IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2021-009-3156
[2024] NZHC 1289

THE KING

v

MOTU SMITH

Hearing: 22 May 2024

Appearances: C J Boshier for Crown
K J Beaton KC for Defendant

Judgment: 22 May 2024

SENTENCING NOTES OF EATON J

This judgment was delivered by me on …….. at ……
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] Motu Smith you appear for sentence, having pleaded guilty to charges of impeding breathing;[1] aggravated robbery,[2] robbery,[3] two charges of unlawfully taking a motor vehicle,[4] providing false details to the police,[5] and to a charge of murdering Daniel Hawkins, a charge for which you were found guilty at trial.

[2] The maximum penalty for murder is life imprisonment. Ms Beaton KC on your behalf, acknowledges that I must sentence you to life imprisonment today and that will be the sentence I shortly impose. What I must determine is how much of that life sentence you will have to serve before being eligible to apply for release on parole. That is the minimum period of imprisonment. I will refer to it as the MPI.

[3] I acknowledge the presence in Court today of many of the family of the deceased, Daniel Hawkins. And I also acknowledge the presence, Mr Smith, of your mother and brother.

Facts

[4] Sentencing is a public function, and it is important the factual basis on which you are to be sentenced is made clear. The details of your admitted offending are summarised in a prosecution summary of facts. I heard evidence to support those allegations during the course of your murder trial. As regards the murder of Mr Hawkins, I have formed a view of the facts based on the evidence that was offered at your trial.

[5] I will deal firstly with the facts that relate to the offending to which you entered guilty pleas on arraignment at the very outset of the trial.

[6] On Thursday, 22 and Friday, 23 April 2021, you were working as a labourer in the Lincoln area in Christchurch. No issue was raised as to your behaviour by your

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1 Crimes Act 1961, s 189A(b): maximum penalty of seven years' imprisonment.
2 Section 235(c): maximum penalty of 14 years' imprisonment.
3 Section 234: maximum penalty of 10 years' imprisonment.
4 Section 226(1): maximum penalty of seven years' imprisonment.
5 Land Transport Act 1998, ss 52A and 114: maximum penalty $10,000 fine.

employer during those two days, other than a comment you made about a conspiracy when you spoke with one of the supervisors on the Thursday, a comment that your supervisor thought was odd.

[7] At about 4:15 pm on the Friday, you entered the portacom office where a supervisor, who I will refer to as J[6], was seated and working at a desk. You asked J if he was going to take you home. There was other small talk. Without warning you approached J from behind. You placed him in a choker hold, putting your arm against his throat and applying pressure. You lifted him off his chair and tightened your grip, using your other arm to tighten the grip of the arm that was around J's neck. His breathing was restricted. The pair of you fell to the ground. His vision became blurry. You then began punching him tightening the choker hold. J managed to escape your grip by gouging you in the eye. There were blows exchanged between the pair of you and ultimately you were separated. That assault is reflected in the strangulation charge.

[8] During your attack on J a chair had broken and splintered. You picked up a splinter that was described as being about 150 millimetres long with a jagged end. You then used it as a weapon. You approached J demanding to know "where is your shit?" After being told that his cell phones were on the floor, you took those items and left. You used the keys in the office door to lock J in the portacom. You then stole his work vehicle using the keys from the office door. It is those actions that give rise to the aggravated robbery charge.

[9] As a result of that offending, J received bruising to his cheekbone, an eye injury and bruising to his body. It was clear when J gave evidence at your trial that the incident was highly traumatic for him.

[10] Exactly where you went in the stolen vehicle, which was a Holden Colorado ute is not clear. The evidence establishes that at about 5:10 am the following Saturday morning, you parked the ute in a very unusual position outside an address in Tai Tapu. When an occupier noticed the lights of your car and approached, he described you

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6 The victim's name is permanently suppressed.

made grunting sounds and asked him for a tow rope. You indicated the vehicle had broken down. It had not.

[11] The police were called and attended. You failed to cooperate with the police. You hid at the back of the ute. You were asking the police not to shoot you before you eventually surrendered.

[12] When you were processed at the Christchurch Central Police Station that morning you did not disclose any physical or mental health concerns. The authorised officer who evaluated you was not concerned with your presentation. At that stage the police were unaware of the serious assault that had been committed on J the previous day.

[13] You were charged with unlawfully taking a motor vehicle and then bailed from the Christchurch Central Police Station shortly after 7:00 am on the Saturday morning. On leaving the police station, your movements were captured on CCTV. That footage shows you depositing a backpack containing your labourer's work kit in a vacant section near the Court. You then tried to discard an item of clothing that you were wearing.

[14] You were next seen your mother's address at Korimako Lane later that morning. Your mother was not home. Your brother was at the address. You spoke with your brother, you had a shower. You also spoke with another resident from that housing complex. That person drove you to a local supermarket where you purchased items.

[15] Neither that other resident nor your brother noticed anything that seemed out of the ordinary for you. Although your brother did say that you were "on edge", something he considered to be quite normal for you.

[16] Shortly after 11:00 am you were seen outside your mother's house smoking a cigarette. Not long before 1 pm you were observed by a number of persons driving erratically in Mr Hawkins' stolen Holden Calais. You were driving in the direction of

Halswell. You ran red lights. You passed other vehicles in a built-up area. A number of civilians made complaints directly to the police about your driving.

[17] What was not known then but is now very clearly known, is that you had stolen Mr Hawkins' car after you had beaten him badly and cut his throat with a knife. You had left him alive at his home, but fatally injured. I will return to what happened within Mr Hawkins' apartment shortly.

[18] You stopped on Monsaraz Boulevard, on the outskirts of the suburb of Halswell. That is an area in the early stages, or it was then, of a residential development. Once there, you set fire to your own cell phone, to a knife, to keys and to other items. You discarded the shoes you had been wearing. You burnt a jersey. You then lit a fire in the driver's seat of the Holden Calais before you abandoned that vehicle on foot.

[19] You walked to the Halswell Library car park. That coincided with victim M[7] arriving at the car park. M was immediately suspicious of you given your presentation. You were wearing shorts and a singlet and had no shoes. You approached M's vehicle. What then happened was recorded on M's dash cam. He got out of his vehicle and asked if you needed help. Immediately he was distracted, you put him in a choker hold and you took him to the ground. You then punched him in the head. He could not breathe. He believed he blacked out. He thought he was going to die. You got into his car and you drove away, leaving him lying motionless on the ground in the car park. And it is those facts that capture the offence of robbery that you pleaded guilty to.

[20] Your movements after that, having stolen M's car were recorded on the vehicle's dash cam. You discarded M's cell phones as you drove down Tai Tapu Road. You then engaged in a number of odd driving manoeuvres involving unexplained U-turns and occasional stops. You drove west towards Little River where you exited the vehicle, walked around it before getting back in the vehicle and driving to Akaroa. In Akaroa you drove around briefly before pulling up outside the bowling club. It was

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7 The victim's name is permanently suppressed.

there that you abandoned M's car and stole a Subaru vehicle. The keys had been left in that vehicle. At some stage shortly after that, you then drove back to Christchurch in the stolen Subaru.

[21] At about 4 pm, police observed you driving the stolen Subaru along Ron Guthrey Road near the Christchurch Airport. You were stopped and you were arrested for unlawfully taking a motor vehicle. You were asked to provide your personal details. You gave your brother's name and date of birth. Eventually you gave the police your true name.

[22] Following your arrest, you were taken back to the Christchurch Central Police Station where you were processed. On this occasion, the authorised officer who evaluated you described you as "vacant" and "distracted" and recorded that you said you were hearing voices.

The murder of Daniel Hawkins

[23] I will go back to what happened inside Mr Hawkins' flat. I have heard submissions from counsel this morning, addressing the factual basis upon which you should be sentenced for the murder of Mr Hawkins. In dispute is whether or not Mr Hawkins was ever armed with a knife; whether you acted with excessive self-defence; and the extent to which your mental illness and past background impacted your offending. As the sentencing Judge, I must accept as having been proven, the facts that are essential to the guilty verdict. Beyond that I am entitled to make factual findings based on the evidence I heard, provided those findings are consistent with the jury's verdict. I am not required to sentence you on a factual basis that is most favourable to you.[8]

[24] It is the Crown case you entered unlawfully into Mr Hawkins' unit and discovered Mr Hawkins who was in his bedroom, most likely lying on his bed, minding his own business. You attacked him, bashing him about the head, either with your fists or with an object. You quickly overcame any resistance he offered. You rendered Mr Hawkins unconscious. You then armed yourself with a knife and stabbed

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8 Sentencing Act 2002, s24 (1)(a); *Edwardson v R* [2017] NZCA 618 at [105] – [107].

him in the neck, before cutting his throat. You then took his car keys and made off in his vehicle. The Crown do not seek to suggest any motive for the murder.

[25] On your behalf, Ms Beaton submits that in a state of elevated mental distress, you entered Mr Hawkins' unit, intent on stealing his car and willing to use violence to do so. She says you had a pre-existing mental illness, you were suffering psychotic symptoms including paranoia and auditory hallucinations, with persecutory beliefs including the risk that gang members posed to you and your family. She submits that the facts permit the Court to find that Mr Hawkins quickly armed himself and threatened you. That you were triggered by his aggressive response and by his gang-related facial tattoos and his leather vest.

[26] Ms Beaton accepts you inflicted blows to Mr Hawkins' head, using your fists, she says, not a weapon. It is accepted you must have disarmed Mr Hawkins and then used his knife at a time you still believed he posed a threat to you. She submits this all happened very quickly and that you ought to be sentenced on the basis that Mr Hawkins was armed with a knife, he did pose a threat to you and that the guilty verdict reflects a determination that you acted in self-defence using excessive force.

[27] Mr Smith, I am satisfied Mr Hawkins was in his bedroom when you entered his home to steal his car keys. I accept it is likely Mr Hawkins did have a knife, close to hand in his bedroom and that he armed himself with a knife when you, an uninvited intruder, entered in his bedroom. I accept it is likely he threatened you. He was quite justified in both arming himself and threatening you. He was being confronted by a much younger, much bigger and much stronger stranger who, by your own admission, was intent on a violent attack in order to steal his car keys.

[28] I accept you were suffering significant mental distress. You were paranoid and that you likely suffered a psychotic experience. I will deal with the issue of your mental health and how it fits into the sentencing shortly.

[29] Whilst I accept it is likely Mr Hawkins was armed with a knife and did utter threats against you, I am satisfied you were very quickly able to overpower Mr Hawkins. Using your fists, with significant force, you rendered him unconscious.

The pathological evidence is that you inflicted with your punches a fatal brain injury. You could have ended your attack on Mr Hawkins then, taken his car keys and left the address. But you did not.

[30] I accept the opinion of forensic pathologist, Dr Anderson, that Mr Hawkins was unconscious on the bed when you inflicted a 5-7 centimetre stab wound to his neck. But still that was not the end of the violence as your final act was to cut Mr Hawkins' throat, a 12-centimetre cut some 4 centimetres deep.

[31] I am satisfied, Mr Smith, you did not use the knife in self-defence. Mr Hawkins posed no threat to you at all. You used the knife in a state of uncontrolled rage.

[32] I do not accept that you were ever acting in defence when you went to Mr Hawkins' apartment. You were always the aggressor. He was entitled to defend himself against your attack. An intruder who is prepared to inflict violence on an innocent victim cannot, in my view, assert self-defence when they choose to continue to physically engage with a victim who is merely defending themselves. You could and should have left when it was clear to you that Mr Hawkins was not someone to go down without a fight. I am satisfied you did not do so because his response triggered in you a reaction of upping the level of violence, I accept at least in part being a reaction that reflects both your personal history and your mental illness. But the short point is you were not acting in self-defence. This was not a case of excessive self-defence.

Victim impact statements

[33] I have both read and carefully listened to the victim impact statements from three of Mr Hawkins' sisters, a daughter and Mr Hawkins' partner at the time of his death. The consequences of your actions for Mr Hawkins' family and loved ones have been profound. That will be so clear to you now, having heard the victim impact statements read this morning. Mr Hawkins' family have suffered so much grief in recent years but to lose a beloved brother, father, grandfather and partner in such violent circumstances has been almost unbearable for those who are closest to him.

[34] The reports do not attempt to portray Mr Hawkins as an angel, far from it, but through the passage of time, the opportunity to heal past familial conflict was very much alive. The victim impact statements express great sadness, frustration and regret, a sense of loss, a lost opportunity to heal family relationships. As Mr Hawkins' daughter said, so many words left unsaid, a family left grieving for what might have been.

[35] I have also received a victim impact statement from M, the victim of the car park robbery. He suffered physical injuries and the ongoing effects of a nasty concussion. He has suffered significantly both in a social setting and in his employment. The direct consequence of your offending against him has been that he has lost trust in others.

Personal circumstances

[36] I turn to your personal circumstances. I have a great deal of material about you, Mr Smith. That includes a pre-sentence report, a report from forensic psychiatrist, Dr Peter Miller, a report from clinical psychologist, Dr Annmaree Kingi, and a s 27 cultural report. I have the letter that you personally have penned. I have letters of support from your whānau and numerous certificates and course participation records recording your achievements over the past three years while you have been on remand.

Corrections' Provision of Advice to the Court

[37] The pre-sentence report tells me that you are now 31 years old. You are affiliated to Ngāti Tahu, but also to Ngāti Awa and Ngāpuhi on your father's side and to Waikato and Ngāti Mahanga on your mother's side. You have a close family made up essentially of your mother, grandmother and perhaps particularly of late, most importantly, your eight-year-old son, who is currently in the care of your grandmother.

[38] In explanation for your offending, you told the pre-sentence report writer you were suffering a mental health breakdown and things spiralled out of control, beginning from when you felt you were being undermined at work, an event that you say triggered you. You say that when confronted with further conflict upon entering

Mr Hawkins' apartment, you lost control, you wanted to escape. This progressed to you using the knife on Mr Hawkins. You told the report writer that after that, you panicked and you fled. You said it was like a bomb going off in your head and you felt as though you were watching events unfold without feeling part of them. You expressed remorse for what had happened and, in particular, the loss of life which resulted. You expressed sorrow that Mr Hawkins' family will suffer that loss. You acknowledged responsibility. The report writer was satisfied your remorse is genuine.

[39] You told the report writer you have come a long way since you were arrested. You said you were heavily medicated after your remand and that you are now feeling stable with your medication regime. You have found faith with God and are working to apply this newfound faith to your life and your beliefs. You say that as a result you feel better prepared for sentencing and that you understand that you will be in custody for a long time. You told the writer you want to ensure that the time you will spend in custody is not wasted. You describe yourself as being very much focused upon making yourself stronger and more resilient.

[40] The pre-sentence report refers briefly to your criminal history. Your first convictions were at the age of 21 years in 2014. Those were convictions for aggravated assault and family violence. In 2014, you were also sentenced to a term of imprisonment for aggravated robbery. Over the following six years you have accumulated further convictions for offences mainly including assaults on family members and for contravening protection orders. At the time of this offending, you were serving a sentence of intensive supervision, following convictions for possessing a knife in a public place and for assaulting police.

Section 27 Cultural Report

[41] I have carefully read the s 27 cultural report. That report identifies potentially causative factors of your offending based on a history provided by you and corroborated by whānau. It identifies potentially causative factors as including cultural deprivation including transience, economic deprivation, normalisation of violence and alcohol use, normalisation of gang activity, familial dysfunction, absence of adult supervision and early use of drugs and alcohol. It refers to childhood sexual

abuse, mental health issues and alcohol and methamphetamine addictions as also being potentially causative factors.

[42] The report goes into some detail about your childhood, Mr Smith. You were born here in Christchurch. When you were born, your parents were aged 18 and 17 years respectively.

[43] The report writer describes your life as marred by dysfunction and abuse, beginning with a traumatic and violent event when you were an infant asleep in a bassinet. Most of your uncles are described as active gang members. You reported witnessing a significant amount of family violence being perpetrated by those uncles against your aunties and cousins.

[44] Your parents were both alcoholics. That led you to spend much time in the care of others. Whilst in that care, you continued to witness much family violence. You were the victim of sexual abuse that is not necessary for me to detail. Your contact with your maternal family was sporadic. When you did see your mother, it was common, in your words, that she would have "black eyes, a swollen face and bloodied limbs and lips". The report refers to an Oranga Tamariki file note providing further evidence of the trauma you faced as a child. The report refers to an incident when you were only seven years old when you stabbed your mother's boyfriend in the stomach with a barbeque fork after she had taken a fierce beating from that boyfriend.

[45] It tells me that you were diagnosed with ADD and dyslexia and had significant behavioural issues at school, where you engaged regularly in fighting and stealing. By the age of 12 years old, you started drinking alcohol and smoking marijuana. You had been placed in your father's care following the stabbing incident and you were not returned to your mother's care until you were 16 years old. In the meantime, you attended multiple different schools. Back in your mother's care, you were exposed to alcohol and drug dependency, intimate partner violence, gangs and inappropriate sexual behaviours. You soon became addicted to methamphetamine. You would use methamphetamine with your mother and her partner.

[46] As happens so often, you began offending to feed your drug habit. You engaged in two toxic and dysfunctional partner relationships that are characterised by alcohol, drug abuse and violence.

[47] The report records that in the period leading up to your offending, your mental health deteriorated drastically. Although you were not actively using methamphetamine at the time of the offending, your mental deterioration was fuelled by your alcohol and drug addictions.

[48] Within the report, you attribute that deterioration to "spiritual or demonic" encounters with "dark entities" that left you feeling extremely afraid and that resurfaced memories from your childhood. You say you began hearing voices instructing you to hurt people around you. You believe you were experiencing a psychotic episode during the current offending. You told the report writer "I was hallucinating and hearing voices saying they wanted to kill me".

[49] By way of summary the s 27 report describes you growing up in an environment in which your cultural identity was eroded by systematic deprivation. You were born into a world where alcoholism, violence and gang associations were normalised. The reports refer to research that indicates a correlation between childhood abuse and recurring anger and aggression later in life.

Mental health reports

[50] As I have acknowledged, your mental health is of relevance to this sentencing. I have been assisted by the reports of Dr Miller and Dr Kingi. They were requested by the Court to assess your fitness to plead to the charges and to consider the availability of a defence of insanity. Although they were provided for that specific purpose, they provide helpful detail regarding your psychiatric history.

[51] Dr Miller's report records that you had not presented to mental health services until August 2020. There were then concerns you may be mentally ill, and you were admitted to Hillmorton hospital. You were assessed as posing a risk towards your mother. Your mother reported a deterioration in your mental state over the previous twelve months following the breakup of a relationship and your increased use of

alcohol and drugs. She also described at that time that you were reporting hearing voices. Your symptoms were assessed as most likely attributable to your use of methamphetamine. No clear evidence of a mental illness was determined, and you were discharged from Hillmorton hospital. A Community Mental Health Team then made a further assessment shortly after and concluded that there was no evidence of a major mental illness, and that your experiences reflected trauma from your early life and your drug use.

[52] Following your arrest on 5 May 2021, you were again assessed on 5 May 2021. The assessing nurse noted that there were oddities in your presentation, convoluted speech, a preoccupation with family relationships. She noted some persecutory and conspiratorial themes. You reported hearing voices every second of the day. The nurse concluded that you were not unequivocally psychotic, but felt you warranted further assessment. The psychiatrist carried out that further assessment and concluded that mental illness "could not be ruled out".

[53] Dr Miller's report describes your developmental period, that is when you were young, as characterised by significant trauma in the form of neglect, multiple forms of abuse, multiple moves of home and school, and inconsistent caregiving. It confirms you had ready access to alcohol and illicit drugs. It confirms an immersion in gang culture through your developmental period. It notes however that notwithstanding a very difficult upbringing involving family violence and unstable schooling, that you achieved well, obtaining NCEA level three at high school.

[54] Dr Miller's report concludes that your psychiatric disorders are best described as a severe personality disorder characterised by antisocial and paranoid components and compounded by methamphetamine and alcohol use.

[55] Dr Kingi's report notes that information made available to her, documents a family history of bipolar disorder, schizophrenia, anxiety and post-traumatic stress disorder. In her opinion you meet the diagnostic criteria for post-traumatic stress disorder and substance use disorder. She could not find any evidence that your offending was driven by command hallucinations or a systematised delusional belief system that directly correlated with the alleged offending.

Other material

[56] The other material I have read and considered are your letters to Mr Hawkins' family and to the victims of the aggravated robberies. I have also considered the lengthy letter that you have written to me as the Judge.

[57] Supporting letters have been filed by your whānau. I have read letters from your grandmother, your mother, your brother, who was a Crown witness at trial, your uncle, who describes you as a little brother, and I have a confirmation from a social worker at Oranga Tamariki about your ongoing supported and encouraged connection with both your son and with your whakapapa through your paternal whānau.

[58] Having regard to that material, Mr Smith, it is clear to me that over the last three years, you have taken a long hard look at yourself and your behaviours and the excuses that you have all too frequently fallen back on to avoid taking responsibility for your past actions.

[59] Notwithstanding the stresses and distractions of a lengthy custodial remand pending trial, the material I have read demonstrates your commitment to change. You know you cannot change the past and so you have committed to looking towards a brighter future, of course for yourself, but also for your young son and your whānau. When I read that material alongside the s 27 report, I accept that the criminal trial process has provided you with the opportunity to understand more about your past and that learning is going to guide you into the future.

[60] I have seen a very impressive array of course qualifications and programme participation, filed on your behalf. That only serves to support that you are putting your words into action. The changes you have made within are strongly reflected in the observations that your family have made in their letters to the Court. You enjoy their love and support notwithstanding their distress and concern they expressed for the family of Mr Hawkins.

The principles and purposes of sentencing

[61] In determining the appropriate sentence, Mr Smith, I must take into account the purposes and principles as outlined in the Sentencing Act 2002. There is a need to denounce your offending and to hold you accountable for the harm that you have done. The sentence I will impose is intended to promote a sense of responsibility in you for that harm. There must be deterrence, both against future offending by you and others who might act similarly. And I have to consider the protection of the public.

[62] The sentence I impose must be consistent in kind and length with the sentences imposed on others who have offended in a similar way. I must consider the gravity of your offending and your own personal culpability. I must take into account the circumstances that might make an otherwise appropriate sentence disproportionately severe, and I must into account the effects that the offending has had for you.

Approach to sentencing

[63] Following your conviction for the murder of Daniel Hawkins, I am required, under the Sentencing Act 2002 to sentence you to life imprisonment, unless I was of the view that such a sentence would be manifestly unjust.[9] There is not and could not be any suggestion that a life sentence would be manifestly unjust. So, as I said at the outset, the end sentence that I will be imposing today must be one of life imprisonment.

[64] The focus of counsel's submissions has been on the MPI. That is the minimum amount of time you will spend in a prison before you can apply to the Parole Board for release on parole. All persons serving sentences of imprisonment in New Zealand can apply to the Parole Board for earlier release from their sentence either after a period defined by statute or at the expiration of an MPI imposed by a sentencing Judge. It is important to make it clear that the MPI is not how long you will in fact spend in prison. It is how long you must spend in prison before a release on parole can even be considered. Even if released on parole, you will always remain subject to the sentence of life imprisonment and therefore always subject to recall if you pose a threat

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9 Sentencing Act 2002, s 102(1).

to the safety of the community. The Sentencing Act provides that the MPI I must impose following a conviction for murder is at least 10 years.

[65] The Act further provides that the MPI must be at least 17 years if particular circumstances are found to apply. Those circumstances include, if the murder involved an unlawful entry into a dwelling place;[10] if the deceased was particularly vulnerable because of his age, health or any other factor;[11] if the killing involved a high degree of brutality and cruelty;[12] or if the murder was committed in the course of carrying out another serious offence.[13]

Is s 104 triggered?

[66] So the first question I must address is whether s 104 of the Sentencing Act has been triggered. Ms Boshier on behalf of the Crown submits that you unlawfully entered Mr Hawkins' dwelling place and that he was particularly vulnerable and that therefore s 104(1) is triggered. She submits there are other two factors that are also worthy of consideration. She submits that an appropriate MPI is higher than 17 years.

[67] Ms Beaton responsibly concedes that s 104(1)(c) is triggered because you unlawfully entered Mr Hawkins' dwelling place. She does not accept that the other s 104 factors apply including vulnerability necessarily apply.

[68] I agree with both counsel that s 104(1(c) is clearly engaged. The sanctity of the home is paramount, Mr Smith. If there is one place members of our community should feel safe, it is within their own private dwelling.

[69] I agree that s 104(1)(d) is not engaged. While there is no doubt that you entered the premises with intent on stealing Mr Hawkins' car and that you were willing to engage in violence and in particular to choke Mr Hawkins to do so, I agree with Ms Boshier that this factor is more appropriately captured within s 104(1)(c) given the lower-level nature of the primary intended offence.

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10 Section 104(1)(c).
11 Section 104(1)(g).
12 Section 104(1)(e).
13 Section 104(1)(d).

[70] Similarly, and not without some hesitation, I accept that this murder does not trigger s 104(1)(e). I am satisfied you used your fists to overcome any resistance offered by Mr Hawkins. You punched him at least twice to the head, causing fractures to his eye sockets and rendering him unconscious. Having disarmed him of the knife, you then stabbed before slashing his neck. He had already suffered what was a potentially fatal head injury and he was defenceless. The use of the knife did involve extreme violence but, as I say by a close margin, I am not satisfied it was at a level such that, of itself, it would trigger s 104. As Ms Boshier submits, the brutality of the assault can be considered under victim vulnerability, s 104(1)(g), an issue which I will now turn to.

[71] The Crown submits that Mr Hawkins was vulnerable because of his physical health, he had been described as frail by a number of witnesses; because he was confined to home on EM bail; because of the significant size, strength and age disparity between yourself and Mr Hawkins; and because he had been beaten unconscious before you used the knife on him, that being established by the blood pooling under his body and the absence of any blood on his hands.

[72] Ms Beaton submits that Mr Hawkins was not vulnerable as reflected in the differing evidence at trial from friends and neighbours about their understanding of his health situation. She refers to the fact that Mr Hawkins had weapons around his home. She relies on your statement to the police that Mr Hawkins had raged at you and that he had a knife.

[73] As I mentioned briefly in my discussions with counsel, an issue that was not the subject of written submissions or fulsome argument before me was whether the vulnerability of a victim should be assessed objectively or subjectively. This issue was briefly discussed in *Marong v R*[14] but because the point of interpretation was not fully argued, the Court in that case declined to determine the issue but took a "cautious approach" and excluded the victim's cerebral palsy condition in the assessment of the extent of that victim's vulnerability. In *Phillips v R*[15] the Court of Appeal stated that the assessment of the degree of a victim's vulnerability involves an objective

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14 *Marong v R* [2020] NZCA 179 at [35]-[37].
15 *Phillips v R* [2023] NZCA 588 at [19].

evaluation of the victim and their surrounding circumstances at the time of the offending. It does not appear the issue as to whether an objective or subjective test ought to be applied was argued in that case. Similarly, in *Tu v R*[16] the Court of Appeal referred to the objective vulnerability of the victim, who was asleep at the time of the attack. Again, the issue discussed in *Marong* does not appear to have been argued.

[74] I think it is appropriate to take the same cautious approach as sounded by the Court of Appeal in *Marong* and therefore not to consider the frailties of Mr Hawkins that might not have been apparent to you. But that does not answer the vulnerability issue.

[75] I am satisfied that you attacked Mr Hawkins in his bedroom. No other area showed any sign of disturbance. I am satisfied he was murdered on his own bed. Blood spattering on the walls around the bed and the blood pooling on the bed confirm the bed was the site of the violence. Mr Hawkins' history that we heard about during the trial, and the fact that he had easy access to items that he could use as weapons, suggest he was someone who was more likely to stand up to an unlawful intruder. And of course he was perfectly entitled to do so. But while he may have been feisty and willing to take steps to defend himself, no doubt part of his persona as being somebody who, at least in the past, had a form of association with the Mongrel Mob, it must have been immediately apparent to you, he was much older, much smaller than you and he had no realistic prospect of ever defending himself against your attack. But as I say, I doubt you were conscious of his frailties that were described by those who knew him.

[76] On balance, I am satisfied that the vulnerability factor under s 104 is engaged. You were able to use your size and superior strength to easily disarm a much older man who was merely defending himself from his own bed. You must have known he was completely defenceless, unconscious, and lying on his own bed when you inflicted the neck wounds. There was, in my view, clear vulnerability of your victim.

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16 *Tu v R* [2023] NZCA 53.

Is a 17-year MPI manifestly unjust?

[77] The next issue is whether a 17-year MPI would be manifestly unjust. The appropriate methodology was discussed by Court of Appeal in *R v Williams* in considering issue.[17] In *Davis v R*[18] the Court of Appeal proposed a variation on that approach whereby the Court considers:

(a) what notional MPI is called for under s 103(2);

(b) whether s 104 applies; and

(c) if s 104 applies, but the notional MPI called for by the s 103 methodology is less than 17 years, determine whether the imposition of a 17-year MPI would be manifestly unjust.

[78] In *Frost v R,*[19] the Court of Appeal referred to the observations made in *Davis* noting that the first two steps need not be followed in that order and that the appropriate sequence may depend on the category and circumstances of the case. The Court observed that some s 104 categories apply unambiguously, giving the example of double murder while others, with reference to s 104(1)(e) may require judgments of quality and degree.

[79] With reference to *Frost* and *Davis*, the Court in *Phillips* determined that as that case clearly engaged s 104, it was not necessary to set a notional MPI under s 103(2).

[80] I am satisfied that s 104 clearly applies to your offending. I therefore, following *Phillips*, do not consider it necessary to consider what notional MPI might otherwise have been imposed. Counsel have been unable to provide me with any helpful comparative cases if I was to embark on that venture. I am however satisfied that an MPI of around 17 years would have been appropriate having regard to the s 104 aggravating factors I have identified and the other aggravating factors including the use of a weapon, the extreme harm caused by your offending to others and your prior

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17 *R v Williams* [2005] 2 NZLR 506 (CA) at [52]-[54].
18 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43.
19 *Frost v R* [2023] NZCA 294 at [35].

history of violent offending. Your personal considerations however would warrant a deduction from that starting point giving rise to an MPI of less than 17 years.

[81] In *R v Williams*, the Court of Appeal stated:[20]

> [67]…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.
>
> [68] Beyond that, what level of disparity amounts to manifest injustice remains a matter of sound sentencing judgment that is not capable of precise determination.
>
> …

[82] Ms Boshier, on behalf of the Crown, acknowledges your background and mental health are relevant considerations in determining whether a 17-year MPI is manifestly unjust. She accepts those factors warrant a deduction in your sentence, but not so as to justify a finding of manifestly unjust. Ms Boshier reminds the Court that manifest injustice must be clearly demonstrated. She submits your offending falls very squarely within s 104 so it could only be personal considerations that might give rise to manifest injustice.

[83] Ms Beaton submits that it would be manifestly unjust to impose a 17-year MPI given your personal circumstances including your mental illness, deprivation, remorse and the circumstances of the offending suggesting you acted with excessive self-defence. I have already dealt with the question of excessive self-defence. Ms Beaton highlights your traumatic and distressing personal circumstances involving

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[20] *R v Williams*, above n 17.

appalling physical and sexual abuse, neglect, deprivation, instability and trauma both as a child and young person. She submits those impacts on you have been significant and have manifested in your addictions, your mental illness, your personality dysfunction and ultimately your violence. She points to the diagnoses of post-traumatic stress disorder and antisocial personality disorder.

[84] Ms Beaton has referred to a number of cases where an offender's youth, deprived background, mental illness, or combination of one or more of those factors has provided the rationale for an MPI of less than 17 years where s 104 has been engaged.[21] She submits that an MPI in the range of 12 years is appropriate when considering similar cases and to meet the purposes and principles of sentencing. In her oral submissions she had adjusted that submission slightly, suggesting that the MPI should be in the range of 12-13 years and accepting it would be higher if I was to reject the submission that you were acting with excessive self-defence.

[85] In considering whether a 17-year MPI would be manifestly unjust it is necessary, in my view, to read the s 27 report in conjunction with the psychiatric and psychological reports. The weight to be given to those personal mitigating factors depends on how those factors affect the core issue of your culpability, your moral responsibility.[22]

[86] I did not think, Mr Smith, that there can be any doubt or that anybody reading those reports would disagree, they make very sad and disturbing reading. You present in 2024 for sentencing as a defendant exposed to the full suite of criminogenic factors. Your early exposure to violence, to alcohol and drug abuse, to sexual assault, to gangs and to criminal behaviour set you on a path that, I accept, has a connection to your offending in April 2021. Although you are clearly an intelligent man, one who now presents with real potential, you did not have the support structures in place or a skillset to cope with the mental distress that engulfed you in the days and weeks leading up to your offending. Responding to or treating your mental illness by others, was complicated by your abuse of methamphetamine.

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21 *R v Gottermeyer* [2014] NZCA 205; *DD (CA595/2014) v R* [2015] NZCA 304; *R v Smith* [2016] NZHC 2581; *R v Karauria* [2018] NZHC 1184; *Thompson v R* [2020] NZCA 355; and *Tu v R,* above n 16, at [42].

22 *Purutanga v R* [2023] NZCA 442 at [33].

[87] It was clear to others, and particularly to your whānau that you were struggling in the days and weeks leading up to your offending. Your letters make it clear to me that in that period, you were conscious that you were losing control.

[88] I rely on the reports of Dr Miller, Dr Kingi and also Dr Foulds who gave evidence on your behalf. They offer the opinion that your psychotic experiences could be due to methamphetamine use and/or they could be due to your history of significant complex trauma combined with personality dysfunction. So, as both counsel acknowledge, the issue of your mental health is a complicated issue. I accept you were experiencing psychotic symptoms over the period when these offences occurred, including paranoia and auditory hallucinations. I think it highly relevant that you had a history of presenting well before this offending with similar symptoms. I am also satisfied that you were displaying erratic and unusual behaviour over the period when this offending took place. I refer to some examples:

(a) the assault and robbery of your supervisor, J, on the Friday, strikes me as being irrational, there is no obvious motive for it;

(b) the parking of the stolen work ute outside the address in Tai Tapu in the small hours of the morning was, again, peculiar. You were expressing an irrational fear of being shot by the police;

(c) after you were released on bail for unlawfully taking the motor vehicle, you discarded a backpack with your work clothes and tried to discard other clothing. That made no obvious sense;

(d) having killed Mr Hawkins, you engaged in highly erratic driving. You attempted to set fire to the car and burnt other incriminating evidence. As Ms Boshier says on the one hand, that suggests some very conscious appreciation of what you had done, but you did so during daylight hours in an area that was relatively open to the public;

(e) after you stole M's car from the community park in Halswell, your driving to Akaroa was erratic. That is unexplained. It is also odd that

you were only very briefly in Akaroa before you stole another car and returned to Christchurch;

(f) it is notable that on your second arrest, you presented to the authorised officers in a manner that caused concern, that you were mentally unwell; and

(g) having viewed your very lengthy police interview carried out the following day, I cannot exclude the very real possibility you were displaying florid symptoms of mental illness on the day after your arrest. In that regard, I have been assisted by the evidence of the Dr Foulds given at the pre-trial hearing.

[89] Mr Smith, I accept that at the time of the offending you were suffering paranoid and persecutory beliefs, and that you did engage in poor-decision making, causing you to become quick to resort to violence. As Ms Beaton submits, your mental illness did make it more likely that you would escalate to serious violence once within Mr Hawkins' flat.

[90] It is your appalling personal history considered alongside the evidence of your mental health that I consider to be the most significant and mitigating factor in assessing your culpability and they are factors that lead me to accept that a 17-year minimum period of imprisonment would be manifestly unjust. I am satisfied there is a causal connection between your personal history, your mental health and your offending.

[91] I have carefully reviewed the authorities that have been referred to me, considering whether a 17-year MPI was manifestly unjust due to personal considerations similar that arise in this case. Each case must ultimately, of course, be considered on its merits.

[92] In *R v Gottermeyer*, the Court considered that it was manifestly unjust to impose a 17-year MPI given Mr Gottermeyer's personal circumstances.[23] His early

[23] *R v Gottermeyer*, above n 21.

guilty plea, remorse and absence of previous convictions reduced the MPI to 15 years, and the Court considered his mental health justified a further significant reduction of three years (20 per cent) to recognise his reduced moral culpability and the need to moderate the requirements for deterrence. The Court imposed a MPI of 12 years.

[93] In *DD (CA595/2014) v R*, a psychiatrist opined that DD, who was a victim of persistent sexual abuse by a family member (later convicted at trial), suffered from borderline personality dysfunction with untreated recurrent depression and PTSD.[24] The doctor opined that her mental condition did not directly cause her offending but did make her more likely to offend in the way that she did. The Court of Appeal in *DD* stated that "Judges have allowed discounts against starting points for a range of offending of between 12 to 30 per cent where mental illness has contributed to offending."[25] A 15 per cent discount (2.5 years) was allowed for mental illness given the defendant's mental condition was not directly causative of the offending.[26] The MPI of 15 years was upheld on appeal.

[94] A similar deduction was allowed to reflect a dreadful upbringing and psychological difficulties in *R v Smith*.[27] The offender was very young and entered a guilty plea.

[95] In *R v Don* the Court observed that while there was some uncertainty as to a diagnosis of mental illness, Mr Don's mental problems had nonetheless affected his ability to cope under duress.[28] The report in that case concluded that despite further assessment being needed to make a clearer psychological diagnosis, the level of impairment and psychological disturbance were matters that the Court "may find relevant to issues of culpability for the offending and mitigation".[29] It was accepted that an MPI of 17 years would be unjust in light of Mr Don's mental health issues and his guilty plea.[30]

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24 *DD (CA595/2014) v R*, above n 21.
25 At [20].
26 At [21].
27 *R v Smith*, above n 21.
28 *R v Don* [2021] NZHC 2882.
29 At [32].
30 At [50].

[96] Finally, I have considered *R v Thompson* and *Tu v R*, both cases where the offenders mental health led the court to conclude that a 17-year MPI would be manifestly unjust.[31] In those cases, MPI's of around 12 years were imposed. The mental illness prevalent at the time of the offending was more severe than in your case Mr Smith.

[97] Ms Beaton submits that beyond your precarious mental state, other personal factors are relevant in considering whether a 17-year MPI is manifestly unjust if so, what the level of deduction should be. Particularly, she relies on your remorse, your prospects of rehabilitation, what she describes as your deeply held belief that you needed to defend yourself against Mr Hawkins, the steps you have taken to improve yourself whilst in custody, and that you intend to begin remote study toward a bachelor degree.

[98] I agree each of those matters are to be applauded and encouraged. But an MPI is not adjusted to take into account personal factors of a defendant as though it were the sentence. Further, I am not satisfied that those factors are of such significance as to have a direct impact on the application of s 104. They are factors that can be appropriately recognised as personal mitigating considerations in fixing the sentence in relation to your other offending.

[99] I am satisfied it would be manifestly unjust to impose a minimum period of imprisonment of 17 years. I allow a deduction of around 15 per cent to reflect your personal background and mental health. I acknowledge that deduction might have been higher if your offending had not been so very serious. It might have been higher had I been imposing a finite sentence of imprisonment. The level of deduction recognises the seriousness of your offending and the need to give effect to the legislative policy behind s 104. I consider the appropriate minimum period of imprisonment to be one of 14 years and six months' imprisonment.

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31 *Thompson v R*, above n 21; and *Tu v R,* above n 16.

Other offending

[100] Finally, Mr Smith, I must fix the appropriate sentence for the offending that you committed both before and after you murdered Mr Hawkins.

[101] The attacks on J and M were unprovoked and serious. As you have recognised in your letters to your victims, they must have suffered significant emotional harm knowing what you did to Mr Hawkins and wondering what might have happened to them.

[102] Ms Boshier does not contend for an uplift to your MPI to reflect your other offending. Not surprisingly, Ms Beaton supports that position. In my view it would have very much have been open to the Court to impose an uplift to reflect that other very serious offending, but in the circumstances, I will not do so. Because you will be sentenced to life imprisonment, the sentences I impose for the other offending will be served concurrently.

[103] Ms Boshier has proposed starting points in relation to each of the other offences. Ms Beaton does not take issue with the starting points as proposed. The starting points are three years six months for the strangulation of J, four years for the aggravated robbery of J, and three years for the robbery of M. Counsel did not propose a starting point for the two charges of unlawfully taking a motor vehicle. In my view, they are largely captured within your more serious offending.

[104] In those circumstances and recognising that the sentences that I impose for the other offending must be concurrent, I do not propose going into any further analysis or case comparators in relation to your other offending. I adopt the proposed starting points. I impose an uplift of 10 per cent to reflect your previous criminal history and that you offended while subject to a sentence. I deduct from that adjusted starting point a 10 per cent credit for your belated guilty pleas, recognising what I accept is genuine remorse. I allow a further deduction of 20 per cent to reflect your personal history, mental illness and rehabilitative efforts. That leads to a net deduction of 20 per cent.

Result

[105] Mr Smith, can you please stand.

(i) On the charge of murdering Daniel Hawkins, Motu Smith you are sentenced to life imprisonment. I impose a minimum period of imprisonment of 14 years and 6 months.

(ii) On the charge of impeding the breathing of victim J you are sentenced to 2 years and 9 months' imprisonment.

(iii) On the charge of aggravated robbery, you are sentenced to 3 years 2 months' imprisonment.

(iv) On the charge of robbery, you are sentenced to 2 years 4 months' imprisonment.

(v) On the two charges of unlawfully taking a motor vehicle you are sentenced to 12 months' imprisonment.

(vi) On the charge of providing false details to the police you are convicted and discharged.

[106] All sentences are to be served concurrently. Mr Smith, I have had a request from Victims Advisors for a further karakia to be conducted before you formally stand down. I will permit that. Thank you.

[107] You may stand down.

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Eaton J

Solicitors:
Crown Solicitors, Christchurch

Counsel:
K J Beaton KC, Christchurch