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

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CRI-2019-096-2216**
**[2020] NZHC 1796**

**THE QUEEN**

v

**WIREMU TAMAHANA ALLEN**

Hearing: 23 July 2020 (via AVL)

Appearances: G J Burston for Crown
C J Nicholls for Defendant

Date: 23 July 2020

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**SENTENCING OF CLARK J**

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## Introduction

[1] Mr Allen, following a sentence indication you pleaded guilty to a charge of wounding with reckless disregard.[1] Before I sentence you this morning I formally enter your conviction on that charge.

[2] This is your third 'strike' offence. That means you must be sentenced to serve the maximum term of seven years' imprisonment prescribed for the offence.[2] My sentence indication was given before any reports, including a s 27 cultural report, had been received.

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1 Crimes Act 1961, s 188(2), maximum penalty 7 years' imprisonment.
2 Sentencing Act 2002, s 86D(2).

[3] So the real question for me today is whether there is anything in those reports that would make it manifestly unjust for me to order that you serve your sentence without parole.

[4] You will already have heard some of what I am going to say. But I need to explain my sentence and the reasons for it. So I need to repeat some of what I said at the indication hearing.

**Summary of offending**

[5] In the early hours of the morning on 15 June 2019, you and your associate, Mr Karaitiana, travelled to the victim's address in Stokes Valley, both armed with pistols. The doors were closed and locked. You and Mr Karaitiana forced an exterior door open. You entered the flat and confronted the victim, who was in bed sleeping. You told him he owed you money.

[6] The victim sat up. You punched him on the side of his face with a closed fist. When the victim went to stand up Mr Karaitiana grabbed him by his tee-shirt. The pistol Mr Karaitiana was holding then discharged and shot the victim in the left knee. The Crown accepts that the discharge of the pistol was accidental.

[7] When you were rummaging through the victim's drawers the victim managed to get away from Mr Karaitiana. He ran to a neighbouring address and called the Police.

[8] The victim sustained injury to the side of his left leg. The bullet was still in his left knee when spoken to by Police at the hospital. His wallet containing $460 cash, and phone valued at approximately $200, were stolen.

**Victim impact**

[9] The victim is a father of three. He says that even though the break-in was last year the thought that his children could have been at the house at the time still makes him sick. He worries about his children. He says the money taken from him was for his children and "you can't do that to people". He required surgery to remove the

bullet. He still does not know the extent of the damage to his knee and his walking is still slightly affected.

**Personal circumstances**

[10] You are 38 years old. You have over 60 convictions. The majority are for driving and dishonesty offences although you have several previous convictions for violent offending, including those for which you received first and second strike warnings.

[11] You were introduced to gang life at an early age and by 16 had received a conviction for theft. You have served numerous sentences of imprisonment throughout your life but have been able to find employment in the past in forestry and as a concreter. You have children. You seek a better life for them than the life you have experienced.

**Three strikes regime**

[12] This is your third strike offence. That means I am required by the Sentencing Act to sentence you to the maximum term of imprisonment for your offence. I am also required by the Sentencing Act to order that you serve the sentence without parole unless I am satisfied it would be manifestly unjust to do that given the circumstances of your offending and your personal circumstances.[3]

[13] The judicial approach to the manifestly unjust exception is to avoid grossly disproportionate sentence outcomes.[4] The case for a finding of manifest injustice must be clear and convincing but need not be rare or exceptional.[5] The determination requires an assessment of the circumstances of the offence and your circumstances.[6] The sentence I would have imposed but for the three strikes regime is relevant to this assessment.[7] I must also take into account your ability to understand the importance of the warnings you have been given, your culpability for the offending and whether

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3 Sentencing Act, s 86(D)(3).
4 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [108](a).
5 At [108](b).
6 At [108](c).
7 At [108](d).

you are likely to reoffend such that the community needs protection.[8] The inquiry into the "manifestly unjust" exception is intensely factual.[9]

**Appropriate sentence but for s 86D**

[14] I now look at the sentence I would have given you if this were not your third-strike offence.

*Starting point*

[15] There is no sentencing guideline judgment for wounding with reckless disregard. The Crown refers to the guideline judgment of the Court of Appeal in *Nuku v R*[10] for offences involving intent to injure.[11]

[16] But I must take care in applying *Nuku* to a charge of wounding with reckless disregard because the mental element is different from offences involving intent to injure.[12]

[17] Mr Nicholls relies on the decision in *R v Davis* to advocate a starting point of around three years imprisonment.[13]

[18] The Crown points out that you told the s 27 report writers it was you who pulled the trigger not Mr Karaitiana. The report writers of the various reports I have seen express concern about your recall of important detail and the reliability of your recollection at times. Regardless of what you may have stated to the s 27 report writers, I must sentence you on the basis of the summary of facts to which you have pleaded guilty. It states the pistol Mr Karaitiana was holding discharged, and the Crown has accepted the discharge was accidental.

[19] I consider your offending to be more serious than in *R v Davis* due to the presence of a co-offender and the level of premeditation that must have been involved

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8 At [108](e).
9 At [108](f).
10 *Nuku v R* [2012] NZCA 584.
11 At [37].
12 *Waitohi v R* [2014] NZCA 614; and *Hannay v Police* [2014] NZHC 2015 at [22].
13 *R v Davis* [2018] NZHC 2289.

in bringing weapons to the address and the stolen property. I consider a starting point of three and a half years is appropriate.

[20] An uplift of 10 per cent for your previous convictions is warranted given your extensive criminal history. This would equate to three years ten months.

[21] I now turn to consider whether any deductions should be made to the starting point to reflect your personal circumstances.

*Cultural report*

[22] The Court of Appeal has confirmed that "ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability".[14] Those matters are to be considered at sentencing where they are shown to contribute in a causative way to the offending.[15]

[23] I have a s 27 cultural report prepared by Matua Cultural Annotators. I have been assisted by its thoughtful content and the care which the report writers have taken to attempt to place before the Court factors in your background which may relate to the commission of the offence. As Whata J said in *Solicitor-General v Heta* "… the presence of deprivation, systemic or otherwise, in the lives of all Māori offenders cannot be assumed".[16] But the:[17]

> symptoms of systemic Māori deprivation are reasonably self-evident, including … intergenerational social and cultural dislocation of the whānau, poverty, alcohol and/or drug abuse by whānau members and by the offender from an early age, whānau unemployment and educational underachievement, and violence in the home.

[24] But the question for me is whether there is evidence identifying the presence of systemic deprivation in your background and whether that is linked in a causative way to this offending.

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14 *Zhang v R* [2019] NZCA 507 at [159], citing *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [50]; *Fane v R* [2015] NZCA 561 at [46]; and *Arona v R* [2018] NZCA 427 at [59].
15 *Zhang v R*, above n 14, at [159].
16 *Solicitor-General v Heta*, above n 14.
17 At [50].

[25] I consider the account of your life from the earliest age provides an ample basis to infer a causative connection between the immense social disadvantages that have characterised your life generally, and the offending:

(a) From a young age you were exposed to family violence and gangs, with your stepfather a member of Black Power Taranaki. Due to the prevalence of violence in your home environment you were uplifted from your family and made a state ward at the age of four. While in state care you were placed into a Wellington church community where the abuse to which your counsel has referred took place. For much of your adolescence you were transient, moving from school to school in Auckland, Whanganui, Fielding and Wellington. This experience left you dislocated and unable to build social or familial bonds.[18]

(b) The way you dealt with your traumatic upbringing was to self-medicate. You began abusing drugs and alcohol at a very young age. As the report notes, use of alcohol and drugs carries an increased risk of mental health issues.[19] In your case a psychiatric report in 2014 recorded you as being "homeless, unemployed, unwell and suicidal." The risk assessment carried out at the time detailed a distressing family background with early integration into the Mongrel Mob. You learned while in prison in 2006 that your 16 year old sister had taken her own life. You made up your mind at that point to carve out a life for yourself.

(c) The report says that you, like so many young urbanised Māori, tried to find kinship and support in the "tribe of Nga Mokai"[20] — the Mongrel Mob and then the King Cobras. After the death of your sister, you became disillusioned with the lack of support in the Mob and attempted to leave, but other gang members did not accept this and you were shot in retaliation. You cut ties with the Mob and for a period attempted to turn your life around and took up employment as a concrete layer but

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18 Cultural report at [41].
19 At [37].
20 At [31] cultural report.

could not adapt to the new lifestyle and soon you were pulled back into gang ties by your uncle, an officer in the King Cobras.

[26] I have no doubt that your unstable and abusive background and your early exposure to violence led you to live at the very margins of society.

[27] Mr Nicholls points to the facts of *Solicitor-General v Heta* in support of his submission that a 30 to 40 per cent discount would be justified in your case.

[28] I have included in an attachment to my sentencing notes examples of cases where discounts have been given.

[29] I accept the report's account of your deprivations. Importantly, I accept that these events and deprivations are intimately connected to your offending and this particular offence which, once again, was drug and gang related. In the recent words of the Court of Appeal in *Moses* the connection between your social and cultural background is sufficiently proximate to mitigate culpability to a degree.[21]

[30] I consider a discount of 15 per cent is in line with discounts in analogous cases and is further warranted by the apparent failure to the state to protect you when you were taken at such a young age into its care.

*Addiction and rehabilitation*

[31] I turn to the alcohol and drug report and your long history of substance abuse. You first started consuming alcohol and using cannabis at ages 11 and 12. By your teen years you were using methamphetamine.

[32] You accept your biggest challenge following release will be giving up alcohol. But you want to leave your substance abuse and offending behind you. You are reported to be at high risk of returning to substance abuse following your release if you do not receive treatment and adequate support. You have previously sought help for your issues with alcohol abuse which apparently reduced in 2016 following

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21 *Moses v R* [2020] NZCA 296 at [70].

treatment at the Salvation Army Bridge Programme, but you were shot in the chest soon after your release from prison and turned back to alcohol as a coping mechanism for post-traumatic stress.

[33] The Court of Appeal in *Zhang v R* recently spoke of the relevance of addiction to the sentencing process and moral culpability of the offender. Addicts may use their substance abuse as a coping mechanism for childhood trauma and in response to developmental difficulties.[22] Pro-social tendencies may be overwhelmed by dependence, calling into question the effectiveness of deterrence in much the same way as mental health issues do.[23] Those comments were made in the context of methamphetamine addiction, but similar considerations apply for alcoholism.[24]

[34] But the Court also said that any discount for addiction should be based on persuasive evidence, as opposed to mere self-reporting, and the onus of proof lies on the offender to establish the extent and effect of addiction.[25] In this case there is insufficient evidence to demonstrate that your addiction was causative of the offending. It cannot, therefore, by itself, justify a separate discount. But it is relevant in the sense that substance abuse strongly engages the sentencing purpose of assisting an offender's rehabilitation and reintegration.[26] The drug and alcohol report recommends you undertake a longer, more intensive form of treatment at Moana House Therapeutic Community in Dunedin. The programme lasts for a year and has a strong emphasis on tīkanga Māori. You say you are prepared to undergo long term treatment and your whānau support that possibility.

[35] Overall, I consider a discount of 20 per cent properly recognises the complex factors and systemic deprivation I have mentioned as well as your rehabilitation potential.

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22 *Zhang v R* [2019] NZCA 507 at [145].
23 At [145].
24 See for example *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *Solicitor-General v Heta* [2018] NZHC 2453.
25 At [148].
26 At [145].

*Guilty plea*

[36] Were it not for the three strikes regime, you would also have been entitled to the practical effect of a discount of 25 per cent in recognition of your early entry of guilty plea.

[37] The guilty plea discount together with the discount of 20 per cent in recognition of cultural factors and rehabilitation potential,[27] would result in an end sentence of two years and one month imprisonment.[28]

[38] Even with these discounts you would have received a sentence of imprisonment regardless of the three strikes regime. That brings me to the question whether it would be manifestly unjust to order you to serve the maximum sentence of seven years without parole.

**Does the manifestly unjust exception apply?**

[39] Cases where the manifestly unjust exception have been held to apply, generally fall into one of the following categories (and several categories overlap):

(a) where the offender is particularly young;[29]

(b) where the offender has significant mental health conditions diminishing culpability;[30]

(c) where the offence has a high maximum penalty but conceivably encompasses a broad range of offending and the act itself is at the lower end of the spectrum of seriousness;[31]

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27 See *Moses* above n 21.

28 46 months -21 month = 25 months.

29 See for example *R v Campbell* [2018] NZHC 2817; and *R v Pomee* — in which the maximum term was twice what would otherwise have been imposed, resulting in a 24-year-old offender being imprisoned until he was 38. Mr Pomee was sentenced to 14 years' imprisonment on two charges of aggravated robbery and one of kidnapping. But he was only to serve a minimum term of five and a half years, because his parole ineligibility for the duration of the 14-year term was held to be manifestly unjust.

30 *Fitzgerald v R* [2020] NZCA 292.

31 See *R v Rutherford* [2019] NZHC 1628.

[40] In a similar camp are those cases where, but for the three strikes regime, the offending would not have attracted a sentence of imprisonment at all.[32]

[41] Examples of comparable cases considering the manifestly unjust exception are included in the attachment to my sentencing notes.

[42] You have complained that your sentence is disproportionate to your associate's. There is a disparity between your sentence and your associate's. But that disparity arises because your circumstances are not comparable to his — neither in terms of your criminal history nor your respective ages. Most significantly, this is your third strike offence.

[43] Parliament purposefully designed a harsh response to offenders who persistently commit serious offences in the face of clear warnings.[33] The three strikes regime necessarily contemplates disproportionate outcomes.

[44] You are assessed as presenting a high risk of reoffending if you do not receive appropriate treatment. Short term rehabilitative treatments provided in the prison environment have evidently been of limited success. The reports note that your best chances of rehabilitation are by undertaking a more intensive, long term programme such as that offered at Moana House. You are willing to undertake such programmes and prepared for the work you must put into them. You expressed frustration at the style of programmes available in prison. Imposing a sentence of seven years without eligibility for parole will delay the commencement of rehabilitation programmes, which may create adverse consequences for the community in the longer term.

[45] Overall I regard yours as a clear and convincing case for departure from the three strikes regime.

**No parole order**

[46] I have concluded that given the circumstances of the offence and your personal circumstances it would be manifestly unjust to order that you serve the sentence of

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32 *R v Campbell*, above n 29.
33 *R v Waitokia*, above n 43, at [22].

seven years' imprisonment without parole. Section 86D(5) of the Sentencing Act requires me to give written reasons for not making that order. My reasons follow.

[47] Your whānau life was chaotic from the start and led to you being uplifted into state care when only four years of age. Predictably, the sense of abandonment when you were sent to Auckland would have been acute. You felt as though your family had given up on you. From early childhood you wished you hadn't been born.

[48] You were exposed to abuse while in state care and you learned from a young age to regard violence as normal behaviour. You were primed in life to do the bidding of your gang superiors.

[49] Two main themes seem to have characterised your life experience to this point:

(a) what the s 27 cultural report writers describe as "the multiple eviscerating emotional, physical, mental, sexual, and psychological lacerations visited upon [your] spirit as a child and as a teenager"; and

(b) intense exposure to gang life. Unsurprisingly your abandonment and dislocation from your biological whānau and your transience meant you have not built social bonds. You have become institutionalised and your underlying addictions have not been treated.

[50] The re-entry into the community and re-unification with your direct whānau can be contemplated if you undertake the comprehensive residential treatment programme that has been recommended for you to unwind your addictions and identify and treat your many psychological and emotional injuries.

[51] As you yourself have observed, rehabilitation — or the rehabilitation you have experienced — has involved sitting in a room dormant for years before doing a few programmes. Dr Grigor, who completed the psychiatric assessment in 2014 was impressed with your insight and intellect. Although you met the criteria for antisocial personality disorder at the time, Dr Grigor believed your prognosis was positive. The Department of Corrections report assesses you as having a high likelihood of

reoffending and posing a high risk of harm to others but it also states that you need to undertake rehabilitation and the possibility of being granted parole would encourage and incentivise you to do that. Your rehabilitative potential is real. It is in the broader community interest that you should succeed. For these reasons I decline to order that you serve the sentence without parole.

**Sentence**

[52] Mr Allen please stand.

[53] I sentence you to seven years' imprisonment. I decline to order that you serve that sentence without parole.

[54] Your unpaid fines are remitted in full.[34] You have a current community work sentence with 139.5 hours outstanding. That sentence is cancelled. I am advised the charge for breach of community work has been withdrawn.

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Karen Clark J

[34] An unpaid fines report records an unpaid fines balance of $1,915.78.

## ATTACHMENT

*R v Rakuraku*[35]

The appellant faced a murder charge as well as a score of other violent offending charges. Williams J noted the high degree of callousness present in the offending. There the factors identified in the s 27 report justified a one year discount on a minimum period of 18 years' imprisonment (5.5 per cent). The report identified a broken home, systemic poverty, endemic violence and a suggestion of post-traumatic stress disorder and brain injury. Williams J observed:

> [58] …Your anger and aggression is partly a factor of your personality and you made free choices in that regard. But it is also partly a response to the drivers I've discussed that aren't of your making at all; to the way the world responds generally to Māori boys and men from poor backgrounds. We must be honest with ourselves about that. So it comes as no surprise to me that you sought security in the brutalised and traumatised company of those who share your experience and history – the Mongrel Mob. That shared experience has a terrible magnifying effect when it gathers in one place. To deny that as a contributing factor would be to deny that race and history have any part to play in Māori criminality generally today, and therefore in your own criminality.

*Rudolph v R*:[36]

The appellant faced one charge of aggravated robbery and dishonestly using a document. The High Court Judge had applied a discount of 10 per cent for the appellant's "deprived social background, limited expressions of remorse and efforts at rehabilitation".[37] The Judge also noted that larger discounts for deprivation "tend to rely on identifying linkages between personal circumstances and the offending" but in that case, the nexus between the deprived background and the offending was unclear. On appeal to the Court of Appeal accepted the discounts were appropriately applied as there was "an obvious inference" that the appellant's unstable background led her to live "on the margins of society and become involved in the type of offending which has occurred here".[38]

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35 *R v Rakuraku* [2014] NZHC 3270.
36 *Rudolph v R* [2019] NZCA 451.
37 *R v Rudolph* [2019] NZHC 1050 at [45].
38 *Rudolph v R*, above n 36, at [33].

*R v Sanders*:[39]

Mr Sanders faced one charge of wounding with intent to cause grievous bodily harm and assault with intent to injure. He faced a maximum penalty of 14 years' imprisonment. In that case the s 27 report recorded an upbringing in a "highly dysfunctional environment", isolated from the pro-social influences of whanau, hapu and iwi.[40] There was little evidence that Mr Sanders had insight into, or remorse over, his actions. The Judge found the offending was serious and was "at the higher end of the scale". Mr Sanders' criminal history recorded increasing escalation in severity, despite strike warnings. Were it not for the three strikes regime, the Judge would have imposed a sentence of seven years' imprisonment. A 14 year sentence was disproportionate and ineligibility for parole would dissuade Mr Sanders from engaging in rehabilitative steps to address his behaviour.[41] The Judge also noted the disparity in sentencing response with Mr Sanders' co-offender, who was sentenced to five years' imprisonment. Overall the Judge concluded that the parole ineligibility was manifestly unjust in the circumstances, but ordered a 50 per cent minimum period of imprisonment to ensure consistency with other cases.[42]

*R v Waitokia*:[43]

The 26 year old offender faced one charge of wounding with intent to injure. His other strike warning offences were for wounding with intent to injure and sexual violation by unlawful sexual connection. The offending was "in the mid range" of seriousness for that offence. Collins J held that, if not for the three strikes regime, an end sentence of two years, three months' imprisonment would have been imposed. He acknowledged that the sentence would be "much harsher" than that otherwise imposed but that was invariably the case for a third strike offence. While the offender was young, that factor bore less significance in the context of a seven year sentence (in contrast to a life sentence). Mr Waitokia was assessed at a high risk of reoffending and displayed a lack of remorse and insight into his behaviour and continued to resort to violence while in custody. Overall the Judge was not convinced it was a clear case for departure from the effects of the regime.

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39 *R v Sanders* [2019] NZHC 164.
40 At [13].
41 At [25], citing *R v Campbell* [2016] NZHC 2817.
42 At [30].
43 *R v Waitokia* [2018] NZHC 2146.