

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

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

**CRI-2020-004-4580
[2022] NZHC 2461**

THE KING

v

MICHAEL FILOA

Hearing: 27 September 2022

Appearances: B H Dickey and S M Murphy for the Crown
D Niven, J N Olsen and A Gruebner for the Defendant

Judgment: 27 September 2022

SENTENCING NOTES OF HARVEY J

Solicitors/Counsel:
Meredith Connell, Auckland
David Niven, Barrister, Auckland
John Munro, Barrister, Auckland (J N Olsen) (A Gruebner)

Introduction

[1] Michael Filoa, at the age of 32, you appear this morning for sentence having been found guilty by a jury of the murder of Clifford Umuhuri. You will be aware that the maximum penalty for murder is life imprisonment.

The facts

[2] Mr Filoa, you will know what happened on 31 May and 1 June 2020 better than most. However, it is important that I address the facts during this sentencing since the law requires that it must be undertaken in public, and that I refer to those facts that are directly relevant when setting the sentence that will be imposed. I will therefore refer in this sentencing to parts of the evidence given at trial.

[3] The events that took place on 1 June 2020 will not easily be forgotten by you or by everyone else connected with the case. On 31 May 2020, your associate, Aaron Davis, wished to sell methamphetamine to someone he knew, Beatrice Gage. She was looking to purchase for herself as well as for her brother, Hayden Gage, and Mr Umuhuri. Ms Gage's request to Mr Davis was made late on 31 May 2020. The agreed amount for purchase was 14 grams and the price was \$4,500. Mr Davis then contacted you and collected you from your address to go with him to complete the deal. You armed yourself with a .22 cut-down sawn off gun.

[4] You both met Ms Gage, Mr Gage, Gary Campbell, their driver, and Mr Umuhuri at a supermarket carpark in Panmure early on the morning of 1 June 2020. It was decided that that location was not suitable to complete the deal. It was then agreed between you and Mr Davis on the one hand and Ms Gage and her associates on the other, that they would follow you both to an alternative location. That group then followed you both to an address in St Johns, Auckland. There was no particular significance about the address, and it appears to have selected quite randomly.

[5] Ms Gage then alighted from Mr Campbell's vehicle and spoke through Mr Davis' car window to confirm that the deal would proceed. The exchange continued that it was preferable for Mr Umuhuri, as the purchaser, to get out of Mr Campbell's car, into Mr Davis' vehicle to complete the deal.

[6] Mr Umuhuri then left Mr Campbell's car and got into the rear of Mr Davis' vehicle next to you. You were sitting behind the front passenger's seat while Mr Umuhuri sat behind Mr Davis. According to your evidence, you asked Mr Umuhuri for the money and he handed over just under \$1,000 in cash. You then said that you told Mr Umuhuri that this was not enough. He then called to Ms Gage who brought a bag to him while he was still sitting in Mr Davis' car next to you. Mr Umuhuri then gave you a further smaller amount of cash. You said you then told him again and after counting the money, which was a little over \$500, that that was insufficient for the purposes of the deal.

[7] Soon after, you said you were struck in the face by Mr Umuhuri numerous times. There was evidence that the car was rocking back and forth. You were seen to exit the vehicle and were observed to be unsteady on your feet by neighbours who had been awoken by yelling and shouting.

[8] You then took your gun from your pocket and fired twice at Mr Umuhuri at close range. One shot struck him in his left upper arm before entering his chest in a downward direction, travelling through his lung and liver before ricocheting off his spine and becoming lodged in his stomach.¹ According to the expert evidence of Dr Glenn, this shot was fatal as it caused him to bleed into his lung cavity which resulted in death.² The second shot struck him in his left buttock and ended up lodged in his groin. This shot was not fatal.

[9] Mr Umuhuri was then assisted from Mr Davis' vehicle, back to Mr Campbell's car. Mr Davis, who had run off down the road, subsequently returned and both of you left the scene and drove around several Auckland suburbs until arriving at the Cintra Apartments in Auckland City later that morning.

[10] You then went to Mr Davis' apartment he was renting and CCTV footage records that you counted the money taken from Mr Umuhuri, which was subsequently shared between you. Later that morning, Mr Davis' then partner drove you both in Mr

¹ *R v Filoa*, Notes of Evidence, Dr Charley Glenn, Evidence in Chief 26 July 2022 at 367, lines 5-29.

² *R v Filoa*, Notes of Evidence, Dr Charley Glenn, Evidence in Chief 26 July 2022 at 377, lines 1-2.

Davis' car to McDonalds. The three of you then returned to the Cintra Apartments. Not long after that, a taxi was arranged which you then took from the Cintra back to your home address.

[11] Mr Campbell, along with Ms Gage, attempted to take Mr Umuhuri to the hospital but he told them not to take him there. Ms Gage left Mr Campbell's vehicle in Greenlane while Mr Campbell continued on to Auckland hospital with Mr Umuhuri. They stopped at Parkfield Terrace in Grafton where Mr Umuhuri attempted to exit the vehicle. He opened the car door, but his feet became stuck in the footwell and he fell onto the road. A resident came to his aid and attempted to deliver CPR. An ambulance then arrived but Mr Umuhuri could not be saved. He died where he fell.

[12] You were subsequently charged with murder and aggravated robbery. Mr Davis was charged with murder and aggravated robbery as a party.

[13] The Crown case was that you fatally shot Mr Umuhuri as part of a drug deal that had gone wrong. You accepted that you had fired the fatal shots but raised self-defence at trial because you said Mr Umuhuri had struck you in the face with a blunt object. You thought he had a gun at the time of these events, and feared he would use it against you, which was why you believed your life was at risk.

[14] Both you and Mr Davis were acquitted of the charge of aggravated robbery. Mr Davis was also acquitted on the charge of murder as a party. However, the jury accepted that, for you, the elements of the charge of murder were proven by the Crown beyond a reasonable doubt. You must accordingly be sentenced on that basis. So, I must determine the factual basis for sentencing, consistent with that verdict.³

Victim impact statements

[15] I have received three victim impact statements from Mr Umuhuri's sister, Mariana Kawana, his brother, Meihana Umuhuri and from his son, Karaneihana Umuhuri.

³ Sentencing Act 2002, s 24(1).

[16] Mr Umuhuri was a loved and respected figure within his immediate whānau. They have all said so and I have no reason to doubt them. As the tuakana, first born, Mr Umuhuri was laden with obligations in a tikanga context. Those responsibilities included being able to provide for his whānau. While his lifestyle choices and personal conduct may appear unorthodox and even unpleasant to some, nonetheless, Mr Umuhuri maintained the affection, love and support of his immediate whānau, several of whom sat through the trial in its entirety.

[17] Nothing I will say can change what has happened. The ongoing impact and toll of his death and the circumstances of it, will remain embedded in the whānau history and consciousness indefinitely. The grieving of Mr Umuhuri's whānau inevitably continues to the present day. I thank all of them for their presence during the trial, despite its emotional toll, and acknowledge their heartfelt and sincere victim impact statements as part of this process of sentencing following the trial.

Approach to sentencing

[18] In imposing sentence today, I will first determine whether the sentence for murder should be life imprisonment. I then determine what the minimum period of imprisonment (MPI) should be, taking into account the aggravating and mitigating features of the offending. I will then apply any uplifts or discounts to reflect personal factors.

Should the presumption in favour of life imprisonment for murder apply?

[19] Life imprisonment is the mandatory sentence for murder unless that sentence would be manifestly unjust.⁴

[20] Citing a number of legal authorities, many of which relate to crimes other than murder, your counsel have argued that a mandatory sentence of life imprisonment would be manifestly unjust.⁵ Your counsel have argued that the jury must have found

⁴ Crimes Act 1961, s 172; and Sentencing Act 2002, s 102(1).

⁵ Including, for example, *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372; *R v Rapira* [2003] 3 NZLR 794 (CA); *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *Mareikura v R* [2012] NZCA 108; and *R v Cunnard* [2014] NZCA 138.

that you were guilty of the less-culpable homicide of reckless murder, and that you acted in excessive self-defence. Further, they say that you did not act in anger, but in fear, motivated by Mr Umuhuri's aggressive conduct. They submit that Courts have accepted that in exceptional cases, excessive self-defence and provocation could be the basis for a finite sentence, even though the cases they specifically cited, *Daken v R* for excessive self-defence and *Hamidzadeh v R* for provocation, did not, on their own facts, justify a departure from the mandatory life sentence.⁶

[21] Your counsel also referred to the Court of Appeal's decision *Mareikura v R* which confirmed that when sentencing, a Court must take into account the conduct of the victim.⁷ Your counsel referred to the decision *R v Cunnard* as authority for the principle that the Court must differentiate with a less culpable offender: proper recognition of the excessive self-defence and significant aggression by the victim arguments must be made or the sentence will be manifestly excessive.⁸

[22] Applying the principles of these authorities to this case, your counsel have argued that, because of important mitigating factors, it would be manifestly unjust to sentence you to life imprisonment. The first factor is what they describe as a finding by the jury that you acted in self-defence, which they also say the jury considered involved excessive force. It was argued that you did not intend to kill Mr Umuhuri and so you are guilty of the less culpable version of homicide- reckless murder. While your counsel accept that this alone would be insufficient to justify a departure from a sentence of life imprisonment, they say that there are distinguishing factors that must be taken into account.

[23] The second factor your counsel emphasised is the conduct of Mr Umuhuri – which they describe as significant aggression. They say that Mr Umuhuri had a weapon which he used to assault you with, that you feared for your life as a result and

⁶ *Daken v R* [2010] NZCA 212 at [67]–[68]. The appeal against conviction and sentence was dismissed. *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [59]. The Court of Appeal accepted that “exceptional nature where the court may properly find that provocation by the victim (or possibly from other sources) was such that a sentence of life imprisonment would be manifestly unjust.” However, they determined that it would not be manifestly unjust in the circumstances of that case.

⁷ *Mareikura v R* [2012] NZCA 108; and Sentencing Act 2002, s 9(2)(c).

⁸ *R v Cunnard* [2014] NZCA 138 at [29] and [31].

that you acted in self-defence when you fired the two shots into the car at Mr Umuhuri. For these reasons, your counsel argued that your culpability is significantly reduced with the result that you should not be given the mandatory sentence of life imprisonment for murder.

[24] Crown counsel, on the other hand, say that the threshold for a conclusion that a life sentence would be manifestly unjust is high and can only be met in exceptional circumstances, citing *R v Rapira*.⁹ For example, where there are issues of physical or mental impairment or significant mitigating circumstances.¹⁰ Crown counsel argue that none of those circumstances are present here.

[25] I have also considered other cases where the mandatory sentence of life imprisonment for murder was not imposed including *R v Reid* where a 10 year sentence was imposed because the defendant had killed his 84 year old neighbour while suffering from major depression accompanied by psychotic delusions and that but for his illness, he would not have killed the victim.¹¹ There are also authorities that involve severe mental illness on the part of the defendant including schizophrenia, where, even then, the presumption has not been displaced.¹² Invariably, all of these examples contain an element of mental health issues, prolonged stress and abuse at the hands of the deceased or other emotional challenges in circumstances that are quite unlike the present case. Accordingly, I am not persuaded that the authorities cited, and the facts of this case lend themselves to displacing the presumption of life imprisonment.

[26] I am satisfied that the facts of the case are a decisive consideration that life imprisonment will be imposed. At the relevant moment, Mr Umuhuri was sitting in Mr Davis' car and his associates were moving toward you both. Mr Davis assisted

⁹ *R v Rapira* [2003] 3 NZLR 794 (CA).

¹⁰ For example, *R v Law* (2002) 19 CRNZ 500 (HC).

¹¹ *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011 (CA). Then there was the example of *R v Wihongi* where a 12 year finite sentence of imprisonment was imposed where offender killed her partner. She had a brain injury with cognitive deficit and a history of abuse at the deceased's hands as well as others which led to post traumatic stress disorder: *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775. See also *R v Smith* [2021] NZCA 318; *R v Knox* [2016] NZHC 3136; *R v Rihia* [2012] NZHC 2720; and *R v Innes* [2014] NZHC 2780.

¹² See, for example, *R v Van Hemert* [2021] NZCA 261; *R v Mayes* [2004] 1 NZLR 71 (CA); *R v Morris* [2012] NZHC 616; and *R v Brackenridge* [2019] NZHC 1627.

you to get out of his car. You were standing outside, in a dazed state, facing toward the car armed with a gun. The shots you fired struck Mr Umuhuri in a manner that suggested a downward angle. The angle of the shots as they entered Mr Umuhuri's body also suggest that he was not facing you at the moment you fired. So he was likely to have been sitting in a front facing position or possibly turning to his right, trying to get out of the rear door behind the driver's seat, given the entry points of the two bullets. The shot that struck him in his left buttock could only have entered his body if he were either sitting with his rear in the air facing toward you as he tried to exit the vehicle through the passenger's door behind the driver, or if he was standing up and facing away from you. In either case, it does not seem likely that he was facing you at the time you fired those shots.

[27] If, as your counsel have argued, the jury did accept that you were acting in self-defence, which Crown counsel deny was the case, your counsel accept that the jury must have found that the force you used was excessive when they arrived at their verdict of guilty for the charge of murder. I agree.

[28] Having considered the submissions of both counsel, my conclusion is that there is no reason why the presumption of life imprisonment should be disturbed. The jury found you guilty of murder and I am not persuaded that in the circumstances of this case, it would be manifestly unjust to set aside the presumption of life imprisonment in favour of a finite sentence. You will be therefore sentenced to life imprisonment.

Minimum period of imprisonment

[29] Where life imprisonment for murder is imposed, the minimum period of imprisonment must not be less than ten years.¹³ This must be the minimum term required to satisfy any or all of the sentencing purposes for murder, which include:¹⁴

- (a) holding you accountable for the harm you have caused to the victim and to the community.

¹³ Sentencing Act 2002, ss 103(1) and 103(2).

¹⁴ Section 103(2).

- (b) denouncing the conduct in which you were involved.
- (c) deterring you against any future offending. It must also deter others.
- (d) protecting the public.

[30] In addition, if one or more specified aggravating factors are present in your offending, then a minimum period of imprisonment (MPI) of at least 17 years must be imposed unless it would be manifestly unjust to do so.¹⁵ Crown counsel say that s 104 of the Sentencing Act 2002 is not engaged for the imposition of a 17-year minimum period of imprisonment. I agree. But that does not diminish the effects and impact of this offending on everyone involved.

[31] Instead, Crown counsel argued that the minimum period of imprisonment range for your offending is between 10 and 16 years' imprisonment. In short, Crown counsel submitted that your minimum period of imprisonment should be 11 years.

[32] Your counsel argued that you should not receive a mandatory sentence of life imprisonment. I have already concluded that those arguments are not persuasive. Alternatively, if life imprisonment was imposed, your counsel have said that the minimum period of imprisonment should not exceed ten years. The issue for me to decide is whether I must sentence you to any more than the ten-year minimum period of imprisonment in order to achieve the relevant purposes of sentencing.

[33] The sentence that I impose should be consistent in kind and length with other comparable cases for persons who have committed similar offences. I must also consider any circumstances that are particular to you that might have a bearing on the sentence. Before then, I have to fix the minimum period of imprisonment by reference to your culpability. In doing so, I must consider any aggravating and mitigating aspects of your offending.

¹⁵ Section 104(1).

Aggravating features

[34] Crown counsel argue that the actual violence and use of a weapon,¹⁶ along with premeditation,¹⁷ are aggravating features for three reasons. First, the weapon used had been modified to be portable and used in small spaces thereby making it easier to use in the circumstances as they occurred here. Secondly, that you carried a loaded weapon on your person for the purpose of a confrontation to either threaten or cause harm. This reveals a degree of premeditation or a readiness to commit serious violence. Thirdly, that you carried that loaded firearm in a number of public spaces and residential areas and eventually discharged that weapon next to two occupied residential dwellings. Crown counsel argued that these factors were all present to a high degree.

[35] In addition, the extent of the harm caused, in that Mr Umuhuri eventually died is an aggravating factor that is also present to a high degree, citing *R v Robinson*.¹⁸ Mr Umuhuri was shot when he was in a confined space, effectively locked in the back of Mr Davis' car with you blocking the left hand passenger's door exit. Alternatively, the shot that entered his buttock must have been fired when Mr Umuhuri was trying to get away. As to the vulnerability of Mr Umuhuri at the time he was shot, Crown counsel say that this demonstrates a level of callousness and brutality. Combined these are all aggravating features that I should take into account.¹⁹ They also say that these aggravating elements overlap and are present to a low to moderate degree.

Mitigating features

[36] Turning then to mitigating features, as I have mentioned, two particular matters have been raised by your counsel which they say must be taken into account. First, it was argued that you faced serious aggression from Mr Umuhuri such that you feared for your life. Secondly, your counsel submitted that the jury found that you acted in self-defence but that the force used was excessive.

¹⁶ Sentencing Act 2002, s 9(1)(a).

¹⁷ Sentencing Act 2002, s 9(1)(i).

¹⁸ Sentencing Act 2002, s 9 (1) (d). *R v Robinson* [2021] NZHC 1605 [26]–[35].

¹⁹ Sentencing Act 2002, s 9(1)(e) and (g).

[37] Crown counsel say that the claim of excessive self-defence if accepted, which was excluded by the verdicts, would in any case and at best, only give rise to a moderate starting point discount.²⁰ Crown counsel also argue three further points that they say reduce any mitigating discount regarding the claim of excessive self-defence:

- (a) You claimed you were hit with a hard object that caused bleeding, yet no such injury is evident from the CCTV or taxi camera footage.
- (b) There is no evidence that Mr Umuhuri was armed other than your statement and even then, you did not say you saw a firearm, and none was ever recovered.
- (c) Mr Umuhuri was shot twice when he was in an unthreatening and vulnerable position.

[38] For these reasons, even if excessive self-defence was accepted, Crown counsel argued that the above features remove any discount for this aspect.

Comparison with other cases

[39] When deciding on a minimum period of imprisonment, I am required to consider similar sentences that have been imposed in cases with generally comparable features. I have read the cases that have been helpfully referred to me by Crown counsel and by your counsel. Both sets of cases have been useful to me in deciding on your minimum period of imprisonment. Having reviewed those cases, I consider that the lower end starting point is 11 years: *R v Locke* where there were fewer blows and the mitigating features of immediate remorse and of rendering medical assistance.²¹ Conversely, 15 years seems to be the upper level in the case of a murder that involved a weapon, the fact that drugs were involved and the defendant's subsequent conduct when disposing of the deceased's body.²² Then there was the example of *R v Robinson* which involved a starting point of 13 years for murder alone.²³ Taking these authorities into account and applying them to your

²⁰ Citing *Wairau v R* [2015] NZCA 215; and Sentencing Act 2002, s 9(2)(c).

²¹ *R v Locke* [2021] NZHC 1843.

²² *R v Lingman* [2021] NZHC 1394; and *Price v R* [2021] NZCA 568.

²³ *R v Robinson* [2021] NZHC 1605.

circumstances in this case, I consider that your offending falls within the lower end of that range and justifies a minimum period of imprisonment starting point of 11 years.

Personal considerations

[40] I now turn to your personal circumstances which includes your pre-sentence report. Regarding your family life, you identify strongly with Samoan culture. Despite your father passing away when you were five, you said your home life was good, and how money was never an issue. You mentioned that you have never been an active member of any gang and that your priority was your family. Your sister Lisa expressed unqualified support for you because she said you were a kind, sensitive and family-orientated person and that violence was not in your nature.

[41] You told the report writer that by the time you were in secondary school, your mother had stopped working and that your older siblings had started contributing financially to the family. You also emphasised that your drive to financially support the family was something that was important to you. This has, however, led to poor choices and engagement with the criminal justice system.

[42] You said alcohol and drugs have not played a large part in your life and that you have no addiction issues. Your sister verified that because of a heart condition your consumption of alcohol has always been limited. Official records, however, confirm that you completed the Odyssey House Drug Treatment Unit programme in 2016 as well as the Meth And Me group while incarcerated in March 2019. You were also bailed in December 2021 to the Grace Foundation for the purposes of rehabilitation.

[43] You told the report writer that an associate of yours needed money and sought methamphetamine from you for a drug deal that had been arranged. You told the report writer that you never had any intention to rob or kill Mr Umuhuri. You said that you did not expect Mr Umuhuri to die and that this was your biggest regret. If you had just gone home you said, Mr Umuhuri might still be here for his family and you would be there for yours.

[44] Your counsel emphasised that you have always accepted responsibility for firing the shots at Mr Umuhuri and have done so throughout the trial. They point out that in another similar case called *R v Hohua* a 5 percent discount on sentence was permitted to reflect remorse.²⁴

[45] Crown counsel have also argued that neither your expression of regret nor your personal background should attract any discount to your sentence. They also point out that your convictions for possession of firearms in 2019 and your two convictions for aggravated robbery in 2010 are historic and because you will receive a lengthy sentence, Crown counsel do not seek any uplift for your previous convictions.

Conclusion - personal considerations

[46] There is little in the pre-sentence report that supports an argument your offending has been directly affected by your background and upbringing. On the contrary, you confirmed that you came from a supportive home environment and that money was not an issue, despite the fact that your father passed away when you were young. You also identify strongly with your Samoan culture and, as I have mentioned, you have a supportive sister.

[47] I take these matters into account when considering your personal circumstances, including your expression of remorse. I consider that, all told, they warrant a discount in all the circumstances of 6 months.

[48] Before formally passing sentence, I need to reiterate the sentence that is being imposed on you today is one of life imprisonment. You must serve at least the minimum period of imprisonment I will now impose before you can be considered eligible for parole. That decision will ultimately depend on the Parole Board's assessment of the risk you pose to the community. After the passage of that minimum period, you will remain in prison until the Parole Board decides otherwise.

²⁴ *R v Hohua* [2021] NZHC 1242. In that case, the charge was manslaughter.

Sentence

[49] Mr Filoa, please stand.

[50] For the murder of Clifford Umuhuri, I sentence you to life imprisonment with a minimum period of imprisonment of ten years and six months.

Please stand down.

Harvey J