

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

**I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE**

**CRI-2018-083-1456
[2022] NZHC 659**

THE QUEEN

v

WAYNE DAVID REARDON

Hearing: 1 April 2022

Counsel: M M Wilkinson-Smith for the Crown
V C Nisbet and C M Gisler for the Defendant

Judgment: 1 April 2022

SENTENCING OF COOKE J

[1] Wayne Reardon you appear today to be sentenced for the manslaughter of James Butler following your guilty plea. You are the final of six offenders to be sentenced.¹

[2] I will begin by outlining the facts of your offending. I will then decide upon an appropriate starting point for the sentence for offending of this kind. I will then address what discounts are appropriate for your guilty plea and other factors personal to you. Finally I will address the impact of the three strikes regime, and how it should affect your end sentence.

¹ *R v Fore and Ors* [2020] NZHC 2290; *R v Wynyard* [2020] NZHC 2367; *R v Audain* [2020] NZHC 2367.

The facts

[3] The basic events of the offending have been outlined several times before this Court. But the summary of fact to which you have entered your guilty plea is materially different from the previous summaries, especially in relation to your personal involvement. You are a senior patched member of Whanganui Black Power. You took a lead role in the events that led to James Butler's death. You were one of the organisers and a leader of the group that day. I need to sentence you on that basis.

[4] In the early evening on Sunday 22 April 2018 you were in a Toyota Corona with Kemp Rippon and Daniel Whareaorere at a Z Service Station in Whanganui. A silver Honda Accord station wagon was waiting nearby at Pitt Street with Mark Audain, Dwayne Fore and Hikitia Hakaraia. Your group had at least three firearms between them, including two .22 rifles and a shotgun. You were carrying the shotgun. You planned to carry out a taxing exercise at James Butler's address — that is demanding with threats or stealing drugs, cash or property from individuals believed to be selling drugs. It was known that James Butler was selling drugs. Over the course of the months leading to the evening of the offending Black Power members had visited the address several times.

[5] The vehicles made their way in tandem to James and Brent Butler's home and drove down and parked in the driveway, with your Toyota Corona in front. Two members of your group wearing balaclavas approached the back door of the house by going up the outside stairs to the door into the sunroom and knocked. They asked for James Butler and were told he wasn't there. They went back down the steps.

[6] About 10 seconds later the pair returned with four to six others, with at least one member of your group remaining outside. The door was forced open and the group entered the sunroom where James Butler and the male associate were seated. You were in that group. A firearm was pointed at the associate and then at James Butler. The person with the firearm demanded drugs.

[7] An altercation developed. You were giving orders to the others. You said to the others "what the fuck are you niggers up to, deal to him". James Butler was then pushed around and physically searched by your group.

[8] At some point during the altercation you pushed James Butler in the chest with the barrel of the shotgun making demands for his property. Members of your group also picked up various bits of property including James Butler's radio scanner.

[9] Brent Butler, who had heard the commotion from the adjoining kitchen and dining area, grabbed a wooden handle from the kitchen and walked into the sunroom to protect his brother. He was able to pull off the bandana from the face of an offender standing near the kitchen door and grabbed the firearm he was holding. There was a tussle between them and a clicking sound as though the firearm had failed to fire.

[10] During these exchanges James' associate was able to escape down the stairs. He was confronted outside by a member of the group and instructed to lie down. He said he would go back inside instead. As he did so, your group came running back down the stairs to return to their vehicles.

[11] The brothers chased after the group. Brent Butler still had the wooden axe handle and James Butler picked up a mallet with a metal head from the garage. The brothers ran up to the Toyota Corona which was still parked in the driveway. Brent Butler reached through the open driver's window and grabbed hold of the driver's shirt, while James Butler started hitting or attempting to hit the left front passenger with the mallet through the opening in the passengers window.

[12] Brent Butler was then assaulted by Mr Rippon and was rendered unconscious. Another member of your group then fired a .22 rifle at James. James started to run for safety. He was then shot at several times from two .22 firearms. The shotgun you had was not fired. James was hit by one of the .22 bullets. He ran holding his neck and coughing out blood. He collapsed at the base of the steps. The group then left the scene in the two vehicles.

[13] James was later found dead at the base of the stairs by Brent after he regained consciousness. James had died as a result of being shot.

Victim impact

[14] We have heard of the impact of the offending on the Butler family again today. De-Ana Bishop and Trish Butler have both spoken. The Butler whanau has suffered in many ways since losing James. His absence has had a profound impact on the many members of his family who looked up to him. The pain has been intense, far-reaching and consistent over the last four years and I know that things will never be the same again. The injuries inflicted on Brent Butler have also significantly impacted his ability to work.

[15] This has been a long ordeal for the Butler family who have been present throughout all steps of these proceedings. The sentences imposed can never properly restore their loss. It is important that you understand the impact that you have had. I acknowledge the short note that you have provided in that context.

Starting point

[16] The first step in working out your sentence is to decide upon the appropriate starting point for your offending.

[17] The crime of manslaughter carries a maximum punishment of life imprisonment.² In sentencing the other members of your group I decided that the appropriate starting point for their offending was eight to nine years imprisonment. This was upheld by the Court of Appeal.³ But as I have said the relevant events, and your role in them, is different. The summary of facts reveals that you played a leading and organising role in the offending which must be reflected in your sentence. In your case the Crown submits a starting point of 11 years is appropriate whereas your counsel has suggested a starting point of 10 years.

[18] There is no guideline judgment for manslaughter. As I have stated previously, I do not find the *Taueki* guidelines particularly helpful in this case, and I again approach the circumstances looking at the comparable manslaughter cases.⁴ That

² Crimes Act 1961, s 177.

³ *R v Fore* [2021] NZCA 28.

⁴ *R v Fore & Ors*, above n 1, at [18].

approach was upheld by the Court of Appeal in the Crown's appeal in relation to the earlier sentences I imposed.

[19] In the previous sentences I used the cases of *Pahau v R* and *Griffin v R* to reach a start point of eight to nine years for someone who was only a participant in the offending.⁵ But you were more than a participant and a leader of the group. You were involved in its planning and you held one of the firearms.

[20] *Pahau v R* involved a similar gang related altercation. There was a charge of murder for one offender, and manslaughter for the others. The Court of Appeal accepted a starting point of 13 years imprisonment on the manslaughter charge for an offender who was identified as a senior member of Black Power and who was responsible for putting the group together and giving the order to pursue the deceased's group.⁶ He then stood by with a gun to assist if needed.

[21] In *Griffin v R* three offenders carried out an armed robbery at the home of the deceased.⁷ The appellant arranged for firearms and ammunition and was also the driver. He held the deceased's partner down whilst his co-offenders chased the deceased and shot him in the chest. The appellant was described as an instrumental leader of the attack. A starting point of 12 years' imprisonment was held to not be outside the available range. The Court then undertook a cross analysis with the *Taueki* factors and identified the offending as falling under band three with a starting point of nine to 14 years. This further confirmed that the starting point of 12 years was not excessive.

[22] But there are reasons to view both *Griffin* and *Pahau* as involving more serious offending than the offending here. When the Court of Appeal addressed the sentences I imposed on your co-offenders they considered this. They indicated that in both *Griffin* and *Pahau* the offenders were carrying out a preconceived plan that involved the use of weapons and violence.⁸ Here the original plan was to rob James Butler using force if necessary to do so. As the Court of Appeal said, that plan was effectively

⁵ *Pahau v R* [2011] NZCA 147; *Griffin v R* [2019] NZCA 422.

⁶ *Pahau v R*, above n 5, at [80].

⁷ *Griffin v R*, above n 5, at [11].

⁸ *R v Fore*, above n 3, at [36]-[37].

abandoned when your group retreated from the house and went back to your vehicles once Brent Butler intervened. For that reason the acts that led to James Butler's death did not occur in the course of the robbery than you had planned. They occurred while you and the group were endeavouring to leave the address. They also occurred in response to the actions of Brent and James when they went after your group using weapons. The Court of Appeal considered that to be an important feature of the offending and one that rendered the offending less serious than in either *Griffin* or *Pahau*. The Court agreed with my assessment that the shots were fired as a form of excessive self-defence which reduced the culpability of the offending.

[23] There is also a need for relativity between your starting point and that of the rest of the group. For those who played a passive role I adopted a starting point of eight years. A higher start point of nine years was adopted for Mr Whareaore who was present inside the sunroom. You were not only inside the sunroom but a leader of the group involved in its planning. In all the circumstances it seems to me that a starting point of 10 years' imprisonment is appropriate.

Personal factors

[24] I next consider the discounts from the starting point because of factors personal to you. I have had the benefit of a pre-sentence report and a cultural report.

[25] You have said that your offending was primarily motivated by alcohol and drug abuse. You were assessed as being at very high risk around drug use and dependant on alcohol at the time you entered prison. You have indicated you are interested in taking steps to resist such temptations upon release.

[26] Your upbringing was under the care of loving adoptive parents. Your birth parents were connected with Black Power. Indeed, your father was the President of the Whanganui Black Power. It is noted that you are expected to remain associated with the gang upon release.

[27] You have also expressed remorse at the death of James Butler, but I concur with the pre-sentence report writer that this must be balanced against the occurrence

of a similar offence that you were also convicted of that occurred just a week after this offence.

[28] The cultural report identifies your background as Te Ati Haunui-a-Pāpārangi and Ngāti Tuwharetoa. You come from a culturally deprived background. Your mother has spoken of the effects of not being allowed to speak Māori on the school grounds. The report writer also refers to a culture of service to the country that is a feature of your family, and identifies that you have lost the cultural bond, and the sense of pride and service that is part of your family's history. He explains the inter-generational transfer of trauma and the ongoing issues of systemic bias which have impacted upon your family, and accordingly on you. He reports that you are currently culturally, spiritually and psychologically damaged. He recommends that you should do more to familiarise yourself with your whakapapa to truly appreciate the connections, and the explanations for where you are today.

[29] I accept that the background described in this report, and in the pre-sentence report is relevant to explain why you have ended up where you are, and that some acknowledgement of the community responsibility for this kind of background is appropriate. Ingrained systemic deprivation and poverty requires consideration when setting sentences. As with your co-offenders I agree that a discount of 10 per cent for such factors is appropriate. I do not give any additional discount for remorse. The 10 per cent discount for cultural factors is sufficient.

[30] I also accept a discount of 25 per cent is available for your guilty plea. This means a global discount of 35 per cent is applied to the starting point. This would bring your proposed end sentence to approximately six years and six months' imprisonment.

Effect of the three strikes regime

[31] But you are subject to the three strikes regime. In particular under s 86C(4) of the Sentencing Act 2002 you are on your second strike, and as a consequence of that you will serve any sentence that I impose without parole. That creates complications.

[32] First your long list of previous offending is such that were it not for the effect of the three strikes regime I would consider giving you an uplift in the range of four to six months for your prior offending. Secondly, when the Court of Appeal upheld my previous decision not to impose a minimum period of imprisonment for those I previously sentenced, it indicated the position would have been different if any of those I had previously sentenced held leadership or organisational roles within the group.⁹ Here you occupied such a role. But the Court also noted that the sentence I imposed for Mr Rippon was to be cumulative on the existing sentence he was serving so that there was no need for an additional minimum period of imprisonment for him.¹⁰ The position is the same here given the impact of the three strikes regime. This means there is no need for a minimum period of imprisonment or for an uplift for your conviction history.

[33] Your counsel also argues that the imposition of your sentence without parole would involve a breach of s 9 of the Bill of Rights Act 1990 and that following the approach of the Supreme Court in *Fitzgerald v R*¹¹ and the Court of Appeal in *Matara v R*¹² I should direct that the term of imprisonment without parole would be disproportionately severe and I should declare that you are eligible for parole notwithstanding s 86C(4). I do not accept that the sentence by itself justifies taking that step. The sentence that I would impose, if it is served without parole, may well be a harsh one, but I do not think it reaches the point of involving a breach of s 9.

[34] But there is a further complicating factor. You are already serving a sentence of imprisonment for aggravated robbery committed after this offending. Your sentence for that offending was four and a half years' imprisonment. Because of the three strikes regime you are serving that sentence without parole. The sentence I will now impose will need to be served cumulatively on that sentence.¹³ You will need to complete your current sentence without parole, and then start serving the new sentence without parole. In addition you were also sentenced to nine months' imprisonment for

⁹ At [46].

¹⁰ At [49].

¹¹ *Fitzgerald v R* [2021] NZSC 131.

¹² *Matara v R* [2021] NZCA 692.

¹³ Sentencing Act 2002, s 84; where offences do not form a connected series of offences, the sentence is imposed cumulatively.

assault with intent to injure while in prison, and as a consequence will be required to serve an additional four and a half months for that offending. This has a significant overall effect. It does make the proposed sentence disproportionately severe.

[35] The Crown invites me to make an adjustment for totality. That is, in effect, an alternative way of mitigating against the severity of the sentence to that proposed by your counsel.

[36] A similar situation existed for Mr Wharearere. He was also serving a sentence without parole for the same aggravated robbery and the sentence I was imposing was also to be cumulative and without parole. In those circumstances I reduced his proposed sentence of five years ten months by one year.¹⁴

[37] A similar approach is warranted here. The Crown suggests I should also reduce your sentence by one year. But in your case the proposed sentence of six years and six months is longer than it was for Mr Wharearere, there is also the additional four and a half months, and in my view the discount needs to be greater to ensure that the ultimate end sentence does not become disproportionately severe. I have accordingly decided to reduce your sentence by one year and six months.

[38] This means that whilst I would normally have sentenced you to a term of imprisonment of six years and six months I am reducing that to a sentence of five years' imprisonment recognising that it will be served without parole and cumulatively on the sentence you are presently serving.

[39] Mr Reardon for the manslaughter of James Butler I sentence you to five years' imprisonment. As a consequence of s 86C(4) of the Sentencing Act this sentence will be served without parole, and is to be served cumulatively on the term of imprisonment you are currently serving.

Cooke J

¹⁴ *R v Fore and Ors*, above n 1, at [67].