

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

**I TE KŌTI MATUA O AOTEAROA
KIRIKIROA ROHE**

**CRI-2019-019-5053
[2020] NZHC 3259**

THE QUEEN

v

MARK RONALD GARSON

Hearing: 9 December 2020

Appearances: J Hamilton for the Crown
C Bean and A Bean for the Defendant

Sentence: 9 December 2020

SENTENCING NOTES OF GORDON J

Solicitors: Crown Solicitor, Hamilton
Bean Law, Hamilton

[1] Mr Garson you appear today for sentence having pleaded guilty to the murder¹ of Sean McKinnon and threatening to kill² Mr McKinnon's fiancée, Bianca Buckley. Your counsel accepts that the Court must impose a sentence of life imprisonment on the charge of murder. What I am required to decide today is how long you must remain in prison before you are eligible to be released on parole.

Background

[2] I will start with the facts of your offending. They are contained in an agreed summary of facts which you accepted when you entered your guilty pleas.

[3] Ms Buckley, a Canadian citizen, and Mr McKinnon, an Australian citizen, were visitors to Aotearoa New Zealand. They met each other in Canada and Mr McKinnon had flown from Australia to spend a couple of weeks with Ms Buckley who was completing a midwifery graduate programme in this country. They had plans for their future together.

[4] Late in the day on 15 August 2019, the two of them parked their rental campervan at Te Toto Gorge on the west coast, south of Raglan. They settled there for the night and went to sleep. But for your acts, it is most unlikely that this Court would know of the two of them.

[5] Two days earlier, on 13 August 2019, you and a friend, Roderick Finlayson, had gone to a gun shop in Hamilton where Mr Finlayson purchased a shotgun and ammunition for you. You paid for the firearm and the ammunition. This purchase was the culmination of discussions which had started in late March 2019 when you had contacted Mr Finlayson and asked him to purchase a firearm for you. You did not have a firearms licence and could not legally buy a firearm yourself. These negotiations continued over a number of months and were finalised on 12 August 2019. You had told Mr Finlayson you wanted "strong deadly ammo". After completing the transaction at the gun shop you returned Mr Finlayson to his home and left, taking the firearm and ammunition with you.

¹ Crimes Act 1961, ss 167, 168. Maximum penalty (s 172): life imprisonment.

² Crimes Act 1961, s 306. Maximum penalty: seven years' imprisonment.

[6] Over the following two days you repeatedly communicated with another friend. You told him you wanted to die by suicide and you asked him to shoot you. You explained to him that the recoil from the shotgun that you now had in your possession prevented you from shooting yourself and you required his assistance in consequence. He was reluctant to assist, but did travel to Raglan with you. You collected him at about 5 pm on 15 August 2019. Together you drove around Hamilton. During this time you purchased methamphetamine. You departed for Raglan at about 11 pm. You were driving and you were smoking methamphetamine as you drove. The journey took about half an hour. You first drove to Manu Bay and then to the Te Toto Gorge lookout.

[7] When you arrived at Te Toto Gorge, you saw the campervan in which Ms Buckley and Mr McKinnon were asleep. Your friend convinced you to drive further along the road away from the campervan. You did so and after stopping your car, you and your friend left the car. You walked into the bush where you smoked cannabis and more methamphetamine. At some point you gave your friend the firearm and told him to shoot you. He refused to do so and put down the firearm. He made an excuse to go back to the car. He got into it and drove away leaving you on the roadside.

[8] In the early hours of 16 August 2019 you approached the rental campervan. You woke Ms Buckley and Mr McKinnon by knocking repeatedly on the outside of the campervan. You initially knocked quietly but then your knocking became loud, assertive and persistent. Mr McKinnon spoke to you through a window. You told him you had been left by an associate and needed a ride. Mr McKinnon spoke to you briefly and offered you the use of a mobile phone to call for assistance. Despite that offer you became aggressive when you realised that Mr McKinnon was not going to offer you a ride. You demanded the keys to the campervan. In response to your threatening demeanour, Mr McKinnon assured you that you could have the keys and he began looking for them.

[9] As he was doing so, you smashed a side window of the campervan and then fired a shot into it. It hit Mr McKinnon in the mid-right side of his abdomen.

[10] Ms Buckley had been on the bed in the back of the campervan and had attempted to hide under the blankets when you first became aggressive. After this first shot, Ms Buckley moved to a position behind the campervan door where she felt safer and Mr McKinnon stood in front of her, protecting her. Mr McKinnon told you he had been shot. But despite suffering a severe injury and in obvious pain, he assured you he would find the keys and he continued his search.

[11] While he was attempting to comply with your demands you fired a second shot through the campervan window, this time hitting Mr McKinnon in the head. He slumped to the floor and appeared lifeless.

[12] You then turned your attention to Ms Buckley. You demanded that she give you the keys. She said she did not know where they were. She opened the door for you and tried to move outside. You demanded that she get back into the campervan and find the keys. You pointed the firearm at her and threatened to shoot her. Ms Buckley managed to find the keys, which were in the ignition of the van, and she told you she had found them. You pointed the shotgun at Ms Buckley again and demanded her mobile phone, telling her you would shoot her if she did not hand it over. She pleaded with you not to kill her.

[13] Ms Buckley was able to grab some items of clothing from the campervan. Believing Mr McKinnon to be dead, she asked you if she could kiss him goodbye. You refused, saying you would take care of Mr McKinnon. You drove away in the campervan with Mr McKinnon, likely deceased by this time, still inside.

[14] Ms Buckley ran and hid in the bushes until she could no longer hear the campervan. She was without her phone and was not wearing any shoes. She ran approximately 2.6 kilometres in the dark looking for help, all the time believing that you would come back and shoot her. She eventually came across a property and woke the occupants who notified the police.

[15] You drove the campervan to Puke Road, Gordonton, where you abandoned it. The police located Mr McKinnon's body inside the campervan shortly after 8 am on 16 August 2019. You were seen in the area throughout the day behaving erratically.

Late in the afternoon of the same day you arrived at your friend's house. That was where the police subsequently located you.

[16] Mr McKinnon died from shotgun wounds to his head and torso. Both were potentially fatal. It was clear he was attempting to protect his head with his hand when you fired the second shot. The firearm used to shoot Mr McKinnon has not been located.

Victim impact statements

[17] I have received seven victim impact statements: from Ms Buckley; Mr McKinnon's three sisters and brother; and two close friends whom I permitted to be treated as members of the immediate family under the Victims' Rights Act 2002.

[18] It is difficult to express in a few words the magnitude of the impact of the loss of Sean on Ms Buckley and on the members of his family and close friends.

[19] As I read Ms Buckley's impact statement, and listened to her reading it this morning, I was struck by the bond between the two of them. She had found the person she was going to be with for the rest of her life.

[20] The statements of Mr McKinnon's siblings convey how incredibly close they all were as a family. He was a dearly loved brother and son. His siblings describe Sean as a kind, generous, loving and compassionate man who loved life and who would have helped anyone who needed his assistance.

[21] Although the statements are in measured terms, they give some insight into the degree of harm and grief your offending has caused. His loss impacts every moment and every aspect of their lives. Drawing on their inner reserves, Ms Buckley and Sean's family members have somehow managed to keep going without him. But their lives and their mother's life will never be the same. It will be many years, if ever, before Ms Buckley and the family are able to come to terms with the grief they are all suffering as a result of Sean's death.

[22] The statements of all the victims make desperately sad reading and it is impossible not to be moved by both the sincerity and love implicit in their tributes and the unfathomable sense of loss Sean's death has brought to so many.

Personal circumstances

[23] I now turn to consider your personal circumstances.

Pre-sentence report

[24] You are 24 years old. The pre-sentence report writer notes your extensive history of prior offending over a relatively short period. You have 21 prior convictions, nearly half for theft, several for driving, two for violence, two for failing to comply with Court orders and one for drug offending. You are assessed at medium risk of reoffending but have a high risk of causing harm to others.

[25] On the night of the offending, you say you were hallucinating and hearing voices after consuming methamphetamine and cannabis. You were still hallucinating when you were taken into custody. The report notes that you placed emphasis on your mental health in describing the offending but that you acknowledged the psychiatric assessment that found you understood the consequences of your actions at the time of the offending. The report writer states that you have been diagnosed with post-traumatic stress disorder. However, I note that that is not mentioned by Dr Dean whose report I will refer to shortly.

[26] You report your closeness to your grandmother as a child and your struggle to deal with her death in your teens. You say that you started using methamphetamine about this time and your mother subsequently evicted you from her house on account of your drug use. You also assaulted your sister and a protection order was taken out against you. You have had no permanent place to live since then. I acknowledge your mother's distress at what has happened and her willingness to support your rehabilitation.

[27] Gang connections are referred to in the report but are inconclusive; you deny you are a gang member and allege that you have been subjected to serious assault and

injury at the hands of gang members. The report writer notes your association with those who support and participate in your offending, including the acquisition of the firearm and drug use. You appear to consider that these were all matters which left you feeling overwhelmed and were the basis on which you attempted suicide, you say on more than one occasion. You told your mother several times that you were planning to commit suicide but she did not think you were serious.

[28] The report records your remorse for the victims of the offending. I also have the four letters you have written to Ms Buckley, the McKinnon family, to the Raglan community and to me, which I have read. I acknowledge your expressions of remorse for the harm you have caused.

Section 27 cultural report

[29] I have reviewed a comprehensive cultural report, dated 3 December 2020, prepared by Shelley Turner and submitted to the Court under s 27 of the Sentencing Act 2002 (the Act). Ms Turner's report is based primarily on information provided by you in an interview. She says much of what you told her was confirmed by your mother during a phone call.

[30] She identified eight features of your life and background which she says are connected to your offending. First, you are of Maori descent but are disconnected from your cultural traditions. Second, the absence of your father and abusive relationship with, and resentment towards, him reflects whānau dysfunction. Third, your education was limited by your early departure from the school system without formal qualifications. Fourth, you carry the trauma of the loss, at a sensitive age, of your grandmother, with whom you had a close relationship. Fifth, you report connections with a prominent criminal gang, where you were introduced to methamphetamine, though you say you never joined the gang. Sixth, you started consuming drugs from a very young age and Ms Turner says methamphetamine-induced psychosis was a key driver of your offending. Sixth, suicidal thoughts were a significant contributing factor to your offending. And finally, she says, you have untreated mental health issues and possible post-traumatic stress disorder arising from your interactions with the gang with which you reported connections.

[31] However, in relation to the post-traumatic stress disorder, I rely on Dr Dean's report rather than what is contained in the cultural report.

Mental health assessment

[32] Mr Bean, who appears on your behalf, has submitted a report from Dr Dean, a consultant psychiatrist, dated 16 November 2020. Dr Dean details his reviews of you on five occasions since 6 September 2019. He reports that you have responded well to treatment and that your symptoms, including perplexed affect, disorganised thinking, memory loss and visual and auditory hallucinations, have improved significantly over time. He considers your symptoms observed after the offending can be attributed to the effects of methamphetamine withdrawal, owing to your dependence on the drug. Dr Dean's assessment is that a substantial reduction in the risk of further offending is likely if you continue to abstain from methamphetamine use.

[33] I will return to these reports later in these sentencing remarks.

Approach to sentencing

[34] As I have already said, you will be sentenced to life imprisonment. There are no grounds on which I could exercise the manifest injustice exception to that sentence.³ The primary issue I need to decide is what minimum term of imprisonment you should serve. That is the minimum term necessary to hold you accountable for the harm done to the victims and the community by your offending, to denounce the conduct in which you were involved, to deter you and others from committing the same or similar offences, and to protect the community from you.⁴

[35] To be clear, the minimum term is not the number of years you will spend in prison. In other words, you will not necessarily be released at the end of that time. Rather, it is the number of years you will be required to serve before release on parole is even possible. It will be up to the Parole Board, at the end of the minimum term, to decide whether you have been sufficiently rehabilitated and your release is justified.

³ Sentencing Act 2002, s 102(1).

⁴ Sentencing Act 2002, s 103(2).

That will occur only if you are no longer a threat to the community. If you are released, you will be subject to recall to prison at any time for the rest of your life if it is believed you have since become a threat to the community.

[36] The Crown submits that there are four specified circumstances of your offending which engage s 104 of the Act. If the Court finds that any or all of those circumstances apply, then the Court must impose a minimum term of not less than 17 years' imprisonment unless it would be manifestly unjust for that to be done.

[37] In cases where the Crown submits that s 104 is engaged, there are three steps the Court must work through.⁵ First, I must determine a minimum term, taking into account aggravating and mitigating factors of the offending and any such factors personal to you. I will use previous cases as a cross-check. If I settle on a minimum term of 17 years or more, that will be the minimum term. However, if it is less than 17 years, I will consider s 104 of the Act. Under s 104, if any one or more of the specified circumstances listed in that section is present, I am required to impose a minimum term of at least 17 years' imprisonment, unless I am satisfied it would be manifestly unjust to do so.

Minimum term

Submissions

[38] Ms Hamilton, for the Crown, submits your offending is among the most serious of murders and that a minimum term of imprisonment of 18 to 19 years is required. She points to a number of aggravating features:

- (a) actual violence, at a very high level, and the use of a firearm;
- (b) unlawful presence in a dwelling place;
- (c) extent of the harm caused;
- (d) effects on the victims;

⁵ *R v Williams* [2005] 2 NZLR 506 (CA) at [52]-[54]; and *Davis v R* [2019] NZCA 40 at [23]-[27].

- (e) the cruelty and callousness of the killing which occurred as Mr McKinnon was attempting to co-operate and find the keys to the campervan;
- (f) vulnerability of Mr McKinnon and Ms Buckley, who were sleeping. They were woken by you and they were unable to protect themselves from your actions; and
- (g) a degree of premeditation as you approached the campervan with a loaded firearm and then took steps which escalated, leaving Mr McKinnon dead and Ms Buckley in fear of her life. Ms Hamilton describes the killing as a cold-blooded execution.

[39] On the other hand, Mr Bean, on your behalf, says a minimum term of 10 years is appropriate. He points to your guilty plea, absence of premeditation, genuine remorse, mental health issues, suicidal tendencies and the consumption of methamphetamine. Mr Bean submits there was an absence of planning or premeditation and distinguishes your situation from the facts in *R v Winders*.⁶ Mr Bean submits you came across the campervan by chance after you were abandoned by your friend. Instead, he draws parallels to another case, *R v Kingi*.⁷ I will consider both of those cases shortly.

Analysis

[40] I have considered the submissions and reports prepared for today's sentencing. I have also taken into account the victims' views. I have identified the following aggravating factors relevant to your offending:

- (a) actual violence and the use of a firearm;
- (b) unlawful entry into a dwelling place;
- (c) extent of the harm caused;

⁶ *Winders v R* [2018] NZCA 277, [2019] 2 NZLR 305.

⁷ *R v Kingi* [2016] NZHC 139.

- (d) effects on the victims;
- (e) vulnerability of Mr McKinnon (and Ms Buckley); and
- (f) callous nature of your offending.

[41] I do not consider any one of these factors is, alone, determinative in arriving at a minimum term. I will consider them collectively to do so.

[42] You used actual and significant violence against two people who had been sleeping in their campervan when you woke them; they ought to have been safe and secure there. The harm which resulted from your offending, the death of Mr McKinnon, was at the highest level. I do not ignore either the effects on Ms Buckley who continues to live with the consequences of seeing her fiancé die beside her and the real and serious threat to her own life immediately afterwards.

[43] I consider both were vulnerable: they were visitors to this country who had parked their campervan in an isolated rural location when you came upon them. In an unfamiliar place, and assailed by you carrying a firearm in the very early hours of the morning, there was no one close by from whom they could seek assistance.

[44] Your actions showed a high degree of callousness. Mr McKinnon was attempting to comply with your requests for assistance. Despite this, you discharged the first shot without warning. You must have known he was injured, and I consider it very likely you would have been aware he was seriously injured given his reaction and the sounds he made. Notwithstanding his injuries, he continued to co-operate with your demands. You went on to discharge the second shot regardless.

[45] And, after rendering Mr McKinnon unable to respond, you turned your attention to Ms Buckley and used the firearm to threaten her. Her fiancé having just been killed by you, I have no doubt of the real and substantial fear she had for her own life especially as you had shot him while he was attempting to assist you and to comply with your demands.

[46] Your actions were determined. But they were impulsive, not planned or pre-meditated. You had a firearm for a very different purpose and, when you were left by your friend, you acted in the way I have described.

[47] Lastly, on the aggravating features, there is the question of whether your actions constitute an unlawful entry or unlawful presence in a dwelling place. The term dwelling place is not defined in the Act.⁸ The Court of Appeal has held that whether or not there was entry into a “dwellinghouse”⁹ depends on all the surrounding circumstances.¹⁰ I have some hesitation on this issue because the Court of Appeal has also found that a serious crime committed against victims sleeping in a campervan in a public carpark had an *element* of home invasion.¹¹ That determination appears to me to be equivocal on whether the campervan itself was a dwelling place for the purposes of the Act (the defendant in that case having clearly entered into the vehicle in the course of the offending).

[48] On balance, however, I am prepared to accept the campervan was a dwelling place. It was where the victims slept and, although it was not a permanent home for them and the campervan moved around from place to place, it was a refuge and a sanctuary. The latter are essential characteristics of a dwelling place.

[49] You did not enter the campervan until after you had murdered Mr McKinnon. That is, it could be said the murder did not involve your unlawful entry or unlawful presence in a dwelling place. However, I adopt the reasoning of MacKenzie J in *R v Clayton*.¹² In that case, the defendant threw burning projectiles into the victim’s house. While the defendant remained outside the house, the Judge accepted that the use of the projectiles breached the sanctity of the victim’s home and constituted an unlawful entry into a dwelling place. I therefore accept an aggravating feature of the offending was unlawful entry into a dwelling place.

⁸ *Pahau v R* [2011] NZCA 147 at [68].

⁹ The term used in a previous version of home invasion legislation.

¹⁰ *R v Clarke* [2000] 3 NZLR 354 (CA) at [12].

¹¹ *R v Growden* CA67/05, 25 October 2005 at [47].

¹² *R v Clayton* HC Wellington CRI-2006-054-557, 22 June 2007.

[50] With all those aggravating features in mind, I now turn to other cases as a cross-check.

[51] The Crown has not referred me to any comparable cases for the purposes of setting a minimum period of imprisonment. Ms Hamilton says that is because this case is outside the norm.

[52] Mr Bean refers me to *R v Winders* and *R v Kingi*. The defendant in *Winders* was ordered to serve a minimum term of 17 years.¹³ However, that case involved an extended period of careful and calculated planning which clearly demonstrated premeditation. As I have said, your actions were largely impulsive with little evidence of planning and premeditation. That was an aggravating factor in *Winders* which otherwise has some similarities to your offending.

[53] Likewise, in *R v Peeni*, the Judge adopted a 17-year minimum term before adjustments for other factors.¹⁴ The Crown's submission that the minimum term, before adjustments, should be 18 to 20 years was rejected. That case was in different circumstances but the level of brutality used by the defendant in his attack on the victim combined with the callousness was at an even greater level than the high level of callousness you demonstrated in your offending.

[54] In *Kingi*, which Mr Bean relies on, the Judge started with a minimum term of 14 years before adjustments.¹⁵ The Judge arrived at that result after considering the defendant's culpability was diminished because there was good evidence that the defendant did not intend to kill the victim. The defendant anticipated the victim would survive the serious assault inflicted on him. I do not consider that factor is present in your offending.

[55] I have considered two other cases which provide assistance. The first is *Skinner v R*.¹⁶ The defendant in that case was at home and saw via CCTV two people who were interfering with his car. When disturbed, they fled on foot. The defendant

¹³ *Winders v R* [2018] NZCA 277, [2019] 2 NZLR 305 at [69].

¹⁴ *R v Peeni* [2020] NZHC 1352 at [23].

¹⁵ *R v Kingi* [2016] NZHC 139 at [78].

¹⁶ *Skinner v R* [2011] NZCA 655.

armed himself with a rifle and pursued them in the car. The victim was shot three times at a nearby property. The Judge adopted an unadjusted minimum term of 13 years and uplifted that by two years to take account of other offending.¹⁷ The final minimum term of 15 years was confirmed by the Court of Appeal. The case involved an attack, with weapons, against strangers with limited premeditation.

[56] The other case of assistance is *R v Hall*.¹⁸ This was a case which involved the use of a firearm. The Judge also found absence of premeditation.¹⁹ The unadjusted minimum term settled on was 13 years with uplifts for other offending and prior convictions of two and a half years resulting in a minimum term of 15 years and six months after adjustments for mitigating factors. Many of the aggravating features in that case are also present here but the Judge in that case did not consider there was the level of callousness which I have found is present in this case. The callousness of your actions in comparison to *Hall* requires a higher minimum term.

[57] Were it not for your conduct after you had shot Mr McKinnon the second time, I would have considered a minimum term of 15 years and six months' imprisonment to be appropriate. However, having regard to your conduct afterwards, including your offending against Ms Buckley which gave rise to the charge of threatening to kill, your general conduct towards her and then driving off with Mr McKinnon's body, the appropriate minimum term is 17 years' imprisonment.

[58] I will now move on to consider whether any adjustment to that minimum term is required to take account of any personal mitigating factors.

Personal factors

[59] The following mitigating factors are for consideration:

- (a) guilty plea;
- (b) remorse; and

¹⁷ At [59].

¹⁸ *R v Hall* [2017] NZHC 410.

¹⁹ At [19].

(c) mental health and drug dependency.

[60] Adjustments applied to a minimum term for a guilty plea in a sentence for murder are different from the adjustments made when imposing a sentence for offending other than murder where a discount of up to 25 per cent may be available.²⁰ In sentences for murder, adjustments of no more than one or two years are usually applied. In your case, it was inevitable that you would be convicted of murder. However, you initially pleaded not guilty and a trial date was set. Your guilty plea came approximately six weeks prior to the planned commencement of the trial.

[61] Your mental health condition after your offending is a relevant consideration in the context of assessing any adjustment for a guilty plea.²¹ Dr Dean's report records that he saw you on 6 September 2019, 5 December 2019, 16 January 2020, 6 August 2020 and 12 November 2020. His initial assessment in September 2019 was that your symptoms rendered you unfit to stand trial. Three months later, in December 2019, his view was that your mental health condition had improved considerably; you had been prescribed antipsychotic medication since his last assessment. He considered your fitness to stand trial had been restored. However, you were unable to give a coherent account of the offending and Dr Dean agreed to a further review the following month.

[62] In January 2020, Dr Dean found your memory of the offending limited but you were able to speak of your mental health symptoms around the time of the offending. Dr Dean doubted a defence of insanity was available but was not definitive on this issue and recommended a further assessment in three months. That further assessment occurred in August 2020. At that time Dr Dean found your mental health had improved again and he was in a position to conclude that a defence of insanity was not available.

[63] Mr Bean today tells the Court he communicated the contents of Dr Dean's report to you in September 2020. You were arraigned and pleaded guilty on 7 October 2020. There was only a short delay between Dr Dean's determination on the

²⁰ *R v Peeni* [2020] NZHC 1352 at [24].

²¹ *Malik v R* [2015] NZCA 597 at [41].

availability of an insanity defence and your arraignment. In all the circumstances, I accept that your guilty plea came at the first available opportunity.

[64] Your guilty plea has had three important consequences. You have saved the cost of the trial. More importantly, however, you have accepted responsibility for your actions. You have also saved the family of Mr McKinnon the trauma of a difficult and distressing trial. Moreover, and importantly, Ms Buckley does not have to give evidence and suffer the ordeal of again recounting the circumstances of that painful night of terror. For all these reasons, I have settled on a reduction in the minimum term of one year for your guilty plea.

[65] As to other personal factors, you told Ms Turner that the loss of your grandmother led you to drugs and subsequently to crime to feed your addiction. In reading the report, I am left with the distinct impression that yours was not a childhood of disadvantage, deprivation and trauma which other young offenders suffer. Despite the absence of your father, and your difficult relationship with him, you have had the care and support of your mother and grandmother. Your mother's frustration at your conduct is understandable but she has indicated she will support your rehabilitation.

[66] It does appear that your methamphetamine addiction took control of you from an early age and that your drug dependency contributed to your mental health condition observed by Dr Dean after your offending. I commend your decision to seek treatment for drug addiction and your resolve never to use methamphetamine again. It also speaks to your acceptance of the harm you have caused, and your remorse which I accept is genuine, that you recognise the role of drug use in your offending.

[67] There is, however, limited evidence of violence in your upbringing. Your reported violent interaction with the gang may be relevant but I can attach little weight to it given the absence of a diagnosis of post-traumatic stress disorder. Dr Dean attributes your mental health condition to methamphetamine dependence. The result is that there is only a limited connection between your background and this offending.

[68] The Court of Appeal has said that circumstances personal to a defendant's background, including those set out in Ms Turner's report, may have relevance in

determining the appropriate sentence.²² The potential mitigating effect of those circumstances is not limited to any particular type of offending. Where a defendant is being sentenced for murder, however, the extent of the discount available is constrained. This is because, as the Court of Appeal observes, a minimum term must accurately reflect the seriousness of the offending and the defendant's background would usually have less weight in sentencing on a charge of murder. Taking account of this point, and for the reasons I set out earlier, I consider you are entitled to an additional discount of only six months for relevant personal factors.

Summary

[69] In summary then, from a minimum term of 17 years' imprisonment, I make a deduction of 18 months. That is, twelve months for your guilty plea and six months for your other personal circumstances. But for s 104, the final minimum term you would be ordered to serve is 15 years and six months.

Section 104

[70] I now turn to the application of s 104.

[71] I addressed unlawful entry into a dwelling place, callousness and vulnerability earlier. I have found the murder involved unlawful entry into a dwelling place and a high level of callousness for the reasons I have already expressed. I also consider Mr McKinnon was vulnerable because he was a tourist sleeping in a campervan in a very isolated location. Section 104 is engaged in consequence.

[72] Ms Hamilton also submits that s 104 is engaged because the murder was committed in the course of another serious offence. She says you were engaged in an aggravated burglary when you murdered Mr McKinnon. That is a serious offence.

[73] An aggravated burglary is one where a person has a weapon while committing a burglary.²³ You had a weapon. A burglary is committed when a person enters any building without authority and with intent to commit an imprisonable offence while

²² *R v Hohua* [2019] NZCA 533 at [44].

²³ Crimes Act 1961, s 232(1)(a).

there.²⁴ A building includes a tent, caravan or houseboat; the definition is sufficiently broad to include the campervan. However, your physical entry into the campervan came after you had committed the murder and s 104(1)(d) requires the murder to have been committed in the course of another serious offence.

[74] It will be recalled I have accepted the Crown's submission that the murder involved the unlawful entry into a dwelling place for the purposes of s 104(1)(c). My determination on that point turns on the construction of that section. The offence of aggravated burglary, in contrast, requires physical entry into the premises and that did not occur in the course of the murder but afterwards. You therefore did not commit the murder in the course of an aggravated burglary. Section 104(1)(d) is not engaged.

[75] Nevertheless, s 104 applies in your case because three other criteria are satisfied. I am, in consequence, required to make an order imposing a minimum term of at least 17 years unless it would be manifestly unjust to do so. If I were to impose a minimum term of 17 years, you would receive no credit at all for your guilty plea. I consider that outcome would be manifestly unjust in your case because your plea has had the significant benefit of avoiding Ms Buckley going through the ordeal of a jury trial where she would have to give evidence against you of deeply distressing and traumatic events.

[76] This is a situation very similar to that in *Vea v R* where the Court of Appeal held that it would be manifestly unjust to impose a minimum term of 17 years when a minimum term of 15 years and six months, allowing for a guilty plea, remorse and efforts at rehabilitation, was otherwise appropriate.²⁵

[77] You entered a guilty plea once the circumstances of your mental health had been finally addressed. There was a short delay but you are entitled to credit. You have also expressed your remorse at what has happened. I am confident your improved mental health condition has contributed to your insight into your offending. It would be manifestly unjust for you to be required to serve a minimum term of

²⁴ Crimes Act 1961, s 231(1)(a).

²⁵ *Vea v R* [2020] NZCA 68 at [23].

17 years when ordinarily you would be required to serve a minimum term of 15 years and six months before being eligible for parole.

Sentence

[78] Mr Garson, please stand.

[79] On the charge of murder, you are sentenced to life imprisonment and ordered to serve a minimum term of 15 years and six months' imprisonment before being eligible for parole.

[80] On the charge of threatening to kill, you are sentenced to three years' imprisonment, to be served concurrently.

[81] Stand down.

Gordon J