

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

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

**CRI-2020-090-002022
[2023] NZHC 1391**

THE KING

v

GAOXIANG YU

Hearing: 2 June 2023

Appearances: Matthew Nathan KC for the Crown
Nick Chisnall KC and Julie Ding for the Defendant

Sentencing Notes: 2 June 2023

SENTENCING NOTES OF MOORE J

Background

[1] Mr Gaoxiang Yu, at the age of 26, you appear for sentence having pleaded guilty to the murder of Mr Wang Baochang (“Mr Wang”).¹ This charge carries a maximum penalty of life imprisonment.² It is my task to sentence you.

[2] These sentencing remarks will take longer than is usual. That is because your case engages a number of procedural and legal complexities which are novel and far from straight forward. I will try to keep it as brief as I can and avoid getting too legally technical. Where I can, I will footnote comments which do not need to be covered orally but which should be recorded so that those reading these sentencing notes are able to understand how I have come to some of the conclusions which follow.

The offending

[3] It is first necessary for me to set out the facts of your offending. These will be familiar to you. But because sentencing is a judicial function which must be undertaken in open Court and in public it is necessary for me to describe them.

[4] The facts are contained in a summary which you accepted shortly after you pleaded guilty. There is no dispute about them.

[5] The summary records that during 2017, you were a member of an organised crime syndicate which manufactured and supplied methamphetamine in New Zealand. Your co-defendants, Mr Zhao and G, were first and second in command respectively. The victim, Mr Wang, was also a member of the syndicate.

[6] You were informed by an acquaintance that Mr Wang was planning to rob or kidnap Mr Zhao. You passed this information on to Mr Zhao. Sometime around 17 August 2017, Mr Zhao advised you that he intended to confront Mr Wang. He asked that you be present when that occurred.

¹ I note that there appears to be some inconsistency in the order in which Mr Wang’s names are published. This is because Chinese surnames are traditionally written before the first or given name. I adopt this approach here.

² Crimes Act 1961, s 172.

[7] On 19 August 2017, you went to an address in Massey. This was where the syndicate had been operating a clandestine methamphetamine laboratory. There you met Mr Zhao, G and an un-named associate. Mr Zhao informed you of his plan to kill Mr Wang if he admitted he intended to rob Mr Zhao. If that was to happen you were to stand behind Mr Wang, hold him down and cover his mouth, while G stabbed him with a knife.

[8] Later that same evening, under a false pretext, Mr Zhao drove Mr Wang and his then-girlfriend, Z, to the address. Mr Zhao led Mr Wang inside while Z remained in the car outside. You met Mr Wang at the door. You were armed with what you say was an unloaded gun.

[9] Mr Zhao ordered Mr Wang to sit in a chair. He bound his hands and feet. Once restrained, Mr Zhao began questioning Mr Wang. You had the gun pointed at Mr Wang while this happened. The associate was told to go out and tell Z that Mr Wang would be staying at the property to manufacture drugs.

[10] At some point, you and G left the room to discuss the plan to kill Mr Wang. G told you to be prepared to “take action” and agreed on a hand signal which was the prompt for you to get a towel and cover Mr Wang’s mouth.

[11] Mr Zhao called you and G back to the room. Mr Zhao told Mr Wang that he would check on Z. He then left the property.

[12] You and G gave Mr Wang some methamphetamine. Then G gave you the signal. As agreed, you went to the kitchen and got a towel. You walked behind Mr Wang and covered his mouth. G began to stab Mr Wang in the chest and abdomen. Mr Wang attempted to defend himself. He grabbed G’s wrists, causing both to fall to the floor. G released himself from Mr Wang’s grip and stabbed him five to six more times in the chest. Mr Wang died from his injuries shortly afterward.

[13] You and G each showered. You waited for more instructions from Mr Zhao. Mr Zhao asked you and the associate to search for a suitable place to bury Mr Wang. In the meantime, his body was covered in ice and placed in the bathtub.

[14] Over the next few days, Mr Zhao instructed you and various others to do certain things. You put bleach on the blood-spattered parts of the house. With Mr Piao, you cleaned out Mr Wang's apartment in central Auckland. You removed drug manufacturing equipment and paraphernalia. You repaired structural damage. You re-painted, re-carpeted, and even bought new furniture.

[15] Next you needed to find somewhere to dispose of the body. You, Mr Piao, G and another drove around Auckland looking for somewhere suitable. You drew a blank. By this time Mr Wang's body was starting to decompose. A chest freezer was bought to put it in.

[16] You finally settled on a burial site well south of Auckland off the Desert Road, near Taupō. At about midnight on 22 August 2017, two of your associates shared a Google location pin with the group. An hour later, Mr Piao left in a van which contained the freezer with Mr Wang's body inside. You and G followed in a separate car.

[17] When you reached the location you helped the others carry the freezer and its contents from the van to the burial site. Mr Wang's body was placed in a shallow grave. You and G filled in the grave and covered the body in quick setting concrete.

[18] After you all got back to Auckland, Mr Zhao began to have misgivings about the depth of the grave. He thought it was too shallow. G and three others later returned to the Desert Road and re-buried Mr Wang's body.

[19] The next task was how to explain to Z, Mr Wang's disappearance. Mr Zhao told her that he was arranging for Mr Wang to return to China. Z left New Zealand shortly afterwards.

[20] Mr Wang was not reported missing for over two years. It was not until one of those involved in the burial was arrested on other charges that this information came to light.

[21] On 23 March 2020, the Police conducted an examination of the burial site and exhumed Mr Wang's remains.

Procedural history

[22] So, how was it that you came to the notice of Police in relation to Mr Wang's death? It starts to get a bit complicated here.

[23] In January 2018, you were arrested on a raft of serious drug charges arising out of two Police operations. You pleaded guilty to these charges 14 months later, on 20 March 2019. You were sentenced by Judge E M Thomas in the District Court at Auckland on 16 August 2019. From a starting point of 12 year's imprisonment, you received a "significant discount" for the contents of a psychologist's report³ and a 15 per cent discount for guilty plea. This resulted in an effective end sentence of six years' imprisonment.⁴

[24] On 22 June 2020, you were charged with being an accessory after the fact to Mr Wang's murder. You accepted a sentence indication on 9 March 2021.⁵ On 11 May 2021, Wylie J in this Court sentenced you to one year, seven months and two weeks' imprisonment, to be served cumulatively on the sentence you were serving on the drug charges. The sentence comprised of a starting point of three years and three months' imprisonment; a 15 per cent discount for your youth and vulnerable psychological condition at the time of the offending; 10 per cent for your attempts at rehabilitation and rehabilitative prospects; and a full 25 per cent for your guilty plea.

[25] On 27 June 2022, you were released on parole and were due to be deported to China on 30 June 2022. By this stage you had served three years, seven months and 12 days as a sentenced prisoner. However, the day before you were due to fly out, you were arrested and charged with Mr Wang's murder. This led to your immediate recall to prison on 11 July 2022.

³ The Judge does not specify the level of discount for this factor.

⁴ *R v G* [2019] NZDC 16307.

⁵ *R v Yu* [2021] NZHC 440.

[26] Following your arrest, you were twice interviewed by the Police. Both times you declined to comment. It was not until 3 April this year that you gave the Police a full account of the murder and your role in it. You pleaded guilty to murder before me on 16 May 2023. So, that is the backdrop to how we got to where we are today.

Victim impact statements

[27] I have received two victim impact statements. They are from Ms Susan Zhu, Mr Wang's ex-wife and the mother of his two children, and Mr Wang's father.

[28] These appear to be the same statements which were before Wylie J when he sentenced you on 11 May 2021. Out of deference to the the victims' privacy, I will keep my comments relatively brief. Ms Zhu, despite having been estranged from him, is heartbroken by Mr Wang's death. The children they shared ask about their father and she finds it difficult to explain to them why he is not around. She points out that as a result of your actions, the children will never experience the love they deserve from their father.

[29] Mr Wang's father lives in China. He was so shocked when he heard the news of his son's death that he suffered a heart attack. Mr Wang was his only son. He had great expectations for him. Apparently, he has not told his wife about their son's death because he is fearful of how she might react. He struggles to accept that his son is dead. He has difficulty eating and sleeping and describes his life as becoming meaningless.

[30] I need only repeat Wylie J's observations⁶ when he said that both these statements speak to the devastating effect your offending has had on those close to Mr Wang. Your involvement in Mr Wang's killing has contributed to the hurt and suffering of the victims.

[31] To your credit, I have received and read your letter which was handed to me immediately before the sentencing exercise commenced. It is apparent from that

⁶ *R v Yu*, above n 5, at [13].

document that you have some empathy, insight and understanding of the devastation your actions have wrought.

Approach to sentencing

[32] Everyone who commits murder is liable to life imprisonment unless such a sentence would be manifestly unjust, given the circumstances of the offence and the offender.⁷ This is a conclusion likely to be reached in exceptional cases only.⁸

[33] Mr Nathan KC, for the Crown, submits that this is not such a case. Your counsel, Mr Chisnall KC, disagrees. As will become clearer as I go on, this issue relates to the appropriate minimum term of imprisonment (“MPI”) that you must serve before being eligible for parole.

[34] If a person is sentenced to life imprisonment for murder, the Court must impose an MPI of not less than 10 years.⁹ If the murder involves one or more of the aggravating factors listed in s 104 of the Sentencing Act 2002 (“the Sentencing Act”), then the Court must impose an MPI of at least 17 years unless it would be manifestly unjust to do so.¹⁰

[35] If, instead, the presumption of life imprisonment is displaced, the Court is not obliged to impose an MPI of any particular length. It can be under 10 years or, arguably, not even at all.

[36] In practical terms, the first phase of the approach I must follow involves three steps:¹¹

- (a) first, to consider whether any of the aggravating factors listed in s 104 is engaged;

⁷ Sentencing Act 2002, s 102.

⁸ *R v Rapira* [2003] 3 NZLR 794 (CA) at [121].

⁹ Sentencing Act 2002, s 103(2).

¹⁰ Section 104.

¹¹ *R v Williams* [2005] 2 NZLR 506 (CA); and *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [25].

- (b) secondly, if one or more of those factors is engaged, to then consider whether an MPI of 17 years would be manifestly unjust; and
- (c) thirdly, if satisfied a 17 Eyear MPI would be manifestly unjust, to consider the appropriate notional MPI.

[37] Once I have decided the appropriate notional MPI then I will move to the next step which will lead to the answer to the ultimate question in this case, that is whether it would be manifestly unjust to impose life imprisonment and, if so, what finite sentence is appropriate. I now turn to consider each of those questions.

Do any of the aggravating factors in s 104 of the Sentencing Act apply?

[38] Mr Nathan submits that two of the s 104 factors are engaged:

- (a) first, that the murder involved calculated or lengthy planning;¹² and
- (b) secondly, that the murder was committed with a high level of brutality, cruelty, depravity, or callousness.¹³

Did the murder involve calculated or lengthy planning?

[39] To meet this criterion the planning need not be competent or sophisticated but must be present to a high degree.¹⁴ This tends to be illustrated by the length of time or degree of thought that has gone into the planning.

[40] I am satisfied that the planning and premeditation in this case meets this threshold. Lang J accepted the same when sentencing your co-defendant, Mr Zhao.¹⁵ The plan to lure Mr Wang to the Massey address by subterfuge with the intention of confronting and killing him was formulated in the days prior to his death. While your involvement in the planning was not as central as Mr Zhao's, you took a number of active steps in furtherance of that plan.

¹² Sentencing Act 2002, s 104(1)(b).

¹³ Section 104(1)(e).

¹⁴ *Desai v R* [2012] NZCA 534 at [39]; and *Kaur v R* [2017] NZCA 465 at [49].

¹⁵ *R v Zhao* [2022] NZHC 2919 at [20].

[41] It follows that I am satisfied that s 104(1)(b) is engaged.

Was the murder committed with a high level of brutality, cruelty, depravity, or callousness?

[42] While it is not strictly necessary for me to go on and consider any other s 104 factors, I record for completeness that I would not have found this factor engaged.

[43] I agree with Lang J when sentencing Mr Zhao.¹⁶ Although there were most certainly elements of brutality and callousness involved in Mr Wang's murder, they do not reach the level to activate s 104(1)(e) engagement.¹⁷

[44] Then there are the extensive efforts to dispose of his body and conceal Mr Wang's death. These most certainly aggravate the seriousness of the offending but are, however, accounted for in the accessory charge for which you have already been sentenced.

[45] It follows that I am satisfied the s 104(1)) threshold has been met in respect of one factor.

Would it be manifestly unjust to impose an MPI of at least 17 years?

[46] Because one of the s 104 factors is engaged, I must consider whether an MPI of 17 years would be manifestly unjust. This is the second step.

[47] The standard for a finding of manifest injustice is set at a high level. As a matter of overall impression the case must fall outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term.¹⁸

¹⁶ *R v Zhao*, above n 15, at [20].

¹⁷ *Fraser v R* [2010] NZCA 313; and *Price v R* [2021] NZCA 568.

¹⁸ *R v Williams*, above n 11, at [67].

[48] A guilty plea will not always carry significant weight in this assessment.¹⁹ If a minimum term of 17 years would include a real element of discount for a guilty plea, it would normally be appropriate to impose that term.²⁰

[49] In your case, however, the minimum term of 17 years would also need to reflect any discounts for assistance, personal circumstances and time spent on pre- and post-sentence detention. These, together with any adjustments for totality and parity, are likely to result in an MPI substantially less than 17 years.

[50] The Crown responsibly accepts that in all of the circumstances of this case, it may be manifestly unjust to impose such a term. I agree. Such a term would not only be inconsistent with the mitigating factors for which you are entitled to credit, but also with your culpability in the offending itself.

[51] I now turn to consider the appropriate notional minimum term of imprisonment.

What is the appropriate notional MPI?

[52] Mr Nathan submits that the appropriate starting MPI is at least 16 years' imprisonment. Your counsel, Mr Chisnall, agrees that such a term reflects the aggravating features present and your role as a subordinate.

[53] I thank counsel for referring me to a number of cases to assist in undertaking the calculations which are required under this step.²¹ Although none is on all fours, they provide some guidance as to the appropriate notional MPI in cases involving premeditated murder in the context of drug-related activity. As observed by Lang J, these types of cases often attract minimum terms of between 16 and 18 years' imprisonment.²²

¹⁹ At [72].

²⁰ At [73]. The Court of Appeal contrasted this by pointing out "that it would be manifestly unjust if two persons with equal culpability sentenced for the same offending, received an identical minimum term of imprisonment despite one only of them having pleaded guilty."

²¹ *Pandey-Johnson v R* [2012] NZCA 595; *R v Moore* HC Wellington CRI-2006-085-4361, 11 April 2008; and *R v Gosset* [2019] NZHC 1366.

²² *R v Zhao*, above n 15, at [22].

[54] In terms of role, the degree of premeditation, and brutality, your offending is evidently less serious than the defendants who receive the 18 year MPIs in *R v Moore* and *Pandey-Johnson v R*.²³ In my view it is more comparable to the co-defendants in *R v Gosset*, although the Court in that case was unable to discern the particular role of either offender leading to the imposition of a 16 year MPI for both.²⁴

[55] The most useful comparison, necessarily in my view, is to be drawn against your co-defendant, Mr Zhao. Lang J described Mr Zhao as “clearly the instigator” and the director of the extensive efforts to conceal the crime.²⁵ Mr Zhao received a starting MPI of 18 years’ imprisonment.²⁶

[56] Unlike in *Gosset*, you cannot be regarded as a joint and equal participant in Mr Wang’s murder.²⁷ You did not direct or instigate the murder. You did not stab Mr Wang to death. That was an act said to have been carried out by G. Having said this, your role was nonetheless an important one. You were aware of the plan to kill Mr Wang. You went to the Massey address in furtherance of that plan. You met Mr Wang at the door. You were armed with a gun. You continued to point the gun at Mr Wang while he was being questioned by Mr Zhao. You held Mr Wang down and covered his mouth while G is alleged to have stabbed him.

[57] I consider a notional starting MPI of 16 years accurately reflects your role and culpability in the offending. It also reflects the fact that your extensive post-death involvement has already been accounted for in the accessory to murder charge for which you have been sentenced.

Adjustments to the MPI for personal circumstances

[58] I now turn to consider what adjustments need to be made to the starting MPI to account for your personal circumstances.

²³ Above n 21.

²⁴ Above n 21.

²⁵ *R v Zhao*, above n 15, at [23].

²⁶ At [23].

²⁷ *R v Gosset*, above n 21.

Guilty plea and assistance

[59] The first relates to your guilty plea and the assistance you have provided and have agreed to provide to authorities.

[60] The discount to be given for a guilty plea in this context is less than would ordinarily be the case.²⁸ The maximum combined discount that may be given for a guilty plea and assistance sits around 60 per cent.²⁹

[61] For the Crown, Mr Nathan submits that a combined discount of around 20 per cent is appropriate in your case. Mr Chisnall submits that the discount should be at least as generous as that received by Mr Zhao, and that a combined discount of between four-and-a-half and five years' imprisonment is commensurate.

[62] Mr Zhao's guilty plea, described by Lang J as "very late in the piece given that one trial had already been aborted", attracted a discount of one year.³⁰ Mr Zhao then received a discount of four years for the assistance he provided to authorities.³¹ In total these amounted to a combined discount of approximately 28 per cent from his starting point of 18 years' imprisonment, although I note applying percentage discounts on MPIs is generally regarded as unhelpful.³²

[63] Your trial was scheduled to commence next Tuesday, that is 6 June 2023. You entered a guilty plea on 16 May 2023. This cannot be regarded as early in the circumstances. The charge had been on foot for approximately 11 months before you pleaded. However, I do accept that your formal admission of guilt was not as late in the piece as Mr Zhao.

[64] In terms of assistance, you provided a statement to the Police on 3 April 2023. I am satisfied you gave a full account of the murder, your role in it, and that of your co-defendants. You have indicated that you will give evidence for the Crown at G's upcoming trial.

²⁸ *R v Williams*, above n 11, at [72].

²⁹ *R v Hadfield* CA337/06, 14 December 2006.

³⁰ *R v Zhao*, above n 15, at [24].

³¹ At [25].

³² *Malik v R* [2015] NZCA 597 at [26].

[65] The Crown accepts that this assistance can be described as significant although tempered. Mr Nathan notes that by the time you gave your statement, the Crown already had a full picture of the murder and surrounding events. This, he says, can be contrasted with Mr Zhao's statement which effectively enabled the Police to charge you with murder.

[66] Mr Chisnall submits that your assistance is of equal value to that of Mr Zhao. He reasons that you were physically present while the murder took place whereas Mr Zhao was not. As such, only you can describe G's actions.

[67] That may be so in respect of the precise details of what occurred in that room after Mr Zhao left. Only those present can speak to what actually occurred and who did what. The fact remains, however, that Mr Zhao directed the murder and G's involvement in it. The Crown was sufficiently aware of his involvement prior to your statement, as evidenced by the fact that it charged G with murder well before you indicated your willingness to assist.

[68] That is not to say that your assistance is of no value. But the simple fact is that Mr Zhao's assistance, being earlier in time and also leading to the arrest of a person not at that stage on the Crown's radar for the murder charge, was of greater value.

[69] There is some limited evidence that you, and potentially your family, will suffer as a result of assisting the Crown in this way. I also accept that it may make the time that you spend in prison more difficult.

[70] Taking these factors into account, I consider a combined discount of four years to be appropriate in all the circumstances. This brings the MPI to 12 years.

Personal circumstances

[71] The next mitigating factor advanced by Mr Chisnall relates to your personal circumstances.

[72] I have before me a psychologist's report dated 1 March 2021, which was also relied on at your sentencing as an accessory after the fact to murder before Wylie J.

[73] This report details social and familial isolation, cultural factors, and a substance abuse disorder as contributing to the offending. You have struggled with your mental health since being a teenager, issues which deteriorated further after you moved to New Zealand and were forced to abandon your tertiary studies due to injury. You attribute this to the beginning of a downward spiral in which you turned to drugs as a coping mechanism. What began as the recreational use of cannabis to ease the pain quickly turned into an addiction to methamphetamine. You became involved with a drug syndicate in which you say you were a vulnerable target due to your addiction and lack of pro-social contacts in New Zealand. You also describe feeling as though you had no choice but to go along with the plans of others out of fear and a culture-based sense of obligation.

[74] These factors, together with your age at the time of this offending, attracted a discount of 15 per cent on the accessory after the fact charge. It is common ground that these factors should also have some bearing on your sentencing for murder today.

[75] In addition, Mr Chisnall submits that you should be entitled to a discrete discount under s 8(h) of the Sentencing Act on the basis that incarceration will be disproportionately severe due to your status as a foreign national. This has been recognised as a mitigating factor in the context of serious drug-related offending previously.³³ I agree that a modest discount is appropriate on that account, notwithstanding the fact that a s 27 report was unable to be prepared in time for your sentencing.

[76] I propose to allow a combined discount of one year and nine months (which represents an 11 percent discount) to reflect your age, vulnerable psychological condition and status as a foreign prisoner. That brings the MPI to 10 years and three months.

³³ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [163].

Totality considerations

[77] The final adjustment to the starting MPI is for totality. It is crucial that the sentence I impose is not out of all proportion to the gravity of the overall offending.³⁴ This involves consideration of the time you have spent in pre- and post-sentence detention across the drug, accessory and murder charges. These charges were all laid as a result of the activities of the drug syndicate in which you were involved.

[78] On the Crown's calculation, you have spent a total of one year and two months on pre-sentence detention. In the usual course, this time would be accounted for by Corrections under s 91 of the Parole Act 2002. In this case, however, Mr Chisnall tells me that Corrections has advised this is not possible, as the murder charge was filed *after* you were sentenced on the drug and accessory charges.³⁵ Based on that information I am thus satisfied, in accordance with the guidance given in *Booth v R*, it is necessary for the Court to deduct this period from the starting MPI.³⁶

[79] You have also spent a total of three years and nine months as a sentenced prisoner. While post-sentence detention is not usually credited against the MPI, issues of totality would arise if it were not taken into account. The Crown properly accepts that you are entitled to a distinct discount for this factor as was considered appropriate by Wylie J when sentencing Mr Zhao.

[80] Mr Zhao received a discount of nine months, or approximately four per cent of the starting MPI of 18 years, to reflect the two years spent as a sentenced prisoner.³⁷ In your case, Mr Nathan submits that a discount in the vicinity of two years is appropriate, reflecting the fact that you spent approximately twice the amount of time as a sentenced prisoner.

[81] Mr Chisnall argues that a discount closer to two years and five months is warranted. He submits that the situation is analogous to that in which the Court has

³⁴ Sentencing Act 2002, s 85(2).

³⁵ By way of contrast, Mr Zhao's pre-sentence detention can be taken into account by Corrections under s 91 of the Parole Act 2002 because he was charged with murder before he was sentenced on the drug charges.

³⁶ *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223 at [24].

³⁷ *R v Zhao*, above n 15, at [33].

to factor in time spent in prison pending sentence as a result of recall. In *Thomas v R*, the Court set the appropriate reduction in such cases at approximately two thirds, or 66 per cent, of the time spent in custody on recall.³⁸ In the present case, 66 per cent of the three years and nine months spent as a sentenced prisoner would lead to a reduction of two years and five months as contended for by Mr Chisnall.

[82] I prefer the approach advanced by the Crown. It accords with principle. I propose to allow a discount of one year and ten months, being approximately half the period spent on post-sentence detention.

[83] This, in addition to the one year and two month discount for time spent on pre-sentence detention, produces a total reduction for pre- and post-sentence detention of three years. That brings the MPI to seven years and three months.

Conclusion on personal mitigating factors

[84] It follows that I have identified discounts totalling eight years and nine months from the starting point MPI of 16 years' imprisonment.

[85] This leads to a notional MPI of seven years and three months' imprisonment.

Would it be manifestly unjust to impose life imprisonment?

[86] The final question is whether it would be manifestly unjust to impose life imprisonment, having determined that the appropriate notional MPI is seven years and three months' imprisonment.

[87] Before embarking on this issue there is another layer of complication; the fact that s 83(4) of the Sentencing Act prohibits the Court from imposing an indeterminate sentence such as life imprisonment cumulatively on another sentence. That principle reflects common sense. In other words, the notional MPI would be served cumulatively on the existing sentence of seven years and seven months you are already

³⁸ *Thomas v R* [2020] NZCA 257.

serving.³⁹ This means that your effective end sentence, assuming you are released when eligible for parole, would be 14 years and 10 months' imprisonment.

[88] On that basis I am easily satisfied that it would be manifestly unjust to impose life imprisonment. My reasons follow. First, it would require you to serve a minimum term of 10 years when I have determined that the appropriate MPI is one of seven years and three months' imprisonment. Secondly, it would be unjust as a matter of parity with your co-defendant, Mr Zhao, who is serving a total effective sentence of 14 years and three months' imprisonment. And thirdly, it would be unjust "as a matter of overall impression" having regard to your culpability, age, vulnerability and the purposes and principles of sentencing.⁴⁰

[89] It follows I am satisfied that a finite sentence ought to be imposed.

What should the finite sentence be?

[90] There is no prescribed method for setting a determinate or finite sentence where the presumption of life imprisonment has been displaced.⁴¹ The Court of Appeal has recently said that the starting point must reflect "the value that the community places on human life and its assessment that murder is the most serious of crimes".⁴² The starting point may then be cross-checked against those for aggravated violent offending.⁴³ The overall assessment, as with any exercise in sentencing, must be undertaken with regard to the circumstances of the offence and the offender, and informed by the purposes and principles of sentencing.⁴⁴

Starting point

[91] As I have noted earlier, you did not play a principal role in the offending in terms of instigating or directing it. Nor were you the one who stabbed Mr Wang. However, I have found that your role was nonetheless instrumental and that you took a number of active steps to facilitate the murder.

³⁹ Sentencing Act 2002, s 83(4).

⁴⁰ *Dickey v R* [2023] NZCA 2 at [194].

⁴¹ *Dickey v R*, above n 40, at [197].

⁴² At [198].

⁴³ At [199].

⁴⁴ At [197].

[92] If drawing a comparison with aggravated violent offending, several of the aggravating features identified in *R v Taueki* are present on the facts.⁴⁵ Some of these, such as serious injury, are inherent in the charge of murder, although others include extreme violence, premeditation, the use of a weapon, multiple attackers, vulnerability of the victim (given that Mr Wang was bound to a chair and rendered effectively defenceless), and the fact that it occurred in an organised crime context. Only three of these factors are required to place the offending within band three of *Taueki*, attracting a starting point of between nine and 14 years' imprisonment.

[93] Evidently, a much higher starting point is required than the 14 year maximum for wounding with intent to cause grievous bodily harm. Mr Chisnall submits that the appropriate range is 18 to 20 years' imprisonment. I consider your role and culpability in the offending warrants a starting point of 19 years' imprisonment.

Adjustments for personal circumstances

[94] You are entitled to discounts for personal mitigating factors. An application of orthodox sentencing principles produces the following tentative deductions:

- (a) 15 per cent for your guilty plea. This strikes the correct balance between recognising the lateness of the plea and the savings associated with not having to proceed to trial;
- (b) 15 per cent for assistance. This reflects the value of your assistance together with the risks and hardship you may face as a result;
- (c) 10 per cent for your age, vulnerable psychological condition and status as a foreign national; and
- (d) three years, or approximately 15.8 per cent, for time spent in pre- and post-sentence detention.

⁴⁵ *R v Taueki* [2005] 3 NZLR 372 (CA) at [31].

[95] This results in an end sentence of eight years and five months' imprisonment. In recognition of the fact that orthodox sentencing methodology does not readily apply to cases of this kind, it is necessary to stand back and consider whether this is a proportionate response to the seriousness of your offending.⁴⁶ I do not consider it is.

[96] Mr Chisnall conceded it is open to the Court to upwardly adjust the determinate sentence to 15 to 16 years' imprisonment to provide a proportionate response. I propose to uplift the sentence to 15 years' imprisonment accordingly.

What should the MPI be?

[97] The MPI in relation to a determinate sentence is imposed under s 86 of the Sentencing Act. The Court may impose an MPI longer than one-third of the determinate sentence if satisfied that this period would be insufficient to satisfy the purposes of accountability, denunciation, deterrence and protection of the community.⁴⁷ It may not impose an MPI that exceeds the lesser of two-thirds of the full term or 10 years' imprisonment.⁴⁸ The legislative policy behind MPIs for murder remains relevant.⁴⁹

[98] Mr Chisnall submits that the commensurate MPI is eight to nine years' imprisonment. I consider an MPI of eight years' imprisonment satisfies the purposes of sentencing to which I have referred.

Cumulative or concurrent

[99] The final question is whether that sentence ought to be imposed cumulatively or concurrently on the sentences you are presently serving. Cumulative sentences are generally appropriate if the offences are different in kind, whether or not they are in a connected series of offences.⁵⁰ Concurrent sentences are generally appropriate if the offences are of a similar kind and form part of a connected series.⁵¹

⁴⁶ *Dickey v R*, above n 40, at [210].

⁴⁷ Sentencing Act 2002, s 86(2).

⁴⁸ Section 86(4).

⁴⁹ *Dickey v R*, above n 40, at [200].

⁵⁰ Sentencing Act 2002, s 84(1).

⁵¹ Section 84(2).

[100] As I noted earlier, the drug, accessory and murder charges all relate to the activities of a syndicate in which you were involved. However, the drug charges are different in kind and lack any real connection in time or circumstance to the accessory and murder charges. It is for this reason that Wylie J imposed a cumulative sentence for the accessory charge.⁵²

[101] Mr Chisnall has made enquiries of Corrections to ascertain the effects of each option – cumulative or concurrent – on your total effective end sentence, parole eligibility date, and statutory release date. What follows is drawn from, and relies on, that advice which was included in supplementary submissions Mr Chisnall filed on Wednesday. The difference in approach yields quite startling variations in the length of the actual prison term you would serve.

[102] Apparently, if sentenced to a cumulative sentence (15 years with an eight year MPI), this would form a single notional sentence under s 77 of the Parole Act 2002. The start date of this sentence, and the date from which your parole eligibility would be counted, would be 16 August 2019 (the date on which you were sentenced on the drug charges).⁵³ Your parole eligibility date would be 17 January 2029.

[103] If, instead, you were sentenced to a finite concurrent sentence, the start date would be today. Your parole eligibility date would be 2 June 2031.

[104] In practical terms, what this means is that you would be eligible for parole approximately two-and-a-half years earlier if sentenced to a cumulative finite term. Assuming you are released when first eligible for parole, you would serve a total effective end sentence of approximately 10 years and six months' imprisonment if the sentence was cumulative. That is to be contrasted with a period of 12 years and 10 months if you were sentenced to a concurrent finite sentence. Mr Zhao's effective end sentence of 14 years and three months' imprisonment must also be kept in mind as a comparative yardstick.

⁵² *R v Yu*, above n 5, at [37].

⁵³ Parole Act 2002, s 77.

[105] I see no reason why it is necessary to prolong your effective end sentence, as measured by your parole eligibility date, by imposing a concurrent finite sentence. An effective end sentence of 10 years and six months is proportionate to the gravity of the overall offending. Based on this information I am satisfied the appropriate approach is to impose the murder sentence cumulatively on that imposed on the other sentences.

End sentence

[106] Mr Yu, please stand.

[107] On the charge of murder, you are sentenced to a finite term of 15 years' imprisonment.

[108] Additionally, I order an MPI of eight years' imprisonment which means that you must remain in prison until at least that time. Whether you are released and when you are released will depend on the Parole Board at that time.

[109] That sentence is to be imposed cumulatively on the sentences you are currently serving.

[110] Stand down.

Moore J

Barristers/Solicitors:
Crown Solicitor, Auckland
Mr Chisnall KC, Auckland
Ms Ding, Auckland