ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OR IDENTIFYING PARTICULARS OF OTHER DEFENDANT UNTIL THE FINAL DISPOSITION OF HIS TRIAL.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2018-096-2743
[2019] NZHC 2948

THE QUEEN

v

FALCON SAMUELS

Hearing: 12 November 2019

Appearances: G J Burston for Crown
N H Wright for Defendant

Sentence date: 12 November 2019

SENTENCING OF COOKE J

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[1] Mr Samuels you appear today to be sentenced for the murder of Paul Te Hiko following your conviction at trial.[1] You also appear for sentence on the following charges in relation to which you earlier pleaded guilty:

(a) assault with intent to rob;[2]

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1 Crimes Act 1961, s 167, maximum penalty life imprisonment.
2 Section 236(1), maximum penalty 14 years' imprisonment.

(b) demanding with menaces,[3] and

(c) two charges of theft.[4]

Factual basis for sentencing

The murder of Paul Te Hiko

[2] I deal first with the factual basis for sentencing, and begin with the murder of Paul Te Hiko. As the Court of Appeal said in *R v Connelly*, I must form my own view of the facts, and I am not bound to accept the version of the facts most favourable to you.[5]

[3] On the evening of 7 March 2018 you went to an address in Wainuiomata which was the pad of the Manga Kahu gang. You met three associates, Mr A, Mr B and Mr C.[6] A plan was then implemented to go to another address in Wainuiomata on Jack Vaughn Grove, nicknamed "the Dojo". The Dojo was occupied by Paul Te Hiko, the victim. Mr Te Hiko was a patched member of Black Power but he had been engaging in business with other gangs and the planned offending was connected with gang disputes. The plan involved going to the Dojo to steal Mr Te Hiko's drugs or other property. It encompassed doing serious violence to him if he was present, potentially involving killing him, particularly if he resisted. Weapons were taken for that purpose.

[4] Mr C drove the group from the gang pad and dropped you near to Jack Vaughn Grove after 10 pm that night. The Dojo was part of a subdivision site. The main building, nicknamed "the Dojo" was an old boxing and karate training hall. The southern half was used for recreation and as a storage area, with weights, a pool table, kitchen, couch and a TV. Directly adjacent was a container used as a sleepout by Mr Te Hiko. Mr Te Hiko was living there.

[5] You and your associates were armed with a shotgun and a crowbar. You approached the Dojo. The lights were on as Mr Te Hiko was home. Mr Te Hiko

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3 Section 239(2), maximum penalty 7 years' imprisonment.
4 Sections 219 and 223(d), maximum penalty three months' imprisonment.
5 *R v Connelly* [2008] NZCA 550 at [14].
6 The identities of Mr A, Mr B and Mr C are suppressed pending determination of charges against Mr B as outlined in my minute of 4 September 2019.

became aware of your presence and he came out of the back door of the Dojo where you were. He was carrying an axe. At that point he was shot at close range with the shotgun and died shortly thereafter. The inside of the Dojo was then ransacked, and any property of value to you was taken by you and your associates.

[6] The three of you then exited the scene through a pathway through the bush line behind the Dojo to a nearby street where you were picked up by Mr P and taken back to the Manga Kahu gang pad.

[7] The Crown has proposed that I sentence you on the basis that you were the person that shot Mr Te Hiko. There is evidence that suggests that you were the shooter — that was the effect of Mr A's evidence, your DNA was found on the outside of Mr Te Hiko's jacket, and there may be some validity to the suggested jailhouse confession to Mr Taylor given it was captured on the prison CTV where you can be seen re-enacting the shooting to Mr Taylor while Mr Taylor takes notes. But I am not satisfied to the required burden that I can be sure that you were the shooter. It is possible that Mr B or somebody else was. In those circumstances I proceed to sentence you on the basis that you are liable as a party to the murder of Mr Te Hiko.

The assault with intent to rob

[8] Three days earlier, on 4 March 2018 at around 5.30 pm you and two associates were driving in Waterloo, Lower Hutt. You pulled up outside the Galway Street Dairy. You exited the car, pulled the hood of your sweatshirt over your head and ran into the shop. You were carrying a firearm. Your associate followed you, carrying a bag. You ran past a female shopkeeper towards the counter. The female shopkeeper began to scream, alerting her husband. Her husband ran down into the shop and confronted you. You and your associate retreated from the shop. You pointed the firearm in a threatening way to both of them as you were confronted and as you retreated. You ran back to the waiting vehicle and drove away from the scene.

Demanding with menaces and theft

[9] Later, on the morning of Monday 2 April 2018 you were with the victim at a Motel in Lower Hutt. You asked the victim to drive you to Tawa. The victim agreed,

and you got into the victim's car. Shortly after leaving the address, you demanded $1000 from the victim. He refused and said he did not have enough money. You demanded $300. The victim again said he did not have the money. You then said "Do what I say, I have a knife, I'm fitter and faster than you and don't run" and gestured to where you were carrying a knife.

[10] The victim continued driving south. You noticed your phone was running out of its battery and told the victim to stop at a petrol station. While at the station you took a phone charger cable without paying and returned to the car. You then continued driving. You then realised the cable was the wrong connection for your phone and you told the victim to stop at another petrol station. While at that station you took another charger cable and again left without paying.

Victim impact statements

[11] I have received victim impact statements. Mr Te Hiko's sister, Linda, speaks of the profound and devastating impact Paul's death has had on her life. Paul's parents, Michael and Dilys, speak of the deep sadness and emptiness they feel without Paul. Paul's son Juane, their grandson, is lost in a void of grief, sadness and confusion.

[12] Mr Patel the owner of the dairy you attempted to rob, says when the shotgun was pointed at him and his wife he feared for their lives. Since the incident he has been worried about his own safety and the safety of his family, as the family home is attached to the shop.

Approach to sentencing for murder

[13] There is a presumption in favour of life imprisonment for offenders convicted of murder.[7] Under s 102 of the Sentencing Act 2002, you must be sentenced to life imprisonment unless a sentence of life imprisonment would be manifestly unjust. The exception only applies in very rare circumstances.[8]

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7 Sentencing Act 2002, s 102.

8 *R v Mayes* [2003] 1 NZLR 71 (CA); *R v Rapira* [2002] 3 NZLR 794 (CA); *R v Smail* [2007] 1 NZLR 411 (CA).

[14] Mrs Wright accepted that if I concluded that you were the shooter there would be no basis to consider the exception in s 102, but argued that if I sentenced you as a party there could be.

[15] I do not accept there is a basis to apply the exception in s 102 even though I sentence you as a party. I will address the nature of the offending and your personal circumstances in greater detail later. Unlike other cases, such as *R v Cunnard* which Mrs Wright referred to, your participation as a secondary party does not involve culpability that differs greatly from that of the principal.[9] The offending was premeditated gang related activity against Mr Te Hiko, a patched Black Power gang member. Serious violence to Mr Te Hiko was almost inevitable if he were present. A shotgun was taken because of this. You were a key participant in this plan. Your responsibility as a party is not so different to that of the principal offender to give rise to the application of the exception.

[16] The main issue, therefore, is the appropriate minimum period of imprisonment you ought to serve.

Minimum period of imprisonment under s 104

[17] If life imprisonment is imposed, under s 103 of the Sentencing Act the Court must order a minimum period of imprisonment of at least 10 years.[10] In certain circumstances, a minimum term of at least 17 years must be imposed where the case fulfils one or more of the criteria under s 104, unless such a minimum term would be manifestly unjust.

[18] In terms of the s 104 criteria I first accept that s 104(1)(c) is engaged as the murder involved unlawful entry into a dwelling place. "Dwelling place" is not defined in the Sentencing Act but is designed to reflect the sanctuary expected of a home.[11] In *Pahau* the Court of Appeal said that the question is "a factual one to be resolved having regard to the particular circumstances".[12] During the day, the Dojo itself was used as a recreational area for construction workers and for Mr Te Hiko's daily business. But

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9 *R v Cunnard* [2014] NZCA 138 at [10], [18] and [31].
10 Section 103.
11 See *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [31](j).
12 *Pahau v R* [2011] NZCA 147 at [73].

Mr Te Hiko had been using the Dojo as a living space and using the adjacent sleepout to sleep since 2014. Given the site was used for a number of non-residential functions, it was by no means a typical dwelling place. It did not possess the usual "sanctuary" qualities ordinarily associated with a dwelling place during the day. But the murder took place at night. At the time Mr Te Hiko was using the Dojo purely as a living space. I do not see that it matters that the place where he slept was detached from the Dojo. Neither does it matter that he was disturbed and came out from the back door when he was shot, and that the Dojo was entered and ransacked after he was killed. In the circumstances I consider there was a violation to the sanctity of his home and it would be artificial to conclude otherwise. In my view that is sufficient to constitute a dwelling space for the purpose of s 104.

[19] Section 104(d) is also engaged as the murder was committed in the course of other serious offences, being attempted aggravated robbery and attempted aggravated burglary.[13]

Is a 17 year MPI manifestly unjust?

[20] The next question is whether a 17 year minimum term of imprisonment would be manifestly unjust. The Court of Appeal in *R v Williams* explained the approach to addressing these provisions involves first making an assessment of what the MPI would have been under s 103 apart from the deeming effect of s 104. This involves assessing the degree of culpability taking into account the aggravating factors set out in s 104, any other applicable aggravating factors and all those in mitigation, and then deciding the appropriate MPI in all the circumstances of the case, including your personal circumstances.[14] Where the first step indicates that the appropriate MPI is 17 years or more the minimum term must reflect that assessment, but if an MPI of less than 17 years is assessed it becomes necessary to consider whether it would be manifestly unjust to impose an MPI of 17 years given the mandating effect of s 104.

[21] In terms of your culpability for this offending I accept that it is on the higher end. Whilst I sentence you on that basis that you were not the shooter, this was gang

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13 Crimes Act 1961, s 235 and s 232.
14 *R v Williams* [2005] 2 NZLR 506 (CA) at [52]–[54].

related premeditated offending against another gang member involving stealing his property and doing violence to him. Serious violence and potential death were likely given that Mr Te Hiko would not likely hand over his property without resistance. There are no mitigating factors associated with the offending.

[22] Adding to that is your extensive criminal history, with some 105 previous convictions. Most are for dishonesty or driving related offending. Apart from the current charges, you only had one other conviction for violent offending, for common assault, in 2008. The latest set of offending represents a surprising, and significant, leap in severity.

Personal circumstances

[23] There are, however, some very significant personal circumstances outlined in the reports that have been provided, and the advice of Dr Duncan Roy. The cultural report from Te Huarahi Rereke Services provides detailed information and further context.

[24] You are 30 years old. Until seven years of age you lived with your parents. When they separated you went to live with your father. Your father was abusive to your mother, your step-mother and you and your siblings. The violence against you occurred most days. The extent of violence, mistreatment and humiliation you endured at the hands of your father detailed in the reports can fairly be described as horrific.

[25] Your father is a patched member of the Mongrel Mob and had already served several sentences of imprisonment by the time you reached adolescence. You recall committing burglaries and selling drugs with your father, and later, your aunt and uncle, from a young age. Criminal life and violence was normalised.

[26] You report a good relationship with your mother and younger siblings. Your mother is supportive. At age eleven you were placed in the care of Oranga Tamariki. You remained in foster care until you were 17.

[27] You are single with no dependents. You have spent the majority of your life in juvenile detention centres and prison. You have never had stable employment. You became a patched member of the Nomads gang when you were 18 years old. You have limited pro-social friends and associates, instead focusing a misguided loyalty towards other gang members and violent offenders. Prior to being remanded in custody, you lived with your father and sister and their respective partners in Wairoa.

[28] The pre-sentence report records you expressing a desire for a different lifestyle following release from prison. You have expressed a willingness to engage in counselling and treatment to support that aim. Although you continue to deny the offending, you accept guilt "by association" and presented to the pre-sentence report writer as remorseful for your role in Mr Te Hiko's death.

[29] The alcohol and other drug assessment report records you first using cannabis at age eight, and consuming alcohol from age 13. Drugs and alcohol were readily available and supplied from your father. From age 13, you started using cannabis "all day, every day". From age 14, you began using methamphetamine and by age 22, you were using methamphetamine multiple times a day. At one point you were consuming as much as 1g per day. The report writer records your poor problem-solving and decision-making ability — given your consumption of drugs and alcohol from such a young age, that is unsurprising.

[30] The cultural report provides a holistic cultural context for your offending. You are of Nga Rauru and Ngati Rangitane descent. You express a frustration that you have never had the opportunity to connect to your Māori identity and have little knowledge of tikanga Māori or Te Reo. You have never experienced a secure and predictable environment where you could have a sense of belonging. Instead your upbringing was one of hardship and disadvantage, where crime and violence were normalised.

[31] Whanau violence is the consequence of a history of colonisation and systemic socioeconomic depravation. Through colonisation Māori have been alienated from their language, values, practices and cultural identities. You and your whanau are a clear example of that colonial legacy.

[32] All the reports suggest that you have a desire to change, and wish to move away from a criminal lifestyle.

Conclusion on MPI but for s 104

[33] The Crown submits an MPI of 17 years should be imposed in the present case even without the effect of s 104. Mr Burston relies on *McHugh v R* where a MPI of 19 years was imposed when s 104(c) and (d) were triggered.[15] The offender there had gone to an address planning to steal money and drugs, bringing a firearm with him. Late at night, the offender entered the address through a back window and walked into the bedroom where the occupant and a visitor were. The offender pointed the firearm at the occupant and discharged a bullet through the wall of the home and demanded drugs and money from the occupant. He then turned and shot and killed the visitor and demanded drugs and money from the occupant before departing the address with the stolen drugs and money.

[34] In *R v Rakuraku* the Court decided upon a 17 year MPI.[16] In that case the offender had killed the person who he lived with who was particularly vulnerable due to his mental illness. He had beaten him savagely over an extended period. Section 104(1)(d) and (e) were triggered. The Judge found that he would have reduced the MPI of imprisonment by 12 months to take account the offender's difficult and abusive background and the systemic deprivation referred to in a cultural report.

[35] I accept in your case the circumstances of this offending would normally warrant a high MPI albeit mitigated by your significant personal circumstances. Were it not for s 104 I would have concluded under s 103 that an MPI of 14 years' imprisonment would have been appropriate. I have already emphasised the elements of premeditation and gang related violence that were involved. Whilst I sentence you on the basis of party liability only, the liability involves knowing participation in pre-planned offending against another gang member.

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15 *R v McHugh* [2015] NZHC 2389.
16 *R v Rakuraku* [2014] NZHC 3270 at [60].

Is a MPI of 17 years manifestly unjust?

[36] The fact that the MPI would have been 14 rather than 17 years does not mean an MPI of 17 years is manifestly unjust. The question of injustice requires an overall assessment, taking into account your personal circumstances, the circumstances and nature of the offending and the purposes and principles of the Sentencing Act. The Court of Appeal in *R v Williams* gave useful guidance on the approach to s 104(1) in the following terms:[17]

> [67] We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.
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> [68] Beyond that, what level of disparity amounts to manifest injustice remains a matter of sound sentencing judgement that is not capable of precise determination. It may be helpful, however, to indicate that when the qualifying factor has only peripheral significance in the case the statutory minimum term may be manifestly unjust. Otherwise, where the culpability attaching to the offence is relatively low having regard to the range of cases caught by s 104, the circumstances of the offender may make the sentence manifestly unjust.

[37] Some examples of cases where the manifest unjust exception have been held to apply are:

(a) *R v Lewis*:[18] here the presumption engaged because murder involved three s 104 factors: calculated lengthy planning, committed in the course of another offence and committed with a high level of brutality, cruelty or callousness. Ms Lewis' personal mitigating factors were that she was just 17 years old at the time of the offending, she pleaded guilty six months before the set trial date, and she had psychological and intellectual challenges.[19] The Court also considered it relevant that

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17 *R v Williams*, above n 14.
18 *R v Lewis* [2018] NZHC 1877.
19 At [39].

Ms Lewis was not the party who actually committed the physical acts of killing the victim and that the sentence ought to reflect that.[20] An MPI of 11 years was imposed.

(b) *R v Turner*:[21] the offender was 29 years old and homeless. His victim was another homeless man living nearby. He admitted to Police to punching the victim in the face for 20–30 minutes. He then dragged him off the bed, and began stomping his head on the floor. Section 104(1)(e) and (g) were engaged. The offender had significant mental health difficulties and had been diagnosed with severe personality disorder, aggravated by substance abuse and had been prescribed anti-psychotics for reports of hearing voices. The Judge held that the guilty pleas and mental disorders made it manifestly unjust to impose a 17 year MPI and an MPI of 15 years was imposed.

(c) *Te Wini v R*:[22] here Ms Te Wini and her cousin broke into an elderly person's home to rob him and when they encountered him they beat him with weapons and killed him. Section 104 was engaged for essentially the same reasons as your case. But Ms Te Wini was only 15 years of age at the time of the offending, she had a traumatic history of victimisation and suffered from depression and PTSD. The Court of Appeal upheld the assessment by the trial judge that an MPI of 10 years should be imposed.

[38] In assessing your case, it seems to me that in addition to the fact that I sentence you only as a party the following factors need to be considered in assessing whether a 17 year MPI is manifestly unjust given the legislative policy:

(a) Whilst this was a home invasion, it was not the type of home invasion that Parliament would have had primarily in mind in enacting the criteria in s 104. This was the premises of another gang member that was also used by him for his activities during the course of the day.

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20 At [28].
21 *R v Turner* [2015] NZHC 189.
22 *Te Wini v R* [2013] NZCA 201.

(b) Your personal background is characterised by significant cultural deprivation, physical and psychological abuse, drug and alcohol abuse and crime. A life of violence and crime has become normalised for you.

(c) The current offending involves a major escalation in terms of seriousness of the offending that you have engaged in, with only one other conviction for a violent offence some 10 years ago. The extreme violence involved in this offending is not characteristic.

[39] Notwithstanding these factors, I am not satisfied that an MPI of 17 years would be manifestly unjust. This was premeditated gang related offending. You are not very young or suffering from diagnosed mental health conditions, as with other cases. Your case is more similar to *R v Rakuraku* where the High Court accepted the 17 year MPI notwithstanding a similar personal background to yours, although that case involved more extreme violence against a vulnerable victim by the principal offender.[23] Here the elements of premeditation in the context of gang related violence are nevertheless significant. Importantly more than one s 104 criteria apply. Whilst the offending involves a significant escalation in the seriousness of the offending you have engaged in, it is an escalation that you have consciously decided to engage in after a period of 10 years with no convictions for violent offending. The threats of violence in the surrounding offending, which I will turn to next, also demonstrate that this violent offence was not an isolated incident. The nature of the offending in light of the presumption created by s 104 means that I am not satisfied that the exception applies.

[40] For those reasons a minimum term of imprisonment mandated by s 104 of 17 years applies.

Other charges

[41] You also face charges for assault with intent to rob, demanding with menaces and theft, on which you should be sentenced concurrently.

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[23] *R v Rakuraku*, above n 16.

Assault with intent to rob (the Galway Street dairy offence)

[42] There is no tariff case for assault with intent to rob. However, the Crown suggests *R v Mako* has some relevance as the leading tariff judgment for aggravated robbery (which carries the same maximum penalty).[24] The relevant aggravating factors as identified in *Mako* present in the offending are:

(a) there were three offenders with two entering the shop and one remaining in the vehicle as getaway driver;

(b) there was an attempt to conceal identity with you covering your head with a hood before entering the store; and

(c) most significantly, the presence of threats and intimidation as you pointed the shotgun at both shopkeepers in a manner suggesting you were about to shoot them.

[43] On the other hand, there was no property stolen and no physical injuries to the victims. The Court of Appeal in *Mako* suggested a starting point of four years for a robbery of a small shop by one offender demanding money from the till under threat of the use of a weapon with no customers present, no actual violence and a small sum of money taken. If the shopkeeper is confined or assaulted, or confronted by multiple offenders, or if more money and other property is taken, a starting point of five years is appropriate. The Crown submits a starting point of five years imprisonment is appropriate, given the aggravating factors in the present case. I agree with that assessment particularly given the presentation of the shotgun to both shopkeepers.

[44] An uplift of six months is also justified given your extensive history of dishonesty related offending. Following a 25 per cent discount for a guilty plea, that results in an end sentence of four years imprisonment.

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[24] *R v Mako* [2000] 2 NZLR 170 (CA).

Demanding with menaces and theft

[45] There is no tariff case for demanding with menaces as the charge potentially covers a broad range of factual scenarios. Based on the cases put forward by the Crown, a starting point of 12 months' imprisonment is appropriate. The Crown does not seek an uplift for the two theft charges.

[46] After a 25 per cent discount for guilty plea, that amounts to an end sentence of nine months' imprisonment.

[47] On the theft charges you are convicted and discharged.

Strike warnings

[48] You are not eligible for a second strike warning given you did not have any record of a first warning at the time of committing the murder.[25] But I remind you of your first strike warning.

Sentence

[49] Mr Samuels will you please stand. On the charge of murder of Paul Te Hiko I sentence you to life imprisonment, and under ss 103 and 104 of the Sentencing Act I order that you serve a minimum period of imprisonment of 17 years.

[50] I also sentence you for the following periods of imprisonment which are to be served concurrently with the sentence for murder. On the charge of assault with intent to rob, four years' imprisonment. On the charges of demanding with menaces and theft, nine months' imprisonment.

[51] Please stand down.

Cooke J

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[25] Sentencing Act 2002, s 86A, definition of "stage-2 offence".