IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2021-092-009236
[2023] NZHC 350

THE KING

v

JIMEL DESMA TIANA BURNS-WONG-TUNG

Hearing:	14 December 2023
Counsel:	T Simmonds and K Karpik for Crown R Mansfield KC and H Stuart for Defendant
Sentence:	14 December 2023

SENTENCING NOTES OF MUIR J

Solicitors: Kayes Fletcher Walker, Auckland

Introduction

[1] Ms Jimel Burns-Wong-Tung, on 8 September 2023 a jury found you guilty of the murder of 22-year-old Mr Rangiwhero Ngaronoa. You now appear for sentence.

[2] In respect of a conviction for murder, I must sentence you to life imprisonment, unless that would be manifestly unjust.[1] If I sentence you to life, I am required to impose a minimum period of imprisonment (MPI).[2] That period is the period of imprisonment that you must serve before becoming eligible for parole. Pursuant to s 103(2) of the Sentencing Act 2002, the MPI I impose must be at least 10 years. If, however, I find that the murder of Mr Ngaronoa was offending within the categories specified in s 104(1) of the Act, the MPI I impose must be at least 17 years, unless doing so would be manifestly unjust.

[3] The Crown submits that your offending engages s 104 and seeks a sentence of life imprisonment with an MPI of 17 years. Your counsel, Mr Mansfield KC, submits that s 104 is not engaged and that the MPI imposed on you should be no longer than 10 years. That contest falls to me to decide.

Background

[4] I begin with a brief account of your offending.

[5] The events which led to Mr Ngaronoa's tragic death have their genesis in an issue which arose between the two of you in late November 2021. It was reported to you that Mr Ngaronoa had made comments about possible sexualised behaviour by one of your young relatives, towards a toddler within your wider orbit of whānau and friends. You took serious offence at the comments and sought retribution.

[6] You enlisted the assistance of your then partner, Mr Tago Hemopo; your mother, Ms Kelly-Anne Burns; and Mr Ngaronoa's uncles, Mr Thomas and

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1 Sentencing Act 2002, s 102(1).
2 Sentencing Act, s 103(1)(a).

Rocky Ngapera. The general plan was to have Mr Ngaronoa brought to you for what the other participants thought would be a hiding.[3]

[7] To that end, Mr Ngaronoa was effectively taken captive by the Ngapera brothers who, on the morning of 21 November 2021, drove him around various addresses in their SUV before ultimately delivering him to a pre-arranged rendezvous in Myna Place, Weymouth. Mr Ngaronoa was fearful and agitated about his impending fate.

[8] Shortly after midday, you were driven by Mr Hemopo to Myna Place. Brothers Robert and Ford Stevens, young relatives of Mr Hemopo who happened to be at your house that morning, were in the back seats of the vehicle. You told them there was a plan to "smash" someone. I accept that evidence.

[9] You arrived at the cul-de-sac at the end of Myna Place at 12.32 pm. Your movements thereafter were captured on CCTV from cameras mounted on an adjacent residence. You exited Mr Hemopo's vehicle, searched for something in the boot and then returned to the front passenger seat to await the arrival of others. The Crown says what you were looking for was a knife.

[10] Shortly thereafter, Ms Burns arrived at the cul-de-sac in her own vehicle. Within a minute or so, the Ngapera brothers likewise arrived in their SUV, with Mr Ngaronoa still in the back seat. The Ngapera brothers parked their vehicle in the entrance to a residential driveway. You then excited your vehicle and marched angrily towards the SUV. I find as a fact that you were carrying a large kitchen style knife. Whether it was concealed in your clothing or held up near your arm on the side of your sweatshirt is not something I have to decide.

[11] You gained entry into the rear door of the SUV and began to attack Mr Ngaronoa with what one witness described as "piston-like" arm movements. As the attack occurred, the same witness heard screaming, which he said sounded like "a pig squealing". Another witness reported "shriekish" screams. You eventually

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[3] Your mother breached bail and, as a result, has not yet been tried on the offence she has been charged with. Her knowledge of what was intended has not yet been established. It could potentially be greater than I have indicated.

relented and walked away. In the words of Mr Robert Stevens' police statement, "[t]here was heaps of blood, there was enough for someone to lose their life."

[12] The Ngapera brothers thereafter sped from the scene with gravely injured Mr Ngaronoa in the back seat. One of the brothers rang 111 from the vehicle a little over a minute later. They proceeded immediately to an emergency clinic where attempts were made to stabilise Mr Ngaronoa. An ambulance arrived shortly afterwards and transported him to Middlemore Hospital. Mr Ngaronoa died approximately an hour and a half after the assault of acute blood loss. Two wounds were especially severe: a wound to his back which penetrated through the plural cavity and into the lung and a wound to the chest 13 cm deep. There were also a number of other wounds to his scalp, arm and foot, some of which were consistent with defensive injuries, others not.

[13] In response to a supplementary question administered to the jury, it confirmed that the principal wounds to the back and chest (each of which I regard as a matter of law as having been substantial and operating causes of death based on the pathologist's evidence) were inflicted by you.

[14] Whether you actually intended to kill Mr Ngaronoa is difficult to determine. The jury verdict does not assist because you were equally guilty of murder if either the provisions of s 167(a) or (b) of the Crimes Act 1961 applied. Ultimately, I consider myself obliged to give you the benefit of the doubt in this respect. But it has little bearing in terms of what I consider an appropriate sentence. That is because your overall response to Mr Ngaronoa's perceived slight was so extreme and the attack so anger-fuelled, that when you embarked on it, you were, in my view, completely indifferent to whether he lived or died as a result. It was, in that sense, about as reckless a murder as this Court is ever required to respond to.

Victim impact statements

[15] Mr Peter Ngaronoa, Rangiwhero's grandfather, has, through Ms Presnall of the Victim Support Unit, given a moving victim impact statement. I am most appreciative of his contribution to the sentencing process, particularly because Rangiwhero's own father has chosen not to participate.

[16] He described Rangiwhero as a happy go lucky and friendly boy whose life was brutally cut short. He said that the one month murder trial was particularly difficult; he can find no peace as he reflects on the last hours of Rangiwhero's life, which play over and over in his head. And is it any wonder? A young man, your own age, whose communications demonstrate intelligence and sensitivity and who, despite a few of his own wrong turns, clearly had significant potential in life, died an excruciating and protracted death over a period of an hour and a half, bleeding out, incapable of being saved by the best medical interventions and repeatedly asking if he was going to die. It is the stuff of nightmares for those who have to relive it.

[17] Mr Peter Ngaronoa explained that the future of his whānau is completely and forever changed as a result of your actions — again, is it any wonder?

Personal circumstances

[18] I now turn to your circumstances. You are a 25 year old of Māori, Chinese and Samoan descent. You are a mother to three children aged between three and nine.

[19] Your criminal record includes prior convictions for violence. In 2017, you were convicted of injuring with intent to cause grievous bodily harm and assaulting a child. Both of those convictions received supervisory sentences. In 2018, you were convicted of robbery by assault and again received a sentence of supervision. Your record also identifies convictions for cannabis possession, theft and dishonesty offending.

[20] Your conviction for assault on a child relates to an incident that occurred when you were aged 19. A teenage girl had made a derogatory comment about a t-shirt you were wearing, and you lashed out. You have a history therefore of unregulated and excessive responses to perceived slights. There may be reasons for this relating to aspects of your background and various traumas which I accept you have experienced in life, but I have no doubt that the carefully calibrated and measured Jimel Burns-Wong-Tung that I observed in the witness box is not the only Jimel Burns-Wong-Tung. Your body language as you exited the vehicle in Myna Place betrays a very different person — an angry, aggressive dispenser of vigilante "justice". Although that is, of course, a total misuse of the word "justice".

[21] A s 27 report has been prepared and provided to the Court. It provides some insight into your background.

[22] You were born into a family with strong gang affiliations, with your uncle and father both holding prominent leadership positions in the Mongrel Mob Notorious Chapter, based in South Auckland. Indeed, your father was the president for a period. Your mother was involved in the distribution of methamphetamine and also struggled with her own addictions.

[23] Your early years were transient and unstable; your family was frequently on the move, and you often slept at gang pads. At age 10, your father was imprisoned, as was your mother a short time later. You were placed in a home but fled after six months, wandering the streets and moving between Mongrel Mob houses. That experience caused you to become untrusting and hypervigilant. You subsequently lived with an aunt and enrolled in school, but your attendance was brief. When your father was released from custody — in fact, he had only been there on remand — you went to live with him in a rehabilitation centre in Northland and subsequently a home in Mangere. It appears that your father underwent something of an epiphany at that point in his life and began to live a more pro-social lifestyle. You became close to him.

[24] At age 13, you began a relationship with the son of a Mongrel Mob member. You had you first child with him at age 15 and your second child two years after. Your relationship with the children's father ended after he developed a methamphetamine addiction.

[25] You suffered significant grief in your teenage years, losing two relatives to suicide and an uncle who succumbed to health complications. At age 19, your father whom I consider you loved greatly, died following a heart attack. His death became the source of serious distress. You were left alone to care for your two children and elderly grandfather. It is only at that stage that you started accumulating criminal convictions. Registered clinical psychologist, Dr Alex Kettner, considers this suggestive of you having "unconsciously sought a sense of love and support from [your deceased father] by involving [yourself] in behaviours and situations [you] may

have believed [your] father approved of". He also considers it likely that your "need for a sense of belonging and affiliation with a group, in this case a gang, was paramount following the loss of [your] father, which negatively affected [your] ability to make decisions supportive of a prosocial lifestyle".

[26] It was about that time that you commenced your relationship with Mr Hemopo, another Mongrel Mob member about ten years your senior. You had your third child to Mr Hemopo in 2020.

[27] Dr Kettner also considers that you likely had untreated postnatal depression following the birth of your first child and now suffer post-traumatic stress disorder or at least "symptoms" of the disorder as a result of what he calls "multiple traumatic events" in your life.[4]

Approach to sentencing

[28] In sentencing you today, I must have regard to the purposes and principles of sentencing contained in the Sentencing Act. In your case, the purposes that I consider particularly apposite include holding you accountable for the harm you have done to Mr Ngaronoa, and by extension, his whānau;[5] denouncing your conduct;[6] deterring you and others from committing an offence of this nature;[7] and protection of the community.[8]

[29] The sentence I impose on you must take into account the gravity of your offending[9] and the desirability for consistency with the sentences imposed in other reasonably similar cases of murder.[10] The sentence must nevertheless be the least restrictive that is appropriate in the circumstances of your case.[11]

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4 The report employs both descriptions.
5 Section 7(1)(a).
6 Section 7(1)(e).
7 Section 7(1)(f).
8 Section 7(1)(g).
9 Section 8(a).
10 Section 8(e).
11 Section 8(g).

[30] The methodology I adopt in setting your sentence is orthodox. I will proceed as follows:

(a) First, and solely because of your comparatively young age at the time of the offending, I am required to decide whether it would be manifestly unjust to sentence you to life imprisonment. Your counsel sensibly concedes it would not. My discussion on that issue will therefore be very brief.

(b) Secondly, I will determine whether s 104 of the Sentencing Act applies (that is the section which, as I have indicated, requires the imposition of an MPI of 17 years if your offending fits within one or more of the specified categories of offending listed in that section).

(c) Thirdly, I will determine what notional MPI is called for under s 103(2) of the Sentencing Act.

(d) Fourthly, if s 104 does apply, but the notional MPI called for by the s 103 methodology is less than 17 years, I will then need to consider whether the imposition of a 17-year MPI would be manifestly unjust.[12]

Is life imprisonment manifestly unjust?

[31] At the time of your offending, you were 23 and a half years old. In the very recent decision in *Dickey v R*,[13] the Court of Appeal stated that when sentencing a young person for murder, a court must give careful consideration as to whether life imprisonment is manifestly unjust.[14] Although 23 is at the older end of the range of what the Court would consider to be a "young person", I accept your youth is nonetheless an important factor when considering whether imprisonment would be manifestly unjust.

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12 The methodology is taken from *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [25]. I note in that case the Court emphasised that there is no fixed sequence in which a sentencing court can approach the issues of whether a category in s 104 applies and what notional sentence would otherwise be imposed. See also *Frost v R* [2023] NZCA 294 at [34]–[36].

13 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.

14 At [177].

[32] However, as indicated, the applicability of the life presumption is an issue on which Mr Mansfield appropriately concedes. Having regard to the circumstances of your offending, as elsewhere addressed in these sentencing notes, and to your personal circumstances, I am satisfied that a life sentence is not manifestly unjust.

Is s 104 of the Sentencing Act engaged?

[33] The Crown submits that your offending satisfies the criteria in s 104(1)(e); namely, murder which involves a high level of brutality, cruelty, depravity or callousness. Mr Mansfield says that is not the case.

[34] All murders involve these elements to a degree. However, in order for s 104(1)(e) to be engaged, the Court of Appeal has referenced a need for "savage violence", "callous indifference", "moral corruption" or "insensitive and cruel disregard".[15]

[35] I consider that the following factors, when taken in combination, do engage s 104(1)(e):

(a) Vigilantism

Mr Ngaronoa's comments, whether truthful or mistaken, caused you great offence. Rather than investigating the comments responsibly and carefully, you immediately sought retribution for what you perceived as a slight on your young relative's reputation, and by extension you. You responded by arranging for the Ngapera brothers to deliver Mr Ngaronoa to you at Myna Place where you were waiting to attack him, as I find, with a large knife.

(b) The nature of the attack

You attacked Mr Ngaronoa while he was effectively captive in the back seat of the Ngapera brothers' SUV. He was unarmed and, within the

[15] *R v Gottermeyer* [2014] NZCA 205 at [79].

close confines of the vehicle, limited in the extent to which he could effectively deflect your "piston-like" thrusts. You stabbed him eight times over a period of approximately a minute. Three wounds were defensive. The other five were targeted to his upper body and head. You continued your assault despite his screams and your associates asking you to stop. You only desisted when Ms Burns and Mr Thomas Ngapera walked up to the vehicle door. The Crown appropriately, in my view, characterises your attack as frenzied, brutal and prolonged.

(c) Conduct subsequent to the attack

After your attack, you left Mr Ngaronoa in the back seat of the vehicle mortally wounded. You did not render any assistance. Instead, in what I regard as a demonstration of callous indifference, you said to Mr Thomas Ngapera "thanks bruv" as you left the scene. You subsequently continued your day as if nothing had happened, attending a family meeting and visiting a laundromat. CCTV footage at the laundromat showed you seemingly oblivious to what you had done only hours before and openly using a large knife (perhaps even the murder weapon) to manipulate a malfunctioning washing machine.

[36] I note that I would also have been prepared to find your offending engaged s 104(1)(g), given that I regard Mr Ngaronoa as particularly vulnerable to your attack as a result of being held effectively captive in a confined space. Although particular vulnerability in terms of s 104 is most often engaged where the deceased had an inherent vulnerability, be it sickness or disability, the words "or because of any other factor" in s 104(1)(g) are wide enough to encompass particular vulnerability which results from physical circumstances present at the time of the offending.[16] There was no possibility here of Mr Ngaronoa running from the scene or engaging with you on any basis approaching an equivalence of arms. That was never going to happen with the Ngapera brothers there and doing your bidding. The best that he could do was flail at you from the confines of the back seat and attempt, at one stage, to retreat over the

[16] *Phillips v R* [2023] NZCA 588 at [19]–[23].

front seat as you took to him with what Mr Robert Stevens described as a big, black plastic handled knife.[17]

What MPI is called for under s 103 of the Sentencing Act?

[37] In setting a notional MPI under s 103, my primary focus is on your level of culpability as compared with the culpability of others sentenced by this Court on the same charge. I must take into account any aggravating or mitigating features of the offending and also, to the extent consistent with the purposes identified in s 103(2), may take into account personal aggravating or mitigating factors.

[38] The process of getting to a notional MPI is often difficult and can seem somewhat artificial given that most of the comparators for what I will call "the worst murders" are s 104 cases, with the result that the analysis can look "self-fulfilling" unless particular care is taken to examine the notional starting points in the comparator cases and such starting points are genuinely free from the influence of s 104. However, it is what I am tasked to do.

[39] I identify the following aggravating features of your offending, some of which build on or overlap with my s 104 analysis: premeditation; use of a weapon; extreme violence involving application of significant force over a prolonged period; brutality and indifference; vigilantism; orchestration relating to Mr Ngaronoa's delivery to Myna Place; and Mr Ngaronoa's high level of vulnerability having regard to the nature of that delivery.

[40] I have considered each of the cases which the Crown and Mr Mansfield consider may assist with identification of an appropriate MPI. I have drawn some (albeit limited) assistance from *Webber v R*[18] and *Vea v R*[19] where, respectively, MPI

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17 Although the murder weapon was never discovered, I accept the description in Mr Robert Stevens' police statement. His description is consistent with the depth of the two principal wounds inflicted on Mr Ngaronoa.

18 *Webber v R* [2021] NZCA 133. The defendant in this case was an "enforcer" for a chapter of the Nomads gang. The deceased was a 25 year old who owed a small debt to the stepdaughter of the gang president. The deceased was collected and taken to an address. While the deceased was leaving the address, the defendant emerged and stabbed him 14 times with a knife. An MPI starting point of 15 years was adopted.

19 *Vea v R* [2020] NZCA 68. The defendant in this case had discovered that the deceased and his wife had been having an affair. The defendant took a machete, went to deceased's house, entered

starting points of 15 and 17 and a half years were adopted. In both cases the offending was motivated by retribution and involved premeditation and an assault with a knife. I acknowledge that in *Vea* there was an additional aggravating feature of home invasion. I have also considered the decisions in *Carroll v R*,[20] *Purutanga v R*,[21] *Price v R*,[22] *R v TH*,[23] *R v Kahia*[24] and *Fraser v R*.[25]

[41] In your case, my overall assessment of your offending is that a notional MPI starting point of between 16 and 17 years would be appropriate. I adopt 16 years.

[42] I now turn to consider mitigating factors personal to you.

[43] A sentencing court is bound to take account of an offender's youth.[26] There is now a considerable body of evidence, extensively reviewed by the appellate courts,[27] establishing that offenders under the age of 25 do not typically demonstrate adult levels of regulation in their behaviour for reasons which have their basis in scientific research on adolescent brain development. You were, as I have indicated, 23 and a half at the time of the offending — approaching the limits at which your youth is a relevant sentencing factor. However, your behaviour was almost classically unregulated — a grossly immature overreaction to an issue which should have simply been the subject of discrete inquiry and, if any evidence was identified to support what Mr Ngaronoa had been saying, quiet intervention with whānau support.

[44] Although conventional discounting formulas do not apply to sentences of life imprisonment,[28] some recognition of your youth is, in my view, necessary in fixing a notional MPI.

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through a window and then waited for the deceased to arrive. Upon the deceased's arrival the defendant attacked him with the machete striking various parts of his body. The defendant ignored the deceased's pleas for mercy. A 17 and a half year starting point was adopted.

20 *Carroll v R* [2018] NZCA 320.

21 *Purutanga v R* [2023] NZCA 442.

22 *Price v R* [2021] NZCA 568.

23 *R v TH* [2023] NZHC 630.

24 *R v Kahia* [2015] NZHC 344.

25 *Fraser v R* [2010] NZCA 313.

26 Sentencing Act, s 9(2).

27 See *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446; *Dickey v R*, above n 13, at [76]–[87].

28 The ability to adjust an MPI for personal mitigating factors nevertheless remains in the discretion of the sentencing judge: see *Malik v R* [2015] NZCA 597 at [36]–[37].

[45] This dovetails into another issue — your personal circumstances and the extent they are causative of your offending. You are clearly an intelligent young woman whose performance in multiple courses undertaken since your conviction speaks to the potential you always had. The multiple references I have received also speak to a caring parent with a willingness to assist others.

[46] However, your childhood and adolescence were characterised by significant instability, parental incarceration, an absence of any focus on your education and exposure to gang culture. I am satisfied that this led to normalisation of and desensitisation in relation to offending behaviours and particularly crimes of violence. In that sense, I do accept a causative link between your background and the present offending. I also acknowledge that as a young and apparently devoted mother of three, the separation from your children for what will inevitably be a lengthy term makes imprisonment a particularly onerous penalty in your case.

[47] Taking these factors into account, together with early rehabilitative steps, I would, in setting a notional MPI, allow a discount of one year for a resulting MPI of 15 years.

Is a 17 year MPI manifestly unjust?

[48] I must now ask myself whether, having regard to that notional MPI, imposition of the minimum MPI specified by s 104, that is 17 years, would be manifestly unjust.

[49] In order for the Court to exercise its discretion to impose an MPI below the specified 17 years, injustice must be clearly demonstrated by reference to the offender's personal circumstances and the purposes and principles of sentencing articulated in the Sentencing Act. In *R v Williams*, the Court of Appeal emphasised that the specified MPI in s 104 is not to be departed from lightly, given that the Court is bound to give effect to its underlying legislative policy.[29] The MPI will be manifestly unjust if there are "[p]owerful mitigating circumstances"[30] and "as a matter of overall impression" the case falls outside the scope of s 104's legislative policy.[31]

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29 *R v Williams* [2005] 2 NZLR 506 (CA) at [66].
30 At [66].
31 At [67].

While findings of manifest injustice in this context are exceptional, they are not necessarily rare.[32]

[50] I recognise that reasonable minds could differ about whether the manifest injustice exception applies to this case. Although you grew up in a disruptive and anti-social environment, your father had high status within gang culture which appears to have protected you from some of the worst excesses of that lifestyle. There is, for example, no suggestion that you personally were the victim of sexual or other violence, that you were induced into the mercantile side of the drug trade or that you developed a serious drug habit yourself. You are also blessed with a level of intelligence which is uncharacteristic of many in your position.

[51] However, I consider you very much a product of your background in terms of your resort to vigilante justice and your totally unregulated response to a perceived slight. In short, you behaved like the gangstress you were largely conditioned to become but which you have, in my view, the capacity to move on from. I also take into account the particularly traumatic period in your life in late adolescence which appears to have been the genesis of your slide into criminality and of a more active gang lifestyle.

[52] When I take these factors into account, together with what I regard as your reasonable prospects of rehabilitation, comparatively young age at the time of offending and that you will, absent success on your foreshadowed appeal, spend some of the most important years of your and your children's life behind bars, I consider it would indeed be manifestly unjust to sentence you to an MPI of 17 years.

[53] Although I am not required to automatically default to my notional MPI,[33] I consider that the appropriate outcome in this case.

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32 At [67].
33 See *Phillips v R*, above n 16.

Sentence

[54] Ms Burns-Wong-Tung, please stand.

[55] On the charge of murder, I sentence you to life imprisonment with an MPI of 15 years.

[56] Stand down please.

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Muir J