IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA564/2020
[2021] NZCA 133

BETWEEN	MATTHEW WINARA WEBBER Appellant
AND	THE QUEEN Respondent

Hearing: 17 March 2021

Court: French, Ellis and Muir JJ

Counsel: K J Gray and K E Bucher for Appellant
C J Boshier and A M Harvey for Respondent

Judgment: 27 April 2021 at 9 am

JUDGMENT OF THE COURT

The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Ellis J)

[1] Mr Webber is the second person in New Zealand to be sentenced on a charge of murder as a stage-3 "strike" offence. He pleaded guilty to that charge following a sentence indication.[1] Nation J then sentenced him in accordance with that sentence

[1] *R v Webber* [2020] NZHC 1758 [Sentence indication].

indication to life imprisonment, with a minimum period of imprisonment (MPI) of 15 years.[2] Mr Webber now appeals that MPI.

Background

Facts

[2] Mr Shayne Heappey was an associate of the Christchurch chapter of the Nomads gang. He was 25 years old. He had the misfortune to owe a small debt to Ms Leonie Cook, who is the stepdaughter of Mr Randall Waho, the President of the gang. Apparently, Mr Heappey was also in possession of a stolen vehicle to which Ms Cook felt some kind of entitlement.

[3] Ms Cook was unable to resolve matters with Mr Heappey. She escalated it to Mr Waho, thereby making her personal dispute a gang issue. Attempts were made by Mr Waho to arrange a meeting with Mr Heappey to resolve the conflict.

[4] For whatever reason, Mr Heappey did not wish to meet with Mr Waho. This perceived disrespect was exacerbated by Mr Heappey later agreeing to meet Mr Waho but then failing to turn up or to respond to messages. At one point, for example, Mr Heappey texted Mr Waho, saying:

> I cant do it tonyt no excuse mad Im not all there tonight mad ill come over tomorrow to see u and matty to collect my punishment I have no excuses just not up to it yeha.

[5] Eventually, on 8 December 2018, it was arranged that Mr Heappey would be collected by Mr Richard Sim (a patched member of the Nomads) and taken to an address in Oakhurst Place. Once there, texts were sent to Mr Webber, advising that Mr Heappey had been found. Mr Webber is also a patched member of the Nomads, and it was understood that he was the gang's "enforcer". It was his job to mete out violence to those who broke the rules.

[6] Ms Cook and Mr Justin Burke picked up Mr Webber and took him to an Oakhurst Place address, where Mr Heappey was waiting. They went inside the house

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2 *R v Webber* [2020] NZHC 2328 [Sentencing notes].

and asked Mr Heappey to come outside. On their way out, Mr Webber closed the curtain so the people inside could not see what was happening.

[7] Mr Webber was armed with a knife.[3] Once outside, he set upon Mr Heappey. He stabbed him fourteen times. Three of the stab wounds were to his chest. Two penetrated his heart, posing an imminent threat to life. Others were less serious, and some were superficial. There were two additional marks in Mr Heappey's clothing that indicated further strikes with the knife that had not reached his body.

[8] Mr Heappey tried to flee back into the house. He fell inside with Mr Burke on top, punching him. Mr Heappey managed to get onto the couch, but it was immediately obvious that his life was in jeopardy. Mr Webber came inside and said to Mr Heappey, "that'll teach you a lesson". He told the others to get Mr Heappey to a hospital.

[9] Mr Heappey was then loaded into a car, and Ms Cook drove him to the Christchurch Hospital, where he was attended to by medical staff. He died soon after.

[10] A few hours later, Mr Webber sent a text message to Mr Waho, saying that he had sorted that weed in the garden and "sent a message to all our brothers".

Mr Webber's co-offenders

[11] Mr Waho, Ms Cook and Mr Sim all pleaded guilty to (among other things) a charge of being a party to causing grievous bodily harm with intent to injure, which carries a seven-year maximum sentence.[4] They were sentenced as follows:

(a) Mr Waho: a four-year starting point[5] and an end sentence of two years and 11 months' imprisonment.[6] This had been reduced on appeal from

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3 It is unclear whether this was known to the others.
4 Crimes Act 1961, ss 188(2) and 66.
5 *R v Waho* [2020] NZHC 112 at [17]. This was confirmed on appeal: see *Waho v R* [2020] NZCA 526 at [21].
6 *Waho v R*, above n 5, at [41].

three years and three months' imprisonment due to personal mitigating factors set out in a s 27 report.[7]

(b) Ms Cook: a three and a half year starting point and an end sentence of two years and three months' imprisonment (on this charge).[8]

(c) Mr Sim: a three-year starting point and an end sentence of two years and three months' imprisonment.[9]

[12] Mr Burke was charged with murder as a party, but he was found guilty of manslaughter. A starting point of six and a half years was adopted,[10] with an end sentence of five years and two months' imprisonment.[11]

Mr Webber's previous convictions and strike warnings

[13] At the time of sentencing, Mr Webber had already been sentenced for four different strike offences and had accumulated two strike warnings. His relevant criminal history was summarised by the Judge in the sentence indication. [12] It is as follows:

(a) 2008: a male assaults female conviction, for which Mr Webber received a (concurrent) term of one month's imprisonment.

(b) 2010: a conviction for wounding with intent to injure, for which he was sentenced to 20 months' imprisonment with leave to apply for home detention.

(c) 2010: convictions for aggravated robbery and assault with intent to rob, for which he received his first strike warning and was sentenced to three years and six months' imprisonment.

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7 *Waho v* R. above n 5, at [33].
8 *R v Cook* [2019] NZHC 2890 at [17] and [30].
9 *R v Sim* [2019] NZHC 2361 at [13] and [19].
10 *R v Burke* [2021] NZHC 136 at [36].
11 *R v Burke* [2021] NZHC 136 at [57].
12 Sentence indication, above n 1, at [56].

(d) 2015: a conviction for aggravated robbery, for which he received his second strike warning and an end sentence of 21 months' imprisonment.

(e) 2015: a conviction for assault with intent to injure, for which he was sentenced to nine months' imprisonment.

(f) 2018: a conviction for assault with intent to injure, for which he was sentenced to 12 months' imprisonment.

(g) 2020: a charge of assaulting a Corrections officer.[13]

Sentencing

[14] Mr Webber's sentencing closely followed — and was interwoven with — the Judge's earlier sentence indication. For that reason, it is necessary to consider aspects of both in order fully to set the scene for the issues on appeal.

[15] Because Mr Webber was on his third strike and was charged with murder, sentencing was required to proceed in accordance with s 86E of the Sentencing Act 2002 (the Act), which relevantly provides:

> **86E When murder is a stage-2 or stage-3 offence**
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> …
>
> (2) If this section applies, the court must—
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> (a) sentence the offender to imprisonment for life for that murder; and
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> (b) order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.
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> …
>
> (4) If the court does not make an order under subsection (2)(b), the court must,—

[13] Mr Webber had in fact been convicted on this charge and sentenced to two months' imprisonment (concurrent) shortly before the sentence indication.

> (a) if that murder is a stage-3 offence, impose a minimum period of imprisonment of not less than 20 years unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so; and
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> (b) if that murder is a stage-2 offence, or if the court is satisfied that a minimum period of imprisonment of not less than 20 years under paragraph (a) would be manifestly unjust, order that the offender serve a minimum period of imprisonment in accordance with section 103.[14]

[16] The Judge considered that it would be manifestly unjust to sentence Mr Webber to life imprisonment without parole or to impose an MPI of 20 years. The principal reasons for his conclusions were:

(a) Mr Webber's age (31 at the time of sentencing), which would make a sentence of life without parole or life with an MPI of 20 years particularly harsh;[15]

(b) the fact that Mr Webber's prior "strike" offending was not of the most serious kind;[16] and

(c) the Judge's assessment that, were Mr Webber to be sentenced simply by reference to s 103 of the Act, an MPI of only 15 years' imprisonment would be warranted.[17]

[17] In making this s 103 assessment, the Judge identified the aggravating factors of Mr Webber's offending as being:[18]

(a) the wider context of gangs and gang violence;

(b) the use of a lethal weapon;

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14 In general terms, s 103 of the Sentencing Act 2002 requires a court sentencing an offender to life imprisonment for murder to impose an MPI of at least 10 years (unless the case is one where s 104 applies, such that an MPI of 17 years or more is required). It was accepted by the Judge and counsel that this was not a case engaging s 104.

15 Sentencing notes, above n 2, at [15].

16 At [15].

17 At [18].

18 At [14].

(c) Mr Heappey's vulnerability, due to the way in which Mr Webber and Mr Burke attacked him; and

(d) premeditation.

[18] The Judge in his sentence indication compared Mr Webber's offending to that in *R v Kahia*.[19] That case also had a wider gang backdrop and a stabbing. Put briefly, after learning about an earlier fight between his brother and the victim, Mr Kahia armed himself with a knife and, with his brother, formed a plan to deal to the victim. At some point during the fight that followed, Mr Kahia drew the knife and stabbed the victim three times, one of which proved fatal. At sentencing, an MPI of 13 years was imposed.[20]

[19] The Judge's reasons for distinguishing *Kahia* — and adopting an MPI that was two years higher — were expressed as follows:[21]

> [53] Here, your attack was part of vigilante justice according to gang rules. There was thus a significant gang context to the attack. There had been considered premeditation as to what you would do. The number of wounds inflicted by you demonstrated an intense element of aggression and hostility towards the victim in a situation where he was vulnerable. Despite the position ultimately taken by the Crown, I consider the offending warranted a minimum period (MPI) of 15 years.

[20] The Judge allowed a discount of one year for the guilty plea.[22]

[21] In terms of aggravating factors personal to Mr Webber, the Judge referred to his established record of violent offending and the fact that the earlier strike warnings had apparently made no difference.[23] While Mr Webber's previous offending was not of the most serious kind, the murder was a stage-3 offence, and he remained committed to the Nomads (and the associated violent lifestyle). The Judge considered that an uplift of 18 months was therefore warranted.[24]

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19 Sentence indication, above n 1, at [52] citing *R v Kahia* [2015] NZHC 344.
20 At [77].
21 Sentence indication, above n 1.
22 At [55].
23 At [57].
24 At [58]–[59].

[22] And in terms of mitigating factors, the Judge had before him (at the time of the sentence indication) two s 27 cultural reports — one from Mr Garrick Cooper and another from Dr Jarrod Gilbert, a leading expert on gangs in New Zealand. This was one of the main focuses of Mr Webber's appeal and so we set out this aspect of the Judge's reasoning in full. In his sentence indication, the Judge said:

> [61] It is clear that you suffered significant violence and had to witness serious violence within your family when you were a young child. The example you had from your father was that violence and being a hard man could bring respect. Dr Gilbert said how you quickly earned respect from Nomads gang members with whom you came into contact during early prison sentences through your ability and willingness to use violence to succeed against others. You became a patched member of the Nomads gang which, after it was formed, Dr Gilbert tells me, it was regarded as one of the most violent and dangerous of all gangs in New Zealand.
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> [62] Dr Gilbert has explained that, within the Nomads, you found violence was normal and encouraged, a means by which you could achieve status. You became an enforcer for the Nomads and were given leadership responsibilities. He said it was within that realm of gang politics you became involved in killing Mr Heappey. He says you were fulfilling your role within the gang by participating in an event to bring somebody into line using violence. Your status in the gang and the gang's status in the community was dependent on you operating that way.
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> [63] Dr Gilbert says you told him of possibly wanting to leave the gang. Your aunt and uncle have said they would give you the opportunity and work with you to make a life away from the gang if you did this. I have not however been told how you plan to achieve this and what you would have to do. You and the gang have previously demonstrated a commitment to doing whatever was required, including the use of violence, to bring people into line if they did not give the gang the respect it required.
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> [64] Despite the Court of Appeal's comments in *Zhang*, it is difficult to treat your loyalty to the Nomads as a significant mitigating feature. Despite the warnings you have received and the times you have already spent in prison because of violent offending, you chose and have chosen to stay with the Nomads and put your role as an enforcer before any respect you might have for the individual who became the victim of your offending.
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> [65] You have received a number of prison sentences. You were subject to post-release conditions which should have given you the opportunity to learn that your violence was not acceptable and would result in further prison sentences if it continued. By the time of this offending, I consider it was your commitment to the gang and not the deprivation you suffered as a child that caused you to offend as you did. I will however have regard to the deprivation you suffered as a child through a reduction to the MPI of six months. That would result in a notional minimum period of imprisonment of 15.
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> (footnote omitted).

[23] At sentencing, the Judge revisited the question of mitigating personal factors at some length. He began by referring to two new (post-sentence indication) matters:

(a) an addendum provided by Dr Gilbert to his earlier report in which he considered, in particular, the question of remorse and the difficulties experienced by gang members who seek to leave a gang;[25] and

(b) the release of the decision in *Carr v R*, in which this Court allowed two sentence appeals on the grounds that the sentencing Judge ought to have afforded discounts for matters outlined in s 27 reports.[26]

[24] As to the first matter, the Judge was unpersuaded that Mr Webber's expressions of remorse were genuine; he referred to the callous text sent by Mr Webber immediately after the murder and to his initial refusal to engage with the pre-sentence report writer. Moreover, the view of the probation service was that the remorse expressed by Mr Webber on previous occasions was belied by his later actions.[27] The Judge also said he was not willing to discount the already indicated MPI on account of Mr Webber's stated intention to leave the Nomads, reasoning that:

(a) Mr Webber had previously recognised the connection between the gang and his offending but had chosen to continue — and act as the gang's enforcer — regardless;[28] and

(b) more recently, there was no evidence of any tangible steps taken by Mr Webber (which potentially included taking advantage of assistance offered by Corrections) in that regard.[29]

[25] And as to the second, the Judge noted this Court's observation in *Keil v R* and in *Carr* that the seriousness of the offending can operate to limit the discount that can

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25 Sentencing notes, above n 2, at [39].
26 At [27]–[37] citing *Carr v R* [2020] NZCA 357.
27 At [39].
28 At [38].
29 At [41]–[43] The Judge noted that since being remanded in custody Mr Webber had become subject to 18 internal misconduct charges (many for violent offending) while in prison and had acquired a new gang tattoo on his neck.

be given because of s 27 matters.[30] He said that this was particularly relevant in Mr Webber's case because, "a young man lost his life and that happened because of your senseless decision to exact retribution on Mr Heappey in the way you did".[31] The Judge also referred, in that context, to Williams J's remarks in *R v Rakuraku*, where the Court discounted an MPI of 18 years by one year (six per cent) for s 27 matters when sentencing Mr Rakuraku for the brutal murder of a vulnerable young man.[32] Nation J viewed this as broadly consistent with the discount of six months that he had already allowed for s 27 matters in his earlier sentence indication.[33]

[26] The Judge recognised that there remained the potential for Mr Webber to turn his life around, as it seemed his father had done, but said that he had already adequately recognised that potential by deciding not to sentence Mr Webber to life without parole or to a minimum period of 20 years' imprisonment.[34] The Judge concluded:

> [46] It is significant that you are to be sentenced for murder after receiving a second and final three strikes warning. As was recognised by the Court of Appeal in *Carr* and Williams J in *Rakuraku*, there should not be an excessive discount to undermine the criminal law precepts of human agency and choice. In *Rakuraku*, Williams J weighed in the balance that Mr Rakuraku's offending was partly a factor of the offender's personality and the free choices he made in that regard. That is particularly the case with you.
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> [47] There has to be an emphasis on denunciation, deterrence and the need to protect others from your potential for further serious violent offending. All of that makes it necessary to impose a minimum term of imprisonment of 15 years.

The appeal

[27] Mr Webber's appeal against the 15-year MPI was brought on the grounds that:

(a) The 15-year "starting point" was too high because:

(i) Mr Webber's co-offenders had been much more leniently sentenced, despite the presence of the same aggravating factors; and

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30 *Keil v R* [2017] NZCA 563 at [58]; and *Carr v R*, above n 26, at [65]–[67].
31 Sentencing notes, above n 2, at [32].
32 *R v Rakuraku* [2014] NZHC 3270.
33 Sentencing notes, above n 2, at [36] and [38].
34 At [45].

(ii) the case was barely more serious than *Kahia*, where a 13-year MPI had been imposed.

(b) A greater discount should have been afforded for cultural matters outlined in the s 27 reports.

Discussion

Was the MPI "starting point" too high?

[28] The first matter can be dealt with relatively briefly. Any comparison with Mr Webber's co-offenders is inapt. None was convicted of murder, and none was on a third strike. And it seems the jury accepted, for example, that Mr Burke did not know that Mr Webber had taken a knife with him.

[29] A similar point can be made about any comparison with *Kahia*. Mr Kahia was not on a third strike; there was no presumptive 20-year MPI in operation. And we agree with the Judge that there are aggravating elements here that were not present in that case. More specifically, we agree that there is a qualitative difference in terms of the pre-meditation involved. Mr Webber and Mr Heappey did not simply get into some kind of "fight". The plan to punish Mr Heappey had been on foot for days, perhaps even weeks. Mr Webber was the gang's designated enforcer. Mr Heappey was rendered all but defenceless. He was stabbed by Mr Webber 14 times.

Should a greater discount have been given for the s 27 reports?

[30] We turn now to the s 27 reports. The Judge discounted Mr Webber's MPI by around three per cent on account of the matters raised in them.

[31] As noted by the Judge at sentencing, the most recent and extensive discussion of s 27 reports in sentencing for serious offending can be found in this Court's decision in *Carr*.[35] In that case, no discount for cultural factors had been given in the District Court when sentencing Mr Carr for a series of aggravated robberies.

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35 *Carr v R*, above n 26.

After canvassing the most recent developments in this field (including the decision of the Full Court in *Zhang v R*)[36], the Court said:[37]

> [65] We consider that the report gave a credible account of matters which might be considered to have impaired choice and diminished moral culpability so as to establish a causative contribution to offending, of the kind envisaged in *Zhang*. Where that is shown, we consider it must have an effect on the sentencing outcome. The focus of s 27 is on matters personal to the offender and while the gravity of the offending might temper the extent of any discount allowed for such considerations, that is a different proposition from saying there should be no allowance. We note in fairness to the Judge that this Court's judgment in *Zhang* had not been delivered when he sentenced the appellants.
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> [66] Nor is it appropriate to reason that because other people with disadvantaged backgrounds do not offend, legitimate references to deprivation affecting the life of an individual offender can be put on one side. We can agree with the Judge that "[e]xcessive discounts in this context" undermine what he described as the criminal law's precepts of human agency and choice. Those observations obviously were intended to embrace s 7(1) of the Sentencing Act's reference to the purposes of sentencing, including holding offenders accountable, promoting a sense of responsibility and denouncing the conduct in which the offender was involved. But there is a clear difference between avoiding an excessive discount and deciding that there should be no discount at all. The latter conclusion might in its turn attract the criticism that the requirements of ss 7(1)(h) and 8(i) of the Sentencing Act had not been met. Section 7(1)(h) states that one of the explicit purposes of sentencing is to assist in the offender's rehabilitation and reintegration. Section 8(i) has been mentioned above. When there is a link of the kind recognised in *Zhang* it would be wrong not to apply the provisions of the Act.

[32] While the Court afforded Mr Carr a discount of 15 per cent for the matters disclosed in his s 27 report; aggravated robbery carries neither a presumptive sentence of life imprisonment nor a mandatory MPI of at least 10 years.[38] By contrast, in a case such as Mr Webber's, s 103(2) of the Act requires that the MPI must be of a length:

> … that the court considers necessary to satisfy all or any of the following purposes:
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> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
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> (b) denouncing the conduct in which the offender was involved:
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> (c) deterring the offender or other persons from committing the same or a similar offence:

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36 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

37 *Carr v R,* above n 26 (footnotes omitted).

38 Sentencing Act, s 103(2) states that an MPI of at least 10 years is mandatory *if* the court sentences the offender to life imprisonment for murder.

(d) protecting the community from the offender.

[33] Section 103(2) thus clearly signals Parliament's intention that marking the inherent seriousness of the offending is to be a sentencing court's particular focus when setting an MPI for murder. It is for this reason that discounts for personal mitigating factors have played a lesser role in such cases.[39] By way of recent example only, we refer to:

(a) *R v Izett*:[40] 12-month (six per cent) discount on "starting point" MPI of 18 years for personal factors;

(b) *R v Garson*:[41] six-month (three per cent) discount on 17-year MPI for personal factors;

(c) *Tufui v R*:[42] no discount for s 27 matters on 17-year MPI, confirmed on appeal;

(d) *Duff v R*:[43] no discount on 17-year MPI confirmed for the "particularly callous and brutal murder of a defenceless and highly vulnerable infant";[44]

(e) *Hohua v R*:[45] no discount on 17-year MPI confirmed on appeal; and

(f) *R v Kahia*:[46] no discount for s 27 report factors on 13-year MPI (although a one-year discount was given primarily to recognise time spent on EM bail and awaiting retrial).[47]

[34] And in Mr Webber's case, the Judge expressly found that an MPI of 15 years was necessary to satisfy (in particular) denunciation, deterrence, and the need to

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39 See the statements of this Court to that effect in *Hohua v R* [2019] NZCA 533 at [44].
40 *R v Izett* [2021] NZHC 70 at [70].
41 *R v Garson* [2020] NZHC 3259 at [68].
42 *Tufui v R* [2020] NZCA 568 at [68].
43 *Duff v R* [2020] NZCA 116.
44 At [62].
45 *Hohua v R*, above n 39, at [45].
46 *R v Kahia* [2019] NZHC 1021 at [45].
47 At [49].

protect the community. Not only did he afford a small, discrete, discount for s 27 matters, those matters also played a part in his decision that there would be manifest injustice in imposing either a life sentence without parole or the presumptive 20-year MPI. We regard that as meaningful recognition of the undoubted cultural and social deprivation experienced by Mr Webber.

Result

[35] For the reasons we have given, we are unable to discern any error in the Judge's approach or in the result. The appeal is dismissed.

Solicitors:
Crown Solicitor, Christchurch for Respondent