IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2020-044-000915
[2021] NZHC 3387

THE QUEEN

v

SIUAKI LISIATE

Hearing:	9 December 2021
Appearances:	David Johnstone and David Wiseman for the Crown Ron Mansfield QC and Jack Oliver-Hood for the Defendant
Sentencing Notes:	9 December 2021

SENTENCING NOTES OF MOORE J

Introduction

[1] Siuaki Lisiate, at the age of 41, you appear for sentence having pleaded guilty to the murder of Blake Lee.

[2] It is my task to pass sentence on you. That process requires me not only to cover the facts and the circumstances of Blake Lee's killing, but also to make some determinations which are relevant in coming to my decision on what the final sentence should be.

[3] For reasons which your counsel, Mr Mansfield QC, may have explained, the law as it applies to the sentencing process in your case is, by no means, straightforward. There will be some technical aspects which I will need to cover and for that reason it is likely I will take longer than would normally be the case.

[4] I shall start with the facts which, of course, will be well known to you. But because the process of sentencing is quintessentially a public function which must be carried out in open Court, I am required to set out the facts which I regard as relevant to my assessment in reaching the appropriate sentence. Before I do, I need to explain how your charge links in with your three other co-defendants.

Procedural background

[5] You, together with Messrs Telefoni, Ngamoki and Tuliloa, were charged with the murder of Blake Lee. Your joint trial was scheduled to start on 24 May 2021. On 19 May 2021, you pleaded guilty to murder. COVID-19 intervened. Since then there have been several false starts which have delayed things.

[6] Due to your plea, the trial of your co-defendants proceeded without you. I was the presiding Judge. At the beginning of the trial the three defendants each pleaded guilty to a charge of injuring Cesar Su'a with intent to injure. On the murder charge, the jury acquitted Messrs Ngamoki and Tuliloa of any form of culpable homicide. They acquitted Mr Telefoni of murder but found him guilty of manslaughter.

[7] I sentenced Messrs Ngamoki and Tuliloa to 23 months' and 22 months' imprisonment respectively. I sentenced Mr Telefoni on the charge of manslaughter to four years' imprisonment which I ordered was to be served concurrently on the sentence he was serving at the time of this offending. That sentence was heavily discounted for totality reasons. I sentenced him to two years' imprisonment in relation to the assault on Mr Su'a, to be served concurrently.

[8] Now I turn to the facts. When you pleaded guilty, an agreed summary of facts was filed. That document contained a comprehensive account of what happened. However, there are some findings of fact which I am required to make which are not contained in the summary. Having presided over the three week trial of your co-defendants and having viewed the relevant footage in various formats many, many times during the pre-trial arguments, at the trial itself and more recently in preparation for this sentencing, I regard myself as well-qualified to make those findings to the required standard.

Facts

[9] In March 2020, you were an inmate at Auckland's maximum security prison at Paremoremo. You were serving a sentence with a minimum term of 18 years for inciting, counselling or procuring the murder of a fellow inmate, and a sentence with a minimum period of five years and two months for wounding another fellow inmate with intent to cause grievous bodily harm.

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

[11] 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 three or so minutes is not plainly visible. On any analysis, the footage is graphic and deeply disturbing, particularly in relation to what you did to Mr Lee. In fact, after the

recording was first played for the first time at the trial, it was necessary to take a break for some of the jurors to compose themselves. This morning Mr Mansfield rightly described the footage as "sickening".

[12] The CCTV reveals that at 2:33 pm, Messrs Lee and Su'a were walking side by side up and down the long axis of the yard. They had been doing so, with others, for quite some time before the initial attack on Mr Lee commenced. You and Mr Telefoni were walking together in the opposite direction. As Mr Lee and Mr Su'a passed you both, Mr Telefoni delivered a single punch to Mr Lee's head causing him to immediately fall backwards onto the concrete floor. 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 and powerless to defend himself. Other than a feeble forward movement of his head, he never moved again. That was because as soon as his back hit the floor you stomped on his face and head. You can be seen lifting your right leg high above Mr Lee's face and head area and bringing it down on him with full force. You did this again and again in rapid succession. While your co-defendants distracted Mr Su'a, you were left to deal to Mr Lee pretty well as you liked. As he lay on his back, you extracted the shank hidden in your beanie and began to stab him repeatedly in the chest. At times you were interrupted by Mr Su'a who courageously attempted to go to Mr Lee's aid. But you carried on with your relentless attack standing at and above Mr Lee's head and stabbing him in the chest again and again. Then you reverted to jumping on his head. With both feet off the ground, you landed on his head and face area with full force. Then you resumed stabbing him, interspersed with jumping on his head and face.

[13] At a later point when Mr Su'a attempted to intervene, with Mr Lee's body between you, you can be seen, shank in hand, beckoning him to challenge you, mocking, smiling and apparently laughing. You gestured at him to come closer as you smirked and made hip-thrusting movements. And even as you did, you continued to sporadically stab at Mr Lee's motionless body. It was only when the prison guards arrived that you retreated, still holding the shank in your bloodied right hand.

[14] When the guards did arrive, you moved slowly away and, at their direction, got to your knees. Despite this, you continued to hold the shank. You lifted it up to your face, lowered it before lifting it up again and licking the blade. You then tossed the shank away towards them.

[15] The summary records that you stabbed Mr Lee no fewer than 37 times to the head, neck, thigh, middle and upper chest area. You jumped or stomped on him, targeting the head, a total of 14 times.

[16] Medical staff attempted to resuscitate Mr Lee, but he died where he had fallen. The post-mortem determined that the primary cause of death were two stab wounds to his chest. He also received extensive head and brain injuries.

Victims

[17] Some of Blake Lee's whānau are here at this sentencing and I acknowledge their presence, recognising the importance of whanau and friends to the sentencing process. His father, Peter Lee is connected remotely.

[18] Two members of the family have made victim impact statements; Blake Lee's mother and his partner. I have read those statements.

[19] Blake Lee was his mother's only son. While she candidly accepts he was not perfect, she describes him as a loving and loyal son. His loss is irreparable, a loss made worse, from her perspective, that he was killed in a place where she rightly believed he would be safe.

[20] For Mr Lee's partner, his loss has been devastating in every sense. They were a deeply committed couple. She describes Mr Lee as a generous, happy and loving partner who turned her life around and who, himself, was starting to show positive signs of extracting himself from the cycle of crime which led him to be in prison. The psychological and other effects of his death will remain with her for the rest of her life.

[21] As I said at Mr Telefoni's sentencing last week, it is important never to forget that at the centre of this whole process is the death of a young man who had his life before him; a life which you cut far too short.

Principles and purposes of sentencing

[22] Deterrence and denunciation are important sentencing values in cases such as this involving serious violent offending.[1]

[23] The relevant s 7 purposes engaged are to hold you accountable for the harm done to Blake Lee, his family and friends, and the community. In sentencing you I must take into account the gravity of the offending and your culpability. I must take into account the seriousness of your offending when compared with others and I must impose the least restrictive outcome that is appropriate in the circumstances.[2]

Approach to sentencing

[24] At issue this morning is whether the statutory presumption which applies in your case, that is life imprisonment without parole, would be manifestly unjust and, if so, what sentence should be imposed instead.

[25] It is common ground that the presumption applies because you have been convicted of murder and that murder is a stage two offence.[3]

[26] If I am satisfied it would be manifestly unjust to sentence you to life imprisonment without parole, I must order you to serve a minimum period of imprisonment ("MPI").[4]

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1 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [57].
2 Sentencing Act 2002, s 8.
3 Mr Lisiate was given a first Sentencing Act warning of a "stage one offence" on 26 September 2019 pursuant to s 86B(1)(b) of the Act, in relation to his conviction for wounding with intent to cause grievous bodily harm.
4 Sentencing Act, above n 2, ss 86E(4)(b) and 103(1).

[27] There are three steps:[5]

(a) first, the starting point is that there is a presumption of life imprisonment without parole;

(b) secondly, the Court must consider what the otherwise appropriate sentence and MPI would be under the Sentencing Act 2002 ("the Sentencing Act");[6] and

(c) thirdly, in light of the MPI considered appropriate, I must determine whether the test for manifest injustice applies. If I am satisfied it would be manifestly unjust to order life without parole I must set the appropriate MPI.

[28] In order to examine whether it would be manifestly unjust I must consider what the otherwise appropriate sentence and MPI would be under the Sentencing Act. It is to that issue I now turn.

Minimum period of imprisonment which would otherwise be imposed

[29] The Crown says that a global MPI in the range of 20 to 22 years would be appropriate to impose concurrently with the MPI you are presently serving. In other words, when that MPI expires in 2029, the balance of any MPI I impose today would continue to operate. This is because the Sentencing Act does not permit what is called an indeterminate sentence to be ordered on top of another indeterminate sentence.[7]

[30] Mr Mansfield submits that a 17 year MPI would be appropriate and that it should be served concurrently with your present MPI which would have the effect of adding an additional 11 or 12 years of MPI to your present sentence.

[31] It is common ground that the circumstances of your offending engage s 104 of the Sentencing Act. This requires the Judge to impose an MPI of at least 17 years

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5 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [31]-[36].
6 Sentencing Act, above n 2, ss 102, 103 and 104.
7 Section 23.

where one or more of the specified aggravating circumstances listed in that provision are present, unless it would be manifestly unjust to do so.

[32] This involves a three-stage process:[8]

(a) first, I must determine whether one or more of the listed criteria is present;

(b) secondly, I must consider the degree of culpability of the offender in relation to the aggravating and mitigating features of the offending to decide whether or not an MPI of 17 years or more is justified in the circumstances; and

(c) thirdly, if an MPI of 17 years or more is not justified, even though s 104 is satisfied, I must consider whether it would be manifestly unjust to impose an MPI of 17 years.

[33] With those factors in mind, I turn first to decide which of the listed criteria are present and to what degree.

[34] The Crown says that three of the statutory factors are engaged:

(a) first, that your offending occurred with a high level of brutality, cruelty, depravity and callousness;

(b) secondly, that Blake Lee was particularly vulnerable; and

(c) thirdly, that you have now been convicted of murder on two separate occasions.

[35] I shall deal with each.

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[8] *R v Williams* [2005] 2 NZLR 506 (CA); *R v Lisiate* HC Auckland CRI-2009-044-2878, 16 December 2011 at [83].

High level of brutality, cruelty, depravity or callousness (s 104(1)(e))

[36] Murder, almost inevitably, involves some degree of brutality or callousness. Brutality has been defined as "savage violence" and "an insensitive and cruel disregard for others".[9] The Crown says that what you did is a clear example of savage violence. Mr Mansfield points out that the duration of the attack was brief and although he accepts the injuries inflicted were serious and ultimately fatal, they were not so serious that they justify the label "extreme".

[37] I am easily satisfied that what you did meets the definition. I have already described some of your actions; how you alternated between stabbing Blake Lee forcefully in the chest and other parts of his body, and jumping on his head and stomping on his head and face. You stabbed him no fewer than 37 times and stomped and jumped on his head and other parts of his body 14 times. That easily meets the definition.

[38] A defendant's conduct after the murder may also be relevant to this assessment.[10] Your act in presenting the shank, lowering it and then bringing it up to your mouth and licking it before throwing it to the ground in front of the prison guards simply adds to the level of depravity and callousness.

[39] I am satisfied that this factor is present to a high degree.

Deceased particularly vulnerable (s 104(g))

[40] It has been said that prisoners are more vulnerable than members of the public because they have nowhere to run when faced with an attack.[11] The yard was confined. At the time, the only other occupants were your fellow inmates. You would have known how long it would take for prison staff to respond. In that sense, Mr Lee was vulnerable.

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9 *R v Gottermeyer* [2014] NZCA 205 at [79].
10 *Marong v R* [2020] NZCA 179 at [33].
11 *R v Burton* HC Auckland CRI-2008-044-10515, 19 February 2010 at [26].

[41] Additionally, your attack on him started almost the moment he hit the ground after Mr Telefoni's punch. You went straight in and stomped on his head and face. He never moved again. And that was your intention. From that point on, other than occasional interruptions by Mr Su'a, you set upon your victim in a methodical and relentless way as he lay flat out on his back with his face upwards. Essentially, you were able to do whatever you wanted from that point on. He was incapable of defending himself.

[42] I regard this factor as present to a high degree.

Defendant convicted of two or more counts of murder (s 104(h))

[43] This third factor requires no evaluation. It is simply a fact that Lee Blake's murder is your second conviction for that crime.

Other factors

[44] I have also considered whether the murder involved calculated or lengthy planning.[12] Although I am satisfied from viewing the footage that the attack on Mr Lee was planned by you and Mr Telefoni and that the two of you worked together, I am satisfied that the murder does not come within the definition of calculated or lengthy planning for the purposes of s 104.

[45] This conclusion is supported by Mr Mansfield's advice to me by yesterday's memorandum that you were not aware before that day that Mr Lee would be on your landing and that you did not "arm up" with the intention of attacking him. Instead, you say the shank was carried by you for protection. Mr Mansfield also asks that the criminogenic environment and elevated gang tensions be taken into account because what happened was inevitable.

[46] While I am prepared to accept some of these claims, others are inconsistent with the evidence. I accept that you did not know that Mr Lee would be placed with you and others that day. He had only arrived at Paremoremo that morning, having been transferred from Whanganui.

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[12] Sentencing Act, above n 2, s 104(1)(b).

[47] I also accept that inter-gang rivalry motivated your attack on Mr Lee. Mr Lee was affiliated to the Mongrel Mob. His gang tattoos were visible on his shoulders and upper arms. You were and remain a senior member of the Crips Gang. To the extent any motive can be discerned, that seems to have been it.

[48] I am easily satisfied that even before Mr Telefoni delivered that first punch, you knew it was coming. For example, just before the attack started, Mr Telefoni changed places with you putting him closest to Mr Lee as the two of you walked towards him. The delivery of that punch had all the hallmarks of an ambush. There was no warning. There was no prior sign of aggression or hostility from Mr Lee. 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 that was yours and Mr Telefoni's intention.

[49] Before that punch, you and Mr Telefoni were engaged in an intense discussion. As Mr Telefoni was moving towards Mr Lee to punch him, you were already moving in the same direction. You knew that the attack was coming and you knew what was planned and what lay ahead.

[50] It has been suggested, although not by Mr Mansfield, that the attack was motivated by Mr Lee directing a mobster gesture at you or Mr Telefoni, before Mr Telefoni punched him. In other words, what happened was spontaneous but provoked. The footage says otherwise. You were not looking in his direction at the time. Instead, you appear to have been in deep conversation with Mr Telefoni.

[51] And so, while I agree that what happened does not meet the definition of calculated or lengthy planning, it would be wrong to characterise it as spontaneous or somehow provoked.

Calculating the appropriate MPI

[52] The next stage requires me to determine the appropriate MPI which, in turn, requires me to consider your degree of culpability when measured against other

sentences imposed for murder, as well as the aggravating and mitigating features relevant to both the offending and to you.[13]

[53] Both the Crown and Mr Mansfield have referred me to a range of cases. I do not propose to discuss them all or to complicate and unnecessarily prolong this already complex and lengthy process by reviewing them in these remarks. Instead, for completeness, I shall footnote them.[14] Somewhat ironically, Potter J's remarks when she sentenced you almost exactly 10 years ago are amongst the most useful when assessing where the present case sits amongst other comparable cases.[15] Although the facts were a little different, there are some close synergies. You and your two co-defendants were found guilty of the murder of a fellow inmate at Auckland Prison. As with the present case, the killing arose out of rival gang tensions. You sent various text messages to one of your co-defendants telling him that the deceased needed to be killed before he was moved to a different block within the prison. Your co-defendants then lured the deceased into a prison cell and strangled him to death. After the killing, a shank was used to inflict further injuries on his body. Potter J noted that you had a close involvement in the plan. She described you as "the driver". She concluded that the appropriate starting point would be in the range of 14 to 15 years with an uplift of two years to reflect the fact that you offended while subject to a sentence and on account of your previous violent offending. This resulted in a global starting point of 16 to 17 years' imprisonment.[16] Her Honour then determined there was nothing in the circumstances to suggest an MPI of 17 years would be manifestly unjust.[17] She adopted a 17 year starting point with a one year uplift for your previous violent offending, leading to a final sentence of life imprisonment with an MPI of 18 years.

[54] The similarities between that killing and the present are striking. Both were committed in a maximum-security prison setting. Both involved multiple attackers. Both involved gang retribution. Both involved the use of a shank although I accept

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13 *R v Williams*, above n 8.

14 *R v Lisiate*, above n 8, at [83]; *R v Betham* [2016] NZHC 2107; *R v Jury* [2020] NZHC 2618; *R v Collins* [2021] NZHC 1029; *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1; *Kahia v R* [2015] NZHC 344; *Webber v R* [2021] NZCA 133; *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602.

15 *R v Lisiate*, above n 8.

16 At [108].

17 At [110].

that the shank did not inflict the fatal injuries and you were not physically present at the killing. I also accept that the level of premeditation in that case was a good deal greater than would seem to be the case here.

[55] I agree with the Crown that the present offending is more serious because it was you who inflicted the violence which caused Mr Lee's death. The attack on Mr Lee was also considerably more brutal and violent. I also regard it as relevant in this calculus that unlike your previous murder where you were charged under s 167(d), Mr Lee's killing undoubtedly involved an intention to kill.[18]

[56] Having regard to the circumstances of the first murder and the other cases which counsel have referred to, I am of the view that an MPI in excess of the 16 to 17 years' global starting point set by Potter J is appropriate. Consistent with the authorities, I would set it at 19 years.

Criminal history

[57] You have a very significant criminal history. You are presently serving a sentence of life imprisonment with an MPI of 18 years. This followed your conviction for the murder of a fellow inmate in 2009. You are also subject to a sentence for preventive detention following your 2020 conviction of wounding a fellow inmate with intent to cause grievous bodily harm.

[58] Your conviction for the murder of Blake Lee is the latest in a series of convictions for serious violent offending. Let me list them:

(a) in 1998, you were convicted of assault with a blunt instrument and two charges of robbery. You were sentenced to imprisonment;

(b) in 2001, you were convicted of one charge of aggravated assault. Again, you were imprisoned;

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[18] Crimes Act 1961, s 167(a).

(c) in 2003, you were convicted of two charges of threatening to kill or do grievous bodily harm. You were again imprisoned;

(d) later in 2003, you were convicted of four charges of aggravated robbery and sentenced to a term of 10 years' imprisonment with an MPI of five years;

(e) in 2011, you were convicted of the murder of a fellow inmate and sentenced to life imprisonment with an MPI of 18 years; and

(f) in 2020, you were convicted of wounding a fellow inmate with intent to cause grievous bodily harm. You were sentenced to preventive detention and given a first strike warning.

Uplift for previous convictions and offending while in prison

[59] The Crown submits an uplift in the range of three years is appropriate to account for your previous convictions and for the fact this offending occurred in prison while you were subject to a sentence. Mr Mansfield suggests an uplift of one to two years may be appropriate.

[60] That the present offending took place in a prison environment is an aggravating factor justifying an uplift.[19] Your previous violent offending also plainly calls for an uplift. When Potter J sentenced you, she gave an uplift of around two years to reflect your previous offending up to that point. Since then you went on to commit two further extremely serious violent offences, both against fellow inmates; wounding with intent to cause grievous bodily harm in 2020 and shortly afterwards the murder of Blake Lee. As for the 2020 conviction there must be a significant uplift to reflect this, which I set at three years.

[61] This brings the total provisional MPI to 22 years before any discounts are made for personal factors.

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19 *Tryselaar v R* [2012] NZCA 353.

Personal mitigating factors

[62] I turn next to consider the mitigating factors which are personal to you. There are two areas where a reduction from that figure may be justified; your guilty plea and your personal circumstances.

Guilty plea

[63] You pleaded guilty on 19 May 2021 just a week before your trial was scheduled to start. I accept Mr Mansfield's submission that a guilty plea had been intimated from a point well before then and that the reason for the lateness of the plea was due to the difficulties Mr Mansfield was experiencing in getting access to you to confirm his instructions.

[64] The Crown says while you are entitled to a discount, it should be modest. Although Mr Mansfield does not specify a particular figure, he does not agree that only a nominal reduction is deserved.

[65] The policy behind discounts for pleas of guilty when determining the appropriate MPI under s 104 is broadly comparable to that in other contexts. Guilty pleas spare the family and friends of the victim the stress of a trial, save precious Court resources and inconvenience to witnesses is avoided. It may also be reflective of remorse.[20] It has been accepted that when determining the appropriate sentence under s 104, a guilty plea will not always attract significant weight when assessing the circumstances as a whole. What weight should be given will depend on the circumstances in which the plea was made.[21]

[66] I accept that to some extent by pleading guilty to Blake Lee's murder, his family have had a measure of closure. The man who killed their loved one has accepted his guilt. A trial was not avoided because your co-defendants defended the charge. However, I agree with Mr Mansfield that it would be unfair to hold that against you. You cannot be held responsible for their decisions. However, against that, it cannot be overlooked that your conviction for murder was all but a certainty once the

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20 *R v Williams*, above n 8, at [70].
21 At [72].

jury viewed the CCTV footage. Neither do I accept that remorse is implicit in your plea. You have showed absolutely no hint of remorse or regret at any stage. In fact, in all the circumstances, the very opposite seems to be the case. You went about the task of killing Blake Lee in a methodical, focused and deliberate way, pausing only when the exertion required you to take a rest. You smiled at and taunted Mr Su'a. Your licking of the knife when the prison guards arrived demonstrates the level of your contempt towards your victim and your total lack of empathy or respect for his human life. You have refused to engage with the Probation Service for the purpose of preparing the pre-sentence report. You deserve no credit for remorse.

[67] In the end I am prepared to discount the MPI by one year to reflect your guilty plea but even that, in all the circumstances, is generous in my view.

Personal circumstances and institutionalisation

[68] Mr Mansfield submits your background and personal circumstances justify a two-year reduction. The Crown accepts such a discount may be available but, in the light of your escalating violent offending and your lack of insight and remorse, they say any discount should be minimal.

[69] Mr Mansfield devoted some time to this aspect in his submissions. In doing so, he relied, in part, on the cultural report prepared by Ms Shelley Turner for your sentencing in 2020. He noted, with regret, that nothing had changed since then to warrant an updated report. The report details your family dysfunction, abuse of alcohol and drugs from an early age, your limited education, your early engagement with Youth Justice, your youth gang affiliation and the fact that you have been aligned to the Crips since the age of about 12.

[70] You have spent almost the entirety of your adult life in prison. Your first introduction to prison was when you were just 17. Your last Christmas outside prison was in 1996. I accept that you are chronically institutionalised. I am satisfied that there is a clear causative link between those challenges and your present offending, justifying a further one-year reduction from the MPI.

[71] However, the seriousness and extent to which a discount in recognition of your personal circumstances may be available, is limited. The Court of Appeal has said more than once that the discretion to reduce an otherwise appropriate sentence on account of such considerations is constrained. This is because the MPI must accurately reflect the wider societal purposes under s 7 and the need to give effect to the statutory purpose. An offender's background of deprivation may carry less weight in the context of the sentencing exercise,[22] precluding any greater allowance.[23]

[72] I reduce the MPI by one year. This takes the final determinant aspect of your sentence to one of 20 years.

Would an MPI of 17 years be manifestly unjust?

[73] Given that I have decided that an MPI of 20 years is appropriate, it is unnecessary for me to undertake a separate examination of this question.

[74] This leads me to the next issue and that is whether the presumption of life imprisonment without parole should be displaced because such a sentence would be manifestly unjust.

Would life imprisonment without parole be manifestly unjust?

[75] While the Crown, properly in my view, does not press for life without parole, it does says that such a sentence may not be manifestly unjust and sets out the grounds which could support such a result. Mr Mansfield strongly submits that it would be manifestly unjust.

[76] The Court of Appeal has prescribed the approach to be taken when determining whether it would be manifestly unjust for a defendant to be sentenced to life imprisonment without parole. The test for manifest injustice is different to that under s 104.[24]

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22 *Keil v R* [2017] NZCA 563 at [57]-[59].
23 *Carr v R* [2020] NZCA 357 at [67]; *Webber v R*, above n 14, at [33].
24 *R v Harrison*, above n 14, at [143].

[77] Both the offender and offending must be considered. A number of principles emerge. Relevantly, these include recognition that the judicial approach when considering the manifestly unjust exception is to avoid grossly disproportionate sentencing outcomes. However, a finding of manifest injustice must be clear and convincing. It requires an assessment of the circumstances of both the offence and the offender.

[78] That this case is a stage two murder rather than a stage three murder is relevant because it relates to the nature and extent of the recidivism. The consequences of life imprisonment without parole sentence are relevant factors where personal mitigating factors, such as a guilty plea, fall to be considered in the balance. Likewise, the sentence which would have been imposed, but for the presumption of life imprisonment without parole, is relevant. Naturally, the greater the disparity between the MPI and life imprisonment without parole, the more any injustice is likely to be manifest. Also relevant are the applicable purposes and principles of sentencing.[25]

[79] There are also other relevant factors such as the extent to which the defendant understands the relevance and importance of the prior warnings, whether the facts of the qualifying offence or offences point to a higher or lower level of culpability and whether the offender is likely to re-offend, thus engaging the need to protect the community. The enquiry is intensely factual.

[80] The Crown says that when viewed in its totality, your offending can rightly be characterised as one of the worst murders. It also points out that your stage one offence was a brutal, sustained attack on another inmate who you arranged to be stabbed. Miraculously the victim survived although he carries permanent injuries. Venning J, in sentencing you to preventive detention on that occasion, described what happened, which has some obvious and close similarities to what you did in March last year. He described it as a sustained attack on a defenceless and vulnerable victim who was on the ground.

[81] The killing of Blake Lee occurred less than two years after that attack. You pleaded guilty and were given your first three strikes warning. But you were on

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[25] Sentencing Act, above n 2, ss 7, 8 and 9.

remand pending sentence for that crime you murdered Blake Lee. That your present offending is simply the latest in a long list of serious violent offending including a previous conviction for murdering a fellow inmate, led the Crown to describe you as an example of "the worse repeat violent offender".[26] The statutory purpose of the three strikes law is that it should apply to those defendants who fail to heed the warnings and continue to offend regardless and irrespective of the consequences.[27]

[82] Also of relevance is that you are serving a sentence of preventive detention which necessarily means that this Court has already determined that you are someone who is likely to commit another violent offence.

[83] Unsurprisingly, Mr Mansfield has pushed very strongly against the Crown's submission on this point.

[84] He has referred me to academic literature which concludes that sentences of life imprisonment without parole do not work. I have carefully considered the various points he makes. He may well be correct. However, whatever views one may hold on the futility of very lengthy sentences of imprisonment, the so-called three strikes law is still part of the Sentencing Act, and as a Judge I am obliged to apply the law.

[85] Mr Mansfield also makes five submissions on why life imprisonment without parole should not be imposed in your case. I summarise them:

(a) first, life imprisonment without parole in your case is self-defeating, purely punitive and eliminates the prospect of hope or rehabilitation. Mr Mansfield says that his suggested concurrent MPI of 17 years would mean that you would remain in prison until you are about 60 and even then, would only be eligible for release at the discretion of the Parole Board. A sentence of life imprisonment without parole would have you dying in jail, purely to punish you. It would remove any deterrent effect of a life imprisonment sentence and would, in fact, operate to immunise

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26 *R v Harrison*, above n 14, at [67]. Referring to the background of the Sentencing and Parole Reform Act 2010; Cabinet Business Committee "No Parole for Worse Repeat Violent Offenders and Worse Murder Cases" (5 December 2008).

27 *R v Harrison*, above n 14, at [75]. Referring to the purposes of the legislation.

you from the consequences of further violent offending. It would also eliminate any rehabilitative purpose of sentencing leaving you with no hope or incentive in favour of release. He tells me you still have hope for release some time in the future;

(b) secondly, Mr Mansfield says that your offending does not warrant such a sentence. He says the Crown's characterisation of this being one of the worst murders is wrong. It does not come even close, in terms of culpability, to the only case to date where life imprisonment without parole has been imposed, namely the Christchurch mosque murders;[28]

(c) thirdly, Mr Mansfield submits that if life imprisonment without parole was imposed, you would serve more than twice what he submits is the appropriate determinate sentence and result in you spending over 50 consecutive years in prison. He points out that if what he submits is the appropriate MPI of 17 years, you would still be in prison until you are at least 57 while serving the sentence concurrently.[29] Self-evidently, if you are sentenced to life imprisonment without parole, you will stay in prison until you die which, according to Mr Mansfield, assuming you live until your late 70s or early 80s,[30] will mean you would spend a further 15 to 25 years in prison, an effective doubling of what Mr Mansfield submits is the appropriate determinate sentence. Such a sentence he says would be "wholly disproportionate" or "grossly disproportionate". Mr Mansfield also calls in aid s 9 of the New Zealand Bill of Rights Act 1990, the right to be free from disproportionately severe treatment or punishment. To impose life imprisonment without parole would be inconsistent with that principle;

(d) fourth, Mr Mansfield refers to your present prison conditions and attaches photographs of your accommodation in D Block at

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28 *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [187].

29 By virtue of s 23 of the Sentencing Act, any MPI I impose must be served concurrently with the one you are already serving.

30 The average life expectancy for a male Pacific Islander is 74.5 years. See Ministry of Health "Tangata Pasifika in New Zealand" Ministry of Health <https://www.health.govt.nz/our-work/populations/pacific-health/tagata-pasifika-new-zealand#overall>.

Paremoremo Prison. He describes these conditions as extremely restrictive and punitive which necessarily have a toll on your physical and psychological well-being; and

(e) finally, Mr Mansfield submits that your guilty plea and personal circumstances weigh in favour of life imprisonment without parole being manifestly unjust. He also refers to your institutionalisation and submits that the issue of your release is a matter which should be left to the Parole Board and that to impose such a sentence would be to deny that specialist body the discretion to ever consider your release.

[86] I have carefully considered these submissions. I have decided that to impose life imprisonment without parole would be manifestly unjust. My reasons follow.

[87] First, I regard it as relevant that the present case is a stage two rather than stage three murder. Although the facts of the qualifying conviction and your previous history plainly paint you as a violent recidivist, the distinction between stage two and stage three is one which deserves some recognition.

[88] Secondly, there is your plea of guilty. The plea represents an acceptance that you are guilty of Mr Lee's murder. That must account for something in terms of this analysis.

[89] Thirdly, I regard it as significant that you are already subject to a sentence of preventive detention. That is an indeterminate sentence which recognises the threat you pose to the health and safety of the community. It is a purposefully protective mechanism to ensure the safety of the community and in that way is very similar to the purposes of s 86E. Under a sentence of preventative detention, the law requires you to remain in prison until such a point when the Parole Board is satisfied that it is safe to release you. When, and in fact whether, that ever happens will be a matter for the Parole Board. It is entirely conceivable that the Parole Board, with all its specialist resources, may well decide you should never, ever be released. However, in my view, that is a matter which is properly left for that specialist body with all the material and

information put before it. The protective measures that a sentence under s 86E would put in place are already in existence through the preventative detention sentence.

[90] Fourth, I accept that there is a causative link between the extremely difficult and deprived circumstances of your upbringing and the present offending. That must count for something when assessing whether a sentence of whole of life without parole is manifestly unjust.

[91] Finally, I accept that prison life for you will be a good deal more oppressive than for virtually all other inmates. You are in D Block. Your ability to mix with others is severely curtailed. The conditions under which you are presently being held will have their toll in terms of your physical and psychological well-being. While, of course, these consequences flow from your offending and behaviour in prison and to that extent, you have brought them on yourself, they remain a relevant consideration in my view.

[92] For these reasons, I am satisfied that a sentence of life imprisonment without parole would be manifestly unjust.

[93] I do not accept some of Mr Mansfield's other submissions on this point. You are not a young man for whom imprisonment for the rest of your life would be particularly harsh. Claims that such a sentence would remove any deterrent effect of life imprisonment and would eliminate the rehabilitative purposes of sentencing will be likely consequences of anyone sentenced to a whole of life sentence. They are not special to you. They are not factors which would make such a sentence manifestly unjust in your particular case.

What is the appropriate MPI?

[94] I have determined that an MPI of 20 years is appropriate.

[95] The MPI which you are presently subject to expires in eight years time, that is 2029 when you will be 49. If a 20 year MPI was imposed concurrently, it would continue for a further 12 years after the current MPI expires, that is in 2041 at which time you would be 61.

Should there be a totality adjustment?

[96] So I then look at the sentence and ask whether there should be a totality adjustment.

[97] If a 20 year MPI was imposed would that be excessive to the point of being crushing. I do not think it would. You are 41 now. You will be 61 when the MPI expires.

[98] Of course, you will be subject to your preventive detention sentence which has no end date for release and I have already talked about the involvement of the Parole Board which will need to assess the risk you pose at that time. There can be no expectation that when this MPI expires you will be released.

[99] I accept this is a severe sentence, but one which reflects all the factors I have discussed and in particular, your pattern of escalating violence which, most recently, culminated in the taking of a young man's life.

[100] Before passing sentence, I am required to issue a second strike warning under s 86E(6) of the Sentencing Act. A copy of what I am about to say will be given to you after this sentencing.

Consequences of final warning

[101] Given your conviction for murder you are now subject to the three strikes law. This is now your final warning which will explain the consequences of another serious violence conviction. You will also be given a written notice outlining these consequences, which lists these "serious violent offences".

[102] If you are convicted of any serious violent offence other than murder or manslaughter, then you will be sentenced to the maximum term of imprisonment for each offence. That will be served without parole or early release unless it would be manifestly unjust.

[103] If you are convicted of manslaughter committed after this warning, then you will be sentenced to imprisonment for life. The Judge must order you to serve at least 20 years' imprisonment unless the Judge considers it would be manifestly unjust to do so, in which case the Judge must order you to serve a minimum of at least 10 years' imprisonment.

[104] If you are convicted of murder after this warning then:

(a) you must be sentenced to imprisonment for life. The Judge must order you to serve this sentence without parole unless it would be manifestly unjust to do so;

(b) if the Judge finds that it is manifestly unjust to do so then the Judge must impose a minimum period of imprisonment of at least 20 years unless that would be manifestly unjust, in which case the Judge must sentence you to a different minimum period of imprisonment.

[105] If you are sentenced to preventive detention you must serve the maximum term of imprisonment of the most serious offence you are convicted of unless a Judge considers that would be manifestly unjust.

[106]

Result

[107] Please stand.

[108] You are sentenced to life imprisonment.

[109] An MPI of 20 years is imposed to run concurrently with the MPI to which you are presently subject.

[110] Stand down.

Moore J

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