ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF THE VICTIM'S SISTER.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2020-004-3127
[2021] NZHC 3367

THE QUEEN

v

JIANN-HWA MAA

Hearing:	10 December 2021
Appearances:	R McCoubrey for the Crown K-A Stoikoff for the Defendant
Sentencing:	10 December 2021

SENTENCE OF GAULT J

Solicitors:
Mr R McCoubrey and Ms S Murphy, Meredith Connell, Office of the Crown Solicitor, Auckland
Ms K-A Stoikoff, Public Defence Service, Auckland

[1] Mr Maa, you appear for sentence after pleading guilty to the murder of Mr Zion Gutnik.[1] I have to explain the sentence in some detail, so I will pause as I go for the interpreter.

[2] I will first set out the facts of your offending, which it is necessary to do in open Court, and refer to the victim impact statements. Then I will explain the approach I am required to take in sentencing you for the offence of murder, which requires me to impose a minimum period of imprisonment, before determining the appropriate sentence having regard to the circumstances of your offending and your personal circumstances, including your guilty plea.

Facts

[3] I turn to the facts of your offending.

[4] 574 Manukau Road, Epsom is well-established as a club used by sex workers to meet and entertain their clients. Several managers organise the daily business on behalf of the proprietor, Ms Li. Those managers work a daytime shift from 10:00 am to 7:00 pm or an evening shift from 7:00 pm, typically ending around 3:00 am the following morning. You and Mr Gutnik were two of the managers. You resided onsite in a sleep-out adjacent to the main building one or two nights a week, while Mr Gutnik travelled to work his shifts from his apartment in central Auckland. You typically worked during the daytime while Mr Gutnik worked during the evenings. The relationship between you and Mr Gutnik was a strained one and on at least one occasion, in December 2019, deteriorated to a physical altercation between you.

[5] At 12:30 am on 10 March 2020, Police were called to 574 Manukau Road. A quantity of blood had been located on a wall in the lounge area and you and Mr Gutnik, who were rostered to work the shifts that day, were both missing. You were working the day shift and Mr Gutnik was working the night shift.

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1 Crimes Act 1961, ss 167(b) and 172. Maximum penalty: life imprisonment.

[6] During a subsequent Police search looking for the missing managers, entry was forced to the sleep-out. The door was jammed, but not locked. Upon entering the sleep-out, Mr Gutnik's body was discovered. His head and upper torso had been concealed inside a black plastic rubbish bag. When Police opened the plastic bag, they discovered he had sustained significant head and facial injuries which made a visual identification impossible.

[7] During the following days the detectives and other experts conducted a detailed scene examination. Surveillance camera footage was also obtained and revealed that you arrived at 574 Manukau Road at 6:09 pm on 9 March 2020. Mr Gutnik arrived at 7:13 pm.

[8] The main seat of activity was confirmed to be the lounge where the blood had been observed and reported to Police. The scene examination revealed a sustained attack had occurred in the lounge with Mr Gutnik having been struck numerous times with a weapon about his face and head. Mr Gutnik's injuries included defensive wounds but ultimately the massive head injuries he sustained were not survivable. He died at the scene over a period of about 35 minutes. There were 29 separate and distinct injuries to the head, eight to the neck and two to the torso. His body was then moved to the kitchen whilst you commenced a clean-up. You finished cleaning the significant amount of blood that was on the floor and then moved Mr Gutnik to the sleep-out.

[9] Inside the sleep-out, Mr Gutnik's body was lying in the middle of the room near the foot of a bed. His bloodstained personal belongings, including a grey bag with a shoulder strap, a bent umbrella, his wallet, including cash and other contents, and a number of his teeth had been bundled into another black plastic bag which had been placed close to where his body lay. Also located by the bedside was a wooden pole, approximately 1.2 metres in length. The pole had evidence of bloodstaining and when it was examined more closely by ESR they extracted a blood profile that matched Mr Gutnik's. The pole also had a distinctive number imprinted into its surface which included the digits 0800.

[10] A post-mortem examination of Mr Gutnik confirmed that he had been struck repeatedly about the head and face. The cause of death was determined to be significant blunt force trauma to these areas. Defensive injuries to Mr Gutnik's hand and forearms were also evident. It was noted during the examination that the numbers 0800 were impressed into his scalp. This corresponded to engravings on the wooden pole. Mr Gutnik's jaw had been broken and he was missing a large number of teeth. He was subsequently identified from his dental records. A DNA profile extracted from material collected from underneath the left fingernails of Mr Gutnik are a match to your DNA profile.

[11] When spoken to by Police on 22 April 2020, you stated that Mr Gutnik presented a stick and advanced upon you. You claimed to have torn the stick from Mr Gutnik's grasp and used it to strike him to the head. You stated that you continued to strike Mr Gutnik with the stick multiple times to the face and head area. While Mr Gutnik was on the floor, you observed his body begin to spasm on the floor and further observed blood streaming from his head. When asked why you did not help or seek help for Mr Gutnik, you stated that you thought somebody else would find him. You were unable to provide an explanation as to why you continued to attack Mr Gutnik when he was rendered defenceless.

Disputed facts hearing

[12] Following your guilty plea, a disputed facts hearing took place to determine whether you intended to kill Mr Gutnik or instead meant to cause him bodily injury that you knew was likely to cause death, and were reckless as to whether death ensued.

[13] In my judgment following that hearing, I decided that the Crown had not proved beyond reasonable doubt that you intended to kill Mr Gutnik.[2] In deciding that, I could not be sure that you initiated the altercation by striking Mr Gutnik from behind.[3] However, I concluded that:

(a) I had no doubt that you struck Mr Gutnik's head at least 10 times.[4]

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2 *R v Maa* [2021] NZHC 1855 (disputed facts) at [50]-[51].
3 At [42].
4 At [43].

(b) The head injuries involved substantial force.[5] If your evidence that you did not hit Mr Gutnik from behind or when he was unconscious is accepted, the only remaining explanation for the traumatic axonal injury to his neck – that is, stretching and breaking the cell structure in the brain stem – is that the blow was so hard that his head moved vigorously despite bracing.

(c) And, accepting that you left the plastic bag open and your reason for using it was to prevent blood spilling,[6] you must have known Mr Gutnik was badly injured when you left him, given the number of blows, the substantial force used, the severity of the blow causing the traumatic axonal injury and the fact that you had seen him spasm on the ground.[7]

Victim impact statements

[14] We have heard the victim impact statements of Zion Gutnik's father, mother and sister. Zion's father cannot understand why you murdered his son. He remembers a very peaceful child and a very kind and amiable young man. He is heartbroken.

[15] Zion's mother spoke of the happiness she felt when her son was born, and how he was a wonderful little boy: kind, polite, reserved, never imposing. They shared a special bond. She referred to the support he provided when she was sick. The last time she saw her son he told her he felt very happy for the first time in many years and he was looking forward to his future. He was in the process of starting a business. She remembers a kind and considerate young man who tried to keep out of trouble and was extra small. He was a very good listener and was interested in poetry, music, politics and reading. The murder has completely changed her life. Every day she tries to process that her son has gone, what she could have done differently. She cannot understand why you hated him so much. She feels like an invalid, a person who has lost a very important part of herself, crippling the rest of her life. She feels stuck and just wants her son back.

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5 *R v Maa* [2021] NZHC 1855 (disputed facts) at [47].
6 At [48].
7 At [49].

[16] Zion's sister recalled the day she heard her brother was dead, murdered. She couldn't stop shaking with shock and grief. She will never forget the stress of having to organise a rushed funeral, nor the horror of reading about her brother's death in the newspapers and the distress of reading of the injuries he endured at each court appearance. She refers to the mental trauma of cleaning out his apartment. The grief process seems never-ending and worse, it gets played out in public. Nothing in her family's life has been the same. Her family relationships have changed. Her brother has been taken away, at 30 years old. She says the effects of his murder will never be over for her family. She feels a lot of anger about what has happened.

[17] I thank the family members for their statements, and acknowledge their incalculable grief and anguish caused by Zion's murder. I know that the need to adjourn the sentencing due to the COVID-19 lockdown has added stress. I also know that any sentencing will not lessen the loss.

Approach to sentencing

[18] In the case of murder, there is a presumption of life imprisonment.[8] As Mr McCoubrey for the Crown submits, and your counsel, Ms Stoikoff, accepts, there are no circumstances making that manifestly unjust. A sentence of life imprisonment is inevitable. The main issue for me to decide is what minimum period of imprisonment (MPI) you must serve before you are eligible for consideration for parole. Ms Stoikoff has rightly focused on all aspects of that issue on your behalf.

[19] It must be the minimum term that is necessary to meet the relevant purposes of sentencing – the need to hold you accountable for the harm done to Mr Gutnik, his family and the community, to denounce your conduct, deter you and others from similar offending and to protect the community.[9] I also consider the relevant principles of sentencing – the gravity of the murder, the seriousness of this type of offence, consistency in sentencing, victim impacts, your personal circumstances and imposition of the least restrictive sentence appropriate in the circumstances.[10]

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8 Sentencing Act 2002, s 102(1).
9 Section 103(2); and *R v Howse* [2003] 3 NZLR 767 (CA).
10 Sentencing Act, s 8.

[20] Ordinarily, the MPI for murder must be not less than 10 years. But for murders with particularly aggravating features set out in s 104 of the Sentencing Act, the MPI must be at least 17 years unless that would be manifestly unjust.[11] The Crown submits that s 104 is engaged in your case on the basis that the murder was committed with a high level of brutality, cruelty and callousness.[12] Ms Stoikoff submits that your offending does not meet the high threshold for a 17 year MPI under s 104.

[21] Before dealing with these arguments, it is important to explain the standard to which disputed facts must be proved, to be taken into account at sentencing.[13] The Crown must prove beyond reasonable doubt the existence of any disputed aggravating fact, and must negate beyond reasonable doubt any disputed mitigating fact[14] raised by the defence that is not wholly implausible or manifestly false.

Does s 104 apply?

Submissions

[22] The Crown submits that your offending was brutal, cruel and callous to the extent that s 104(1)(e) is engaged, unaffected by my earlier decision that intention to kill was not proved beyond reasonable doubt. Mr McCoubrey submits you launched a sustained attack on Mr Gutnik, focusing on his face and head, and striking him at least 10 times with substantial force. The Crown says the ferocity of the attack is demonstrated by the nature and quantity of Mr Gutnik's injuries.

[23] Mr McCoubrey refers to two other cases where s 104(1)(e) was engaged.[15] He submits your offending is as serious, if not more serious, than the offending in those cases. The number of blows to the head and injuries sustained are similar. Mr McCoubrey submits that while not premeditated, the attack was frenzied and brutal, and Mr Gutnik suffered defensive injuries, suggesting he initially attempted to

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11 Sentencing Act, s 104; and *R v Gottermeyer* [2014] NZCA 205 at [77].
12 Sentencing Act, s 104(1)(e).
13 Section 24.
14 Any disputed mitigating fact other than a mitigating fact that is not related to the nature of the offence or to the offender's part in the offence: Sentencing Act, s 24(2)(c)-(d).
15 *R v Ford* [2020] NZHC 2579; and *R v Findlay* [2017] NZHC 2551. In both cases, the 17 year MPI was found to be manifestly unjust.

defend himself but at some stage you continued to attack him while he was defenceless.

[24] Mr McCoubrey submits your offending is further aggravated by your actions after the attack. He submits your purpose was to hide Mr Gutnik's body, but regardless of your specific intent, your actions were callous in the sense envisaged. He submits that, as Mr Gutnik was dying, you took the time to clean his blood, gather items, and move them and him to another room and then the sleep-out, and you failed to seek medical attention – indeed, your actions prevented him from being found. He submits that, if Mr Gutnik was conscious during this period, being isolated in the sleep-out, wrapped in a rubbish bag, would have substantially increased his terror.

[25] Mr McCoubrey submits there are no mitigating features of the offending; that self-defence does not arise on the evidence, given your lack of injuries compared with Mr Gutnik's injuries. He also points to my conclusion as to the force you must have used to cause the traumatic axonal injury.[16]

[26] Based on my disputed facts judgment, Ms Stoikoff submits that the offending was not premeditated, that there was no finding that you initiated the altercation and that Mr Gutnik may have been struck from behind or from the side. She submits that your offending does not reach the s 104 threshold of a high level of brutality or callousness.[17] Ms Stoikoff also refers to several cases.[18]

Analysis

[27] Many murders are brutal and callous to some degree. The issue is whether the admitted facts and those proved beyond reasonable doubt that I have identified involve

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16 *R v Maa* [2021] NZHC 1855 (disputed facts) at [47].

17 Ms Stoikoff noted that the Court of Appeal has said that brutality is "savage violence", "cruelty" or "callous indifference", and callousness is "insensitive and cruel disregard for others" (*R v Marinovich* [2020] NZHC 1160 at [33], citing *R v Gottermeyer* [2014] NZCA 205 at [78]) involving a "numbness of the soul" (*Marinovich* at [33], citing *R v Beazley* [2019] NZHC 672 at [36]).

18 *R v Gosset* [2019] NZHC 1366; *Marinovich*; and *R v Ford* [2020] NZHC 2579. In *R v Gosset* [2019] NZHC 1366 two defendants planned murder, transported victim to isolated location under pretext of drug endeavour; shot him in the knee, chest and multiple times in the face from close range. Starting MPI of 16 years each, s 104 not engaged. *Marinovich* and *Ford* involved vulnerable victims. Ms Stoikoff also addressed *R v Findlay* [2017] NZHC 2551 in response to the Crown submissions.

the high level of brutality, cruelty or callousness required by s 104. The Court necessarily must make comparisons with other murder cases, which are clearly and intrinsically brutal, cruel and callous, in order to determine whether the circumstances fall within the statutory presumption.

[28] Your actions were brutal. You struck Mr Gutnik's head at least 10 times, including with the wooden pole. The head injuries involved substantial force. The traumatic axonal injury to his neck was from a blow so hard that his head moved vigorously despite bracing. The head injuries were not survivable. It matters not whether only one or two of the blows were themselves fatal. But the Crown did not prove that you initiated the altercation by striking Mr Gutnik from behind, leaving open the possibility that he had the pole initially.[19]

[29] Your actions were also callous even though intent to kill was not proved beyond reasonable doubt. When Mr Gutnik was lying on the ground you cleaned up, put a bag over his upper body to prevent blood spilling, moved him to the sleepout and left him there. You did not seek medical assistance for him.

[30] Overall, having regard to these aggravating facts and the disputed mitigating facts not disproved, and considering murder sentencing decisions with some similarities, I have concluded by a small margin that the circumstances of this murder fall outside the high level of brutality or callousness required as a matter of legislative policy to come within the statutory presumption of an MPI of at least 17 years.

Starting point for MPI

[31] Even so, I consider the aggravating features of this murder of Mr Gutnik require the imposition of a very significant minimum term of imprisonment to meet the purposes of sentencing I have mentioned – holding you accountable for the harm done, denouncing your conduct, deterrence and protecting the community. Taking into

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[19] Whereas *R v Ford* involved an unprovoked and violent attack which continued after the victim was rendered defenceless. In *R v Findlay* most of the injuries were inflicted while the deceased was on the ground.

account these matters, the cases cited and other similar cases,[20] I consider an MPI of 16 years' imprisonment is the appropriate starting point.

Personal factors

[32] I now turn to consider your personal circumstances. It is accepted there are no aggravating factors personal to you. As to whether there are personal mitigating factors that justify a reduction to the 16 year starting MPI, Ms Stoikoff submits that your guilty plea, personal background, the psychiatric reports which demonstrate your remorse, and your previous good character should all be taken into account to reduce your end sentence. She submits an end MPI in the vicinity of 14 years would be appropriate and not manifestly unjust. The Crown accepts that the key mitigating feature is your absence of convictions, and that a discount is available for guilty plea, but submits there are no other mitigating factors, although Mr McCoubrey acknowledged this morning that there may be room for a further small discount having regard to your personal circumstances.[21]

[33] I address these factors in turn, beginning with your guilty plea.

Guilty plea

[34] You pleaded guilty to the offending on 2 June 2021, one week before trial was scheduled to commence. Ms Stoikoff submits a discount of one to two years' imprisonment would be appropriate. As the Crown submits, the plea was entered well after the first available opportunity and was in the face of strong Crown evidence including your admissions in your Police interview. However, as your plea removed the need for a number of vulnerable witnesses to give evidence, I consider a discount of one year is appropriate for your guilty plea.

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[20] *R v Mete* [2020] NZHC 1573: numerous blows to face, aiming at nose and eyes; sheer force and number of blows caused multiple fractures to victim's skull; defendant also used extension cord to tie victim's hands together in front of and around her neck. Starting MPI of 16 years "but for" s 104. Section 104 engaged but 17-year MPI manifestly unjust, final MPI of 14 years.
R v Ransfield [2020] NZHC 2487: multiple strikes to victim's head with metal pipe, causing pipe to break in two; defendant hit victim as hard as he could; significant blunt force trauma including fractured skull. Starting MPI of 16 years, s 104 not engaged.

[21] In the event that s 104 was not engaged.

Personal background

[35] I now consider your personal background and upbringing. I have received a helpful s 27 report from Mr Lee. It indicates you are of Chinese descent from Taiwan. Your father was in the Chinese Navy and relocated to Taiwan after the events of 1949. Your parents had six children and you were the fifth in the family. You were raised in the seaport of Keelung City during a period of social and political restlessness when the military government was in control of Taiwan. Your family was very poor and struggled to put food on the table. You report being physically abused by your father. Your mother, brothers and sister were also beaten by him. Your childhood was surrounded by a depressing and anxious atmosphere.

[36] To break out of this poverty, you became a commercial ship worker, then a hotel receptionist – and there is reference in other reports to three years in some form of military service – before starting a cosmetic business with your wife. You decided to relocate to New Zealand in 2003 to seek a better life, especially for your two daughters. Your wife ran the business from Taiwan while you flew back and forth to look after your daughters, who were studying in New Zealand. This frequent travel and living apart put stress on your marriage and you separated about 2010.

[37] You underestimated the cost of immigrating to New Zealand. Mostly unemployed, for some years you had to work in the club used by sex workers to support your living and you felt embarrassed about this. The report writer explained that such employment is considered shameful by the Chinese community. You became disconnected from your family, friends and community as a result. In addition, long hours, low wages, work stress and financial pressure took an increasing toll on your mental health.

[38] The report writer noted that under traditional Chinese Confucianism, the upbringing of most Chinese people is immersed in filial piety, which consists of physical care, love, service, respect and obedience towards parents and ancestors. He suggested that your prolonged relational distress could be an explanation for your outburst.

[39] In the future, you would like to continue studying English, and apply to the Open Polytech. You might study horticulture after that. You have a strong desire to be a positive influence in the lives of your children.

[40] Unfortunately, your lack of family support means your background circumstances are mostly self-reported. I also have little detail about the reported abuse you suffered as a child. Given that, and your age – you are now 61 – there is no suggestion that your upbringing has a causal connection with your offending. I accept that you have struggled with the move to a foreign country, with financial hardship and you have become disconnected from your family. I acknowledge that these circumstances would have been difficult and stressful for you whatever the cause.

[41] But it is hard to see that these circumstances have any direct nexus – other than in a very broad way – with your offending. Even if there were persuasive evidence, the scope for a discount for such personal circumstances is constrained in very serious cases where other sentencing purposes are more likely to dominate.[22]

[42] However, I consider a modest discount is appropriate given your dislocation from your family support and culture, your age and your health issue,[23] that is your longstanding bone marrow failure disorder which means you may require a bone marrow transplant in the future. These circumstances may make the effect of a prison sentence more difficult for you.[24] I consider a discount of six months is appropriate.

Psychiatric reports and remorse

[43] The psychiatric reports indicate that you do not have a history of mental illness or suffer from mental illness, but you experienced a major depressive episode

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22 *Arona v R* [2018] NZCA 427 at [61], citing *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [57]. The position is even more constrained where s 104 applies: *Hohua v R* [2019] NZCA 533 at [44].

23 *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [87]-[88] as cited in *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [155]; and see *Mahomed v R* [2010] NZCA 419 at [112] and [115].

24 *Mahomed* at [112] and [115]; and *R v Lingman* [2021] NZHC 1394 at [63]-[64] (lack of familial support in New Zealand would make 16 year MPI more burdensome, awarded discount of 5 per cent or 9.6 months). Lack of familial support for foreign nationals/dislocation from family and culture has been treated as a mitigating factor (making imprisonment more burdensome) in drug offending cases: see *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [163]; and *Cheng v R* [2021] NZCA 68 at [22].

following the murder, and planned to take your own life. You were admitted to the Acute Psychiatric Unit at Auckland Hospital for a period. You also self-harmed in prison last year. You were no longer experiencing symptoms at the time of the latest assessment and you have been assessed at a low risk of violent reoffending. Dr Skipworth's most recent assessment was that your depressive illness was in remission. That should be kept under review.

[44] Ms Stoikoff submits your depressive episode demonstrates you have deep regret and remorse for the offending. I accept that you expressed remorse to Dr Skipworth and said you would willingly participate in any rehabilitative programmes offered to you. You indicated that you needed to be more tolerant and wished to apologise to Mr Gutnik's family, your employers, and your own family. You have also written a letter to the Court expressing remorse, grief and regret for what you have done, which I acknowledge. However, Dr Skipworth's assessment was that your depression reflected your shock at being charged and imprisoned. You have continued to minimise your offending and try to shift blame onto Mr Gutnik. You have not demonstrated the genuine remorse that could warrant a separate discount.

Previous good character

[45] Both counsel note your lack of any prior convictions. But previous good character has less applicability given the seriousness of the charge. Having already taken into account your age, I do not consider a further discount is appropriate given your offending is not far below the s 104 threshold.[25]

Summary

[46] In summary, from a starting MPI of 16 years' imprisonment, I deduct one year for your guilty plea and six months for your personal circumstances. That reduces the MPI to 14 and a half years. I consider that is the minimum period consistent with the sentencing purposes of accountability, denunciation and deterrence.

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[25] See *R v Malik* [2015] NZHC 466 at [59], albeit s 104 was engaged in that case.

[47] That means that you will not become eligible for parole until you have served 14 and a half years in prison. Whether you are released on parole at that time is to be determined by the Parole Board.

Result

[48] Mr Maa, please stand.

[49] On the charge of murder, I sentence you to life imprisonment. I impose a minimum period of imprisonment of 14 and a half years.

[50] Please stand down.

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Gault J