

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CRI-2018-092-005114  
[2019] NZHC 1867**

**THE QUEEN**

v

**FILILAU TAPAEVALU  
MESUI TUFUI**

Hearing: 2 August 2019

Appearances: G Kayes and C Robertson for Crown  
S Wimsett for Mr Tapaevalu  
P Borich QC and T D Clee for Mr Tufui

Judgment: 2 August 2019

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**SENTENCING REMARKS OF LANG J**

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[1] Mr Tufui and Mr Tapaevalu, you were found guilty by a jury on charges of murder and attempted murder. As you are well aware, those charges carry maximum sentences of life imprisonment and 14 years imprisonment respectively.

[2] Prior to your trial, Mr Tufui, you also pleaded guilty to a charge of being in possession of 1.7 grams of methamphetamine. The maximum sentence for that charge is one of six months imprisonment.

[3] Mr Tapaevalu, you pleaded guilty to two charges of being in possession of methamphetamine for supply. These related to two quantities of methamphetamine found at your address when the police searched it. One of these comprised 16.5 grams of methamphetamine and the other comprised 1.1 grams. In addition, you pleaded guilty to two charges of being in unlawful possession of firearms. These were found at an address in Te Atatu to which I will refer later in my remarks. They were the weapons used in the offending to which I am about to turn.

### **The facts**

[4] The charges relate to an incident that occurred in the late evening of 30 April 2017 and running into the early hours of the following morning. The incident had its genesis, however, in the events of the previous few days. You were charged originally with a man called Mr Taani, and I need to factor in his involvement in the offending of which you have been found guilty because he played a very important part.

[5] Mr Taani was a patched member of the Comancheros gang and the evidence makes it clear that he was involved in the supply of methamphetamine in a reasonably substantial way. Mr Tapaevalu, you were also involved in the supply of drugs and also in a reasonably commercial way. You dealt with Mr Taani in that capacity. Mr Tufui, you were regarded as a “runner” for Mr Tapaevalu, which I take to be a person lower down in the drug dealing order.

[6] The male victim in this case, Mr Tu’uheava, had lived in Australia for some years. He returned to New Zealand and became involved in dealing methamphetamine. It is clear from the evidence that he sought to make contact with the Comancheros organisation because he viewed it as a source of methamphetamine

that he could sell on to others. At that stage he was obtaining methamphetamine from other sources in Auckland and selling it, it would seem, in the South Island.

[7] Your group's involvement with Mr Tu'uheava began 27 April 2017 when Mr Taani made contact with Mr Tu'uheava by text message and said that from now on he would be the contact point with whom Mr Tu'uheava should deal. At that point Mr Tu'uheava was about to depart for the South Island to sell drugs in the Southland area. He said that he would be home on the Sunday and would make contact at that point. On the Sunday afternoon, Mr Taani sent a text message to Mr Tu'uheava asking whether he had arrived home. It turned out that Mr Tu'uheava's flight from the South Island had been delayed and he did not return until the Monday evening.

[8] On the Sunday afternoon, the two of you had gathered at Mr Taani's house. Whether or not this was for purely social purposes or because you anticipated Mr Tu'uheava's arrival back from the South Island is impossible to say. What is clear, however, is that Mr Tu'uheava arrived at Auckland Airport at about 4.40 pm on the Monday afternoon. Mr Taani made contact with him shortly afterwards and he then made contact with you, Mr Tapaevalu, and Mr Tapaevalu immediately made contact with you, Mr Tufui.

[9] Arrangements were then made for you to travel to the McDonalds Restaurant in Manukau City. You parked in the carpark there with Mr Taani and awaited Mr Tu'uheava's arrival. Mr Taani got out of the car and spoke for about 20 or 25 minutes with Mr Tu'uheava. During this period you remained in your vehicle, but looked after Mr Tu'uheava's cellphone that Mr Taani had taken off him.

[10] Following that meeting, you travelled to an address in Bucklands Beach. The evidence at trial suggested this was occupied by the leader of the Comancheros organisation in Auckland. Mr Taani got out of the vehicle at this point and went into that person's house. He then returned to the vehicle and the vehicle travelled back to Mr Taani's address. Later in these remarks I shall describe a conversation that Mr Tufui told the police occurred between Mr Tapaevalu and Mr Taani after Mr Taani returned to the vehicle.

[11] You then went your separate ways back to your home addresses, but you met up again later in the evening and arranged to meet Mr Tu'uheava at Greenwood Road in Mangere. This was a location that you, Mr Tapaevalu, suggested to Mr Taani. You went to Greenwood Road at about 10.43 pm. It seems that Mr Taani and Mr Tu'uheava spoke outside the vehicle for about five minutes before both vehicles left the scene. It seems from what Mrs Tu'uheava says that her husband believed that a drug deal of some sort had been agreed at that point. He had taken to the scene two bags containing a total of approximately \$63,000 in cash. It is clear that he was seeking to obtain a re-supply of methamphetamine he could then re-sell.

[12] You went to a service station where, Mr Tapaevalu, you were recorded making a purchase. You then got back into the driver's seat of the vehicle and the vehicle travelled back to Greenwood Road. You arrived there at approximately 11.15 pm.

[13] At your trial, Mr Tapaevalu, you said that you had stopped the vehicle a short distance away from Greenwood Road and got into the back seat because you were tired. You said Mr Tufui had taken over driving the vehicle. You said you had then gone to sleep and did not wake up for some considerable time, by which stage the incident that has given rise to the present charges was underway. I do not accept that evidence. I consider it is inconsistent with the fact that you were driving for the balance of the evening, including during the latter stages of the incident in question. I have no doubt that you were driving the vehicle throughout, and that you were not asleep at any stage.

[14] When you got to Greenwood Road, you drove up to the vehicle occupied by Mr and Mrs Tu'uheava. The two vehicles remained at that point for nearly an hour and a quarter. During this time there was obviously considerable discussion between Mr Taani and Mr Tu'uheava. It ended, however, when Mr Tu'uheava came running to his vehicle and calling out to his wife. Mrs Tu'uheava then looked out the window and saw a man with a gun. This precipitated the series of events that has led to these charges.

[15] Mrs Tu'uheava said she was forced to get out of the vehicle. She described two men being there. She described Mr Taani as being the "main guy". She said that

when she got out of the door of the vehicle she was confronted with a man holding a shotgun. She referred to this person as the “younger guy”, and I have no doubt given the jury’s verdicts, Mr Tufui, that you were the person she described as the younger guy. She then described a series of events in which she and her husband were ordered at gunpoint to walk to the edge of the road. They then began running down the road. As, or at about the time that occurred, at least one shot was fired.

[16] The evidence suggests that, as they ran away, Mr Taani went back to the vehicle. I am satisfied, Mr Tufui, that you carried on down the road with the shotgun you were holding. I draw that inference because three live shotgun shells were found on or beside the road approximately half-way between where the vehicles were parked and the point to which Mr and Mrs Tu’uheava ran. I am also certain that Mr Tu’uheava was alive when he arrived at the second position, known at the trial as Position 2.

[17] Mr Taani got into the vehicle and, Mr Tapaevalu, you then drove him down to the point known as Position 2. At that point Mr Taani got out and a large number of shots were fired. Seven of these struck Mr Tu’uheava. He received two gunshots to the left upper arm, two gunshots to the back and three wounds to the head. Not all of these were fatal. The fatal shot entered his lower back and travelled through his chest cavity, causing irreparable damage to vital organs.

[18] At or about the same time, I am satisfied Mr Taani discharged two shots at Mrs Tu’uheava. These struck her in the arm or upper arm or shoulder area. He then changed weapons and shot her twice in the head with a .38 Smith & Wesson revolver. Remarkably, Mrs Tu’uheava survived these wounds. She pretended to be dead and you eventually left the scene with Mr Tapaevalu driving the vehicle.

[19] You then went to Te Atatu, where you left the two weapons that had been used in the shooting at Mr Tapaevalu’s partner’s address in a shed. You travelled back into the city where you bought a padlock. You then put the padlock on the shed and keys to this were given to you, Mr Tapaevalu. You then travelled back to the Tapaevalu family home in Tidal Road, Mangere, where the three of you were seen asleep by another occupant of the address at about 7 am that morning.

[20] Mr and Mrs Tu'uheava were not discovered until approximately 6 am the same day, when a passing motorist noticed two bodies lying on the side of the road. Mrs Tu'uheava was still alive and was able to give a reasonably lucid account of what had occurred both to police officers who attended the scene and ambulance officers. Mr Tu'uheava, unfortunately, was found dead where he lay.

[21] Mrs Tu'uheava was taken to hospital and surgeons were able to remove one of the bullets from her brain. Both bullets had fractured the skull and entered the brain. The second bullet could not be removed because of the attendant risks to Mrs Tu'uheava's life should that be undertaken. She was able to give the police a very lengthy statement over the following days as to what had occurred. She was also able to identify you, Mr Tufui, from a photograph montage. She was unable to identify you, Mr Tapavalu. That is not surprising, because she said she only got a glimpse of the person who was at the wheel of the vehicle. You were subsequently arrested and, as I have said, drugs were found in both the shed in Te Atatu and in your possession, Mr Tufui.

[22] Mr Tufui, you underwent two videotaped interviews with the police. During these your story evolved but, in essence, it was that, although you had been with Mr Tapavalu and Mr Taani earlier in the evening, you were not with them when they went to Greenwood Road. You said you had gone to Mr Tapavalu's address and waited for him to return. You said that when he returned he and Mr Taani burned items of clothing in a fire at the property. The police also found in the ashes in that firepit the remains of a cellphone similar to that used by Mr Taani. You therefore denied any involvement in what had occurred at Greenwood Road.

[23] Mr Tapavalu, you exercised your right not to make any explanation to the police. You gave your version of events at trial. In short, you said you had been asleep in the passenger seat and awoke to find events unfolding. You immediately got in the front seat and followed a direction by Mr Taani to drive down to Position 2 where further shooting occurred.

### **Was there a pre-arranged plan to kill Mr Tu'uheava?**

[24] Against that background it is necessary for me to make a factual finding relating to an important issue so far as Mr Tufui is concerned.

[25] The Crown case at trial was that he went to Greenwood Road knowing Mr Tu'uheava was to be killed there. The Crown based this allegation on comments Mr Tufui made to the police during the course of his interview. He said that when the vehicle stopped at Bucklands Beach and Mr Taani returned to the vehicle after going inside the house, Mr Taani made a number of remarks to Mr Tapaevalu. These included the fact that they had been given the "green light" and that something would happen tonight. There was reference to "putting someone to sleep" and that this person had been "making money out of the Como name". The Crown says Mr Tufui was therefore fixed with the knowledge that Mr Tu'uheava was to be killed later that night on the orders of someone in the Comanchero gang.

[26] The Crown is placed in an awkward position so far as this evidence is concerned because it was inadmissible against both Mr Taani and Mr Tapaevalu even though they were the persons who were allegedly the participants in the conversation. It was inadmissible against them because neither of them had been present at the police station when Mr Tufui made his statement. As a result, the Crown could only rely on it at trial against Mr Tufui. It now says that the minimum term of imprisonment to be imposed on Mr Tufui should be greater than that imposed on Mr Taani because, unlike Mr Taani, he knew there was to be a murder carried out that night.

[27] Premeditation, or lengthy and calculated planning, can be an aggravating factor of offending generally<sup>1</sup> and can also affect the length of any minimum term of imprisonment.<sup>2</sup> It is in the latter context that the Crown says this issue is important in the present case.

[28] In this context I bear in mind that aggravating factors need to be proved by the Crown beyond reasonable doubt. This means I must be sure Mr Tufui was telling the

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<sup>1</sup> Sentencing Act 2002, s 9(1)(i).

<sup>2</sup> Sentencing Act 2002, s 104(1)(b).

truth about this conversation before I can take it into account. Other factors suggest that the account was not accurate.

[29] The allegation as to premeditation and planning of Mr Tu'uheava's death needs to be considered in its context. First, it arises only as a result of the explanation given by Mr Tufui to the police. As I have already indicated, this was an evolving account. At trial the Crown invited the jury to disregard virtually all of it as being a lie designed to save Mr Tufui from being convicted of the murder. The Crown therefore invited the jury to disregard most of the interview, but to believe that aspect of his account when he described the conversation that occurred at Bucklands Beach. That is not a confident start against which to base an allegation.

[30] I consider the activities that occurred prior to the events at Greenwood Road are consistent both with an arrangement to carry out a drug transaction and a plan to carry out a murder. It is impossible to say, however, that they are consistent only with a plan to kill Mr Tu'uheava. I say that despite the fact that I have no doubt at least three firearms were taken to the scene. Unfortunately, firearms and serious drug dealing go hand in hand. Those who are involved in this type of activity take precautions against the risk that they might be robbed of cash or drugs by the other party. It is therefore not uncommon for firearms to be taken to a scene where serious drug dealing activity is about to occur.

[31] It also needs to be borne in mind that it seems this was the first occasion on which these parties had dealt with each other. There is certainly no evidence that Mr Tu'uheava had ever dealt with the Comancheros before. It is therefore no surprise that your group took firearms to the scene.

[32] In submissions to the jury and to the Court today, Mr Borich has suggested there may be an alternative narrative available in relation to the shotgun that Mrs Tu'uheava saw in the hands of the person she described as the younger man. Mr Borich says that Mr Tu'uheava may have taken that firearm to the scene and that there may have been a struggle in which Mr Tufui disarmed him and then used the shotgun himself.

[33] There are several problems with this, the most significant of which is that there is absolutely no evidence to support the theory. Mrs Tu'uheava did not say she had ever seen her husband in possession of a shotgun and there is no other evidence to suggest there was a shotgun in his vehicle when he arrived at the scene. Nor is there any evidence of a struggle at which a shotgun was taken from his possession. I consider it far more likely that Mr Taani armed himself with the .22 rifle that was used to shoot the majority of bullets that night, and also the .38 revolver that was used to wound Mrs Tu'uheava in the head. Mr Tufui, for his part, took a shotgun to the scene along with live shotgun cartridges. Fortunately, however there is no evidence the shotgun was ever discharged.

[34] The most important factors in relation to the issue of premeditation and planning relate to the manner in which events unfolded. If this was a plan to kill Mr Tu'uheava, then why was it not carried out when the group first arrived at Greenwood Road at about 11.15 pm? Why would perpetrators of a scheme like that risk being detected by arranging for two separate occasions on which to meet the person who was to be killed?

[35] Even more importantly, the second meeting lasted for nearly an hour and a quarter. If the plan was to kill Mr Tu'uheava, why was that not done at the beginning of the second meeting? It is inconceivable, in my view, that a person planning to kill a victim would chat with them for nearly an hour and a quarter before carrying out the plan. I therefore proceed, as I advised counsel in a minute issued yesterday, on the basis that this was initially a meeting to discuss a drug dealing transaction. The fact that it may have taken some time is not surprising given the fact that the participants had not dealt with each other before. They may well have spent some time endeavouring to ascertain whether each could trust the other. Eventually, however, something occurred to spark the violence that ensued. Only Mr Taani and Mr Tufui will ever know what that was. It is not necessary for the Court to make any finding in that regard because the essential feature of this incident is the violence that occurred, not the issue that provoked it.

[36] This also raises the issue of why Mr Tufui may have told the police that the conversation occurred, when in fact it did not. It is not strictly necessary to answer this

question because the facts show that what he says was incorrect. It may be, however, as Mr Borich submits, that Mr Tufui was endeavouring to distance himself from Mr Tapavalu and Mr Taani. He sought to do that by attributing to them a conversation about a killing that he had no involvement in.

[37] I therefore proceed on the basis that the Crown cannot establish beyond reasonable doubt that there was a premeditated plan to kill Mr Tu'uheava.

### **The sentence for murder**

[38] Against that background I need to consider the sentence to be imposed on both of you. Whenever an offender is convicted of murder the Court is required to impose a sentence of life imprisonment unless that would be manifestly unjust.<sup>3</sup> There is no suggestion in the present case that the imposition of a life sentence would be manifestly unjust. That, therefore, must be the sentence of the Court.

[39] The real issue is the minimum term of imprisonment you will be required to serve before you may apply for parole. In the ordinary course of events the Court is required to impose a minimum term of ten years imprisonment unless that would be manifestly unjust.<sup>4</sup> Again, there is no suggestion in the present case that the imposition of a minimum term of imprisonment would be unjust. Importantly, however, the Court is required to impose such a minimum term as reflects the overall culpability of the offending.

[40] There is another factor that needs to be taken into account in the present context. Section 104 of the Sentencing Act 2002 requires the Court to impose a minimum term of imprisonment of not less than 17 years where certain criteria are met. All counsel agree that this threshold is reached in the present case because of three factors. The first is that this offending occurred in the context of serious criminal activity, namely dealing in the Class A controlled drug methamphetamine.<sup>5</sup> Secondly, it occurred, so far as Mr Tufui is concerned, in a brutal and callous fashion.<sup>6</sup> Thirdly,

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<sup>3</sup> Sentencing Act 2002, s 102(1).

<sup>4</sup> Sentencing Act 2002, s 103(2).

<sup>5</sup> Sentencing Act 2002, s 104(1)(d).

<sup>6</sup> Sentencing Act 2002, s 104(1)(e).

there is an exceptional circumstance here that must also be taken into account.<sup>7</sup> This relates to the way that Mrs Tu'uheava, an innocent bystander, was gunned down needlessly merely because she was the witness to events that unfolded at the time her husband was killed. I consider this to be an exceptional circumstance that needs to be taken into account.

[41] When Hinton J sentenced Mr Taani, she considered the threshold requirements of s 104 were met for all three of these reasons.<sup>8</sup> She considered a minimum term of 19 years imprisonment was required to reflect the overall culpability of the offending.<sup>9</sup> She reduced that by 18 months to reflect the fact that Mr Taani had entered guilty pleas to all the charges against him before his trial began.<sup>10</sup>

[42] I now need to consider the minimum term to be imposed on you based on the overall culpability of your offending. I deal first with general factors. The first is that this was an attack by a group of attackers, by two men, on two unarmed individuals. Secondly, it involved the use of lethal weapons. It also involved the discharge of not one but two lethal weapons, and the use of a third to gain control of the victims. Thirdly, it involved the death of one victim and the near death of another.

[43] Next, the victim impact statements I have received from Mrs Tu'uheava and Mr Tu'uheava's mother demonstrate that this offending has had extremely far-reaching consequences for them. Mrs Tu'uheava suffers not only from the ongoing physical issues associated with the bullet that remains in her brain, but also with severe psychological issues arising out of the trauma of that night. That is entirely unsurprising because anybody who went through what she went through that night would no doubt suffer very significant psychological harm. That harm will remain with her, I have no doubt, for the balance of her life. Mr Tu'uheava's death had effects obviously not only for her but also for his wider family. Whatever the cause of this incident it should not have resulted in what amounted to an execution of a defenceless person.

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<sup>7</sup> Sentencing Act 2002, s 103(2).

<sup>8</sup> *R v Taani* [2019] NZHC 1746 at [37]-[43].

<sup>9</sup> *R v Taani*, above n 8, at [55].

<sup>10</sup> *R v Taani*, above n 8, at [58].

[44] Against that general background I then need to consider the minimum terms to be imposed on you.

*Mr Tufui*

[45] Mr Tufui, Mr Borich submits on your behalf that you played a somewhat lesser role than Mr Taani because of the fact that you did not fire any of the shots that struck the victims. That submission, however, needs to be viewed against what you actually did. You went to that event armed with a shotgun, and I have no doubt you intended that you would use it at least to intimidate or threaten should any trouble arise. You then used that shotgun to intimidate Mrs Tu'uheava, to get her out of the car and then to give her and her husband orders about where they should go. You were present when the first shot was fired in the area of where the cars were parked. Rather than disengage from proceedings at that point, I am satisfied you followed the two victims down the road, dropping the three shotgun cartridges as you went. You knew that Mr Taani was going to execute those two persons and the jury's verdict makes it clear that you intended to assist knowing that this was his intention. So you were present with your shotgun keeping the victims under control throughout this incident, and the jury has found you intentionally provided assistance in the knowledge of Mr Taani's murderous intent.

[46] Given that scenario I see no basis on which I can reasonably distinguish your position from that of Mr Taani. Realistically, Mr Borich accepts that this is so. In your case I therefore select a starting point of 19 years imprisonment in relation to the minimum term of imprisonment to be imposed on you.

[47] You point to the fact that you have relatively few previous convictions and you have the positive support of your family. It is, however, a matter of concern that you have one previous conviction for a charge of presenting an object like a firearm. That occurred in 2015 and you were a 16 year old at that time. It is therefore no surprise that you were only ordered to come up for sentence if called upon. I acknowledge the support that you have of your family, but in this particular area of sentencing law I do not consider these factors are sufficient to reduce the starting point I have selected.

*Mr Tapaevalu*

[48] Mr Tapaevalu, Mr Wimsett accepts that s 104 is engaged because of the factors to which I have referred. He submits, however, that but for that section you would be facing a sentence of around 14 to 15 years imprisonment and he contends it would be manifestly unjust for you to receive a minimum term of 17 years imprisonment as the Crown submits you should.

[49] I do not accept that submission. I consider that the aggravating factors of this offending, even leaving aside the brutality and callousness of the killing, are sufficient to justify on its own a minimum term of 17 years imprisonment without the intervention of s 107. I rely on the cases referred to by Hinton J when she sentenced Mr Taani and repeated by the Crown in its submissions before me.<sup>11</sup> I therefore consider that, even apart from s 104, your offending would justify a minimum term of 17 years imprisonment.

[50] Whether or not it would be manifestly unjust to impose that minimum term therefore, strictly speaking, does not need to be considered. However, standing back and looking at the matter as a matter of overall impression, I have no doubt that this type of situation falls squarely within the category of offending for which Parliament intended s 104 to apply. I would therefore view the imposition of a minimum term of 17 years imprisonment as not amounting to a manifest injustice in this case.

### **The remaining charges**

[51] Turning to the charge of attempted murder, this pales into insignificance in the sense that the maximum sentence for the offence is 14 years imprisonment and you will be serving a life sentence in any event. Nevertheless, Hinton J gave the issue consideration when she sentenced Mr Taani. She indicated she could not conceive of a case of attempted murder that could be more serious than this.<sup>12</sup> Mr Taani took every step within his power to ensure Mrs Tu'uheava was dead by the time he left the scene.

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<sup>11</sup> *R v Doyle* HC Rotorua CRI-2005-070-6451, 13 October 2006; *R v Tumahai* CA262/04, 26 October 2004; *Marteley v R* [2016] NZCA 480; *Lavemai v R* [2016] NZCA 363; *R v Skinner & Clegg* HC Auckland CRI-2008-092-145990, 30 August 2010; *R v Yates* [2018] NZHC 2600; *R v Karauria* [2018] NZHC 1184 and *R v Carroll* [2017] NZHC 2691.

<sup>12</sup> *R v Taani*, above n 8, at [61].

She therefore selected a starting point of 14 years imprisonment to reflect that fact. I take the same view, and you do not have the benefit of a guilty plea as did Mr Taani.

[52] The remaining charges also pale into insignificance although as the Crown points out, Mr Tapaevalu, the charge of being in possession of 16.5 grams of methamphetamine would of itself ordinarily call for a deterrent sentence. I will impose concurrent sentences on those charges.

### **Sentence**

[53] Mr Tufui, on the charge of murder, you are sentenced to life imprisonment. You are ordered to serve 19 years in prison before being eligible to apply for parole. On the charge of attempted murder, you are sentenced to 14 years imprisonment. On the charge of being in possession of methamphetamine for supply, you are sentenced to six months imprisonment.

[54] Mr Tapaevalu, on the charge of murder, you are sentenced to life imprisonment. You are ordered to serve a minimum term of 17 years before being eligible to apply for parole. On the charge of attempted murder, you are sentenced to 12 years imprisonment. On the charge of being in possession of 16.5 grams of methamphetamine, you are sentenced to five years imprisonment. On the charge of being in possession of 1.1 grams of methamphetamine for supply, you are sentenced to one year's imprisonment. On the two charges of being in unlawful possession of firearms, you are sentenced to 18 months imprisonment on each.

[55] All sentences are to be served concurrently.

[56] Stand down.

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Lang J

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