NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF AJN REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA509/2011
[2016] NZCA 480

BETWEEN	TODD MARTELEY Appellant
AND	THE QUEEN Respondent

Hearing: 27 September 2016

Court: Wild, Asher and Brown JJ

Counsel: E R Fairbrother QC and G M Fairbrother for Appellant
J E Mildenhall for Respondent

Judgment: 5 October 2016 at 10 am

JUDGMENT OF THE COURT

A An extension of time to appeal is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Mr Marteley applies for an extension of time to appeal against a sentence of life imprisonment, with a minimum period of imprisonment (MPI) of 14 years,

imposed on him by Heath J in the High Court at Hamilton on 5 November 2010.[1] Mr Marteley had been convicted of murder, as had two of his co-offenders. The fourth co-offender was convicted of manslaughter.

[2] His notice of appeal, filed on 23 August 2011 (but dated 29 July 2011), is about eight months out of time. Despite that, the Crown could not point to any prejudice, and did not oppose an extension of time. Accordingly, we grant one.

[3] For the appellant, Mr Fairbrother QC submits the sentence is manifestly excessive for two reasons:

(a) the Judge erred in applying s 104 of the Sentencing Act 2002 when sentencing Mr Marteley. Section 104 did not apply or, if it did, it was manifestly unjust to apply it; and

(b) there was a lack of parity between the sentence imposed on Mr Marteley and the sentences Heath J had earlier imposed on two of Mr Marteley's three co-offenders. There was an insufficient discount for Mr Marteley's guilty plea.

[4] Before addressing these grounds we detail the offending, the sentencing process and the sentences imposed on the co-offenders.

The offending

[5] The man killed, Mr Kingi, was a methamphetamine dealer. Mr Marteley thought Mr Kingi had "ripped him off" for his share of the proceeds of a theft of some drug-making chemicals from an industrial plant. One of the other accused, Mr Manukau, was disgruntled with the quality of methamphetamine Mr Kingi had supplied to him.

[6] Between them, Messrs Marteley and Manukau hatched a plan to obtain retribution for these perceived wrongs by robbing Mr Kingi of drugs and money. The plan was to lure Mr Kingi to Mr Marteley's home, on the pretext that

1 *R v Marteley* HC Hamilton CRI-2009-019-9786, 5 November 2010.

Mr Manukau had a large amount of money available to buy methamphetamine. Mr Kingi was to be told this money had come from the sale of a powerboat. After Mr Kingi entered the house, he was to be set upon and robbed.

[7] Messrs Manukau and Marteley involved their two co-accused in this plan. One was a young man we will refer to as AJN, because he has name suppression. AJN was recruited by Mr Manukau. The fourth offender was Ms Heremaia, who was Mr Marteley's partner.

[8] The plan was implemented by Mr Marteley texting Mr Kingi. Mr Manukau and Ms Heremaia were the lookouts, posted away from the house. Mr Marteley and AJN were inside the house when Mr Kingi arrived around midday on 10 June 2009. They had two weapons. One was a cricket bat Mr Marteley had brought from Mr Manukau's home. The other was a tomahawk that belonged to Mr Marteley and that he had sharpened shortly before Mr Kingi arrived. After Mr Kingi came into the house, AJN stepped out from behind a curtain and hit him over the head with the cricket bat. A sustained attack followed, in the course of which Mr Kingi was hit a number of times over the head and also sustained cuts and stabs the pathologist considered were likely inflicted with the tomahawk. The head injuries Mr Kingi received smashed in his skull and caused haemorrhaging, which led to Mr Kingi's death in a bedroom in the house.

[9] After Mr Kingi was killed, his clothing and his car were searched for drugs and money. It is not clear what drugs and money — if any — were taken. However, the searchers overlooked four snaplock bags of methamphetamine in the coin pocket in his trousers.

[10] Mr Kingi's body was then bundled up in some bed clothing, carried out to Mr Kingi's car, and the car driven away and abandoned, parked on a roadside with Mr Kingi's body in it.

[11] On the evening of the following day, 11 June 2009, Mr Marteley rang a police officer he knew. He alerted this officer to the fact that Mr Kingi had been killed at his home. He disclaimed any responsibility, telling the officer that other

people had murdered Mr Kingi at his address in his absence and said he was in fear for his and Ms Heremaia's lives. The gist of this information was that Mr Marteley, although he knew that Mr Kingi had been killed, had not had any involvement in killing him.

[12] After several interviews with the police, Mr Marteley, Mr Manukau, AJN and Ms Heremaia were all charged with Mr Kingi's murder. The police laid an amended information on 2 July 2009 charging the four, under s 168(1)(a) of the Crimes Act 1961, that they:

> … meant to cause grievous bodily harm to Piki Maunga Kingi for the purpose of facilitating the commission of the offence of robbery and death ensued from that injury thereby committing the murder of Piki Maunga Kingi.

The sentencing process

[13] These are the key events:

Date	**Event**
11 August 2010	AJN pleaded guilty to the murder charge.
3 September 2010	Messrs Marteley and Manukau pleaded guilty to the murder charge. Ms Heremaia pleaded guilty to a charge of manslaughter. Sentencing scheduled for 30 September.
13 September 2010	Scheduled trial date — vacated when the guilty pleas were entered on 3 September.
29 September 2010	Mr Marteley, through his counsel, indicated an intention to apply to vacate his guilty plea.
30 September 2010	Heath J sentenced AJN, Ms Heremaia and Mr Manukau.[2]
7 October 2010	Mr Marteley, through his counsel, advised that he would not pursue an application to vacate his guilty plea.
5 November 2010	Heath J sentenced Mr Marteley.[3]

The sentences imposed on the co-offenders

[14] As indicated in the chronology above, the Judge sentenced AJN, Ms Heremaia and Mr Manukau together on 30 September 2010.

[15] The Judge sentenced AJN, who had been convicted of murder, to life imprisonment with an MPI of 10 years.

2 *R v AJN* HC Hamilton CRI-2009-019-9786, 30 September 2010.
3 *R v Marteley*, above n 1.

[16] The Judge sentenced Mr Manukau, who had also been convicted of murder, to life imprisonment with an MPI of 12 years.

[17] Ms Heremaia, who had been convicted of manslaughter, was sentenced to three years and nine months imprisonment.

[18] In paragraphs [33]–[35] below, we give some further detail about the way in which Heath J arrived at the sentences he imposed on AJN and Mr Manukau.

First ground of appeal: s 104 of the Sentencing Act did not apply, or should not have been applied

[19] In sentencing Mr Marteley, Heath J fixed his sentencing starting point at 17 years. He explained he used the term "starting point" as "the period that the law requires me to use for the purpose of determining whether it is manifestly unjust for you to receive any lesser period".[4] He referred to ss 103(2) and 104(1) of the Sentencing Act. For the reasons we explain in [21], this aspect of the Judge's approach to sentencing was incorrect. We recognise this may have arisen from the particular way in which submissions were made to the Judge, in particular the concession by the defence that s 104 applied, and the Crown's concession that a 17-year MPI would be manifestly unjust.

[20] The Judge then identified the following factors as instrumental in fixing the MPI at 17 years:

(a) the attempts to subvert the course of justice, by hiding Mr Kingi's body in his car and abandoning it at a distant location — all "designed to cover up what had happened":[5] s 104(1)(a) of the Sentencing Act;

(b) the killing was premeditated — it resulted from a calculated plan in which Mr Marteley was involved: s 104(1)(b); and

4 *R v Marteley*, above n 1, at [20].
5 At [21(c)].

(c) the murder was committed with a high level of brutality, cruelty and callousness, as evidenced by the pathologist's report: s 104(1)(e).

[21] It is evident from this that Heath J did not follow the two-step process suggested by this Court in *R v Williams*.[6] Step one required the Judge to fix the MPI he considered appropriate, but for the operation of s 104. Then as step two, the Judge needed to consider whether it would be manifestly unjust to impose the MPI of 17 years stipulated by s 104, rather than the minimum term otherwise appropriate.

[22] Before Heath J, the Crown submitted s 104 was engaged, in particular because the factors in s 104(1)(b) (planning), s 104(1)(d) (the murder was committed in the course of another serious offence) and s 104(1)(e) (a high level of brutality, cruelty and callousness) were all present.

[23] Appearing for Mr Marteley at his sentencing, Mr Morgan QC accepted s 104(1)(d) was engaged, but resisted application of the other factors relied on by the Crown.

[24] Before us, Mr Fairbrother argued s 104(1) did not apply. He sought to align this case with *R v Kinghorn*.[7] In *Kinghorn* this Court dealt with a Solicitor-General's appeal against a sentence of life imprisonment with a 13-year MPI. The Solicitor-General argued s 104(1)(d) applied. The offender had deliberately driven his car into the female victim, causing her death, and then put her body in the back of his car and left it there. Although there was no physical evidence of any sexual offending, at sentencing the Crown had sought to have the Judge draw an inference that Mr Kinghorn had run down the victim because he intended to commit a sexual offence against her. The Judge declined to draw any such inference. Consequently, the Judge held s 104(1)(d) did not apply as there was no evidence of any sexual offending or any steps taken by Mr Kinghorn to effect an intention to commit a sexual offence. This Court upheld the Judge's sentence — the murder had not been committed "in the course of" another serious offence.

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[6] *R v Williams* [2005] 2 NZLR 506 (CA) at [52]–[54].
[7] *R v Kinghorn* [2014] NZCA 168.

[25] The factual situation in *Kinghorn* is readily distinguishable from the situation here, where there is clear evidence of robbery. We are in no doubt that s 104(1) did apply.

[26] We agree with counsel that s 104(1)(a) was not relevant. The offenders' attempts to subvert the course of justice occurred after Mr Kingi's murder, when they tried to hide his body; they did not murder him as part of some other attempt to subvert the course of justice.

[27] But other paragraphs of s 104(1) are relevant. When the Court referred Mr Fairbrother to Mr Morgan's acceptance that s 104(1)(d) applied, Mr Fairbrother very properly accepted he was in difficulties in retreating from that concession. The concession was rightly made — Mr Marteley and his co-offenders murdered Mr Kingi in the course of a robbery.

[28] Arguably, the factors listed in s 104(1)(b) and (e) also applied here. We say arguably, because the plan hatched and implemented by Mr Marteley and his co-offenders was to rob Mr Kingi, not to murder him. The laying of the charge under s 168(1)(a) of the Crimes Act reflects that. And, sadly, the level of brutality and callousness here was arguably fairly common in drug-related attacks, rather than comparatively "high".

[29] Adopting the *Williams* two-step approach, we consider the aggravating factors we have referred to meant the appropriate MPI here was in the range 14–15 years imprisonment, disregarding the operation of s 104.

[30] We move to *Williams* step two. In our view, given the facts of this offending, and the personal factors applying to Mr Marteley (his record of violent offending, and the fact that he showed no genuine remorse), it would have been difficult to show that it was manifestly unjust to impose the 17-year MPI mandated by s 104. However, there was a further factor identified by the Judge in the following paragraph in his sentencing remarks:[8]

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[8] *R v Marteley*, above n 1, at [26].

> … there is information before me to suggest that there are some compelling personal circumstances that make it appropriate to allow some credit from the 17 year minimum period that would otherwise be appropriate. They are matters into which it is not appropriate to go publicly and I do not intend to do so. However, I am satisfied on the basis of what I have read that a minimum sentence should have deducted from it a period of three years so that the minimum period of imprisonment you will serve is one of 14 years.

[31] Ms Mildenhall was able to advise us that this referred to assistance provided by Mr Marteley to the police in relation to an unrelated matter. Although we have no information as to what that assistance was, at sentencing the Crown accepted Mr Marteley's assistance meant it would be manifestly unjust to impose an MPI of 17 years. That remains the Crown's position: there is no cross-appeal. Moreover, Mr Fairbrother does not challenge the appropriateness of the three-year discount that the Judge allowed for Mr Marteley's assistance.

[32] To summarise this first appeal issue, we consider s 104 of the Sentencing Act did apply to Mr Marteley. But, for the reason just mentioned, we also consider it would have been manifestly unjust to set the MPI at 17 years, and that Heath J was right to reduce it to 14 years. Although the Judge's sentencing approach was not correct in terms of *Williams*, it has not prejudiced Mr Marteley. The 14-year MPI challenged is unassailable. Indeed, given the aggravating factors and the application of s 104, it could be viewed as low.

Second ground of appeal: lack of parity with the sentences imposed on the co-offenders AJN and Mr Manukau

[33] Heath J's sentencing starting point for both AJN and Mr Manukau was 17 years imprisonment, again on the basis that s 104 of the Sentencing Act applied.

[34] In the case of AJN, Heath J allowed a 20 per cent discount for AJN's comparatively early guilty plea, and the remorse he had expressed to the Court (counsel read out to the Judge a statement AJN had written). That 20 per cent equated to three years and five months. The Judge then allowed AJN a further (unquantified) discount for (apparently, very considerable) assistance AJN had provided to the police in relation to Mr Kingi's murder. Taking those factors into account, the Judge reduced the MPI for AJN to 10 years imprisonment.

[35] In Mr Manukau's case, the Judge allowed a discount "in the region of 10 per cent" for Mr Manukau's plea of guilty entered "at a much later stage".[9] That equated to a discount of 20 months. The Judge then allowed Mr Manukau a further discount for serious health issues he faced. Although the Judge did not quantify that additional discount, it must have been in the order of three years four months because the Judge imposed a 12-year MPI on Mr Manukau.[10]

[36] Although the 14-year MPI under appeal is significantly higher than those of 10 years and 12 years imposed on AJN and on Mr Manukau respectively, we see no concerning disparity. On the eve of sentencing, Mr Marteley had advised the Court that he intended to apply to vacate his guilty plea. The consequence was that he could not be sentenced along with his co-offenders. Mr Fairbrother emphasised that only eight days elapsed before Mr Marteley told the Court that he would adhere to his guilty plea. While the time period was indeed a short one, the point is that Mr Marteley prevaricated about accepting guilt, and demonstrated a lack of remorse. Indeed, Mr Fairbrother told us Mr Marteley continues to maintain that he was not involved in the physical attack on Mr Kingi. Any discount for Mr Marteley's guilty plea is therefore limited, and there can be none for remorse.

[37] We turn to the level of Mr Marteley's involvement. The summary of facts to which he pleaded guilty did not state that he physically attacked Mr Kingi. In sentencing Mr Marteley, Heath J did not make a finding to that effect. The Judge simply stated:[11]

> [13] Having been tricked on that basis, Mr Kingi came to your house on 10 June 2009. He was struck in the head with a cricket bat and with a tomahawk. The post mortem report indicates that Mr Kingi died as a result of head injuries consistent with blunt force trauma. Death occurred quickly, with Mr Kingi dying in one of the bedrooms.

[38] The fact is that Mr Marteley was involved in the murder of Mr Kingi from beginning to end. He was instrumental in luring Mr Kingi to his house. He was in

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9 *R v AJN*, above n 2, at [34].

10 Mr Manukau appealed his sentence on the ground of lack of parity with AJN's sentence. He was not successful — this Court held the two offenders' personal circumstances, including the considerably greater assistance AJN had given to the police, meant the difference in MPI length was justifiable: *R v Manukau* [2011] NZCA 108.

11 *R v Marteley*, above n 1.

the house when Mr Kingi entered and was attacked. He had brought one of the weapons (the cricket bat) used to attack Mr Kingi to his house. The other weapon (the tomahawk) was his and he had sharpened it shortly before the attack. He and AJN were the two who bundled Mr Kingi's body into Mr Kingi's car and drove it to the place where it was abandoned. Of the four offenders, we consider he was the most culpable because of his central involvement in every aspect of the criminal enterprise that resulted in Mr Kingi's death. While AJN was at least equally involved in the physical attack on Mr Kingi, he was only 21 when sentenced, and had been brought into the enterprise by Mr Manukau. AJN had also displayed the particular remorse noted by Heath J. Mr Manukau, although involved in planning the attack on Mr Kingi, was not in the house when Mr Kingi was attacked and was not involved in the ensuing violence.

[39] As to Mr Marteley's late guilty plea, Heath J observed:

> [25] Your decision not to proceed with the application to vacate the guilty plea has clearly saved the State and the family both economically and in emotional terms respectively but the level of credit to be given to you must diminish as a result of the time that has passed before true closure could be achieved.

[40] Given Mr Marteley's patent culpability, there was never any justification for his seeking to withdraw his guilty plea. Although the Judge did not identify a discrete discount for that guilty plea, it must have been less — we think significantly less — than the 10 per cent discount the Judge allowed Mr Manukau, who did not seek to vacate his guilty plea. We consider any limited discount is adequately reflected in the three year reduction the Judge allowed Mr Marteley in reducing the MPI from 17 to 14 years. Or, to put the matter another way, as Mr Fairbrother was not in a position to give us any information about the assistance provided by Mr Marteley that earned him the lion's share of that discount, he was also not in a position to challenge the overall appropriateness of the substantial discount he was given.

[41] For those reasons this second point on appeal also fails.

Result

[42] An extension of time to appeal is granted.

[43] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent