IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CRI-2020-054-001281
[2021] NZHC 2882

THE QUEEN

v

ALASTAIR MANUA TE ARIANIWA DON

Hearing:	26 October 2021
Appearances:	B Vanderkolk and E Pairman for the Crown P Surridge for the Defendant
Judgment:	26 October 2021

NOTES ON SENTENCING OF GRICE J

Introduction[1]

[1] Mr Don, you are to be sentenced on one charge of murder to which you have pleaded guilty.[2] The plea of guilty was entered at the last moment on the morning of the trial and after the jury had been empanelled.

[2] Since then quite some time has passed. The Court has now received information about your background, which sheds some light on the causes of the incident that led to the death of Roger Chin.

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1 Address to the public and remote participants, and acknowledging the victim, whānau and friends was delivered before sentencing submissions and not reported here.

2 The oral decision was delivered on 26 October 2021. These sentencing notes have been edited for grammar, flow and with the addition of footnote references and citations. The substance is unchanged.

[3] These reports include a s 38 psychological report and a s 27 cultural report. I have also heard from the Crown and the defence. I have heard personally from a number of Mr Chin's family and a friend.

[4] I will take some time to go through the background issues relevant to your sentence. I will outline the purposes and principles of sentencing. My taking the time to do this is important both for the victim and the family present today, and for you and your whānau.

Background

[5] Mr Chin was your landlord. He had a home in Ōtaki. Both your families knew each other and had known each other for some years. You, at that stage, had nowhere else to stay and Mr Chin took you in during the COVID-19 lockdown. During this time you spent at the house, tensions grew between the people at the house, apparently relating to your drinking habits and similar issues.

[6] On 16 May 2020, Mr Chin had finished work mid-afternoon and he returned home. You and he shared a meal together. You had a loud argument and after that Mr Chin withdrew and he went to his room to sleep. You located a hammer and then went into Mr Chin's bedroom. While Roger Chin lay in bed you hit him on the head with the hammer.

[7] You then left. You concealed the hammer on your person and then discarded it while you walked down the highway. You hitchhiked to Paraparaumu to visit an uncle, who then returned you to Waikanae. You hitchhiked back to Ōtaki.

[8] Your other flatmate discovered Mr Chin after hearing his laboured breathing. She called emergency services but Mr Chin was pronounced dead at 8.30 pm. He had suffered a fractured skull and a fractured jaw, and significant brain injury as a result of blunt force trauma.

Principles and purposes of sentencing

[9] I now turn to the principles and purposes of sentencing. Those principles and purposes are set out in the Sentencing Act 2002, which I must take into account. The most relevant here are accountability, denunciation, protection of the community and making you responsible for your actions, as well as deterrence.[3] You must be held accountable for the harm that you have caused by this offending, to the victim, to his whānau and friends, and to the community. However, any sentence imposed must be consistent with other sentences imposed in similar cases,[4] and take into account information as to the effect of the offending on the victim and your personal circumstances as they relate to the offending.

Approach to sentencing for murder

[10] In considering sentencing for murder some special factors apply.

[11] The starting point is to look at whether the presumption of life imprisonment is displaced. It can only be displaced if it is manifestly unjust.[5] Having considered that, I must then consider the setting of a minimum period of imprisonment (MPI). This is because if there are one or more of the criteria listed under s 104(1) present, the Court must consider imposing an MPI of 17 years, unless it is manifestly unjust to do so. If I find it would be manifestly unjust then I must set an MPI period of between 10 and 17 years' imprisonment.

Life imprisonment

[12] Murder attracts a presumption of life imprisonment, unless such a sentence is manifestly unjust.[6]

[13] The test for whether a sentence is "manifestly unjust" is based on the circumstances of the offence and offender and finding they must justify a departure from the presumption of life imprisonment, having regard to the sentencing purposes

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3 Sentencing Act 2002, ss 7(1)(a), (b), (e) and (f).
4 Section 8(e).
5 Section 102.
6 Section 102.

and principles.[7] Cases of such manifest injustice would only be reached in exceptional cases, given the legislative history of s 102.[8] However, the subsection does not "limit a sentencing judge's power in any particular case", and "the phrase 'manifestly unjust' allows all circumstances to be taken into account so long as they relate to the offence or the offender".[9]

Minimum period of imprisonment

[14] If one or more of the listed criteria under s 104(a)–(i) is present, then an MPI of 17 years must be imposed unless such a term would be manifestly unjust. A factor that makes that provision relevant here is the vulnerability of the victim.

[15] The Court of Appeal in *R v Williams* set out the approach under s 104 as follows:[10]

(a) The Court first consider the degree of culpability in relation to the range of murders that have come before the courts, including factors relating to the offending and the offender.

(b) The Court should then have regard to the policy underpinning s 104, being that the presence of one or more s 104 factors establishes sufficient seriousness to justify an MPI.

(c) If it is concluded an MPI of less than 17 years should be imposed, then the Court must decide whether an MPI of 17 years is manifestly unjust. This test, as the Court of Appeal noted, is different to the "manifestly unjust" test under s 102.[11] Under s 104, the test is whether, "as a matter of overall impression the case falls outside the scope of the legislative

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7 *R v Rawiri* HC Tāmaki Makaurau |Auckland T014047, 16 September 2002; endorsed on appeal in *R v Rapira* [2003] 3 NZLR 794 (CA); *R v Smail* [2007] 1 NZLR 411 (CA); and *Hamidzadeh* [2012] NZCA 550, [2013] 1 NZLR 369.

8 *R v Rapira*, above n 7, at [121]; affirmed in *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775 at [70] and *Hamidzadeh v R*, above n 7, at [58].

9 *R v Cunnard* [2014] NZCA 138 at [15].

10 *R v Williams* [2005] 2 NZLR 506 (CA) at [45]–[54].

11 At [55]–[68].

policy that murders with specified features are sufficiently serious to justify at least that term [of a 17-year MPI]".[12]

(d) A guilty plea could be a relevant mitigating factor when determining whether it would be manifestly unjust to impose a 17-year MPI. How much weight must still depend on the circumstances in which the plea was made, "bearing in mind the plea avoids a murder trial, giving closure sooner to the victim's family".[13]

[16] If s 104 does not apply, then, under s 103, the Court must decide on an MPI that must not be less than 10 years and must be the MPI necessary to satisfy all or any of the following purposes:[14]

(a) holding the offender accountable for the harm done to the victim and the community by the offending:

(b) denouncing the conduct in which the offender was involved:

(c) deterring the offender or other persons from committing the same or a similar offence:

(d) protecting the community from the offender.

[17] That sets out the principles and policies that I must take into account. Now, more importantly, I come to how these apply to the sentence I impose here.

Material before the Court

[18] I have before me a number of reports, as well as counsel's submissions and the victim impact statements.

Section 27 cultural report

[19] The report writer says you whakapapa to Ngāti Whātua, on your father's side, and Ngāti Kahungunu on your mother's side. However, you have had little or no contact or support in terms of your connection with your heritage. Mr Surridge said

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12 *R v Williams,* above n 10, at [67].
13 At [72].
14 Sentencing Act 2002, s 103(2).

that having provided you with material on tikanga Māori to try and reconnect you to your background and culture, you now better understand your life and your background. Mr Surridge submits that you have an improved future outlook, an improved vocabulary, and an improving ability to communicate.

[20] The cultural report sets out details of your background, upbringing, and the difficulties you had because you did not have a stable background. You had a childhood which was anything but stable, which continued into adulthood. Your underlying mental health and anger issues are directly linked to your abusive upbringing, according to the report writer. They contribute to strong reactions, or overreactions to stress. This behaviour is linked to the present offending.

[21] Your upbringing and youth was characterised by constant disagreements between your parents. Violence was meted out to you and your three younger siblings by your father. Dr Barry-Walsh, the s 38 psychiatric report writer, has interviewed your sisters and confirms these circumstances.

[22] Your whānau was poor and survived on your father's basic wage. While in Porirua you had a relatively positive experience at primary school and intermediate. However, when your father's work was terminated, you moved with the family to Motueka to help support the wider whānau. The family moved again within a year. This constant instability provided minimal support for your development of self-confidence. You left for Porirua College, having been asked to leave Motueka for truancy. You reported that you did not go to school because you were constantly covering up what happened at home.

[23] Mr Don, you left school at 15 to find work and became a painter in Motueka for one or two years. You went to trade school and returned to Porirua. However, no work eventuated, and you returned to Motueka. This pattern of constantly moving and no constant work continued. You were left depressed and turned to alcohol, methamphetamine and cannabis.

[24] By the time that you were living with Mr Chin, you were on an unemployment benefit of $160 and paying $100 in board. You said you felt constantly disrespected by other flatmates, including being kept up at night with loud stomping.

[25] The report says that your alienation from tikanga Māori had some causative effect to your present state. Your mana was diminished over time. Despite your quest in vain to make something of yourself you have a pattern of shunning normal contact, substance abuse, and lack of self-control, which are connected to the reason for the offending.

[26] On a more general note the report identifies this is a pattern for many Māori youth so you are no exception.

Section 38 report by Dr Barry-Walsh

[27] The report by Dr Barry-Walsh is detailed. He had interviewed you for an earlier report. He had concluded that he could not find evidence of an active psychiatric illness but said you had diminished intellectual functioning, a sense of injustice and inability to cope with adversity. There was also evidence of substance abuse.

[28] The main report was filed on 20 October. Dr Barry-Walsh had conducted two interviews with you, and interviews with your sisters and aunty and reviewed the police disclosure files. He concluded that:

> It is my view Mr Don is someone with markedly impaired personality function as a result of repeated adversity and traumas in childhood and into adulthood. This has left him limited in his capacity to cope with the vicissitudes of life, to live independently, to regulate his mood and would account for his outbursts of anger and frustration. It is possible that related to this he also has a developing psychotic illness. In addition, it is evident Mr Don has had problems with dependence on alcohol and abuse of cannabis and methamphetamine.

[29] That is the best summary of the contents of the reports.

[30] While there remains some uncertainty as to a diagnosis of mental illness, nonetheless your mental problems have affected your ability to cope under duress.

The problems have been brought on by long-term physical and emotional abuse, from childhood to adulthood. The family members interviewed say that you were often treated as a "punching bag" when others had problems.

[31] Your mental health was deteriorating for some years before the incident. You had used methamphetamine the day before the offending. The report writer noted that the murder was likely due to your feeling pressure. You felt you had been subjected to repeated victimisation, you were struggling with accommodation, had difficulty maintaining your independence and unfulfilling vocational activity. Conflict during this time, given your compromised state of mental health, would have triggered an angry state, leading to the fateful incident.

[32] The report concludes that despite further assessment being needed to make a clearer psychological diagnosis, the level of impairment and psychological disturbance are matters the Court "may find relevant to issues of culpability for the offending and mitigation".

[33] Dr Barry-Walsh also noted the remorse and distress that you had expressed, in your own way, for the harm caused.

Restorative justice report

[34] There was some attempt at restorative justice. Mr Lester Chin (whom we heard from today, who is a brother of the deceased) had expressed a willingness to take part in that, but it did not get completed due to factors identified by the restorative justice report writers that would have made it inappropriate for you to participate in restorative justice. The facilitators were to meet with you and assist you in writing a letter of apology and, indeed today your counsel handed up a letter of apology which I understand has also been handed to the family. It expresses significant remorse for what happened. It is for the family to accept, reject, or deal with that as it will. Nevertheless, it is a gesture of remorse.

[35] Family members of the deceased had wanted to travel to the sentencing hearing from Australia. It has not been possible for all of them to be here due to the COVID-19

travel restrictions. But we have had the benefit of the victim impact reports and one was read from a remote location over the AVL system.

[36] Mr Surridge indicated that there have been informal communications between the families. Mr Don, your father, has been a long-time friend of Mr Lester Chin.

Victim impact statements

[37] Victim impact statements (VIS) were received from all of Roger Chin's siblings, as well as his best friend Kamal Agalawatta, and his two nieces.

[38] I have carefully read all the reports. Today we heard from two of Roger's sisters and his younger brother, Lester. All reports speak of the deep loss, unbearable pain and suffering caused to the family and friends of Roger Chin. Some said they will never forget what has happened and will continue to be haunted. We heard from one of Roger's sisters who mentioned the ongoing stress, anxiety, and trauma that has required counselling. She feels crushed spiritually and emotionally. One of Roger Chin's nieces, still in high school, spoke of a significant impact on her of her uncle's death. Although he had no children of his own, he was a much-loved uncle.

[39] Many spoke of Mr Chin being taken too soon, with one niece commenting she had always thought he would be there for her graduation. The deceased has been robbed of a future. It was mentioned Mr Chin said he did not even get to his 60th birthday.

[40] Many described Mr Chin as kind and considerate, not perfect, but brought you into his home during your time of need and got this in return.

[41] Mr Surridge notes in his submissions that he has read to you, Mr Don, all the victim impact statements. He says that you have heard them and understood them. You accept what you did was wrong, that you are responsible for it and you are remorseful. That is what you say in that letter.

[42] However, whatever sentence I impose today will never make up for the loss of Roger Chin and the grief that his death has caused to his family and whānau. A need for justice in sentencing was expressed by the victims.

Submissions

Crown submissions

[43] The Crown notes the aggravating factors were, firstly, premeditation. This was limited to the finding of a hammer and entering Mr Chin's room. It also notes the vulnerability of Mr Chin, given he was asleep at the time. The Crown also points to your intention to kill, or at least significantly hurt Mr Chin, knowing death was a likely consequence.

[44] The Crown pointed to various statements in your video interview taken shortly after the murder in support of this.

[45] Finally, the Crown notes the harm done to the deceased's whānau and friends, which was reinforced by the victim impact statements.

[46] The Crown notes there are two comparable cases of *R v Morris*[15] and *R v Tu.*[16]

(a) In *R v Morris*, the Court imposed life imprisonment with a minimum period of imprisonment of 10 years. Ms Morris' son had been placed into Oranga Tamariki shortly after her self-discharge from a mental-health centre. Ms Morris believed her neighbour, Ms White, had laughed when her son had been taken away. Ms Morris then entered her neighbour's house and assaulted her with a hammer in the toilet, causing at least 15 lacerations on Ms White's head. A number of psychiatric reports before the Court detailed a history of extreme trauma in a childhood of physical abuse, emotional neglect and instability. This manifested from a young age. By about 12 to 13, Ms Morris was diagnosed with schizophrenia. In adult life, she would

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15 *R v Morris* [2012] NZHC 616.
16 *R v Tu* [2016] NZHC 1780.

continue to experience paranoia and auditory hallucinations. The Court found that the offending pointed to an MPI of 17 years, however the significant mental health challenges, the background and remorse and the entering of a guilty plea led the Court to conclude such a sentence manifestly unjust. The Court imposed an MPI of 10 years.

(b) In *R v Tu*, the Court imposed a sentence of life imprisonment with an MPI of 12 years. Mr Tu flatted with the deceased, the deceased's girlfriend and another friend. After sharing a meal, Mr Tu left the address to speak to nearby police officers investigating a traffic incident and told them he believed the deceased was a threat to him. The Judge accepted there was no evidence of this, but that Mr Tu perceived such a threat. The officers advised Mr Tu to raise his concerns at the station the following morning. Mr Tu returned to the flat, found a hammer in the cupboard, and went into the deceased's room where he and his girlfriend were sleeping. Mr Tu struck the deceased twice in the head with the hammer. After returning the hammer and waiting for a time, Mr Tu returned to the room in the morning and lay down between the deceased and his girlfriend. He began touching her and attempted to remove her pants, which woke her. She forced Mr Tu from the bed and raised the alarm.

(i) The Court noted Mr Tu's serious mental health disorders, which displayed themselves through highly abnormal behaviour. Mr Tu had been receiving treatment for some time.

(ii) The Court found the victim's vulnerability, in being asleep, was an aggravating s 104 factor. In light of his significant mental health issues, an MPI of 17 years would have a disproportionate effect on Mr Tu. The Court concluded that such a sentence would be manifestly unjust.

(iii) The Court set an MPI of 12 years, noting other cases including *R v Waititi*,[17] where the Court allowed a discount of 30 per cent due to the defendant's Asperger's syndrome as well as provocation in the context of an assault. The Judge also noted that the offending occurred when the defendant was cut adrift from normal support structures and all the mental health assessments suggested ongoing medical treatment.

[47] The Crown submits that the aggravating features justify the presumption of life imprisonment, and that would be consistent with the sentencing principles and purposes of accountability, denunciation and deterrence, as well as protection of the community.

[48] The Crown says the same approach should be taken here as in *Morris* and *Tu* where there was a degree of culpability justifying life imprisonment despite significant mental health conditions of those defendants.

[49] Given the vulnerability of the victim, and noting *R v Tu*, s 104(g) in my view vulnerability is engaged.

[50] The Crown accepted that an MPI of 17 years here would be manifestly unjust given your mental health issues, Mr Don, and the entry of a guilty plea before the evidence was started at trial. The Crown also noted the s 38 reports, the significance of mental health issues in this case which would impact on the MPI.

Defendant's submissions

[51] Mr Surridge, on your behalf, does not take issue with the MPI suggested by the Crown as being at the lower end, 10 to 12 years. He submits that the term of imprisonment should be at the lower end because of the "forensic background matters", including the psychiatric evidence. He says allowance should be made for the cultural issues and your background deprivation, as well as remorse, the fact of a written apology and the guilty plea.

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17 *R v Waititi* [2015] NZHC 1211.

[52] Mr Surridge's submissions recount the interactions between the families. He refers to your lifestyle before the offending and says it was this environment that lead to the flash point in which Mr Chin was grievously injured and died.

[53] Mr Surridge also noted that you will be assisted in your rehabilitation by health professionals.

Discussion

[54] The presumption of life imprisonment is not manifestly unjust. The defence did not seriously suggest that it was. In both *Morris* and *Tu* the courts determined that despite significant mental disorders life imprisonment should stand.

[55] Both Mr Tu and Ms Morris had been diagnosed with clear and significant mental illnesses.

[56] There remains some uncertainty as to the precise nature of Mr Don's mental illness, nevertheless Dr Barry-Walsh's report indicates there is likely to be an underlying and deteriorating mental health condition.

[57] I conclude on the first question of whether life imprisonment should stand, that the presumption of life imprisonment has not been displaced.

[58] The next question relates to whether an MPI of 17 years would be manifestly unjust.

[59] The vulnerability of the victim is the factor present in this case, the fact that he was asleep. This is similar to the situation in *R v Tu*, in which Mr Tu had struck the deceased, while asleep, at least twice in the head with a hammer. The Court observed:[18]

> [23] In terms of s 104(g), a particularly vulnerable victim is an aggravating factor for the purposes of sentencing. As I have said, Shane was sleeping at the time of the murder and defenceless. Vulnerability is literally about susceptibility to attack and a sleeping person in their home (whatever their age or health) is particularly susceptible to attack from a flatmate. The cases cited

[18] *R v Tu*, above n 16. (Footnotes omitted).

> by Mr Tomlinson said to favour a more restrictive meaning of "vulnerable", for the most part, involved a conscious victim. The Court of Appeal also observed in a footnote (without having heard argument, it appears) in *Hamidzadeh v R* that attacking a person while sleeping would qualify as a s 104 aggravating factor. While the Crown submits that it is more likely that s 104 is not engaged in this case, given a general reluctance in the authorities to rely on vulnerability, the vulnerability factor is, in my view, triggered by the circumstances of your offending.

[60] The Court in that case observed that vulnerability was literally about susceptibility to attack and a sleeping person in their home is particularly susceptible to attack. That vulnerability factor has been triggered here. Therefore the issue of whether it would be manifestly unjust to impose an MPI of 17 years must be considered.

[61] As to the degree of your culpability, the mental health report and s 27 report do not absolve you of responsibility to any extent. They do go a long way to explaining the factors that gave rise to this incident. The reports provide information that contextualises the offending and assesses the culpability.

[62] These considerations weigh against a 17-year MPI. I accept the submissions of the Crown and defence and find that a 17-year MPI would be manifestly unjust. The same conclusion was reached in *Tu* and *Morris*.

Minimum sentence

[63] Having reached that conclusion, I now look at what MPI would be appropriate in this case. This inquiry is fact specific. It should be undertaken in light of the four purposes specified in s 103, being: accountability, denunciation, deterrence and protecting the community.

[64] The contents of the s 38 mental health report and, to some extent, the cultural report bear on all these factors. The Crown suggested it be at the lower end of the range of 10 to 12 years, taking into account the comparable points in the cases of *Morris* and *Tu*.

[65] The impact on the victims must also be factored into the consideration.

[66] You entered a guilty plea on the first day of trial, after the Crown had opened their case. As Mr Vanderkolk indicated, it could have been much earlier than this, so only a limited discount would usually apply. However, the ordinary exercise of discounting for guilty pleas is not compatible with the inquiry into the appropriate MPI for murder.

[67] In the case of *R v Tu*, Mr Tu was found guilty by jury. Therefore he put the family through the stress of a trial. However, in this case, that was avoided.[19] In my view any discount would have been limited. The Courts have also said that in cases that are setting an MPI for murder, it is not appropriate to work back from discounts.

[68] In the case of *R v Tu,* the Court had evidence of identifiable and serious mental health disorders, as was the case in *Morris*. Your mental health is apparently deteriorating and certainly appears to have contributed to the incident. Neither counsel has suggested that you have a mental health condition of such nature that would require a special sentence; therefore, I do not consider that.

[69] In this case, the s 27 report also details ongoing trauma to you from childhood to adulthood, in the form of abuse. It suggests that this has had a great effect on your mana. You tried to build yourself up, and alongside continuing being treated as a "punching bag", suffered from lack of stability and no support. This put you in the position you were in when the events occurred. This provides some context, but no excuse.

[70] I must stand back and consider all of those circumstances, Mr Don. Sentencing is not a science. It is a matter of looking at all the relevant factors, including those personal to you, Mr Don, and reaching a determination. I have gone through the relevant factors, including the public and the risk that you do present if you were not imprisoned for an appreciable period of time.

[71] In *Tu*, an MPI of 12 years was applied. There the defendant did have a substantial and diagnosed mental condition. However, in that case there was no guilty

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19 See *R v Rihia* [2012] NZHC 2720.

plea nor remorse shown. You have shown remorse generally in your letter. I take that into account notionally as part of the guilty plea consideration.

[72] In this case the minimum period is within the lower end range of 10 to 12 years meted by the Crown.

[73] I consider an MPI of 10 years is appropriate here. Analysed another way, this recognises a notional discount for a guilty plea and remorse, an allowance for mental health and cultural issues as well as your background deprivations, which are entwined. That approximates to 30 per cent for both, or 15 per cent for mental health and 15 per cent for cultural and background issues. As I have said, this is not an arithmetical calculation and those factors are entwined. The important issue is the end result.

Result

[74] Mr Don you are sentenced to life imprisonment with a minimum period of imprisonment of 10 years.

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Grice J

Solicitors:
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