IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CRI-2020-063-004339
[2022] NZHC 863

THE QUEEN

v

WILSON WIRIHANA

Hearing: 28 April 2022

Appearances: R W Jenson for Crown
A J Holland for Defendant

Sentence: 28 April 2022

SENTENCING REMARKS OF EDWARDS J

Solicitors/Counsel:
Pollett Legal (Office of the Crown Solicitor), Tauranga
A J Holland, Auckland

[1] Mr Wirihana, you appear today for sentencing having been acquitted of murder but found guilty of manslaughter following a jury trial last year. You were also acquitted of two charges of disfiguring with intent to cause grievous bodily harm in that same trial.

[2] Before I go on, I want to acknowledge all those who are gathered here today. That includes the family and friends of Mr Wirihana, and those of the deceased, Mr Wipatene Mason. It will be a difficult day for all of you.

[3] I will return to the very moving victim impact statements we have heard shortly, but I do acknowledge them at this point. The sentence I am about to pass is not a measure of a victim's life and nothing I say will undo the tragic events which led to Mr Mason's passing.

Approach to sentencing

[4] Sentencing follows a process. The sentence I determine must give effect to the purposes and principles of the Sentencing Act 2002.

[5] The purposes relevant in your case, Mr Wirihana, include: the need to hold you accountable and promote a sense of responsibility; to denounce and deter you and others from similar offending; to protect the community from harm; and to assist in your rehabilitation and reintegration.

[6] I also take into account the principle of consistency with appropriate sentencing levels, the effect of the offending on the victims, and your personal circumstances including any that would make the sentence disproportionately severe. I must impose the least restrictive outcome in the circumstances.

[7] In determining your sentence today, I must also decide whether you should serve it without parole. Usually offenders who are sentenced to imprisonment of over two years will be eligible for parole after serving one third of that sentence, unless a minimum period of imprisonment is imposed.

[8] However, your conviction for manslaughter engages what is known as the three strikes regime. Because your conviction is a second-strike offence, I am required to order that you serve the full term of your sentence without parole unless it would be so disproportionately severe as to contravene s 9 of the New Zealand Bill of Rights Act 1990.

[9] In light of those issues, I have approached your sentencing by considering what the sentence would be if the three strikes regime did not apply. That involves considering the nature of your offending and the impacts of it on the victims. I will then fix a starting point for the offending and go on to consider any adjustments to that starting point for factors personal to you. I will then consider whether a minimum period of imprisonment is justified. After that I will turn to consider whether to order you to serve a sentence without parole.

[10] You may remain seated throughout until I ask you to stand at the end when I pass sentence.

Your offending

[11] I turn now to summarise your offending. I realise that this may be very difficult for some of you who are present today to hear. It is necessary that I do this so that the basis upon which sentence is passed is clear.

[12] In outlining the offending, I make findings of fact which are relevant to your culpability, or blameworthiness but which are not inconsistent with the jury's verdicts.

[13] It was Christmas Eve in 2020. You were at your partner's house in Nukuhou North with your partner's two children. Relatives of your partner turned up at around lunchtime, and you were all drinking in the shed.

[14] Your partner's aunty took a disliking to you and words were exchanged. Following a physical altercation between that aunty and her niece, the aunty left the property.

[15] She arrived approximately two hours later in a red car with four other men, including the deceased, Mr Mason. There is evidence that she had told the men that you had beaten her up, and I accept that is what she told them – there was no other reason for them to be there.

[16] When they arrived at the house two of the men from the car rushed at you accusing you of beating up their aunty. It was aggressive and unprovoked. Although this was not an organised, to use the words of one witness, "gang bash", there were nevertheless gang overtones in what was being said at the time.

[17] A fight quickly followed. You were pinned against the water tank with at least two men punching you to your head and body. I find that one of the men hit you on the head with a shovel at this stage, causing a serious gash on your forehead. That is consistent with the blood found on the water tank, and on the back steps of the house.

[18] You managed to escape, but were followed by one of the other men, who tackled you to the ground and you were struggling with each other while others tried to break you apart. It was during this incident that you bit the other man's nose and ear. Part of that ear came off when that man was pulled off you by another relative there at the time. The jury acquitted you of the disfiguring charges. I consider they must have done so on the grounds that you were acting in self-defence.

[19] After the biting incidents, you went into the house and armed yourself with a knife. There was some suggestion that you may have been holding two knives. However, on the basis of the evidence I heard at trial I am only satisfied that you were holding one. You came out to the front of the house waving the knife in front of you.

[20] I do not accept that the men were attempting to leave at this stage or that the fight was over at this time. These men had arrived for a fight. You had just inflicted serious harm on one of them and you were outnumbered. They were not going to back down.

[21] On the basis of Ms Biddle's evidence, I accept that one of the men was brandishing a shovel at you. The red car in which the men had arrived in reversed out

of the driveway and crashed into a fencepost. The passenger door was ripped off. The car then revved its engine and headed straight for you and your partner at the front of the house. The direction and the speed of the car leaves me in no doubt that this was an attempt to run you over.

[22] The red car crashed into another car parked at the front door, shunting it into the house and causing damage to the side of the car. Your partner moved away, but she was caught when the red car reversed and pinned her against your blue car parked on the property. There was damage caused to your car, and your partner sustained significant bruising to her thigh. That is an indication of just how fast the car was travelling. The car drove forwards again at speed and crashed into the side of the house where it came to a stop.

[23] It is then that you entered through the passenger door with a knife in your right hand. Mr Mason was in the driver's seat. I accept that he was driving the car when it tried to run you over. Some witnesses put him in the driver's seat at this time, and all witnesses who saw him get out of the car after the stabbing say that he got out from the driver's side.

[24] Some of the blood staining evidence was consistent with the stabbing having taken place in the passenger seat. However, I find that it took place in the driver's seat. Mr Mason's body on the driver's seat may have shielded it from bloodstains, and it does not make sense for Mr Mason to get out of the driver's side if he had been stabbed on the other side of the car.

[25] The wound was to the right of the Adam's apple and travelled a further two to three centimetres to the right. It was six centimetres deep with the wound tracking down and back. The pathologist concluded it was consistent with someone from the passenger's side of the vehicle lunging forwards to grab car keys with a knife in their right hand – as you had told police. But it was not consistent with someone pulling the knife back again – as you had also told police. The pathologist was unable to say whether the wound was unintentionally or intentionally inflicted.

[26] Following the stabbing, Mr Mason got out of the car and stumbled part way down the driveway. He was taken from the property in a private car and then transferred to an ambulance which took him to the hospital. He died two days later on 26 December 2020 from the blood loss caused by the stab wound.

[27] Following the stabbing, you told your partner "I should have let them go. I was just trying to protect myself and protect you". In your interview with police, you told them that you felt rage and you wanted to kill everyone as a consequence of the beating you had received.

Victim impact statements

[28] I have read all the victim impact statements and we have all seen and heard first-hand the devastating effects of losing a husband, a father, son, brother, koro, and friend. The impacts on Mr Mason's wife and daughter in particular are immense and I am not sure words can really capture the deep emotional burden your actions have imposed on Mr Mason's whānau.

[29] Nor can I hope to do justice to those impacts by trying to summarise them today. It was clear that Mr Mason was much loved and a central figure in the life of his whānau. He was a kind man who had much to offer to the world. You have left his whānau with long-lasting scars and the effect of your actions that day are felt far and wide.

[30] I thank those who provided a victim impact statement and to those who read them out in Court. It is an important part of the sentencing process. It is not easy to share such personal, intimate, and emotional details. And I thank you again for doing so.

Starting point

[31] I turn now to fix the relevant starting point. In doing so I have regard to factors outlined by the Court of Appeal in a case called *Taueki*,[1] and the cases which both counsel have referred to me for sentencing today.

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1 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

[32] When looking at your offending Mr Wirihana, and by reference to the factors in *Taueki*,[2] I consider there are four aggravating features which are present in different degrees:

(a) First, the stabbing caused serious injury to Mr Mason's neck which ultimately led to the loss of his life.

(b) Second, you used a knife, a lethal weapon, to inflict violence on Mr Mason.

(c) Third, your conduct involved an element of pre-meditation in that you took deliberate steps to lean in through the passenger door of the car and stab Mr Mason in the neck. But pre-meditation goes no further than that.

(d) Fourth, as to the level of violence, your offending involved a single stab to the neck which caused a wound six centimetres deep. The stabbing was not prolonged or gratuitous, nor as grave as other stabbing cases. Nevertheless, any violence leading to the loss of life is serious and, in that sense, at least, extreme.

[33] These factors need to be weighed in their wider context. Provocation is an element in your case. Those that arrived at the house that day were hyped up and aggressive having acted on the mistaken assumption that you had beaten up their aunty. You were outnumbered. You were punched and beaten to the head with a shovel causing a very large gash. The men continued to pursue you and you were tackled to the ground. The jury must have accepted that you were acting in self-defence at this time and that is why they returned not guilty verdicts on the disfiguring charges.

[34] The fight was not over when you went to the front of the house. You were again presented with a shovel and Mr Mason was driving the red car directly at you, and it pinned your partner. There is no evidence that Mr Mason was involved in the

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[2] At [31].

prior fight, but I accept that at the time of the stabbing you may have reasonably concluded that he was part of the group intent on attacking you, and possibly your partner. I accept that you feared for your life and that of your partner at the time the car came towards you.

[35] Your counsel says this was a case of excessive force. That is, the jury must have been satisfied that you were acting to defend your partner and yourself at the time of the offending, but that the force you used in stabbing Mr Mason was more than was reasonable in the circumstances.

[36] I do not agree with that characterisation. I accept that there was provocation in the events leading up to the stabbing and this needs to be recognised in assessing the starting point. However, by the time you came to stab Mr Mason, the car had come to a standstill having crashed into the side of the house. The imminence of the threat had subsided. Your partner was not in the vicinity of the car and she was able to move away. You could have moved away also or gone inside the house to where you might have been safe. Instead, you made a decision to go to the passenger side of the car, lean over to Mr Mason in the driver's seat, and stab him, albeit without murderous intent. At the time you leaned in through the passenger door, I do not consider you were acting in your own defence or that of your partner. As you said in your police interview, you were feeling real rage at this point as a result of the attack on you.

[37] Rather than a case of excessive force in the context of self-defence, I consider the jury's verdicts indicate that they rejected self-defence but were not satisfied beyond reasonable doubt that you had murderous intent.

[38] Standing back and considering these factors in their totality, and in their proper context, I consider they place you in band two of *Taueki*. That attracts starting points of five to 10 years' imprisonment. I turn now to consider the comparable cases.

[39] The Crown has referred me to four cases which they say support a starting point in the range of seven-and-a-half years to nine years' imprisonment.[3] Of these, I

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[3] *R v Olley* [2012] NZHC 40; *R v Kaihau* [2013] NZHC 3192; *R v Scollay* [2014] NZHC 465; and *R v Hohua* [2021] NZHC 1242.

find the recent case of *Hohua* to be the most comparable. That case also involved an altercation where the defendant was acquitted on a charge of murder but found guilty of manslaughter and where self-defence was in issue. A starting point of eight years was reduced to seven-and-a-half years for what was considered modest provocation.

[40] I consider this case to be generally on a par with yours, although I consider the provocation to be greater in your case given the number of men you were facing, the prior attack with the shovel, and the approach of the car towards you and your partner. A starting point less than seven years, six months may be justified.

[41] Your counsel has referred me to three cases which they say supports a starting point of no more than four years' imprisonment.[4] These cases also involve stabbings although in different circumstances to your own. These cases involve direct acts of aggression by the deceased with the defendant's response taking place in the context of a struggle and in the heat of the moment. The threat in each case posed by the deceased was more imminent than in your case. And, as I have found, I do not consider your offending involved excessive force in the context of self-defence. To that extent at least, your offending is more serious than any of the cases cited to me by your counsel.

[42] Weighing all these factors in totality, I consider a starting point of seven years' imprisonment reflects the gravity of your offending and is consistent with other cases involving comparable offending.

Personal mitigating and aggravating factors

[43] Next, I turn to features that are personal to you.

[44] You are 37 years of age. You whakapapa to Ngāti Kahungugu and Te Whānau-ā-Apanui. You were born and raised in Lower Hutt and are the third of four children. You have the support of your mother and are in a strong and pro-social relationship. I will return to this when discussing your rehabilitative prospects. You have worked in

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4 *Wang v R* [2014] NZCA 251; *R v Harnwell* [2021] NZHC 3409; and *Solicitor-General v Kane* CA154/98, 23 September 1998.

traffic control, labouring jobs, and were employed in kiwifruit orchards at the time of the offending.

Aggravating features

[45] Turning to aggravating features, you have a criminal history comprising several relevant offences. The most recent of these was for wounding with intent to cause grievous bodily harm for offending in March 2016. You were sentenced in 2017 to three years and five months' imprisonment for this offence. This was your first strike offence. That offending also involved a fight, a stabbing, and a claim of self-defence. Deterrence and denunciation require that I apply an uplift for your prior offending. I apply an uplift of eight months.

Mitigating features

[46] As for mitigating features which are personal to you, I have had the benefit of an excellent s 27 report prepared by David Shenkin. Sources for that report include interviews with family members and your partner, notes from your psychologist who attended on you during your last incarceration, and medical notes from the District Health Board.

[47] As outlined in that report, you grew up in Wellington in an urban and economically depressed area. The report writer suggests your disconnection from Te Ao Māori is part of systemic Māori deprivation which is a contributing factor to your offending.

[48] You witnessed years of physical abuse by your father against your mother which resulted in your mother suffering several mental health breakdowns. Your care fell on your sister who was six years older than yourself and so you had a lack of adult guidance in your early life. The report also notes that attention issues and early onset of drug use (from the age of nine) contributed to you leaving school at 15 years of age.

[49] Significantly, you have suffered multiple head injuries. These include several serious head traumas from fights, playing rugby at school, and from a serious hammer

attack in 2016. You have also been hospitalised with drug-induced psychosis, and the report notes a sleeping disorder.

[50] The report writer concluded that your reaction appeared to be connected to a strong impulse to protect loved ones and yourself. However, historic abuse, substance use issues, emotional dysregulation, PTSD, past head traumas and other mental health difficulties likely contributed to what he termed an "amygdala hijack" that escalated your reactions with lethal consequences.

[51] I am satisfied that the cumulative impact of these factors is causally linked to your offending. These factors operated together so as to constrain your ability to respond to the situation that faced you at the time. That does not excuse what you did or absolve you from responsibility. But it does help to explain why you acted the way you did and mitigates your blameworthiness to some degree. I apply a 10 per cent discount from the starting point for these factors.

[52] As to your rehabilitative prospects, I note that you have completed rehabilitation programmes in the past with mixed success. However, I consider the key difference between the past and where you find yourself now, is the support of your current partner. The events that led to the stabbing occurred at her place and she gave evidence at your trial. She impressed me as a witness, and I found her evidence to be genuine and measured. Your offending has put her in a very difficult position as she is related to the deceased's whānau. Yet she continues to support you. She is committed to assisting you to engage with Tikanga and whakapapa as a pathway to healing. She appears to be an extremely positive influence in your life.

[53] In addition, there are indications in the s 27 report that you were at a turning point prior to this incident, and you have continued to work on addressing the factors that contributed to the offending since. The report notes that you met with two pastors in the weeks before the incident to discuss voices and disordered thinking. You reduced your alcohol use and ceased using methamphetamine and MDMA months before your arrest. The report records that you are working on opening up emotionally with your family and with your partner – those are all a good start.

[54] There are also several suggestions made in the s 27 report which might assist you further, including neurological and psychiatric assessments and participation in Māori psychology or therapy sessions. What I take out of the s 27 report, Mr Wirihana, is hope for your future. With the support of your partner and whānau, I consider you to have good rehabilitative prospects.

[55] As to remorse, there is conflicting information before the Court. I am prepared to accept your expressions of remorse as recorded in the s 27 report as genuine, despite the contrary picture painted in the pre-sentence report. It is evident that you engaged with the s 27 report writer but did not do so with the pre-sentence report writer. Your counsel says you have written a letter of remorse but due to delays in making contact as a result of prison transfers and COVID-19, that letter has not made it to the Court. Your counsel tells me you offered at an early stage to attend restorative justice, and although initially entertained by some of the deceased's family, this was ultimately rejected – as is their right. I accept that your offer to plead guilty to manslaughter at an early stage also indicates a willingness to accept responsibility for your actions, although much of that will be reflected in the discount afforded for your offer to plead guilty to that lesser charge, as I will shortly address.

[56] Considering all these factors in the round, I consider a discount of 10 per cent is warranted to reflect rehabilitative prospects and remorse that is not already captured by the discount for an offer to plead guilty. As I will discuss shortly, these factors, together with the s 27 report, have the most force when I come to consider whether requiring you to serve your sentence without parole would be disproportionately severe.

[57] Next, I turn to the offer to plead guilty to a charge of manslaughter. This issue arose at the last minute, but the Crown was prepared to proceed on the basis that the information set out in defence counsel's memorandum filed this morning was accurate, and an adjournment to allow affidavit evidence to be prepared was not required. I proceed on that basis.

[58] The key events arising from that memoranda are as follows. You were arrested on 25 December 2020. Your current counsel was assigned in April 2021. There is no

information from your prior counsel, or from you, about what was discussed in that intervening period. However, you instructed counsel on 22 April 2021 to contact the Crown to assess whether early resolution to a reduced charge of manslaughter was possible. Your counsel did that. Further, on 13 May 2021, you indicated to your counsel that you would be willing to plead guilty to an amended charge of manslaughter if that was offered by the Crown.

[59] It is accepted by your counsel that the offer to plead guilty to manslaughter was not communicated in formal terms or in accordance with best practice as set out in *Hessell*.[5] It is important that offers of this sort comply with that process to avoid a dispute such as these that have arisen at last minute. It will also prevent matters going to trial that might have been earlier resolved but for a miscommunication. In this case, the Crown declined to engage on a possibility of an early resolution on manslaughter, ultimately deciding that it was appropriate to proceed with a murder charge. They were entitled to do so, and no criticism of that decision is intended.

[60] I have taken into account the various cases cited to me in support of both the Crown and defence submissions. As the Supreme Court said in *Hessell*, the critical issue is whether you have demonstrated a willingness to plead guilty to the charge of which you were convicted and what stage in the proceeding that occurred.[6]

[61] On the basis of the matters raised in the memoranda, I accept that you expressed a willingness to plead guilty to the charge of manslaughter in April 2021. In light of the intervening summer break and the delay in the transfer of files between assigned counsel, I accept that this was at the earliest opportunity and you are entitled to a full discount of 25 per cent for this offer.

[62] Applying the methodology in *Moses*,[7] and with some rounding, this results a sentence of four years and six months' imprisonment.

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5 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
6 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
7 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46].

Minimum period of imprisonment

[63] I have carefully considered whether a minimum period of imprisonment would be required in your case. I consider the sentence already reflects accountability and denouncement in both the starting point adopted and the discounts applied for remorse and rehabilitation. Your rehabilitative prospects provide the best protection for the community going forwards.

[64] A minimum period of imprisonment would delay and defer your ability to access rehabilitation programmes while in prison. That runs counter to protection for the community going forwards. Given the element of provocation in the offending, and your rehabilitative prospects, I consider a sentence of imprisonment provides sufficient deterrence to you and to others, and a minimum period of imprisonment is not necessary in your case.

Eligibility for parole

[65] I turn now to consider whether to order you to serve your sentence without parole.

[66] In approaching this issue, I am acutely aware of Mr Robert Carter's eloquent and moving victim impact statement read to this Court where he describes the participation in the legal process as one of the negative impacts of the offending. I suspect that this part of the sentencing will feel far removed from the raw emotion expressed earlier, and the events that led to Mr Mason's death. However, it is important that the decision I reach is fully reasoned, which is why I must canvass aspects of the law in these remarks.

[67] As I said at the outset, Mr Wirihana, I am required by statute to order that you serve your sentence without parole. That is because your conviction for manslaughter is a second-stage offence. However, the Court of Appeal has said that the effect of a recent Supreme Court case,[8] means that a Judge is not required to make such an order if doing so would result in a sentence that would be so disproportionately severe as to

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8 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.

be inconsistent with s 9 of the New Zealand Bill of Rights Act 1990.[9] Section 9 provides that everyone has a right not to be subjected to disproportionately severe treatment or punishment.

[68] In deciding whether ineligibility for parole is disproportionately severe, I take into account the seriousness of your offending which resulted in the loss of life. That aspect of your offending makes it more serious than in either *Fitzgerald* or *Matara*. Your first strike offence was also more serious than in either of those cases. The mental health issues experienced by the defendants in those cases are different to those you have experienced also. Given your past criminal history, I accept you appear to be the type of offender to whom the three strikes regime was directed.

[69] However, the Government has announced its intention to repeal the three strikes regime. The Three Strikes Legislation Repeal Bill 2021 was introduced into Parliament on 11 November 2021. If passed, the Bill as currently drafted will come into effect on 1 July 2022.[10] As presently drafted it specifically precludes sentencing appeals by those who are sentenced prior to its operative date. That means, Mr Wirihana, that you would not benefit from the repeal and would remain otherwise ineligible for parole. I note however that whether that position is changed is presently being considered by the Select Committee.[11]

[70] As recently confirmed by the Court of Appeal, I must apply the law as it is currently in force. I cannot, for example, adjourn this sentencing to after 1 July 2022 so that you can benefit from any repeal of the current law.[12] But I do not interpret the Court of Appeal as saying that I should ignore the possibility (and I put it no higher than that) of the law being repealed, and the reasons for that proposed repeal, when considering whether ineligibility for parole would result in a disproportionately severe sentence.

[71] The reasons for repealing the three-strikes regime are set out in the explanatory note to the Bill. They include the fact that the mandatory sentencing regime created

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9 *Matara v R* [2021] NZCA 692.
10 Three Strikes Legislation Repeal Bill 2021 (79-1), cl 2.
11 See *Morgan v R* [2022] NZCA 112 at [7] and [9].
12 *Morgan v R* [2022] NZCA 112 at [19] and [24].

has resulted in, and I quote, "unjust outcomes that affect Māori disproportionately and have raised concerns regarding inconsistencies with the New Zealand Bill of Rights Act 1990". The Government's stated objectives in repealing the law are to remove the mandatory sentencing requirements that result in, quote, "excessive and disproportionate sentence outcomes by preventing Judges from taking the individual circumstances of the offender and the offending into account".[13]

[72] These reasons are directly engaged in your case. The s 27 report details your disconnection from Te Ao Māori and suggests that this is part of a wider issue involving systemic Māori deprivation.[14] The Court of Appeal has said that systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case as having impaired choice and diminished moral culpability.[15] In light of the reasons for the proposed repeal of the three-strikes regime, I consider there to be a real risk that an order declining eligibility for parole will simply compound the impact of social deprivation further. I consider that to be an unjust and overly severe response.

[73] The timing of the proposed repeal is also relevant. Of course, the Bill may not be enacted in its present form, or indeed enacted at all. Whether it ultimately includes elements of retrospectivity is a matter for Parliament. Nevertheless, the proximity of your sentencing date to the possibility of repeal is relevant. If this sentencing was taking place just a few months later, there is a real possibility (and, again, it is only just that) that you, Mr Wirihana, would be eligible for parole.

[74] I am acutely aware that there are many factors that could have resulted in your sentencing being legitimately adjourned until after the operative date of any new legislation that may be passed. For example, this sentencing could have been further adjourned if delays caused by COVID-19 meant there was insufficient information before the Court to proceed. Or it could have been adjourned if a key participant had got COVID-19.

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13 Three Strikes Legislation Repeal Bill 2021 (79-1) (explanatory note) at 1.
14 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [40]–[41].
15 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [159].

[75] This suggests that if the Bill is enacted in its present form, your eligibility for parole turns on the arbitrariness of the chosen date for sentencing. I consider the potential for arbitrariness in whether you are to be eligible for parole, particularly in light of the reasons for the proposed change in regime, adds to the disproportionality of a sentence to be served without parole.

[76] Furthermore, I have reached your sentence by doing what Judges do. That is, I have taken into account the nature of your offending, the impact on the victims, and your personal circumstances. I am satisfied that the sentence I have reached reflects the purposes and principles of sentencing. There is nothing to suggest that making you ineligible for parole will provide any additional denouncement or deterrence and it will not strengthen or serve the other purposes and principles of sentencing. In other words, there is no rational connection between denying eligibility for parole and the principles and purposes of sentencing in your case.[16]

[77] In fact, I consider an order making you ineligible for parole may have the opposite effect. I understand that ineligibility for parole means you will not be able to engage in rehabilitative programmes while in custody until you near the end of your sentence. It is likely to crush the spark of hope which is so integral to effective rehabilitation. That is significant in your case, because as I have said, I consider the s 27 report reveals you are at a turning point in your life. To crush rehabilitative prospects in those circumstances is an unduly severe response.

[78] I have considered whether adjusting the sentence to take into account the fact that it must be served without parole would be sufficient.[17] But such a modification would not relieve the harshness of being ineligible to participate in rehabilitation programmes whilst in custody until nearing the end of your sentence. I am not satisfied that such an adjustment would therefore relieve the severity of not being eligible for parole.

[79] I do not overlook the victims' views in all of this. I have heard and taken into account what they have said to me today. They seek justice for the loss of a loved one.

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16 *Matara v R* [2021] NZCA 692 at [66].
17 *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49.

And I understand that. I also heard Mrs Mason say that no other wife and child should have to look on their husband as she did. I consider that being able to access rehabilitative programmes earlier and by providing the hope of parole, provides a better chance of preventing that from happening than requiring a sentence to be served without parole. In the end, justice requires a sentence to be imposed that is fair in all the circumstances, and one which is not disproportionately severe.

[80] The cumulative impact of all these factors leaves me satisfied that the non-availability of parole would result in a disproportionately severe sentence. I have considered whether it is so disproportionately severe to meet the high threshold of contravening s 9 of the New Zealand Bill of Rights Act 1990. I take into account the Supreme Court's views that it will only be in rare cases that a sentence will reach that threshold, and also the Court of Appeal's subsequent observations that suggest such cases are not, in fact, that rare.[18]

[81] On balance, given the nature of the offending, the matters raised in the s 27 report, your rehabilitative prospects, and the possibility of repeal of the three-strikes regime, I am satisfied that to make an order that you would not be eligible for parole would result in a sentence that contravenes s 9 of the New Zealand Bill of Rights Act 1990.

[82] I emphasise that this does not affect the term of imprisonment that I am about to impose. All it effects is your eligibility for parole. It will be for you, Mr Wirihana, and ultimately the Parole Board, to determine how much of your sentence above the one third minimum you ultimately serve.

Sentence

[83] Mr Wirihana, please stand.

[84] For the manslaughter of Mr Wipatene Mason, I sentence you to four years and six months' imprisonment.

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[18] *Matara v R* [2021] NZCA 692 at [72]–[73].

[85] I decline to make an order under s 86C(4) of the Sentencing Act 2002 requiring you to serve your sentence without parole on the grounds that to make such an order would be so disproportionately severe as to breach s 9 of the New Zealand Bill of Rights Act 1990.

[86] Mr Wirihana, you may stand down.

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Edwards J