IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 113/2020
[2021] NZSC 26

BETWEEN	FISILAU TAPAEVALU Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	J-A Kincade QC for Applicant F R J Sinclair for Respondent
Judgment:	18 March 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] After a jury trial in the High Court at Auckland, the applicant, Fisilau Tapaevalu, was convicted on charges of murder and attempted murder, along with Mesui Tufui. On the murder charge, the applicant was sentenced to life imprisonment with a minimum term of imprisonment of 17 years.[1] The applicant appealed unsuccessfully to the Court of Appeal against sentence and now seeks leave to appeal to this Court.[2]

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1 *R v Tapaevalu* [2019] NZHC 1867 (Lang J) [Sentencing remarks].

2 *Tufui v R* [2020] NZCA 568 (Courtney, Wylie and Muir JJ) [CA judgment]. The Court of Appeal also dismissed Mr Tufui's appeal against conviction. His application for leave to appeal to this Court against conviction is the subject of a separate judgment being delivered at the same time: *Tufui v R* [2021] NZSC 25.

Background

[2] As is explained in the judgment relating to Mr Tufui's application for leave to appeal, the murder charge arose out of the shooting, in the early hours of the morning of 1 May 2018, of Abraham Tu'uheava. Mr Tu'uheava died having been shot a number of times by Viliami Taani. The attempted murder charge arose out of the shooting of Yolanda Tu'uheava, Mr Tu'uheava's wife. Mrs Tu'uheava was shot twice in the head and twice in the arm, but survived. Mr Taani pleaded guilty to the murder of Mr Tu'uheava and to the attempted murder of Mrs Tu'uheava. The applicant and Mr Tufui pleaded not guilty and were tried together.[3]

[3] In her evidence at trial, Mrs Tu'uheava described the man who shot her husband and shot her in the head as "the main guy". There was no dispute that this man was Mr Taani. Mrs Tu'uheava referred to the man who shot her in the arm as "the younger guy". On the Crown case, Mr Tufui was the younger guy and the applicant was the driver of the car in which the three men travelled to the location of the shooting.[4]

[4] In sentencing Mr Taani, Hinton J found that s 104 of the Sentencing Act 2002 applied.[5] That section requires the court to impose a minimum term of imprisonment of not less than 17 years where certain criteria are met, unless the court is satisfied it would be manifestly unjust to do so. The Judge considered the appropriate starting point for the minimum period of imprisonment for Mr Taani was 19 years, from which there was a discount for his guilty plea, resulting in an end sentence of life imprisonment with a minimum term of imprisonment of 17 and a half years.

[5] In sentencing Mr Tufui and the applicant, the trial Judge, Lang J, proceeded on the basis that the Crown could not establish beyond reasonable doubt that there was a premeditated plan to kill Mr Tu'uheava. Rather, this was a drug deal that had gone wrong. It was accepted that s 104 of the Sentencing Act applied. That was because

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3 The applicant pleaded guilty to two charges of being in possession of methamphetamine for supply and two charges of being in unlawful possession of firearms (the weapons used in the shooting): Sentencing remarks, above n 1, at [3]. The weapons had been hidden in a shed after the incident.

4 The three men are cousins. Mr Taani was a patched member of the Comanchero Motorcycle Club and the applicant was associated with that gang. All three men and Mr Tu'uheava had varying degrees of involvement in drug dealing.

5 *R v Taani* [2019] NZHC 1746.

of three factors. First, the offending took place in the context of serious criminal activity, that is, dealing in the Class A controlled drug methamphetamine.[6] Second, in relation to Mr Tufui, it occurred in a brutal and callous manner.[7] Finally, in terms of s 104(1)(i) of the Sentencing Act, there was an exceptional circumstance that had to be taken into account. The Judge said this concerned "the way that Mrs Tu'uheava, an innocent bystander," was shot "merely because she was the witness to events that unfolded" when Mr Tu'uheava was killed.[8]

[6] The Judge identified a number of general factors relevant to the overall culpability of Mr Tufui and the applicant as follows: this was an attack by two men on two unarmed individuals involving the use of not one, but two lethal weapons, and the use of a third to gain control of the victims; and it involved the death of one victim and the near death of another victim.[9] The Judge also referred to the "far-reaching consequences" on the victims, noting that "[w]hatever the cause of this incident it should not have resulted in what amounted to an execution of a defenceless person".[10]

[7] Mr Tufui was seen as being in the same position as Mr Taani in terms of his culpability. A starting point of 19 years' imprisonment in relation to the minimum term was adopted. As there were no mitigating factors, that was the term imposed. In imposing a minimum term of 17 years' imprisonment on the applicant, the Judge rejected the submission that this would be manifestly unjust. There were no mitigating factors so, again, that was the term imposed.

The proposed appeal

[8] The applicant says that there is a public interest in this Court considering the approach to sentencing for those in the role of a secondary party, and in particular in murder cases involving the application of s 104 of the Sentencing Act.[11] The applicant

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6 Sentencing Act 2002, s 104(1)(d).
7 Section 104(1)(e).
8 Sentencing remarks, above n 1, at [40].
9 At [42].
10 At [43].
11 In particular, the applicant says guidance from this Court is necessary on the weight to be given to the role played by a party to murder where the murder was not premeditated but s 104 applies and on the approach where the defendant was not directly responsible for the factors that lead to the application of s 104.

also wishes to argue that the imposition of a 17-year minimum term of imprisonment was manifestly excessive given the features of his offending, including: the finding that the murder was not premeditated; his role as a secondary party (as the driver, and not in a leading or organisational role); the fact he did not have a gun; and the fact he did not participate in the physical act of shooting. He says the cases relied on by the sentencing Judge involved a lead offender directly involved in the offending. Those cases assisted in assessing the culpability of his co-offenders, but were not relevant in this case given his lesser role in the offending. The applicant also provides information as to sentencing outcomes in a number of other cases to support the submission that the Court of Appeal did not consider parity of cases. In this respect, the applicant argues that the factors identified by the Court of Appeal as relevant to his culpability are simply those factors which make him a party to the murder.

Our assessment

[9] It may be arguable that there is a question of general or public importance about the methodology to be used in sentencing in these types of cases and where s 104 is engaged.[12] However, we accept the submission for the respondent in opposing the grant of leave that the present case is not an appropriate case in which to consider that question. The respondent makes the point that, if the original plan did not involve murder, it was overtaken by the fact the applicant continued to help the principal offender once it was clear that there would be serious violence. Accordingly, we see the proposed appeal as turning on an assessment of the particular factual circumstances, namely, whether the sentence imposed was manifestly excessive given the applicant's culpability and the relative culpability of his co-offenders.

[10] In concluding that the applicant's culpability warranted a minimum term of 17 years, the Court of Appeal said that on the Judge's findings of the evidence, the applicant "must have been aware by the time he moved the car" from its original position "up to where Mr and Mrs Tu'uheava were hiding that serious violence was underway". The Court took the view that pursuing Mr and Mrs Tu'uheava "up the road, after at least one shot had been fired, was clearly going to end in only one way". In those circumstances, "[e]ven allowing for the fact that [the applicant] was not

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12 Senior Courts Act 2016, s 74(2)(a).

directly involved in any of the violence", his culpability as a party warranted the minimum term imposed.[13]

[11] Nothing raised by the applicant gives rise to an appearance of a miscarriage of justice in the Court of Appeal's assessment of the factual circumstances and the relative culpabilities.[14] As the respondent submits, there are concurrent findings of fact that the applicant drove the car after it was clear that Mr Taani was intending to kill the victims. This was a factor relevant to issues about the relative culpability of the three men.

[12] The criteria for leave to appeal are accordingly not met. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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13 CA judgment, above n 2, at [64].
14 Senior Courts Act, s 74(2)(b).