IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CRI-2019-020-1924
[2020] NZHC 2475

THE QUEEN

v

BEN WAIRAMA ARUNDEL LAMBERT

Hearing:	27 November 2020
Counsel:	S J Manning for Crown S W Hughes QC and A W Clarke for defendant
Sentence:	27 November 2020

SENTENCING NOTES OF DOBSON J

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[1] Mr Lambert, I have to sentence you this morning on your conviction for the murder of Michael Huata. You are also to be sentenced on charges of common assault and intentional damage, but the main focus is on the murder conviction, which is obviously the most serious of these and the most serious of virtually all charges in the criminal law.

[2] I first need to briefly review the factual circumstances in which the offending occurred. I will then describe the considerations that the law requires me to take into account in deciding on the sentence and explain to you what the components of the sentence mean. I will then take into account personal circumstances about you to the extent that they can affect the ultimate sentence.

[3] On 16 June last year, you were at a residential address in the township of Mohaka. You saw Mr Hirini Taurima in the next door property and climbed over the fence to engage with him. That discussion led you to believe that Mr Taurima had been responsible for stealing the wheel of a car owned by one of your aunties. You punched him in the head, leading to a fight between the two of you. You armed yourself with an axe in response to which Mr Taurima armed himself with a boning knife, apparently to dissuade you from further fighting. You used the axe to smash the windows and lights of Mr Taurima's car, you climbed on top of it, jumping on the vehicle to cause substantial panel damage. You were then chased from the property by Mr Taurima, who was still wielding the boning knife Your initial hit to Mr Taurima's head on that occasion is the subject of the charge of common assault and your damage to his car is the subject of the charge of intentional damage.

[4] Two afternoons later, on 18 June 2019, there was another confrontation, this time at an address in Raupunga. Mr Taurima, with his brother and a nephew, arrived at that property looking for you. Initially they were told you were not there but you then came out of the house and told Mr Taurima that he should take your van as compensation for the damage you had caused to his car. A scuffle ensued between you and Mr Taurima's nephew. Mr Taurima, who had been armed with a shotgun throughout, approached the two of you and fired a single shot from his shotgun into the ground. The shot was close enough to cause some minor injury to one of your feet. While you were on the ground, Mr Taurima kicked you in the face before he and those with him left the property.

[5] On the evening of the same day, a friend of yours who had been with you during the confrontation two days before – 16 June 2019 – went to Mr Taurima's address and threatened Mr Taurima, saying words to the effect of "clear the house, you're going to get it". He then left the property. Mr Taurima believed that your friend was holding a gun but that part of the story is not clear.

[6] Later the same evening, you packed a change of clothing in a bag and used a different vehicle that had been hidden until then to go to the property next door to Mr Taurima's. You were armed with a cut-down semi-automatic shotgun with three rounds in it. You parked your car so that you had a ready exit from the property and

could also observe what was going on in Mr Taurima's property next door. After you arrived, Mr Michael Huata and his nephew arrived at Mr Taurima's property. They noticed your car but did not think anything of it.

[7] The summary of facts indicates that Mr Huata had gone to Mr Taurima's address, having heard of the confrontations earlier in the day and having concerns particularly for the children who were living at Mr Taurima's. As Mr Manning has emphasised this morning, he was entirely unconnected with the build-up to these events and he was there entirely innocently. After he had a brief conversation with the people at Mr Taurima's house, Mr Huata stepped over the fence between the two properties and walked towards the house in the paddock where you were parked. By this time, you were out of the vehicle and sitting behind it, able to see Mr Huata's approach. As he did that, you moved into his view so that he could see you. You were holding the sawn-off shotgun but at that point it was concealed from his view. You called out to him to "get Hirini" (Mr Taurima) but Mr Huata did not reply and continued to walk towards you.

[8] At that point, the agreed summary states that you raised the firearm so that it was visible to Mr Huata and told him to turn around and go and get Mr Taurima. Mr Huata stopped briefly before continuing his approach towards you, without saying anything. You then lifted the gun and aimed at Mr Huata, warning him that you were "not fucking around". At that point, you were not sure whether Mr Huata was armed but did not want to take any chances, given what had occurred earlier. You told Mr Huata that if he came any closer, you would shoot him. This is a confrontation that builds up, as Mr Manning says, all too readily given the ready access to illegal firearms, in which the specialty seems to be sawn-off shotguns as you had with you.

[9] Mr Huata got so close to you that you could see his eyes and you later commented that you did not see fear in his eyes and did not think that Mr Huata was scared of you. You shot him with a single cartridge when he was only about one and a half metres away from you. The shot caused massive injury to the side of his lower face and neck and Mr Huata later died from those injuries in Wairoa Hospital.

[10] Having shot Mr Huata, you sat down next to him but then left the scene without making any arrangements for assistance for him when you heard someone else approaching the scene. You left in the car you had arrived in and, after driving some 10 kilometres on State Highway Two, you abandoned the vehicle, walked across farmland to throw the shotgun in the Te Kiwi stream. You then spent several hours walking along the railway track back to your home, changing out of the clothing you had been wearing into the fresh clothing you had brought with you and hiding the other clothing in the bushes near the railway track.

[11] Three days later, there was an initial meeting with the Police but at that stage you were not prepared to talk. Three further days later you contacted the Police to confirm that you were the person they were looking for, and arrangements were then made for a full interview to occur on 27 June 2019 when you made full admissions about the offending and showed the Police where you had left the car, the point in the stream at which you had thrown the shotgun and where you had hidden the backpack.

[12] Despite that full admission, you maintained a not guilty plea to the murder charge until the morning of your trial, but the Crown accepts that there was reason for the lateness of your guilty plea, which still avoided the trauma of a trial for all who would have been involved.

[13] As to the consequences of Mr Huata's murder, in addition to the five or six victim impact statements that have been read in Court this morning, I have received and considered a total of 14 from Mr Huata's parents and from other members of his whānau. They relate in gut-wrenching terms the huge loss that they all feel. A common theme in those victim impact statements is that Mr Huata was treated as a protector of all the family as well as being a positive grandson, son, brother, father, uncle and friend. They saw his strength as protecting them and keeping them safe and the shock of his death has caused huge disruption in all of their lives.

[14] I am told by Ms Hughes QC that you have read all those victim impact statements, and I urge you, as part of your rehabilitation, to re-read them and to reflect on them. Certainly, many of the victims do not accept that you do understand the consequences for his whānau and community of your so unexpectedly and randomly

taking his life. Your commitment to rehabilitation should extend to reflecting on the breadth of the harm you have caused. You should realise that Mr Huata was by no means your only victim.

[15] As to your attempts to acknowledge the harm you have caused, I appreciate that you have written a letter, which you wished to read to the family in Court today. Mr Huata's whānau do not wish to hear that, but I have read that letter and I have had regard to it.

[16] Now, coming to the law on murder sentencing. Anyone convicted of murder must be sentenced to life imprisonment unless the Court is satisfied it would be manifestly unjust to do so.[1] In your case, there can be no suggestion that a sentence of life imprisonment is manifestly unjust and so that is the sentence I will be imposing on you. In doing so, I also have to decide on a minimum non-parole period (what the lawyers call an MPI) of the minimum period you must serve before you are eligible to be released on parole. Whether you are paroled after whatever minimum period I set will depend on the Parole Board's assessment of your progress with rehabilitation. Whenever you are released, the life sentence stays with you, so that you could thereafter be recalled to prison if you misbehave.

[17] In setting that MPI it must be not less than 10 years.[2] The MPI in individual cases therefore goes up from 10 years depending on the seriousness of the circumstances of the murder and the personal circumstances of the offender.

[18] There is another benchmark on murder sentencings in s 104 of the Sentencing Act, which says that in particularly serious murders, if specified features are present the Court has to impose an MPI of not less than 17 years. Counsel are agreed in this case that there are no features that would warrant my considering the need to apply the 17 year minimum from s 104.

[19] I hope you have followed counsel's submissions to me this morning and have had a chance to read the written submissions that preceded it on what the appropriate

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1 Sentencing Act 2002, s 102.
2 Sentencing Act 2002, s 103.

MPI should be in your case. The Crown has suggested that there are four factors relevant to ranking the seriousness of this murder:

(a) first, that there was an element of pre-meditation given that you went to the property at which it occurred with the loaded shotgun, even though you had no intention in advance to harm Mr Huata;

(b) second, that you used a shotgun, which always has the potential to cause significant harm;

(c) third, that you shot Mr Huata at such close range; and

(d) fourth, that after you had shot him you made no attempt to get any assistance for him.

[20] On your behalf, Ms Hughes has disputed that there is any pre-meditation: she points out you had no grievance with Mr Huata, that you were armed to put you on what you thought to be an equal footing with Mr Taurima in the hope of settling the differences with him and that Mr Huata was shot spontaneously when you panicked. As to not offering assistance to Mr Huata, Ms Hughes makes the point that you left the scene knowing very well that others in the adjoining property would promptly come to his aid. I have heard Mr Manning this morning on what is not a usual form of pre-meditation, in that you had no intention of harming the victim. The form of pre-meditation I think cannot be given great weight because this was a tragic mistake, notwithstanding that you were prepared to arm yourself and inferentially use it in your dealings with Mr Taurima.

[21] In getting to a starting point for the MPI, Mr Manning referred me to two Court of Appeal decisions confirming sentencings of this type and four earlier High Court sentencings in cases with certain similarities.[3]

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[3] *Winders v R* [2018] NZCA 277; *Lane v R* [2010] NZCA 245; *R v Roling* [2020] NZHC 2725; *R v Te Poono* [2020] NZHC 1188; *R v Paewhenua* [2018] NZHC 301; *R v Meads* HC Hamilton CRI 2009-019-8828, 31 March 2011.

[22] When I have my notes of this sentencing prepared, I will add a schedule of the cases that I have considered to be most useful as comparisons to the factors in this murder. The result of my ranking against those others leads me to the view that the starting point for the MPI should be 11 years and nine months' imprisonment.

[23] From that starting point, I have to consider matters in your favour that could justify reducing it. The largest factor in your favour is your guilty pleas. The Supreme Court guidance on this factor recognises discounts of up to 25 per cent for guilty pleas that are offered at an early stage.[4] Understandably, you get a larger discount if the Court does not have to summon jurors and make all the arrangements for a trial and the Crown does not have to complete the briefing of all its witnesses and make all the other arrangements for trial and those who are going to be traumatically involved in it have to psychologically prepare themselves for it. All those steps had to be taken in this case before you pleaded guilty on the opening morning of trial.

[24] I do accept as reasonable the Crown's concession that even though the guilty plea came as late as that, you should be given a measure of credit for it. Ms Hughes had only recently been instructed and the preparation for the trial occurred taking into account your full admission to the Police near the outset. That made the Crown's position much more straightforward than it might otherwise have been. I consider the late guilty plea will justify a discount of 12 per cent from the starting point of the MPI of 11 years and nine months.

[25] The other personal circumstances in your favour are the lack of any previous violence convictions, your relative youth and your positive attitude towards rehabilitation. You have offered to participate in a restorative justice conference, have been prepared to read an apology to the whānau of the deceased, and have a commitment to preparing yourself for a positive life outside prison. As has been eloquently demonstrated this morning, thus far at least your expressions of remorse have been rejected by Mr Huata's whānau. You should weigh more heavily the consequences of your offending because of the obvious rift it has caused between your whānau and that of your victim.

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4 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607. The mode of applying guilty plea discounts has recently been refined in *Moses v R* [2020] NZCA 296 at [47]. I have adopted that approach.

[26] I am impressed by the large number of letters of support for you that have been produced to the Court. They speak consistently of a good young man diverted from a better course in life by poor choices and gang associations. They remain supportive of you and you are indeed very fortunate in this one respect that your whānau and friends are making that commitment and it will be important to your rehabilitation.

[27] As I discussed with Ms Hughes, with respect to the writers of the s 27 cultural report, I have not found their 63 page report particularly useful. You have endured a measure of social deprivation, but that has been within a strong whānau setting. I see that as more relevant to your positive rehabilitation prospects in the future than as a mitigating circumstance in your past that would justify any material additional discount.

[28] Having considered all these possible factors in your favour, as well as a modest acknowledgement for your relative youth, I consider that an additional eight per cent discount is warranted for your rehabilitative prospects, cultural factors and a modest allowance on account of your relative youth and lack of previous offending.

[29] So, applying total discounts of 20 per cent to the starting point for the MPI of 11 years and nine months would result in an MPI of 113 months or nine years and five months' imprisonment. That is a greater reduction than is available to you, given that the minimum MPI must be 10 years. I am not satisfied that applying the full extent of those discounts that would get you to an MPI of nine years and five months means that the additional seven months' discount you might otherwise get makes 10 years manifestly unjust. There are numerous cases in which the final calculation of an MPI plays out in that way.

[30] As a matter of detail, I remit the outstanding fines that are reported as being owed by you and I now come to sentencing you. Would you please stand.

[31] Dealing with your major conviction for murder, the result is that you are sentenced to a term of life imprisonment with a minimum period of imprisonment of 10 years.

[32] On the additional convictions I sentence you to concurrent terms of imprisonment of one month for common assault and four months' imprisonment for intentional damage. Stand down.

Dobson J

Solicitors:
Crown Solicitor, Gisborne
A W Clarke Legal, Gisborne

Possible comparators on starting point for murder

The first two of these cases were proposed as the most analogous by the Crown:

R v Te Poono **[2020] NZHC 1188**

Concerned the shooting of the victim at the defendant's address, after a period of raised tensions (with the victim refusing to leave), shouting and conflict between the two.[5] When both parties were in an escalated state of agitation, the defendant retrieved a shotgun from the wall of his shed and pointed it at the victim. The victim was alleged to have thrown objects from the table next to him at the defendant, and the defendant responded by shooting the victim in his right thigh, eventually causing him to bleed to death, dying at the scene. After considering other similar cases, Edwards J arrived at a starting point of 10.5 years' imprisonment, concluding that while the offending was less serious than other cases put to her (because it involved a shot to the victim's leg), the fact that the victim was becoming increasingly aggressive did not materially reduce the defendant's responsibility for pulling the trigger.[6] Her Honour noted the aggravating factors (a six month uplift was imposed for offending on EM bail) and that the mitigating factors, which included the cultural factors influencing the defendant's background, remorse and mental health, could amount to a discount of 40 per cent, but that this could not be applied because a sentence of life imprisonment in these circumstances was not manifestly unjust.[7] Therefore, the statutory minimum period of 10 years was imposed.

The shooting in the present case, at the victim's head and neck, makes this case somewhat more serious.

R v Roling **[2020] NZHC 2725**

The defendant, who had formed a resentment of his former girlfriend's new partner, left the address that he was staying at and walked to their house with a shotgun.[8] The defendant walked down the side of the neighbouring property and lay in wait for an hour and a half. When the defendant's former girlfriend and her new partner returned home, the defendant shot the new partner in the back as he was walking towards the house, stating "that'll teach him" after he did so. Brewer J imposed a starting point of 11.5 years MPI on the basis that the murder was planned and the victim was vulnerable at the time of shooting (being unarmed with his back turned), which he reduced by six months to take into account the defendant's lack of previous convictions, remorse and psychiatric disorder.[9]

The closeness of the victim when shot, and shooting in the face, made the present case marginally more serious.

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5 At [6]–[11].
6 At [26].
7 At [31]–[42].
8 At [12].
9 At [20]–[22].

Other cases:

R v Broughton **[2017] NZHC 671**

This involved a defendant mistakenly parking his car and pointing a shotgun at a group of people who he thought were his friends, but were in fact associates of a rival gang. That led to the group surrounding the defendant in his car with one punching him through the driver's window.[10] The defendant fired two shots at the group with one victim dying as a result (which was acknowledged to be excessive self-defence).[11] Venning J, while considering that it would not be manifestly unjust to impose a sentence of life imprisonment, noted that the statutory minimum of 10 years would be appropriate, but imposed an end sentence of 12 years MPI due to the additional charge of wounding with intent to cause grievous bodily harm.

Here, there was only one shot and a single victim, suggesting a starting point slightly less than 12 years.

R v Te Tomo **[2015] NZHC 2671**

The defendant shot the victim in the face from around 10 feet away following verbal and physical confrontations between two rival groups of gangs, which included other weapons.[12] Hinton J considered a starting point of 12 years MPI to be appropriate, given the "cold-blooded and callous" nature of the shooting, but allowed for an 18 month discount for the defendant's youth and background.[13]

That killing was more a part of a deliberate confrontation in a gang setting. I treat it as marginally more serious than the present.

R v Moala **HC Auckland CRI-2007-404-28,12 December 2007**

In that case, two gangs formed into lines facing each other during a street fight. The victim advanced to within two or three metres of the defendant and invited a fight, with the defendant then raising the shotgun and firing at close range into the victim's face.[14] Courtney J considered that a starting point of 13 years MPI was appropriate, given the premeditated retaliation, brutality and callousness of the murder, and the defendant's previous convictions for violence.[15] A one year discount for guilty plea and remorse was granted, leading to an end MPI of 12 years.

This starting point may rank that offending somewhat more seriously than other comparable sentences, and I am satisfied a margin lower is warranted here.

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10 At [4]–[5].
11 At [6] and [12].
12 At [2]–[7].
13 At [43]–[44].
14 At [4].
15 At [15].