ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF VICTIM PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2024-088-0460
[2024] NZHC 2534

THE KING

v

ALEXANDER SHAW MURPHY

Hearing: 5 September 2024

Appearances: A F Devathasan for Crown
ARA Pell for Mr Murphy

Date of sentence: 5 September 2024

SENTENCING NOTES OF JAGOSE J

Counsel/Solicitors:
Adam Pell, Barrister, Whangārei
Kayes Fletcher Walker, Manukau

[1] Mr Murphy, you come before me today for sentencing on your guilty plea to the charge of attempting to murder Catherine Murphy, your mother.[1]

[2] You pleaded guilty immediately on my 10 July 2024 indication "a court would be likely to sentence you to imprisonment for a period of no more than two years and six months".[2] That 30-month indication comprised a 25 per cent deduction for your guilty plea from a starting point of 40 months' imprisonment.[3]

[3] My sentencing indication, a copy of which will be annexed to the written version of what I am saying now in sentencing you, explains the basis for that starting point. I do not repeat that explanation now, except to say I concluded then:[4]

> … your premeditated intervention to end the life of a particularly vulnerable person, already receiving medical treatment to alleviate her discomfort and pain[, was especially aggravating]. Your actions were not borne of any 'impulsivity' or "otherwise … greatly diminished responsibility" as may offer further reduction. You deliberately acted to take Catherine's life in circumstances in which there was no compelling requirement to foreshorten it, and her end-of-life comfort was the hospital's determined objective. Those are the same circumstances faced by anyone with close family in institutional end-of-life care.

I assessed your actions brought you to the "upper bound" of a sentencing range for comparable offending,[5] resulting in starting points of up to three and a half years' imprisonment.[6] Unless there is new information materially affecting the basis for my indication, which there is not, I am bound by it in sentencing you now.[7]

[4] As I said at the time of sentencing indication, I have read all the Crown and your counsel, Adam Pell, have had to say. I have given what they have written, and said, careful consideration. I am not going to recite it because sentencing continues to be an intense exercise of my own judgement. I am not bound by the lawyers' views. I have to come to my own decision.

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1 Crimes Act 1961, s 173: maximum penalty, 14 years' imprisonment.
2 *R v Murphy* [2024] NZHC 1883 at [25].
3 At [22] and [24].
4 At [21] (footnote omitted).
5 At [21].
6 At [15], referring to *R v Martin* CA199/04, 14 February 2005 and *R v Martin* HC Whanganui CRI-2003-083-0432, 30 April 2004 at [55].
7 Criminal Procedure Act 2011, s 116.

[5] Mr Murphy, I will not be sentencing you to imprisonment. Rather, I consider your personal mitigating circumstances justify a further 20 per cent discount, meaning a short-term sentence of 22 months' imprisonment. I further am satisfied imprisonment is not required to meet sentencing's purposes in your case and I may instead impose a sentence of home detention. That is what I am going to do.

[6] I still need to explain how I get there. From my 30-month indication, I am to "impose the least restrictive outcome that is appropriate in the circumstances",[8] taking into account your particular circumstances and background and the outcome of any restorative justice process.[9]

[7] I have substantially more information now than I had at the time I gave my indication, including a probation officer's pre-sentence reports and a report from a restorative justice conference facilitated between you and [**Redacted**], the other victims of your offending. I also have more character references, as well as your letter directly to me. Perhaps understandably, I have no formal victim impact statements but [**Redacted**] statements recorded from the restorative justice conference assist me in understanding their views about your offending, and thus fulfil a similar purpose.[10]

[8] First, I cannot identify any additional aggravating factor in your personal circumstances. I am satisfied, despite the October 2018 family violence assault conviction on which you were discharged,[11] it does not resound in your present offending. Although both are your acts of violence against members of your family, their respective circumstances are so distinct your previous convictions do not warrant any uplift on account of your personal deterrence or risk of reoffending now.[12]

[9] As to that latter risk, I note the probation officer's pre-sentence report calculates your risks of reconviction and imprisonment to be negligible, arising only

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8 Sentencing Act 2002, s 8(g).

9 Section 8(h)–(j).

10 Victims' Rights Act 2002, s 17AB. My sentencing indication notes I then had one victim impact statement.

11 *R v Murphy*, above n 2, at [22].

12 *Blackmore v R* [2014] NZCA 109 at [12] and *Beckham v R* [2012] NZCA 290 at [84] (referring to *R v Casey* [1931] NZLR 594 (CA) at 597 and *R v Ward* [1976] 1 NZLR 588 (CA) at 591), both endorsed by *Enoka v R* [2018] NZCA 185 at [28].

from your "sense of entitlement and … emotional decision making". You recognise acting on those in relation to your mother caused great pain and disruption to her other survivors, who were profoundly hurt by your actions. You say you are making "genuine efforts to change".

[10] Conversely, your previous conviction substantially reduces any discount available to you for your previous good character.[13] My indication explained I understood, from the references you had provided, the considerable respect with which you are held in the community.[14] I have more material now to the same end. All of it emphasises your long-standing and significant contributions in employment and volunteer, and personal, neighbourhood and community, relationships. I have no doubt that respect is justified. But it stands to be assessed in the balance also with your conduct in your private life, recognising family violence is a scourge in our society, affecting "the sense of security of the whole community".[15] I will allow a five per cent discount only on account of your good character.

[11] And last, I must also consider "any remorse shown" by you.[16] Here, that 'showing' is very real, including by your constructive participation in the successful restorative justice conference, and by applying at least a substantial portion of your inheritance from your mother on her death to establish a relevant bequest in her memory. I am not sure what more you could have done to show your remorse. [**Redacted**] are clear you have done as much as they want you to do in atonement for your actions. I think it also is shown by your acceptance of a statement of facts suggesting your mother's death was imminent, when [**Redacted**] say that is not what they (and you) then were given to understand. I will allow a 15 per cent discount under this head.[17]

[12] Together, those give a further 20 per cent discount: in total, 45 per cent from my 40-month starting point, reducing it to 22 months' imprisonment. Despite, as

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13 Sentencing Act, s 9(2)(g).
14 *R v Murphy*, above n 2, at [23].
15 *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 3 NZLR 420 at [27], referring to *R v McLean* [1999] 2 NZLR 263 (CA) at 266.
16 Sentencing Act, s 9(2)(f).
17 *Kohu v R* [2023] NZCA 343 at [40], referring to *Poi v R* [2015] NZCA 300, *Rowles v R* [2016] NZCA 208, *A v R* [2018] NZHC 543 and *C v R* [2022] NZHC 1807.

I indicated,[18] the presumption attempted murder only is punishable by a term of imprisonment, that is rebutted here by the particular circumstances of your conduct, your acceptance and demonstrations of accountability for your actions, and the desirability of your reintegration and rehabilitation. Your minimal risk means the last must be on your own cognisance, because you do not qualify for Corrections' programmes. Your imprisonment then would serve no net material sentencing purpose. But nothing short of home detention serves sufficiently to mark the seriousness of your attempt to take someone's life.

[13] Because, were you sentenced to 22 months' imprisonment, you would be released after serving half that short-term sentence,[19] I would sentence you to 11 months' home detention. I am satisfied your home and its occupants have been assessed as suitable for a sentence of home detention, and you understand the conditions that will apply during your detention and agree to comply with them.[20]

[14] I am aware you hope to maintain your current employment(s). I have thought if to combine your home detention sentence with a sentence of community work. The probation officer says up to 400 hours are available. Given your connections in the community, I am concerned any significant combination of employment and community work risks overly diminishing the detention aspect of your sentence.

[15] I consider the better course is for the probation officer in the first instance to assess what exceptions from detention may be justified in terms of the sentence's standard conditions.[21] I will not impose any special conditions of your sentence because I am not satisfied there is significant risk of your further offending not adequately reduced by the standard conditions.[22]

[16] Mr Murphy, please stand. On your guilty plea to the charge of attempting to murder Catherine Murphy, I sentence you to 11 months' home detention at

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18 *R v Murphy*, above n 2, at [24].
19 Parole Act 2002, s 86(1).
20 Sentencing Act, s 80A(2)(a).
21 Section 80C(2).
22 Section 80D(2).

[**Redacted**], subject to standard conditions. Your address will be redacted in the publicly available record of your sentence. You may stand down.

—Jagose J

NOTE: PUBLICATION OF THE JUDGMENT AND OF THE REQUEST FOR A SENTENCING INDICATION IN ANY NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE IS PROHIBITED BY SECTION 63 OF THE CRIMINAL PROCEDURE ACT 2011 UNTIL THE DEFENDANT HAS BEEN SENTENCED OR THE CHARGE DISMISSED. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3865734.html

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2024-088-0460
[2024] NZHC 1883

THE KING

v

ALEXANDER SHAW MURPHY

Hearing: 10 July 2024

Appearances: K A Venter and A F Devathasan for Crown
ARA Pell for defendant

Date of judgment: 10 July 2024

SENTENCE INDICATION OF JAGOSE J

Counsel/Solicitors:
Adam Pell, Barrister, Whangārei
Kayes Fletcher Walker, Manukau

[1] Mr Murphy, you are charged with attempting to murder your mother, Catherine Murphy.[1] You are presumed innocent until pleading or proven guilty of that charge.[2]

[2] Catherine since has died. I extend this Court's condolence to her survivors. Because you all share a surname, I mean no disrespect in referring to members of your family by their given names, you being Sandy.

[3] You are seeking my sentence indication today.[3] I will tell you what sentence you are likely to receive if you plead guilty to the charge.[4] I have read and heard all the Crown and your counsel, Adam Pell, have had to say. I have given that careful consideration. I don't recite any of it, because sentencing is an intense exercise of my own judgement. I am not bound by the lawyers' views; I have to come to my own decision.

[4] So I have a summary of facts, agreed for the purpose of my indication, as well as a copy of your criminal history and a victim impact statement [**Redacted**]. So I have all the information I must have to give this indication, and I am satisfied the information available to me now is sufficient for the purpose of indicating your sentence.[5] I turn now to your alleged offending.

Alleged offending

[5] In very potted summary, for the purpose of my indication only, you and the Crown agree Catherine was hospitalised in late 2023 with abdominal pain, leading to her diagnosis with advanced and terminal ovarian cancer. She intended to be discharged for palliative care until her death at home. But her condition deteriorated, with the result she was to remain in hospital, moved from a care to a comfort regime. You stayed with her there from 9 to 13 November 2023, advocating for her comfort.

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1 Crimes Act 1961, s 173: maximum penalty, 14 years' imprisonment.
2 New Zealand Bill of Rights Act 1990, s 25(c).
3 Criminal Procedure Act 2011, pt 3, sub-p 4.
4 Section 60.
5 Section 61.

[6] The comfort regime involved Catherine being administered medication (fentanyl and haloperidol infusions) over 24-hour periods through an automated syringe driver into a line in her upper left arm to relieve her pain and discomfort. By late on 11 November 2023, as a result of the medication, Catherine was “largely noncommunicative and observed to be sleeping or unconscious”.

[7] Another line established in Catherine’s abdomen was used to administer medication top ups as required in response to acute discomfort or pain. You repeatedly and increasingly pressed hospital staff to administer such top ups, claiming Catherine to be in acute discomfort or pain; staff found her instead to be asleep or comfortable at the time. When you continued to pursue these top ups in the presence of family on 11 November 2023, [**Redacted**] left upset, saying you were trying to hasten Catherine’s death.

[8] The next evening, after Catherine’s clinicians increased the automated dose in response to the number of top ups being administered, you asked the nurse changing the dosage to administer the whole 24-hour infusion in one go. She declined to do so. When [**Redacted**] came into Catherine’s room soon after, you were alone with Catherine, holding the syringe driver in your hands. [**Redacted**] told you to stop and left the hospital, saying she wanted nothing to do with your plans. You then administered the whole of the contents of the syringe to Catherine to end her life, refilling the syringe with water to conceal your actions.

[9] Throughout the following day, 13 November 2023, you asked Catherine be administered further top ups. You asked staff detailed questions about how the medication and its automated administration worked. I apprehend you were anxious about Catherine’s continued comfort, despite — or, perhaps, because of — your attempt to kill her. On staff attempts to reassure you of the adequacy of their treatment of Catherine, you said and repeated the syringe then contained only water, which you had refilled after administering the entire syringe of medication to Catherine the previous day. You then left the hospital.

[10] Catherine died early on 14 November 2023. The cause of her death remains undetermined.

Approach

[11] My indication — of the likely sentence you would receive, if pleading guilty to the charge of attempted murder — is to help you decide if to plead guilty. I follow the same approach as in a proper sentencing, which involves two steps.[6] First, I indicate what starting point offending of this type would attract. That involves identifying the aggravating and mitigating features of the offending itself. Second, I may adjust that starting point up or down to take into account what presently I can discern of your personal circumstances, including what discount you would receive if you plead guilty. That gives the sentence indication. It is the end point that matters, Mr Murphy. Don't get it confused with my starting point. And recognise it may further be adjusted at your actual sentencing, if you were to plead guilty.

[12] The usual purposes and principles of sentencing are relevant.[7] Those here include denouncing your conduct, holding you accountable for the harm you are alleged to have done, getting you to accept responsibility for it and deterring you and others from causing such harm in the future. Also relevant is your own rehabilitation and reintegration into society. The sentence must be proportionate to the offending's seriousness, consistent with others for similar offending, and the least restrictive outcome appropriate in all the circumstances. I must satisfy myself of the appropriate sentence for the gravity (or seriousness) of your alleged offending, including your culpability (or responsibility) for it. The ultimate consideration is if the sentence is "a just one in all the circumstances", having regard to "the circumstances of the offence and offender against the applicable sentence purposes, principles and factors".[8]

Starting point

[13] Absent any guideline judgment for sentencing attempted murder, reference may instead be made to sentencing of conduct with intention to cause grievous bodily harm,[9] adjusted to recognise the more serious specific intention to kill in attempted

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6 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.
7 Sentencing Act 2002, ss 7–8.
8 *Moses v R*, above n 6, at [49].
9 *R v Taueki* [2005] 3 NZLR 372 (CA).

murder,[10] generally within a starting point range of five to 10 years' imprisonment, although a higher range of nine to 14 years' imprisonment is available.[11]

[14] That is not a straightforward assessment in cases of so-called 'mercy killing' (itself not a straightforward assessment either),[12] which the Court of Appeal has said in a case called *Martin* — while still a "grave" crime[13] — is as "fact dependent and responsive to idiosyncratic indications for judicial mercy" as the broad range of conduct falling for manslaughter sentencing.[14] At a high level of principle, I am:[15]

> … bound to reflect the Court's duty to respect human life. This is mandated not just by humanitarian principles, but also by s 8 of the New Zealand Bill of Rights Act. That section provides:
>
> > "No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice."
>
> A just and humane society expects accountability for the deliberate taking, or attempted taking, of a human life. The issue is not one of private arrangement, but community values.

[15] That case, *Martin*, concerned a defendant who "deliberately injected her mother with a potentially lethal dose of morphine, in order to kill her, at a time when her mother was deeply unconscious".[16] The sentencing judge noted "a range of sentences imposed in a variety of broadly comparable … situations",[17] from "[eight] years' imprisonment at the top end down to a variety of non-custodial sentences at the lower end".[18] The Judge considered Ms Martin's offending, by reason of "[her] motive — love and compassion — not wanting [her] mother to die a long and lingering death",[19] fell "squarely" within a subset of such offending, "of mercy killing or attempted mercy killing and assisted suicide where the sentences do not go above 3½ years imprisonment".[20] The Court of Appeal held the Judge's ultimate sentence of

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10 *Ali v R* [2019] NZCA 35 at [8], referring to *Shen v R* [2017] NZCA 103 and *Hu v R* [2011] NZCA 412.
11 *Shen v R*, above n 10, at [37]; *Marsters v R* [2011] NZCA 505 at [17].
12 *R v Knox* [2016] NZHC 3136 at [62].
13 *R v Martin* CA199/04, 14 February 2005 at [130].
14 At [162].
15 At [165]–[166]. Similarly, see *R v Albury-Thomson* (1998) 16 CRNZ 79 (CA) at 85–86, referring to *R v Ruscoe* (1992) 8 CRNZ 68 (CA) at 70 (referring to *R v Stead* (1991) 7 CRNZ 291 (CA)).
16 At [167].
17 *R v Martin* HC Whanganui CRI-2003-083-0432, 30 April 2004 at [40].
18 At [41].
19 At [55].
20 At [55].

15 months' imprisonment coupled with an order for leave to apply for home detention was not manifestly excessive or wrong in principle.[21]

[16] There is no dispute your actions also were motivated by mitigating love and compassion for Catherine as may bring you within that range to three and a half years' imprisonment. I carefully have read your 1 July 2024 affidavit, which explains your close relationship with your parents, and your knowledge of Catherine's preference for end-of-life care, "[to] pass peacefully without pain or distress", informed by your shared experience of your father's medically-assisted death.

[17] You explain being in Catherine's company from 9 November 2023 as her condition deteriorated, she "experiencing long periods of unconsciousness … interspersed with small bouts of consciousness, the periods of consciousness shifting from stages of being complete[ly] aware through to being in complete delirium". Her awareness included expressing her discomfort as "agony" and her wish to die. When unconscious, her breathing was slow and irregular; I do not know if that was increasingly involuntary and reflexive end-of-life Cheyne-Stokes breathing.

[18] Catherine did not regain consciousness at all after the evening of Saturday, 11 November 2023. You do not say she exhibited any further sign of pain or distress. Despite her breathing, but because "she had pneumonia in one of her lungs", you understood "her death process could take as long as four weeks". The following evening, after the nurse's refusal to do so, you administered the full new 24-hour dose of pain medication all at once to Catherine, "to alleviate and end her suffering". I have no doubt you acted in what you understood to be Catherine's best interests. As in *Martin*, given your motivation, your alleged offending would fall within that same three and a half years' imprisonment penalty cap.

[19] Within that 42-month cap, as you've heard me say to counsel, at least prior to enactment of the End of Life Choice Act 2019, assisted suicide (and associated attempts) generally was the lesser offence, because the intended deceased "chooses the moment and method of death", whereas so-called 'mercy killing' is at the hand of

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21 *R v Martin*, above n 13, at [168].

"the one who ends or attempts to end life".[22] I do not see the cap to require uplifting by reason of passage since of the 2019 Act. Rather the new legislation affords opportunity for qualifying conduct entirely to escape categorisation as attempted murder. If that changes the relative seriousness of assisted suicide and 'mercy killing' within that categorisation is not for my decision.

[20] Within the cap, some headroom still is necessary on the present charge of attempted murder:

(a) first, for the unsuccessful attempt only, indicated by the gap between attempted murder's 14-year maximum penalty and murder's mandatory life imprisonment, and illustrated by lower starting points in applicable ranges for other attempted crimes, leavened by realisation the failure tends not to be for lack of determination (here, to kill);[23] and

(b) then, for potentially more grave attempted so-called 'mercy killings', for example, perhaps where the attempt is exercised without knowledge of or even contrary to the victim's express wishes. But there is not much in this either, particularly as the nature of 'mercy killing' to alleviate perceived unbearable suffering is the presumed wish of the victim.[24]

[21] Otherwise your alleged offending is at the range's upper bound. Of especial aggravation is your premeditated intervention to end the life of a particularly vulnerable person, already receiving medical treatment to alleviate her discomfort and pain. Your actions were not borne of any 'impulsivity' or "otherwise … greatly diminished responsibility" as may offer further reduction.[25] You deliberately acted to take Catherine's life in circumstances in which there was no compelling requirement to foreshorten it, and her end-of-life comfort was the hospital's determined objective.

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[22] *R v Crutchley* HC Hamilton CRI-2007-069-83, 9 July 2008 at [62], referring to *R v Stead*, above n 15.

[23] For example, with reference to attempted sexual violation: *Pesefea v R* [2016] NZCA 35 at [9]–[10], referring to *Bowman v R* [2014] NZCA 92 at [17]; *R v Tutu & Carter* HC Napier CRI-2010-041-0163, 4 February 2011; and *R v Hassan* [1999] 1 NZLR 14 (CA) at [16].

[24] Cf *R v Smail* [2007] 1 NZLR 411 (CA) at [17] and [25] where — on the Solicitor-General's appeal — the Court of Appeal endorsed the sentencing Judge's finding a defendant killing his friend in the friend's comprehended best interests was not a 'mercy killing', and therefore did not displace the presumption of life imprisonment.

[25] *R v Martin*, above n 13, at [168]; see, for example, *R v Johnson* [2020] NZHC 169 at [48]–[50].

Those are the same circumstances faced by anyone with close family in institutional end-of-life care.

[22] Other cases to which I have had regard do not advance assessment of a starting point.[26] All turn on personal aggravating or mitigating factors beyond that of the offending itself. I therefore take a starting point of 40 months' imprisonment.

Adjustment for personal circumstances

[23] Except for your prospective guilty plea, I am not prepared to assess aggravating or mitigating factors personal to you without at least the usual Corrections' pre-sentence report,[27] which I would direct be prepared if you were to plead guilty. I have reviewed your criminal history, most recently including your October 2018 family violence assault conviction on which you were discharged, which may have resonance in sentencing on the present charge. I do not know. I understand, from the references you have provided me, the respect with which you are held in the community. There may be other material you wish to put before me.[28] [**Redacted**] also says you did not plan Catherine's death or gain from it, and seeks leniency in your sentencing to enable her to be relieved of some of her burden necessitated by your bail conditions' prohibition of contact with your sisters and daughters. Any further uplift or discount is for the sentencing judge to determine.

[24] So far as a guilty plea discount is concerned, it is accepted your plea would be your "first reasonable opportunity" for such, warranting recognition accordingly,[29] and better than if made later.[30] I would apply the full 25 per cent deduction, bringing the end sentence to 30 months' imprisonment. Further adjustment for any personal aggravating or mitigating factors remains to be applied at sentencing. If then resulting in a short-term sentence of imprisonment, of "24 months or less",[31] conversion to a

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26 *R v Morton* [2021] NZHC 1096; *R v Johnson* [2020] NZHC 169; *R v Davison* HC Dunedin CRI-2010-012-4876, 24 November 2011; *R v Crutchley*, above n 22; *R v Faithfull* HC Auckland CRI-2007-044-7451, 14 March 2008; *R v Law* HC Hamilton T021094, 29 August 2002; and *R v Karnon* HC Auckland S14/99, 29 April 1999.

27 Sentencing Act, s 26.

28 Section 27.

29 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [45]; and *Moses v R*, above n 6, at [23].

30 *McDonald v R* [2021] NZCA 531 at [37].

31 Sentencing Act, s 4(1) (definition of "short-term sentence", referring to s 4(1) of the Parole Act 2002).

sentence of home detention is in prospect,[32] notwithstanding the presumption intending to kill a person only is punishable by a term of imprisonment.[33]

Sentence indication

[25] Mr Murphy — if you plead guilty to the attempted murder charge you face, on the information presently before me — I assess a court would be likely to sentence you to imprisonment for a period of no more than two years and six months. That is my indication to you. If you want to accept it, you must do so by **5pm on Wednesday, 17 July 2024**: that is, next Wednesday.

[26] Finally, I need to make it clear it is an offence to publish any information about this request for a sentence indication, or the indication I have given, before Mr Murphy is sentenced or the charge is dismissed.[34]

—Jagose J

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32 Sections 15A and 80A.

33 *R v Ruscoe*, above n 15, at 70; *R v Hill* [2008] NZCA 41, [2008] 2 NZLR 381 at [32]–[34]; and *R v Iosefa* [2008] NZCA 453 at [41].

34 Criminal Procedure Act, s 63(1).