

**SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS  
JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE  
PARAGRAPH [61].**

**<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html>**

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

**I TE KŌTI MATUA O AOTEAROA  
ŌTAUTAHI ROHE**

**CRI-2018-009-11281  
[2021] NZHC 136**

**THE QUEEN**

v

**JUSTIN RICHARD BURKE**

Hearing: 10 February 2021

Appearances: C J Boshier and A M Harvey for the Crown  
J R Rapley QC and S M Grieve for Defendant

Judgment: 10 February 2021

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**[REDACTED] SENTENCING REMARKS OF OSBORNE J**

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*This judgment contains redaction of personal or sensitive information.*

This judgment was delivered by me on 10 February 2021 at 10.55 pm

Registrar/Deputy Registrar  
Date:

## **Introduction**

[1] Mr Burke, I am going to ask you to stand, please.

[2] On 6 November 2020, following your jury trial, you were found guilty of the manslaughter of Shayne George Heapey. The maximum penalty for that as you know is life imprisonment.

[3] I am going to shortly invite you to sit again because I need to identify in the remarks I make the background to your offending, the facts which you have heard counsel talk about and, importantly, the reasons for the sentence I will impose on you. That will take some time.

[4] Please be seated for now.

[5] So, to consider my sentence I will deal with a number of topics in this order:

- (a) First, I will refer to the facts. That will include my consideration of both the evidence given at your trial, the victim impact statements which surviving victims have read and the other reports which have been made available to me including the restorative justice report from last Thursday's meeting.
- (b) I will then turn to examine the period of imprisonment which I must impose on you. That requires me to consider, as you will have seen from counsel's submissions:
  - (i) first, a starting point, that is a period of imprisonment which I consider reflects the seriousness of your crime;
  - (ii) secondly, any personal factors about you which make your offending worse (and I can indicate at this point that there aren't any of those); and

- (iii) thirdly, the circumstances personal to you which reduce your level of responsibility for the crime of manslaughter.

[6] So, at this point, I am going to summarise the facts.

### **Factual background**

[7] The offending occurred as you know on 8 December 2018. You and Mr Heapey were known to one another prior to that because of your association with the Nomads gang in Christchurch.

[8] In the days leading up to the offending, Mr Heapey was being sought by the gang in relation to the debt owed to Ms Cook, the stepdaughter of the Christchurch Nomads President, Mr Waho. Several gang members attempted to locate Mr Heapey to discuss the debt. He ignored requests repeated to meet and he acknowledged in a message to another gang member, Mr Sim, that he had let him down and would come and “collect his punishment”.

[9] On the evening of 8 December 2018 Mr Sim contacted Mr Heapey by text and asked him where his address was. Mr Heapey provided his address. Mr Sim went and picked up Mr Heapey and drove him to Mr Sim’s house. Mr Sim contacted Ms Cook and Mr Webber telling them that Mr Heapey was in the house and they should get there as soon as possible.

[10] You and Mr Webber were driven to Mr Sim’s house by Ms Cook. You arrived at about 10.50 pm. You and Mr Webber went to the house and Mr Heapey was told to come outside. The curtains to the house were drawn.

[11] Mr Heapey exited the house and the attack which caused his death promptly followed. He sustained multiple stab wounds to his chest and his arms. He attempted to escape and re-enter the house. An occupant opened the door, Mr Heapey fell to the floor, where the attack continued. Mr Heapey could not respond at that time due to his injuries. You did not stab Mr Heapey during this attack, rather you admitted to punching him and putting him in a chokehold in the period he was trying to get into the house. The injuries you inflicted were not causative of his death.

[12] After the attack you and Mr Webber put Mr Heappey in Ms Cook's car. Ms Cook then drove Mr Heappey to Christchurch Hospital. Mr Heappey died a short time later as a result of the injuries from the stabbing. In total he sustained 14 separate wounds from stabbing or cutting. He sustained a significant defensive wound from a knife to his left hand and arm, a stab wound penetrating through his forearm, and three stab wounds to his chest, two penetrating his heart.

[13] I add this to the factual basis upon which I am to sentence you. Mr Rapley QC, on your behalf, has correctly observed that the jury's verdict does not reveal whether it found you guilty of manslaughter as a party under s 66(1) or s 66(2) of the Crimes Act 1961. That is, the verdict does not record whether the jury found you guilty because you encouraged or assisted Mr Webber in the stabbing of Mr Heappey or, on the other hand, because you were involved in a plan to punish Mr Heappey by assaulting him. I will sentence you on the basis that you were guilty as a party under s 66(2), and that the plan involved Mr Heappey getting a physical beating or "hiding". But I do not ignore the fact that you knew Mr Webber to be both the gang's enforcer and a person prone to violence — as you described it to the probation officer he was "often crazy and out of control". You also knew that you were both operating in a meth-fuelled environment.

[14] Mr Rapley also addressed me on the matter of what you know or did not know about Mr Webber's possession of a knife that day. As a notional 13<sup>th</sup> juror, I am not satisfied that you knew for sure that Mr Webber had a knife on him at the time the two of you escorted him outside for his punishment, but I proceed on the basis that you knew his possession of a knife was a distinct possibility.

[15] Mr Rapley also addressed us on the question of whether you saw Mr Burke stabbing Mr Heappey during the fatal assault. I am sentencing you upon the basis that it was not established that you were able, in the relative dark, to see that there was stabbing involved in the assault.

### **Victim impact statements**

[16] I want to acknowledge Mr Heappey's family and the statements you have provided to this Court. I am grateful for the assistance provided to the Court in

understanding more of who Mr Heappey was, how his loss has affected the family. I am especially conscious that in sentencing you, Mr Burke, the family has been through this process, repeatedly, for almost two years. It is a most difficult process, I appreciate.

[17] It is clear from the family's statements that Mr Heappey was a caring, genuine, loyal, funny man who loved his family and his close friends. His mother, Glenis, has spoken to me of Mr Heappey as a person with a heart of gold and she described as you heard how devastating his death has been for her and the family. She referred to his love — his abundant and overflowing love for his young daughter and stepson. Their loss and fate through your conduct — to grow up without a father — is utterly profound. Mr Heappey's sister, Rebekah, spoke to me of Mr Heappey's loving nature, the pain his loss has caused to her and the family, including, particularly, Mr Heappey's twin identical brother with whom he shared that special bond that twins have. She described the breakdowns, the employment losses, the continued grief that your actions have led to. She is very sadly spot on when she says their "lives will never be the same". And I have also had the benefit of understanding of the impact on Mr Heappey's father, Bruce, and his twin, Marcus, through the record I received in the last 24 hours of their meeting with you last week. They have told you directly, I don't need to repeat it here, the utter devastation that you have caused in this family.

[18] I have to take into account the effect of your offending on the victims when imposing sentence, and I will be doing so. I also recognise that no sentence I pass down today will be able to redress the loss that the family and friends have suffered.

### **The sentencing of other offenders**

[19] I turn to the sentencing of other offenders. I sentence you against the background that four other people involved in the activities on 8 December 2018 which led to Mr Heappey's death, have been convicted and sentenced for particular offences:

- (a) Matthew Webber pleaded guilty to murdering Mr Heappey – he was sentenced to life imprisonment with a minimum period of imprisonment of 15 years.<sup>1</sup>
- (b) Randall Waho pleaded guilty to being a party to causing Mr Heappey grievous bodily harm with intent to injure. His starting point (upheld on appeal) was four years’ imprisonment.<sup>2</sup>
- (c) Leonie Cook pleaded guilty to the same offence as Mr Waho – her starting point was three and a half years’ imprisonment.<sup>3</sup>
- (d) Richard Sim pleaded guilty to the same offence again – his starting point was three years’ imprisonment.<sup>4</sup>

### **Purposes and principles of sentencing**

[20] In sentencing you today, Mr Burke, I must have regard to the relevant purposes and the principles of sentencing under ss 7 and 8 of the Sentencing Act 2002. These include accountability, denunciation, deterrence and rehabilitation. I must consider the protection of the community and I must also aim to achieve consistency between your sentence and other sentences for similar offending.

### **Starting point**

[21] The maximum penalty for manslaughter is life imprisonment.<sup>5</sup> There is no tariff case as you have heard counsel confirm. As the Courts have said, the offence covers “a myriad of situations which are all but impossible to categorise”.<sup>6</sup>

### *Aggravating features of the offending*

[22] The aggravating features which I find to be present in your case are as follows:

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<sup>1</sup> *R v Webber* [2020] NZHC 2328.

<sup>2</sup> *Waho v R* [2020] NZCA 526; and *Waho v R* [2020] NZHC 112.

<sup>3</sup> *R v Cook* [2019] NZHC 2890.

<sup>4</sup> *R v Sim* [2019] NZHC 2361.

<sup>5</sup> Crimes Act 1961, s 177.

<sup>6</sup> *R v Thomas* [2018] NZHC 819 at [49].

- (a) premeditation — you were at Mr Heappey’s house or the house that Mr Heappey’s was at, Mr Sim’s house, for the purpose of confronting him and inflicting a physical beating to him as some form of ritualistic gang justice. That was planned. I appreciate that your involvement in the plan comes relatively late in the part but it is nevertheless an involvement in the plan;
- (b) serious injury — Mr Heappey died because of his injuries. There were 14 different stab injuries as I have recorded. That said, I recognise that Mr Heappey’s death is an element of the offence of which you have been convicted;
- (c) multiple attackers — Mr Heappey was in a physical confrontation where there were, I find deliberately, two against one;
- (d) vulnerability of the victim – flowing from the setting in which Mr Heappey was attacked, in which he expected to receive a hiding from fellow gang members; and
- (e) the gang context — this offending was all about gang authority.

[23] By reason of the evidence as to your knowledge in relation to the knife and the stabbing, I do not treat the fact that Mr Burke committed extreme violence with a knife as his weapon as aggravating features relevant to your culpability. That said, the serious injuries which Mr Heappey sustained are relevant.

*Mitigating features of the offending*

[24] There are no mitigating factors in relation to the manslaughter you committed – you are being sentenced for manslaughter, not murder. Your conviction for manslaughter reflects the fact that you were not a party to the murder committed by Mr Webber.

## Discussion

[25] Both counsel have acknowledged that there are two approaches to sentencing for manslaughter, as identified in the case of *R v Tai*.<sup>7</sup> The first is on the basis of a set of ranges — an approach set out in *R v Taueki*, which is the guideline decision for serious violent offending, taking into account that death was caused.<sup>8</sup> The other, as you have heard counsel say, is assessing culpability by reference to comparable manslaughter cases.<sup>9</sup> The Court of Appeal in *Everett v R* observed that utilising both approaches to act as a check on one another is desirable in manslaughter cases.<sup>10</sup>

[26] Accordingly, I will first look at the approach set out in *R v Taueki*.<sup>11</sup>

[27] The case before me involves, as I have related, a number of the aggravating factors that were established in *R v Taueki*.<sup>12</sup>

[28] I consider your offending falls into the middle of band two, as set out in *R v Taueki*.<sup>13</sup> That would suggest a starting point of six to eight years. It also reflects my assessment that your manslaughter conviction reflects more culpable offending than that of Mr Waho, Mr Sim or Ms Cook. You were present and involved throughout the murderous attack. You alone of Mr Webber's co-offenders were present with Mr Webber at the time Mr Heappey was taken outside to be dealt with. You provided the extra presence, which made Mr Heappey's escape and survival less likely. As you explained to the probation officer, the point at which you punched and choked Mr Heappey was when he was trying to "take off".

[29] Having regard to the aggravating features of your offending, the *Taueki* approach would lead me to a starting sentence of six years and six months imprisonment.

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<sup>7</sup> *R v Tai* [2010] NZCA 598.

<sup>8</sup> *R v Taueki* [2005] 3 NZLR 372 (CA).

<sup>9</sup> *R v Tai*, above n 7.

<sup>10</sup> *R v Everett* [2019] NZCA 68 at [27].

<sup>11</sup> *R v Taueki*, above n 8.

<sup>12</sup> *R v Taueki*, above n 8, at [31].

<sup>13</sup> At [38]–[39].

[30] Having reached that conclusion, I will now consider the starting point also by reference to other manslaughter cases by way of comparison.

[31] Mr Harvey, for the Crown, referred to several cases as relevant to a starting point. The first and the one I will particularly mention is *R v Madams*.<sup>14</sup> The Court there considered cases where a person had been killed in a group attack and the Court had to consider the relative culpability of party offenders. Mallon J conducted an extensive review of other cases and she found that:<sup>15</sup>

Those cases suggest a range of up to eight years for non-physical participants and those whose physical involvement in the attack are minor, lower starting points are available for those whose physical involvement in the attack are minor and can be considerably lower for those with peripheral roles.

(Footnotes omitted).

[32] That case is useful in identifying a range of starting points found repeatedly over the years to have been appropriate in cases with similarity to yours.<sup>16</sup>

[33] Mr Rapley referred me to a number of cases, ending with the case of *R v Innes*.<sup>17</sup> I will refer to that case in particular. Mr Innes drove with the principal to an address with the purpose of luring the victim outside to obtain drugs. Mr Innes knew that the principal had a hunting knife. The principal fatally stabbed the victim, although Mr Innes was not present at the time. The Judge accepted Mr Innes had no intention of bringing about the death and that any element of premeditation on Mr Innes's part was not linked to the homicide. Instead, Mr Innes had assisted in bringing about a dangerous situation. The Judge concluded he must have known of the real risk that the principal would be violent if necessary. Although the end result was unexpected, Mr Innes knew the principal was erratic, unreliable and armed with a knife. A starting point of four and a half years of imprisonment was adopted.

[34] I have also carefully considered the other manslaughter sentences in the four

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<sup>14</sup> *R v Madams* [2017] NZHC 81 at [38].

<sup>15</sup> At [38].

<sup>16</sup> I have taken into account also the analyses of appropriate starting points undertaken in *R v Betham* [2016] NZHC 2107; *R v Bush* [2018] NZHC 1354; and *R v Pomare* [2016] NZHC 1346.

<sup>17</sup> *R v Innes* [2016] NZHC 1195.

other cases referred to by Mr Rapley.<sup>18</sup> As Mr Rapley correctly summarised, those cases involved starting points of four to eight years' imprisonment in situations where the defendant did not take part in the fatal assault itself.

[35] I do not find it particularly helpful to seek to draw sentencing comparisons from cases which do not involve homicide. I find more helpful the two step process which I have just gone through, identified in *Tai* and *Everett*, which involves first the Court of Appeal's *Taueki* analysis, followed by reference to previous manslaughter cases which provide some comparison.

[36] I find given your relative culpability, the sentences of your co-offenders and the aggravating features in relation to the offending an appropriate starting point is six and a half years on the comparative process. That is consistent with my application of the *Taueki* bands.

### **Personal circumstances relevant to your offending**

#### *Previous convictions*

[37] You have some 82 previous convictions, Mr Burke, including convictions for dishonesty and violent offending which reading your restorative justice report, you appear to have slightly played down in that meeting. But, before now — that is, in the period from 2009 till now — there was no violent offending conviction. None of your prior convictions involved manslaughter. Mr Harvey, for the Crown, has accepted that, because of that, no personal uplift for your criminal history should be applied. That is also my conclusion.

### **Personal circumstances – personal to you**

#### *Remorse and restorative justice*

[38] As you have heard, Mr Rapley has submitted that you have shown clear remorse. He has referred to the emotion you displayed in your Police interviews and

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<sup>18</sup> *Te Kani v R* [2020] NZCA 69; *R v Hura* [2018] NZHC 3347; *R v Bridger* HC, Wellington, CRI-2004-241-116, 3 September 2009; and *R v Hartley* [1978] 2 NZLR 199.

in the statements you made to others, to family at the time. That demonstration of remorse is also pointed to in the cultural report which I have received where you were noted as saying that you took responsibility for your actions and the offending “haunts” you on a daily basis. You say you are no longer a patched member of the Nomads and are currently in voluntary segregation in prison for your own safety as a result of that decision to dissociate yourself.

[39] Mr Rapley has also submitted that you have always taken responsibility for injuring Mr Heappey with intent and you wanted to show his family how sorry you are through your own actions in this process recently. Mr Rapley submits that this acceptance of responsibility is also demonstrated by your offer to plead guilty to the lesser charge of injuring with intent back in January 2019.

[40] The difficulty in assessing the extent to which you are remorseful for your criminal involvement in Mr Heappey’s death is that you have never accepted that you have been criminally involved in his death. Your acceptance of criminal responsibility for physical acts has only been in relation to punching and choking, on which the evidence was overwhelming. But your acts of punching and choking were, on the expert evidence provided to the Court, excluded as causes of Mr Heappey’s death. In other words, you have accepted responsibility for acts which could have nothing to do with Mr Heappey’s death but you did not accept responsibility for the actions carried out by Mr Webber in your presence which caused the death.

[41] I also now as you have heard discussed have before me the report of Restorative Justice Services Ōtautahi Christchurch. It contains the verbatim detail of your meeting on Thursday last week with Bruce and Marcus Heappey. The record of the meeting once again reinforces in my mind the distinction you draw between the physical assaults you were involved with, choking, punching, and the stabbing which occurred, and you distance yourself from that by saying that you didn’t know Mr Heappey would be killed. Mr Heappey’s father and brother, at the end of the restorative justice meeting, were understandably left struggling to match your expression of responsibility with your insistence that the more appropriate conviction would have been causing bodily harm, not homicide.

[42] My conclusion is that you have some true remorse for your criminal misconduct but it is far from unqualified remorse for what you actually were involved with. In other words, your expressions of remorse have deliberately been structured on your part by your refusal to accept full responsibility for your involvement.

[43] For your remorse I will allow a discount of five per cent.

*Offer to plead guilty to a lesser offence*

[44] You offered to plead guilty to a lesser offence of injuring with intent by that letter, I think it was June 2019, not January. Mr Rapley submitted that that demonstrated responsibility on your behalf and should attract a discrete 10 per cent discount.

[45] In *R v Clarke* this Court was faced with a somewhat similar situation.<sup>19</sup> The defendant was charged with manslaughter, offered to plead guilty instead to a lesser charge of alcohol impaired driving causing injury. The defendant was later convicted of manslaughter. In those circumstances – where the offer was to plead guilty to a lesser charge, with a more serious offence withdrawn – it was not considered to be akin to an early guilty plea which acted as a mitigating factor entitling the defendant to a discount on that basis.

[46] Had you offered to plead guilty to manslaughter before the trial started, and that had been refused by the Crown who wished to proceed on murder, a discount would have been appropriate on your conviction for manslaughter.<sup>20</sup> But that was not the plea you offered.

[47] To the extent that you made through counsel your plea offer in June 2019, I have still taken it into account as I think Mr Rapley came to in his oral submissions today in the context of my assessment for remorse.

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<sup>19</sup> *R v Clarke* HC Palmerston North CRI-2010-039-152, 25 March 2011.

<sup>20</sup> *R v Jamieson* [2009] NZCA 555 at [44]; and *R v Lee* NZHC 3446 at [62]–[65].

*Background and the need for rehabilitation*

[48] Your cultural report outlines a very difficult childhood. It outlines a history of very young heavy illegal drug use. You reported that your life had generally been carefree until the age of 10 or 11 when your parents started to foster children. You recalled how those children used to beat you and introduced you to the drugs and alcohol which became part of your adolescent life. After that you recall going “off the rails”, in your words, and you were expelled at the age of 13 from school for drug possession. You were relocated to a foster situation. [REDACTED]. Following that, your life perhaps predictably turned to gangs, criminal offending and drug abuse. You acknowledge your drug addiction now, in relation to methamphetamine in particular. Mr Burke you indicate that you want to leave that lifestyle. You indicate that you are willing to engage in a custody-based drug treatment programme. The slight irony of the situation is that with your present thinking about the prospects of appeal, to which you are entitled, your admission to such programmes will be put on hold, but it will be for you to work through how you proceed along that path.

[49] The pre-sentence report notes that you have identified your drug use as the catalyst for the offending behaviour which you have engaged in. You maintain that you are not a violent person. The writer of the pre-sentence report notes perceptively, I suggest, that your life choices and acceptance of violence within a gang environment do not particularly back up your view of yourself as not being a violent person but clearly you have accepted and would benefit from participating in the Special Treatment Unit Rehabilitation Programme for violent offenders.

[50] I have carefully considered counsels’ submissions. I accept that on the basis of your cultural report that there is a clear nexus or connection between the matters in your personal background and the situation you got yourself into when you became a party to the assault on Mr Heapey. That is so both in terms of your drug-fuelled involvement and your long participation in gang culture.

[51] I acknowledge Mr Harvey’s identification of the fact that this Court must be vigilant to recognise that a background of deprivation doesn’t necessarily excuse autonomous decisions to become involved in something criminal that are later made,

not truly influenced by the deprivation. But I recognise also Mr Rapley's emphasis upon the relatively late point that day in which you were introduced into the administration of a beating on Mr Heapey.

[52] I do accept, Mr Burke, that you have taken positive steps towards rehabilitation. The steps you have taken while in prison serve to verify that. In the pre-sentence report you stated that you must accept your bad life choices. You have stated that the idea of a pro-social life excites you. You have acknowledged that you have a long way to go to be restored.

[53] I trust for both your sake, Mr Burke, but also for the wider community that your desire to rehabilitate and improve your life is something you can carry through in practice. You have been attending counselling sessions. The counsellor's letter indicates to me that you are motivated to make positive choices. I accept that as fact. You have said that you are no longer a patched member of the Nomads. You are in voluntary segregation. That is all extremely positive. I acknowledge that it is a step which requires courage in the environment you are in at the moment — it is a real step towards rehabilitation. You have also acknowledged, and I trust that you can stick with this, that returning to work in the tattoo industry would not be good for your rehabilitation.

[54] The cultural report indicates that you wish to build a relationship with your 14 year old son. In Mr Rapley's written submissions, he observed that you want to reconnect with your birth family. The cultural report writer notes that your parents and your older sister support you emotionally and financially to the extent they can and they have stated that they have never stopped loving you. The reports show to me both the existence of that support structure which would be valuable in your rehabilitation and a level of insight on your part, Mr Burke, of the job that lies ahead of you. You have a supporting structure available to you if you grab it.

[55] You do appear to me to have come to what will probably be the most important cross-road that you will cross in your life – if you take the road that you are talking of to these people who are trying to help you, what you have described to the probation officer as getting to a “normal life”, with ongoing support, you will have the

opportunity to be a valuable member of the community — a healthy member, a valued member. Take the other road and, as you well know, your life will become a pattern of drug-fuelled offending dominated by gang culture. My sentence is going to reflect the need to keep your term of imprisonment to a period which promotes the opportunity for your full rehabilitation which I believe can occur.

[56] For your personal background and your prospects of rehabilitation, Mr Rapley submits that a discount of 15% should be available. I accept that figure — that is the discount I will provide on account of your prospects of rehabilitation against your background of deprivation.

### **Conclusion**

[57] Given the Court of Appeal's recent decision in *Moses v R*, I will combine the personal mitigating factors into a single discount.<sup>21</sup> That is, from a starting point of six years and six months' imprisonment, I will discount the start sentence by a total of 20 per cent – five per cent for remorse and 15 per cent for rehabilitation and your background. That produces an end sentence which I will be rounding to five years and two months imprisonment.

### **Result**

[58] Mr Burke, would you please stand.

[59] On the charge of manslaughter, I impose a sentence of five years and two months' imprisonment.

[60] Please stand down.

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<sup>21</sup> *Moses v R* [2020] NZCA 296, (2020) 29 CRNZ 381.

[61] I make an order suppressing the detail of certain events in Mr Burke's childhood, as referred to in the seventh sentence of paragraph [48], which shall be redacted in the public version of these remarks.

**Osborne J**

Solicitors:  
Crown Solicitor, Christchurch  
Bridgeside Chambers, Christchurch