IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2019-092-3146
[2019] NZHC 3164

THE QUEEN

v

SEMI PILITATI

Hearing:	3 December 2019
Appearances:	M S Williams and C M Hallaway for Crown P Le'au'anae and T M Saseve for Defendant
Judgment:	3 December 2019

SENTENCING REMARKS OF DUFFY J

Solicitors/Counsel:
Kayes Fletcher Walker Limited, Auckland
Panama Le'au'anae, Barrister, Auckland
Saseve Lawyers, Auckland

[1] Mr Pilitati, you appear for sentence today having pleaded guilty to the murder of Arthur Brown.

Facts of the offending

[2] The bare facts of the offending are set out in the police summary of facts. More detailed information is given in your police interview and the statements given to police by the persons they interviewed. This information is not inconsistent with the police summary of facts and I propose to take it into account because it offers a clearer explanation for how the offending arose.

[3] The police summary of facts informs me that the victim Arthur Brown was 26 years old. In the early hours of 10 March 2019, Mr Brown was standing outside a bakery, which is in the shopping area on the corner of Vine and Farmer Street in Mangere, when he was attacked by you.

[4] Shortly before the attack you had been at your home with family and friends. Alcohol was consumed although you deny having consumed any.

[5] CCTV footage shows that at approximately 12.30am, which was roughly 10 minutes before the attack, Mr Brown had walked from the shopping area down Vine Street towards your home. A few minutes later he appears on the CCTV footage walking back towards the Vine Street shops. The CCTV footage then shows that at 12.40am you, your brother and an associate went along Vine Street towards the shopping area. You were armed with a shotgun; your brother was carrying a machete and the associate had an axe.

[6] You confronted Mr Brown outside the bakery. You shot him twice with your shotgun. He fell to the ground after the first shot. One shot hit his left collar bone, damaging the carotid artery and jugular vein. This caused the fatal injury. The other injury was to Mr Brown's back, near his right shoulder. The police arrived at the scene shortly afterwards. They attempted to give first aid to Mr Brown, but he was pronounced dead at the scene. At the police interview you said the first shot you fired hit Mr Brown in the back and when he turned around you shot him again.

[7] You and your associates then ran away, got into a van and drove to another address, where you stored and cleaned the shotgun.

[8] You later told the police that when you arrived at the shopping area you saw Mr Brown talking on a cell-phone and heard him say words to the effect they are drinking in the garage. This led you to believe that Mr Brown was planning with the Red Army street gang to do something to you and your family and friends. You said you shot Mr Brown to protect yourself and others, but you did not mean to kill him. We now know today, having heard from Mr Brown's wife, that at the time when he was talking on the phone when you saw him he was actually talking to her.

[9] Your counsel Mr Le'au'anae relies on additional information to better explain how the offending came about. This is the other information you provided to police when interviewed and the statements four other persons gave to the police. In summary this material outlines how in December 2018 you were involved in a road rage incident at traffic lights when a passenger in a vehicle. This incident led to a fight between you and members of the Red Army street gang.

[10] Later in January of this year members of the Red Army gang (who by then had learned of your home address) turned up at your home. At the time you were at home with your partner, young children and I understand your younger brother. You felt responsible for their welfare as well as your own. You were the eldest person there no doubt. The gang members threatened you and smashed windows of your home and your car. You ran to your car, and I don't know whether the shotgun was in the car or whether you took it with you. While you were in the car someone smashed a window and you were attacked, splitting your forehead. You then fired a shot and the other persons left. You said to the police that you had lived in fear of harm from then on. You also believed that the Red Army gang was watching your house and would attack again.

[11] The Court has been provided with reports from a clinical forensic psychologist Dr Sakdalan, which inform me that since the injury to your head you have manifested signs of post-traumatic stress disorder, including being hypervigilant and fearful of further attack from the Red Army gang. Dr Sakdalan states that you have reported

recurring nightmares and flash-backs about the assault you suffered. Dr Sakdalan also opines that at the time of the attack on Mr Brown it is likely that you had a flight or fight response, which was triggered by your post-traumatic stress disorder and the hypervigilant state it would have generated.

[12] You have said to the Police you believed that Mr Brown was a member or associated with the Red Army gang. You told the pre-sentence report writer that shortly before the attack on Mr Brown, while you were still at your home in the garage, you had seen someone at the end of your driveway wearing red clothing and you thought he was watching you and your friends. Red is a colour worn by members of the Red Army gang.

[13] The Crown accepts the incident in which you were injured in January occurred. The Police cannot confirm if Mr Brown was a member or associate of the Red Army gang, but it is accepted that Mr Brown was wearing red that evening.

[14] Your attack on Mr Brown on the night of the incident is consistent with you having a belief that he was a member of this gang. It explains why you left your home armed as you were and in the company of others who were also armed. It does not excuse what occurred. Indeed, what occurred and the heartbreak it has caused to everyone in this courtroom, demonstrates why it is never right for anyone to attempt to resort to violence. The right thing to do was to call the police the moment you saw Mr Brown in the vicinity of your home and feared an attack, if, in fact, an attack was likely. Had you done so Mr Brown would not have lost his life and you would not be facing a sentence of life imprisonment. Both of you, young men in your twenties, with futures ahead of you. Mr Brown was recently married and about to become a father. His child was born shortly after he died. You have two children who are aged one and two. Now, albeit for different reasons, neither his child nor your children will have the benefit of a father who is involved in their day to day lives during their formative years. That is something that can never be undone.

Personal circumstances

[15] You are now 21 years old and, as I said, you were 20 at the time of the offending. You moved to New Zealand from Samoa when you were seven. You have

lived in South Auckland since. You have five brothers and one sister. You have your own two children. Your parents have recently moved to Australia and were living there at the time of the offending. I understand they have since returned to New Zealand to support you.

[16] For the last five or so years, you worked doing scaffolding with your brother. You deny having any gang links. You have reported that you do not use drugs, and only consume alcohol on special occasions.

[17] Your criminal history, which starts in 2015, comprises traffic offending, and then in 2018 you committed offences of robbery by assault, aggravated assault and driving while disqualified. The robbery by assault offence led to you receiving a first strike warning entered on 29 October 2018. I will return to the impact of this on your sentence.

Pre-sentence reports

[18] The pre-sentence report writer states that you are remorseful.

[19] The writer describes your offending as having significantly escalated since your first conviction in 2015. Your offending related factors are assessed as being a propensity for violence and a sense of entitlement. The writer describes you as being a high risk of further offending, although these comments flow from the nature of the present offence.

[20] The report writer notes that you have reflected on your actions and the harm it has caused to the victim and his family. You are said to be aware of the impact of your offending on others. You reported that you are disappointed you will not get to be a part of your children's lives, and you do not want them to become familiar with the "jail lifestyle". The writer notes that you are motivated to become a "better person." I also take note of the statement that you have made to the Court today and acknowledge that I consider you are truly remorseful.

Victim impact statements

[21] I have heard the victim impact statements. It is clear that Mr Brown had a large, loving family who have been profoundly impacted by his death.

[22] We have heard from Mr Brown's wife. She was pregnant at the time and gave birth after his death. Both of them at that time must have been looking forward to the impending birth of their daughter. She expresses the despair and anxiety she felt when she made her way to the scene. She describes receiving confirmation that her husband had died as the most heart-breaking moment day of her life. She recounts flashbacks of the night and describes the sleepless nights and her loss of appetite. Her expectation around that time was that Mr Brown was going to be accompanying her to the hospital to give birth to their daughter.

[23] She describes Mr Brown as a good person; loving, loyal, humble and trying to improve his life. She despairs over the loss of their future together. She experiences feeling vulnerable and saddened every day.

[24] Mr Brown's mother has provided a statement. She describes the night she learned her son had died as the worst night of her life. She recounts waiting until 3.00 pm the following day to see him at the mortuary. She often goes to Mr Brown's grave and says he is always with her.

[25] Lisa Brown describes her son as gentle and kind. He was special to her, and to her family, who she says are shattered by his death. She dreads explaining to Mr Brown's daughter what happened to her father. She expresses feeling bitterness and hatred for you. She says that she can no longer sleep in her own bed because she associates it with the night she found out her son had died. She cannot see a police officer without thinking of that night. She says that she feels her life has ended, and that her pain will last until she dies.

[26] Benjamin Brown, Mr Brown's brother, has provided a victim impact statement. He recalls celebrating a birthday with Mr Brown only a few days before he died. He says nothing prepares one for the experience of burying a family member.

[27] Mr Brown's aunt, Merina, has provided a victim impact statement. She says that nothing she has experienced in life compares to the grief that you have put her through. She describes it as difficult to find solace and peace. She expresses the sadness that she, her family and Mr Brown's daughter will feel. She says that no sentence can ever compare to what you have sentenced her family to. She wants you to think about the loss you have caused her family.

[28] Margaret Brown, Mr Brown's first cousin, has also provided a victim impact statement. She cannot describe the hurt and pain she felt when she was told that Mr Brown had been shot. She recounts being unable to stop crying and could not believe he was really gone. She recalls thinking about the memories she had with Mr Brown. She does not understand how anyone could commit such a crime towards such a loving and humble person. She has put her job at risk from taking time off because she could not get out of bed because of her sorrow. She laments that she will never see Mr Brown's cheerful smile, hear his voice, hug him or see his face again. She wants you to know that she forgives you because she cannot live the rest of her life hating you. She wants you to think about what you have done to her, her family and Mr Brown's friends.

[29] Ms Purcell has provided a victim impact statement. She describes feeling anger, grief and many other emotions. She describes Mr Brown as a gentle giant who was caring, humble and loved his family.

[30] Ben and Ma Ulugia have provided a victim impact statement. They lament that Mr Brown will not be able to grow old himself, or see his daughter grow old. It is clear to me from the victim impact statements that the persons who made those statements and other family members as well, deeply suffer from the loss of Mr Brown.

Submissions

[31] This is a sentencing where despite the seriousness of the offending and the harm done, the Crown responsibly recognises that, for reasons I come to later, it would be manifestly unjust to sentence you to life imprisonment without parole. The Crown also acknowledges that none of the factors in s 104 of the Sentencing Act 2002 are sufficiently engaged in the circumstances of your offending.

[32] When it comes to setting a minimum term of imprisonment, the Crown submits that the aggravating factors of your offending are the use of a weapon, particularly at close range, the location of the shot, and the vulnerability of the victim, in that he was confronted at night by three armed assailants. The Crown submits that your offending does not involve lengthy planning, but also it cannot be classified as impulsive given that you followed the victim to the shops before shooting him.

[33] With regard to the aggravating factors, the Crown submits that a starting point of 12 years for a minimum sentence of imprisonment is appropriate. The Crown submits that an uplift to recognise that your offending was done whilst on bail for an earlier violent offence is appropriate, but that this is neutralised by your youth. The Crown submits that a discount of 12 months is appropriate to recognise your guilty plea. Accordingly, the Crown submits that you should be sentenced to life imprisonment with a minimum period of imprisonment of 11 years.

[34] Your counsel also submits that it would be manifestly unjust to impose a sentence of life imprisonment without parole.

[35] Your counsel submits that your offending must be looked at through a cultural lens. He draws attention to your Samoan heritage, you having moved here at the age of seven. He submits that the Pasifika worldview is that individuality lies within a system of family, or aiga. He submits that this system includes the immediate aiga, the wider aiga and the community in which the individual lives. So, an individual's sense of self exists in relation to others, and places weight on your shame and remorse for the offending.

[36] He submits that despite your previous convictions, the offending is out of character. He submits that your offending related factors can be positively addressed, and that you are committed to getting further education, employment, and pursuing other rehabilitative opportunities.

[37] Taking account of your guilty plea and youth, your counsel submits that you should be sentenced to life imprisonment with a minimum period of imprisonment of ten years.

[38] Both the Crown and your counsel rely on *R v Te Tomo*,[1] as a comparable case.

Purposes and principles of sentencing

[39] To determine an appropriate sentence, I must take into account the relevant purposes within s 7 of the Sentencing Act 2002. Among others, these include the need to hold you accountable for the harm done to the community, to promote a sense of responsibility for the harm of the offending, to provide for the interests of the victims, to denounce your conduct and to protect the community.

[40] I must also take into account the principles of sentencing outlined in s 8 of the Act. These include consideration of the gravity of your offending, the seriousness of the type of offence, consistency with appropriate sentencing levels. I have also taken into account the need to impose the least restrictive outcome appropriate in the circumstances.

Analysis

[41] Mr Pilitati, your first strike warning was issued on 29 October 2018 pursuant to s 86B of the Sentencing Act.

[42] This offending is your second strike. Because it is a conviction for murder, s 86E of the Sentencing Act is applicable. The effect of s 86E is that I must sentence you to life imprisonment. That sentence must also be without parole unless, given your circumstances and that of the offending, I am satisfied it would be manifestly unjust to make the sentence without parole.

[43] If I consider a sentence of life imprisonment without parole to be manifestly unjust, I must order you serve a mandatory sentence of imprisonment in accordance with s 103 of the Sentencing Act.

[44] The Court of Appeal, in *R v Harrison* have outlined a three-step approach to be taken when conducting a murder sentencing in which s 86E is applicable:[2]

---

1 *R v Te Tomo* [2015] NZHC 2671.
2 *R v Harrison* [2016] NZCA 381; [2016] 3 NZLR 602 at [109]–[110].

(a) The first step is recognition that the sentence for a stage two or three murder is life imprisonment without parole.

(b) The second step is consideration of actual culpability based on the facts of the case, as compared with other murder cases.

(c) The final step is determining whether it would be grossly disproportionate, given the circumstances of the offending and the offender, for the offender to be subject to a sentence of life without parole.

First step

[45] The first step is that your sentence will be life imprisonment.

Second step

[46] The task under the second step is to set the minimum term of imprisonment. There is not a large difference between the Crown and defence submissions on this point. The former submits that 11 years is appropriate, the latter submits that 10 is appropriate.

[47] Relevant to this is s 103(2) of the Sentencing Act, which reads:

> (2) The minimum term of imprisonment may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary so satisfy all or any of the following purposes:
>
> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community form the offender.

[48] The principles in s 8 of the Sentencing Act, and the aggravating factors in s 9 of the Sentencing Act should also be taken into account to the extent that they are relevant to the purpose in subs (2).[3]

[49] The focus of the inquiry in fixing a minimum term is determining how much more than the minimum of ten years is required in order to achieve those purposes. As remarked by the Court of Appeal in *Malik v R*:[4]

> Under s 103 the minimum term must be the period that the Court thinks necessary to satisfy the sentencing objectives of accountability, denunciation, deterrence and community protection. Of course, these are not the only objectives of sentencing. They address features of an offence that aggravate its seriousness or point to a need for community protection. Mitigating factors can and do offset these features when setting a minimum period, but the fact remains that the statutory criteria for a minimum period do not include the full set of sentencing purposes and principles that apply when a determinate sentence is being fixed.

[50] Section 103 is subject to s 104, which provides for situations in which a MPI of at least 17 years must be imposed. Those circumstances are:

> (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
>
> (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
>
> (c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or
>
> (d) if the murder was committed in the course of another serious offence; or
>
> (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
>
> (ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or
>
> (f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or
>
> (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or

---

3 *R v Walsh* (2005) 21 CRNZ 946 (CA).
4 *Malik v R* [2015] NZCA 597 at [28].

> (h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or
>
> (i) in any other exceptional circumstances.

[51] The Crown and defence are in agreement that s 104 is not engaged in relation to your offending. I agree that none of s 104 factors are applicable. Accordingly, the appropriate minimum period of imprisonment is to be fixed in accordance with s 103.

[52] The approach to be taken in sentencings for murder has been summarised by the Court of Appeal in *Robertson v R* as follows:[5]

> First, the judge should compare the offender's culpability with cases of murder that attract the statutory minimum of 10 years, which serves as a datum point or benchmark. Second, the judge should decide whether an additional minimum period is needed to satisfy the sentencing purposes of accountability, denunciation, deterrence and community protection. When following these processes the judge must apply the legislative policy that, in general, the presence of one or more s 104 factors justifies a minimum period of not less than 12 years; and further, that there may be cases in which the sentencing purpose in s 103(2) require that the sentence be served without parole. Third, the judge should compare sentencing decisions in other cases for reasonable consistency of outcome. As this Court explained in *R v Howse* [2003] 3 NZLR 767 (CA) at [61]–[64] and repeated in *R v Bell* CA80/03, 7 August 2003 at [9], the primary comparison is between the individual case and the 10-year-datum point. Comparison with other cases is a secondary requirement, albeit necessary and important as a check.

[53] Determination of an appropriate minimum period of imprisonment is not an exact science. The Court of Appeal remarked in *R v Howse*:[6]

> In the end whatever analysis or set of comparison may be invoked, the question whether the duration of a minimum period order of the present kind is or is not excessive can only be a matter almost intuitive judgment. Assessment of the degree of culpability inherent in any particular offending is not an exact science. The relationship of the instant offending to statutory datum based on the concept of the ordinary range of murder of the particular kind, is capable no more than imprecise determination.

[54] Your offending occurred whilst you were on bail which is an aggravating feature of the offending.

---

5 *Robertson v R* [2016] NZCA 99 at [80]. See also *Brown v R* [2011] NZCA 95 at [76].
6 *R v Howse* [2003] 3 NZLR 767 (CA) at [69].

[55] I must also recognise that Mr Brown was vulnerable that night. You and two of your associates approached him at night. All three of you were armed. He was unarmed. I note that you believed that the Red Army gang, including Mr Brown who you saw as associated with them, were a threat to you and those at your home. However, I do not consider that there was any element of provocation deserving of a discount.

[56] The first relevant case is *R v Te Tomo*.[7] Mr Te Tomo was 17 years old. He had been found guilty at trial. Mr Te Tomo was associated with the Mongrel Mob. He and an associate got into a verbal disagreement with the deceased and one of the deceased's associates, who were associated with the Black Power gang.

[57] Mr Te Tomo and an associate approached the deceased and his associate with ornamental swords. Those swords were taken off them and thrown away. Mr Te Tomo and his associate returned with a slug gun, which was also confiscated. Mr Te Tomo returned again, this time with a .22 rifle with a sawn-off barrel. The victim was walking off the front lawn at the time. Mr Te Tomo fired two shots at the deceased, the second hitting his face, killing him.

[58] Hinton J considered the aggravating factors to be the usage of a lethal weapon, leading to the loss of life. She considered that the victim was vulnerable to a degree, and noted that after the first shot was fired, he took cover behind a power box where he received the second shot. She did not consider the conduct of the deceased and his associate mitigated or reduced the level of the offending in any way.

[59] On premeditation, Hinton J considered Mr Te Tomo's case to be less serious than those instigated days in advance, and accepted that there was little premeditation and planning involved. She considered the cold-blooded and callous nature of the offending had to be recognised.

---

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

[60] She adopted a starting point of 12 years' MPI, with a discount of 1.5 years for youth.[8] There was no discount for remorse, and to the end minimum period of imprisonment of 10.5 years.

[61] The other case referred to by the Crown and the defence is *R v Mills*.[9] In that case, Mr Mills' partner had a grievance with the deceased over $140. The pair invited the deceased to their house. Mr Mills was inside the house with an extensively modified firearm. Mr Mills shot the deceased. A forensic examination indicated that the deceased had been crouching at the time.

[62] Ronald Young J considered that there was an element of pre-meditation involved in tricking the victim to coming to his house. He considered a starting point of 12 years' MPI to be appropriate. Ronald Young J gave an uplift of 1 year for the offending having been committed whilst on bail, and a discount of 2 years to reflect the guilty plea and remorse. So, the total minimum period of imprisonment imposed was 11 years.

[63] Another comparable case is *R v Moala*.[10] Mr Moala was 20 at the time of the murder. He was a member of a street gang. The victim was a member of a different street gang. Months before the murder, Mr Moala and the victim were involved in an altercation. Over the following months there were various threats of fights. On the night of the murder, Mr Moala and his associates went to the house with weapons looking for members of the opposing gang. A number of fights broke out. Mr Moala took a shotgun from an associate. The victim advanced threateningly towards Mr Moala, who shot him at close range in the face.

[64] In sentencing, Courtney J considered it important that it had been the culmination of a planned and organised retaliation against another gang. She found that the shooting of an unarmed man in the face at close range is particularly brutal and callous. Finally, she considered Mr Moala's three prior convictions for violent offending to be relevant. She considered a starting point of 13 years' MPI to be

---

8 At [44].
9 *R v Mills* HC Palmerston North, CRI-2009-054-3808, 16 June 2010.
10 *R v Moala* HC Auckland CRI-2007-404-28, 12 December 2007.

appropriate, which was further reduced by one year to reflect Mr Moala's youth and guilty plea.

[65] Finally, I have had regard to *R v Broughton*.[11] Mr Broughton and two associates had been travelling to see a friend who apparently owed them money. Mr Broughton had a loaded sawn-off shotgun with him. Before arriving at that friend's house, he saw some people he believed he knew. Among them was the victim. Mr Broughton greeted them with the shotgun, in what Venning J accepted was with a joking bravado. However, those people were not his friends or associates. The group advanced on Mr Broughton, who fled to the car. He was punched while in the car. Mr Broughton shot the victim twice.

[66] In sentencing Mr Broughton, Venning J considered that it was important that he was deliberately carrying a loaded shotgun, originally confronted the other unarmed group, and deliberately shot the victim. He considered a 10 year MPI on the murder charge alone would be appropriate, but this was subsequently increased by two years to reflect the charge of wounding with intention to cause grievous bodily harm.[12]

[67] I consider your offending to be more serious than that of Mr Broughton. His offending involved an element of excessive self-defence which is absent from your case. He was in imminent danger, whereas you simply believed that the Red Army gang generally posed some sort of threat to you.

[68] I consider your offending to be less serious than each of the other cases. *R v Moala* involved a planned retaliation against another gang, that is not the case here. *R v Mills* involved premeditation through tricking the victim to come to Mr Mills home. That degree of premeditation is not involved here. I consider your offending is most closely comparable to *R v Te Tomo*. Like Mr Te Tomo's offending, the main aggravating factor is the usage of a lethal weapon, with lethal effect at close range.

[69] However, I consider Mr Te Tomo's offending to be more serious. It is important to note that Mr Te Tomo's offending was prolonged. It was an escalating

---

11 *R v Broughton* [2017] NZHC 671.
12 At [12]–[13].

fight in which he went into the house to get increasingly dangerous weapons and made increasingly serious attempts at harming the victim.

[70] It is also material that in *Te Tomo*, Mr Te Tomo fired a first shot which missed. This caused his victim to hide behind a power box. Mr Te Tomo then approached him and shot him, killing him while he was hiding defensively. The act of pursuing a fleeing victim, then making the conscious decision to shoot him at close range while he was attempting to hide demonstrates a degree of callousness which I consider is absent from your offending.

[71] Your offending has an element of spontaneity not present in *R v Te Tomo*. The cases of *Mills* and *Moala* display elements of premeditation that are absent from your offending. There has been no suggestion that your offending was planned beyond your trip from your home with the shotgun.

[72] Accordingly, I consider a starting point of 11 years' imprisonment is appropriate to reflect the nature of the offending. The fact that it was committed while you were on bail warrants recognition with a six-month uplift.

[73] There are factors which justify a reduction from this point. First, your youth. The offending occurred when you were 20 years old. The relevance of youth to sentencing is well established. In short:[13]

(a) There are age related neurological differences between young people and adults. Young people are not as mature and do not respond to events in the same way that a more mature adult will;

(b) Imprisonment has a greater effect on young people. A long sentence has the potential to be crushing;

(c) Young people have greater potential and capacity for rehabilitation with the appropriate direction.

---

[13] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

[74] Here the relevance of the neurological characteristics of your youth is exacerbated further by the post-traumatic stress syndrome from which you suffer. Whilst there was no element of provocation, the opinion of Dr Sakdalan outlines how post-traumatic stress syndrome resulting from your previous encounter with the Red Army has contributed to your offending.

[75] You have shown remorse both to the pre-sentence report writer and to this Court today. You have shown that you have insight into the impact of your offending on both your family and the victim's family.

[76] Finally, you have rehabilitative prospects. You have indicated a willingness and desire to improve your life while in prison.

[77] These factors taken together warrant a nine-month discount.

[78] Additionally, you pleaded guilty. While your guilty plea was not immediate, I understand it was made after your counsel received a report on your fitness to stand trial. This demonstrates taking responsibility for your offending and has ensured the avoidance of a trial. It warrants recognition with a further nine-month discount.

[79] Altogether the mitigating factors I have identified lead to a discount of 18 months which brings the minimum period of imprisonment to 10 years.

Third step

[80] The third step is assessment of whether life imprisonment without parole would be manifestly unjust. In this step I am required to complete an overall assessment of the consequences of a life sentence without parole, the circumstances of the offending and the first strike offending, your circumstances, and the principles of sentencing.[14] The Court of Appeal made the following observations in relation to determining when the imposition of life imprisonment without parole would be manifestly unjust:[15]

---

14 *R v Harrison*, above n 2, at [107]–[108] and [110].
15 At [108].

a) The judicial approach to the scope of the manifestly unjust exception is intended to avoid wholly disproportionate, that is, grossly disproportionate, sentencing outcomes.

b) The case for a finding of manifest injustice must be clear and convincing. This follows from the use of the word "manifestly". However such cases need not be rare or exceptional.

c) The determination requires an assessment of the circumstances both of the offence and the offender:

    i. The fact that the case is a stage-2 murder as opposed to a stage-3 murder is relevant. This factor may inform the nature and extent of the recidivism involved.

    ii. The consequences of a whole-of-life sentence (without parole) are a relevant factor. Personal mitigating factors under s 9(2), including mental health, relative youth and a guilty plea, fall to be considered in the balance.

d) The sentence that would have been imposed but for s 86E is relevant to this assessment. The sentencing judge will consider, and give weigh to, the applicable purposes and principles of sentencing in ss 7, 8 and 9 of the Sentencing Act.

e) Other relevant (non-exclusive) factors include:

    i. Whether an offender has any, or limited, ability to understand the relevance and importance of a first or final warning.

    ii. Whether the factual matrix of the qualifying offence or offences, or of the index offence, points to a higher level of culpability.

    iii. Whether the offender is likely to re-offend such that there is a need for community protection.

f) The inquiry into the applicability of the manifestly unjust exception is an intensely factual one.

[81] The Crown has referred me to 11 cases in which a defendant has been sentenced for murder as a second-strike offence, to which I have had regard to.[16] A sentence of life without parole has been found to be manifestly unjust in all of those cases. This is not surprising, as the Court of Appeal expressly rejected that the test for

[16] *R v Harrison* [2014] NZHC 2705, *R v Turner* [2015] NZHC 189, *R v Kingi* [2016] NZHC 139, *R v Herkt* [2016] NZHC 284, *R v Eruera* [2016] NZHC 532, *R v Heihei* [2017] NZHC 2243, *R v Puna* [2018] NZHC 79, *R v Davis* [2018] NZHC 1162, *R v Alexander* [2018] NZHC 1584, *R v Tai* [2018] NZHC 1602 and *R v Hone* [2018] NZHC 2605.

manifest injustice would only be reached in exceptional circumstances.[17] The following cases stand out.

[82] Also relevant is the recent sentencing of *R v Tai*.[18] Mr Tai, a 23 year old man, was also for sentence for murder as his second strike offence. Section 86E was engaged. Muir J had determined that an appropriate minimum period of imprisonment would be 17 years. He considered that the imposition of life imprisonment without parole would be manifestly unjust. This was despite, as Muir J found, the fact that "many of the factors that have influenced previous decisions simply could not be called on in Mr Tai's aid".[19] He had not expressed any remorse and was assessed as having a high risk of re-offending. However, Muir J considered it material that Mr Tai was being sentenced on a second strike, that the first strike warning incurred a penalty of nine months' imprisonment only, and that Mr Tai had indicated a willingness to participate in rehabilitative programmes. He also considered it important that Mr Tai would be imprisoned for approximately four times what would otherwise be the case, if he were sentenced to life imprisonment without parole. Further, his offending, whilst severe, could not be properly classified as one of the worst types of murder.

[83] Another recent and relevant case is *R v Davis*.[20] Mr Davis was 26 years old. He was convicted of murdering his partner. It was his third strike offence. In sentencing, Paul Davison J considered that an appropriate minimum period of imprisonment would be 14 years' imprisonment.[21] Mr Davis had an extensive criminal history, and in fact had himself made statements which were akin to a rejection that he had rehabilitative prospects. Additionally, he had not expressed any remorse for the murder.

[84] Paul Davison J considered the case finely balanced. However, he considered the discrepancy between Mr Davis' remaining life, and the appropriate 14-year

---

17 *Harrison* at [106].
18 *R v Tai* [2018] NZHC 1602.
19 At [55].
20 *R v Davis* [2018] NZHC 1162.
21 As it was a third-strike murder, Paul Davison J also had to impose a 20 year minimum period of imprisonment unless to do so was manifestly unjust. Whilst he considered that the imposition of life imprisonment without parole would be manifestly unjust, he did not make the same finding in relation to the 20 year minimum period of imprisonment. So, the minimum period of imprisonment ultimately imposed was 20 years.

minimum period of imprisonment would make the imposition of a sentence of life imprisonment without parole to be grossly disproportionate. He also considered that despite Mr Davis' comments, future rehabilitation was not entirely out of the question.

[85] Finally, the case of *R v Puna*.[22] Mr Puna was also a young man who had committed a murder as his second-strike offence. So, like you, s 86E of the Sentencing Act was applicable. Cull J had determined that a minimum period of imprisonment of 14 years was the appropriate sentence.

[86] In determining whether it would be manifestly unjust to sentence Mr Puna to life imprisonment without parole, Cull J considered it material that Mr Puna had displayed remorse and acknowledged his actions. He had expressed remorse to his family and had positive prospects for rehabilitation. Cull J considered that the difference between the minimum period of imprisonment of 14 years and life imprisonment without parole was grossly disproportionate. She also considered that the imposition of a sentence of life imprisonment would defeat any incentive for Mr Puna to take those rehabilitative steps which he was willing to take.

[87] Your circumstances are most comparable to those of Mr Puna. You have good rehabilitative prospects. You have demonstrated remorse, and insight into your offending. Those factors already distinguish your case from those of *Davis* and *Tai*, for whom it was nevertheless manifestly unjust to sentence to life imprisonment without parole.

[88] You are 21 years old. The average life expectancy for a male in New Zealand is 79 years.[23] I have found an appropriate minimum period of imprisonment is 10 years. This means that if you were imprisoned without parole you would be imprisoned for an additional 48 years. This significant discrepancy is a strong indication that the imposition of life imprisonment without parole would be manifestly unjust. This concern has troubled previous judges dealing with second and third strike murders. As was noted in *Tai*:[24]

---

22 *R v Puna* [2018] NZHC 79.

23 Statistics New Zealand "New Zealand period life tables: 2012–2014" (8 May 2015) <https://www.stats.govt.nz/topics/life-expectancy>.

24 *R v Tai*, above n 18, at [51].

> A common and powerful theme running through all of the cases is to focus on the discrepancy between the period of incarceration a whole of life sentence could be expected to impose and that which would be imposed apart from the strike regime.

[89] I also consider here the imposition of a sentence of life without parole would be grossly disproportionate.

[90] I must also consider the circumstances of your first strike offence.[25] I now turn to the offending for which you received your first strike warning.[26] Your first strike was entered for a robbery and aggravated assault. You and an associate had decided to rob a local Thirsty Liquor store for cigarettes. The plan was that you would enter the store armed with a hammer and take as many cigarettes as possible. Your associate was to remain in the car. You engaged the store worker in discussion about vodka, and when he moved closer to you to speak to you, you punched him in the face. The victim offered no resistance and tried to escape through the door. You discarded the hammer, took several cartons of cigarettes and departed the store. Meanwhile, your associate had become concerned and left the car heading towards the store. He saw the store worker fleeing and attacked him. You approached the store worker and punched him again in the head.

[91] You played a major role in that offending. However, you were sentenced to two years' imprisonment on the robbery charge and one year on the aggravated assault charge to be served concurrently. The maximum sentence for those offences is 10 years and three years respectively.[27] Further, the sentencing notes for this offending record that the Judge accepted it was possible you could have received a community-based sentence.[28] Such was not imposed because by the time you were sentenced for the robbery offending you were in custody on the murder charge. I am satisfied the earlier offending for which you received the first strike warning was not the most serious of that type of offending.

---

25 *R v Harrison*, above n 2, at [104].
26 *Police v Pilitati* [2019] NZDC 7859.
27 Crimes Act 1961, ss 234 and 192.
28 *Police v Pilitati*, above n 26, at [1].

[92] Accordingly, I am satisfied that this is a clear and convincing case in which it would be manifestly unjust to sentence you to life imprisonment without parole. The Crown was right to make this concession.

Sentence

[93] Mr Pilitati please stand.

[94] For the murder of Mr Brown, you are sentenced to life imprisonment with a minimum term of 10 years imprisonment.

[95] I also make an order for the destruction of the firearm.

Second strike warning

[96] Given your conviction for murder, you are now subject to 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 lists the serious violent offences.

(a) 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.

(b) 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.

(c) If you are convicted of murder after this warning then:

(i) you must be sentenced to life imprisonment. The Judge must order you to serve this sentence without parole unless it would be manifestly unjust to do so;

(ii) if the Judge finds 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.

(d) 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.

[97] You may stand down.

Duffy J