

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

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

**CRI-2022-090-001966
[2024] NZHC 1421**

THE KING

v

JULIUS ABNER TE HIVAKA

Hearing: 31 May 2024
Counsel: B D Tantrum and C Purdon for Crown
R M Mansfield KC and Mr C Taylor for Defendant
Sentence: 31 May 2024

SENTENCING REMARKS OF LANG J

Solicitors/counsel:
Meredith Connell, Office of the Crown Solicitor, Auckland
R M Mansfield KC/C Taylor, Auckland

[1] Mr Te Hivaka, you appear for sentence having been found guilty by a jury on a charge of murder.

[2] The principal issues I am required to determine today are whether you should receive a sentence of life imprisonment and, if so, the minimum term of imprisonment you will be required to serve before being eligible to apply for parole.

Factual background

[3] I propose to sentence you on the basis of the facts as I find them to be, having been the Judge who presided over your trial.

[4] The victim of your offending was Mr Benjamin McIntosh. You had an association with him prior to the events that led to his death. You had purchased drugs from him on previous occasions in his capacity as a low-level drug dealer. As I shall shortly explain, you initiated the contact with Mr McIntosh that led to his death for the ostensible purpose of acquiring drugs from him.

[5] Mr McIntosh died from a single gunshot wound he received on the morning of 3 June 2022. The shot was fired by your co-defendant, Mr Ethan Dodds, using a .22 calibre rifle. The bullet initially entered Mr McIntosh's shoulder before leaving his upper torso and striking him in the head. It then lodged in his brain, causing a fatal injury.

[6] At the time Mr Dodds shot Mr McIntosh, Mr McIntosh was seated in the driver's seat of his vehicle. His vehicle was parked in the parking area at a park in West Auckland. Mr McIntosh had gone there in the belief that he was to sell you a quantity of drugs.

[7] Shortly before the events that led to his death, Mr McIntosh had won a significant sum of money on a gaming machine at a bar. The evidence at trial satisfies me that you and Mr Dodds became aware of this during the previous evening. You were present at the bar where Mr McIntosh won the money. You had gone there to purchase drugs from him. During the early hours of 3 June 2022, you and Mr Dodds spent a considerable amount of time in each other's company and also in the company

of your other co-defendant, Ms Tamirah Baker. She also knew that Mr McIntosh had won the money on a gaming machine. You said at trial you were not aware Mr McIntosh had won some money. However, I am satisfied you became aware of that fact through your discussions with Ms Baker.

[8] The evidence establishes that you and Mr Dodds were driving around Auckland in the early hours of 3 June 2022. At 5.18 am, you both returned to Mr Dodds' mother's address in Hillsborough and spent approximately an hour there. By this stage you had been in contact with Mr McIntosh on Facebook about purchasing methamphetamine. However, you said in evidence that by this stage you had not yet made arrangements to meet him at the park to purchase a gram of methamphetamine.

[9] A CCTV camera at the Hillsborough Road address showed you and Mr Dodds leaving the address at approximately 6.20 am. Mr Dodds was carrying a bag as he got into a vehicle owned by his brother. This bag contained a .22 calibre firearm. It appears that you then drove to Mr Dodds' address in Massey, before driving to the park. The vehicle in which you were travelling was captured on a CCTV camera arriving at the park at approximately 7.30 am.

[10] The same camera captured Mr McIntosh's vehicle arriving at approximately 7.50 am. It then showed your vehicle leaving the park approximately 10 minutes later. During the intervening period, Mr Dodds had fatally wounded Mr McIntosh with a firearm he had taken to the park. Extensive efforts by emergency services and hospital staff over the next two days were unable to save his life.

[11] After leaving the park you dropped Mr Dodds off at his mother's address and you then drove away in the vehicle belonging to Mr Dodds' brother. You did not meet up with Mr Dodds again until later the same night, when you met him and Ms Baker at a service station after he returned from Cambridge where he had spent the day and the better part of the evening. There is no evidence that you acquired anything that may have been stolen from Mr McIntosh's vehicle. Mr Dodds said that he had taken a bag that contained drugs from the vehicle. It is clear that Mr Dodds retained these and there is no evidence that you received any of them.

[12] At trial, the Crown alleged that you and Mr Dodds had formulated a plan to rob Mr McIntosh of money and drugs and that you lured him to the park for that purpose. Mr Dodds then fatally wounded Mr McIntosh during the robbery. When the police subsequently discovered Mr McIntosh's vehicle they did not find any cash or drugs inside it. Later that morning, however, Mr Dodds contacted you saying that if you did not hurry up he intended to consume your half share of the bag. I take this to be a bag of drugs.

[13] You gave evidence at the trial and said you went to the park for the purpose of purchasing drugs from Mr McIntosh. You said you did not know Mr Dodds was in possession of a firearm and had no knowledge of what was about to happen before Mr Dodds fired the shot that fatally wounded Mr McIntosh. The jury's verdict makes it clear, however, that you knew that Mr Dodds was taking a firearm with him to the park and that you were party to a plan with Mr Dodds to rob Mr McIntosh of cash and drugs at gunpoint. You also knew that the reckless shooting of Mr McIntosh was a probable consequence of the implementation of the plan.

[14] I cannot be sure as to the exact sequence of events that led to Mr McIntosh being shot. At trial you and Mr Dodds said that you left your vehicle first and went over to Mr McIntosh's vehicle, where you got into the front passenger seat. That is likely to be correct. Mr Dodds said that he then got out of his vehicle and approached Mr McIntosh's vehicle whilst concealing the firearm behind him. He said that he got into the back seat of the vehicle and started talking to Mr McIntosh. You agreed with this evidence. I accept that it is likely to be correct given the fact that Mr Dodds' fingerprints were found in the rear of the vehicle.

[15] Mr Dodds told the jury that after he produced the firearm Mr McIntosh made a movement towards it and it discharged. His evidence on this point was quite vague. The jury's verdict makes it clear, however, that they were satisfied beyond reasonable doubt that Mr Dodds intentionally discharged the firearm.

[16] I consider it most likely that some form of struggle occurred after you both entered Mr McIntosh's vehicle and Mr Dodds produced the firearm. At that point, Mr Dodds intentionally discharged the firearm in Mr McIntosh's direction.

Importantly, however, the Crown did not allege at trial that Mr Dodds intended to kill Mr McIntosh. Rather, it contended he was reckless when he discharged the firearm because he appreciated that he could kill Mr McIntosh by doing so and carried on regardless.

[17] You and Mr Dodds both said that when you saw Mr McIntosh had been shot, you immediately got out of his vehicle and drove away from the park. As I have said, before leaving Mr McIntosh's vehicle, Mr Dodds took a shoulder bag that Mr McIntosh habitually carried around his neck.

[18] The Crown also alleged that when Mr Dodds discharged the firearm, he intended to cause Mr McIntosh grievous bodily injury for the purpose of enabling you both to commit the offence of robbery. However, from one of the questions the jury asked during their deliberations I consider they concluded you agreed with Mr Dodds to rob Mr McIntosh and to assist each other in doing so. The reckless killing of Mr McIntosh, as I have said, was known by you to be something that could well happen in carrying out that plan.

[19] Unlike Mr Dodds, you remained in the Auckland area until your eventual arrest on 9 June 2022.

[20] When Mr Dodds was sentenced earlier today, five victim impact statements were read to the Court. These were prepared by members of Mr McIntosh's family. To spare them further pain, I have agreed that they should not be required to read their victim impact statements again at your sentencing. However, Mr Mansfield tells me that he has discussed them with you and you know what they say. You will therefore know the pain and grief that you and Mr Dodds have caused to this family. The victim impact statements are cast in extremely measured and thoughtful terms. Nevertheless, they show that your offending has had a catastrophic effect on this family. Notably, however, they expressly refer to their appreciation for the fact that you and your family have reached out to them during the course of the trial.

Is a sentence of life imprisonment appropriate?

[21] Your counsel submits that you should receive a finite sentence of imprisonment rather than the indeterminate sentence of life imprisonment. He acknowledges the threshold is high, as the authorities demonstrate. The Court must be satisfied that it would be manifestly unjust to impose a sentence of life imprisonment by making an overall assessment of the circumstances of the offence and the offender.¹ It is a conclusion likely to be reached only in exceptional cases.

[22] Your offending occurred in the course of an armed robbery where you and Mr Dodds confronted an unarmed victim for the purpose of stealing drugs and/or money from him at gunpoint. Although you did not pull the trigger or intend Mr McIntosh to die, the jury's verdict makes it clear, as I have already said, that you knew a reckless killing was something that could well happen in the course of implementing the plan to rob Mr McIntosh of drugs and cash. I see nothing about your offending to rebut the presumption that a sentence of life imprisonment should be imposed.

[23] You committed this offence at the age of 25 years. You are therefore at the very upper end of the age range for which principles relating to youth offending apply. Sadly, it is now not uncommon for young persons to be convicted of murder. You also have a reasonably lengthy list of criminal convictions. Many of these are for offending involving violence, albeit at the lower end of the scale. You undoubtedly had a difficult childhood and were severely addicted to methamphetamine at the time of the offending, but those factors are sadly present in many cases where murders are committed.

[24] I see nothing in your personal circumstances that would make it manifestly unjust for a sentence of life imprisonment to be imposed. I am therefore satisfied that there is no principled basis on which I could impose any other sentence than a sentence of life imprisonment.

¹ *R v Rapira* [2003] 3 NZLR 794 (HC) at [121].

Is s 104 of the Sentencing Act 2002 engaged?

[25] In any case where the Court imposes a sentence of life imprisonment on a charge of murder, it must also specify the minimum term of imprisonment the offender must serve before being eligible to apply for parole.² The minimum term must not be less than ten years and must be that required to reflect the sentencing purposes of deterrence, denunciation, the need to hold the offender accountable for the offending and the need to protect the public from further offending.³

[26] The Crown contends that s 104 of the Sentencing Act 2002 is engaged. This requires the Court to impose a sentence of a minimum term of at least 17 years imprisonment where it is satisfied that the commission of the offence of murder engages one or more of the factors specified in the section. The Court may only impose a lesser minimum term of imprisonment where it is satisfied that it would be manifestly unjust to impose a minimum term of 17 years.

[27] The Crown alleges that s 104(1)(d) is engaged because the murder occurred whilst committing another serious offence. There is no dispute that an aggravated robbery is a serious offence for the purposes of s 104(1)(d).

[28] I therefore accept the Crown's submission that s 104(1)(d) is engaged for the reason it gives. The issue now is whether it would be manifestly unjust to impose a minimum term of 17 years imprisonment on you.

Would it be manifestly unjust to impose a minimum term of 17 years imprisonment?

[29] When I sentenced Mr Dodds earlier today, I found that it would be manifestly unjust to impose a minimum term of 17 years imprisonment in his case. This was for two reasons. First, I found that, but for the application of s 104, his offending would require a minimum term of 13 and a half years imprisonment before taking into account mitigating factors personal to him. That is obviously considerably less than the 17 year minimum term required by s 104.

² Sentencing Act 2002, s 103(1).

³ Section 103(2).

[30] Secondly, I found that Mr Dodds' offending fell outside the scope of offences for which s 104 was intended to apply. This is because the Crown has never alleged that the plan to rob Mr McIntosh also included an intention to kill him. Nor did the Crown contend at trial that Mr Dodds intentionally killed Mr McIntosh. Rather, it alleged he killed him recklessly. As I have already observed, I am satisfied the jury found you guilty on the basis that you knew a reckless killing was something that could well happen in carrying out the plan to rob Mr McIntosh using a firearm.

[31] Given the approach I have taken in the case of Mr Dodds, it would obviously be unjust to take a different approach in your case. I therefore find that it would be manifestly unjust to impose a minimum term of 17 years imprisonment.

What minimum term of imprisonment should be imposed?

[32] It is now necessary to determine the minimum term of imprisonment that you should serve before being eligible to apply for parole.

[33] In one sense your culpability is less than that of Mr Dodds because you were not the person who killed Mr McIntosh. However, you were instrumental in having Mr McIntosh come to the park because you knew him and had dealt with him previously. You and he had never had any issue with each other in your previous dealings. He would therefore have had no reason to fear that he was about to be robbed by you. You then further allayed any concerns he may have had by getting into the front seat of the vehicle unaccompanied by Mr Dodds, with whom he had never previously dealt.

[34] The Crown accepts, however, that I should make a distinction between you and Mr Dodds because he was ultimately responsible for causing Mr McIntosh's death. I agree with that approach. I therefore select a minimum term of 12 years imprisonment before taking into account mitigating factors personal to you.

Mitigating factors

[35] It is apparent from the material that your counsel has placed before the Court that you had a deprived upbringing. You and your brothers effectively raised

yourselves in the absence of any support or guidance from your parents. However, despite the deprivation in your home environment, you have excelled on the sporting field and this was obviously a considerable pro-social factor in your life. It is a tragedy Mr Te Hivaka, that the lure of drugs took you away from your chosen sport of rugby league.

[36] Unfortunately, the consumption of methamphetamine has been a feature of your life for some time. At the time of the present offending, you were heavily addicted to the drug and a desire to obtain it was the principal cause of the present offending. I accept that the factors to which your counsel has pointed out have made a causative contribution to the situation in which you found yourself at the time of the present offending. In addition, your family has reached out to Mr McIntosh's family and, as I have said, they appreciate it. This is an important issue that I need to recognise.

[37] In addition, you are entitled to a modest discount for your youth, although I have already observed, you fall at the very upper end of the scale for youth offending.

[38] I am prepared to reduce the minimum term of imprisonment by two years to reflect these factors.

Sentence

[39] Mr Te Hivaka, if you would stand.

[40] On the charge of murder, you are sentenced to life imprisonment. You are ordered to serve a minimum term of 10 years imprisonment before being eligible to apply for parole.

[41] Stand down.