IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA48/2020
[2021] NZCA 234

BETWEEN	JAMES TAYLOR MARTIN WEBBY Appellant
AND	THE QUEEN Respondent

Hearing: 12 May 2021

Court: Clifford, Simon France and Edwards JJ

Counsel: E J Forster and H A Neumegen for Appellant
M H Cooke for Respondent

Judgment: 4 June 2021 at 10.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, James Webby, pleaded guilty to the murder of Alex Latimer, and to two charges of aggravated robbery, one of arson and one of attempting to pervert the course of justice. Mr Webby was sentenced by Dobson J to life imprisonment with a minimum non-parole period (MPI) of 17 years and nine months.[1]

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1 *R v Lothian* [2019] NZHC 2938 [Judgment under appeal].

[2] Mr Webby now brings an as-of right appeal against that sentence.[2] He says the Judge erred in the way he determined Mr Webby's MPI, with the result his sentence is manifestly excessive. Mr Webby says his MPI should be no greater than 17 years.

Background

[3] Mr Webby was charged with the murder of Mr Latimer together with an associate, Mr Lothian. Mr Webby's trial was due to start on 11 November 2019. Some months earlier, Dobson J had given Mr Lothian a sentencing indication. Mr Lothian had accepted that sentencing indication. As we understand it, Mr Lothian was to be sentenced immediately before Mr Webby's trial commenced.

[4] On 11 November 2019, and before Mr Lothian had been sentenced, counsel for Mr Webby sought an informal indication from the Judge as to the extent to which the Judge's analysis in Mr Lothian's sentencing indication would apply if Mr Webby pleaded guilty. After discussions, Mr Webby entered a guilty plea and the Judge then proceeded to sentence both Mr Lothian and Mr Webby.

[5] In doing so, the Judge first set out the circumstances of their offending and, in particular, the murder of Mr Latimer. For the purposes of this appeal, those circumstances can be summarised as follows.

[6] Mr Latimer was a small-scale dealer in cannabis and methamphetamine. In January 2017 either or both of Mr Lothian and Mr Webby had purchased drugs from Mr Latimer. Mr Latimer considered he was owed money by Mr Lothian. Mr Latimer made enquiries about Mr Lothian at Mr Webby's flat. One of Mr Webby's flatmates told Mr Lothian about those enquiries, prompting Mr Lothian to go to that flat. When Mr Lothian arrived, he and Mr Webby attacked and beat Mr Latimer, taking a bag from him containing drugs and money. Mr Latimer was picked up by his brother who observed he had a black eye; his face was bleeding and swollen and he had cuts to his head and face.

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2 Criminal Procedure Act 2011, s 244.

[7] It would not appear Mr Latimer had any further dealings with Mr Lothian or Mr Webby until the night of his murder.

[8] That evening, Mr Lothian, Mr Webby and an associate were at Mr Lothian's residence, located at Te Haroto approximately halfway between Napier and Taupō on the Napier-Taupō Highway. The associate had had recent dealings with Mr Latimer.

[9] In a text message exchange initiated by the associate, it was agreed Mr Latimer would come to the address to supply drugs. Mr Latimer was not told, however, of the presence of Mr Lothian and Mr Webby.

[10] Mr Latimer arrived at the address at about 3.00 am the following morning. He was greeted by the associate. The associate went inside to get a cigarette, where upon Mr Lothian and Mr Webby set upon Mr Latimer. Mr Latimer was beaten about the head, hit with a shovel and forced to the back of the property. At Mr Lothian's direction, Mr Webby again hit Mr Latimer with the shovel. As the Judge put it:[3]

> Mr Latimer went quiet and a shovel was then thrown at him and he was ordered to dig his own grave. You then resumed your attack on him, with each of you kicking, punching and hitting him with the shovel. Next, you both dug a shallow grave for Mr Latimer. Mr Lothian stabbed Mr Latimer multiple times in his back and in his side, telling Mr Latimer that he was going to die. After those stabbings, Mr Lothian, you used the knife to stab Mr Latimer once in the neck.

[11] Mr Latimer was then moved from the grave he had partially dug to one which had been dug some 10 metres away. Mr Lothian and Mr Webby then removed Mr Latimer's clothing, and their own, and burnt it.

[12] During the beating, a bag of pills, some pipes used to smoke methamphetamine, a bag of cannabis and an unknown quantity of money was taken from Mr Latimer.

[13] Mr Latimer's post-mortem established he had died from stab wounds and from blunt force trauma to his face and chest. Serious stab injuries were inflicted to his

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3 Judgment under appeal, above n 1, at [6].

right lung, his liver and one of the large veins entering his heart. He had bleeding on the brain and fractures on the left side of his sixth and seventh ribs.

[14] Mr Lothian and Mr Webby then drove Mr Latimer's car to another remote location and set it alight, totally destroying it. The arson charge they both faced reflected those circumstances.

[15] After his arrest Mr Webby was in custody on remand. Having become aware that the associate had provided information to the police, he was seen writing on the walls of the exercise yard that the associate, whom he named, was a "nark" and identified where he lived. Those circumstances resulted in the charge Mr Webby faced on attempting to pervert the course of justice.

[16] Having set out those circumstances, the Judge then sentenced Mr Lothian, in terms of the indication he had given. Mr Lothian had already been given a first strike warning for a serious violent offence. Therefore, his conviction for Mr Latimer's murder would be a stage-2 offence. Accordingly, Mr Lothian was to be sentenced to life imprisonment without parole unless it would be manifestly unjust to impose that sentence.[4] In considering that question, the Judge was required to identify what sentence would be appropriate for Mr Lothian if the three strikes provision did not apply.

[17] As he had indicated, the Judge found that Mr Lothian's murder of Mr Latimer would, absent the three strikes regime, attract the operation of s 104 of the Sentencing Act 2002.[5] That section requires the imposition of an MPI of at least 17 years where certain circumstances are made out unless that would be manifestly unjust. In this case, some of those circumstances were present. The murder was committed with a high level of brutality, cruelty and callousness, and carried out over a period of time involving multiple blows from fists, the spade and ultimately the knife. Moreover, it was carried out in the course of another serious offence, namely the aggravated robbery.[6]

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4 Sentencing Act 2002, s 86E.
5 Judgment under appeal, above n 1, at [21].
6 At [27]–[28]; and Sentencing Act, s 104(1)(d) and (e).

[18] Ranking the seriousness of those circumstances against other cases where s 104 applied the Judge, again as he had indicated, chose a starting point for Mr Lothian's MPI of 18 years.[7] Taking account of the other offending to which Mr Lothian pleaded guilty, and his previous criminal record, the Judge uplifted that starting point MPI to 22 years.[8] Accepting the Crown submission, the Judge then allowed a two-year discount on account of Mr Lothian's guilty pleas, resulting in an MPI of 20 years.[9] Given Mr Lothian's age, 27, and the circumstances of his first strike warning, the Judge was satisfied it would be manifestly unjust to impose a life sentence without parole.[10]

[19] Mr Lothian was, therefore, sentenced to life imprisonment with an MPI of 20 years.

[20] The Judge then turned to sentence Mr Webby. Based on his reasoning regarding Mr Lothian, the Judge concluded that Mr Webby's actions also attracted the operation of s 104. The Judge said Mr Webby had taken a full part in a truly ghastly murder. He acknowledged Mr Webby had been led by Mr Lothian and it was Mr Lothian who had done the stabbing. Nevertheless, the Judge was satisfied it was a two-man job and the distinction between Mr Lothian and Mr Webby could not be great when it came to any difference in the length of the starting point MPI.[11] On that basis, the Judge settled on a starting point MPI of 17 years and three months, relative to Mr Lothian's of 18 years.[12]

[21] The Judge uplifted that starting point by two years on account of the aggravated robbery of Mr Latimer in 2017, and for Mr Webby's part in the arson of Mr Latimer's car, as he had done for Mr Lothian.[13] The Judge added a further six months' uplift for the attempting to pervert the course of justice offending.[14]

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7 At [29].
8 At [30]–[32].
9 At [33]–[34].
10 At [41]; and Sentencing Act, s 86E(2)(b).
11 At [44].
12 At [45].
13 At [46].
14 At [47]–[48].

[22] Then, and notwithstanding he thought the approach was a generous one, the Judge accepted the Crown's submission that Mr Webby should be given a two-year discount in recognition of his late guilty plea.[15] On that basis, the Judge arrived at an MPI for Mr Webby of 17 years and nine months.[16] He was satisfied that difference in sentence between Mr Lothian and Mr Webby appropriately reflected their individual culpability.[17]

The appeal

[23] Mr Webby challenges his sentence on one ground. He says the Judge erred because he did not, when sentencing Mr Webby, take the three-step approach to Mr Webby's sentence for murder identified by this Court in *R v Williams* as correctly applying s 104.[18] That is, judges applying s 104 are first to identify the period of imprisonment that would have been appropriate if s 104 did not apply. They then determine, in light of that, whether imposing the MPI called for by s 104 would be manifestly unjust. In making that determination, they are to pay heed to the policy behind s 104, which calls for 17-year MPIs when, absent s 104, a lesser sentence would have been imposed.

[24] Rather, Mr Webby submitted, having determined that s 104 applied the Judge fixed the MPI to apply without discretely identifying the starting point MPI that, but for the operation of s 104, would have properly responded to the circumstances of Mr Webby's murder of Mr Latimer. If the Judge had taken the correct approach, an MPI of 15 years or thereabouts would have been an available starting point. Subsequent uplifts for Mr Webby's other offending, and the agreed discount for his guilty pleas, would have produced an end MPI in the region of 17 years.

Analysis

[25] In sentencing appeals it is the sentence imposed that ultimately matters, not the route the Judge took in determining that sentence.[19] If that sentence is within range,

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15 At [51].
16 At [53].
17 At [54].
18 *R v Williams* [2005] 2 NZLR 506 (CA) at [52]–[54] and [75].
19 *D (CA197/2014) v R* [2014] NZCA 373 at [18].

then alleged errors in methodology or approach will not be sufficient to sustain the appeal.[20] At the same time, the stepped approach to the application of s 104, which can be traced to the earlier decisions of this Court in *R v Williams* and *R v Howse*, is important.[21] In particular, its purpose is to enable the court to make a properly informed assessment of whether the application of s 104 would, in the particular circumstances, be manifestly unjust.

[26] Having said that, the courts have not said a sentencing judge must always expressly reason using that methodology. In *R v Williams*, this Court recognised that judges would be assisted by direct comparison between the case before them and other cases that had attracted the operation of s 104. This Court has also said in *Davis v R*:[22]

> Section 104 is no longer new. There is now a substantial body of cases and sentencing judges sometimes cite them without expressly using the three-step methodology. This is unobjectionable, provided the judge addressed the relevant sentencing purposes and principles and it can be seen that the sentence in a comparator case could have been arrived at consistently with *Howse* and *Williams*.

[27] As we have already noted, when Dobson J gave his sentencing indication to Mr Lothian, he recorded that he had fixed a starting point MPI of 18 years by reference to other cases where s 104 had applied. The Crown had identified those cases in the submissions it made for Mr Lothian's sentencing indication and, again, at his actual sentencing. Thus, when the Judge identified the starting point MPI for Mr Webby he did so on the same basis.

[28] As we have noted, the Judge found that two of the s 104 factors were engaged: the brutality and callousness of the murder, and that it occurred in the course of another serious offence, namely aggravated robbery.[23] We agree with the Crown that, when comparing the circumstances of Mr Webby's offending against the cases the Judge was referred to, each of which engaged the same or similar s 104 factors, the starting MPI of 17 years and three months was not out of range. Moreover, in three of those

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20 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
21 *R v Williams*, above n 18; and *R v Howse* [2003] 3 NZLR 767 (CA).
22 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [27].
23 Judgment under appeal, above n 1, at [27]–[28]; Sentencing Act, s 104(1)(d) and (e).

cases[24] the Judges had adopted the practice acknowledged by this court in *Davis v R* as unobjectionable: that is, referring to other comparator cases without expressly adopting the three-step methodology.

[29] We are therefore satisfied Dobson J did not err in sentencing Mr Webby.

Result

[30] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[24] *R v Gosnell* [2013] NZHC 1313; *R v Lavemai* [2014] NZHC 797; and *R v Rakuraku* [2014] NZHC 3270.