

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

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

**CRI-2018-020-3114
[2019] NZHC 2938**

THE QUEEN

v

**DAVID JAMES LOTHIAN
JAMES TAYLOR MARTIN WEBBY**

Hearing: 11 November 2019

Counsel: S B Manning and J E Reilly for Crown
R B Philip for Mr Lothian
L P F Lafferty for Mr Webby

Sentence: 11 November 2019

SENTENCING NOTES OF DOBSON J

[1] Mr Lothian and Mr Webby, I have to sentence each of you this morning for the murder of Alex Latimer. I also have to sentence you for other convictions, the circumstances of which I will shortly outline, but my sentencing analysis is dominated by the circumstances of the murder, so I begin with that.

[2] On the evening of 29 September 2018, you were both at Mr Lothian's address at Te Haroto. Mr Lothian, your partner was present and also a Mr Boyd who lived a couple of kilometres away. In the course of an evening drinking and smoking cannabis together, the prospect arose of luring Mr Latimer to the property, with what was initially an intention to roll him for drugs.

[3] Mr Latimer was a small-scale dealer in cannabis and methamphetamine. He had not had any recent dealings with either of you, most likely because of your earlier assault and robbery of money and drugs from him, and I will come to the detail of that in a moment. It was left to Mr Boyd to maintain text contact with Mr Latimer to invite him to come to Te Haroto to supply drugs. Mr Boyd did not disclose that either of you would be there and promised Mr Latimer money in return for drugs.

[4] You arranged that Mr Boyd would sit near the gate of the address with a torch to guide Mr Latimer's car into the property when he arrived. Mr Lothian, you waited in a shed nearby and Mr Webby, you were in a car parked at the property.

[5] Mr Latimer arrived at about 3 00 am on the morning of Sunday, 30 September. Not knowing that you two were there, he was greeted by Mr Boyd, who told him he would go inside to get a cigarette. He was then set upon by both of you, beaten about the head and forced around the side of the house, and then around to the back of the property. He was hit with a shovel as he was dragged to the rear of the property.

[6] Once you had dragged Mr Latimer around to the back of the house, Mr Lothian, you directed Mr Webby to hit him again with the shovel and Mr Webby, you did that, hitting him over the back and the head. Mr Latimer went quiet and a shovel was then thrown at him and he was ordered to dig his own grave. You then resumed your attack on him, with each of you kicking, punching and hitting him with the shovel. Next, you both dug a shallow grave for Mr Latimer. Mr Lothian stabbed Mr Latimer multiple times in his back and in his side, telling Mr Latimer that he was going to die. After those stabbings, Mr Lothian, you used the knife to stab Mr Latimer once in the neck.

[7] You made an effort to bury Mr Latimer in the shallow grave where the stabbing and assaults had occurred, but you then decided to dig a second grave and moved Mr Latimer from the first one. You went to an area just outside the boundary of the property about 10 metres from the first grave and dug a deeper grave. Mr Latimer was removed from the first grave and dragged to the second. In the process, you cut and removed his clothing before placing him in the second grave in which he was then buried.

[8] In interviews with the Probation officers preparing your pre-sentence reports, you have both insisted that Mr Latimer was dead before you buried him. In your case Mr Lothian, you state that your last stab wound to Mr Latimer's neck means that you can be certain he was dead before you buried him.

[9] You both removed your own clothing and, together with Mr Latimer's, burnt them all in a drum at the rear of the property. You both washed yourselves in a bath with strong bleach to remove any traces of blood.

[10] At some point during the assaults on Mr Latimer, a bag of pills, some pipes used to smoke methamphetamine, a bag of cannabis and an unknown quantity of money was taken from him.

[11] A post mortem established that Mr Latimer had died of the stab wounds and also of blunt force trauma to his face and chest. The stab wounds resulted in a number of injuries in his right lung, plus one of the large veins draining into his heart and his liver. Injuries to his head had caused some bleeding on the brain and he had fractures on the left side of his sixth and seventh ribs.

[12] I acknowledge the depth of feeling reflected in the victim impact statements from four members of Mr Latimer's family. You have heard one of them read this morning, and if you have not already read the rest of them, then I urge both of you to do so and to reflect on the wider extent of the harm that this horrendous crime has caused.

[13] Your limited dealings with Mr Latimer may only have been in the context of drug dealing, but clearly he had another life in a close-knit family where he gave and received considerable love and support, and your brutal killing of him was entirely unprovoked.

[14] Before addressing the other offending arising out of the murder, I need to go back to the circumstances of your earlier aggravated robbery of Mr Latimer, which occurred in January 2017. Prior to that time, there had been drug transactions between Messrs Latimer, and Mr Latimer considered that he was owed money by Mr Lothian.

At Mr Webby's flat in Napier, Mr Latimer made enquiries of others there, including one of Mr Webby's flatmates, about Mr Lothian. That person told Mr Lothian about the enquiries Mr Latimer had made and Mr Lothian arrived at the flat. You both attacked him on that occasion, Mr Webby using a judo manoeuvre to throw Mr Latimer, which involved his hitting his head against a wall to an extent that it caused a hole in the wall. You both took a bag from Mr Latimer which contained drugs and money.

[15] After the beating, Mr Latimer left the flat and was picked up by his brother. His brother saw that Mr Latimer had a black eye, his face was bleeding and swollen and he had cuts to his head and face. His brother's understanding was that Mr Latimer had been lured to the flat and assaulted and robbed by you. That offending is reflected in the first charge of aggravated robbery to which you have both pleaded guilty. The events on the night of 29/30 September 2018 are reflected in the most serious charge of murder and also the second charge of aggravated robbery, to which you have both pleaded guilty.

[16] On the night of 30 September 2018, being the night of the early morning murder, you were both involved in removing Mr Latimer's car from Mr Lothian's Te Haroto property and leaving it at an isolated location in Puketapu. You set it alight there and it was totally destroyed, resulting in a charge against each of you for arson, to which you have both pleaded guilty.

[17] Next, on 4 October 2018, Mr Lothian drove both of you, together with his partner and her child away from the Te Haroto property. You were signalled to stop by the Police but refused. After being followed by the Police for a short distance, Mr Lothian pulled off the road and let all the passengers out – Mr Lothian, you driving off on your own, pursued by the Police. After a chase of some 10 kilometres, your vehicle was forced from the road by the Police and you were arrested and the driving conduct on that occasion resulted in a charge of reckless driving, and you have also pleaded guilty to that.

[18] Subsequent to arrest, Mr Webby, you were remanded in custody at Hawke's Bay Regional Prison. By then, you were aware that Mr Boyd had provided

information to the Police about what had happened on the night of the murder. On 29 October 2018 in the exercise yard at the prison, you were observed writing in chalk, in a number of places on the exercise yard walls, statements about Mr Boyd being a nark and stating where he was living. In its context, that was an attempt to encourage others to pressure Mr Boyd not to help the Police, including pressure not to give evidence against you. It constituted the elements of perverting the course of justice with which you were charged and to which you have pleaded guilty.

[19] Very shortly before the trial was scheduled to commence, Mr Lothian, you sought a sentence indication. An obvious concern for you was that you have previously been given a first strike warning for earlier violent offending.

[20] Now, because you have already had that first strike warning, if you are convicted of murder, it would be a stage two offence. That means that the issues I must consider are whether you would serve a whole of life term of imprisonment, that is, stay in prison all your life with no prospect of parole. Further, if that is not to be the sentence, what the minimum period of imprisonment (MPI) would be.¹ The following section of my sentencing remarks reflects the sentencing indication I gave you shortly before trial was due to begin.

[21] To avoid a sentence that would be for the whole of your lifetime, I have to be satisfied that, given the circumstances of the offence and of you as the offender, it would be manifestly unjust to impose that sentence. That analysis starts by assessing what the appropriate sentence would be if the three strikes provisions did not apply to you, and then compare that outcome with a sentence of life imprisonment without parole to consider whether the difference between those two outcomes means that the whole of life sentence would indeed be manifestly unjust. Mr Lothian, it is not a matter of fine margins and I need to be clearly satisfied that the disproportionality was truly gross before I could make the finding that a whole of life sentence would indeed be manifestly unjust.²

¹ Sentencing Act 2002, s 86E(2)(b) and (4)(b).

² Compare *R v Harrison* [2016] NZCA 381 at [106]–[108].

[22] So, putting the three strikes provisions to one side for a moment, I would have to order you to serve an MPI, initially in accordance with s 103 of the Sentencing Act 2002. If any of the criteria in s 104(1) of the Sentencing Act are met, the MPI must be at least 17 years, again unless an MPI of that length would be manifestly unjust.

[23] At the hearing of your sentence indication, Mr Manning submitted that a starting point in the range of 20 years is applicable for the murder. He said the following s 104(1) criteria apply:

- first, that the murder was committed with a high level of brutality, cruelty, depravity or callousness;
- second, it was premeditated;
- third, it was carried out over a period of time and involved multiple blows to Mr Latimer with fists, a spade and ultimately a knife;
- fourth, it was carried out in the course of another serious offence, namely aggravated robbery.

[24] The Crown contended for uplifts, first on account of your previous convictions, and secondly because of the other charges, assuming you also pleaded guilty to them.

[25] Mr Manning submitted that the only mitigating factor which could justify a reduction from that would be a guilty plea. In that event, he submitted that a reduction in the range of two years would be appropriate. The resulting MPI would be in the range of 18 to 20 years' imprisonment.

[26] On your behalf, Mr Philip submitted that the murder was not of the most serious kind. He also argued there is a huge difference for you, a 27 year old, between the crushing impact of a sentence lasting all of your life, and a finite term – even one of up to 20 years – before you would become eligible to be considered for parole.

[27] In setting a starting point, I found that the s 104 criteria do apply. Your killing of Mr Latimer involved a high level of brutality, you went about it in a seriously cruel

way and you dealt very callously with him, for example, demanding that Mr Latimer help to dig his own grave. The attack persisted over a period of time and it is fair to assume that the attack on Mr Latimer with the knife when he was completely helpless would have exacerbated the very serious level of pain inflicted by attacks with fists and a spade. You removed his clothes and moved him from one shallow grave to another – all very callous conduct, whatever the point at which Mr Latimer died.

[28] As Mr Manning pointed out, the killing occurred in the course of another serious offence, namely your aggravated robbery of Mr Latimer.

[29] Ranking the seriousness of these circumstances against other cases where s 104 has applied, I chose a starting point for the MPI for you of 18 years.

[30] There are two aggravating factors, that is, factors that might increase that MPI. First, the other convictions for two aggravated robberies, the arson and reckless driving. The first of those was an entirely separate event, with its own sinister overtones. I consider that those other convictions warrant a combined uplift of two years.

[31] The second aggravating factor is your previous criminal record. Of most relevance is the 2013 conviction for wounding with intent to injure, for which you were sentenced to two years and five months' imprisonment, but there are also 10 other convictions for lesser forms of violence starting in 2007 and continuing until 2017. The pattern is worrying and appears persistent. A range of valid approaches might apply to dealing with the worrying extent of previous convictions where the main current offending is as serious as this murder. However, these approaches vary significantly depending on the individual mix of circumstances, and in this case I would add a further two years to a finite sentence.

[32] That amounts to a total starting point of 22 years as an MPI.

[33] From that length of sentence, you are entitled to a discount for the guilty pleas. The Crown has accepted that a two year discount would be appropriate. That may verge on being generous, but I adopt the Crown proposal, given some scope for

argument that the extent of uplift for your previous convictions might be on the high side. In other words, if I had added only, say, 18 months' uplift for previous convictions, then I may be minded to only allow a discount of 18 months for the guilty plea. It has to be seen in the round.

[34] The outcome for you, Mr Lothian, is an MPI of 20 years, which I am satisfied is appropriate in all the circumstances of the offending and of you as the offender.

[35] The next issue is whether the difference between a term of 20 years before you are entitled to be considered for parole, and a sentence under the three strikes provision in s 86E of the Act of imprisonment for the whole of your life, would be manifestly unjust.

[36] There is now something of a pattern of decisions which take into account the extent of the difference, and also take into account the circumstances of the offending triggering the first strike, as well as the defendant's personal circumstances.

[37] Here, the offending that resulted in the first strike warning appears, from the notes on that sentencing, to have been a moderately serious charge of wounding with reckless disregard. In a single unexpected punch, you caused serious injury to the victim's eye to an extent that, certainly at the time of sentencing, he had not regained sight properly in that eye. He received skin wounds to the upper and lower eyelids, received stitches to his right ear to re-attach his earlobe and fractures to bones in the left-hand side of his face. On that occasion, the sentencing judge recognised that you had serious issues with anger and with alcohol and, as I have noted, you were sentenced to two years and five months' imprisonment.

[38] I accepted Mr Philip's submission at the sentence indication hearing that this was certainly not among the more serious violent offences for which a strike warning may be given.

[39] The fact that a conviction for wounding in those circumstances triggers your vulnerability on the current, much more serious, conviction to life imprisonment

without parole adds to the disproportionality analysis between that outcome and a finite sentence of 20 years before becoming entitled to be considered for parole.

[40] The other factor here, Mr Lothian, is your age. At 27, you might spend 50 years before dying in prison. I am mindful of the additional punitive impact of your knowing, for as long as that, that you would never achieve a release.

[41] In the end, I am satisfied that it would be manifestly unjust to impose a life sentence without parole. I therefore indicated that I would instead impose a sentence of life imprisonment subject to an MPI of 20 years' imprisonment on your murder conviction. You pleaded guilty in reliance on that indication.

[42] Since then, I have the advantage of a pre-sentence report and two letters in support of you from your mother and your partner. I have carefully considered all of their content but am unable to give you any credit for mitigating circumstances raised in the report or those letters. I have also considered your recent letter addressed to Mr Latimer's family expressing regret. That may be some ground for encouragement in your rehabilitation but its terms, coming when it does, do not justify any reduction in your end sentence.

[43] Now coming to Mr Webby, you did not seek a sentence indication, but as your trial was about to get underway, Mr Lafferty sought an informal indication from me as to whether parts of the analysis I had indicated in the sentence indication for Mr Lothian would also apply to you if you pleaded guilty before the Crown opened its case. The Crown indicated that it would agree to my doing so, despite the fact that the trial was about to get underway. After discussions with your counsel, you also pleaded guilty to each of the charges you faced, so I come to consider the sentence for you in that context. You do not have a first strike against your name so parts of the analysis will be somewhat different.

[44] As to the starting point for you for the murder, there is no question that you are also to be sentenced under s 104. You took a full part in this truly ghastly murder. I do accept that you were led by Mr Lothian and that he was the one doing the stabbing.

Overall, however, it was a two-man job and the distinction between you cannot be great when it comes to any difference in the length of the starting point.

[45] I have settled on a starting point of 17 years and three months, relative to Mr Lothian's of 18 years.

[46] I then have to add an uplift to reflect the other convictions, bearing in mind that they will be imposed on a concurrent basis with the life sentence that is inevitable for the murder. There is aggravated robbery at the time of the murder plus the earlier aggravated robbery of Mr Latimer at your flat in 2017, and your part in the arson conviction for burning Mr Latimer's car. Similar considerations to those for Mr Lothian apply to the uplift for these and I set it at two years.

[47] In addition, there is your conviction for attempting to pervert the course of justice after you had been remanded in custody. Mr Lafferty submits that it was a less serious example of this type of offending and that any uplift should be adequately accommodated in the anticipated uplift of two years for the other convictions. He makes the point that Mr Boyd was not directly confronted with the writings and that they could have only limited effect.

[48] You should understand, Mr Webby, that the Crown and the Court takes any attempt at perverting the course of justice seriously and I accept the Crown submission on this that an uplift in the range of between six and 12 months' imprisonment would be appropriate. I set six months as the appropriate additional uplift for that conviction.

[49] You do have previous convictions. In relative terms, there is nothing in them that ranks as a further aggravating factor.

[50] I therefore calculate a combined starting point for you of 19 years and nine months' imprisonment.

[51] In terms of mitigating factors, there is only your late guilty plea. As with Mr Lothian, I accept the Crown attitude as realistic, if not generous, in accepting that a two year discount should still be given notwithstanding that your guilty plea arose

only as the trial was about to begin. As Mr Lafferty said this morning, it came in time to spare all that would have been involved in the rigours of trial, but you should know that in precedential terms, it is extremely generous to get as large a proportion of what would otherwise be the sentence when we had empanelled a jury and all arrangements were in train. Having said all of that, you get the same discount that Mr Lothian gets.

[52] The pre-sentence report on you is sympathetic about difficulties in your life but does not reflect any mitigating circumstances that would warrant an additional reduction.

[53] The final range of MPIs that have been put to me in your case are, for the Crown, 18 and a half years, and on your behalf from Mr Lafferty, 17 years. The outcome, on the components of the length of the MPI I have described, is that I will sentence you to life imprisonment with a minimum non-parole period of 17 years and nine months.

[54] I have reflected on the relativity between the final MPIs of 20 years, and 17 years nine months and I am satisfied that the difference is appropriate: Mr Lothian played a larger part in the fatal injuries to Mr Latimer, and has prior serious violence convictions which brought him within consideration of a sentence for the whole of his life.

Strike warnings

[55] The last part of my sentencing is to issue strike warnings to each of you.

[56] **Mr Lothian:** your convictions for murder and aggravated robbery count further under the three strikes law. This is now your final warning which will explain the consequences of another serious violence conviction. You will also be given a written notice outlining these consequences, which includes a list of what are “serious violent offences”.

[57] Mr Lothian, if you are convicted of any serious violent offence other than murder or manslaughter, then you will be sentenced to the maximum term of

imprisonment for each offence. That will be served without parole or early release unless it would be manifestly unjust.

[58] If you are convicted of manslaughter committed after this warning, then you will be sentenced to imprisonment for life. The Judge must order you to serve at least 20 years' imprisonment unless the Judge considers it would be manifestly unjust to do so, in which case the Judge must order you to serve a minimum of at least 10 years' imprisonment.

[59] If you are convicted of murder after this warning, then:

- (a) you must be sentenced to imprisonment for life and the Judge must order you to serve that sentence without parole unless it would be manifestly unjust to do so; and
- (b) if the Judge does find that it is manifestly unjust to do so then the Judge must impose a minimum period of imprisonment of at least 20 years unless that would be manifestly unjust, in which case the Judge must sentence you to a different minimum period of imprisonment.

[60] If you are sentenced to preventive detention you must serve the maximum term of imprisonment of the most serious offence you are convicted of unless a Judge considers that would be manifestly unjust.

[61] As I have said, the terms of that will be provided to you in writing.

[62] **Mr Webby:** given your convictions for murder and aggravated robbery, you are now subject to the three strikes law. This is your first warning which explains the consequences of your being convicted of any serious violent offence committed after this first warning.

[63] If you are convicted of any serious violent offence (except murder) committed after receiving this warning, you will receive a final warning. In addition, if the Judge imposes a sentence of imprisonment for that offence (other than life imprisonment for

manslaughter, or preventive detention) then you will serve that sentence without parole or early release.

[64] If you are convicted of a murder committed after receiving this first warning, you will be sentenced to imprisonment for life. You must serve the life sentence without parole unless it would be manifestly unjust to do so. If you receive a life sentence without parole, you will not be released from prison. If serving the sentence without parole would be manifestly unjust, the Judge must specify the minimum term of imprisonment you will serve.

Sentencing

[65] Would you both please stand. **Mr Lothian**, I now sentence you to life imprisonment for your conviction for murder and order that you are to serve a minimum period of 20 years before becoming eligible for parole. I sentence you to concurrent sentences of three years for each of your convictions for aggravated robbery, 12 months for the arson of Mr Latimer's car, and I convict and discharge you on the charge of reckless driving.

[66] **Mr Webby**, I sentence you to life imprisonment for your conviction for murder and order that you are to serve a minimum period of 17 years and nine months before becoming eligible for parole. I also sentence you to concurrent terms of three years for each of the convictions for aggravated robbery, 12 months for the arson and 15 months for the attempt to pervert the course of justice.

[67] Stand down.

Dobson J

Solicitors:
Crown Solicitor, Napier
Bramwell Bate, Hastings for Mr Lothian
Leo Lafferty, Napier for Mr Webby