgment, above n 2, at [129].
5 At [8]–[22] (footnotes omitted).

Rolleston, Canterbury. He had been employing Ms Sullivan at the pet shop for nearly a year. Shortly before the events giving rise to Mr Sears' death, she had introduced Mr Cochrane to Mr French. Mr Cochrane had begun carrying out manual labour work for the pet shop business. None of them had any gang affiliations.

[9] Mr Sears had known Mr French for about a year. In the days leading up to his death, Mr Sears was endeavouring to collect a claimed debt of about $40,000 that he said Mr French owed to him or the King Cobras. Mr French denied there was any such debt. Rather, he said that Mr Sears owed him $20,000, being the balance of a $60,000 debt for cannabis that Mr Sears had purchased from him earlier.

[10] On 12 October 2018, Mr Sears and an associate went to the pet shop to threaten Mr French and to obtain payment of the claimed debt. An altercation took place involving Mr Sears standing over Mr French and punching him. Ms Sullivan produced a shotgun and placed it on the table in an apparent attempt to scare off Mr Sears. There was then an argument about the weapon and a tussle over it. Mr Sears and his associate then left.

[11] Later that day, Mr Sears and his associate returned, again demanding payment of the alleged debt. He produced a pistol, threatened Mr French with it, and punched him in the face. Ms Sullivan called the police. Police officers arrived and escorted Mr Sears and his associate off the premises. As a result of the police being called, Mr Sears "taxed" Mr French by increasing the debt he said Mr French owed to him. Mr Sears told him that he had to sign over a rural property he owned at Sheffield as part of the alleged debt. On the same day Mr Sears had visited this property and told the tenant he needed to vacate it and the concerned tenant had called Mr French about this.

[12] The next day, 13 October 2018, Mr French asked Mr Cochrane to accompany him to deliver a load of firewood and to act as a form of protection or "muscle". This was in case they were confronted by Mr Sears or other members of the King Cobras. They left the pet shop in Mr French's vehicle. Mr French was the driver. Mr Cochrane was in the front passenger seat and had with him a loaded sawn-off shotgun in a bag.

[13] As they were driving along a rural road, they encountered Mr Sears driving the other way with his fiancé, Ms Lawson. Both vehicles stopped. Mr French and Mr Sears got out and began to talk to each other on the road. A physical fight began between them. Ms Lawson got out of Mr Sears' car and tried to stop him engaging in the fight. Mr Sears told Ms Lawson to get back in the car. Mr Cochrane got out of the vehicle with the shotgun, pointed it at Mr Sears and told him to leave Mr French alone. Mr Sears then walked towards Mr Cochrane, saying words to the effect of, "what are you going to do with that?", while facing the gun with his arms outstretched. Mr Cochrane retreated. Ms Lawson was pushed away by Mr Sears and again told to return to the car. Mr French said to Mr Cochrane to "put the gun away" and "let's leave", and Mr Cochrane may also have said something too about leaving the scene.

[14] Mr Sears moved to the driver's door of Mr French's vehicle. The door was closed but its window was largely open. Mr Cochrane went to the front passenger side of the vehicle. The window of the passenger door was open. Mr Sears leant through the driver's door window to take the keys out of the

ignition, saying that they were "not going anywhere". Mr Cochrane was still holding the shotgun. The shotgun discharged and Mr Sears was hit in the right side of his chest. He died of his injuries shortly afterwards.

[15] Mr French and Mr Cochrane got into the vehicle and drove off. They went to Mr French's address. Mr French gave Mr Cochrane the keys to another vehicle and Mr Cochrane left. Several minutes later, Mr French drove back to the scene of the shooting, contacted the police and said the firearm had accidentally discharged.

[16] Although the police knew Mr French was involved in the events, they did not know the identity of the shooter. On the afternoon of 13 October 2018, after the shooting, the police spoke to Ms Sullivan. She told them that "Ali" was involved, he had the last name "Wilson", he lived in Linwood, had links to Black Power and was from Blenheim.

[17] On 14 October 2018 she was again spoken to by police. She said she had only met the man involved at a party some weeks earlier. She signed a statement saying his name was "Al Yo", "Elijah" or "Eleshia Wilson". She said she regularly picked him up to take him to work at the pet shop. This was all false because the shooter was Mr Cochrane and he was living with Ms Sullivan at the time.

[18] Ms Sullivan was again interviewed on 16 October 2018. By this time Mr Cochrane had been identified by the police as the likely shooter. Ms Sullivan told the police that she had known Mr Cochrane for a few years and the last time she saw him was three weeks earlier. She again referred to "Al Yo" and said this was not Mr Cochrane. She also said she did not know the whereabouts of Mr Cochrane, but that he was possibly in Gisborne. These statements were untrue.

[19] Ms Sullivan was interviewed again on 17 and 18 October 2018. On 17 October she admitted that "Al Yo" was Mr Cochrane and said she had not seen him for a number of days. On 18 October she said that Mr Cochrane had arrived back at the pet shop on the day in question but he had left in a hurry and she saw him back home. She also said she had never seen him with a gun and he did not own one.

[20] On 18 October 2018 Mr Cochrane handed himself in. On that date a search warrant was executed at Ms Sullivan's address. The search found four firearms together with a quantity of ammunition in a secret compartment constructed and hidden under a manhole in a bedroom wardrobe in the house. Two of the firearms were cut-down shotguns fitted with pistol grips, and there was also a pump action shotgun and .223 calibre assault rifle.

[21] On 13 December 2018, Ms Sullivan conceded to police that some of her earlier statements were "bullshit". She denied any knowledge about the firearms found at her address. In an intercepted phone call made from prison Ms Sullivan admitted to giving the police "a whole lot of bullshit" when she had spoken to them on the earlier occasions.

[22] In addition to the charges that went to trial and Mr Cochrane's guilty pleas at the commencement of the trial to four charges of unlawful possession of a firearm and one charge of unlawful possession of ammunition, Mr French pleaded guilty in the District Court to the following: possession of

> methamphetamine for supply, offering to supply methamphetamine, two charges of unlawful possession of a firearm, two charges of unlawful possession of ammunition, cultivation of cannabis, selling and supplying cannabis, possession of N-Ethylpentylone for supply, and theft.

[6] The Court rejected Mr Cochrane's appeal against his murder conviction.[6] But it allowed Mr French's appeal.[7] The Crown's case was that Mr French and Mr Cochrane had armed themselves with the shotgun on the day of the shooting, with the shared understanding that they would use it as a deterrent and at the very least to scare Mr Sears should they become involved in a confrontation with him.

[7] Mr French's liability was alleged to arise under s 66(2) of the Crimes Act 1961. The Crown claimed that a probable consequence of carrying a loaded firearm was that someone would be shot, especially in a tense situation involving a confrontation with a gang member. The Crown contended that Mr French must have foreseen that, as Mr Sears was not prepared to back down or walk away from Mr French, it was a probable consequence that Mr Sears would be shot by Mr Cochrane.

[8] The Judge summed up on the basis that if the jury were sure that Mr Cochrane had murdered Mr Sears, to convict Mr French of murder they would need to be sure that there was a shared understanding or agreement between them to present a loaded firearm at Mr Sears to scare and/or assault him.[8] Defence counsel had sought that the jury be instructed that they needed to be sure that "the purpose to scare or assault was unlawful in the circumstances", because there would not be an unlawful purpose if the agreement had only been to present the firearm in circumstances of justified self-defence or defence of another. The jury were directed to consider whether Mr Cochrane was acting in self-defence when considering whether he was guilty of murder; they were not directed to consider whether it was reasonably possible that the understanding between Mr Cochrane and Mr French was to present the firearm only in self-defence (or defence of another) in which case there would have been no unlawful common purpose.

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6 At [39].
7 At [66].
8 At [48]–[50].

[9] This Court allowed Mr French's appeal on that basis. Liability under s 66(2) required proof that the shared understanding was to carry out an unlawful purpose, which could not include acting in self-defence.[9] The jury should have been directed to consider "whether it was reasonably possible that the shared understanding was to present the firearm only in circumstances of justified self-defence, in which case there would not have been a common unlawful purpose."[10] That omission was a material error in the directions to the jury, given there was evidence on which they could have concluded that it was reasonably possible that the common intention was so limited.[11]

[10] A further and consequential issue with the summing up was that the jury was not asked to consider whether Mr French foresaw a culpable homicide, that is the death of Mr Sears in circumstances other than self-defence.[12] Because of these two errors, there was a real risk that the outcome of the trial was affected, for the purposes of s 232(4)(a) of the Criminal Procedure Act 2011.[13]

[11] Finally, the Court concluded that Mr French's defence that he had withdrawn from any agreement he had with Mr Cochrane to carry out an unlawful act had not been properly put in the summing up.[14] This was another material error that could have affected the outcome of the trial.[15] As a consequence, Mr French's conviction appeal was allowed and his conviction for murder quashed.[16] The Court ordered a new trial.[17]

[12] It is necessary now to note that Mr French had pleaded guilty to charges of possessing methamphetamine for supply and offering to supply methamphetamine; cultivating cannabis and unlawfully supplying cannabis; unlawfully possessing firearms and ammunition; theft and possession of N-Ethylpentylone for supply. Gendall J imposed concurrent sentences on all those charges, with an overall term of

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9 At [53]–[55].
10 At [63].
11 At [63].
12 At [65].
13 At [66].
14 At [83]–[89].
15 At [89].
16 At [129].
17 At [131].

seven years and two months' imprisonment.[18] His methodology was summarised by this Court as follows:[19]

> [90] In sentencing Mr French on the charges to which he had pleaded guilty, the Judge's approach was to set a starting point of three years and six months for the methamphetamine offending, and then four years on the cultivating cannabis charge, with an 18 month uplift for possession of firearms and ammunition and a six month uplift for theft and possession of N-Ethylpentylone. After adjustments for totality, previous convictions and the guilty plea, the overall end sentence on these charges was seven years and two months' imprisonment. The Judge did not go on to allocate sentences to the individual charges. In summarising the [appellants'] sentences he said:
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> > [111] Then, for the drugs charges, the methamphetamine, cannabis and related charges, the firearms and theft charges, Mr French, you are sentenced to seven years and two months' imprisonment, to be served concurrently.

[13] Because a specific sentence had not been expressed in respect of each individual charge, the consequence of this approach was to impose the sentence of seven years and two months on each charge. This meant that the sentences for the cultivating cannabis, firearms and ammunition charges exceeded the statutory maximum. The sentence appeal was advanced on the sole basis of that error, the Crown conceding that the appeal should be allowed to correct it and allocate appropriate sentences to each of the charges. But as this Court recorded, neither Mr French nor the Crown suggested what the individual sentences should be.[20]

[14] It was left to the Court to allocate individual sentences that reflected the respective seriousness of the offences but preserved the overall effective sentence of seven years and two months' imprisonment. In the result the sentences on the charges to which Mr French had pleaded guilty were set aside and new sentences were substituted as follows:[21]

> [93] Accordingly, we grant leave to appeal out of time and we set aside the High Court sentences on the charges to which Mr French had pleaded guilty and substitute the following sentences:

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18 Gendall J's sentencing notes, above n 3, at [109] and [111].
19 Conviction appeal judgment, above n 2.
20 At [92].
21 Footnote omitted.

(a) On the convictions for possessing methamphetamine for supply and offering to supply methamphetamine: concurrent sentences of three years' imprisonment.

(b) On the convictions for cultivating cannabis and unlawfully supplying cannabis: concurrent sentences of three years' imprisonment.

(c) On the convictions for unlawfully possessing firearms and ammunition: concurrent sentences of one year imprisonment.

(d) On the convictions for theft and possession of N-Ethylpentylone for supply: concurrent sentences of two months' imprisonment.

(e) The sentences in (a), (b), (c) and (d) are cumulative on each other.

[15] Mr French subsequently pleaded guilty to causing the death of Mr Sears by an unlawful act thereby committing manslaughter.[22] Osborne J sentenced Mr French on the basis that he was liable as a party under s 66(2) of the Crimes Act.[23] This meant, as was accepted by Mr Bailey in the High Court, that Mr French had participated in an unlawful common purpose, from which he had not withdrawn before Mr Cochrane shot Mr Sears.

[16] The Judge said that he was adopting the narrative of events set out in the conviction appeal judgment,[24] which reflected the evidence at the trial, although he also noted that the "central facts" were contained in the summary of facts which Mr French had accepted.[25] He then set out his own summary.[26]

[17] He observed that there was no tariff case for manslaughter because the circumstances of that offence are so variable.[27] In fixing the starting point the Judge identified four aggravating features of the offending.[28] These were premeditation (the Judge noted both Mr French and Mr Cochrane were in possession of the shotgun), the serious injury caused, the vulnerability of the victim and the fact that there was a

22 Crimes Act 1961, ss 62(2), 160, 171 and 177.
23 Osborne J's sentencing notes, above n 1, at [1].
24 At [4].
25 At [3].
26 At [5]–[12].
27 At [31] citing *R v Thomas* [2018] NZHC 819 at [49].
28 At [32].

background of drug offending.[29] Mitigating features of the offending were said to be serious provocation by the victim, Mr French's limited involvement in the offence, and his cooperation with the police.[30]

[18] Since the case involved serious violent offending, the Judge thought it appropriate to apply this Court's judgement in *R v Taueki*.[31] He considered the offending was at the higher end of Band 2 (calling for starting points between five to 10 years' imprisonment) having particular regard to the involvement of the firearm.[32] But the mitigating features were unusual and significant.[33] After considering other manslaughter sentences to which counsel referred and finding them of limited assistance,[34] he arrived at a starting point of six years and nine months' imprisonment.[35]

[19] Although Mr French had a number of previous convictions for firearm and drug offending, the Judge did not uplift the starting point saying that would be inappropriate on account of previous similar convictions for which sentences had already been imposed.[36] He allowed a 25 per cent discount for the guilty plea.[37] He was not satisfied Mr French was remorseful to an extent requiring a discrete discount but allowed a further discount of five per cent for participation in a restorative justice conference.[38] Another discount, of 10 per cent, was allowed to reflect the likelihood that animosity towards him by members of the King Cobras gang would make imprisonment more difficult for Mr French than for many other prisoners.[39]

[20] Overall, the starting point of six years and nine months was reduced by discounts totalling 40 per cent, leaving an end sentence of four years' imprisonment.[40] The Judge then considered totality, noting that the sentences imposed on the other

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29 At [32]
30 At [33].
31 At [34].
32 At [35].
33 At [36].
34 At [39]–[41]. The Judge discussed *R v Rapira* [2003] 3 NZLR 794 (CA), *Pahau v R* [2011] NZCA 147 and *R v Innes* [2016] NZHC 1195.
35 At [42].
36 At [44].
37 At [46].
38 At [50]–[51].
39 At [52].
40 At [54].

charges were originally to be served cumulatively on the sentence of life imprisonment originally imposed for murder.[41] The Judge assessed the appropriate outcome was a sentence of three years' imprisonment for the manslaughter, to be served cumulatively on the existing sentences.[42] This meant that the effective term for all of the offending would be 10 years and two months' imprisonment.[43]

The appeal

[21] Mr French appeals on the basis that the sentence of three years' imprisonment imposed by Osborne J resulted in an overall sentence that was manifestly excessive. Mr Bailey submits the Judge had wrongly identified aggravating features, overlooked a mitigating factor, adopted an excessively high starting point and failed properly to adjust the overall sentence for totality.

[22] Mr Bailey was also critical of the fact that Osborne J, by imposing a cumulative sentence, had overlooked errors of approach in Gendall J's original sentence concerning the appropriate uplift for Mr French's previous offending. This was fixed at 12 months, a figure Mr Bailey claimed was too high. He was also critical of the point at which Gendall J had adjusted the sentence for totality, claiming that if the appropriate approach had been adopted the reduction would have been greater and the end sentence lower.

[23] Mr Bailey submitted that this Court should recall the conviction appeal judgment so as to adjust the sentences imposed on the other charges, claiming there was a "very special reason" to do so, in terms of the Supreme Court's judgment in *Uhrle v R*.[44] The very special reason relied on was the difficulties that would attend Mr French's time in prison, difficulties that had not been referred to (and consequently not taken into account) when Mr French was sentenced by Gendall J, but had been included in the pre-sentence report prepared for the manslaughter sentencing and taken into account by Osborne J. Mr Bailey argued that the Court should reduce the sentence

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41 At [55].
42 At [57].
43 The Judge referred to 10 years three months' imprisonment, but should have referred to ten years two months.
44 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [29].

imposed by this Court on the other charges. One way of doing that would be to withdraw the conviction appeal judgment to make the appropriate adjustment.

[24] Mr Bailey also urged recall on the basis that this Court had not carried out a proper assessment of the merits of the sentences imposed on the other offending, merely adjusting the original sentences to overcome the error concerning maximum penalties.

[25] We deal with the recall issue before turning to the other grounds of appeal.

Recall

[26] In practice, an application for recall would normally be dealt with by the panel of the court that delivered the judgment in question. It is preferable that course be followed. However, we accept that is not a reason for declining the application now made and in this case there is a justification for dealing with the issue in conjunction with the sentence appeal also before this Court.

[27] However, an application for recall can only be advanced in limited circumstances, as confirmed by the Supreme Court in *Uhrle v R.*[45] Recall is an "exceptional step" only permissible where:[46]

(a) following the hearing, a relevant statute or regulation of high authority has been amended;

(b) counsel failed at hearing to direct the court's attention to a plainly relevant legislative provision or authority; or

(c) for a "very special reason" justice requires it.

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45 *Uhrle v R*, above n 44, at [25]–[29] citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC*)* at 633 and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76. In *Uhrle v R*, the Supreme Court held that the court's recall jurisdiction is sufficiently captured by the test traditionally applied in the civil jurisdiction, as articulated in *Horowhenua County*.

46 *Uhrle*, above above n 44, at [25]–[29].

[28] This Court in *Lyon v R* held that:[47]

> The interests of justice do not ordinarily require that the applicant be given a second opportunity to take an available point of fact or law. The starting point is that the applicant has already had a hearing. So recall does not extend to a party recasting previous arguments or putting forward further grounds that might have been examined at the earlier hearing but were not.

[29] Mr Bailey has submitted that the newly available evidence of the difficulties that Mr French will experience in prison constitutes a "very special reason" warranting a recall. However, recall is not appropriate in these circumstances for three reasons.

[30] First, the purpose of the argument for recall is essentially to further an attempt to reduce the sentences imposed by Gendall J. But there has already been an appeal against those sentences.[48] Mr Bailey appeared for Mr French at the hearing. It was plainly not suggested then that the sentence imposed on the other charges was excessive. All that was claimed was that because the same sentence was imposed on all the offences to be served concurrently, the result had been that in some cases statutory maxima had been exceeded. This Court adjusted the sentences while preserving the overall outcome of an effective term of seven years two months' imprisonment.[49] It was not suggested then that any other approach was appropriate, or necessary to avoid an excessive sentence. There had been ample time to develop any available argument to that effect in the 17 months that had elapsed between the sentencing and the hearing of the appeal in this Court. The limited basis on which the appeal against sentence was advanced is an unpropitious basis on which to now advance an argument for recall.

[31] Second, the sentences imposed, as adjusted by this Court, do not appear to be excessive. Gendall J had imposed sentences of three years six months for the methamphetamine offending, saying:[50]

> …in terms of your methamphetamine offending, Mr French, both the possession for supply quantity of 28.1 g and the offering to supply consisting of [31] offers of between 0.5 g to 5 g, fall into the low to mid end of [Band 2] of *Zhang* under "supply", given the nature of the operation. You played a key

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47 *Lyon v R* [2020] NZCA 430 at [25] (footnote omitted).
48 See conviction appeal judgment, above n 2.
49 At [92].
50 Gendall J's sentencing notes, above n 3, at [94] (footnote omitted). Citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

> role in the offending, Mr French, by sourcing the methamphetamine for supply and by providing the vehicle for your co-defendant, Ms Ward, to use to distribute the drug, and you called yourselves a "team". Ms Ward, on those charges, accepted the sentence indication, as we have said, where a starting point was adopted for the methamphetamine offending of three and a half years' imprisonment. In those circumstances, I consider it appropriate [to set] a starting point of three years and six months is also adopted here.

[32] This Court reduced the sentences for the methamphetamine offending to concurrent sentences of three years' imprisonment.[51] In relation to the cannabis charges, cultivation and unlawful supply, Gendall J said:[52]

> …your cannabis offending, Mr French, falls squarely into category 3 of *Terewi*. This was a sophisticated and large-scale growing operation. Based on the information you, Mr French, gave to police as to the quantity you typically grew and the value you sold it for, the value to you of one growing cycle was between $33,600 and $39,200. Given the clear commerciality of the offending, a starting point of four years is appropriate, consistent with the *Terewi* categorisation.

[33] The summary of facts described a "sophisticated and well-executed cannabis operation with an extremely well-organised and planned theft of power." The latter gave rise to the charge of theft,[53] the summary of facts from the conviction appeal referring to power stolen from Genesis Energy to the value of $11,917.54. Gendall J imposed an uplift of six months separately for this theft and the possession of N-Ethylpentylone.[54]

[34] This Court again adjusted the sentences for the convictions for cultivating and unlawfully supplying cannabis to concurrent sentences of three years' imprisonment.[55] This Court also substituted the uplift for the convictions for theft and possession of N-Ethylpentylone with concurrent sentences of two months' imprisonment.[56] As previously noted, there were comparatively minor adjustments in respect of the other charges. But the same approach to cumulative sentences was preserved — the sentences were to be cumulative on each other — as was the uplift for previous offending, and the discount for the guilty plea.[57]

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51 Conviction appeal judgment, above n 2, at [93(b)].
52 Gendall J's sentencing notes, above n 3, at [95]. Citing *R v Terewi* [1999] 3 NZLR 62 (CA).
53 Crimes Act 1961, ss 219 and 223(b).
54 Gendall J's sentencing notes, above n 3, at [97].
55 Conviction appeal judgment, above n 2, at [93(c)].
56 At [93(d)].
57 At [93(e)].

[35] Mr Bailey submitted that this Court had not undertaken an assessment as to the appropriateness of the overall seven years two months' term of imprisonment, but the adjustments made suggest that it did in fact consider the appropriate sentence for each of the charges. We do not accept that the Court would have preserved the effective term of seven years and two months' imprisonment if it had been of the view the sentence was manifestly excessive. Mr Bailey articulated no reasoned basis on which the starting points notionally adopted were excessive.[58]

[36] Third, Mr Bailey says that the primary basis for recalling the judgment is the newly available material about the difficulties Mr French will face in prison. We are not persuaded this can be a proper ground for recalling the conviction appeal judgment, especially in circumstances where Mr Bailey articulates no compelling argument that the sentences previously imposed for the offending were excessive.

[37] In sum, we are satisfied that the high threshold set by the test adopted by the Supreme Court in *Uhrle* has not been met.[59] No sufficiently special reason has been made out which would warrant the granting of a recall application. The result is that the Court's previous judgment should not be recalled. Rather, the present appeal should be considered on the basis of whether the cumulative sentence of three years imposed by Osborne J for the manslaughter of Mr Sears was clearly excessive. In saying that, we accept that the sentence has to be approached by acknowledging it was imposed cumulatively on the sentences earlier imposed by Gendall J.

The manslaughter sentence

[38] Mr Bailey argued the sentence imposed by Osborne J was clearly excessive on a number of bases, but all leading in the end to the claim that considered in terms of a totality analysis, the overall outcome was not justified. We see totality as the main issue, because on the face of it a sentence of three years' imprisonment following a guilty plea to a manslaughter in which the deceased died as a result of being shot does not of itself appear excessive, even though it was Mr Cochrane who shot the victim.

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58 The limited nature of the argument presented meant that the Court did not articulate what starting points were adopted, being content to make minor downwards adjustments for the major offending.

59 *Uhrle v R*, above n 44, at [25]–[29].

[39] Mr Bailey's first argument was that the Judge wrongly identified premeditation, victim vulnerability and the "drug-offending background" as aggravating features.[60] He noted that at sentencing, the Judge said in relation to premeditation that both Mr Cochrane and Mr French "each had that shotgun with intent to use it if it proved necessary".[61] Mr Bailey maintained that this was consistent with Mr French being sentenced on the basis that he foresaw death with murderous intent, but Mr French had not pleaded guilty to manslaughter on that basis. It is not necessary for a party to manslaughter to foresee death, simply the risk of an unlawful act.[62] Consequently, Mr Bailey contended there was only limited premeditation, because the Crown's case was that Mr Cochrane and Mr French had a common understanding or agreement simply to present the loaded firearm at the deceased to "scare and/or assault" him.

[40] This argument does not properly reflect what Osborne J said on the issue of premeditation. His remarks were as follows:[63]

> …you were, with Mr Cochrane, deliberately in possession of a shotgun (we know that it was loaded but I do not treat you as being aware of the fact that it was loaded) and you each had that shotgun with intent to use it if it proved necessary…

[41] We do not accept this shows, as submitted by Mr Bailey, the Judge was sentencing Mr French on the basis that the ultimate outcome of a "murderous death" was premeditated. The acknowledgement that Mr French did not know the gun was loaded shows that was not the Judge's approach. The reference to an intent to "use" the gun was consistent with the use being threatening the victim with it. The guilty plea to the manslaughter must be taken as acknowledging the possibility that more than trivial harm might be caused by executing the common purpose. The Judge was right to identify the presence of the gun as indicative of premeditation in the sense he described. We see no error in his approach.

[42] Mr Bailey is on slightly stronger ground with his criticism of the Judge's reference to the victim being vulnerable. The Judge noted the deceased was unarmed

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60 See Osborne J's sentencing notes, above n 1, at [32(a)] and [32(c)-(d)].
61 See [32(a)].
62 Mr Bailey referred here to *Burke v R* [2022] NZCA 137.
63 At [32(a)].

and would have been unaware that the shotgun was loaded, and the degree of risk he faced.[64] We accept that he was vulnerable in that sense, but s 9(1)(g) of the Sentencing Act 2002 refers to victims who are particularly vulnerable because of age, health or any other factor known to the offender. We do not see those words as naturally applying to a situation where the only source of vulnerability is a gun in the possession of the offender which the victim does not know is loaded. The idea of particular vulnerability requires something more than that to provide a sensible basis for increasing the sentence that would otherwise have been imposed.[65]

[43] But in any event, it is not immediately apparent why the sentence to be imposed on Mr French should have been influenced by his knowledge that Mr Sears would not have known the gun was loaded, when he himself did not know it was. So, we are inclined to agree this aggravating factor was not made out.

[44] As to the drug-offending background, the Judge held that this was something to which he must "have some regard" as an aggravating feature.[66] He indicated it was not as significant as the other aggravating matters, but he accepted a Crown submission that the drug offending context, in which a shotgun and ammunition were involved, in itself, created a dangerous situation.[67]

[45] Mr Bailey criticised this approach on the basis that the shotgun was not possessed for the purpose of protecting any drug growing or dealing operation, nor to enforce any drug dealing debt. Rather, the shotgun had been carried because of Mr Sears' own unlawful actions including the threats and assaults directed against Mr French. However, the drug dealing background was clearly a relevant part of the context. On Mr French's own admissions, he had claimed Mr Sears owed him $20,000 in respect of the purchase of cannabis, with the King Cobras claiming Mr French was indebted to them for twice that amount. It was appropriate for the Judge to take the context into account, including the inherent dangers involved in the combination of drug dealing and firearms.

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64 At [32(c)].

65 *Cummings v R* [2016] NZCA 509 at [81]. This Court found particular vulnerability which was not innate to the victim had no weight as an aggravating factor, as most victims are vulnerable to an offender's attack in some way.

66 Osborne J's sentencing notes, above n 1, at [32(d)].

67 At [32(d)].

[46] In the end the only error as to an aggravating feature arises from the characterisation of Mr Sears as particularly vulnerable for the purposes of s 9(1)(g) of the Sentencing Act. That left premeditation, serious injury and the drug-offending background as matters which could legitimately be counted as aggravating for the purposes of calculating the starting point.

[47] The next criticism advanced was that the Judge failed to take into account as a mitigating factor the limited nature of the common purpose which led to Mr French's culpability. The common purpose, Mr Bailey argued, should not have been viewed as "unlawful *per se*". Rather, it was "unlawful because the pre-emptive (contingent) level of force involved with it was disproportionate to the threat (again only by a fine margin)." Mr Bailey developed this argument by drawing an analogy to cases involving excessive self-defence, a kind of case recognised in *R v Taueki* as capable of reducing the seriousness of offending causing grievous bodily harm.[68] In *Taueki*, this Court said, in reference to excessive self-defence, that:[69]

> …where a party has acted out of self-defence but has gone too far, the fact that the attack initially commenced as an effort to defend himself or herself (or another) may be seen as reducing the seriousness of the offending.

[48] Here, Mr Bailey submitted the Judge should have sentenced Mr French on the basis that it was appropriate for him, given the background of Mr Sears' threats and assaults, to have planned ahead and made arrangements for his safety. The common purpose entered into was one for defensive purposes, and contingent in nature. The guilty plea meant that the purpose was unlawful, but only on the basis that it went too far.

[49] As this Court recognised in the conviction appeal judgment: "[a] shared understanding to do something only if justified in circumstances of self-defence is not a shared understanding to do something unlawful."[70] So Mr French's guilty plea is inconsistent with the idea that his shared understanding with Mr Cochrane was only that they would use the gun if necessary for self-defence. Mr Bailey's submission attempts to avoid the implication of the guilty plea, which is that he and Mr Cochrane

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68 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.
69 At [32(b)]
70 Conviction appeal judgment, above n 2, at [60].

acted pursuant to an unlawful common purpose. Even if it were accepted that Mr French's original intention were to act only in self-defence, at some point the line was crossed and the common purpose changed its character. He therefore became a party to an unlawful homicide under s 66(2). We do not see this as analogous to cases of excessive self-defence discussed in *Taueki*:[71] the incident in which Mr Sears was shot did not begin with Mr French acting to defend himself.

[50] To the extent that there was prior conduct by Mr Sears which formed a relevant part of the background to the offending, that was properly taken into account by the Judge as one of the mitigating features of Mr French's offending. His sentencing remarks included the following:[72]

> Provocation: the Court of Appeal has indicated that the conduct of the victim is to be taken into account if I am satisfied that there was serious provocation which was an operative cause of the violence inflicted upon Mr Sears, and that it remained an operative cause throughout the commission of the offence.[73] I am satisfied that Mr Sears' conduct, particularly against his gang background, was and remained an operative cause in your offending. As Mr Bailey submitted, your fears for your own safety stemmed from Mr Sears' earlier conduct over the preceding period. Those fears, I accept, were well-founded. It was undoubtedly the escalation of Mr Sears' aggression and violence the previous day that led to your involvement in the decision to be involved with a shotgun as you and Mr Cochrane drove off in your vehicle on 13 October. It was Mr Sears who had given you cause to fear for your own safety. That was a continuing situation.

[51] This fully and appropriately dealt with the conduct of Mr Sears relevant to the offending. The conduct formed one of the elements that led the Judge to deduct 25 per cent from the starting point for matters mitigating the offending.[74] This was the appropriate way to deal with Mr Sears' conduct. We see no basis on which this Court could conclude that the Judge's approach was wrong.

[52] Mr Bailey's final argument focussing specifically on the manslaughter sentence was that the starting point adopted was excessively high. This was advanced principally on the basis that that the Judge had wrongly drawn an analogy to *Taueki* in assessing the appropriate starting point. In doing so the Judge placed the offending at

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71 *R v Taueki,* above n 69, at [32(b)]

72 Osborne J's sentencing notes, above n 1, at [33](a).

73 *R v Taueki*, above n 69, at [32](a); *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR at [62]–[63]; and *Va v R* [2011] VSCA 426 at [42].

74 At [36].

the higher end of Band 2, "particularly having regard to the involvement of the firearm."[75] Mr Bailey contended that the Judge should instead have had regard to other manslaughter cases: in particular he should have been influenced by the starting point of four and a half years' imprisonment adopted in *R v Innes*.[76] In fact, he submitted an even lower starting point was appropriate here.

[53] Mr Bailey argued that *Taueki* was an inappropriate authority to use because it concerned the intentional infliction of violence, and that had not been Mr French's intention. He drew support for this submission by reference to observations of Cooke J in *R v Fore* which he submitted had been endorsed on appeal in this Court.[77] Cooke J observed that in manslaughter cases there may some awkwardness in applying the *Taueki* guidelines, and that comparisons with other cases may be a better guide.[78] On appeal, this Court observed:[79]

> The aggravating factors identified in *Taueki* were obviously relevant when fixing the starting points in the present case. The Judge took them into account, as do we. However, care needs to be taken when comparing them to starting points selected in cases involving the intentional infliction of grievous bodily harm. As the Judge observed, the respondents in this case were very much participants in a robbery gone wrong. We agree with his observation that starting points adopted in cases that are factually comparable provide the greatest assistance in selecting the appropriate starting points in the present case.

[54] In the present case the Judge did not simply apply *Taueki* – he also discussed comparator cases to which he had been referred by counsel. He noted that the unusual nature of the offending made it difficult to find cases that were similar. He rejected as unhelpful cases on which the Crown relied, *R v Rapira* and *Pahau v R*, noting that they had involved defendants who had set out on confrontations intended respectively to involve robbery and serious violence.[80] Mr Bailey relied principally on *R v Innes*, in which Mander J had adopted a starting point of four and a half years' imprisonment for manslaughter.[81] Mr Bailey suggested by comparison, an even lower starting point should have been adopted in the present case.

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75 At [35].
76 See *Innes*, above n 34.
77 *R v Fore* [2020] NZHC 2290 at [18]; and *R v Fore* [2021] NZCA 28 at [40].
78 *R v Fore* (HC) at [18].
79 *R v Fore* (CA), above n 77, at [40].
80 *R v Rapira and Pahau v R*, above n 34.
81 *R v Innes*, above n 34, at [28].

[55] In *Innes*, the appellant and his co-defendant Mr Baker went to a residential address for the purpose of obtaining illicit drugs. They agreed on a plan, which involved Mr Innes knocking on the door while Mr Baker hid outside in bushes. The plan was for Mr Innes to lure the occupants outside which he succeeded in doing. The occupants then became aware of the presence of Mr Baker and retreated inside. Mr Baker had a hunting knife. A confrontation ensued, and one of the occupants was fatally stabbed by Mr Baker. Mr Innes was aware from the outset that Mr Baker was carrying the knife but played no part in the assault.

[56] Mander J sentenced Mr Innes on the basis that he had agreed to assist Mr Baker to obtain drugs from the occupants of the property, that he had known Mr Baker had a knife, and that he must have appreciated the risk of a confrontation which would likely involve threats of violence, and which might result in an assault.[82] He had also known that Mr Baker was erratic and unreliable.[83] While the facts were distinguishable, the differences were favourable to Mr French, and a starting point no higher than three years would have been appropriate in the present case.

[57] Osborne J concluded the common enterprise in the present case carried with it a "potentially greater risk of someone dying" than that in *Innes* because it involved the use of a shotgun to "scare or assault" someone who "was plainly and recently aggressive".[84] Importantly, however, he also took the view that the four and a half years starting point adopted in *Innes* sat "at the bottom of an appropriate range".[85] He thought it was too low to be applied in the present case even taking into account the significant mitigating features which he had identified.

[58] Mr McClenaghan for the Crown acknowledged that the six years nine months' starting point the Judge adopted was towards the upper end of the available range but maintained that it did not result in a manifestly excessive sentence.

[59] We are inclined to the view that the starting point adopted by the Judge was too high. He was not bound to adopt a similar starting point to that fixed in *Innes* and

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82 At [27].
83 At [27].
84 Osborne J's sentencing notes, above n 1, at [40].
85 At [41].

he was entitled to consider that the starting point in that case was low. He was also entitled to be influenced by the fact that the defendants were in possession of a gun brought to the scene with the intention of using it. Again, the Judge was right to conclude that a gun may be inherently more dangerous than a knife. But there is merit in the point made by Mr Bailey that in *Innes* the defendants had set out on a purpose which was from the outset unlawful as they intended to take the drugs by force if necessary. Here, it appears that, at least initially, the gun was carried for the purpose of protection, although it was not ultimately used in that way. That of course does not detract from the implications of Mr French's guilty plea. But there is a wide difference between the six years nine months starting point here, and the four years six months fixed in *Innes*. Both cases involved the use of a weapon and secondary offenders who were not directly responsible for the act which caused death. We doubt the extent of the disparity can be explained on any basis other than Osborne J considering that the *Innes* starting point was too low.

[60] Having said that, we have not been persuaded that, considered on its own, the manslaughter sentence of four years' imprisonment (prior to the totality adjustment) was manifestly excessive. As discussed, we do not agree with most of Mr Bailey's specific criticisms of the way the sentence was constructed. The only element which we have not accepted was the characterisation of Mr Sears as vulnerable. Since there were other aggravating circumstances on which the Judge properly relied, we doubt this would have been material to the overall calculation of the sentence. In the end we are not persuaded the sentence for manslaughter was excessive prior to adjustment for totality. The adjustment reduced the final sentence to one of three years' imprisonment, which was not significantly different from the final sentence of two years ten months imposed in *Innes*.[86]

Totality

[61] The final question is whether the adjustment for totality was sufficient. The Judge recognised that an adjustment for totality was appropriate, without articulating reasons for arriving at the three-year cumulative term which he fixed.[87]

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86 See *Innes*, above n 34, at [36].
87 Osborne J's sentencing notes, above n 1, at [55]–[57].

[62] Mr Bailey argued that the totality adjustment should have been greater. He contended that the seven years two months' effective term for Mr French's other offending was "academic" when imposed in the High Court and confirmed by this Court because of the contemporaneous sentence of life imprisonment for murder. The sentences imposed by Gendall J for the other offending were necessarily concurrent with the sentence for murder. While the sentences as adjusted by this Court were imposed cumulatively on each other, there could be no consideration of totality pending the outcome of the retrial. The fact that Osborne J had imposed the manslaughter sentence as a cumulative one meant that it was appropriate to consider afresh all of the sentences imposed for the purposes of a proper totality analysis.

[63] In this context Mr Bailey noted that Gendall J imposed a 12-month uplift for previous offending relevant to the drugs, firearms and ammunition charges, which he alleged was excessive, given that for all of the relevant prior charges Mr French had been sentenced only to five months' home detention. In accordance with the Court's reasoning in *Orchard v R*, the uplift exceeded the prior sentence and was consequently disproportionate.[88] And in the circumstances, Osborne J had imposed the manslaughter sentence cumulatively on an effective sentence for the other offending that was already too high.

[64] Mr Bailey was also critical of the methodology by which Gendall J constructed the sentence, making a totality deduction at the outset, instead of doing so at the end of the calculation.[89] The alternative and correct approach would have been to make the totality adjustment at the end, which Mr Bailey claimed would have resulted in a sentence five months lower than that imposed. We note Gendall J's sentence was imposed prior to this Court's decision in *Moses v R*,[90] which would have required a different approach, although Mr Bailey's argument assumes the totality deduction would have been the same, which is not necessarily the case.

[65] Another argument raised by Mr Bailey concerned the fact that while Osborne J had allowed a 10 per cent deduction to reflect the gang-related difficulties that

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88 *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [41].
89 See Gendall J's sentencing notes, above n 3, at [98].
90 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.

Mr French would likely face in prison,[91] no such deduction had been made by Gendall J.[92] It was not an issue raised at that stage, and relied largely on difficulties that have become apparent subsequently. Mr Bailey advanced this issue by reference to the pre-sentence report prepared for the manslaughter sentence. It is clear from the report that Osborne J was justified in taking this into account. He accepted in his sentencing remarks that the level of animosity and violence displayed towards Mr French by members of the King Cobras gang had implications for his safety in custody, and had caused him to be moved into a segregated unit within the prison to guard against the risks to his safety.[93] This in turn had implications for access to treatment programmes needed to facilitate potential release on parole.

[66] Mr Bailey points out that the 10 per cent discount given by Osborne J applies only to the manslaughter sentence — less than 30 per cent of the overall sentence of 10 years two months. He argues that there is no reason it should not apply to the overall sentence. Somewhat optimistically, he seeks that a discount of 15 per cent now be applied for all the charges because of the parole implications of Mr French's segregation and, in the absence of a recall of this Court's conviction appeal judgement, this must be by way of reduction from the three-year manslaughter term.

[67] We are not comfortable with the idea that a sentence that is otherwise appropriate should be reduced to take account of possible difficulties that might be encountered by prisoners at the hands of rival gang members in the prison. It is the responsibility of the Department of Corrections to ensure that prisoners in their care are kept safe. One means of doing so is through the use of segregation, as has happened here. We do not need to say more about this point, for, we consider the issues raised by Mr Bailey about the extent of the uplift for previous firearms offending, and the point at which Gendall J adjusted the sentence for totality mean it is appropriate to make some further adjustment to the manslaughter sentence in the interests of ensuring that the overall sentence which Mr French must serve is not excessive. We consider there should be a further discount of six months for this purpose.

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91 Osborne J's sentencing notes, above n 1, at [52].
92 It would have been futile to do so in any event, in the context of the life sentence for murder.
93 At [52].

[68] In the result the manslaughter sentence will be reduced to a cumulative term of two years six months.

Result

[69] The application to recall the conviction appeal judgment is declined.

[70] The appeal is allowed and the sentence of three years' imprisonment for manslaughter is set aside. A sentence of two years six months is substituted, to be served cumulatively on the sentences imposed in the conviction appeal judgment.

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