NOTE: SOME SUPPRESSION ORDERS REMAIN AS SET OUT IN FOOTNOTES 11 AND 13 OF THE REASONS.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA306/2012
[2012] NZCA 492

BETWEEN	TAME WAIRERE ITI First Appellant
AND	THE QUEEN Respondent

CA363/2012

AND BETWEEN	TE RANGIKAIWHIRIA KEMARA Second Appellant
AND	THE QUEEN Respondent

CA415/2012

AND BETWEEN	URS SIGNER Third Appellant
AND	THE QUEEN Respondent

CA416/2012

AND BETWEEN	EMILY FELICITY BAILEY Fourth Appellant
AND	THE QUEEN Respondent

Hearing: 22 August 2012

Court: O'Regan P, Arnold and Ellen France JJ

Counsel: E R Fairbrother for Appellant Iti
G M Fairbrother for Appellant Kemara
C W J Stevenson and J K Mahuta-Coyle for Appellant Signer
V C Nisbet and C A J Fewkes for Appellant Bailey
A R Burns and E C Finlayson-Davis for Respondent

Judgment: 29 October 2012 at 2.30 pm

JUDGMENT OF THE COURT

The appeals by all appellants against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Ellen France J)

Table of Contents

Introduction

[1] After a trial before a jury, Tame Iti, Te Rangikaiwhiria Kemara, Urs Signer and Emily Bailey were found guilty of charges of unlawful possession of firearms

and a restricted weapon (Molotov cocktails). The charges arose in relation to military-style camps conducted on Tuhoe-owned lands in the Urewera Ranges in 2006–2007 and to a search on the termination of a police operation in mid-October 2007.

[2] The appellants were found not guilty of four charges relating to camps in November 2006, and in April and August 2007. Mr Signer was also found not guilty in relation to a camp in June 2007. The jury was unable to reach a verdict on a charge relating to all four appellants of participating in an organised criminal group contrary to s 98A of the Crimes Act 1961. On the application of the Crown, a stay of proceedings was entered on that charge.

[3] Mr Iti and Mr Kemara were sentenced by the trial Judge, Rodney Hansen J, to terms of imprisonment of two and a half years.[1] Mr Signer and Ms Bailey were sentenced to nine months home detention.[2]

[4] The appellants appeal against conviction and sentence. The issues raised on the conviction appeals include the impact of pre-trial publicity on a fair trial, the treatment of party liability and other aspects of the directions on summing up, and the appropriateness of the s 98A charge. The sentence appeals focus on the factual basis adopted by the Judge in sentencing.

[5] To put matters in context we need to say something about how the case came to trial, the factual background and about the trial itself.

Matters leading up to the trial

[6] We start with events in May 2006. At that time, in response to information that a group of individuals was involved in paramilitary training in the Urewera Ranges in preparation for possible terrorist activity, police launched an investigation (referred to as "Operation 8"). Ultimately, as part of the investigation, the police obtained various search and interception warrants. They observed a

---

1 *R v Iti* [2012] NZHC 1130 [sentencing remarks, Messrs Iti and Kemara].
2 *R v Signer* [2012] NZHC 1423 [sentencing remarks, Mr Signer and Ms Bailey].

number of camps over a period from November 2006 to October 2007. The police operation terminated on 15 October 2007 with the execution of search warrants in respect of various persons' homes and other locations, including those occupied by the four appellants. Some firearms were seized during the searches.

[7] The police unsuccessfully sought the consent of the Solicitor-General to terrorism charges being brought.[3] The case proceeded instead with charges of offences contrary to the Arms Act 1983 relating to the possession and use of firearms and Molotov cocktails. As at late September 2009, there were a total of 18 defendants. Five of the defendants (the present appellants and one other) were also charged under s 98A of the Crimes Act with participation in an organised criminal group.[4]

[8] There then followed a series of interlocutory proceedings. At this point we need only mention an unsuccessful application for stay on the basis of pre-trial publicity;[5] applications for severance and for trial by Judge alone;[6] and a challenge to the various search warrants and the admissibility of evidence obtained under the warrants.[7] The conclusion of the challenge to the search warrants was that all of the disputed evidence was admissible against the present appellants who were charged under both the Arms Act and the Crimes Act. Some of the evidence against defendants charged only in relation to the Arms Act was ruled inadmissible. The end result was that the Crown proceeded to trial by jury only against the present four appellants.

The factual background

[9] The facts giving rise to the charges are summarised in more detail in Rodney Hansen J's sentencing remarks.[8] The description which follows largely reflects that summary.

---

3 Terrorism Suppression Act 2002, s 67.

4 The fifth of the defendants charged under s 98A died before the matter proceeded to trial.

5 *R v Bailey* HC Auckland CRI-2007-085-7842, 23 April 2010 [the stay judgment].

6 *R v Iti* HC Auckland CRI-2007-085-7842, 9 December 2010; *Iti v R* [2011] NZCA 114; *R v Signer* [2011] NZSC 109.

7 *R v Bailey* HC Auckland CRI-2007-085-7842, 15 December 2009; *Hunt v R* [2010] NZCA 528, [2011] 2 NZLR 499; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

8 Sentencing remarks, Messrs Iti and Kemara, at [18]–[28].

[10] The Judge explained that the camps, or rama as the participants called them, took place in three locations in the Ruatoki valley near the township of Ruatoki in the Bay of Plenty region. Two of these sites were in bush-clad hills and the other in open riverside land on the outskirts of the town.

[11] Rodney Hansen J's impression was that the numbers of participants at the camp ranged from as few as 10 to as many as 30. Some of those participating were local. Others came from a distance. The participants who travelled included Mr Kemara, who drove with others, from Auckland, and Ms Bailey and Mr Signer who usually lived in Wellington. Mr Signer was, however, staying in Ruatoki when the October camp took place. Mr Iti resided in the area.

[12] The Judge described the presence of the firearms at the camps as follows:[9]

> [21] There were firearms present and used at each of the four camps. They could not always be identified with precision but included semi-automatic weapons (capable of firing a round each time the trigger is pulled), sawn-off shotguns and .22 sporting rifles. The semi-automatic weapons, when fitted with a magazine of seven rounds or more, would qualify as a military-style semi-automatic weapon.

[13] The Judge said that the camps were primarily directed "to training participants in military manoeuvres and exercises".[10] Evidence of this was found in the surveillance footage and the evidence of an Army officer, which was not really challenged.[11] The Judge continued:[12]

> [25] Molotov cocktails were made and thrown at the September camp. None of [the appellants] was identified as one of those using the weapons but Mr Signer, … [was] seen on the surveillance footage passing a Molotov cocktail to one of [the] former co-accused, … .
>
> [26] When the police operation was terminated, [the appellants] were all found in possession of firearms. Under a tarpaulin at [Mr Iti's] house in Ruatoki, ... three rifles were found, two of them semi-automatic. Two of those weapons had been bought by Mr Kemara from an arms dealer.
>
> [27] ... four rifles and a semi-automatic shotgun were found in [Mr Kemara's] possession. Four were in the boot of [his] car. One was in a caravan that [he] occupied.

---

9 Sentencing remarks, Messrs Iti and Kemara.
10 Sentencing remarks, Messrs Iti and Kemara, at [23].
11 The name and information as to the deployment of this officer remains suppressed.
12 Sentencing remarks, Messrs Iti and Kemara.

> [28] Mr Signer and Ms Bailey, ... were found to be in joint possession of a .22 calibre rifle. It is known as a takedown rifle as it can be taken apart for ease of carriage. It was found [in] a backpack at a campsite [they] occupied in Wellington.

The trial

[14] As we have indicated, all four appellants were charged with participation in an organised criminal group (count 1). The jury could not agree on these charges, which have now been stayed. The appellants were also charged with possession of firearms contrary to s 45(1)(b) of the Arms Act relating to camps in November 2006, and January, April, June, August, September and October 2007 (counts 2, 3, 4, 5, 6, 8 and 10). Under that section, it is an offence to be in possession of any firearm except for a lawful purpose. In addition, there were charges against all four relating to the possession of Molotov cocktails in both August and September 2007 (counts 7 and 9). The other Arms Act counts resulted from the execution of search warrants on the termination of the police operation on 15 October 2007 (counts 11, 12 and 13).

[15] The appellants were convicted of the firearms offences except those relating to the November 2006, April 2007 and August 2007 camps. All four were found not guilty of possession of Molotov cocktails in August 2007 and Mr Signer was found not guilty of the possession of firearms in relation to the June 2007 camp, at which point he was out of the country.

[16] The evidence at trial comprised video (DVD) footage, still photographs, material recovered from the searches (for example, empty shells found at the location of a camp), and text and other chatroom message exchanges involving the appellants. In addition there were some eyewitnesses. For example, there was evidence given by two young men who were made to participate in a simulated ambush at the January camp,[13] and evidence of the sounds of gunshots at the January, June and October camps.

[17] None of the appellants gave evidence at trial. Mr Iti and Mr Signer did call evidence, however. We will refer to that evidence in more detail later in this judgment. At this point, it is sufficient to note that a theme of the defence was that

---

[13] The names of these two eyewitnesses remain suppressed.

the Crown could not establish that the appellants' activities were directed at any unlawful purpose. In addition, the defence offered some legitimate objectives, such as training people to undertake security protection work.

[18] Much of the Crown evidence was not disputed, although some aspects were challenged. For example, Mr Iti challenged some of the evidence identifying him at various locations. However, it is common ground that the primary focus at trial was on what could be drawn from the evidence. Rodney Hansen J summarised this point when he suggested to the jury that it may consider the "key underlying question" in the trial was what did this all mean, "where was it all leading, what was the end game?"[14] Expanding on this central question, the Judge posed these questions:

> [24] ... Were [the camps] directed, as the Crown suggests, to training some sort of militia to commit crimes of violence if peaceful negotiations failed to bring results? Or were they to provide training in bush-craft or to enable participants to gain skills for employment in New Zealand or overseas in the security industry? Or is there another explanation?

[19] To anticipate the discussion that follows, we note that the first possible purpose identified in this excerpt from the summing up, that is, training a militia to commit crimes of violence, came to be known as "Plan B". The peaceful negotiations process to resolve Tuhoe's grievances with the Crown was referred to as "Plan A".

[20] It is also helpful at this point to record that it is generally agreed that the pattern of acquittals and guilty verdicts is explicable by the presence or absence of relevant DVD footage and surveillance photographs. In other words, as Mr Burns for the Crown put it, the jury has relied on the "evidence before their eyes". Acquittals have resulted where that type of evidence was absent. This approach is apparent from the following, very brief, analysis of the evidence.

[21] Count 2 resulted in not guilty verdicts for all appellants and related to a camp on 16–19 November 2006. In relation to this camp, there was evidence from a police officer who followed Mr Kemara on 17 November from Auckland to Taneatua. There was also a photograph of Mr Iti's vehicle travelling along a nearby

---

[14] Summing up at [24] and [23].

road at the time. Another witness gave evidence of hearing volleys of shots and military-style commands by a male voice on 18 November. There were also some text messages of Messrs Iti, Kemara and Signer. However, the only photographic evidence of the camp showed the location with no activity recorded. There was no DVD footage.

[22] Count 3, which resulted in guilty verdicts, related to a camp on 10–14 January 2007. Surveillance photographs showed Mr Kemara and Mr Signer travelling to the area. The evidence on this count also included DVD footage of the group moving through the Paekoa Track with firearms. There was evidence from two young men who attended the camp about what occurred there and about the presence of firearms at the camp. In addition, there were still photographs of Mr Iti's vehicle parked on the track and of Mr Iti and Ms Bailey at the back of the vehicle.

[24] Count 4, resulting in not guilty verdicts, related to 26–29 April 2007. There was evidence of Mr Kemara and two others travelling to the area and some text messages from Mr Iti and Mr Kemara. The photographic evidence was limited to a photo of Mr Iti's vehicle travelling along a nearby road.

[25] Count 5 related to a camp over the period 21–25 June 2007. Mr Iti, Mr Kemara and Ms Bailey were found guilty on this count of possession of firearms. Mr Signer, who it was accepted was out of the country at the time, was acquitted. The three appellants convicted on this count were all identified as present at the camp at which firearms were present. Mr Kemara was seen holding a weapon. DVD footage showed the group moving along a track in the area around Rangitihi hill.

[26] The appellants were all acquitted on counts 6 and 7. These two counts related to the 16–19 August 2007 camp. There was some photographic evidence of the appellants travelling towards the area and some evidence of the remains of Molotov cocktails in the area the camp took place (count 7). However, there was no DVD footage of the camp itself that identified the appellants actually at the camp.

[27] Counts 8 and 9 relate to the 13–16 September 2007 camp at Whetu Road. All of the appellants were identified as being present at this camp in the DVD footage. For example, Mr Iti was seen carrying a firearm and giving it to someone else. He was also identified observing people using Molotov cocktails (count 9). Mr Signer was seen passing a Molotov cocktail to another person. Ms Bailey was seen holding a firearm. All of the appellants were found guilty of these charges of unlawful possession of a firearm and of a restricted weapon.

[28] Count 10 relates to a camp over 11–14 October 2007. All of the appellants were found guilty in respect of this count of unlawful possession of firearms. There is DVD footage of this camp. Mr Iti can be seen on the footage and he is identified swapping firearms with another person. Mr Kemara is seen at the start of the footage. He, Mr Signer and Ms Bailey were seen in photographs travelling to and from the camp. There was also other forensic evidence confirming Mr Signer and Ms Bailey's presence at the camp.

[29] The remaining counts (11, 12 and 13) for which there were guilty verdicts, reflected actual possession of the weapons. The evidence was of firearms found at the appellants' places of occupation.

The conviction appeals

[30] We deal first with the effect of pre-trial publicity. We then discuss the issues arising from the treatment of party liability and other aspects of the Judge's directions. Finally, we discuss the challenge relating to the appropriateness of the s 98A charge.

The effect of pre-trial publicity

[31] The essential proposition for the appellants is that the extent and nature of the pre-trial publicity about the case meant they could not have a fair trial and has resulted in a substantial miscarriage of justice. The levels of publicity over the relevant period (up to the end of 2007) and the prejudicial nature of some of the

publicity is such that the appellants say this is a case where directions by the trial Judge could not adequately deal with the issue.

[32] While this is not, in a formal sense, an appeal against Winkelmann J's judgment dismissing the appellants' application for a stay on account of prejudicial pre-trial publicity, her reasoning featured in the submissions of the parties. Further, the parties agreed that we should have regard to the evidence placed before her, in particular evidence from Professor Neil Vidmar.

The factual narrative

[33] The key events are discussed by Winkelmann J[15] and also by the High Court in its decision dismissing the application by the Solicitor-General that the publisher of *The Dominion Post* and others be held in contempt.[16] The latter decision, as we shall discuss, related to some of the pre-trial publicity now complained about.

[34] For these purposes, the first key event was the termination of the police operation on 15 October 2007. As Winkelmann J noted, from about midday on that day there were television and radio reports of police searches and arrests undertaken as part of the termination of the operation. The Judge referred to "extensive" coverage throughout the day.[17] Police officers were shown carrying weapons and wearing concealing black clothing, which the then applicants described as "ninja" in style. There was footage of a press conference convened by the Police Commissioner, which was relayed throughout the day. The Commissioner explained that the warrants were executed to search for evidence relating to offences under the Arms Act and under the Terrorism Suppression Act 2002.

[35] As Winkelmann J observed, the next key event in this chronology was the Solicitor-General's refusal on 8 November 2007 to consent to terrorism charges being brought. That decision was announced at a press conference in the course of which the Solicitor-General emphasised that the Terrorism Suppression Act set a

---

15 The stay judgment at [5]–[32]. Mr Stevenson also provided a schedule of references to the media reports.

16 *Solicitor-General v Fairfax New Zealand Ltd* HC Wellington CIV-2008-485-705, 10 October 2008. See [36]–[37] below for details of this proceeding.

17 The stay judgment at [11].

very high standard and that the police had acted correctly in bringing the material to him for decision. The Solicitor-General added that the police had put an end to some very "disturbing activities".

[36] The effect of s 312N of the Crimes Act was that all communications obtained pursuant to the interception warrants became inadmissible after the Solicitor-General refused to consent to the bringing of terrorism charges. This evidence was accordingly inadmissible as evidence in relation to the Arms Act and Crimes Act charges ultimately faced by the appellants. This fact is relevant to the next significant event, that is, the publication on 14 November 2007 by *The Dominion Post* newspaper of a feature article on the front page headed, "The Terrorism Files". The newspaper article quoted extensively from an affidavit prepared by Detective Sergeant Pascoe in support of the application for search warrants (the Pascoe affidavit). This included verbatim extracts from the intercepted communications.[18] Accordingly, there was publication of material that would be inadmissible against the appellants. This, in turn, led to ongoing media coverage. Winkelmann J noted that on 27 November some media began reporting that the entire Pascoe affidavit was available online, which it was, on several sites at the time.[19]

[37] The next step in this narrative is that the Solicitor-General applied for orders that Fairfax New Zealand Ltd, the publisher of *The Dominion Post*, and others be held in contempt of court. The application was made on the basis that the articles created a risk of interference with the due administration of justice. The Solicitor-General's application, as we have noted, was unsuccessful.

[38] The depositions hearing in early September 2007 also created media interest and activity. There was further media coverage of the laying of charges against the appellants under s 98A of the Crimes Act in late 2008 and of the transfer of the proceedings to the High Court in March 2009.

---

[18] The information in the article was republished in substantially similar form on the Stuff website and in other Fairfax newspapers.

[19] The Judge found there was no evidence of any improper disclosure of the affidavit by the police or any officer of the state or by any of the defendants or their counsel.

[39] Winkelmann J noted two features of the pre-trial publicity that were pervasive of each step in this chronology. The first was the linking of the events to Tuhoe generally and to Mr Iti in particular. For example, coverage of the arrests suggested that one thing the defendants had in common was an invitation to a "freedom fighters party" for the Tuhoe nation. The second aspect of the publicity referred to was the presence on the internet of sites containing opinions relating to the events. Winkelmann J noted that just about any viewpoint could be found set out on blog sites. Some of these expressed extreme, even racist, sentiments while at the other extreme were "conspiracy" anti-government views.

The approach in the High Court

[40] Having considered the comprehensive evidence about the media coverage, the Judge said there were four problematic aspects of the publicity:[20]

> a) The frequent use of language identified by Professor [Jane] Kelsey [a law professor who gave evidence for the applicants] – terrorist, terrorism, para-military, guerrilla and associated dramatic imagery.
>
> b) Exaggerated claims as to what police had discovered, and in particular in relation to testing of "napalm bombs".
>
> c) Extensive reporting that there is evidence that the public, and by necessary implication, the jury, will never get to see.
>
> d) Some disclosure of that evidence.

[41] The Judge did not consider that either of the first two of these features, whilst problematic, was likely to adversely affect the prospects of a fair trial. Essentially that was because the language used was merely consistent with the Crown case. Further, as to the imagery identified by Professor Kelsey,[21] the Judge took the view that even if it was the case that images are kept in the memory longer than text or spoken words, the images identified were consistent with the reporting of the events. In other words, they were not sensationalised or exaggerated. For example, images of police in "ninja" gear, whilst attention grabbing, are not unique. Similar images are commonly associated with any action taken by the Armed Offenders Squad.

---

[20] The stay judgment at [53].

[21] Such as armed police in "ninja" clothing, and a helicopter flying over the Ureweras.

[42] As to the inaccurate reporting, the Judge took the view that counsel could reach agreement as to how this was to be addressed.

[43] The stay applicants relied on expert evidence from Professor Vidmar, a professor of law and psychology at two American universities. The Judge did not accept Professor Vidmar's opinion that the initial intense media coverage would have caused prejudice in the minds of the jury pool. That was because the reporting from the outset was "remarkably balanced".[22] Nor did the coverage assume guilt. Any abusive comment was not on the mainstream media sites. Further, the Judge considered that Professor Vidmar had a "tendency to equate the likely impact of the nature of the events as they unfolded, with prejudicial reporting".[23] Winkelmann J also considered that Professor Vidmar's evaluation of the coverage may have been coloured by the interests of the applicants for a stay. The Judge gave some illustrations of this, which whilst not significant on their own, together suggested a partisan analysis of the information provided.[24]

[44] Winkelmann J considered that the other two aspects of the media coverage (extensive reporting of inadmissible evidence and the associated disclosure of some of that evidence) were more problematic. The Judge said this:

> [63] [T]he media coverage of the fact that there is evidence which the public, and again by implication the jury, will never get to see, has been extensive. There has also been media coverage which suggests the material reveals "disturbing activities". That issue was such a feature of the media coverage, that I proceed on the basis that the jury pool is likely to have been exposed to that information, and to recall it at the time of trial.

[45] The Judge also considered it was possible that in this case the jury pool had had access to some of the inadmissible evidence. However, the Judge noted that it is not infrequent for jurors to know that there is evidence they may not weigh against an accused because it is inadmissible. Winkelmann J continued:

> [65] Everyone comes to a jury trial with prejudices. Jurors are directed to put those prejudices to one side. A preliminary view particular to the charges may be more problematic, but I have no doubt that the reality of the trial

---

22 Stay judgment at [57].
23 Stay judgment at [60].
24 Stay judgment at [62].

> process, the oath that they take as jurors, and judicial direction will be sufficient in this case to address the issue.

[46] The Judge took some comfort in the fact that a considerable period of time had elapsed since the disclosure of the contents of the affidavit. The fact that this was a multi-accused trial with different cases against each applicant was also seen as relevant. Winkelmann J was satisfied that feelings of prejudice without a factual foundation that could be recalled would be displaced by the discipline of the trial process, particularly in a trial scheduled to take 12 weeks.

[47] Winkelmann J also noted in this respect that in terms of the Fairfax publication, the impact of that disclosure had been quickly absorbed into the "existing fabric of the debate".[25] Other risks such as those arising from internet research could also be dealt with by direction.

[48] At that point in time, the Judge had been unable to find the Pascoe affidavit online, the link identified to her no longer existing.

[49] The Judge concluded that a fair trial was achievable if appropriate steps were taken in empanelling the jury and with appropriate judicial directions.

Our evaluation

[50] For a number of reasons, we do not consider that the effect of the pre-trial publicity was such as to give rise to a risk of an unfair trial. Winkelmann J has correctly identified the relevant principles. Her Honour referred to a number of the authorities, including *R v Harawira* in which this Court said the question of whether a fair trial was possible was to be judged:[26]

> … in relation to New Zealand circumstances and experience, bearing in mind that the trial Judge will direct the jury to put aside emotion and prejudice, to ignore anything they may have previously heard, and to decide the case solely on the evidence … .

We agree with the analysis adopted by Winkelmann J in applying these principles to

---

[25] Stay judgment at [68].

[26] *R v Harawira* [1989] 2 NZLR 714 (CA) at 729.

the facts as she found them. In terms of those facts, we now have evidence that the Pascoe affidavit was still available on line at the beginning of February 2012.[27] That fact does not in our view alter the approach to be taken.

[51] We emphasise that there was a significant lapse in time between the bulk of the publicity in issue and the trial. The focus, as Mr Stevenson (who argued this part of the appeal) accepted, was on the publicity prior to the end of 2007. This in the context of a trial that began in February 2012.

[52] The High Court in *Solicitor-General v W & H Specialist Publications Ltd* observed that whether there was a real risk of prejudice depended upon all the circumstances.[28] The Court said that the "most important" circumstances were "the impact of the publication and the timing in relation to trial".[29] Further, it was said:

> [30] … Dissipation of effect (and therefore the reality of risk) is a factor of both timing and impact. For that reason, it is not possible to develop a rule of thumb that the distance of a fixed period from publication will prevent the risk of prejudice remaining real. The assessment of real risk is inevitably a judgment which is specific to the facts of each case.

The publication in that case (favourable to the defendant) took place in late October 2001 and early November 2001 not long before the scheduled retrial in December 2001. The retrial was adjourned for four months.

[53] Professor Vidmar's evidence is that the time delay in the present case made no difference to the prejudice in the sense of recollection of factual material given the unique, unusual and emotive issues involved. We accept, as did Winkelmann J, that the jurors were likely to have been exposed to the information in the media and on the internet and to recall it at the time of trial. But in our view the fact that some or all jurors may have had some knowledge does not mean that it was not possible to obtain a fair trial.

[54] The High Court in the contempt proceedings against Fairfax concluded that the Solicitor-General in 2008 had not shown a real risk of interference with the

---

27 We formally grant leave to admit the affidavit of Mauriana Du-ce' Brown on this topic.
28 *Solicitor-General v W & H Specialist Publications Ltd* [2003] 3 NZLR 12 (HC) at [30].
29 At [30].

administration of justice.[30] That outcome may be seen as a fortunate one for Fairfax given that all that needed to be proved was a real risk of interference. However, even if it had been found that Fairfax's actions amounted to a contempt, that would not necessarily have meant that there was no ability to have a fair trial. These matters have to be considered in light of the other factors we now discuss.

[55] First, as anticipated by Winkelmann J in the stay judgment, the trial Judge, Rodney Hansen J, undertook a special process in empanelling the jury. Before the jury was empanelled, we understand they were told of the subject matter of the trial and directed to advise the Judge if as a result of what they had read or heard or opinions they had formed, they doubted their ability to try the case fairly on the evidence. We accept that not all potential jurors may have recognised what may well be unconscious prejudice. However, significant numbers did. We were told that about 60 persons sought to be, and were, excused. Even after the panel was selected and had retired, we understand that at least one more came forward and withdrew. In this and in the other matters we now discuss, we have the benefit of assessing the matter post rather than pre-trial.

[56] The second point we note is that the trial Judge's directions on the issue of publicity and how the jurors were to respond to it were very firm and were repeated.

[57] In his opening remarks to the jury at the start of the trial, the Judge described the topic of publicity outside of the courtroom as one of "critical importance". The Judge asked the jury to pay particular attention to this part. Rodney Hansen J reminded the jury that when he spoke to the panel before the process of empanelling began he had talked about the amount of publicity there had been about the case. He reassured them about their own privacy. The concern, he said, was the amount of information that had already been and would continue to be generated in the media about the trial. The Judge emphasised that the jury members had sworn to come to their verdict solely on the evidence before them. Rodney Hansen J then said this:

> [23] … This is absolutely fundamental to our criminal justice system. Fairness to the Crown and to the accused requires that an accused person is tried solely on the basis of evidence given in open Court which they have the

[30] *Solicitor-General v Fairfax New Zealand Ltd*, above n 16.

> opportunity to challenge and to test. Anything else that has come to your notice or that comes to your notice in the course of the trial should be put out of your mind and should play no part in your deliberations. Quite apart from anything else, the information may not be accurate. It certainly will be incomplete. The only information, the only evidence that you can rely on is what you hear in the course of the trial. There will, of course, be newspaper reports, radio reports and television broadcasts which will refer to the proceedings which you are part of. They may well be accurate but they will not be complete and they are no substitute for the real thing. I would advise you to ignore any of those reports, certainly to the extent that they are inconsistent with anything that you hear. You have got the best seats in the house. You don't need any other information in order to decide this case and you should not be tempted to expose yourself anymore than necessary to anything extraneous … .

[58] That latter remark led the Judge then to deal with access to the internet. The Judge observed that there would be on the internet many news items, blogs and so on on the topic of the charges. He noted that the charges had had a long and somewhat controversial history. Rodney Hansen J then stated:

> [24] … You might be tempted to go to the internet and see what has been said. That is not permitted. You are prohibited from doing that. You must not attempt to access the internet on any matter relating to this hearing at any time in the course of the trial. That is a direction which I give to you. It is not simply advice, it is a direction, which has the force of law.

[59] The Judge dealt also with the limits on the jury talking to anyone other than other jurors about the case.

[60] The Judge then drew the various threads together. Rodney Hansen J noted that there had been a lot of interest in the case and a lot of talk about it but that this should not and need not affect the way the jury approached its task. The jury was again directed to put anything it had heard or read about the case out of its mind and to start with a clean slate. The Judge continued:

> [28] … Write on that slate only what you have heard about in this Court. If you have any prior views, impressions, preconceptions, put them to one side. Keep an open mind. …

[61] These directions were repeated in the Judge's summing up. We do not need to spell out the detail of those directions other than to note the Judge again emphasised the fundamental nature of the need to decide the case on the evidence. Rodney Hansen J concluded:

> [6] So you must put out of your mind any other information, however it might have come to your notice. As I said to you right at the very beginning, you have had the best seats in the house. You have had the benefit of hearing firsthand all that is necessary for you to come to fully-informed verdicts.

[62] We agree with Winkelmann J on the effect of such directions.[31] Her Honour stated:[32]

> [67] Trial judges regularly express confidence in the efficacy of judicial directions. These are not expressions of wishful thinking, but reflect a common experience of the trial judge that juries do follow judicial directions. Judges are able to measure the efficacy of judicial direction in the verdicts delivered by juries who, by their verdicts, show that they have understood and followed directions, including those as to prejudice and the proper use of evidence.

[63] There is nothing to suggest the directions have not been followed. Indeed, the verdicts suggest the jury did approach the task in an analytical way as instructed.

[64] Finally, our position is also consistent with that advanced in the context of the appellants' appeal against Winkelmann J's decision to proceed by way of trial by judge alone.[33] The decision to proceed by trial by judge alone was made after the stay application was declined. However, the effect of pre-trial publicity was not perceived by the current appellants to be a problem when they sought trial by jury.

The treatment of party liability and other aspects of the directions

[65] This part of the conviction appeal relating to party liability raises issues about the interaction between s 66 of the Crimes Act, the parties provision, and s 45 of the Arms Act. Section 66 provides that every one is a party to an offence who:

> (1) …
>
> (a) actually commits the offence; or
>
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or

---

31 This Court in *Weatherston v R* [2011] NZCA 276 at [24] noted that the criminal system proceeds on the assumption such directions are "faithfully followed" by juries, albeit some cases may raise such significant concerns that the Court is uneasy to deal with them by direction.

32 Stay judgment.

33 *R v Iti* HC Auckland CRI-2000-085-7842, 9 December 2010.

(c) abets any person in the commission of the offence; or

(d) incites, counsels, or procures any person to commit the offence.

(2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.

[66] Section 45(1) of the Arms Act states that every person commits an offence who, "except for some lawful, proper, and sufficient purpose" is in possession of any firearm or restricted weapon. Section 45(2) of the Arms Act provides that in any prosecution for an offence against s 45(1) in which it is proved that the defendant was carrying or in possession of any firearm, "the burden of proving the existence of some lawful, proper, and sufficient purpose shall lie on the defendant".

[67] We note that the indictment made no reference to s 66 of the Crimes Act. In the appellants' written submissions, it was suggested there was inadequate notification of the extent to which the Crown intended to rely on s 66(1) and/or s 66(2). This was not a matter pressed in oral argument. That is not surprising given it was quite plain from the various interlocutory proceedings and from information provided by the Crown to the defence, as early as August 2010, exactly what the Crown case was in this regard.

[68] To put the discussion of these issues in context, we first need to explain the Crown approach.

The extent to which the Crown case relied on liability as a party

[69] As the Judge said in summing up, the Crown advanced three potential ways in which the jury could find an appellant to be in possession of a firearm or Molotov cocktail.

[70] The first option was actual physical possession. This option was illustrated by the video of a camp that showed Mr Iti handing over a gun to another person. The Judge explained that if the jury was to find "more generally" that the group

shared possession of a firearm or firearms then "provided individual members knowingly had that custody and control and intended to exercise it, then he or she would be in actual possession of the firearm".[34]

[71] The second option was that an individual did not have actual physical control but he or she provided assistance or encouragement to someone else to have possession. In other words, the Crown relied on s 66(1) of the Crimes Act. It was sufficient, on this analysis, if at a particular camp the defendant provided assistance or encouragement to someone else to have possession. The third potential basis relied on by the Crown was a shared intention to assist in prosecuting an unlawful purpose, that is, undertaking training camps to prepare participants to commit serious violent offences. The Crown relied in this respect on s 66(2).

[72] The various approaches are apparent from the Judge's question trail provided to the jury. We set out as an example in the appendix excerpts from the questions relating to count 2 (the November 2006 camp). For present purposes, we note that the jury was directed that if they found the Crown had proved beyond reasonable doubt that the defendant had custody or control of one or more firearms, knew of the existence of the firearms and intended to exercise either custody or control over the firearms then the jury had to consider whether the defendant had shown that it was more likely than not that he or she had a lawful, proper and sufficient purpose for possessing the firearms.

[73] If the jury answered "no" to any of these matters, then the jury was asked to consider whether the Crown had proved beyond reasonable doubt that the defendant had encouraged or assisted others to possess a firearm in the manner described in the first question (that is having custody or control, knowing of the existence of the firearms and intending to exercise either custody or control). Again, if the answer to this question was "yes" then the jury had to consider whether the defendant had shown a lawful purpose.

[74] Finally, if the question relating to encouragement or assistance was answered "no", then the jury had to consider whether it was satisfied that the defendant:

---

[34] At [46].

[5] [a] In common with others, intended to prosecute an unlawful purpose. …

[b] Intended to assist those others to prosecute that unlawful purpose. …

[c] Knew that the unlawful possession of firearm(s) in the manner described … above was a probable consequence of the prosecution of the common purpose.

[75] The unlawful purpose referred to in [5][a] above was described as "to undertake military-style training camps in order to prepare the participants to commit serious violent offences".

[76] The jury was told that if the answer to questions [5][a], [b], and [c] was "yes" then it was to answer the question relating to lawful purpose. However, if the answer to any or all of these questions was "no" then the jury was to find the defendants not guilty.

The applicability of the reverse onus

[77] In reliance on *R v Samuels* and *R v Hill*, the appellants say the reverse onus in s 45(2) of the Arms Act does not apply to a party.[35] The Judge accordingly should have directed the jury that if they found an appellant was acting as a party, then the Crown had to prove that the purpose was not a lawful purpose.

[78] The appellant in *Samuels* was charged, on an alternative basis, with aiding and abetting possession of the controlled drug, cannabis by his co-accused Mr Kaio for the purpose of sale or supply. On the charge of possession of cannabis for supply, proof that the principal party was in possession of a specified quantity of cannabis raised the statutory presumption of possession for a prohibited purpose.[36] The principal party was then deemed to be in possession for the purpose of supply unless the contrary was proved.

[79] This Court said that the essence of aiding and abetting was intentional help. It followed that in order to prove Mr Samuels was aiding and abetting possession for

---

35 *R v Samuels* [1985] 1 NZLR 350 (CA) and *R v Hill* [2004] 2 NZLR 145 (CA).

36 Misuse of Drugs Act 1975, s 6(6).

supply, the prosecution had to establish Mr Samuels' guilt without the aid of the presumption in favour of supply. Cooke P, delivering the judgment of the Court, said that a statutory provision shifting the onus relating to mens rea for a serious offence such as this was "obviously not one to be construed at all loosely".[37] Accordingly, the Crown still had to prove that Mr Samuels as the alleged accessory had the mens rea ordinarily required before it could make him a party to the offence. Therefore, the Crown had to satisfy the jury without the aid of the presumption that Mr Samuels knew that Mr Kaio had the cannabis and that he intended to help Mr Kaio to have possession of it for sale or supply.

[80] The *Samuels* approach was applied in *Hill* to a secondary party charged with aiding an adjudged bankrupt as a principal party to commit offences against the Insolvency Act 1967.[38]

[81] This Court in *Hill* noted that in the case of the principal (Mr Hill) the Crown had to prove the first two elements of the offences (falsification of any book or document relating to the bankrupt's affairs within the two-year period before presentation of the bankruptcy petition) beyond reasonable doubt. Proof of the third element (intention to conceal the state of a bankrupt's affairs or to defeat the law) was presumed unless it was proved on the balance of probabilities that the bankrupt had no intent to defraud. The Court said that Parliament could not have intended:

> [89] ... to place upon Ms Turton as an alleged accessory, the burden of proving Mr Hill's state of mind at the time the documents were falsified. The burden of proving the state of another's mind at any particular time is considerable, particularly bearing in mind that the act or acts in question could have occurred up to two years prior to the presentation of the petition at a time when financial difficulties in the bankrupt's affairs may not have been evident.

[82] We accept the submission for the Crown that *Samuels* and *Hill* do not apply here. The matters dealt with in s 45(2) of the Arms Act are not an element of the offence but, rather, a matter of excuse.

---

[37] At 356.

[38] Insolvency Act 1967, s 126(1)(f) and (g). Under that section, an adjudged bankrupt commits a crime who, after presentation of a bankruptcy petition or within two years next before such a presentation, "conceals … any book or document affecting or relating to" his or her property unless it is proved he or she had no intent to conceal the state of their affairs (subs (f)); or after the presentation or within two years next conceals any property to the specified value or conceals any debt, unless it is proved there was no intent to defraud (subs (g)).

[83] Even if *Samuels* and *Hill* were applicable, we are satisfied that the failure to direct in accordance with the principle in those cases has not led to a miscarriage. If the appellants were in possession or knowingly encouraged or aided others of the group to be in possession in the context of this case, knowledge of an unlawful purpose cannot be denied. Once the jury was satisfied the appellants were in possession of the firearms or Molotov cocktails, on the facts of this case, they had to know the purpose. The fairness concerns underlying the approach in *Samuels* and *Hill* are not raised on the facts of this case.

Sufficient immediacy?

[84] The appellants say that the jury should have been directed that any unlawful purpose under the Arms Act had to have immediacy. By contrast, the "Plan B" advanced by the Crown was too inchoate to comprise an unlawful purpose under the Act.[39]

[85] Mr Burns' response is that on the basis on which the Crown case was put the appellants were training at the very time in issue to act in a violent way. The Crown accepted, as Mr Burns said in closing, that it could not say the appellants "were intending to blow up the houses of Parliament or tear down a war memorial somewhere". However, that did not mean they were not preparing for, to use Mr Iti's words, "war if we have to". It was not just a case of being prepared to resort to Plan B if Plan A did not work; they were preparing to implement the plan, and "doing that by way of the training camps".

[86] Mr Burns accepts the Judge encapsulated the Crown case accurately when the Judge said in summing up:

> [56] … the accused cannot show that there was a lawful, proper and sufficient purpose because they were undertaking these training camps with the ultimate objective of committing, if need be, crimes of violence.[40]

---

[39] Counsel raised this matter with the Judge at the conclusion of the summing up. The Judge recalled the jury and gave a further direction which referred to the fact peaceful negotiations had been pursued since 2005. He said that the violent objective advanced by the Crown in its case could exist even if planning was contingent on a failure of negotiations.

[40] As we have noted, that approach was reflected in the question trail in which the unlawful purpose was described as to "undertake military-style training camps in order to prepare the participants to commit serious violent offences".

[87] It is possible a purpose may be so remote from the activity that it does not comprise an unlawful purpose in this context. However, on the evidence it was open to the jury to be satisfied the appellants had a purpose of, essentially, using violence to achieve their goal. The fact that violence might not actually occur until a later date was not significant. It was open to the jury to reach the conclusion it did on the basis the appellants were engaging in military-style exercises, rather than negotiating a Treaty claim.

Did the Judge need to direct the jury about the options if they rejected the common purpose?

[88] The appellants argue that the directions in summing up were insufficient because the jury was given no guidance as to the analysis to be adopted if the jury rejected the Crown case that the appellants' common purpose was to undertake military-style training camps to prepare the participants to commit serious violence. Underlying this submission is the proposition that the inability to reach a verdict on the s 98A charge suggests it is likely the jury did not accept this purpose. As a result, Mr Fairbrother suggested the jury was left to "wander between the realms of remote purpose and acts of possession". A related submission is that the Judge should have canvassed in summing up the evidence concerning all of the possible scenarios.

[89] It would have been preferable for the Judge to tell the jury that if it rejected the Crown case as to a common purpose, that decision had implications in terms of the ability to rely on s 66(2). However, the question trail nonetheless made plain all of the elements on which the jury had to be satisfied so it was at least implicit that if there was no common purpose, s 66(2) was unavailable. (The question trail was discussed with counsel prior to its distribution to the jury.)

[90] We are satisfied, in any event, that any omission has not given rise to a miscarriage. A fair inference is that there has been no reliance on s 66(2). We say that because of the explanation for the pattern of verdicts, which we have already discussed. That inference is also consistent with what we do know about the jury's approach. We refer here to the jury's question, after deliberating for about three and a half days, about the order in which they could deliberate on the various counts.

Rodney Hansen J told them they could deal with the counts in any order they liked. His Honour continued:

> … if it were to be the case that you had been focusing on count 1 and hadn't, at this stage, concerned yourself with the other counts …, you are perfectly at liberty to set count 1 to one side and work through the remaining counts … in any order that you wish. …

Did the Judge need to direct the jury as to all possible scenarios?

[91] We turn then to the complaint that the Judge should have traversed the evidence relevant to all of the possible scenarios. It is not suggested that any of the defence cases have not been properly put. Rather, the argument is that the jury needed more help.

[92] We do not see any merit in this submission. It would require the Judge going beyond what has been seen to be sufficient in terms of traversing factual issues in New Zealand.[41] The reality was that although there was a great deal of evidence, a lot of it was very similar with the only difference being the dates of the camps to which it related. Further, the Crown relied in large part on evidence about all of the camps to prove its case about their nature. What the appellants would require in this case would amount to a considerable burden of further factual material being imposed on the jury who, after all, had the benefit of the transcript of the oral evidence as well as helpful booklets of materials from counsel for the Crown and for the defence.

[93] We do not agree that any further analysis of the evidence was necessary or appropriate.

The directions on lawful purpose

[94] The appellants say the Judge in his directions on what comprised a lawful purpose should have told the jury to consider this in light of the different world in which the appellants were operating. In particular, Mr Fairbrother argued the jury

---

[41] See, for example, the discussion of the various authorities in Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [Ch5.18.01(5)(a)].

should have been directed as follows: that to assess the lawfulness they had to look at the environment; the fact that the exercises were organised; uninvolved members of the public were excluded; there was an element of discipline; there was no evidence of others being upset by it; and that there was evidence from Tamati Kruger that exercising with firearms was not particularly unusual, nor would he expect all of the appellants to have firearms licences.

[95] We do not agree. First, the Judge's directions as to what comprises a lawful purpose were legally correct. As Rodney Hansen J said, a lawful purpose has to be one that is not criminal. Further, the Judge gave an illustration of what would be a lawful purpose (shooting rabbits). Finally, the Judge referred also to the matters referred to by the defence in their submissions. The complaint is that these directions should have been supplemented.

[96] Secondly, we note that the directions were sufficiently broad to encompass the concept of a different world. Rodney Hansen J said:

> [56] ... A proper purpose is one that is lawful and appropriate and the purpose will be sufficient if, having regard to all the circumstances, the accused was in possession of the firearms for a lawful and proper purpose. [The example given was of shooting rabbits.] But the Crown case here is that the accused cannot show that there was a lawful, proper and sufficient purpose because they were undertaking these training camps with the ultimate objective of committing, if need be, crimes of violence. And if you accept that – and this really takes me back to this overarching issue that we talked about right at the beginning – if you accept the Crown's interpretation of events, then quite plainly the accused would be unable to persuade you, on the balance of probabilities, that they had a lawful or sufficient purpose.
>
> [57] On the other hand, if you were to accept that these firearms were simply there in order to provide skills to people in bushcraft or some such thing or to acquire employment skills to enable them to obtain work in New Zealand or overseas, you might take a very different view. You may well regard that as a lawful, proper and sufficient purpose. …

[97] Thirdly, the part of the Judge's summing up relating to the defence evidence also drew attention to the importance of context. Rodney Hansen J said this:

> [99] First of all, the evidence that you heard from the witnesses called by Mr Iti places the activities, which are the focus of the charges, into the unique, historical, cultural, political and perhaps geographical context in which they occurred. Such a broad context is rarely relevant in criminal charges. It is, however, relevant in this case because, among the key

> questions that you are being asked to decide is whether the accused acted for an unlawful or criminal purpose. The defence says, and the Crown accepts, that that is a question that cannot be answered without an understanding of the history, aspirations and customs of Tuhoe. So you will need to factor into your deliberations your knowledge of the burning sense of injustice harboured by Tuhoe for past wrongs, the fact that those grievances were belatedly acknowledged by the Crown in 2005, the progress that has since been made to redressing those grievances by peaceful means and, of course, the values, aspirations and the way of life which form the backdrop to the events that we have been scrutinising. That, in summary, is context but it is, I am sure you will agree, very important context.

[98] Finally, the defence evidence that the appellants say supports the submission a further direction was required, is not particularly strong. Mr Fairbrother, in opening prior to calling evidence for Mr Iti, told the jury that if a person was in Ruatoria, Ruatoki or the Ureweras, and was carrying a gun "no one will blink". That is because it is a life among the mountains "and shooting wildlife is part of the way you live". Mr Fairbrother contrasted that reaction to the likely reaction to someone walking down Queen Street in Auckland carrying a gun. However, the evidence as called was less dramatic.

[99] The high point of the defence evidence on this aspect came from Tamati Kruger. Mr Kruger is the chief Tuhoe negotiator in Tuhoe's Waitangi Tribunal claims. In evidence-in-chief, Mr Kruger said he would not be surprised to find people in Ruatoki carrying guns. Nor would it surprise him, he said, if Mr Iti had a firearm and if half, if not more than half, of those Tuhoe owning firearms did not have licences. However, when asked whether he would be alarmed to see someone walking down the road in Ruatoki with a firearm, he qualified his reply in this way:

> I think, I think given the circumstances of, if I knew that person, knew of that person and if I immediately recognised that person as someone who hunted and visited Te Urewera bush, I would not be, I would not be alarmed, mhm.

[100] Further, Mr Kruger said those in the community in Taneatua and Ruatoki "largely" knew of Mr Iti's training exercises in Whetu Road and areas such as the Paekoa Track. He said while some may have disagreed with it, these activities did not generate any fear and indeed, some were supportive of them. However, that

evidence has to be viewed in the context of Mr Kruger's evidence of his understanding of the nature of the activities, namely:

> … that there was training going on, that it was a combination of bush crafts, bush survival, um, living in that kind of terrain, that there was firearm training, licensing, I think it was, as I understand it. There were people interested in being taught how to handle firearms and others were interested in getting firearms licences. There [were] also others there that were interested in security type jobs and that was part of what they were doing as well.

[101] This part of the evidence goes to the issue that was clearly put before the jury, that is, what was the nature of the activities being undertaken? There is no doubt from the record that this issue was fully canvassed and the jury would have had no doubt about what they needed to decide.

[102] Mr Kruger accepted in cross-examination that the Tuhoe plan was for peaceful justice. He said he did not know Molotov cocktail training was one of the things Mr Iti was teaching at the camps and that training with Molotov cocktails would be unacceptable for Tuhoe. Finally, Mr Kruger accepted that military patrols are "necessarily about violence" and if someone was conducting such activities without his knowledge, that would not be something Tuhoe would embrace.

[103] The other defence evidence did not advance this point particularly. The other relevant defence witnesses were Dr Paul McHugh, Rau Hunt and Professor David Williams. Dr McHugh's area of expertise is the history of the British Crown's relations with indigenous peoples. His focus was on New Zealand's constitutional arrangements, changes to them and Tuhoe's aspirations in that regard.

[104] Rau Hunt is a security consultant who conducted training at one of the camps. He talked about the convoy training in one of the camps as seen in DVD footage.

[105] Finally, Professor David Williams, a law professor, discussed the Treaty settlement process. He mentioned the experience of some students from Tanzania who, despite their country having obtained independence, continued to use the language of "resistance struggle" and of "overthrowing British oppression".

[106] When these matters are taken into account, we do not consider there was any omission in the summing up in this respect. If there was, it was not material.

Adequacy of directions about the use of some of the evidence

[107] In the written submissions, the appellants were critical of the adequacy of directions on the use of evidence from alleged members in a group who were not part of the trial. This was not a matter pressed in oral argument and we see no merit in it. As Mr Burns submits, once admissible pursuant to the co-conspirators rule, there were no particular limits as to its use. Further, with limited exceptions, the evidence referred to involved one or more of the appellants. Finally, Rodney Hansen J explained the use to which the evidence in question could be used and emphasised the need for particular care in relation to evidence of the acts and statements of persons not before the Court. Nothing further was required.

Impact of s 98A charge and the approach in the Supreme Court

[108] The appellants submit that the Crown case on the s 98A charge did not comprise a criminal offence. Because the s 98A charge was the sole basis for distinguishing these four appellants from the other, original, defendants and allowing evidence to be adduced against them at trial, the distinction can no longer persist.

[109] Mr Stevenson, who argued this part of the case for the appellants, submitted that the entirely contingent nature of any resort to violence meant that even on the Crown theory there was no crime. Essentially, the argument is, the objective or purpose in s 98A must amount to more than "bad thoughts" in circumstances where it cannot be said the purpose will ever eventuate. An associated argument is that the Crown case as to the purpose at trial was different from that as advanced before the Supreme Court when that Court dealt with the question of the admissibility of evidence obtained in the course of Operation 8.

[110] We interpolate here that Rodney Hansen J in sentencing the appellants rejected the latter argument. The Judge concluded that the Crown advanced its case against the appellants at trial on "substantially" the same basis as anticipated by the

Supreme Court.[42] He also considered that a finding that the commission of serious violent offences was the overall objective was open to the jury on the evidence.

[111] The other point advanced by the appellants is that the Supreme Court was misled as to the evidence linking Ms Bailey to the s 98A charge. Mr Nisbet, who argued this part of the appeal, said that this misrepresentation was significant because it was the additional charges under s 98A that divided the Supreme Court on the issue of whether, in terms of s 30 of the Evidence Act 2006, the seriousness of the charges outweighed the impropriety caused by what the Court concluded was unreasonable search and seizure.

[112] We agree with the Judge that the jury's inability to agree on the s 98A charge does not "retrospectively affect the analysis which led to the evidence being admitted in the first place".[43] In any event, like the High Court, we are bound by the decision of the Supreme Court that the evidence was admissible. Nor can we deal with a submission based on the submissions made in the Supreme Court. If the appellants want to pursue these issues, they will now have to do so in that Court.

The sentence appeal

[113] We first set out the approach taken by the Judge.

The sentencing remarks

[114] Rodney Hansen J declined the applications for a discharge without conviction. He noted that it appeared there was no jurisdiction to grant these applications in any event because convictions had already been entered.

[115] The Judge then identified a number of aggravating features of the offending. These were, first, the period of the offending and its repetitive nature. The contrast was with the one-off incident more commonly the subject of sentencing in the Court. Associated with that was the premeditation and planning apparent.

---

42 Sentencing remarks, Messrs Iti and Kemara, at [11].
43 Sentencing remarks, Messrs Iti and Kemara, at [14].

[116] The second aggravating feature was the multiple number of weapons. Eleven firearms were found at the termination of the operation. It was difficult to tell how many guns were used at the camps but it appeared that nine firearms were available at the September camp and eight in January. A number of these were semi-automatic and some bought at considerable cost. That reflected the "considerable resources in time and money devoted to the enterprise".[44] The Judge also saw the particular characteristics of a Molotov cocktail as highly relevant. Their use could not be reconciled with the peaceful purposes relied on by the defence to explain what had occurred at the camps.

[117] Thirdly, the Judge concluded that the firearms were being used in the context of training participants in military-style exercises with the intention of training them in the use of weaponry with the potential to operate for paramilitary purposes.

[118] In this context, Rodney Hansen J dealt with the submission that because the jury was unable to agree on the count relating to s 98A, it was not open to him to make findings as to the purpose for which the weapons were held. The Judge did not accept that, holding that the question of whether the appellants participated in a criminal group with the objective of committing serious crimes of violence was distinct from the issue of why they acquired the weapons and deployed them at the camps. In reaching the view about the purpose, the Judge noted that although there were "elements of Dad's Army in the group" the intent was a serious one.[45]

[119] The Judge considered that the serious intent was apparent from the surveillance footage and what was said in chatroom conversations involving members of the leadership group. The Judge gave the following examples:[46]

- Mr Iti described the group as "a revolutionary military wing [of] Aotearoa".
- In conversation with Mr Iti, Mr Kemara referred to "planning the surrender of the Urewera".
- In another conversation with a third party Mr Iti referred to training "to smash the system".

---

44 Sentencing remarks, Messrs Iti and Kemara, at [41].
45 Sentencing remarks, Messrs Iti and Kemara, at [44].
46 Sentencing remarks, Messrs Iti and Kemara, at [44].

- In conversation with [one of the original defendants who was only charged under the Arms Act] in response to a statement by her "I don't really want to kill if I can help it" Mr Kemara said, "No one wants to kill, we are training to kill because we will probably have to ... i.e. being attacked".

[120] Rodney Hansen J did not consider these were idle boasts. They reflected the tenor of conversations intercepted intermittently over a considerable period of time. The Judge referred to other evidence to similar effect:[47]

- One of the [two young men who attended a camp] quoted Mr Iti as saying that the exercises were for "preparing troops for battle ... urban warfare".

- Tuhoe Lambert's diary referred to military manoeuvres and the "Scenarios" document, of which [Mr Signer] was the author, detailed exercises which involved, among other things, "eliminating" a guard and blowing up a building, and kidnapping. Another scenario refers to "MT" and lists the ingredients of a Molotov cocktail.

[121] Accordingly, the Judge concluded on the evidence that a private militia was being established.

[122] Because of these aggravating features, this offending was seen as more serious than in those cases referred to the Judge in which sentences of up to three years imprisonment had been imposed for possession of firearms on a single occasion or during a short period.

[123] The Judge then considered the mitigating features.

[124] First of all, the Judge accepted that it was a mitigating feature of the offending that the ultimate goal to which the possession of the weapons was directed was not a criminal one. The Judge continued:

> [51] ... That is not intended to convey any view on the charge of participating in a criminal group. It is simply to acknowledge what is common ground, namely, that your activities were directed to the objective, in a general sense, of redressing Tuhoe grievances and, more specifically, to achieving mana motuhake or a form of self government for Tuhoe. In

[47] Sentencing remarks, Messrs Iti and Kemara, at [46].

> contrast, the unlawful possession of firearms is invariably associated with other criminal activities, commonly drug-dealing and offences of violence.

[125] The Judge said that although the pursuit of altruistic motives could not excuse what had occurred, it could appropriately be recognised on sentence. The Judge also saw it as highly relevant that there was no immediate intention or imminent prospect of violent offending. Negotiation was Plan A, force was Plan B. Rodney Hansen J continued:

> [55] In these circumstances, one of the enduring mysteries of this case, which the defence has done nothing to dispel, is that you saw it as necessary to have a Plan B at all, and devoted so much in time and money to develop some sort of military capability. There is nothing to show any real likelihood that Plan B would be implemented and that the possession and use of the weapons would have led to offences of violence against persons or property. That is a significant mitigating factor which should be reflected in final sentence.

[126] The appellants' individual roles were then discussed. In this respect, Rodney Hansen J rejected the Crown submission that there was no distinguishing feature between the appellants in terms of their roles. The Judge said that the intercepted communications confirmed that Mr Iti was one of the instigators, if not the instigator of the offending and he was the person primarily responsible for organising the camps. The Judge said that the intercepted communications showed that Mr Kemara liaised closely with Mr Iti about arrangements for the camps and was primarily responsible for purchasing weapons and ammunition. The Judge described Mr Kemara, in military terms, as Mr Iti's lieutenant. Ms Bailey and Mr Signer were treated as followers rather than leaders.

[127] The Judge concluded this part of his sentencing remarks in this way:

> [59] I consider your respective roles are substantially reflected in the weapons found in your possession at termination. Messrs Iti and Kemara held a number of the weapons used by the group, including military style semi-automatic weapons together with ammunition and magazines. Ms Bailey and Mr Signer were in joint possession of a rifle generally used for hunting small animals.

[128] Accordingly, a term of imprisonment of five or six years was seen as an appropriate starting point but for the mitigating factors. In terms of Mr Iti and Mr Kemara, the Judge took a starting point of three years imprisonment reflecting

their leading roles and the possession of multiple firearms. From that starting point, a reduction in sentence was made to take account of time spent in custody on remand, the restrictive conditions of bail over a lengthy period, and the fact that the two men had been "living under a cloud of uncertainty for almost five years".[48]

[129] Mr Kemara was also given credit for his previously unblemished record. In terms of Mr Iti some credit was given for his outstanding record of service to his community. These factors justified a reduction in sentence of six months for each of the men, resulting in end sentences of two years and six months imprisonment.

[130] There was jurisdiction to impose a sentence of home detention but Mr Iti had made it clear that was not an option for him because of the disruption it would cause his family. In any event, the Judge said he did not regard it as an option for either of the men given their roles in the offending and the importance of denunciation and deterrence.

[131] Ms Bailey and Mr Signer were seen as in a "materially" different position as followers rather than leaders.[49] The Judge thought they were drawn into the project without any clear understanding of what it involved or where it would lead.

[132] The Judge considered their roles in the offending warranted a reduced starting point of two years imprisonment, which was further reduced by six months to take account of previous good character, the restrictive bail conditions, their lack of certainty about what was involved and their personal circumstances. Rodney Hansen J said he did not overlook the particular consequences of convictions for Mr Signer including the difficulties they may cause for his immigration status.

[133] The Judge adjourned the sentencing of Mr Signer and Ms Bailey so that home detention reports could be obtained. A sentence of nine months home detention was subsequently imposed on both of these appellants.

[134] We turn then to the submissions made in relation to the sentence appeal.

---

[48] Sentencing remarks, Messrs Iti and Kemara, at [63].
[49] Sentencing remarks, Messrs Iti and Kemara, at [65].

The submissions

[135] All of the appellants say that the Judge has sentenced them on a factual basis that is inconsistent with the jury's inability to agree on s 98A. The argument is that the jury has rejected the Crown's case that the four shared an unlawful purpose. Accordingly, it was not open to the Judge to sentence them on the basis that their "intention was to train participants in the use of weaponry with the potential to operate for paramilitary purposes".[50]

[136] Mr Fairbrother, in developing the submissions on this aspect, says that the point is emphasised by what he describes as the Crown concession in the hearing before us that the Arms Act convictions did not rest on s 66(2). The verdicts, he submits, are understandable only as based on actual possession, either jointly, or individually as a principal or as a party pursuant to s 66(1).

[137] Once this factual underpinning is removed, the appellants say the offending is at the low end of the scale. Further, absent a common purpose, it is said there is no basis to distinguish between the appellants. The sentences are therefore manifestly excessive.

[138] In addition, various matters are advanced for the individual appellants.

[139] In relation to Mr Kemara, Ms Fairbrother emphasises he had the relevant licence for the firearms dealt with in count 13. His conviction on that count rested on s 66 of the Arms Act. Section 66 provides that the occupier of premises or the driver of a vehicle in which a firearm is found is deemed to be in possession unless he or she proves that it was not his property and that it was in the possession of someone else. Finally, Ms Fairbrother notes that all but one of the firearms were unloaded. One had a bullet jammed in it.

[140] For Mr Signer, Mr Stevenson points to the consequences of the convictions. Mr Signer is a Swiss national. He and Ms Bailey are partners and have a child. The convictions mean deportation is an option. The convictions also impact adversely on

---

[50] Sentencing remarks, Messrs Iti and Kemara, at [44].

his potential teaching career. One of the character witnesses called by Mr Signer deposed to his talent.

[141] Given the various difficulties associated with the case including the delay in getting to trial and the harsh consequences for Mr Signer, Ms Bailey and their child, the submission is that the sentence is manifestly excessive.

[142] On behalf of Ms Bailey, Mr Nisbet submits she was a follower, not a leader, and someone for whom the pursuit of social justice has long been a goal.

[143] The Crown submits there is no basis for interfering with the approach taken by the Judge which was, in fact, a generous one.

Discussion

[144] We agree with the reasoning of Rodney Hansen J as set out in this passage:

> [43] … The question of whether the four of you participated in a criminal group, which had as its objective the commission of serious crimes of violence, is quite distinct from the issue of why you acquired the firearms and deployed them at the camps. Your intention in that latter sense is highly relevant to an assessment of your culpability and there is sufficient evidence on that issue to satisfy me to the standard of beyond reasonable doubt.[51]

[145] The Judge's task in sentencing is to determine the circumstances surrounding the convictions that were reached. The appellants were not acquitted on the s 98A charges so the jury's approach to those charges does not limit the Judge. Whether the Judge's findings would lead a different jury to another view on the next occasion is a different issue. The fact the charges have now been stayed does not affect this either. Accordingly, we consider it was open to the Judge to reach the factual findings he did. Once that point is accepted, there can be no real argument that the sentences imposed were within range. Indeed, there is force in the Crown submission that in giving credit for the appellants' altruistic motivation, the approach taken was generous.

---

[51] Citations omitted. The reference to the standard of beyond reasonable doubt reflects s 24 of the Sentencing Act 2002.

[146] The other factors raised by the appellants were all considered by the Judge and appropriately addressed.

Result

[147] The appeals by all appellants against conviction and sentence are dismissed.

Solicitors:
Fairbrother Family Law, Napier for Appellants Iti and Kemara
Ord Legal, Wellington for Appellant Bailey
Crown Law Office, Wellington for Respondent

APPENDIX – Excerpt from Question trail

Count 2 – Possession of one or more firearm(s) without lawful proper and sufficient purpose

Has the Crown proved beyond reasonable doubt that between 16 and 19 November 2006 the accused:

[1] Had custody or control of one or more firearm(s).

> **Custody** means physical custody. **Control** means the power to exercise control over one or more of the firearm(s).
>
> Custody or control need not be exclusive – a person may have custody or control over a firearm even if another person is also responsible for it.

[2] Knew of the existence of the firearm(s).

[3] Intended to exercise either custody or control over the firearm(s).

If the answer to questions [1] – [3] is "yes", go to question [6].
If the answer to all or any of questions [1] – [3] is "no", go to question [4].

[4] Encouraged or assisted others to possess a firearm(s) in the manner described in questions [1] – [3] above.

> To **encourage** is to urge, instigate, or advise any person to commit the offence. To **assist** is to do or omit an act for the purposes of helping or supporting any person to commit the offence.

If the answer to question [4] is "yes", go to question [6].
If the answer to question [4] is "no", go to question [5].

[5] [a] In common with others, intended to prosecute an unlawful purpose.

> The **unlawful purpose** was to undertake military-style training camps in order to prepare the participants to commit serious violent offences.

[b] Intended to assist those others to prosecute that unlawful purpose.

> To **assist** requires a reciprocal intention to help each other in prosecuting the unlawful purpose. Actual assistance does not need to be proven.

[c] Knew that the unlawful possession of firearm(s) in the manner described in questions [1] – [3] above was a probable consequence of the prosecution of the common purpose.

> A **probable consequence** is one that was a substantial or real risk, or an event that could well have happened.

If the answer to questions [5][a], [b], and [c] is "yes", go to question [6].

If the answer to any or all of questions [5][a], [b], and [c] is "no", find the accused ***not guilty****.*

[6] Has the accused shown that it is more likely than not that he or she had a lawful, proper and sufficient purpose for possessing the firearm(s)?

> A **lawful** purpose is one that is not criminal. A **proper** purpose is one that is lawful and appropriate. The purpose will be sufficient if, having regard to all the circumstances, the accused was in the possession of the firearm(s) for a lawful and proper purpose.

If the answer to question [6] is "yes", find the accused ***not guilty****.*

If the answer to question [6] is "no", find the accused ***guilty****.*

* The question trail included definitions of the serious violent offences. We have omitted these definitions.