IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CRI-2017-063-003251
[2018] NZHC 3332

THE QUEEN

v

DANIEL GEORGE CHASE
WHAKAPUMATANGA CLARKE
CODY PAUL GRIFFIN

Hearing:	14 December 2018
Counsel:	A J Gordon and C Harvey for Crown W Lawson for Chase M A Simpkins for Clarke J D Munro and D S Niven for Griffin
Judgment:	14 December 2018

SENTENCING NOTES OF KATZ J

Solicitors:	Gordon Pilditch, Office of the Crown Solicitor, Rotorua W Lawson, Lance Lawson, Rotorua M A Simpkins, Lance Lawson, Rotorua
Counsel:	J M Munro, Barrister, Auckland D S Niven, Barrister, Sentinel Chambers, Auckland

Introduction

[1] Mr Clarke, Mr Chase and Mr Griffin, after a jury trial before me, you were each found guilty of aggravated robbery.[1] Mr Clarke, you were also found guilty of murdering Scott Henry during the course of that robbery.[2] Mr Griffin, you were found guilty of Mr Henry's manslaughter.[3]

[2] I acknowledge at the outset the presence of Mr Henry's family here in Court today, and the profound loss that you have suffered. Mr Henry was clearly a very much-loved partner, father, son, brother and friend.

Facts

[3] Mr Henry lived in a converted shed on a rural property just outside of Taupō, with his partner and adult son.

[4] Mr Clarke, Mr Chase and Mr Griffin—the three of you planned to, and did, carry out an armed robbery at that property on the evening of 20 July 2017. Your aim was to steal drugs and money from Mr Henry.

[5] Prior to the robbery, Mr Griffin picked up three firearms, including a shotgun that he had stored at a friend's house, together with some shotgun shells. Mr Griffin and Mr Chase then picked up a female associate. You wanted her to join you because she knew where Mr Henry lived.

[6] At a lookout just outside of Taupō, Mr Griffin stopped the vehicle. Mr Clarke was already at that meeting point, and got into the back of the car.

[7] The vehicle carried on driving towards Kinloch, pulling over in a layby just past the Kinloch turnoff. The three of you got out and removed your Mongrel Mob gang patches. When you got back into the car, Mr Clarke was holding the shotgun, which he had presumably retrieved from the boot of the car. From this point onwards, at the latest, all three of you were aware that a firearm was going to be involved in the

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1 Crimes Act 1961, s 235(c) and s 66. The maximum penalty is 14 years' imprisonment.
2 Crimes Act 1961, s 167(d) and 172. The maximum penalty is life imprisonment.
3 Crimes Act 1961, s 171 and 177. The maximum penalty is life imprisonment.

robbery. I am satisfied that Mr Clarke and Mr Griffin both knew that the firearm was loaded.

[8] When you arrived at the property, it was dark, raining, and there were no external lights on, although there was some light coming from the shed by way of a half open roller door. All three of you got out of the car, wearing disguises over the lower part of your faces. Mr Clarke was holding the gun.

[9] As you arrived, Mr Henry's partner came out of an outside toilet. You confronted her, demanding drugs and money and asking where Mr Henry was. Mr Griffin, you grabbed hold of Mr Henry's partner, took her torch, and told her to wait with you.

[10] Mr Clarke and Mr Chase then went to find Mr Henry. As they rounded the corner of a lean-to attached to the shed, they saw him walking towards them. It seems that he had likely heard the vehicle arrive and was coming out to see who it was. Almost immediately a shot rang out. Mr Clarke, you were between two and five metres away from Mr Henry when you shot him in the chest.

[11] Either Mr Clarke or Mr Chase then grabbed a bag owned by Mr Henry that contained methamphetamine and cash, and all of you then fled the scene, leaving Mr Henry dead or dying. You made no effort to help him or to call emergency services.

[12] After you left, Mr Henry's partner went to find him. He was lying just outside the door of the lean-to area, and appeared to be dead. Terrified that you would return, Mr Henry's partner ran to a neighbouring property for help, but unfortunately no-one was at home.

[13] Meanwhile, Mr Henry's 21-year-old son arrived home to find his father lying on the ground outside the lean-to, in the dark and rain. He called emergency services and desperately performed CPR. It was too late, however, as Mr Henry had already died.

[14] After leaving the property, you drove to the Pureora forest where you made your female associate get out of the car. Mr Chase stayed with her while Mr Clarke and Mr Griffin disposed of the stolen bag and other items, keeping the methamphetamine and cash.

Victim impact

[15] I have received five victim impact statements. They are from Mr Henry's partner, his mother, his son, his daughter and his younger sister. We have all heard Mr Henry's mother read her moving and powerful victim impact statement here in court this morning.

[16] Mr Henry was clearly a very deeply loved family member. His loss has had a devastating impact on the lives of his loved ones. He was an adored big brother, a loving father and son, and a popular uncle. No sentence I impose can bring back their loved one.

[17] Mr Henry's daughter was only 18 at the time of his death and his son several years older. His daughter describes Mr Henry as "the best father any kid could ever dream of". His son says that he was extremely close to his father, who was always taking him hunting or fishing, or doing things in the outdoors, from a very young age. Mr Henry was effectively both mother and father to his children, as he raised them as a single father from the time they were quite young. Losing their father has therefore had a huge impact on his children's lives. Mr Henry's son also has to live with the trauma of having found his father's body, and having to tell his younger sister of their father's death.

[18] Mr Henry's partner describes him as her rock and as a true, honest and caring man who helped her find love and happiness again after the tragic death of her young son. Mr Henry's mother describes living a nightmare. Her life has been changed forever by the loss of her much loved first-born child. She feels angry and bereft.

[19] Mr Henry's younger sister suffers not only the grief of losing a loved family member, but also the additional pain of knowing how her brother's life was taken. She remembers Mr Henry as a charismatic man that people loved to be around. He made

friends easily and had a huge personality. He was the heart and soul of the family. His loss has left a hole that will never be filled.

Shared aggravating features of the offending

[20] I am first going to outline what I find are the common aggravating features of your offending, before turning to consider the position of each of you individually.

Use of a weapon

[21] First there is the use of a weapon. Mr Clarke, you not only carried, but used, a shotgun. This feature is relevant to the culpability of all three of you, although its significance in relation to Mr Chase is somewhat less than the other two of you, for reasons I will outline later.

[22] To some extent the presence of a weapon is inherent in the aggravated robbery charge. The nature of the weapon is significant, however. Mr Clarke did not opportunistically pick up a nearby broom handle. A loaded shotgun was taken to the scene. This was a highly lethal weapon.

Actual violence used

[23] The second aggravating feature is that actual violence was used. The potential for violence materialised into actual violence.[4] I keep in mind, however, in relation to Mr Chase, that the jury was not satisfied that he was aware that a probable consequence of the armed robbery was that Mr Henry would be shot and injured. Mr Chase must nevertheless have appreciated that there was a real risk of actual violence of some form occurring during the robbery.

Premeditation

[24] The third aggravating feature is premeditation. The robbery was clearly premeditated. I accept, however, that the murder was not premeditated, in that you did not go to the property intending to kill Mr Henry.

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4 *R v Mako* [2000] 2 NZLR 170 (CA) at [43]; *R v Chan Kee* HC Auckland CRI-2008-092-8864, 7 May 2010 at [36].

Multiple defendants

[25] The fourth aggravating feature is the involvement of multiple offenders. The jury must have found that the three of you formed a common intention to rob Mr Henry.

Unlawful entry into a dwelling place at night

[26] The fifth aggravating feature is that there was an element of home invasion involved in your offending, because you entered Mr Henry's property at night with the intention of robbing him.[5]

[27] Defence counsel submit that this aggravating feature does not arise, given that Mr Henry was not inside his dwelling, but was outside of it when he was shot. I note, however, that the drugs and cash were likely stolen from inside his dwelling. Further, in previous cases, offending occurring on the driveway to a victim's dwelling has been considered to involve an element of home invasion.[6] Here, the shed comprised the living and bedroom areas of the dwelling, but the dwelling also included an outside shower and separate outside toilet. Mr Henry's partner was accosted as she came out of the outside toilet, having just used the outside shower. Given the nature and layout of the property, I am satisfied that the overall offending occurred in such close proximity to the dwelling that the offending can appropriately be considered as having a home invasion element.

[28] Counsel for both Mr Chase and Mr Clarke submitted that because Mr Henry used the property as a base for drug dealing, this aggravating factor should carry significantly less weight. I reject that submission. The fact that the property was used to sell drugs does not diminish the victims' expectations of privacy and safety in their own home. People who may conduct unlawful activities in their homes are not fair game for armed robbers.

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5 Sentencing Act 2002, s 9(1)(b).

6 *Simeon v R* [2010] NZCA 559 at [35(f)] and [43]; and *Katene v R* [2010] NZCA 394 at [20]. See also *R v Clarke* [2000] 3 NZLR 354 (CA) at [15], [17]–[18].

Detention of Mr Henry's partner

[29] The sixth aggravating feature of your offending is that Mr Griffin detained Mr Henry's partner while the others went in search of Mr Henry. While she was not detained for long, she feared for her life. It is of note that after fleeing to an unoccupied neighbouring property she remained in hiding there until 3.00 pm the next day. When she was found by police using a tracker dog, she was suffering from mild hypothermia, having just spent a mid-winter night outside on a porch. This demonstrates the level of terror that she must have felt.

[30] Although Mr Griffin was the person who physically detained Mr Henry's partner, he did this in order to facilitate the armed robbery that all three of you had planned and agreed to participate in. Neither Mr Clarke nor Mr Chase took issue with Mr Griffin detaining her. Indeed, her detention facilitated Mr Clarke and Mr Chase in their aim of locating Mr Henry and committing the robbery, as Mr Henry's partner was prevented from alerting him to what was going on.

Property stolen

[31] The next aggravating feature is that property was stolen. Counsel for Mr Clarke and Mr Chase submitted that the fact that the property stolen was drugs and illicit cash means that this factor should not be treated as aggravating, or should carry little weight. In my view, however, this has little or no bearing on the culpability of the three of you, which is measured by the fact that you forcibly took what was not yours. To suggest that this consideration (namely that the property stolen was drugs or illicit cash) eliminates or materially reduces this aggravating feature would be tantamount, in my view, to condoning vigilante action.

Victim impact

[32] The final aggravating feature is the very serious victim impact resulting from the offending. Mr Henry lost his life. This has had a devastating impact on his family, who are also victims of your offending. However, I accept the submission of your counsel, Mr Chase, that the victim impact resulting from Mr Henry's death cannot be

attributed to you, given that you were not found guilty of culpable homicide. It is, however, an aggravating feature of Mr Clarke and Mr Griffin's offending.

Mr Chase

[33] Mr Chase, I am going to first consider your sentence. This requires me to first set a starting point, and then adjust that starting point in light of any aggravating or mitigating features that are personal to you. You were convicted of aggravated robbery only.

The starting point

[34] The jury found all three of you guilty of aggravated robbery. They must therefore have been satisfied that the three of you agreed to carry out a robbery at Mr Henry's property while one of you was armed with a firearm; that you agreed to work together and assist each other to commit the armed robbery; and that one or more of you took Mr Henry's bag and its contents, while Mr Clarke was armed with the shotgun.

[35] Mr Chase, you were a party to the plan to commit armed robbery and were involved in implementing that plan. However, given that you were not found guilty of either murder or manslaughter, the Crown failed to prove that you realised that a probable consequence of proceeding with the robbery was that Mr Henry would be shot and either killed or injured.

[36] Nevertheless, although you may not have foreseen Mr Henry being shot and injured as a *probable* consequence of taking a firearm to the scene, it is my view that you must have appreciated at least a risk of harm occurring, although at a level falling short of probability. As noted in *R v Kee*, the use of a firearm in a robbery, whether it is loaded or not, creates a serious risk of injury, whether or not it is actually fired.[7] Further, the intended use of the shotgun was not limited to actually shooting Mr Henry. A key reason for taking it to the scene was for the purposes of intimidation, in order to facilitate the stealing of drugs and money from Mr Henry.

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7 *R v Chan Kee*, above n 4, at [35].

[37] The Crown submits that a starting point of ten years' imprisonment would be appropriate for your conviction on the aggravated robbery charge. This is on the basis that a starting point of 11 to 12 years' imprisonment would have been appropriate but for the fact that you did not know that the gun was loaded. Obviously, you may have had your suspicions, but you did not actually know whether the gun was loaded or not. The Crown accepts that this reduces your culpability, by a modest degree.

[38] Mr Lawson, on your behalf, submitted that the appropriate starting point is one of six to seven years' imprisonment.

[39] The tariff case for aggravated robbery is *R v Mako*.[8] The Court stated in that case that:[9]

> …For serious organised robberies having the attendant features of dangerous weapons, terrorising conduct or actual violence a starting point of imprisonment for 10 years for conviction after trial but before allowances in mitigation has been accepted. There have, of course, been higher sentences for repeat and multiple offenders.

[40] I note also that, although I am sentencing you on the basis that you did not know the gun was loaded, the Court in *Mako* stated that:[10]

> …It should be kept in mind that the very object of offenders is to convince victims that firearms are loaded and the impact on them is no less because they are in fact not loaded. Nor is there any less risk that victims might react in ways dangerous to themselves or others believing they are in mortal danger.
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> …
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> Forced entry to premises at night by a number of offenders seeking money, drugs or other property, violence against victims, where weapons are brandished even if no serious injuries are inflicted would require a starting point of 7 years or more. Where a private house is entered the starting point would be increased under the home invasion provisions to around 10 years.

[41] Mr Lawson referred to *Hemopo v R*,[11] where the Court of Appeal held that starting points of more than seven years remain appropriate for aggravated robbery

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8 *R v Mako*, above n 4.
9 At [28].
10 At [39] and [58].
11 *Hemopo v R* [2016] NZCA 242.

involving invasion of a private home. The degree of violence used is relevant to how much higher than seven years the starting point should be.

[42] In my view, with reference to the cases referred to by counsel, and the aggravating features I have identified, a starting point of **nine years' imprisonment** on the charge of aggravated robbery is appropriate in all the circumstances.

Personal circumstances

[43] Mr Lawson submits that your personal circumstances warrant a reduction of five to ten per cent from your sentence starting point.

[44] An offender's background is relevant in a sentencing context. The relevant background includes not only the offender's personal background, but also matters relating to his or her whānau, community and cultural background.[12] An offender may request the Court to hear any person or persons called by the offender to speak on such matters.[13] An offender's relevant background may also extend to what is described as systemic disadvantage, or longstanding deprivations that affect particular groups, particularly when that background may relate to the commission of the offence.[14]

[45] Mr Lawson referred to a detailed cultural report and rehabilitation plan prepared by Wera Consultants Ltd. Unfortunately, while the reports provided by Wera Consultants in respect of both you and Mr Clarke contain some helpful background information, they also have a number of shortcomings. Of particular concern, they appear to have been prepared using a generic template that may be suitable for offenders who have a realistic prospect of receiving a community-based sentence. That template, however, has serious shortcomings in relation to serious criminal offending, where the law requires that a sentence of imprisonment be imposed.

[46] For example, both your report and that of Mr Clarke set out comprehensive proposed rehabilitation plans that are predicated on you both being sentenced to a

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12 Sentencing Act 2002, s 8(i).
13 Sentencing Act 2002, s 27.
14 See Sentencing Act 2002, s 27(1)(b); and *Solicitor-General v Heta* [2018] NZHC 2453 and the cases cited therein.

community-based sentence today. The proposed timeline suggests various rehabilitative activities that you and Mr Clarke (who I note has been convicted of murder) could undertake in the community from now until January 2020. The reports recommend that, for both of you, the proposed rehabilitation plan "would be an alternative cultural response to imprisonment and would contribute to his and his whānau and community wellbeing". I can only assume that the report-writer was not fully aware of the serious nature of your offending and that of Mr Clarke, and the inevitability of lengthy sentences of imprisonment.

[47] Another somewhat concerning feature of both of the Wera Consultants' reports is that the identified victims of your offending are your whānau, drug users, marae and the community you live in. Various strategies are suggested to enable you to achieve reconciliation with those victims. The assumption appears to be that your offending was drug offending, rather than murder (Mr Clarke) and aggravated robbery (Mr Chase). While I accept that others may well be victims of your offending in a broad sense, the immediate and most significant victims of your offending are Mr Henry and his family. The reports make no real effort, however, to explore either your understanding, or that of Mr Clarke, regarding the harm you have done to them, your level of insight into your offending, or your genuine remorse. Developing a degree of meaningful insight into the harm you have done is key to your long-term prospects of rehabilitation. A rehabilitation-focused report therefore needs to squarely engage with such matters.

[48] A further limitation of the reports is that the only source of information appears to be one meeting with you (and Mr Clarke, in respect of his report). There is no evidence of any consultation with your wider whānau, who obviously know you best and could no doubt provide helpful background information.

[49] Those criticisms aside, however, the reports do provide some helpful background information, based on what you told the author of the report. I will therefore summarise what the report records about your family and cultural background.

[50] Mr Chase, you are 23 years' old. You come from a loving home and whānau environment. Your mother and wider whānau members were instrumental in providing a good quality of life for you, giving you the support, help and encouragement you needed to move forward in your life. There were, however, some facets of dysfunction within your family, including a level of alcohol abuse in your early years and some fairly hard handed discipline or possibly even violence within the home. Your mother, however, did her best to ensure that you and your siblings were loved, taken care of, fed and clothed.

[51] You attended Kōhanga Reo. Your primary school years were happy. You were enrolled in your school's bilingual unit. You were raised in a strong positive Māori environment, and have basic knowledge of Te Reo and Tikanga Māori. You are described as having a very strong connection to your whānau and hapu.

[52] From the ages of 11 to 14 you lived with a close school friend and his family, as your mother was unable to care for you at that time and it appears that you were removed from her care by CYFS. You recall living with your friend's family as a very loving and caring environment with good structures and routine. Unfortunately, however, in your young teenage years you befriended the wrong group of people, resulting in your behaviour beginning to spiral out of control. Under the influence of these friends and associates you started to commit low-level crime.

[53] You decided to move to Taupō to live with your father at the age of 14. At the time, he was the President of the Taupō Mongrel Mob chapter. You say that your father's gang affiliations did not influence what was happening in the home and that while living with your father you had structure, routine and rules in the home. Nevertheless, you came under the influence of the gang environment and philosophy, although you state that your father heavily discouraged you from becoming involved in the gang.

[54] By the age of 17 you were drinking and smoking cannabis heavily, and getting into trouble. Allowing yourself to follow bad examples and be involved in crime led to you eventually disconnecting from your Māori culture, losing all notions of the values taught to you by your kaumātua. You made bad choices, and surrounded

yourself with gang members, drug users and dealers. You are now a fully patched member of the Taupō Mongrel Mob chapter.

[55] Mr Lawson specifically noted the references in the report to alcohol abuse by family members in your early years, your isolation from positive whānau and pro-social influences as you grew older, and your remorse and desire to rehabilitate. Overall, he submitted that collectively these factors could justify a discount of five to 10 per cent. In addition, Mr Lawson submitted that some level of discount should be provided for your youth.

[56] Although you are relatively young (22 years old at the time of the offending), the Crown submits that your lengthy previous criminal history bars you from relying on youth as a mitigating factor. Ms Gordon referred to case law to the effect that offenders who accumulated lengthy lists of convictions while in their teens cannot expect leniency in sentencing for serious aggravated robbery offences.[15]

[57] Despite your criminal history, Mr Lawson submits that a youth discount may nevertheless be appropriate to reflect the fact that young people are less culpable because of deficiencies in their maturity and cognitive development.[16]

[58] Mr Chase, your criminal history makes sad reading. At the age of 23 you have accumulated 26 previous convictions, a number of which are for violent offences. These include five convictions for assaults with intent to injure since 2012, when you would have been 17. On a previous sentence of home detention, you participated in the Tai Aroha programme for violent offenders, but failed to complete it due to your ongoing aggressive behaviour. Your pre-sentence report assesses your risk of re-offending as high, due to your propensity for violence and strong gang allegiance. Indeed, rather than being given a discount for youth, the Crown submits that I should uplift your sentence to reflect your criminal history.

[59] Although there are some elements of dysfunction in your background, they are at a fairly low level relative to many others who come before this Court. You report

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15 *R v Mako*, above n 4, at [65].
16 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77(a)–(c)].

that you had a largely loving and supportive upbringing, with a strong connection to Tikanga Māori. Unfortunately, your choice of friends and associates from your early teens onwards appears to have led you away from those positive influences and down a path of crime. You appear to remain strongly committed to the gang lifestyle, and this limits your prospects of rehabilitation.

[60] Although, as I have noted, personal, cultural and whānau factors can have an effect on sentence, it is well recognized that personal factors will generally have at most a modest effect when the offending involves serious violence or serious sexual offending.[17] Other sentencing principles will often prevail, especially denunciation and community protection.

[61] I also note that your counsel did not seek a specific discount for remorse, but suggested that I could have some regard to your remorse and a letter that you have written in which you expressed a degree of remorse.

[62] Mr Chase, your criminal history would normally warrant an uplift of four months to your sentence. Despite your counsel's best endeavours to persuade me otherwise, it is my view that only a small discount, at most at around four months, could be justified for your personal circumstances and youth. I will accordingly not apply the uplift that I otherwise would have, to take account of this factor. The result is that no alteration to your sentence is required to take into account either your criminal history or your personal circumstances as they, in effect, cancel each other out.

[63] Mr Lawson also submitted that I should give you a discount to reflect the fact that, shortly before trial, you, Mr Clarke and Mr Griffin put a joint resolution proposal to the Crown. The offer, as I understand it, was that Mr Clarke would plead guilty to murder and you and Mr Griffin would both plead guilty to manslaughter. The offer was made as a joint offer, not three separate offers that could be taken independently of one another. The Crown declined the offer, presumably because it wished to proceed with murder charges against all three of you.

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[17] *Keil v R* [2017] NZCA 563 at [58]; *Solicitor-General v Heta*, above n 14, at [57]; and *R v Misitea* [1987] 2 NZLR 257 (CA).

[64] Mr Lawson submits that a discount ought to be granted on the basis that, if the Crown had accepted your offer, this would have avoided the need for a three-week trial.[18] In my view a discount of 10 per cent is appropriate to recognise the offer that was made. Such a discount reflects that it was a reasonable offer, particularly given that you were ultimately not convicted of manslaughter at trial. If your pre-trial resolution offer had been accepted by the Crown, you would have received a modest guilty plea discount at that time.

[65] On the other hand, it is relevant that the resolution offer was effectively put to the Crown as a "package deal." When that was rejected it was open to you to plead guilty to the aggravated robbery charge and defend the murder and manslaughter charges. You elected not to do so, however, and instead elected to defend all charges. I therefore reject Mr Lawson's submission that a discount of 15 per cent would be appropriate.

Minimum period of imprisonment

[66] The final issue I need to consider in relation to your sentence is whether to impose a minimum period of imprisonment.

[67] The default minimum period of imprisonment is one-third of your sentence. A longer minimum term may be imposed if the Court is satisfied that a minimum period of one-third would be insufficient for the purposes of accountability, denunciation, deterrence or protecting the community.[19]

[68] I consider that a minimum period of imprisonment of 50 per cent is appropriate. You are at high risk of reoffending and causing further harm. Your pre-sentence report records that your commitment to your gang connections shows no sign of abating. You have not shown any meaningful insight or remorse. In my view, the standard one-third minimum period of imprisonment would not sufficiently hold you accountable, deter and denounce your offending or protect the community from you.

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18 Sentencing Act 2002, s 9(2)(fa).
19 Sentencing Act 2002, s 86(2).

Mr Griffin

[69] Mr Griffin, I now turn to consider your sentence. You have been convicted of aggravated robbery and manslaughter.

Starting point

[70] There is no tariff or guideline judgment for manslaughter,[20] although *R v Taueki*[21] has previously been considered to be of assistance in fixing a starting point for manslaughter cases where serious injury (if not death) was a foreseeable outcome.[22]

[71] The Crown submits that a starting point in the region of 14 years' imprisonment would be appropriate. With reference to *Taueki,* the Crown submits six aggravating features are present in the offending. They are premeditation, serious injury, use of weapons, facilitation of a crime, multiple attackers and home invasion. I agree that all of those features are present.

[72] *R v Taueki* provides that band three normally encompasses offending that has three or more aggravating features present, where the combination of features is particularly grave.[23] Offending within band 3 encompasses starting points between nine and 14 years' imprisonment.[24] The Crown submits that the combination of aggravating features here is particularly grave, and analogies can be drawn with the examples of a serious street attack or serious domestic assault from *Taueki*.[25] On that basis, Ms Gordon submits the present offending is at the top of band three, warranting a starting point of 14 years.

[73] Mr Munro submitted, on your behalf, that a starting point of eight years and six months' to nine years' imprisonment would appropriately reflect your culpability.

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20 *Pahau v R* [2011] NZCA 147 at [96].
21 *R v Taueki* [2005] 3 NZLR 372 (CA).
22 See *R v Jamieson* [2009] NZCA 555 at [34].
23 *R v Taueki*, above n 21, at [40].
24 At [34(c)].
25 At [41(a)–(b)].

[74] I have carefully considered the various cases referred to by counsel and the submissions of counsel regarding those cases.[26] None of the cases are strictly comparable, which is not surprising given the range of circumstances in which manslaughter can occur.

[75] I accept that it is relevant in assessing your culpability that you did not directly cause the death of Mr Henry. You were not the shooter. Indeed, you were elsewhere on the property, detaining Mr Henry's partner, when Mr Clarke shot Mr Henry. In such circumstances, your culpability is not at the same level as that of the defendants in a number of cases relied on by the Crown. Nor did you intend that Mr Henry be killed, or realise that a probable consequence of committing the armed robbery was that he would be shot and killed.

[76] The starting point proposed by your lawyer, on the other hand, does not adequately address the seriousness of your conduct. You agreed to the plan to go and rob Mr Henry that night, and actively participated in it. You entered onto private property to carry out the plan. The jury found that you knew, prior to the armed robbery commencing, that a probable consequence of proceeding with it was that Mr Henry would be shot and injured. You went ahead regardless. The shotgun and ammunition used to kill Mr Henry belonged to you. You collected the gun prior to the robbery and provided it to Mr Clarke. You knew that the gun was loaded. You detained Mr Henry's partner to stop her from alerting Mr Henry to your group's arrival, while Mr Clarke and Mr Chase went to find him. Within a short period of time, no more than a minute or two and possibly only seconds, Mr Henry had been fatally shot.

[77] Taking all of these matters into account, it is my view that an appropriate starting point for your manslaughter offending is 12 years' imprisonment.

[78] Given that Mr Henry was killed during the course of an aggravated robbery, I propose to sentence you for the aggravated robbery and manslaughter on a concurrent

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[26] *R v Moala* HC Auckland CRI-2006-092-461, 12 December 2007; *R v Pahau*, above n 20; *R v Wallace* HC Wellington CRI-2007-083-1608, 20 February 2009; *R v Tafutu* [2014] NZHC 657; *R v Maxwell* CA359/02, 31 March 2003.

basis. The starting point for your overall offending is therefore 12 years' imprisonment.

Personal circumstances

[79] I now turn to consider what adjustments should be made to that starting point to reflect your personal circumstances. Mr Griffin, you are 27 years' old. You were raised by your mother. You have a partner and a child aged about one year.

[80] Your criminal history spans back to 2008. You have previous convictions relating to driving, unlawful possession of a firearm, wounding with intent to cause grievous bodily harm, breach of court orders and sentence, wilful damage, drug-related offending, and receiving property.

[81] You have worked in the dairy industry and in forestry and have a good reputation as a worker. Alcohol abuse is not an issue for you. Nor do you appear to have a methamphetamine problem. You are a patched member of the Mongrel Mob. You are assessed as being at high risk of reoffending and harming others.

[82] You have a number of relevant previous convictions, and you have previously received a first-strike warning under the three strikes sentencing regime. In such circumstances, an uplift to your sentence to reflect your criminal history is not required, as the loss of the right to parole can adequately serve the purposes of denunciation, accountability, deterrence and community protection.[27]

[83] Mr Munro submitted that you should be given a discount for your willingness to plead guilty to manslaughter and aggravated robbery prior to trial. That offer was declined, presumably because the Crown wished to pursue the charge of murder against you. The jury did not, however, find you guilty of murder. In my view, a discount of 10 per cent is justified for this factor, which is the same discount that I gave to Mr Chase.

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[27] *Wipa v R* [2018] NZCA 219 at [36]; and *R v Henry* [2018] NZHC 1983 at [33].

[84] Finally, I note that I received, prior to court this morning, a brief letter from you expressing your remorse. You are not entitled to a separate remorse discount in respect of that letter, but I do note your somewhat belated acknowledgment of regret and remorse for what occurred that day.

Minimum period of imprisonment

[85] Under the three strikes regime you are required to serve the entire term of your sentence without parole. I accept the Crown submission that the interests of justice do not require any adjustment to your sentence in accordance with the principles set out by the Court of Appeal in *Barnes v R*.[28] Both your current offence and your first strike offence are offences of the kind that were intended to be captured by the three strikes regime, with all the consequences that entails.

[86] However, even though you must serve your sentence without parole, I am required to state what period of minimum imprisonment I would have imposed (if any), absent the three-strikes regime.[29] I would have imposed a minimum period of imprisonment of 50 per cent, on the basis that the default minimum period of one-third of your sentence would not have been sufficient to hold you accountable, denounce your conduct and protect the community.

Mr Clarke

[87] Mr Clarke, I now turn to consider your sentence. You were found guilty of aggravated robbery, and also of murder. The jury must therefore have found that you deliberately shot Mr Henry in the course of committing the armed robbery at his property, and that when you did so, you knew that shooting him was likely to cause his death.

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28 *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49.
29 Sentencing Act 2002, s 86C(6).

Murder

[88] It is common ground that you will be sentenced to life imprisonment. The only issue I must determine is what minimum period you must serve before you are eligible for parole.

[89] The law provides that, for especially bad murders, the minimum non-parole period must be at least 17 years, unless that would be manifestly unjust.[30] Mr Simpkins accepts that the especially bad murder provision applies in your case, as murders committed in the course of another serious offence, such as aggravated robbery, are covered by the relevant provision in the Sentencing Act.

[90] In order to determine if a 17-year minimum period would be manifestly unjust, I am required to first consider similar cases to identify what the minimum period would have been, if the 17-year benchmark did not apply. I am satisfied that the circumstances of your offending would have warranted a minimum period of at least 15 years, irrespective of the especially bad murder provision, with reference to the various cases referred to me by counsel and also some additional cases I have considered.[31]

[91] Given that, in the absence of the especially bad murder provision I would have imposed a minimum period of less than 17 years, I must now consider whether it would be manifestly unjust to impose a minimum period of 17 years. If it is, then the minimum period must be reassessed as to what the Court considers is justified. I must keep in mind, however, that Parliament intended that murders committed in the course of an aggravated robbery[32] should normally attract a minimum period of not less than 17 years.[33]

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30 Sentencing Act 2002, s 104.

31 See *R v Chan Kee,* above n 4; *Marteley v R* [2016] NZCA 480 at [29]; *Nicholson v R* [2015] NZCA 366; *R v Bush* [2018] NZHC 1217; *R v McHugh* [2015] NZHC 2389; and *R v Watene* HC Wellington CRI-2007-485-127, 11 December 2007 at [32].

32 i.e. section 104 of the Sentencing Act 2002 is engaged.

33 *Robertson v R* [2016] NZCA 99 at [80].

Personal factors and manifest injustice

[92] Mr Simpkins submits, in effect, that a minimum period of 17 years would be manifestly unjust as it would not give you sufficient (or any) credit for your personal circumstances, or your offer to plead guilty to murder prior to trial.

[93] In terms of your personal circumstances, Mr Simpkins relies on a cultural and rehabilitation report prepared by Wera Consultants, following a meeting with you. I have already mentioned some concerns I have regarding that report. Nevertheless, it provides some helpful background information. I also refer to your pre-sentence report for further relevant background information.

[94] You are 27 years old. You were born and raised in Taupō with both of your parents. You have four siblings, with whom you had a close relationship. You have a partner and together you share three children. You described a loving home environment growing up. You attended Kōhanga Reo. There was kai to eat, clean clothes to wear and a warm bed to sleep in. Both of your parents worked. You were enrolled into the bilingual unit at primary school and for the most part had an enjoyable time there.

[95] As you grew older, however, you started hanging out with your friends causing trouble and smoking cannabis. Halfway through your final year at intermediate school you were expelled for smoking cannabis on the school grounds. Although you were enrolled in high school, you rarely attended. You left school at the age of almost 15 and enrolled in a Department of Conservation course. Unfortunately, you continued to hang out with anti-social friends, causing trouble, smoking cannabis and drinking alcohol.

[96] At the age of 17 you began to prospect for the Taupō Mongrel Mob Chapter, following in the footsteps of friends and some members of your extended whānau. While prospecting you began to smoke meth. You became a patched gang member at the age of 18. Your family was concerned that you decided to join the Mongrel Mob, but were nevertheless supportive and accepting of you.

[97] Although you grew up in a loving and caring environment, your befriending of the wrong group of friends and following their bad example led you to disconnect from your Māori culture, heritage and values. Mr Simpkins submits that having disconnected from your Māori culture you then failed to connect with or assimilate into the dominant European culture, leaving you rootless and adrift. It is clear that your connection and commitments to your friends were your primary influences from your mid to late teens onwards.

[98] Your pre-sentence report notes your lengthy criminal history, including convictions for, relevantly, unlawful possession of a firearm, assault, and theft. You were arrested in relation to Mr Henry's murder in September 2017. That offending occurred four months after you had been released from prison in May 2017 for prior offending. While you do not have a significant history of violence, you do have a number of convictions for threatening behaviour and three for unlawful possession of firearms.

[99] You have said in previous pre-sentence reports that you wish to end your gang association. Your actions, however, suggest otherwise. You remain fully committed to the gang and the present offending was undertaken with two fellow gang members. Your entrenched gang allegiance has been identified as the most notable barrier to your rehabilitation.

[100] I acknowledge the letter you have provided to me expressing your remorse for killing Mr Henry. I give limited weight to that expression of remorse and note that Mr Simpkins did not seek an express discount for remorse. That was appropriate in all the circumstances, including that you chose to defend the charges at trial.

[101] In my view, there is nothing in the personal circumstances I have just outlined that would make a 17-year minimum period manifestly unjust. The Court of Appeal has held that personal circumstances of an offender will rarely displace the presumptive 17-year minimum term.[34] Although your background may have been economically disadvantaged, you report coming from a loving two-parent family, with close and supportive siblings. Unfortunately, however, you gravitated towards drugs

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[34] *R v Williams* [2005] 2 NZLR 506 (CA) at [66]–[67].

and anti-social friends at a relatively young age and this seemed to precipitate your downward spiral.

[102] Mr Simpkins also suggested that your offer to plead guilty to murder prior to trial is a matter I should take into account. I do not accept that submission. There was nothing to stop you pleading guilty to murder prior to trial, if you wished. Presumably, the reason you did not was that the proposed resolution was offered to the Crown as a "package deal", involving the Crown agreeing to drop the murder charges against your associates Mr Chase and Mr Griffin, in exchange for you pleading guilty to murder. When the Crown did not accept that offer, you proceeded to trial. These circumstances do not render a 17-year minimum period of imprisonment manifestly unjust.

Sentence

[103] Mr Chase, please stand. I sentence you to a term of eight years and one month's imprisonment on the charge of aggravated robbery, with a minimum non-parole period of four years and two weeks' imprisonment.

[104] Mr Griffin, please stand. I sentence you to a term of ten years and nine months' imprisonment on the charge of manslaughter. As required by the three strikes regime, I order that you serve that sentence without parole. On the charge of aggravated robbery, I sentence you to a concurrent term of eight years and six months' imprisonment.

[105] Mr Clarke, please stand. You are sentenced to a term of life imprisonment for murder, with a minimum non-parole period of 17 years. On the charge of aggravated robbery, I sentence you to a concurrent term of nine years' imprisonment.

Katz J