

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

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

**CRI-2019-004-1413  
[2020] NZHC 1893**

**THE QUEEN**

v

**BENNY PENI FATU  
DON IOSEFA EKEROMA**

Hearing: 31 July 2020

Appearances: B D Tantrum and S S McMullan for the Crown  
G J Newell and DMM Dickinson for Mr Fatu  
L B Cordwell and E I Haronga for Mr Ekeroma

Date of sentence: 31 July 2020

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**SENTENCING NOTES OF JAGOSE J**

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*Solicitors/Counsel:*

Meredith Connell, Crown Solicitor, Auckland  
G J Newell Barrister, Auckland  
DMM Dickinson Barrister, Auckland  
L B Cordwell Barrister, Auckland  
E I Haronga Barrister, Auckland

[1] Mr Fatu, Mr Ekeroma, as you know, I now am to sentence you on your convictions for manslaughter,<sup>1</sup> and aggravated robbery.<sup>2</sup> In sentencing you, I must accept as proven all facts that are essential to your pleaded or proven guilt.<sup>3</sup>

[2] I have considered what counsel have had to say, both for you and for the Crown. They recommend a starting point for your imprisonment of 10 to 12 years, with a variety of uplifts and discounts, credits to reflect factors personal to each of you.

[3] I am not bound by their recommendations. I must satisfy myself of the appropriate sentence for the gravity – the seriousness – of your offending, including your culpability – your responsibility – for it.

### **Background**

[4] I need to cover off the background.

[5] On 11 December 2018, after making arrangements earlier in the day to do so, you both went to Shannon Shelby Baker's home in Auckland's Sandringham to obtain money and methamphetamine. You each entered into Mr Baker's home, intending to commit an imprisonable offence. You both intentionally attacked Mr Baker. He was beaten and incapacitated in his own home late at night. Your assault was a substantial and operative cause of Mr Baker's death. You robbed him of methamphetamine, a wallet containing \$600 in cash, and car keys. Mr Baker died of asphyxiation after you left him face-down on a bed "hog-tied", with hands and feet tied together behind his back, and a pair of shorts likely tied over his nose and mouth.

[6] As trial judge, it is my task to flesh out the factual particulars of the charges in a manner not inconsistent with the jury's verdict.<sup>4</sup> Implicit in that verdict is your intentional assault, robbery, binding, gagging, and abandonment of Mr Baker; you

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<sup>1</sup> Crimes Act 1961, s 177. Maximum penalty life imprisonment.

<sup>2</sup> Section 235(b). Maximum penalty 14 years' imprisonment.

<sup>3</sup> Sentencing Act 2002, s 24(1)(b).

<sup>4</sup> *Edwardson v R* [2017] NZCA 618 at [105]–[107].

both are equally responsible for Mr Baker's death, having pleaded guilty to the joint enterprise aggravated robbery.<sup>5</sup>

[7] The assault took place in the privacy of Mr Baker's home, without any witnesses. The nature of the assault, and the immediate circumstances in which it took place, are not matters on which I can make clear factual findings. I cannot be sure, for instance, who punched or kicked Mr Baker, the level of violence employed by each of you, whether weapons were used and specifically by whom, or your awareness of the seriousness of your actions.

[8] We do know this: after your attack, Mr Baker was left hog-tied in a prone position on a bed with soft bedding, and shorts tied with a shoe-lace most likely placed around his nose and mouth. A portion of those shorts became saturated with fluid. Dr Kesha, the pathologist, advised if this portion had been covering Mr Baker's mouth, it would have made his breathing more difficult; if inside his mouth, it would have contributed to his asphyxiation.

[9] Your assault of Mr Baker gave him 26 abrasions and eight contusions – to his head, chest, back, arms, legs and hand – from your assault of him. His facial injuries were consistent with multiple significant blunt force impacts. His nose and left eye-socket were fractured; the impact to his eye-socket also ruptured his eyeball, permanently blinding him in that eye. Dr Kesha described the force involved in Mr Baker's head trauma as "quite significant". The bruising on his ankles and wrists was consistent with his forceful restraint by being bound.

### **Victim impact statements**

[10] I acknowledge Mr Baker's family who are with us today, and those who cannot be present. I extend the Court's sympathy for your loss, for which I hope today provides a degree of closure, however small. His friend at trial described Mr Baker earlier on the evening of his death as being "good" and "cheery", "in a good fine mood". That seems a better way to remember him.

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<sup>5</sup> Crimes Act 1961, s 66(2).

[11] Mr Fatu, Mr Ekeroma, you have heard Mr Baker's stepmother, Margaret Baker's words this morning spoken of her family and her family's loss to your senseless and violent attack. Her words explained that the family have only "memories whereas you live on, your families can still see you". And Mr Baker's older brother, Robin, explained in his words how much he misses his brother, and "the opportunity to hug him and say 'Goodbye'."

[12] In taking Mr Baker's life, you also have taken irrecoverably from Mr Baker's family.

### **Personal circumstances**

—*Benny Peni Fatu*

[13] Mr Fatu, I turn to your personal circumstances.

[14] The Department of Corrections' pre-sentence report assesses you as being of medium risk of re-offending, with a high risk of harm to others. That is attributed to your anti-social associations, drug use, poor problem-solving skills, and poor impulse control. You continue to deny knowing what was intended at Mr Baker's home, and say you did not assault him, or tie him up.

[15] You are your Samoan parents' youngest child, born here in 1990, but moved with the family to California in 1992, where your parents were undocumented workers and ultimately you attended university on a sports scholarship, studying business administration. You earlier had returned to New Zealand to attend school in your childhood, where you lived with your aunt and uncle, and later moved to Brisbane in Australia in 2009, living with your older brother, before being deported to New Zealand in 2015, living with a cousin. Your initial construction industry work here ceased after an epileptic episode, and you have had irregular employment since.

[16] A drugs screen at the time of your arrest showed a high level of methamphetamine use, which you acknowledge to be a key driver of your offending.

—Don Josefa Ekeroma

[17] For you, Mr Ekeroma, the report-writer says your offending is a substantial escalation from your prior history. For similar reasons of pro-criminal associations, offending-related attitudes, and drug use, you also are assessed as being a high risk of harm to others. You also denied assaulting Mr Baker, saying your intention was only “to scare him so we could extort more money off him”.

[18] You were born in New Zealand to Samoan parents, but lived with your maternal grandmother in a strict household. Rebellious against those strictures brought you into youthful contact with the law. But you found your way out of that to become a self-employed builder until you say Mr Fatu introduced you to methamphetamine, which made your continued work unsustainable. Your use of methamphetamine is said to be high risk.

[19] You appear to have been a model prisoner since being remanded in custody earlier this year, being employed as the unit cleaner and showing “a good level of compliance and behaviour”. You have obtained entry to specialist programmes to enhance your drug rehabilitation.

### **Approach to sentencing**

[20] Mr Fatu, Mr Ekeroma, I approach your sentencing in two steps.<sup>6</sup> With reference to relevant cases, and aggravating and mitigating features of the offending, I first decide the starting point your offending attracts. As the aggravated robbery was a joint enterprise, and the admissible evidence does not point to either one of you being more culpable than the other in relation to Mr Baker’s manslaughter, step one will establish a common starting point. Then I adjust that up or down to take into account your personal circumstances, producing an individual sentence.<sup>7</sup>

[21] I must have regard for the statutory purposes and principles of sentencing.<sup>8</sup> I must hold you accountable for your offending and for the harm you have caused.<sup>9</sup>

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<sup>6</sup> *Moses v R* [2020] NZCA 296 at [46].

<sup>7</sup> *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [8].

<sup>8</sup> Sentencing Act 2002, ss 7 and 8.

<sup>9</sup> Section 7(1)(a).

Your sentence should be sufficient to denounce your conduct and protect the community.<sup>10</sup> I must consider the gravity and seriousness of your offending, and take into account its effect on the victim.<sup>11</sup> The sentence is to be the “least restrictive” appropriate in the circumstances, consistent with appropriate sentencing levels.<sup>12</sup> However, I am required to impose the maximum penalty described for the offence if the offending is within the most serious of cases.<sup>13</sup> Similarly, a sentence close to the maximum is required if the offending is “near to the most serious of cases”.<sup>14</sup> The purposes and principles of sentencings have no ranking.<sup>15</sup>

### **Starting point**

[22] Your cases are:<sup>16</sup>

... a reminder that the maximum sentence for manslaughter is life imprisonment and that random acts of senseless and extreme violence resulting in death are likely to result in stern sentences in appropriate cases.

[23] Due to the connected nature of your aggravated robbery and manslaughter of Mr Baker, I will impose your sentences concurrently, means you will serve them together.<sup>17</sup> I take your manslaughter convictions as the lead charge. Your offending reflects a problem of serious and mindless violence which is a matter of widespread and continuing concern within this community.<sup>18</sup>

[24] There is, as you have heard your lawyers say, no tariff decision in relation to manslaughter.<sup>19</sup> That is because the circumstances in which manslaughter can be committed are so variable:<sup>20</sup> they can be close to accidental, or they can fall just short of murder.<sup>21</sup> Manslaughter is unique: unlike most offences, here, its consequence is

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<sup>10</sup> Sections 7(1)(e) and (g).

<sup>11</sup> Sections 8(a) and (b).

<sup>12</sup> Section 8(g).

<sup>13</sup> Section 8(c); and *R v Taueki*, above n 7, at [24].

<sup>14</sup> Section 8(d); and *R v Taueki*, above n 7, at [24].

<sup>15</sup> *Moses v R*, above n 6, at [4], citing *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [37].

<sup>16</sup> *Waipuka v R* [2013] NZCA 661 at [36].

<sup>17</sup> Sentencing Act 2002, s 84(2).

<sup>18</sup> *R v Taueki*, above n 7, at [26].

<sup>19</sup> *R v Leuta* [2002] 1 NZLR 215 (CA) at [59].

<sup>20</sup> *R v Jamieson* [2009] NZCA 555 at [33] citing *R v Leuta*, above n 19, at [56].

<sup>21</sup> *R v Jefferies-Smith* [2019] NZHC 2067 at [65], citing *R v Dodd* [2018] NZHC 3432 and *R v Wickliffe* [1987] 1 NZLR 55 (CA).

unintended, and may be caused in unusual circumstances.<sup>22</sup> Thus other manslaughter sentencing are of limited assistance. But they range from starting points of life imprisonment, for prolonged mistreatment of a child with fatal consequences,<sup>23</sup> 20 years' imprisonment, in circumstances in which the deceased was gagged and hog-tied before being assaulted in a manner described as "an execution",<sup>24</sup> to less than five years' imprisonment for a death arising in response to long-term family violence.<sup>25</sup>

[25] Mr Baker's death here arose in circumstances of serious violence, where serious injury was a foreseeable consequence, making a Court of Appeal guideline for serious violence offences useful.<sup>26</sup> But, because applying the guideline beyond its serious violence target can be awkward, analysis of comparable cases is often the better guide.<sup>27</sup> That is the "counsel of perfection"<sup>28</sup> in sentencing for manslaughter offending founded on an initial act of grievous bodily harm.<sup>29</sup>

[26] The guideline establishes three bands for setting a starting point.<sup>30</sup> The number of "aggravating features" present in your offending will determine which sentencing band applies.<sup>31</sup> As sentencing Judge, I need to identify those factors, and to evaluate the seriousness of each particular factor.<sup>32</sup>

[27] I first assess your culpability by reference to, among other things, comparable manslaughter sentencing. I then consider the matter in terms of the guideline, making an appropriate upward adjustment for the fact the consequence of the serious violence here has not just been serious injury but death. I use both approaches, each providing a check on the other.<sup>33</sup>

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<sup>22</sup> *R v Jamieson*, above n 20, at [33].

<sup>23</sup> *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629.

<sup>24</sup> *Bracken v R* [2016] NZCA 79 at [2].

<sup>25</sup> *Woods v R* [2011] NZCA 573.

<sup>26</sup> *R v Tai* [2010] NZCA 598 at [11], citing *R v Jamieson*, above n 20, and *R v Taueki*, above n 7, endorsed in *Pahau v R* [2011] NZCA 147 at [96].

<sup>27</sup> *Murray v R* [2013] NZCA 177 at [27].

<sup>28</sup> *R v Tai*, above n 26 at [12].

<sup>29</sup> *Everett v R* [2019] NZCA 68 at [27], citing *Ioata v R* [2013] NZCA 235. Referring to the "counsel of perfection" approach in *R v Tai*, above n 26 at [12].

<sup>30</sup> *R v Taueki*, above n 7, at [34].

<sup>31</sup> At [35].

<sup>32</sup> At [30].

<sup>33</sup> *R v Tai*, above n 26 at [12].

—comparable manslaughter sentences

[28] Starting points of 10 to 15 years' imprisonment have been adopted in manslaughter cases involving serious violence.<sup>34</sup> With aggravating features of repetitive violence or home invasion, the Court of Appeal has said “a starting point of ten years is unlikely to be sufficient to reflect the gravity of the offending”.<sup>35</sup> Allowing only for the inadvertence of Mr Baker's death as distinguishing the circumstances from sentencing for murder, I would adopt a starting point of 12 years' imprisonment on this basis.

—the guideline approach

[29] I turn to consider the guideline approach. Under that approach, I identify at least ten aggravating factors in your offending.<sup>36</sup> Of moderate aggravation is (1) the premeditated nature of the intended robbery,<sup>37</sup> by which (2) the two of you entered Mr Baker's home.<sup>38</sup> Of much higher aggravation is (3) the extreme violence shown to Mr Baker, resulting in (4) his serious injury.<sup>39</sup> He was (5) attacked to the head – (6) if not with weapons, then with fists and feet as weapons<sup>40</sup> – and (7) in his home.<sup>41</sup> And the attack was (8) to facilitate your admitted crime, of aggravated robbery. Last, the two of you overwhelmed (9) the much smaller, sick, at least partially sedated, and thus vulnerable Mr Baker in his bedroom. His restraint and abandonment was (10) particularly cruel, any attempt to escape likely contributing to his asphyxiation.

[30] Ten moderate and serious aggravating factors present in your offending puts you well inside the guidelines' third band of nine to 14 years' imprisonment and, because that band relates only to grievous bodily harm, an uplift is necessary to take account of Mr Baker's death. Again, a 12-year starting point is easily within reach.

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<sup>34</sup> *Griffin v R* [2019] NZCA 422; *R v Neketai* [2016] NZCA 174 at [6]; *Waipuka v R*, above n 16, at [35].

<sup>35</sup> *R v Rapira* [2003] 3 NZLR 794 (CA) at [132].

<sup>36</sup> Sentencing Act 2002, s 9.

<sup>37</sup> *R v Mako* [2000] 2 NZLR 170 (CA) at [36].

<sup>38</sup> *Hoko v R* [2017] NZCA 484 at [13].

<sup>39</sup> *Waipuka v R*, above n 16, at [33].

<sup>40</sup> *R v Jamieson*, above n 20, at [35].

<sup>41</sup> *Tiori v R* [2011] NZCA 355 at [15].

—*uplift for aggravated robbery*

[31] I considered applying, but haven't applied, an uplift for your aggravated robbery convictions. They are so indistinguishable from your manslaughter convictions as to risk double-counting, or if not to require their deduction again when adjusting for totality.

[32] I therefore adopt a starting point of 12 years' imprisonment cumulatively on both convictions for each of you.

### **Adjustments for personal circumstances**

[33] I now turn to you individually, to adjust the starting point up or down, taking into account your circumstances, together with a discount for your guilty pleas on the aggravated robbery charge which will be reflected as a percentage of the adjusted starting point.<sup>42</sup>

[34] I say at the outset I will not be increasing your sentences above the 12-year starting point I have identified. You both have significant and relevant criminal histories, with worrying resonance for your stand-over extortion attempt on Mr Baker. They are relatively historic, and any aggravation counterbalanced by the subsequent period of quiet. But your recidivism similarly cancels out any prospect of discounts for previous good character.

[35] You both say your offending sprang from your methamphetamine use, which was of recent origin or renewal. There is no clinical evidence you were addicted.<sup>43</sup> Thus your use was recreational, and that comes perilously close to constituting an aggravating factor.<sup>44</sup> However, I am not asked to treat it in that way, and do not.

[36] I will assess any discount for mitigating factors in the round, rather than artificially aggregating them from their individual and isolated determination.

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<sup>42</sup> *Moses v R*, above n 6, at [46].

<sup>43</sup> *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [148].

<sup>44</sup> *R v Campbell* CA134/80, 4 November 1980; *Dubovksy v R* CA278/00, 16 November 2000; *Gurnick v R* CA287/02, 23 October 2002.

[37] I have already summarised your pre-sentence reports. You both have asked I also consider reports of your respective background's relevance to your offending or sentence.<sup>45</sup> If sufficiently bearing on your individual culpability for your offending, your background may justify its own discount.<sup>46</sup>

—*Benny Peni Fatu*

[38] Mr Fatu, the report identifies you to be culturally dislocated and from a dysfunctional family, in which you were exposed to significant violence from your extended family, to the point of causing you to suffer from epilepsy. That childhood trauma is said to have resounded in two sentences of imprisonment for violent offending (in Australia), also connected to methamphetamine use. Your subsequent deportation to New Zealand caused you further isolation, from which you developed your drug-defined friendship with Mr Ekeroma through common building work. You relapsed into methamphetamine use on chance encounter with the drug here.

[39] I cannot identify anything in that report sufficiently connected to your offending or its consequences to justify any discount. Your own insight is your offending is due to your drugs use. Your admission of significant parts of the Crown case reduced the length and cost of trial.<sup>47</sup> I am hesitant to put too much weight on your letter to me as remorse – if rather an expression of sadness for your own position, as illustrated by your tearful appearance during your police interview – but I would allow some discount for your independent efforts to obtain insight into your drug use, and for your guilty plea to aggravated robbery at a reasonably early stage after being charged. I do not accept that should be taken as a measure of your acceptance of culpability for Mr Baker's death; had that been the case, you would not have been committed to trial at all. Notably, you continued to dispute your role in Mr Baker's death, attributing more blame to Mr Ekeroma.

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<sup>45</sup> Sentencing Act 2002, s 27.

<sup>46</sup> *Zhang v R*, above n 43, at [155] and [162].

<sup>47</sup> Sentencing Act 2002, s 9(2)(fa). Although trial was scheduled for four weeks and concluded within nine days (including extended jury deliberation), the admissions may not have accounted for much more than a day or two's evidence; the Crown says "fewer than five sitting days".

[40] In the round, I will apply a 12 per cent discount for your personal circumstances. That comes to an end sentence for you, Mr Fatu, of ten years and six months' imprisonment.

—*Don Iosefa Ekeroma*

[41] For you, Mr Ekeroma, the report-writer notes your history of familial rejection and your rebellious response to those traumas, including gang associations, imprisonment, and drug use. But she notes also the sea change in your conduct and behaviour after being released from custody in 2009, to qualify as a builder subcontracted to significant construction projects. That was until you came into contact with methamphetamine, which took you from a stable existence with a good job to offending and causing Mr Baker's death all in six months.

[42] Again, I cannot find anything in that report as justifying a discount. Your admissions of significant parts of the Crown case also reduced the length and cost of trial. While I recognise you unsuccessfully sought to participate in restorative justice with Mr Baker's family, more telling of your remorse is your offer at a relatively early stage to plead guilty to Mr Baker's manslaughter. And I have your letter to me, accepting responsibility for those consequences. I also am bound to take account of your nearly one year on EM bail,<sup>48</sup> on 24-hour curfew and with only two minor breaches.

[43] In the round, again, I will allow a 16 per cent discount for your personal circumstances. That comes to an end sentence for you, Mr Ekeroma, of ten years' imprisonment.

### **Minimum period of imprisonment**

[44] Mr Fatu, Mr Ekeroma, your respective offending is sufficiently serious that serving the normal minimum period of one-third of the sentence will be insufficient to hold either of you to account for the harm done to Mr Baker and his family, or to

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<sup>48</sup> Section 9(2)(h).

protect the community from you.<sup>49</sup> I therefore will impose a minimum period of imprisonment upon you both.

[45] I do this because of the specific aggravating features present in your offending, which render the normal parole period clearly inadequate for the purposes of punishment, denunciation, deterrence and protection of the community. To be released after one-third of your sentence, or less than four years, would be an inadequate response to your violent offending causing Mr Baker's death.

[46] A minimum period of imprisonment is required to confer a degree of reality on the sentence.<sup>50</sup> The risk you presented to the community, reflected by the aggravating factors of your offending, means your personal mitigating factors are insufficient to avoid that minimum period.<sup>51</sup>

[47] The minimum period of imprisonment for you each will be 40 per cent of your end sentence. That means for you, Mr Fatu, you will not be eligible for parole until you have served four years and three months' imprisonment; and you, Mr Ekeroma, will not be eligible for parole until you have served four years' imprisonment.

## **Result**

[48] Please would you both stand?

[49] Mr Fatu, on your conviction for manslaughter and aggravated robbery, I sentence you to ten years and six months' imprisonment, with a minimum period of imprisonment of four years and three months.

[50] Mr Ekeroma, on your conviction for manslaughter and aggravated robbery, I sentence you to ten years' imprisonment, with a minimum period of imprisonment of four years.

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<sup>49</sup> Section 86(2)(a) and (d); *R v Brown* [2002] 3 NZLR 670 (CA) at [35].

<sup>50</sup> *R v Gordon* [2009] NZCA 145 at [15].

<sup>51</sup> *Shaw v R* [2016] NZCA 110 [24]; and *Fleming v R* [2011] NZCA 646 at [22].

[51] You may stand down.

—Jagose J