

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CRI-2020-044-000915  
[2021] NZHC 3295**

**THE QUEEN**

v

**LOPETI TELEFONI**

Hearing: 3 December 2021

Appearances: David Wiseman and Josie Butcher for the Crown  
Emma Priest and Scott Brickell for the Defendant

Sentencing Notes: 3 December 2021

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**SENTENCING NOTES OF MOORE J**

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## **Introduction**

[1] Lopeti Telefoni, at the age of 22, you appear for sentence having been convicted of the manslaughter of Blake Lee.<sup>1</sup> I presided over your three week trial in this Court. Before it started you pleaded guilty to a charge of injuring Cesar Su'a with intent to injure.<sup>2</sup>

[2] The facts are well known to you, but because the process of sentencing is quintessentially a public function which must be carried out in open Court, I must set out the facts which are relevant to my assessment of the appropriate sentence. However, before I do that, I need to explain how your charges link in with your three other co-defendants.

## **Procedural background**

[3] You, with three others, Messrs Lisiate, Ngamoki and Tuliloa were jointly charged with the murder of Mr Lee and the assault on Mr Su'a. Mr Lisiate pleaded guilty to the murder charge on 19 May 2021. COVID-19 intervened and delayed his sentencing. He will now be sentenced next week.

[4] At the start of the trial, you and Messrs Ngamoki and Tuliloa pleaded guilty to the joint charge relating to Mr Su'a. The jury acquitted Messrs Ngamoki and Tuliloa of any form of culpable homicide. The jury acquitted you of murder but found you guilty of manslaughter.

[5] I have already sentenced Messrs Ngamoki and Tuliloa. I sentenced Mr Ngamoki to 23 months' imprisonment and Mr Tuliloa to 22 months. The starting point for each was two years.

## **Facts**

[6] I turn now to set out the facts.

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<sup>1</sup> Crimes Act 1961, ss 160, 171 and 177. Maximum penalty life imprisonment.

<sup>2</sup> Section 189(2). Maximum penalty five years' imprisonment.

[7] The facts in relation to the manslaughter of Mr Lee are as established through the evidence at trial. The facts in relation to the charge relating to Mr Su'a are as contained in the summary of facts. For the purposes of today's sentencing the distinction is a fine one and little or nothing turns on it.

[8] In March 2020, you were an inmate at Auckland's maximum security prison at Paremoremo. You were serving a three year and two month sentence for burglary and robbery.

[9] On the afternoon of 5 March 2020, there were eight inmates in Exercise Yard 5. Two of those were not involved in what happened. In addition to you, the others were Messrs Lee, Su'a, Lisiate, Ngamoki and Tuliloa. It was your one hour of allotted daily exercise time.

[10] What happened in that yard up to and including the attack on Messrs Lee and Su'a was recorded by two CCTV cameras positioned opposite each other. Their coverage captured the whole of the yard from different ends. The quality of the recorded footage is excellent. Very little of what happened during the pivotal two to three minutes is not plainly visible, although at trial there was a considerable contest around some of the detail and what inferences might properly be drawn from the actions of those involved. On any analysis the footage is graphic and deeply disturbing. After the recording was first played at the trial it was necessary to take a break for some of the jurors to compose themselves.

[11] While I cannot place a precise figure on it, I would estimate I have viewed the relevant footage in various formats literally dozens of times. I reviewed the footage in preparation for the pre-trial applications. At the pre-trial hearing, I also viewed the 160 or so still images produced by the Crown. At the trial itself the images were painstakingly covered in the Crown's opening. The footage was produced by a Police witness who played it to the jury in sequential clips, cross-referenced to the still photographs. This witness was cross-examined by all counsel at length. The video footage and stills were played and re-played. Each defendant called expert evidence. This included photographic experts who produced their own enhanced footage, played the clips in slow motion and enlarged images.

[12] The intensity of this focus was as predictable as it was necessary, because the video footage was the core evidence from which the jury was required to assess the actions and intentions of the defendants for the purposes of their verdicts. Where those verdicts do not necessarily convey the jury's assessment of what happened for the purposes of sentencing, I am required to make findings of fact to the criminal standard. Having presided over the trial I am well positioned to do so.

[13] The CCTV reveals that at 2:33 pm, Messrs Lee and Su'a were walking together up and down the long axis of the yard. They had been doing so, with others, for several minutes before the initial attack commenced. Approaching them from the opposite direction, you and Mr Lisiate were walking together. As Mr Lee passed you both, you delivered a single punch to Mr Lee's head, causing him to immediately fall backwards onto the concrete surface. The punch took him by surprise. He had no time to take any defensive stance. Supine on his back, it is obvious that from the moment he hit the concrete floor Mr Lee was essentially unconscious. Other than a feeble movement of his head, he never moved again. Mr Su'a attempted to intervene but was knocked to the floor. You were the first to attack Mr Su'a, which you did by punching him as he moved to help Mr Lee.

[14] However, your involvement in the attack on Mr Lee did not stop after you had knocked him to the ground. As he lay face upwards, you went to stomp on his head before you broke off and joined Messrs Ngamoki and Tuliloa in their attack on Mr Su'a. At the trial there was some contention around whether your stomp actually connected with Mr Lee's head. While the evidence certainly points to your foot connecting, it is not something I need to resolve here. What can be seen is that as Mr Lisiate commences stomping on Mr Lee's head, you, shoulder to shoulder with him, lift your left leg up and bring it down toward where Mr Lee's face was. Whether or not you stomped on his head, there can be no doubt from the footage that that was your intention. You also stomped him at least once in the torso area.

[15] As you moved away from Mr Lee to assist Messrs Ngamoki and Tuliloa in engaging with Mr Su'a, Mr Lisiate removed a shank he had hidden in a beanie. He continued to stomp on Mr Lee's head and then began to stab Mr Lee repeatedly. As he did, Mr Su'a managed to return to where Mr Lisiate was stabbing Mr Lee. You

followed him, kicking him and stomping on him as he struggled on the ground beside Mr Lee. Mr Lisiate turned his attention on Mr Su'a and the two of you began to attack him. Mr Lisiate was armed with the shank and can be seen using it on Mr Su'a with you in very close proximity. You can also be seen stomping on Mr Lee. Shortly after this point, and before you ran back to help the others with Mr Su'a, you were right beside Mr Lisiate as he was stabbing Mr Lee. It is clear you must have seen and appreciated the shank and Mr Lisiate's use of it. Despite knowledge of the weapon, you continued to be engaged in your assistance of Mr Lisiate's assault on Mr Lee.

[16] You, with Messrs Ngamoki and Tuliloa twice pushed Mr Su'a to the ground, kicking and punching him. Each of you delivered at least one kick to the head. During the attack, as Mr Su'a lay on the floor, you held his legs and dragged him.

[17] The entire attack lasted only two minutes or so before prison guards entered and defused the situation. Medical staff attempted to resuscitate Mr Lee, but he died at the scene. Mr Su'a suffered a stab wound to his left arm which would have been caused when he was wrestling with you and Mr Lisiate.

### **Victims**

[18] Blake Lee's whānau are connected to this remote sentencing and I acknowledge their presence and the importance of them being part of this whole process. Two of them have made victim impact statements which I have read.

[19] Blake Lee was his mother's only son. While she candidly accepted he was not perfect, she describes him as a loving son to his mother and to those he cared for. His loss has left a hole which cannot be filled. He died in a place where those who loved him deserved to believe he would be safe.

[20] For Blake's partner, his loss has been devastating in every way. They were a couple deeply committed to each other. She describes a generous, happy and loving partner who turned her life around; a man who was showing positive signs of escaping the cycle of crime. The psychological and other effects of his death continue and are incalculable.

[21] It is important never to forget that sitting at the centre of this whole process is a young man who had his whole life ahead of him; a life which you contributed to cutting far too short.

### **Approach to sentencing**

[22] The process which is followed for sentencing in New Zealand is well settled. I must first identify the relevant purposes and principles in the Sentencing Act 2002 (“the Sentencing Act”). Then I set a starting point for the offending by reference to the aggravating and mitigating factors present and by referring to any relevant case law. After that I will consider your personal circumstances and what possible increases or reductions need to be made to the notional starting point. Finally, I must stand back and consider the proposed sentence as a whole, which I may adjust to account for totality.

[23] The totality principle is of importance here because you are a serving prisoner. The usual course when sentencing a serving prisoner for offending committed while in prison is to direct that the sentence be served cumulatively, that is, on top of the sentence the prisoner was already subject to at the time of the offending. It is imperative I ensure that in doing so, the sentence is proportionate and not excessive.

### **Purposes and principles of sentencing**

[24] So, what are the purposes and principles of the Sentencing Act which are engaged in your case?

[25] While justice requires a careful balancing of these principles, there is firm authority for the prioritising of deterrence and denunciation where sentencing for violent offending committed in a prison environment.<sup>3</sup> The Court of Appeal has said that re-offending while in prison, particularly violent offending, must have significant consequences for the offender “notwithstanding that the outcome is a lengthy period of imprisonment”.<sup>4</sup>

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<sup>3</sup> *Papa v R* [2020] NZHC 80 at [35], citing *Kepu v R* [2011] NZCA 104 and *Tryselaar v R* [2021] NZCA 353.

<sup>4</sup> *R v Connelly* [2010] NZCA 52 at [31].

[26] I must also take into account the need to provide for the victim's interests, protect the community, assist in your rehabilitation where possible and impose the least restrictive outcome appropriate.

### **Legal principles**

[27] A manslaughter conviction carries a possible maximum penalty of life imprisonment. Injuring with intent to injure carries a maximum penalty of three years' imprisonment.

[28] There is no tariff guideline for either, because both involve offending which can be committed in a wide variety of ways.<sup>5</sup> The Court of Appeal has commented that when sentencing for manslaughter, the Judge should "assess, and impose a sentence commensurate with, the culpability of the offending".<sup>6</sup>

[29] Reference to the serious violence guidelines set out in *R v Taueki*<sup>7</sup> may be appropriate.<sup>8</sup> Band one is for offending with one or fewer aggravating features and attracts a starting point of between three and six years.<sup>9</sup> Band two is for offending with two or three features. Starting points range between five and 10 years.<sup>10</sup> Band three encompasses offending featuring three or more aggravating factors with a starting point ranging between nine and 14 years.<sup>11</sup>

[30] Analysis of comparative cases is also important when sentencing for manslaughter.

[31] Utilising both these methodologies operates as something of a cross-checking mechanism. It is an approach which has been recommended.<sup>12</sup>

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<sup>5</sup> *Kepu v R* [2011] NZCA 104 at [15], referring to *R v Leuta* [2002] 1 NZLR 215 (CA).

<sup>6</sup> At [15].

<sup>7</sup> *R v Taueki* [2005] NZCA 174; [2005] 3 NZLR 372.

<sup>8</sup> *Murray v R* [2013] NZCA 177 at [20].

<sup>9</sup> At [34] and [36].

<sup>10</sup> At [34] and [38].

<sup>11</sup> At [34].

<sup>12</sup> *Everett v R* [2019] NZCA 68 at [27].

## **Starting point**

[32] So, what does the jury's verdict mean? To have found you guilty of Mr Lee's manslaughter, the jury must have accepted that you intentionally assisted Mr Lisiate to assault Mr Lee but rejected the Crown's proposition that you did so knowing Mr Lisiate either intended to kill Mr Lee or intended to cause some bodily injury which you knew could well cause Mr Lee's death. That rationale is reflected in the question trail. And that is the basis on which I must sentence you.

[33] Naturally, I take the manslaughter charge to be the lead charge for sentencing purposes.

[34] The Crown's position is that a starting point of 10 years is appropriate. Ms Priest submits the starting point should be in the range of seven years.

[35] Adopting the approach in *Taueki*, I will consider the relevant aggravating features present in your offending and evaluate the seriousness of each in determining your culpability. In my view, there are five which are present to a greater or lesser degree.

### *Premeditation*

[36] Both counsel were agreed that in assessing the starting point, one of the key features is the finding that I must make in relation to the level of premeditation.

[37] The jury's verdict necessarily means that they found it proved that you knowingly assisted Mr Lisiate in the way I have earlier described, but rejected any knowledge on your part that Mr Lisiate would or was acting with murderous intent.

[38] There is no evidence that before the attack commenced you knew Mr Lisiate had the shank. I am, however, easily satisfied that before you delivered that first punch you knew of Mr Lisiate's plan to attack Mr Lee and you agreed to participate. Even without the benefit I have had of pouring over the video, it is plain from the CCTV that this was a wellexecuted plan in which you and Mr Lisiate each understood your respective roles. For example, just before the attack, you can be seen changing

positions with Mr Lisiate, putting you closest to Mr Lee as you walked towards him. The delivery of that first punch had all the hallmarks of an ambush. You gave no prior sign of aggression or hostility. The blow came out of the blue as Mr Lee's head was turned towards Mr Su'a in conversation. He never saw it coming and it is plain that was your intention.

[39] Before that first punch you and Mr Lisiate were engaged in an intense discussion. It was your powerful, single punch which initiated the attack and rendered Mr Lee defenceless on the ground, unable to resist the attack which followed. That this was planned and expected is also apparent from Mr Lisiate's movements at this point. He knew the attack was coming and moved immediately towards Mr Lee the moment you struck. Once Mr Lee was on the ground you and Mr Lisiate worked together. You kept Mr Su'a at bay and you actively assaulted Mr Lee as he lay on the ground.

[40] Ms Priest submits that the attack was motivated by Mr Lee directing a gang gesture at you just before you punched him. In other words what happened was spontaneous and provoked. Again, the footage says otherwise. If the gesture in question was a gang signal, which I accept it may have been, you could not have seen it. Your head was turned away. And, in any event, you did not respond immediately in the way that might be expected of someone provoked. Instead you waited until Mr Lee was facing away from you in conversation with Mr Su'a.

[41] I am satisfied this feature is present to a moderate degree.

#### *Serious injury*

[42] I consider this feature is also present to a moderate degree. The injury caused to Mr Lee by your initial punch is clear from the CCTV. As I have said, the force of the punch was enough to knock him to the ground and effectively incapacitate him from that point onwards. You followed the punch up with stomps to Mr Lee's upper body including one or two towards his head. The pathology revealed significant trauma to Mr Lee's head although I accept Ms Priest's submission that Mr Lisiate also inflicted significant trauma to Mr Lee's head.

*Attacking the head*

[43] Relatedly, I consider the fact Mr Lee's head was targeted is an aggravating factor present here to a high degree. The force of that single punch caused Mr Lee's head to snap back, his knees crumpled, and he dropped to the floor onto his back. I accept this factor overlaps with the previous one and acknowledge the need to avoid double counting on this point.

*Multiple attackers*

[44] This factor is present to a moderately high degree. There were four attackers and two victims. However, I accept Ms Priest's submission that in light of the jury verdicts, I should consider the attack on Mr Lee to have involved just two offenders.

[45] I regard it as relevant that you did not focus your energies solely on Mr Lee. You also attacked Mr Su'a. You personally inflicted injury and harm to Mr Lee beyond that caused by Mr Lisiate although the extent and nature of the injuries attributable to you are not possible to isolate. You remained in close enough proximity to Mr Lisiate for your presence to be felt and be plainly available if and when needed.

*Vulnerability of the victim*

[46] This factor is present to a high degree in relation to Mr Lee. The attack on him occurred while Mr Lee was unconscious and lying face upwards. I accept your involvement, once Mr Lee was knocked to the ground, was relatively limited. But, you did stomp and you did kick Mr Lee while he lay on the ground. He had absolutely no ability to defend himself or remove himself from the situation.

[47] Based on these five aggravating features, some of which I accept to some extent overlap, I am satisfied your offending easily fits within Band three of *Taueki* with a starting point between nine and 14 years imprisonment.

## Case law

[48] I move now to consider comparable case law. Both Crown counsel<sup>13</sup> and Ms Priest<sup>14</sup> have referred me to many cases they consider analogous. I thank them for their industry.

[49] Many involved offending which occurred outside the prison context. Some involve gang settings,<sup>15</sup> or involve the use of weapons.<sup>16</sup> Others relate to so-called “one-punch” manslaughters.<sup>17</sup> The type and extent of violence covers a broad spectrum. In some cases, the offender inflicted the physical harm. In others the role was secondary or in the form of assistance.<sup>18</sup> This variability simply operates to emphasise the breadth of variability in manslaughter cases and why it is there can be no tariff cases. No case is the same. As a result, setting a starting point by reference to the case law is somewhat impressionistic.

[50] Despite that, I am of the view that your offending relative to Mr Lee is most analogous to that in *R v Betham*<sup>19</sup> and *Reuben v R*.<sup>20</sup> The relevant facts are footnoted.<sup>21</sup> A starting point of nine years for Mr Reuben was upheld on appeal.<sup>22</sup> Mr Betham’s culpability was reduced, resulting in a starting point of seven years.<sup>23</sup>

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<sup>13</sup> *Reuben v R* [2017] NZCA 138; *R v Madams* [2017] NZHC 81; *R v Taoho* HC Rotorua CRI-2009-263-163, 12 December 2001; *Pahau v R* [2011] NZCA 147.

<sup>14</sup> *R v Betham* [2016] NZHC 2107; *R v Madams* [2017] NZHC 81; *R v McNaughton* [2012] NZHC 815; *R v Sullivan* HC Gisborne CRI-2005-016-2100, 25 August 2006; *R v Jamieson* [2009] NZCA 555; *R v Taoho* HC Rotorua CRI-2009-263-163, 12 December 2011; *R v Burke* [2021] NZHC 136; *R v Bush* [2018] NZHC 1354; *R v Carruthers* [2012] NZHC 1662; *Murray v R* [2013] NZCA 177; *R v Bryenton* HC Auckland CRI-2009-004-3080, 7 April 2009; *R v McFarland* [2014] NZHC 1106; *R v Tai* [2010] NZCA 598.

<sup>15</sup> *R v Taoho* HC Rotorua CRI-2009-263-163, 12 December 2001; *R v Burke* [2021] NZHC 136.

<sup>16</sup> *Pahau v R* [2011] NZCA 147; *R v Taoho* HC Rotorua CRI-2009-263-163, 12 December 2001.

<sup>17</sup> *R v McFarland* [2014] NZHC 1106.

<sup>18</sup> *Reuben v R* [2017] NZCA 138; *R v Betham* [2016] NZHC 2107; *R v Bush* [2018] NZHC 1354.

<sup>19</sup> *R v Betham* [2016] NZHC 2107.

<sup>20</sup> *Reuben v R* [2017] NZCA 138.

<sup>21</sup> There, three inmates attacked a fourth. Two, Mr Reuben and Mr Betham, were convicted of and sentenced for manslaughter. CCTV footage showed the three attackers entering the victim’s cell. The Crown accepted there was no evidence Mr Reuben struck the victim, but his presence enabled his co-offender to carry out the attack. The victim suffered significant injuries which Mr Reuben would certainly have appreciated while present in the cell. Mr Betham had a lesser role in that he was primarily a lookout. Mr Betham had entered the victim’s cell for about 26 seconds in comparison to Mr Reuben and the third co-offender who were in the cell for approximately one minute and 20 seconds.

<sup>22</sup> *Reuben v R* [2017] NZCA 138 at [29].

<sup>23</sup> *R v Betham* [2016] NZHC 2107 at [88].

[51] I consider your offending to be more serious than Mr Betham's and on par with Mr Reuben's. Your actions and presence actively facilitated Mr Lisiate in attacking Mr Lee in the way he did. You also administered violence yourself. You were not just a facilitator nor a mere presence or look out.

[52] I am of the view a starting point of nine years' imprisonment is appropriate by reference to both the *Tauaki* principles and the caselaw.

### **Personal aggravating features**

#### *Injuring with intent charge*

[53] Mr Wiseman submits that an uplift of 12 months should be applied to take into account the charge of injuring Mr Su'a with intent to injure. Ms Priest submits that if such an uplift is warranted, it should be modest

[54] The manslaughter conviction is your second strike offence. This means you must serve whatever sentence I impose without parole. To uplift would result in you serving an even longer sentence without parole, as a consequence of a sentence imposed for an offence which does not fall under the three strikes regime. Ms Priest submits that if you were to be sentenced on this charge alone, you would likely serve a sentence of around 12 months' imprisonment. A sentence at that level would normally attract an uplift of around six months, but considering the non-parole context, Ms Priest says an uplift of three months is appropriate.

[55] If I was sentencing on this charge alone, I would be inclined towards a two-and-a-half year starting point, likely reaching an end sentence of around two years. I agree with the Crown that an uplift of one year is appropriate.

#### *Offending while subject to sentence and criminal history*

[56] Under s 9 of the Sentencing Act, I must take into account the fact you were subject to a sentence when the offending took place. This is an aggravating feature.<sup>24</sup> The legislation does not say whether this aspect should be considered as an

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<sup>24</sup> Sentencing Act 2002, s 9(1)(c).

aggravating feature of the offending or of the offender. I prefer to consider it as the latter because it sits independently of the offending and is a circumstance peculiar to an assessment of your personal circumstances.

[57] Mr Wiseman submits an uplift of six months is appropriate on account of your criminal history and for offending while in prison.

[58] On this point, Ms Priest makes a similar submission to that made on an uplift on the injuring charge. It is acknowledged you have an extensive criminal history, but the majority of your adult criminal record is for dishonesty and driving offending. There have been some instances of minor violence offending, but apart from the sentence you are currently serving the longest sentence of imprisonment previously imposed was only seven months. Ms Priest submits that the strikes regime requiring you to serve your sentence without parole is a deterrent in itself, and that an uplift for previous convictions would be duplicitous.

[59] Ms Priest also submits that the prison environment and the criminogenic effects on prisoners must be taken into account when considering whether to impose an uplift for offending while in prison.<sup>25</sup> Gang rivalry is prevalent and young people are often targeted. She notes your only serious violence offending occurred in prison.

[60] You have an extensive criminal record and this offence marks a significant escalation in your offending. I acknowledge Ms Priest's submissions, particularly in relation to the criminogenic effects on prisoners. I add only a modest uplift of three months.

### **Personal mitigating features**

#### *Personal circumstances*

[61] You turned 22 today. You are of Tongan heritage. Although you have limited contact with your siblings, you report that you have regular contact with your parents, and they are supportive of you. You have a partner and a four year old child.

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<sup>25</sup> *Vincent v R* [2015] NZCA 201.

[62] You have spent a large portion of the last four years in a custodial environment. As a result, there has been no opportunity for education or employment.

[63] As mentioned earlier, at the time of this offending you were serving a three-year, two-month sentence for burglary and robbery. That sentence is due to expire on 22 August 2022. Your criminal record is extensive given your age; 31 convictions.

[64] The writer of the pre-sentence reports describes you as being an articulate, contemplative and humble young man.

### *Youth*

Ms Priest submits a discount for your youth is appropriate. You were 20 when this offending occurred. I consider a discount of 10 per cent is appropriate on account of this.

### *Section 27 report*

[65] I have read the extremely detailed and lengthy s 27 Cultural Report dated 9 December 2019 prepared by Ms Pani Paora-Chamberlin. I have also read the supplementary report which she co-authored.

[66] It is not appropriate for me to set out in any detail your childhood and upbringing, but I do acknowledge that you have suffered deprivation, severe poverty, isolation and dislocation from your family. You have been exposed to violence, substance and alcohol abuse and anti-social behaviour. You have struggled to connect with your Tongan cultural identity, and you lack a sense of belonging. You describe feelings of paranoia and anxiety; feelings which Ms Priest submitted to me likely drove your offending on the day.

[67] I agree with Ms Priest that there is a clear causative link between your background and upbringing, and your offending. I agree a 20 per cent discount appropriate on this.

*Offer to plead guilty to manslaughter charge*

[68] You made an offer to plead guilty to manslaughter on 10 May 2021, just a fortnight before the trial was due to start. Ms Priest advises that the offer was accompanied by a draft summary of facts which she says was on the same basis as the defence ultimately run at trial and “mirror[ed] the verdict”. She says the offer was made after receiving the pathology report from the Crown and following full legal advice. She says the pathology report contained critical information as to whether your actions were a direct contributing cause to Mr Lee’s death. Ms Priest thus submits you should have the benefit of the maximum discount calculated from the point when the offer was first communicated in accordance with *R v Hessell*.<sup>26</sup>

[69] Mr Wiseman advises that the coronial autopsy report was disclosed on 16 May 2020, a year before the plea was offered. Mr Wiseman confirms that there were no material differences between this and the formal written statement filed on 28 April 2021. That is unsurprising. In my experience, it would be very unusual for there to be any significant differences between the two reports. That being the case, the delay in advancing an offer earlier is left unexplained. Mr Wiseman also strongly rejects Ms Priest’s description of the offer. He describes it as “highly conditional” and based on a narrative which was disproved at trial. More significantly, he points out that recent changes in the law<sup>27</sup> are such that communications relating to plea discussions may not be disclosed.

[70] It is not appropriate for me to extend this sentencing process any longer than it needs to be by setting out the detailed legal reasons for rejecting Ms Priest’s submission. Ultimately, I am of the view that only the most modest of discounts, if any, would be given for a plea entered two weeks before a three week trial. The trial still went ahead. Your co-defendants would have, as they did, continued to defend the manslaughter charge. Pleading at that point would have attracted none of the accepted benefits which justify a discount such as time and cost savings, avoiding inconvenience to witnesses and sparing victims from the trauma of having to endure the trial process. An allowance for remorse, often reflected in a plea, will be covered

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<sup>26</sup> *R v Hessell* [2009] NZCA 450, (2009) 24 CRNZ 612.

<sup>27</sup> Evidence Act 2002, s 57(2A). Inserted 8 January 2017.

in the next section of my remarks. It follows I am not prepared to give any discount for this factor.

### *Remorse and rehabilitation*

[71] Ms Priest's submits that a five per cent discount is appropriate in recognition of your attempts to engage in restorative justice and the remorse you have demonstrated through the cultural reports, the pre-sentence report and your letter to the Blake family which she provided earlier in the week and which I have read.

[72] Although you requested a restorative justice referral, the victim's family was, understandably, unwilling to participate. Despite this, I accept you are genuinely remorseful for your actions. You have not attempted to shift blame which you might easily have done in the circumstances. Your prison medical notes disclose issues with sleeping after the offending. The second cultural report records your feelings toward your offending and its consequences. You are reported as seeing Mr Lee's family at the trial and putting yourself "in the victim's family's shoes". You consider that what you did to be "the saddest thing that has happened in [your] life". The report also details the positive, personal changes you hope to make in your life.

[73] That theme is a consistent one from a variety of disparate sources. I am satisfied your sentiments are sincere. I allow a five per cent discount.

### **Summary**

[74] Mr Telefoni, the following is a summary of the sentence calculations to this point. It does not account for any totality adjustment.

[75] The nine-year starting point is uplifted by 12 months for the charge of injuring Mr Su'a and by a further three months for your criminal history and the fact the offending occurred while you were subject to sentence. That brings the sentence to one of 10 years' and three months' imprisonment. From that you are entitled to discounts of 10 per cent for youth, 20 per cent for your background and personal circumstances and five per cent for your remorse and rehabilitative prospects. This brings your end sentence to one of six years and eight months' imprisonment.

## **Totality**

[76] Totality is an important consideration in your case because any sentence I fix will be served cumulatively on the one you are currently subject to. I must not impose a sentence which may be appropriate when viewed in isolation but is excessive to the point of being crushing when viewed in its totality. The end sentence must be in proportion to your overall culpability and the gravity of the overall offending.

[77] The Crown submits a totality adjustment may not be necessary. Ms Priest submits otherwise.

[78] As I have already mentioned, your present sentence will expire in August 2022. By that time, you will still be 22. The strikes regime requires you to serve the whole of your sentence without parole or early release. The legislation to abolish that law has been introduced to Parliament and will be passed within the current parliamentary term. I appreciate the difficulty in that the present form of the Bill does not appear to accommodate the sort of situation you face; that is, a requirement for a defendant to serve the whole of their sentence without parole, cumulative upon an existing prison sentence. There do not appear to be any relevant transitional provisions nor is it expected the new legislation will have retrospective effect. The fact of the matter is that there can be no certainty around what the new law will look like. However, as Mr Wiseman submitted, a Judge, I am bound to follow and apply the law as it presently stands. It is accepted that the requirement to serve a sentence without parole is a relevant consideration when assessing totality.<sup>28</sup> If the new statute does have retrospective effect then you will likely enjoy the benefit of serving a shorter sentence but, again, I cannot take that into account for present purposes.

[79] I am clearly of the view that to cumulatively impose a six-year eight-month sentence on your existing sentence would be crushing and out of proportion. If that was the case you would not be released until April 2029, by which time you would be 29. The effects of extended incarceration combined with the prison environment are known to be damaging. I also regard it as relevant in this assessment that your first

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<sup>28</sup> *Barnes v R* [2018] NZCA 42 at [56] and [57].

strike offence did not involve violence. I make a totality adjustment on this account and reduce the sentence by two years and eight months.

[80] Before passing sentence, I am required to give you a second strike warning under s 86C of the Sentencing Act.

*Consequences of final warning*

[81] If you are convicted of any serious violent offence (except murder or manslaughter) committed after you received the final warning, you will either be:

- (a) sentenced to the maximum term of imprisonment for that offence. You will serve that sentence without parole unless that would be manifestly unjust; or
- (b) sentenced to preventive detention. You will serve a minimum term of imprisonment of at least the length of the maximum term of imprisonment for the offence, unless that would be manifestly unjust. In that case, the Judge must specify the minimum term of imprisonment that you will serve.

[82] If you are convicted of a murder committed after you received the final warning, you will be sentenced to imprisonment for life. You must serve the life sentence without parole unless it would be manifestly unjust to do so. If you receive a life sentence without parole, you will not be released from prison.

[83] If serving the life sentence without parole would be manifestly unjust, the Judge must impose a minimum term of imprisonment of at least 20 years unless that would also be manifestly unjust. In that case, the Judge must specify the minimum term of imprisonment that you will serve.

[84] If you are convicted of manslaughter committed after you received the final warning, you will be sentenced to imprisonment for life. The Judge must impose a minimum term of imprisonment of at least 20 years unless that would be manifestly

unjust. In that case, the Judge must impose a minimum term of imprisonment of at least 10 years.

### **Sentence**

[85] Mr Telefoni, on the charge of manslaughter, you are sentenced to four years' imprisonment.

[86] That term is to be served cumulatively on the sentence you are presently serving.

[87] You are also sentenced to two years' imprisonment for injuring Mr Su'a with intent to injure. That sentence is to be served concurrently with the manslaughter sentence.

[88] Stand down.

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**Moore J**

*Solicitors:*  
Crown Solicitor, Auckland  
Ms Priest, Auckland