

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

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

**CRI-2022-092-1425
[2024] NZHC 118**

THE KING

v

**ANDREW LAMOSITELE-BROWN
Defendant**

Hearing: 8 February 2024

Appearances: CP Howard and SRDD Bicknell for the Crown
VJ Feyen and MA Edgar for the Defendant

Judgment: 8 February 2024

SENTENCING NOTES OF FITZGERALD J

Solicitors: Kayes Fletcher Walker, Auckland

To: V Feyen, Auckland
M Edgar, Auckland

Introduction

[1] Mr Lamositele-Brown, please remain seated until I ask you to stand at the end of this sentencing.

[2] You appear today for sentencing following the jury's unanimous verdicts of guilty on the charges of murder,¹ and unlawful possession of a firearm.² You are also to be sentenced on drug charges which have been transferred to this Court from the District Court for the purposes of sentencing.³

[3] Before I go any further, I want to acknowledge those here in court today, firstly Mr Petau's family members and supporters. I know this will be a very difficult time for you, and I acknowledge your presence in court today and extend to you the Court's deepest sympathies. I also want to acknowledge the reading in court today of the victim impact statements. I will discuss these later in my sentencing remarks, but for now it is appropriate to acknowledge the courage it took to read them in court, and the great dignity with which you did so.

[4] It is also appropriate, Mr Lamositele-Brown, that I acknowledge the presence of any of your own family members and supporters here today. For your immediate family in particular, this is also a difficult time for them.

[5] Before turning to how I propose to approach your sentencing, I will first summarise the facts of your offending. You, and the lawyers and many of those here present today, will already be familiar with these, including from having sat through the evidence given at trial. However, sentencing is a public function and so it is important that the public is aware of the facts upon which I will be sentencing you.

¹ Crimes Act 1961, ss 167 and 172. Maximum penalty life imprisonment.

² Arms Act 1983, s 45. Maximum penalty four years' imprisonment, or a fine of up to \$4000, or both.

³ Misuse of Drugs Act 1975, s 6(1)(f) and (2)(a). Maximum penalty life imprisonment; and s 7(1)(a) and (2)(a). Maximum penalty 6 months imprisonment, or a fine of up to \$1000 or both.

The facts

[6] At the time of your offending, you were living with your partner and your four children at an address in Flat Bush. You had arrived back in New Zealand some six months prior to this, having been deported from Australia under what is colloquially referred to as the 501 legislation.

[7] The victim, Mr Petau, was a friend of yours. You were a member of the Hells Angels motorcycle gang, and Mr Petau also had some association with the gang. I want to emphasise, however, that it is not suggested that what happened on the evening of 25 December and the morning of 26 December 2021 and led to Mr Petau's death was directly gang-related. I consider it a fair inference, however, that the fact you were in possession of a loaded firearm that night was in some way related to your role in a gang.

[8] On Christmas Day 2021, you, your partner and children spent some time celebrating Christmas with other family members. By all accounts, it was a normal and happy day. You returned home earlier than your partner and were looking after your youngest child, and were in charge of cooking a barbeque dinner. Your partner and your remaining children arrived home at about 10.00 pm, and noticed that you had been drinking. You all had dinner together. You continued to have some drinks with your partner, and your children soon thereafter went to bed. In her evidence-in-chief at trial, your partner described you as being drunk. She explained that when you drink, you often accuse her of cheating. She said your mood had changed from when they first got home; she described you as "grumpy".

[9] Not too long afterwards your partner also went up to bed. You stayed downstairs drinking and listening to music. Your partner said in her evidence that after she had gone up to bed, you came up and stood at the bedroom door, just looking at her, and that you looked angry.

[10] You had not drunk to excess for some time prior to that evening. Your drinking that evening was, however, clearly of concern to your partner, as she texted her sister at about 12.50 am, saying "man Dru is drinking and I think he is gonna make troubles". I pause to note that I do not accept your partner's evidence when cross-examined that

the reference to “making troubles” was simply a reference to you playing loud music and her concern that this would annoy the neighbours. Indeed, none of the neighbours who gave evidence said anything to the effect of loud music playing before the events in question. In her evidence-in-chief, your partner said that it was your drinking that caused her to send that message. Plainly, it was very difficult for your partner to give evidence for the Crown at your trial; and that is entirely understandable. I prefer her account of what happened as given in her evidence-in-chief, and those aspects of her police statement which were put to her in her evidence-in-chief. I do not accept much of what she said in cross-examination, which often involved simply agreeing with whatever the defence lawyers put to her.

[11] Returning to the events that evening, shortly before, at 12.35 am on Boxing Day morning, Mr Petau sent you a text message wishing you a Merry Christmas. You called him about 10 minutes later and we can infer that you invited him over. CCTV footage showed Mr Petau travelling on his motorbike towards your home. Nothing seemed amiss. He arrived at your house at approximately 1.05 am.

[12] Upon hearing Mr Petau arrive, your partner came downstairs to tidy up, and had a brief exchange with him, expressing her embarrassment that the place was not tidy, in response to which he laughed and said that she should see his house “it was worse”. Not long after, your partner went back upstairs and texted her sister “OMG now his friend is here”, and in another text, said that you were “carrying the toy in his stupid pocket”. I am satisfied that this was not a literal reference to a toy in your pocket, but was a reference to the Taurus Millennium 9 mm semi-automatic pistol with which you later shot Mr Petau.

[13] You gave evidence at the trial that you obtained this gun from an unknown third person with whom you did a drug transaction earlier that day. I do not know whether you got the gun that day, or already had it at your home, which could be consistent with the presence of drugs and substantial amounts of cash also found at your home when it was later searched by police. It is not necessary for me to make a formal finding on this point however, for the purposes of this sentencing. Whenever it was when you first came into possession of this firearm, the fact remains that you

were in possession of a loaded semi-automatic pistol while in a highly intoxicated state.

[14] All seemed relatively well between yourself and Mr Petau when he first arrived, but the innocuous and friendly exchange between Mr Petau and your partner when she came downstairs to tidy up *may* have contributed to the events which unfolded. Much later, after the shooting, and in some exchanges with the police negotiator who was trying to get you to come out of the house unarmed, you responded “ask my missus” when asked what had happened. You also responded at one point that “he fucked with the wrong cunt”. You gave evidence that this was a reference to the person from whom you got the pistol, suggesting that he had messed up because he had left the pistol loaded but did not tell you that it was. I found that evidence wholly unpersuasive, and by its verdict the jury clearly did so also. Your reference to “he fucked with the wrong cunt” was plainly a reference to Mr Petau. But the reason why you had a beef with Mr Petau that evening ultimately remains unknown.

[15] Turning back to the events as they occurred, after your partner had gone back upstairs to bed, she heard Mr Petau says words to the effect of “my uso” (meaning “my brother”) loudly and in a surprised way, immediately before hearing the first gunshot. It was not in dispute that this shot was fired when you and Mr Petau were in the dining room, and that it was the fatal shot. I am satisfied that he was sitting at the dining table when this occurred, and that you were standing up, most likely on the other side of the table. Mr Petau was shot in the torso, and while he was able to survive for a few minutes, the pathology evidence was that an injury such as this was not in fact survivable. After the first shot, Mr Petau was able to get from the dining room to the hallway where he collapsed.

[16] Your partner immediately came downstairs to see what had happened, and saw Mr Petau lying face down on the hallway floor at the bottom of the stairs. This led to her screaming very loudly, which was heard by neighbours, a number of whom called 111. This was shortly before or around 1.15 am. Your partner lunged at you and tried to take the pistol from you. There was a struggle and she reported to police in her formal statement that you had pointed the gun at her, and in her later 111 call to the police, she said that you had threatened her. I accept that evidence.

[17] Sadly, two of your daughters also came down the stairs at the time and saw Mr Petau on the ground. While they were not willing to give any substantive evidence at your trial, and again that is totally understandable, I admitted into evidence their statements made to the police immediately after the events in question. One of your daughters described you as looking angry when she came downstairs after the first shot had been fired. In one of the 111 calls to the police, one of your daughters described you as being “drunk off your head”.

[18] Much of which occurred after the first shot was fired was actually captured in the telephone calls between your partner or one of your daughters and the police, as well as in telephone calls between a police negotiator and yourself, after you had barricaded yourself in the house.

[19] A further shot was heard in some of the 111 calls shortly after the first shot, and I am satisfied that this was a shot fired by you from up on the staircase, which passed close over the top of Mr Petau’s body before landing on the floor near to where his body lay. I cannot conclude that you were trying to shoot Mr Petau again with this second shot. That would, in my view, be speculation. It could equally have been a shot fired in his general direction, but not at him, out of anger and frustration at what had just occurred.

[20] In response to your partner and neighbours’ 111 phone calls, the police arrived at the scene and were outside your home by approximately 1.35 am. From this point onwards, they began voice appealing to you by loud hailer to come outside and surrender your weapon. At around 1.55 am, a third shot was heard. I am satisfied that this was the shot fired towards the hallway wall near the front door, being consistent with a response by you to the constant calling to you from outside. You continued to respond aggressively from time to time to the police, including swearing at them. I accept, however, that by this point you were also likely to be feeling somewhat overwhelmed by the situation you had got yourself into.

[21] For some time after the shooting, your partner and children remained barricaded in the bedroom upstairs. I accept that at no time during this stage of the events did you go upstairs and try and get into the bedroom. Nor, however, did you

go upstairs to check on their safety or that they were okay. They were ultimately removed out of the top floor bedroom window by police after a few hours, and made statements to the police fairly soon thereafter about what had occurred.

[22] Over the course of the next several hours, a female police negotiator continued to engage with you, and finally, at approximately 8.00 am on Boxing Day morning, you complied with her request to leave the property unarmed, walking out through the garage door, leaving the pistol inside on the garage floor.

[23] As you were taken into custody, a clear plastic bag containing 9.8 grams of cocaine was located in the pocket of your shorts. When your house was later searched by police, they found a plastic bag in the master bedroom containing 77.2 grams of methamphetamine; two further smaller plastic bags containing 853 milligrams and 382 milligrams of methamphetamine respectively. Police also found just over \$46,000 in cash at the house. The presence of this very large amount of cash, together with the drugs and the gun, has the hallmarks of commercial drug dealing.

[24] I want to now address what you said in evidence happened that night. You said that after Mr Petau had arrived, you were showing off with the gun, which you did not know was loaded, and it accidentally went off and killed him. By its verdict, the jury plainly rejected that account, and so do I. The overall narrative of events is inconsistent with an accidental killing of a friend. There is the evidence of your high level of intoxication and your partner's concerns at your aggression and jealousy when in such a state. There are your own statements to the police negotiator about what had happened and to which I have already referred. Further, if it had truly been an accidental shooting of a friend, one would have expected that you would have made attempts to help him, or call 111, which you did not do. Instead, your partner and daughters saw you in an aggressive state. You fired further shots. Further, if this had been an accident, one would have expected that after trying to help your friend, you would have immediately taken steps to reassure your partner and your children that it was an accident, rather than leaving them barricaded in an upstairs bedroom.

[25] That all said, I am not persuaded that this was a planned or premediated shooting. You were drunk, you were aggressive, and you were volatile. You may well

have called Mr Petau over to your home intending to have a social drink with him; equally you *might* have called him over to have it out with him, in terms of whatever it was that you perceived he had done to wrong you. We will never know. However something triggered serious aggression in you shortly after he had arrived, leading you to fire the loaded pistol at him. On the evidence that I accept, namely pointing a loaded pistol at another person at reasonably close range, and despite your lawyer's careful and detailed submissions to the contrary, the only available inference is that, at least at that moment in time, you intended to kill Mr Petau.

Victim impact statements

[26] Before going any further, I want to address the victim impact statements, which I have read, and which have been spoken to in Court this morning. Mr Petau's death has understandably had a devastating effect on all of his family. It is clear that he was an extremely valued member of the family, and his passing plainly leaves a very significant hole in that family. I want in particular to refer to Mr Petau's mother's victim impact statement which was written with great dignity. As she said, and you heard this morning, "I humbly say on behalf of my children, but especially the children of Petau, we forgive you Andrew but we can never forget that day and what happened". The expression of such forgiveness is truly humbling.

Approach to sentencing

[27] What I will do now is turn to your actual sentencing. Under the Sentencing Act 2002, I am required to sentence you to life imprisonment, unless such a sentence would be manifestly unjust.⁴ It is responsibly not suggested by either the Crown or your lawyers that a life sentence would be manifestly unjust in this case. As your lawyers will no doubt have told you, the end sentence which I will be sentencing you today is therefore one of life imprisonment.

[28] What I must also determine, however, on the charge of murder, is what is known as the minimum period of imprisonment. The minimum period of imprisonment is the minimum amount of time that you *must* spend in custody before

⁴ Sentencing Act 2002, s 102(1).

you can start applying to the Parole Board for parole. I should emphasise to those present here in court today, and to the media, the minimum period of imprisonment is *not* the sentence. As I have just said, the sentence is life imprisonment. Once you have served your minimum period of imprisonment, however, you can start applying to the Parole Board for parole. Whether or not the Parole Board grants you parole will be a matter for the Board at that time. And even if you are granted parole you remain subject to your life sentence, and can be recalled at any time during your life to prison, should you go on to offend further.

[29] The Sentencing Act says that for the offence of murder, the minimum period of imprisonment must be at least 10 years. Another section in the Sentencing Act also says that if the murder is particularly brutal or callous, the minimum period of imprisonment must be 17 years.⁵ The Crown, rightly in my view, accepts that this provision of the Sentencing Act does not apply. All murders are of course callous and cruel, and involve a high degree of violence. But I agree with the Crown that the features of your offending do not trigger the requirement of a minimum period of imprisonment of at least 17 years.

[30] The Crown has suggested a minimum period of imprisonment of 12 to 13 years, with that uplifted by around 18 months' imprisonment to reflect the additional drugs and firearms charges to which you pleaded guilty. Your lawyers suggest a minimum period of imprisonment on the murder charge of 11 to 11 and a half years, and agree that an uplift of 18 months' imprisonment is appropriate to reflect the drugs and firearm charges.

[31] Turning first to the minimum period of imprisonment on the murder charge, I must consider the aggravating and mitigating features of your offending. Aggravating features are the use of a weapon, the unlawful possession of that weapon (you did not have a firearms licence at the time), that your offending was from an objective standpoint unprovoked, and was against an unarmed victim. There is no suggestion in the evidence, for example, that Mr Petau was threatening to you, or was aggressive, on that evening.

⁵ Sentencing Act, s 104(1)(e).

[32] I do not consider there to be any mitigating factors relating to the offending itself.

[33] The lawyers have also referred me to a number of other cases, some of which have *some* similarities to your case.⁶ Without going through all of these cases, and every case is of course unique, I consider your case less serious than that of *Vaitohi*, in which minimum periods of imprisonment of 14 years, and 13 and a half years, were adopted. I also consider it is also less serious than in a case called *Graham*, which involved some pre-meditation, and in which a minimum period of imprisonment of 14 years was adopted. In one case, with some similarities to this, called *Paewhenua*, a starting point of 11 and a half years was adopted. Given the victim in that case was shot in the head, that case could be said to be more serious than yours. However, I consider that minimum period of imprisonment to be somewhat generous. So too the 11 year minimum period of imprisonment adopted in *Lyttle*, though there was a suggestion of aggression and threatening behaviour on the part of the victim in that case.

[34] Having regard to these cases and others that I have read, I am satisfied that a minimum period of imprisonment of **11 years and six months** is appropriate. This reflects that I am sentencing you on the basis that, at least in the moment that you fired the first shot at Mr Petau, you intended to kill him, but also that there was no real pre-meditation, and that, as I discuss later, I also accept that fairly soon thereafter you regretted what had occurred and are remorseful. I do not consider the events following the shooting to be materially aggravating factors, though they are aggravating. They have not caused me to adopt a significantly higher minimum period of imprisonment.

[35] I turn next to the uplift for the drugs charges. The 18 month uplift both the Crown and your lawyers suggest is referenced to a decision of the Court of Appeal in a case called *Zhang* and a decision of the Supreme Court in a case called *Berkland*.⁷ Based on those decisions, and others to which I have been referred, I agree with the

⁶ *R v Vaitohi* [2023] NZHC 2761; *R v Graham* [2022] NZHC 2947; *R v Meads* HC Hamilton CRI 2009-019-8823, 31 March 2011; *R v Kaitai* [2022] NZHC 2438; *R v Lyttle* [2019] NZHC 3454; *R v McDonald* HC Auckland CRI-2010-092-10476, 13 December 2011; *R v Paewhenua* [2018] NZHC 301.

⁷ *Zhang v R* [2019] NZCA 507; [2019] 3 NZLR 648; *Berkland v R* [2022] NZSC 143.

Crown that had you been sentenced for this offending on its own, it could have attracted a starting point of between three and four years' imprisonment. The quantity of the methamphetamine, and the significant amount of cash found at your home, and the possession of a firearm, have the hallmarks of not insignificant commercial dealing. There is no suggestion that you yourself were at that time a drug addict and were dealing to fund your own habit.

[36] The Crown's suggested 18 month uplift, with which your lawyers agree, reflects however, what the Crown suggests could be an up to 20 percent discount to reflect the fact that you pleaded guilty to the drug and firearm charges about six weeks prior to your District Court trial. I consider a 20 percent discount to be too generous. Those pleas were entered relatively close to trial and, given the drugs and cash found at your house, the case against you was very strong. Had you been sentenced on the drug and firearm charges alone, I would have been prepared to give you a maximum of a 10 percent discount, and even that could also be said to be on the generous side. Looking at the proposed sentence overall, however, and taking into account what we refer to as the "totality principle", I consider a 20 month uplift to the minimum period of imprisonment is appropriate, leading to a minimum period of imprisonment of 13 years and two months' imprisonment. This uplift primarily reflects the charge of possession of methamphetamine for supply. I do not propose to increase the uplift to reflect the charge of unlawful possession of a firearm, which is closely linked to the main charge of murder. And the charge of possession of cocaine is relatively immaterial in the overall mix of things.

Personal circumstances

[37] I turn now to whether there are any circumstances personal to you, rather than related to your offending, which means there should be any adjustments, upwards or downwards, to the minimum period of imprisonment.

Aggravating personal circumstances

[38] As to aggravating personal factors, you have no relevant prior convictions in New Zealand; just one driving offence from 2002. You have some drug related and

other convictions in Australia, but these are at a relatively low level. I do not consider these prior convictions warrant an uplift.

Mitigating personal circumstances

[39] Turning to mitigating personal circumstances, I have read the Provision of Advice to Courts Report from the Department of Corrections, which I will refer to as the “PAC” report, together with a s 27 cultural report provided to me by your lawyers. I have also read your letter provided to me this morning and seen the various certificates of the courses you have completed while on remand in custody.

[40] The PAC report records that you maintain that the shooting of Mr Petau was an accident. The report briefly canvasses your background, though does not address anything that in my view was an operative cause of your offending. The report records what I am satisfied is remorse for your offending and, in particular, for Mr Petau’s children and his immediate family. I note in passing that the report records you as saying that alcohol use has never been a problem for you, which is inconsistent with the evidence given at your trial.

[41] Turning to the cultural report, it is more detailed. It is not necessary that I traverse its contents in any detail in these sentencing remarks. It is sufficient to record that you grew up in a strict but what seems to have been a relatively happy environment as a child, where you shouldered many of the family responsibilities as the eldest born son. Following in your father’s footsteps, you took up boxing training from a young age, and had a close bond with your father through this pursuit. You left school at aged 16 to help your father financially, and the report records that you had a fairly consistent work history from that time.

[42] Sadly, when you were around 11 or 12, extended family members introduced you to alcohol, and you also began sniffing petrol. This led to experimentation with cannabis in your mid-teens and you were introduced to methamphetamine at about the age of 20. As we so often see with persons before the court who are regular users of methamphetamine, you then became involved in criminal activity to finance your habit.

[43] You have had a relatively stable relationship with your partner since 2004 and, in 2012, decided to move to Australia for a change in lifestyle, and to get away from criminal activity such as selling drugs. You went “cold turkey” and managed to kick your habit. You and your family settled in Melbourne and you found work in warehousing. You describe this time as “the golden life” and involving “definitely more money”.

[44] Somewhat curiously, therefore, despite these good times, you then became involved with the Hells Angels gang. This came at a time when links with your family were getting more distant, and your father passed away in 2014. Other difficulties arose with your family and you described there being a “fall out”. Following the rift with your family, you describe going “full throttle” with the Hells Angels. You fell into the same habits as in New Zealand, including selling drugs. You rose through the ranks of the gang to become President of a local chapter in 2019. Ultimately it was those gang associations that led to your deportation back to New Zealand in 2021.

[45] The s 27 report also records your expressions of remorse and that you and your family were, at least at the time the report was written, in the process of trying to arrange a traditional Samoan ceremony where the families of the victim and your family come together to negotiate a form of apology, recompense and forgiveness.

[46] Standing back, and having carefully considered these reports, I do not discern any causative link between your background, or your engagement with the Hells Angels gang, and your offending in relation to Mr Petau. I therefore do not propose to give any discount for your personal and cultural background. As I said earlier, shooting Mr Petau appears to have been a somewhat impulsive and tragic step taken by you in an intoxicated and aggressive state, in response to some perceived slight by him against you.

[47] I am, however, satisfied that, despite taking this matter to a trial, as you were entitled to do, you exhibit *some* remorse, particularly in relation to Mr Petau’s children and his immediate family. I have also read the information about the steps you have taken to rehabilitation while you have been in custody. You enjoy the continuing support of your brother, your partner and your children. You have self-awareness of

the need for support in relation to your own mental health. You say that you have cut ties with the Hells Angels gang, and I sincerely hope that is the case. Nothing good comes from being associated with a gang. Overall, I am satisfied that there are reasonably good prospects for your rehabilitation.

[48] Taking into account both remorse and rehabilitation, I propose to reduce the minimum period of imprisonment by six months, bringing it to 12 years and eight months' imprisonment.

Sentence

[49] Mr Lamositele-Brown would you now please stand.

[50] On the charge of murder, I sentence you to life imprisonment with a minimum period of imprisonment 12 years and eight months.

[51] On the charge of possession of methamphetamine for supply, I sentence you to 20 months' imprisonment. On the charge of unlawful possession of a firearm, you are sentenced to one year's imprisonment. These sentences are to be served concurrently with each other, and also with your life sentence. You are convicted and discharged on the charge of possession of cocaine. All of this means that your overall sentence remains one of life imprisonment, with a minimum period of imprisonment of 12 years and eight months.

[52] You may now stand down.

Fitzgerald J