

THE QUEEN

v.

JACOB MISITEA

C.A. 166/87

C.A. 177/87

THE QUEEN

v.

EDWARD TE WHAITI

C.A. 167/87

C.A. 196/87

THE QUEEN

v.

BEN RICHARD TE WHAITI

C.A. 168/87

THE QUEEN

v.

WINIATA SOPER

C.A. 169/87

C.A. 211/87

THE QUEEN

v.

DENNIS ROY NGAHEKE

Coram:

Cooke P.  
Somers J.  
Casey J.  
Bisson J.  
Chilwell J.

Hearing:

18 and 19 August 1987

Counsel:

D.P. Neazor Q.C. and P. Dacre for Crown  
P.J. Kaye for Misitea  
S.P. Bryers for E. Te Whaiti  
M.I. Koya for B.R. Te Whaiti  
Mrs L.O. Smith for Soper  
Ms A. Duffy for Ngaheke

Judgment: 24 September 1987

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JUDGMENT OF THE COURT DELIVERED BY COOKE P.

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This case relates to atrocities inflicted on a young Maori woman, aged 20, at a convention of the Mongrel Mob at Ambury Farm Park, Mangere, on the night of Saturday 13 to Sunday 14 December 1986. We must begin with an account of the episode. To avoid any suggestion of exaggeration against the accused, we base the following account on the memorandum of submissions in this Court by counsel who opened the arguments for them against their convictions and also opened their opposition to the Crown application to have the sentences increased.

At the time of this incident the complainant was living in Dell Road, Otahuhu, with her boyfriend and his parents. At about 9 p.m. she left with her German Shepherd dog to go to a friend's house, a short distance away in Ambury Road. This was close to the Ambury Farm Park. The Mongrel Mob gang were holding a convention there, attended by gang members from all over New Zealand. It began on the Friday evening and finished late on the Sunday afternoon.

As the complainant walked down Muir Avenue, a car pulled up and the occupants asked her for directions. Not hearing the first words, she went closer. She was then seized and pulled into the back of the car. Although

certain that there were five men inside the car, she could not give any real description of them or their clothing. She was held down between the men, at times with her head between their legs. The car drove through the gateway to Ambury Farm Park, where she was pushed out on to the grass.

She sat in the same position for a few minutes, somewhat stunned by what had happened, before she was approached by two or three men wearing leather jackets and gang patches. She was then dragged near a wall, where she was physically passed round a group of men. They stripped her naked, also stealing her handbag, jewellery and watch. Various men slapped her, pulled at her breasts and placed fingers in her vagina. She thought there were about ten to fifteen men involved at this stage, but again no identification by her was possible. At the end of this phase, one man had full sexual intercourse with her.

Eventually, according to her recollection, she got away and ran to a stage that had been put up in the park. Bands had been playing there earlier. She climbed (or possibly was thrown) on to the stage - shaking, crying and naked. After some time one gang member brought her a sleeping bag, which she wrapped around herself. Later she was sufficiently recovered to leave the stage and try to hide under a truck parked nearby.

But she had little respite. She was approached by a man who said that he would take her home and grasped her

hand, saying '...the Wairoa gang bad rapists...' Rather assured by the actions of this man, she went with him but was taken towards the rear of a white van parked not far away. There she was laid on the ground, had petrol poured over her and was urinated upon by several men. Again no identification of her attackers was possible.

Next she was picked up and put inside the back of the white van. She was laid on the floor, her hair was pulled, her arms held down and her legs held apart, right on the rear edge of the van itself; a bolt socket left its mark in the form of a wound at the base of her spine, though for some of the time there was a mattress under her. She was then made to suck the penis of one man (other incidents of that kind were to follow); there were attempts to sodomise her, she was hit and punched and then a number of the men had sexual intercourse with her. A beer bottle was pushed into her. They kept calling her bitch and slut. Photographs of the van were put in as exhibits at the trial and show the area where the complainant was assaulted. More importantly, they record some of the criminal activities and, quite vividly, a small part of the girl's suffering. And they enable some of the assailants to be identified. These prints were developed from a film taken by one of the gang and found by the police abandoned or hidden under another vehicle.

Once or twice the complainant managed to break away, only to be chased and dragged back to the van, where the

same type of sexual abuses recurred. In total, according to her evidence, there were probably three periods in the back of the van when she was raped or sexually assaulted orally by numerous men. Twenty or thirty could well be a very conservative figure for those who physically abused her in some way at some stage during what she called the whole night.

In the end she got away, or was left to do so, and ran out of the farm park into a nearby property, where she climbed a fence and took some clothing from a clothesline to cover herself. She went home and told her boyfriend what had happened; he summoned the police between 6 and 7 a.m.

There was no reliable estimate of the length of her ordeal, but there was some defence evidence, which was uncontradicted, that the white van had been taken to various addresses during the evening and early hours of the Sunday morning and had only returned to the farm park between 2.30 and 3 a.m. That would appear to put the time span of the incidents in the van as between 2.30 to 3 a.m. and 6 a.m. It should be added, however, that on the complainant's own estimate of times she must have been a prisoner for some eight hours. At the trial little attempt was made to challenge her account in cross-examination. She accepted that she could be confused about some details and the precise sequence of events. For instance, the petrol incident may have occurred immediately before she was put in the van the second time, after running away once. She was

probably unconscious or semi-conscious for part of the time; at one point beer was poured over her to wake her up.

There were literally hundreds of men at the convention and the police had great difficulty in identifying those who took part in the crimes. Probably a number of the worst offenders have not been identified. In the event seven men stood trial before a Judge and jury in the Auckland High Court in June 1987. The result of the trial was that four of them were convicted of both sexual violation by rape and sexual violation by unlawful sexual connection. They were Jacob Misitea, Winiata Soper, Edward Te Whaiti and Ben Te Whaiti. Another accused, Dennis Roy Ngaheke, was found not guilty on the first of these charges but guilty on the second. Two other accused were acquitted altogether.

The differentiations in the verdicts show that the jury, as counselled in the summing up, were careful not to be carried away by revulsion at the gang conduct. Clearly they judged each man by the evidence relating to his part in the events. All those convicted on both charges were sentenced to imprisonment for seven years. Ngaheke's sentence was five years.

Four other men - Puna Peter Gary Monsal, Michael Neville Te Whaiti, Graham David Reihana and Reginald Paetawa Mahaki (who took the photographs) - pleaded guilty to both charges. On 22 May 1987 the two men first mentioned were

sentenced respectively to imprisonment for six and seven-and-a-half years. The other two received sentences later of five-and-a-half and six years each. It is possible that if the Judge had not been called upon to deal with Monsal and Michael Te Whaiti until after the trial, and so after hearing all the evidence, he might have taken an even more serious view of their culpability and imposed longer sentences. Indeed we think that he could well have decided to adopt a higher sentencing scale generally if he had been able to set his pattern after the trial. Still, all four of those men were at least entitled to some credit for their guilty pleas. All four may have been fortunate in their sentences.

It is convenient to mention at this point, since we are affirming the convictions for the reasons shortly to be given, that this Court is not prepared in the circumstances to treat their sentences as in any way a benchmark for the sentences of the five who pleaded not guilty and were convicted. They did not spare the girl the further ordeal of giving evidence and if there has been any contrition it has been very belated.

The Solicitor-General applies for leave to appeal against the sentences of those five men. Four of them - Misitea, Edward and Ben Te Whaiti, and Ngaheke - appeal or apply for leave to appeal against their convictions.

### Convictions

Each of the accused who pursued a challenge to his conviction in this Court was separately represented by counsel and full submissions were presented on behalf of each. After hearing counsel we were satisfied, however, that there was no substance in any of the appeals and did not find it necessary to call on the Crown to support the convictions. It is sufficient to deal with the separate cases fairly briefly, although we have not ignored matters mentioned by counsel which are not specifically dealt with in what we are about to say.

The summing up was necessarily comparatively long, but the Judge succeeded in doing justice to the case for and against each accused without addressing the jury at excessive length. As it goes to the crucial issue as regards each appellant, we reproduce the following admirably correct and clear extract from the summing up:

...And that brings me to the next direction which is on the subject of parties, and again, I probably now need hardly emphasise to you how important this direction is because the Crown case against each of these seven accused is that they were parties to the crimes that occurred.

Our Crimes Act says that everyone is a party to and guilty of an offence who actually commits the offence or who does or omits any act for the purpose of aiding any person to commit the offence, or abets any person in the commission of the offence, or incites, counsels or procures any person to commit the offence. Now. A number of matters arising from that definition. First, you will note that a person who is a party is also guilty of the offence itself. You see the Act says that everyone is a party to and guilty of an offence, who does any one of those



things. That is why each accused in each case is charged with the offence itself, because if he's a party he's guilty of the offence itself. Secondly, you aid a person if you actually help him with what he is doing or what he is going to do. You abet a person if you urge him or incite him in what he is doing or what he is going to do. So aiding and abetting involve the taking of active steps by word or action. There must therefore be some positive or active involvement in the offence. Inciting, counselling or procuring involves urging, instigating, taking appropriate steps to see that something has occurred. I emphasise that some degree of active involvement of the kind I have described is essential. Mere presence is not enough. A bystander or an onlooker is not a party. There can be circumstances where passive acquiescence could make a person into a party, but they are relatively unusual and do not concern you in this case. You will note that the definition refers to the aiding, abetting, etc. the commission of the offence. The person need not know precisely the offence that is intended to be committed, nor the manner in which it is going to be committed. It suffices if the person intended the commission of one of the limited number of offences of the kind he had in mind. In this case the Crown alleges that each accused knew what the crime was that was to be committed, that is, either rape or unlawful sexual connection. A person must intend to aid, abet etc. A person is not a party who inadvertently or accidentally helps another commit an offence. The aiding, abetting etc. must be deliberate. The Crown alleges, in this case, actual helping, for example by holding the complainant down by a leg or by a hand, while others committed the crime, or, that the party was actively encouraging others to commit a crime by being present and by his presence joining in the activity.

Now let me just say a word about this question of encouragement as a form of aiding, abetting, counselling or procuring. Where there is a non accidental, that is a deliberate presence without a firm agreement with the actual perpetrator of the crime, or positive physical acts of participation in the commission of the crime, but the Crown alleges that a person is a party by encouragement, two elements must be proved. First the person must intend to encourage the commission of the offence, and secondly, he must actually encourage. That is the person committing the offence must in fact be encouraged by the alleged party. For example if the person committing the offence did not know that the alleged party was present, the latter could not be a party even though he may have intended to encourage,

because in those circumstances he would not actually have encouraged the perpetrator of the crime. Intention to encourage alone is not enough, there must also be actual encouragement.

We now turn to the case of each appellant.

#### Misitea

A signed police statement by Misitea was ruled inadmissible by the Judge, so we have disregarded it. The jury did not see it. There was police evidence before the jury that Misitea said that after watching until the band finished from about 7 p.m. to midnight he 'crashed out'; he had walked past the van but never up to it. The Crown case against him rested chiefly on a photograph, with some support from the evidence given by the accused Edward Te Whaiti, who figures in the photograph, apparently seated in the van. He said in the witness box that while he was in the van, looking down on the girl's legs and feet, a man was sitting on her. The photograph shows Edward Te Whaiti looking out of the van towards the camera, apparently exultant and holding his fingers upwards, clutching a cigarette lighter. Other gang members are looking downwards towards the floor of the van, where the girl must have been lying. One of these men, wearing a red headband with white spots and a Mongrel Mob leather jacket with a patch, has his back to the camera; he is facing into the van between the open doors. The back of his head is towards the camera, but his head is turned slightly to the right so that the right ear and sideburns are visible. The Crown case is that this is Misitea.

Two police witnesses gave evidence bearing on identification of Misitea from the photograph. One, a Porirua constable who was familiar with Misitea's appearance and the clothes he customarily wore, identified him by reference to the headband, the patch, the pattern of the sideburns, the crop of his hair, the broad shoulders, the clothing under the patch. The other, who had confiscated Misitea's patch six days after the crimes, pointed out features which he regarded as identical between that and the one shown in the photograph.

In his argument in this Court, as at the trial, Mr Kaye for Misitea strongly attacked this identification evidence, characterising it to us as of such poor quality that it should have been withdrawn from the jury. The patch comparison was also attacked on the ground that the constable was being asked to give his opinion, as if as an expert, on the ultimate issue for the jury.

As to the evidence of the local constable who knew Misitea, we are satisfied that in combination the features on which he relied could justifiably be regarded by the jury as significant. Each detail by itself might easily have been shared by many men present at the convention; but that is not necessarily so as regards their collective effect and it is apparent that the sideburns beside the right ear hair have a gap in the hair pattern which could well be distinctive. As to the patch comparison, whether or not the witness went a little too far in offering an opinion we

regard as an academic question. The Crown prosecutor was entitled to point out the similarities to the jury, and could have done so with at least equal effectiveness without reference to any policeman's evidence. Further, comparison of the photograph of the man in the van group and photographs of Misitea's patch brings out what we think, and what the jury were entitled to think, are very striking similarities in soiling and creasing. The jury was well entitled on this evidence as a whole to find that Misitea was the man in the photograph. If so, it is scarcely possible against the background of other evidence to resist the inference that he was most actively encouraging the physical abuse of the girl.

Edward Te Whaiti

As already mentioned, this man gave evidence, claiming that he heard that there was a 'block' going on in the van and went over to the van to have a look and climbed into it, sitting near the girl's legs and feet; she was at least half naked. He said that he did not touch her but that a man was sitting on the top part of her. Edward Te Whaiti also admitted telling a police officer that he could 'only assume that oral sex was taking place'. He maintained that he was only in the van for about two minutes. In cross-examination he maintained that a block could be consensual, but we regard it as fanciful to suggest that he would have thought that she was consenting while a man was sitting on her chest. No doubt the jury took that view also.

The inference was fairly open to them that he took a prominent position immediately beside her in the van for the purpose, at least, of encouraging blocking, including in that term both raping and oral sex. He explained in cross-examination that these were common features of gang blocks. His counsel, Mr Bryers, argued that he was 'nothing more than a voyeur', using that description in the sense of a mere onlooker. The photograph already mentioned gives the answer to this argument. It testifies to his enthusiasm for what was going on. Counsel says that his client was drunk, which may be so up to a point but does not help him. While it would matter little in the circumstances whether rape as distinct from oral violation occurred while he was there, the jury were entitled to infer from the advantageous viewpoint position he obtained and the girl's account of events that he actively encouraged both.

Ben Richard Te Whaiti

This accused did not give evidence, but there was evidence from a police constable that he admitted seeing the girl on the bonnet of a car with a man; he heard a bang and she was more or less chucked off and looked dead to him; she was lying on the stage; he gave her a slap on the face to revive her; she told him she had been raped; he grabbed a blanket and told her to put it round her; 'I walked her across to the Waipuk van. I told her to split. She didn't. Then there was a bit of a carry on' and he walked away. He told the constable that she smelt of petrol. He also said

'She just turned me off with what she said about being raped and having petrol poured over her'. When he left her, he thought she would be blocked.

At a later interview on the same day, though, he admitted putting her into the back of the van, or taking her there according to one of his versions, and 'holding her hand' while she was on the floor with her legs facing to the front and other men were talking to her 'just a lot of bumble'. He said that he and the girl were just talking for a short time before other men got in. More men piled in and he thought she was going to get blocked. He was sitting on the seat behind the driver's seat, his feet would have been facing sideways. He got out of the side door when he had a chance. He repeated about just holding her hand and denied having sex with her. He signed the constable's notes of the interview.

A witness called for the defence of Soper, Carol Taylor, the secretary of the Notorious Chapter of the Mongrel Mob, gave evidence of seeing the girl lying naked on the stage and then walking from it, with a blanket wrapped round her, accompanied by two Mongrel Mob members. From the commotion about five minutes later she assumed that the girl was taken to the van. When this witness was asked what she did when she realised what was happening, she replied 'What could I do?'

Mr Koya for Ben Te Whaiti argued that the Judge did not put adequately to the jury this accused's defences of no unlawful purpose on his part and effective withdrawal before any crimes were committed in the van. In the detailed part of his summing up the Judge dealt with this particular accused first and at some length. In our opinion he did so with ample emphasis on the main points advanced by counsel and such minor criticisms as are made are of no weight. A further argument that the verdict was 'against the weight of the evidence' - not, as we have often to point out, a correct representation of the ground provided for in the Crimes Act 1961, s.385(1)(a) - cannot overcome the fact that this accused admitted taking the girl, whom he had shortly beforehand seen naked and apparently dead, to the van and there 'holding her hand' while she was on the floor.

He appears to have offered no explanation of why she should be in that position. It was open to the jury to accept the girl's own evidence that petrol was poured over her on one of the occasions before she was put in the van. This man says both that he took her away from the stage after she had been thrown on to it and that he smelt petrol on her. Putting the pieces of evidence together, there was a clear case that he was a party to contriving to get her into the van and holding her there after the petrol had been poured on her. He did not have the keys to the van, so his purpose cannot have been to drive her away. Despite his story, the circumstances described by her and by Carol

Taylor leave no reasonable room for doubt that the common purpose of those who were associated in putting her into the van, at whatever time, was her violation by gang members.

Ngaheke

This accused was represented in both Courts by Ms Duffy. In the jury's verdict he fared better than the two other accused, being convicted on the second count only. Obviously the verdict was based largely on his signed police statement. The most material part reads:

I saw this girl sitting on the stage. She was a Maori girl, she was wearing a poncho type thing on her. I was wondering wondering what that girl was doing up there on the stage, she was just sitting there all by herself. She was right on the edge of the stage, the stage was only low and I went up to her and asked if she was alright. She didn't answer me, she looked out of it. There was some other fellas talking to her too. I think they were from Upper Hutt or Porirua but I couldn't be sure. There was a big group of Mobsters around the front of the stage. There were more than twenty of them at least. Some of the Mobsters were giving her shit when she was on the stage, that's why I went to see if she was alright. While I was talking to her a couple of Mobsters led her away. I just followed along behind them to see if she was okay. They put her into a white van, I don't know whose it was. It was parked near the fire. I will draw where it was on the paper. (DRAWS POSITION OF VAN ON PAPER). I got into the van and the doors were all closed. There was four of us in the van with her. I was sitting in the back of the van next to the door (INDICATES ON PAPER). The girl was sitting next to me on the seat. (INDICATES ON PAPER). One of the other dogs was sitting across from me and the other two were in the front. (INDICATES ON THE PAPER WHERE THE OTHER THREE WERE). We were all in the van for about five minutes only. I was talking to the girl and asking her if she was alright. She didn't say anything back to me. When I got into the van I thought these other dogs were going to take her away from the convention and do her somewhere else because I knew that Bruno didn't want that sort of thing happening at the convention. The next thing the back doors to the van



got pulled open. There were quite a few Mobsters outside the van some of these guys piled into the van. The girl that was in the van started screaming. A couple of our guys yelled out for me to get the fuck out of there. I knew that they were going to block her, I mean you ask yourself what do you think they were there for. That's when I cut a track out of the van.

I have been shown some photos. I remember Puna and Michael being in the Van now. Puna was on the same seat as me (INDICATES ON PAPER WHERE PUNA WAS) Michael was sitting opposite him. Michael was holding the girl by the hair. They must have come in the side door. Some of the ones that came in the side door had their cocks out. The girl was starting to scream now. Some of the Mobsters started getting her to suck them off. I can't remember who was getting her to suck them off. There were only a couple that I can remember that got sucked off while I was there. To me she looked as though she wasn't willing to suck them off and she was being held. I can't remember anyone fucking her while I was in the van. I was too pissed to do anything. When the back doors got open and then those Mobsters piled in I knew she was going to get blocked. I never fucked that girl and she never sucked me off. I know Puna from the convention, that was the first time I met him, he is an Islander looking fella. I know Michael from the convention too. He is the one with his hand on that girl's neck in the photo.

Ms Duffy submitted to us that there were some misdirections, but on examination we can find no substantial blemish in the passages in the summing up to which she drew attention; the points of criticism taken by counsel in this Court were in this instance also very fine ones, not meriting detailed notice in the present judgment.

Counsel argued that the acquittal on count one and the conviction on count two are inconsistent. Perhaps Ngaheke was fortunate to escape conviction on count one also, but the Judge particularly drew the jury's attention to that possible approach and, in the light of Ngaheke's

assertion that no rape occurred while he was in the van, they evidently decided to give him the benefit of the doubt. There was a further argument that there was no evidence of wilful encouragement by this accused, but he admitted being there while two gang members (as far as he could remember) had oral sexual connection with her, while she 'looked as though she wasn't willing'. He must have been seated almost immediately opposite her. He said he was too drunk to do anything, but the jury could justifiably have concluded that his purpose in sitting near at hand during the time it must have taken for two crimes to be committed was at least to encourage the activity.

For those reasons all the convictions are confirmed and we turn to the question of sentence.

### Sentences

Presenting his applications for leave to appeal against sentences, the Solicitor-General made it clear that he did not think it necessary or appropriate in this case to ask for general rape sentencing levels to be reviewed. Rather his submissions were to the effect that the sentences were too low in the light of existing levels. He said that the facts of the offences put them at the top end of seriousness of rape with aggravating circumstances, and that the sentences should have reflected that gravity, subject to whatever effect should be given to the fact that the accused were not convicted of the actual sexual assaults.

We suspect that, despite or perhaps because of the kind of publicity given to this case, the general public may not appreciate that none of those convicted were proved to have had sexual connection with the girl. All were convicted on the basis that they were proved to have encouraged or aided.

Another point that needs to be understood is that the sentencing Judge in the High Court did not have any really close precedent to act on. This Court has reviewed rape sentencing levels from time to time in recent years. Most recently we did so in R. v. Villicky Clark (C.A. 50/87; judgment 26 May 1987) where the broad similarity between current New Zealand and English rape sentencing levels was drawn to attention and reference was made to the approach that for rape committed by an adult, without any aggravating or mitigating features, five years can be taken as a starting point in a contested case. The present type of case is quite different. There are the grossest aggravating features in the group atrocities. On the other hand none of the convicted men is proved to have himself violated the girl.

This Court has had to consider some gang rape cases, but usually on appeals by convicted persons. There has not previously been a case on which on a Crown appeal we have had occasion to provide guidelines for the upper levels of sentencing in such cases. The sentencing Judge's remarks show that he did not in the slightest degree underestimate

the gravity of the conduct. He described it as the most gross and brutal it was possible to imagine. He was thoroughly alive also to community concern. But he was also very conscious of the limited basis on which these men had been convicted and the fact that they had apparently not been parties to the original abduction. If he took a conservative approach to sentencing, as we think he did, it was understandable in the light of those factors and the absence of precedent. He would of course have been aware that his sentences could be tested on appeal.

Counsel for the men sentenced naturally stressed in their arguments against the Solicitor-General that the Judge had obviously taken all relevant factors into account. That is true, but it overlooks the absence of clear precedent and the duty of this Court.

It is a function of this Court to consider how such a case should be approached in principle. Among cases we have had to consider recently, our approach to rape with aggravating features appears from the series of cases collected and dealt with in R. v. Te Pou [1985] 2 N.Z.L.R. 508 and the judgment dealing with a group of associated crimes in R. v. Hiha (C.A. 201/86; judgment 13 May 1987). The latter case is unfortunately unreported to date. There are other decisions, but it is enough to refer specifically to those.

The cases of Te Pou and others concerned rapes by men acting alone but with various kinds of serious aggravating features - intrusion by night into a nurses' home, violence, sodomy, an attack on an 81 year old woman in her own home. Discussion centred mainly on the effect of guilty pleas, to which the appellants were held entitled to some allowances in varying degrees. It is apparent from the judgment that, but for those allowances, this Court would have regarded sentences of the order of eight, nine and ten years as appropriate for the crimes in question.

The case of Hiha and others is rather closer on the facts, in that three youths acting in concert attacked a party of young people on the beach at Napier, inflicting serious violation on the young women and serious physical injuries on one of the young men. In the event, with some adjustment to avoid disparity between the three this Court fixed the sentences at ten and twelve years.

We regard the crimes at Ambury Farm Park as even worse than those. The victim's ordeal was much longer. The element of domination and degradation of a helpless woman, treated as the object of utter male licentiousness, is almost unbelievably callous. It was an intrusion of the gravest kind into her bodily rights as a human being. To perpetrate this kind of conduct was also an affront to New Zealand society as a whole.

If persons shown to have been ringleaders had been convicted, sentences at or close to the maximum of 14 years' imprisonment might very well have been appropriate. The question is mainly what allowance should be made for conviction on the basis of something less than the fullest participation.

Regrettably as regards some of the accused, we have to agree with the sentencing Judge that personal circumstances can do little to reduce the sentences for crimes of this gravity. Nor, unfortunately, can the effect on their families be allowed to count for much. We recognise that for some families the effect will be severe. It is a heavy blow for responsible parents and wives, particularly with young children to look after, who are guiltless and have tried to be supportive. But the Court's first duty in this type of case has to be deterrent sentencing.

A disturbing feature is the ages of most of these men. It is true that Misitea, who the pre-sentence probation report describes as of Rarotongan-Samoan nationality, was aged only 21 and has not a very serious list of previous convictions and a reasonably favourable report, characterising him as of obvious intelligence, well spoken and articulate, with a de facto wife and a two year old daughter.

Edward Te Whaiti, however, is 29 with a criminal record including offences of violence. He too is a family man with dependants and is said in the pre-sentence report to have 'many pleasant qualities'. His de facto wife caused to be presented to us through counsel an album of testimonials and other items which supports that description; his counsel said that this was to have been his last Mongrel Mob occasion. His brother Ben Te Whaiti was aged nearly 27 and also has a de facto wife and child; his record again includes some offences of violence (not of a high degree of seriousness) but the report had to record that he had not created a favourable impression with prison staff while on remand and that his behaviour was seen as threatening.

Winiata Soper abandoned his appeal against conviction. He figures prominently in one of the photographs of gang members surrounding the girl. On his behalf Mrs Smith emphasised the very brief period for which he claims to have been in the van, but we see insufficient reason to differentiate between his part and that of others convicted on both charges. He is another older man - 27 at the date of the crimes - and has a very long list of convictions. It is less than four years since he appealed unsuccessfully to this Court against a sentence of six years' imprisonment for manslaughter, when he shot a young woman during a drunken Mongrel Mob party (C.A. 24/83; judgment 2 December 1983). In upholding that sentence this

Court said that the dominating factors were the high degree of recklessness and the need for deterrent sentences to try to stamp out the carrying of firearms for use in gang confrontations and the like. Now he has involved himself in another type of major gang crime.

Ngaheke is the oldest of the five, being 32 at the date of the crimes. He too has a long list, mainly of fairly minor offences; he has a long-term, heavy alcohol association. He is charitably described as 'amenable, sunny, naturally irrepressible and irresponsible'.

As we have said, personal circumstances can carry little weight against the gravity of crimes of this kind. The Solicitor-General suggested no weight at all. It would be unsafe to lay down that as an invariable rule; but in the circumstances of this case, the first of its kind to require a ruling from this Court, the personal circumstances of the offenders do have to be relegated to the background. Whatever can reasonably be done to deter others from this type of gang conduct must be done now.

We also agree with the Judge that there is no sufficient or satisfactory basis for distinguishing between the four men convicted of both charges so far as their parts in the whole episode are concerned. Ngaheke should receive a somewhat lesser sentence because he was convicted only on the second charge.



The Solicitor-General put his main submission in this way:

In such a case as the present when the offence has been committed by many men and the victim is unable to identify who has done what in all the circumstances, including the number of incidents of rape and other sexual violation, the darkness (broken in this case by the camera flashlight) and her absolute powerlessness alone and naked amongst a very large number of men whom she does not know, it is submitted that it is inappropriate to make any significant distinction between those who have actually committed the physical acts and those who have restrained the victim or otherwise actively encouraged what has been done, unless it is clear that the part of the aiders has been very minor indeed.

We do not go quite the full length of accepting that submission as worded. A significant distinction may be necessary in some cases. But we accept the submission to the extent that in a gang rape episode of major dimension the difference cannot be great.

Each man who joins in the gang activity by any form of encouragement or help contributes to the ongoing wave of crimes. Each must know this very well. It is a process of group stimulation. There is mutual encouragement to reject civilised standards of human decency. The victim and the community are treated with arrogant contempt. Whether the Courts can reduce the risk of repetition of this sort of conduct by the sentencing process is far from clear. A view often held is that the causes and remedies lie deeper. All that we can say is that the Courts should do what they fairly can, without totally jettisoning the need to judge

each individual offender on his or her merits or lack of merits.

For those reasons we grant the Solicitor-General's applications for leave to appeal, quash the existing sentences on the five men, and replace them by sentences of imprisonment for ten years for each except Ngaheke, whose sentence will be eight years. As a matter of mechanics, the sentences for the other four will be ten years for being parties to rape and eight years concurrently for being parties to the other unlawful sexual connection.

*R B Cooke P.*

Solicitors:

Crown Law Office, Wellington, for Crown