

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

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

**CRI-2021-092-4333
[2023] NZHC 2761**

THE KING

v

**SOSAIA VAITOHI
METHUSELAH TALAKAI
Defendants**

Hearing: 3 October 2023

Appearances: CP Howard and JAE Tausi for the Crown
AS Bloem for Mr Vaitohi
J-A Kincade KC and S Brickell for Mr Talakai

Sentencing: 3 October 2023

SENTENCING NOTES OF FITZGERALD J

Solicitors: Kayes Fletcher Walker, Auckland

To: J-A Kincade KC, Auckland
A Bloem, Auckland
S Brickell, Auckland

Introduction

[1] Mr Vaitohi and Mr Talakai, you appear for sentencing before me this morning following the jury at your trial unanimously finding you each guilty of the murder of Alec Moala.

[2] Before going further, I would first like to acknowledge the presence of family members and supporters here in Court today for all parties. I appreciate that it is a difficult and emotional time.

[3] I particularly want to acknowledge the presence of Mr Moala's wife who has read her victim impact statement here in Court this morning. That takes great courage, and I am sure you will all agree that she did so with great dignity. It is clear how much Mr Moala meant to you and your family, and how much his presence is and will be missed. I extend the Court's deepest sympathies to you. I appreciate that nothing I say or do today will take away the grief and sense of loss that you and your family are experiencing, but I hope that today's sentencing brings *some* closure for you, at least in terms of this court process.

[4] Mr Vaitohi and Mr Talakai, the first thing I am going to do in sentencing this morning is to summarise the facts of your offending. You will already be familiar with the facts, having seen and heard all of the evidence given at trial. But sentencing is a public process and so it is important that the public understand the basis upon which I am sentencing you today.

[5] I make one final point by way of introduction. Under the Sentencing Act 2002, and unless it would be manifestly unjust to do so, the law says that I *must* sentence each of you to life imprisonment. Your lawyers quite rightly do not try to argue that it would be manifestly unjust to impose a sentence of life imprisonment in this case. Life imprisonment will therefore be the sentence I impose on each of you at the end of this sentencing. What will be the focus of my sentencing remarks today is what the minimum period of imprisonment, or what I will refer to as the "MPI", should be. The MPI is not the sentence. It is the amount of time that you each must spend in custody before you can *start* to ask the Parole Board to be released on parole. There is no guarantee that the Parole Board will release you at that point. And even if released,

you will remain subject to parole conditions for the remainder of your life sentence and subject to recall into prison should you go on to commit any further offending while on parole.

[6] I make these comments about the MPI because there is often confusion in the public, including in some parts of the media, as to what the sentence for murder is.

The facts

[7] As the trial Judge, I saw and heard all of the evidence given at your trial. I say at the outset that despite the Crown case against each of you being largely circumstantial, the evidence at trial amounted to a strong case, and the jury's unanimous verdicts were therefore understandable and unsurprising.

[8] The evidence is that you are both members of the "36" gang which is a sub-group of the Crips gang. Mr Moala was also a part of the Crips gang, but in another sub-group of it. His gang name was "Blacc8". In May 2021, Mr Vaitohi, you were living at a house in Beatty Street, Ōtāhuhu, together with some members of your family, as well as an acquaintance, who I will refer to in these sentencing notes as Ms A. Mr Talakai, you also knew Ms A and you were known to her and others by the nickname "Flight" or "Flighty". Ms A also knew Mr Moala; she was a relative and they would see each other regularly.

[9] The events which led to Mr Moala's murder had their origins in contact between you, Mr Talakai, and Ms A late in the afternoon and into the evening of 22 May 2021. This was about drug deals. It seems that Ms A would arrange for persons to acquire drugs from you. During the early evening of 22 May, one of those deals fell over when the intended purchaser ended up getting their drugs from someone else. This caused tension between yourself and Ms A. You went to Beatty Street, where she was, at about 9.45 pm, abusing her, saying things like you "owned" her, demanding money, and trying to take some of her family's property, and in the end slapping her. Mr Vaitohi was with you at that time, but there is no suggestion that he was directly involved in your dispute with Ms A at that point.

[10] At about 10.25 pm, Ms A text Mr Moala asking him to “come asap”. Mr Moala did not respond straight away as he was out with a friend. She was also texting you, Mr Talakai trying to, in effect, apologise for wasting your time and asking why you had done what you did.

[11] Not long after midnight there was a phone call between you, Mr Talakai, and Ms A. We do not know what was said in it, but it didn’t calm things down, and you went back to Beatty Street at around quarter past midnight. Shortly afterwards, Ms A text Mr Moala saying, “Cuhz cn you tell flighty to leave me alone idk wtfs wrong with him.” Mr Moala responded this time saying, “what’s wrong with him? On my way to you now”. Ms A responded, “Idk, he reckons he owns me nw looked fucked otg”.

[12] At this time, Mr Talakai, you were also back in contact with Mr Vaitohi; you both having separated at some point after being together at Beatty Street when you slapped Ms A. Mr Vaitohi, you gave and called alibi evidence suggesting that you were at a property, not far away from Beatty Street, from around midnight until early the following morning, when it was getting light. By its verdict, the jury plainly did not accept that evidence, and must have concluded that you were either not at the property at all, or left in time to hook back up with Mr Talakai in order to be back at Beatty Street by around 2.00 am.

[13] In the meantime, Mr Moala and his friend had arrived at Beatty Street just after half past midnight. Ms A was not there as she had gone out with a friend in search of methamphetamine. Ms A’s friend dropped her back at Beatty Street at about 1.30 am. Also around this time there were further texts between you, Mr Talakai, and Ms A. You were also texting with Mr Vaitohi, seemingly angry with him for having “ditched you” for some other guy. Mr Vaitohi, you responded to Mr Talakai saying, “Ayy fku cuz I was grabbing the fkn lighter!”. When giving evidence, you suggested that this was simply a lighter for cigarettes, but I consider that in light of what happened later in the evening, and that you had a shotgun which was not the shotgun you normally carried with you, it was more likely a reference to getting a gun.

[14] At some point, probably at about 1.30 am, both of you met back up again. By that time, Ms A continued to send texts to you Mr Vaitohi, wanting to know

Mr Talakai's address. From this I infer that the idea was for Mr Moala to come to Mr Talakai to sort things out—consistent with him using Ms A's phone to text you, Mr Talakai, saying, "it's me, blacc8 wea u ill come to u cunt".

[15] There then followed a series of calls and messages between Ms A and Mr Moala on the one hand, and both of you on the other. Tensions were clearly rising. Mr Moala's friend overheard some of those calls, and heard you, Mr Talakai, saying to Mr Moala "see you soon". Immediately after that, Mr Moala's friend text his partner saying, "stuff this man not down for my doko blacc to get shot at tonight". From that point I am satisfied that the plan between the two of you was to shoot Mr Moala. After another, fairly lengthy, call between Ms A and you, Mr Vaitohi, Mr Moala's friend text his partner saying, "Im having a bad feeling that Im with blacc one of us gona get fanai". Mr Moala's friend also sent another text at around 2.00am saying, "shit went down when blacc told me some cat slapped his girl cuzn and blacc came out and they wanna shoot up on us." At around the same time, 2.00 am, Mr Vaitohi, you text your partner saying, "Ima go alowt, [don't worry] your hear [about it]!!!!

[16] At around 2.10 am, at Beatty Street, Ms A and Mr Moala were sitting on a seat outside the front door, and Mr Moala's friend was sitting in his car in the driveway.

[17] You both arrived at Beatty Street in a black Honda Jazz that you, Mr Talakai, had borrowed from a cousin earlier in the evening. The next events happened very quickly. Mr Vaitohi, you walked up the path with a shotgun and Ms A saw you and tried to stop you. She was unsuccessful and you shot at Mr Moala from fairly close range. The evidence suggested that there were three shots, the first missing Mr Moala, the second hitting him in the front of his torso which was the fatal shot, with the third shot to Mr Moala's back from a much closer range.

[18] Mr Vaitohi, you returned to the black Honda Jazz and Mr Talakai drove both of you away. Ms A immediately called 111 but despite everybody's best efforts, Mr Moala was unable to be revived and passed away at the scene.

[19] Following the shooting, the black Honda Jazz was seen in CCTV footage in Flatbush, and a male exiting the vehicle and heading towards a house where,

Mr Talakai, your former partner and the mother of your daughter, lives. There is no doubt that the male was you. You got a lift back from there to your cousin's place. The Honda Jazz was left in Flatbush but the following morning you returned and told your former partner to "scrap it", that it needed to be done that day, and to clean the car out because you did not want any traces of you found in it. CCTV footage shows your former partner cleaning parts of the inside and outside of the car, and also the number plates being removed. The car didn't get scrapped and was located by police a few days later. Mr Moala's blood was found in the car, as was yours, Mr Vaitohi.

[20] Mr Vaitohi, you made three types of admission to the shooting fairly soon after it occurred. In particular, your admission made to your partner's mother when you arrived at her house later in the morning on 22 May, looking for your partner, was very clear, telling her in terms that you had shot someone twice, referring to Beatty Street, and that the person was "one of your brother's boys". You told her you wanted to find your partner 'before the pigs come'.

[21] Your trial, which lasted for just over five weeks, was difficult. No doubt because of your gang connections, a number of witnesses were very reluctant to come to court and give evidence. Warrants to arrest had to be issued and when they did eventually come to court, a number of them were declared hostile. This led to their earlier statements made to the police becoming admissible. In my view, the most reliable statements made by those witnesses were what they had told police shortly after the events in question. Their police statements, or what they told the police at the time of the shooting, were all remarkably consistent, both with each other and with other objective evidence. A number of those witnesses plainly lied in the witness box when they professed not to remember anything about what had happened. That will not have been lost on the jury.

Appropriate minimum period of imprisonment

[22] I turn now to your sentences. As I explained earlier, the sentence for murder is one of life imprisonment. I must however also set an MPI which is the time period before which you can start to apply to the Parole Board for parole.

[23] When considering what the MPI should be, I take into account the aggravating and any mitigating factors of your offending. An obvious aggravating factor is the use of a weapon, and in particular, a shotgun.¹ While the extent of loss or harm from offending can in some cases be a separate aggravating factor, I accept your lawyers' submission that the loss of Mr Moala's life is inherent in the charge of murder itself. Post offending conduct, involving fleeing the scene and destroying and disposing of evidence, has been accepted in a number of cases to be an aggravating factor,² and it is present to a degree in this case. I also consider premeditation to be a further aggravating factor,³ given this was not a spontaneous reaction to a developing situation. That said, the extent of the premeditation was not *very* significant, commencing only about half an hour before the shooting itself.

[24] One of the provisions in the Sentencing Act, s 104, says that if the circumstances of a murder are particularly serious, the Court *must* impose a minimum period imprisonment of at least 17 years. The Crown submits that, on balance, s 104 of the Act is not engaged in this case. I agree. In particular, the degree of premeditation does not in my view mean that s 104 ought to apply.⁴ Nor do I consider that the offending involved the unlawful entry into a dwelling place.⁵ Here, Mr Moala was not at his home, and in fact Beatty Street was the place where Mr Vaitohi was living at the time. The shooting also occurred outside the front of the house. And while the circumstances in which Mr Moala was shot, being hit twice and once in the back, were brutal and callous, they do not in my view reach the "high level" of such conduct required to trigger s 104.⁶

[25] What then should the appropriate MPI be? The Sentencing Act says that it must be at least 10 years' imprisonment. In this case, and based on its submissions that you are both equally culpable for Mr Moala's death, the Crown says that the MPI should be around 13 to 14 years' imprisonment. On the other hand, and as you have

¹ Sentencing Act 2002, s 9(1)(a).

² *R v Samuels* [2019] NZHC 2948; *R v Tinei* [2021] NZHC 556; and *R v Paewhenua* [2018] NZHC 301.

³ Sentencing Act, s 9(1)(i).

⁴ Section 104(1)(b).

⁵ *R v Taueki* [2005] 3 NZLR 372. See also *R v Samuels*, above n 2.

⁶ Section 104(1)(e).

heard this morning, each of your lawyers say it should be around 11 to 12 years' imprisonment.

[26] The lawyers have referred me to a number of other sentencing decisions that they say are similar to this one, and I have read all of those.⁷ It is difficult to draw any direct comparisons with other cases, and the matter is often more one of overall impression. Having read the cases to which I have been referred, I have found some to be not particularly helpful, being either quite dated now, such as a case called *R v Moala*, and in addition, that case involving quite different offending, in terms of a more significant confrontation between two rival gangs.⁸ *R v Te Tomo*, in which a 12 year MPI was adopted, is also now somewhat dated, and involved a very young defendant (17 years old) in circumstances I consider different to the present.⁹ I consider it to be a less serious case than this one. The case of *R v Paewhenua*, attracting an MPI of 11 and a half years, is also less serious in my view, being an example of more spontaneous offending.¹⁰ I have also considered a case called *Pilitati*, in which an 11 year MPI was adopted, which again I conclude is less serious, also involving a young defendant and circumstances where the offending appears to have stemmed from fears of retaliation arising from PTSD and hyper-vigilance conditions.¹¹

[27] In *Yates*, the defendant killed a fellow member of his gang.¹² The reason for doing so was unclear, but it involved elements of kidnapping and two separate instances of shooting the victim, and then disposing of his body. An MPI of 15 and a half years was adopted, though this also reflected an earlier shooting in which a person was injured in the leg. I consider *Yates* to be more serious than this case. In *Tinei* and *Tapusoa*, the defendants went out looking for members of a rival gang and ended up shooting and killing a man who was not a gang member or associated with a gang, merely on the basis of what colour he was wearing.¹³ That was a 2021 decision, so

⁷ *R v Samuels*, above n 2; *R v Tinei*, above n 2; *R v Paewhenua*, above n 2; *R v Yates* [2018] NZHC 2600; *R v Moala* HC Auckland CRI-2006-092-461, 12 December 2007; *R v Te Tomo* [2015] NZHC 2671; *R v Pilitati* [2019] NZHC 3164;

⁸ *R v Moala*, above n 7.

⁹ *R v Te Tomo*, above n 7.

¹⁰ *R v Paewhenua*, above n 2.

¹¹ *R v Pilitati*, above n 7.

¹² *R v Yates*, above n 7.

¹³ *R v Tinei*, above n 2.

more recent, and MPIs of 14 years for the shooter and 13 years for the driver were adopted. Having read that decision, I consider that given the seriousness of the offending in that case, those MPIs were generous, and there was a case in my view for s 104 applying.

[28] Finally, in *Samuels*, a 2019 decision, the Judge adopted a 14-year MPI for Mr Samuels on the basis that he was *a party* to the shooting of a rival gang member.¹⁴ There was premeditation involved, it involved entry into a dwelling place, and the victim's residence was also ransacked after the shooting. It is more serious than in this case. Nevertheless, I note that the Judge adopted a 14 year MPI for the party offender after taking into account "significant" personal mitigating factors attaching to the defendant in that case.

[29] In light of those cases, Mr Vaitohi, and given your role as the person who actually shot Mr Moala, I consider that before any further adjustments are made, the minimum period of imprisonment for your offending ought to be **14 years' imprisonment**. This reflects that I am satisfied that you intended to kill Mr Moala, rather than what has been referred to as a "reckless" form of murderous intent. That is evident from the manner in which Mr Moala was shot, and indeed as Mrs Bloem acknowledged to the jury, whoever did kill Mr Moala plainly intended to do so.

[30] Mr Talakai, while the Crown says that you are equally culpable as Mr Vaitohi, I accept that you did not actually shoot him. That said, the jury's unanimous verdict meant that it was sure that you knew what was about to happen, what Mr Vaitohi was intending to do, and intended to help him do that by taking him to Beatty Street.

[31] In those circumstances, while I consider your culpability to be less than Mr Vaitohi's, that is only marginally so. Your role was more involved than, say, the driver in *Tinei*, where a one year difference was adopted between the shooter and the driver. Here, you were closely involved in the escalating dispute with Mr Moala, and indeed for a considerable period of time, it was more a dispute between you and Mr Moala rather than Mr Vaitohi and Mr Moala. For you, I adopt an MPI of **13 years and six months' imprisonment**.

¹⁴ *R v Samuels*, above n 2.

Personal factors

[32] I will now address whether the MPIs I have just discussed should be adjusted upwards or downwards to reflect factors personal to each of you. Before turning to factors specific to each of you, I record that neither of you express any remorse for what you have done. I have also not found the Provision of Advice to Courts reports of any real assistance, including given neither of you appear to have fully engaged in that process. What is set out in those reports, however, is broadly consistent with the s 27 cultural reports which I have received, and which I will discuss shortly.

[33] Mr Talakai, you have some previous convictions, but none of which I consider warrant an uplift to your MPI.

[34] In terms of possible discounts, I been provided with a s 27 cultural report outlining your upbringing both here and in the United States. It is not necessary for me to spell out the details of that report, but it notes that you had some difficulties adjusting to moving locations and schools, and in particular moving between New Zealand and the United States. You got into some trouble at school, but not anything particularly serious in your earlier years. Unfortunately, however, when you were about 15 years old, you connected with the wrong people and started dealing drugs, and then using them yourself. This led to you coming back to New Zealand. You moved around various relatives' houses, and committed your first offence in 2010 and were sentenced to prison. This put you into contact with others involved with methamphetamine and gangs, and led you to identifying with the Crips gang.

[35] I am of the view that there is no sufficient causative contribution from anything in your upbringing or background that warrants a discount for this serious offending. Your background, while disrupted in a number of ways, was far more stable and positive than many of those persons that we see in this Court. In particular, you have loving, albeit strict, parents who you say you cannot fault, an aunt who was very supportive of you when you returned to New Zealand, and a very supportive sister, who attended every day of your trial to support you once she had given her evidence. But for your encounter with gang members in prison, there would seem to be no reason why you have found yourself in the position you are in today.

[36] In my view, should you take the opportunities that will be made available to you in prison, which I hope are offered sooner rather than later, there is scope in my view for you to become a contributing member of society upon your release.

[37] Accordingly, your MPI will remain at **13 years and six months' imprisonment.**

[38] Mr Vaitohi, you have quite a number of earlier convictions, though for matters much less serious than your present offending. Of most relevance, you were convicted in 2015 for firearms offending, including presenting a firearm at another person. More recently, in 2019, you were convicted on two charges of possession of an offensive weapon and assaulting police. I do not have any details about that offending, but the sentence indicates that it was not particularly serious.

[39] The Crown says that your MPI should be uplifted by six months to reflect this pattern of offending. Mrs Bloem accepts that an uplift is warranted, but says that it should be only three months. I agree that an uplift is warranted, to reflect a pattern of relevant offending. But I also agree with Mrs Bloem that the uplift should only be **three months**. This reflects that your firearm offending was in 2015, that your 2019 offending appears to have been at the less serious end of the scale, and therefore to ensure that there is no double counting for your earlier offending.

[40] I have also been provided with a comprehensive and helpful s 27 cultural report which outlines your upbringing and other circumstances which Mrs Bloem submits have contributed to your current lifestyle, and thus have a causative link with your offending. She submits that these factors warrant a 20 percent discount from your MPI. Mr Howard submits that a discount of no more than six months is appropriate to reflect those factors.

[41] Again, it is not necessary or appropriate that I go into the details of the report. It is sufficient to record that you clearly had a difficult upbringing, and in particular, witnessed and were the subject of violence in the home, and had a lack of a positive role model, in particular from your father. One of your older brothers stepped into that role for a time, but was then sentenced to a lengthy period of imprisonment for serious

offending. Your mother, who supported you each day of your trial here, appears to have been somewhat of a constant in your life, but the report writer notes that at times she was working very long hours due to financial deprivation.

[42] You suffered a brain abscess and ear infection when you were young, which left you with or exacerbated hearing loss in one ear, which no doubt hindered you at school and no doubt more broadly as well. You left school without any qualifications and were in state care for a time when you were young, which was difficult and disturbing for you, and then you were in custodial institutions from a young age, being incarcerated in an adult prison when you were 17 years old. You were also exposed to and took drugs and alcohol from a young age. You grew up surrounded in gang environments, for example your father being a patched member of the Black Power gang and an older brother a member of the Crips. You joined a street gang at a relatively young age, and now identify with the Crips.

[43] In my view, these factors do give rise to a causative contribution to your offending; they explain how you found yourself in a gang, why violence is embedded in your lifestyle, and how you came to be on the pathway to committing your present offending. But equally, those links must be tempered somewhat by the sheer seriousness of the offending. This was not a reaction with spontaneous physical violence in an unexpected encounter. In a case called *Berkland*, the Supreme Court said that background factors that have a causative effect on offending may in some cases get overtaken by other sentencing principles which assume more importance.¹⁵ In the present case, and in light of the escalation in firearms violence in Auckland in more recent years, particularly in the context of gangs, the principles of denunciation and deterrence in my view are particularly important. These lead me to adopt an **eight-month** discount for background factors, rather than the larger discount advocated for by Mrs Bloem.¹⁶

¹⁵ *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [109]-[112].

¹⁶ By comparison, in *Te Tomo*, above n 7, 1.5 years' discount for background and youth; in *Pilitati*, above n 7, 18 month discount for youth, remorse and guilty plea; in *Samuels*, above n 2, as noted, a 14 year MPI *after* taking into account significant background factors, described as "horrific"; Mr Tapusoa in *R v Tinei*, above n 2, an eight percent discount for cultural background factors and substance abuse; *Tinei*, above n 2, a 12 percent discount for background factors.

[44] Taken together with the uplift for your previous convictions, Mr Vaitohi, this leads to an MPI of 13 years and seven months' imprisonment.

[45] I also need to deal with contempt. When you gave evidence, you swore to tell the truth, the *whole truth* and nothing but the truth. But when you were asked about anything to do with Mr Talakai, you refused to answer, even when directed by me to do so on several occasions, saying you could not or were not allowed, because of gang code.

[46] There is no real dispute that this was an act of contempt of court.¹⁷ The directions to you to answer the questions were clear. You were aware of my directions and what they meant and you received legal advice at the time. You did not have a reasonable excuse not to answer the questions. To be clear, gang code cannot and will never be something that can come into the courtroom and override the principles of law. I am accordingly satisfied beyond reasonable doubt as to those matters set out in s 16(3) of the Contempt of Court Act 2019.

[47] I am not persuaded however, that I ought to, or have the power, at least under s 16 of the Contempt of Court Act, to sentence you in light of this contempt. Section 16 is directed to "enforcing" court directions, not sentencing or punishing someone for an earlier contempt. It is therefore referred to in the statutory section as an "enforcement action".

[48] The statute does say that it does not override this Court's inherent jurisdiction to punish for contempt for situations not covered by the Act, other than that the maximum penalty is six months imprisonment.¹⁸ In this case, however, I have not received submissions on these matters. Any sentence or penalty for contempt is somewhat moot in any event, given your life sentence. But I think it is important to nevertheless mark the contempt with the finding that I have made, and to record that had I been satisfied as to the jurisdiction under the statute to punish you for that contempt, I would have imposed a two-month concurrent sentence of imprisonment.

¹⁷ Contempt of Court Act 2019, s 16.

¹⁸ Sections 26 and 27.

Sentence

[49] I will now formally sentence each of you. Would you both now please stand.

[50] Mr Talakai, on the charge of murder, I sentence you to life imprisonment with a minimum period of imprisonment of 13 years and six months.

[51] Mr Vaitohi, on the charge of murder, I sentence you to life imprisonment with a minimum period of imprisonment of 13 years and seven months.

[52] Would you both please now stand down.

Fitzgerald J