NOTE: ORDER IN PLACE PROHIBITING PUBLICATION OF THE NAME AND ANY PARTICULARS LIKELY TO LEAD TO THE IDENTIFICATION OF PF [PF V R CRI-2009-044-2878, 21 OCTOBER 2011].

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2009-044-2878

THE QUEEN

v

SIUAKI LISIATE, PF AND ENEASI FINAU

Hearing: 16 December 2011

Counsel: K J Glubb and W E Andrews for the Crown
M J Dyhrberg for Siuaki Lisiate
D S Niven and J E Boyack for PF
S Lance for Eneasi Finau

Judgment: 16 December 2011

SENTENCE OF POTTER J

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Introduction

[1] Following trial by jury, Siuaki Lisiate, PF and Eneasi Finau were found guilty of the murder of Mr Tue Fa'avae, a fellow inmate at Paremoremo Auckland Prison on or about 1 March 2009.

[2] The Crown case against PF and Mr Finau was that they were either principal offenders or parties to the murder by intentionally helping, assisting, encouraging or urging the other to cause the death of Mr Tue Fa'avae. Mr Lisiate was charged under s 66(1)(d) of the Crimes Act 1961 on the basis that he incited, counselled or procured the death of Mr Tue Fa'avae.

[3] Murder carries a mandatory sentence of life imprisonment. The issue on sentencing is the minimum period of imprisonment which each of the prisoners should be ordered to serve for this offence. The effect of a minimum period of imprisonment is that the prisoner is not eligible to apply for parole until the expiration of that period. Whether or not he will be granted parole is a matter for the Parole Board at the relevant time. A prisoner serving a life sentence is always subject to recall to prison.

[4] I note that the three strikes provisions introduced into the Sentencing Act 2002 in ss 86B to 86E from 1 June 2010 do not apply because this offending took place before that date.

[5] Mr Finau is also to be sentenced on a charge of attempting to dissuade a person by threats from giving evidence. He entered a guilty plea to that charge prior to trial. The maximum penalty for that charge is seven years imprisonment.

Background facts

Murder

[6] Mr Lisiate, PF and Mr Finau are all Tongan members of the Crips street gang and are all serving prisoners at Auckland Prison at Paremoremo. The deceased, Mr Tue Fa'avae, was a Samoan member of the rival Bloods street gang.

[7] The Crown case was that the deceased became a marked man after being heard to say "B's up", a reference apparently to "Bloods up". This was shortly after a serious assault on a member of the Crips gang, Lava Savelio, on 11 February 2009, by two Samoan inmates. One had allegiance with the King Cobra gang within the prison, the other had no known gang allegiance. The Crown contended that as part of a deliberate plan, Mr Finau got himself moved from cell 22 on the lower landing of B Block (where Mr Lisiate's cell also was) to the upper west landing, where the deceased was housed. He, and later PF who was housed on the same landing from 17 February 2009, then befriended the deceased and gained his trust.

[8] On 28 February 2009, Mr Lisiate sent a text message to Mr Finau telling him that the deceased needed to be killed before he was moved to A Block. This was followed by another text message a short time later stating that they had talked about how to kill the deceased, and that it was now time to do so.

[9] At around 8.30 a.m. on 1 March 2009, the deceased was unlocked from his cell on the upper west B Block landing to carry out his cleaning duties. The front six cells were unlocked for the prisoners in those cells to use the landing, showers, and a telephone. After the unlock period the prisoners were to return to their cells, but the deceased "kicked back". He hid in the shower until the back six cells were unlocked. He then ran to cell 46 which was then occupied by Mr Finau and an associate.

[10] A short time later the associate and Mr Finau left cell 46. Mr Finau covered with toothpaste the two CCTV cameras monitoring the back cells, while PF covered another and T (an inmate also housed in the back cells) covered the fourth.

[11] Mr Finau and PF then returned to cell 46 where they strangled the deceased to death with an electrical cord provided by Mr Fa'avae. Mr Finau, PF and T (whose help was enlisted for this purpose) then dragged the body of the deceased from the cell down the landing to an unoccupied shower cubicle at the end of the landing.

[12] PF removed the cord from the deceased's neck before walking back to his cell area. Mr Finau returned to the body in the shower and inflicted numerous cuts and stab wounds to it before returning to his cell area. He was seen carrying a shank (a sharpened metal instrument), which the Crown said he used to inflict injuries to the deceased's eyelids, cheeks and chest. Mr Finau then cautioned other inmates to say nothing and bragged that "it" had "gone down mafia style".

[13] A short time later prison staff found the body. The pathologist's evidence at trial was that the deceased had been strangled from the front, causing significant bruising and two broken bones in his neck. The cause of death was determined to be ligature strangulation.

Attempting to dissuade a witness

[14] Mr Finau's guilty plea to the charge of attempting to dissuade a witness was entered on the basis of an agreed summary of facts.

[15] Mr Finau was charged with Mr Tue Fa'avae's murder on 1 April 2010. On 31 July 2010, T made a statement to the police which implicated Mr Finau in the murder. T had also agreed to give evidence in the trial of Mr Finau and his co-accused. This became common knowledge in the prison.

[16] On 10 September 2009 T's partner received a letter at her home address. The envelope containing the letter was addressed from "E. Finau, Paremoremo Prison, Maxi, Albany". In the letter Mr Finau made threats against T's life and health if he continued to cooperate with the police. T's partner subsequently gave the letter to police. Forensic analysis of the letter showed that Mr Finau was the author of the letter. T was not harmed and gave evidence for the prosecution at depositions and at trial.

Disputed facts

[17] Counsel for each of the prisoners has made submissions that contest the Crown's version of events relating to the murder in certain respects and which seek to minimise the role of the particular prisoner in the offending. Counsel have confirmed that none of the prisoners seeks a disputed facts hearing under s 24 of the Sentencing Act.

[18] As the Judge who presided at trial I am entitled on the basis of the evidence to reach a view of the facts relevant to sentencing provided that such view is not inconsistent with the verdict of the jury. In doing so I am not bound to accept the version of facts most favourable to the prisoner.[1]

[19] The Crown submitted there is clear evidence that this was a planned "execution", designed to send a message to the opposing Bloods gang and others. It was submitted that it is difficult to conceive of a more cold-blooded and callous attack or a more carefully orchestrated plan. The Crown submitted that the clear evidence of deliberate planning and premeditation is a significant aggravating feature of the offending.

Mr Lisiate

[20] Counsel for Mr Lisiate submitted that his involvement as a party in the offending was limited to encouraging Mr Finau to hurry up and get on with what he was doing, namely the killing of Mr Tue Fa'avae; that Mr Lisiate had no knowledge or involvement in how the offence would be carried out, and that Mr Finau was very much in charge. While accepting that Mr Lisiate was a party to the murder in encouraging Mr Finau, Ms Dyhrberg submitted that Mr Lisiate did not have the status or role of "lead figure" as identified by the Crown.

[21] The jury found Mr Lisiate guilty under s 66(1)(d) of the Crimes Act of inciting, counselling or procuring the commission of the offence, namely the murder

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1 *R v Connelly* [2008] NZCA 550.

of Mr Tue Fa'avae. On my assessment the evidence shows that he had a primary role in procuring the death of Mr Tue Fa'avae, that he was a party to the plan he developed with Mr Finau to kill the deceased, and that he directed the outcome from beginning to end.

[22] Mr Lisiate with Mr Finau witnessed the aftermath of the serious assault on Lava Savelio on 11 February 2009. Mr Lisiate had a particular role within the prison in relation to Lava Savelio. Mr Soloman Nui, a corrections officer at the prison and unit manager for Blocks A and B at the relevant time, said that prison staff used to use Mr Lisiate to calm Mr Savelio down when he played up. Mr Nui said they used to think of Mr Savelio as "the boy" but Mr Lisiate said to them "No, he's the man", with reference to the Crips gang. Mr Nui assessed that after Mr Savelio was assaulted Mr Lisiate assumed a leadership role within the Crips gang, although he said there appeared to be no recognisable hierarchy in the Crips gang.

[23] That Mr Lisiate had an early, continuing and close involvment in the plan to exact retribution for the assault on Lava Savelio is evidenced from the many text messages from his cellphone to Mr Finau and others which were adduced in evidence. I do not intend to refer to all of them. For example, on 13 February 2009, just two days after Lava Savelio was assaulted, he sent a text to someone outside the prison (translated from the Tongan language used in the text):

> … there is no snake in this block, only those two assholes that habitually attacked us. The Bloods laughing now. Maybe the dog are secretly laughing too bro on the banner man, I'll kill the Bloods when the door is unlock. If I get "lyfy", that's gona be it, that's the right move I'll do inside here. Just watch the next news because I'll be in it. We'll talk later …

[24] Earlier on the same day he had sent a text to someone apparently within the prison:

> When I say watch the news, I mean when we square out shit trust me it will be worth the wait. No snakes here so might as well hit the next best thing.

[25] Clearly Mr Lisiate was bent on retribution. There were no King Cobras on whom retribution could be exacted so they might as well take the next best thing: "I'll kill the Bloods when the door is unlok". There can be no doubt that Mr Lisiate

was planning serious retribution. And he knew the risk he was planning to take: "If I get "lyfy", that's gona be it, that's the right move I'll do inside here".

[26] The text communications continued. There were many between Mr Lisiate and Mr Finau. Ultimately, Mr Lisiate became impatient. On 28 February 2009, of the several texts he sent, two to Mr Finau are important. At 13:29:

> Asshole. Hurry up and do something before the asshole Fa'avae escapes to block A.

[27] The evidence of Mr Solomon Nui was that although a firm date had not been set, the prison authorities had decided to move Mr Tue Fa'avae to Block A. Obviously Mr Lisiate got wind of this.

[28] Then at 13:54 on the same day Mr Lisiate again sent a text message to Mr Finau:

> Asshole. We talked and sus owty a way to kill Fa'avae, and you kept saying yes yes n nt walk th talk.

This text was signed "justfuckenkrazy", as were others sent by Mr Lisiate. He would sometimes use "jfk" as a signature. I find that Mr Lisiate sent the texts attributed to him in Exhibit 4 in the case.

[29] Both the Crown and the defence called interpreters who gave their opinions as to the correct meanings and translations of those parts of the texts that were in the Tongan language. In particular there was disagreement about the interpretation of the words "tamaté i" and "maté i" and whether such words meant "kill" or "put out of action". When these text messages are placed in context of the overall events between 11 February 2009 when Lava Savelio was severely beaten, and 1 March 2009, when Mr Tue Fa'avae was strangled to death, I am left with no reasonable doubt that the plan Mr Lisiate and Mr Finau devised, as evidenced in the text communications, and as put into action by Mr Finau with the later assistance of PF, was to kill Mr Tue Fa'avae. Further, I am satisfied that the plan was implemented not only with the agreement and encouragement of Mr Lisiate, but at his direction and insistence. He may not have known the final details of how the murder was to have been carried out, but he intended and was an active participant in achieving the

end result, namely the death of Mr Tue Fa'avae. His own appreciation of the risk he ran, that he might get "lyfy", is consistent with this intention, and shows that he was prepared to run the risk to achieve that result.

[30] Counsel for Mr Lisiate referred to a text sent after the murder on 2 March 2009 in which Mr Lisiate said he was "deeply sorry" and that he didn't know "his homie" was going to take it that far. The expression of regret is inconsistent with the urgings and demands of Mr Lisiate just two days before, and what happened in response to those urgings and demands. The expression of regret, in my view, lacks veracity. But the text confirms Mr Lisiate's view of Mr Finau's position; that he was "his man".

[31] I accept the Crown's categorisation of this killing as a "hit". I find that it was a planned and directed killing in which Mr Lisiate, Mr Finau and later PF were directly and knowingly involved.

[32] I reject the submission of counsel for Mr Lisiate that his involvement and culpability were limited to encouragement of the principal offenders, Mr Finau and PF.

Mr Finau

[33] Mr Lance submitted there was no plan to kill and no prearranged plan as to where to dispose of the body. He submitted that the text messages refer to retribution but not killing and are generally full of "bravado" rather than evidencing intention of a plan to kill. He submitted the evidence of the cameras being obscured gives rise to an inference that the purpose was to hide from the prison authorities that Mr Finau was going to have a fight with Mr Tue Fa'avae (which was Mr Finau's evidence at trial).

[34] Mr Lance referred in particular to a text by Mr Finau to the effect that when he got out "we can go and kill those cunt", and "if you get any of the Bloods then smash til rotten". He suggested this was not evidence of planning.

[35] However, on 11 February 2009 after Lava Savelio had been attacked, Mr Finau sent a text to someone on the outside stating that:

> … he was walking by himself and they got him. The snakes and the slob. When we unlok we will do what is called fuk tha horse to let them know that cuz is the gangster. Crip til rotten is the way.

[36] Numerous text exchanges from Mr Finau followed, particularly with Mr Lisiate. Significantly on 17 February 2009 Mr Finau sent a text to someone within the prison saying "i might try to go upstairs so can catch those fucken slobs n kill cz tha puk up".

[37] On 13 February 2009 Mr Finau told Mr Lisiate to "be more patient. We got heaps on our plate right now you know that". In response to further demanding texts from Mr Lisiate on 20 and 25 February including a request to put "Tingles" (Mr Turaki) on the phone, Mr Finau said "n yea I'm already doing my own thnks with ths crip 4rn my hood. Nt tingle". He apologised to Mr Lisiate for whatever he was angry at him for.

[38] On 28 February Mr Finau received the two texts from Mr Lisiate referred to above, where Mr Lisiate demanded that he "hurry up" before "Fa'avae escapes to Block A" and that despite having sussed out a way to "kill Fa'avae" Mr Finau was not walking the talk. Mr Finau suggested in evidence that he did not receive those texts but it is significant that he made a telephone call of 27 seconds duration to Mr Lisiate's cellphone just minutes before those texts were sent, following texts from Mr Lisiate demanding that he (Mr Finau) "pik up".

[39] Mr Lance also referred to various unknown factors which he said indicated there was no prearranged plan as the Crown contended. He submitted there were many intervening factors that could have upset any such prearranged plan had there been one. For example, that Mr Finau could not have known that the deceased would "kick back" on the morning of 1 March 2009, as he did. Nor could he have known that the staff on the landing would not have carried out the routine check after the front six were locked down, as they failed to do on that particular morning. He said there was no evidence of planning in relation to any weapon to be used, when the attack should occur, by whom it would be made, or any such details. He said

there was no evidence of any prearrangement or plan or indeed any mention in texts or other communications of the removal of the body to the shower. He submitted that much of the language in the texts was "trash talk" which simply demonstrated the outrage that Mr Finau and his associates felt about the assault on Lava Savelio.

[40] Obviously, unknown interventions can cause any plan to go awry. However, when I consider all the evidence including the following: the text communications by and to Mr Finau, his request to be moved from the lower landing to the upper landing where the deceased was housed (a matter ultimately for decision by the prison authorities but prompted in this instance by Mr Finau's request made to a prison officer); the befriending of the deceased, making available to him the use of Mr Finau's cellphone (cellphones being regarded like gold in prison) as was the evidence; the discussions on the landing on 28 February 2009 between Mr Finau and PF and their focus on the CCTV cameras; the rapid covering of those cameras on the morning of 1 March after the deceased had "kicked back" and gone into Mr Finau's cell, and the swift and effective implementation of the actions that resulted in his death by strangulation in Mr Finau's cell; I am satisfied beyond reasonable doubt that there was a plan to kill the deceased and that Mr Finau was a vital part of that plan in its conception, development and implementation.

[41] Mr Lance also sought to place reliance on a question asked by the jury at 11:47 a.m. on 27 May 2011 during the course of their deliberations, when they asked for definition of the term "reckless" and the meaning of "his death could well happen" in relation to a question in the jury questionnaire. Mr Lance submitted that the jury would only have asked these questions if they had rejected the first alternative under s 167 of the Crimes Act 1961, namely, that the killing was intentional.

[42] It is not possible to determine the basis upon which the jury reached its verdict that Mr Finau was guilty of the murder of the deceased. The jury question may simply indicate that they wanted to be fully informed as to the meaning of the component parts of the second alternative before reaching their verdict. I do not accept the jury question indicates the jury rejected intentional killing. It is, in my view, the basis for the guilty verdict which is more consistent with the facts.

PF

[43] The disputed facts raised by PF relate to his knowledge at any time of a plan to kill the deceased. While counsel accepted that PF covered one of the security cameras and that he was aware the other cameras were covered, it was not accepted he knew of a plan to kill the deceased at that stage, nor on the previous day when he and Mr Finau were shown on the video footage walking up and down the landing. It was also submitted that such evidence was consistent with knowledge by PF that Mr Finau intended to fight the deceased, as he gave in evidence.

[44] Mr Niven referred to the fact that PF did not previously know Lava Savelio or anyone else involved in the incident when he was assaulted; that as at 1 March 2009 he had not even met Mr Lisiate; and that he met Mr Finau, T and Mr Turaki only when he came on to the upper landing in B Block on 17 February 2009. He was not a party to any of the text messaging. The only texts he sent were to his girlfriend. His only association with the deceased's killing, therefore, was that he was a member of the Crips street gang.

[45] Mr Niven noted that the facts relied on by the Crown in relation to T's involvement in the killing of Mr Tue Fa'avae were his discussion with Mr Finau on the landing, his glancing at the camera (although there was no evidence as to what was said), his participation in covering the cameras, his delivery of the radio cable (the murder weapon) to cell 46 and his assistance in moving the body to the shower. Mr Niven suggested that each of those actions was capable of an alternative and innocent explanation rather than PF being a party to the intentional killing of Mr Tue Fa'avae.

[46] In relation to T's evidence that PF was in cell 46 when the victim was killed, Mr Niven said that was not the only inference available on the facts. It was possible that PF could have entered the cell after the victim was strangled and was seen there by T when he looked in cell 46.

[47] T's evidence was fully before the jury. Not only was the jury directed and urged by me on more than one occasion during the course of my summing up to go

back and consider all of T's evidence, but, with the agreement of counsel, I also read back to them the passages in the evidence relating to this point.

[48] I am satisfied on the basis of all the evidence, including the evidence of T, that when summonsed by Mr Finau to assist in dragging the body to the shower, T looked in cell 46 and saw PF standing by the torso of the deceased. I so find as a fact. I am satisfied that the jury's verdict of guilty in respect of PF was not on the basis that he assisted the killing in a peripheral way only as was submitted.

[49] As to the point at which PF became involved in the plan to kill the deceased, I find this would have been no later than the day before the murder when Mr Finau and PF were shown walking up and down the landing and focusing on the cameras. I consider it probable that he became part of the plan earlier than this, probably by the time Mr Finau reported by text to Mr Lisiate on 25 February that he was doing his own thing with this "crip 4rn my hood. Nt tingle". I believe that was a reference to PF. There was no suggestion that it was a reference to any other specific person, although doubt was cast on whether the reference to "my hood" was applicable to PF. However, I am satisfied that by the morning of the day prior to the murder at the latest, PF was party to a plan to kill the deceased.

[50] My findings of fact set out above are that there was a plan and considerable premeditation involved in the murder of Mr Tue Fa'avae by the three prisoners. I accept that PF became privy to and a willing participant in the plan later than Mr Lisiate and Mr Finau.

[51] I find that the plan to kill Mr Tue Fa'avae was in deliberate retribution for the earlier assault on Lava Savelio, that from the outset it was planned by Mr Lisiate and Mr Finau following that assault on 11 February 2009, and that the target of the plan was Mr Tue Fa'avae who, while not a member of the King Cobras gang (to which one of the assailants of Lava Savelio was affiliated) was Samoan, as were his two assailants. He was also a member of the Bloods gang which was a rival of the Crips gang to which the prisoners were affiliated. I find that Mr Lisiate was the organiser and directed the plan and its implementation.

[52] Although it involves some repetition I will summarise briefly the essential components of the plan.

- Mr Finau asked to be transferred to the upper B Block landing which enabled him to be housed in close proximity to the target, Mr Tue Fa'avae.[2]

- There was a degree of urgency about implementing the plan, the reason being that word had got around that the prison authorities were planning to move Mr Tue Fa'avae to A Block (confirmed by the evidence of Mr Solomon Nui).

- It was necessary to gain the trust of Mr Tue Fa'avae. Mr Finau befriended him, and at least in the latter stages, PF acted in a friendly way towards him.

- The way in which the killing would actually be carried out was developed by Mr Finau and PF during a discussion over approximately 20 minutes while they paced the landing on the day before the murder, 28 February 2009, during which they paid particular heed to the CCTV cameras which covered the landing but not the cells.

- Relying on the trust established, on the morning of 1 March 2009 the deceased was lured into cell 46 with the promise of the use of Mr Finau's cellphone. (The deceased did not have access to a cellphone on his landing).

- When the deceased arrived in cell 46, the surveillance cameras covering the landing were immediately systematically covered to prevent the filming of the events to follow. This was completed within four minutes of the deceased's arrival in cell 46.

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[2] In evidence at trial Mr Finau said the request for a transfer was because of tension between himself and Mr Lisiate. The text communications between Mr Finau and Mr Lisiate indicate certain tensions between the two, the source of which is unclear except for Mr Lisiate's frustration and concern with Mr Finau's delay in implementing the plan to kill Tue Fa'avae. Overall, however, the continuing text communications between the two are inconsistent with a falling out such as would have warranted a physical separation by Mr Finau moving to another landing.

- PF brought a radio cord from his cell into Mr Finau's cell, it being wrapped around his hand.

- Mr Tue Fa'avae was then strangled in cell 46. T looked into cell 46 and saw the body of the deceased on the floor with PF standing near his torso and Mr Finau standing near the door with a shank in his hand.

- The body was then removed by Mr Finau and PF, with the assistance of T, to the shower cubicle.

- Mr Finau carried with him a sheet to obscure the body from the view of the occupants of the back cells, four of whom were in one of the back cells as they dragged the body by.

[53] Mr Finau subsequently returned to the shower cubicle and defaced with cuts the face, eye-lids and part of the upper body of the deceased. (The evidence of the pathologist was that these wounds were inflicted after death). This may have been part of the plan or alternatively was a gratuitous act of insult by Mr Finau. He also bragged to other prisoners on the landing, after telling them that they had "not seen anything", that "… it had gone down mafia style".

Victim impact statements

[54] Mr Tue Fa'avae was the youngest of seven brothers and three sisters. His violent death has impacted significantly on the whole family. Victim impact statements have been filed by his eldest brother, his mother, another older brother Filipo, Filipo's father-in-law and mother-in-law, and a sister. They speak of the "worthless" murder of Mr Tue Fa'avae just because he was Samoan. They speak of their shock at Tue's death and of stress on Tue's mother's health and also on the family finances. Filipo's parents-in-law say they are Tongan but see themselves as part of the Fa'avae extended Samoan family. They speak of their anger and shame as Tongans, that the Tongan offenders murdered Tue because he was Samoan.

[55] I acknowledge the presence in Court of family members, both during submissions and on sentencing. The death of Mr Tue Fa'avae is a tragedy. He died needlessly, suddenly and violently. Nothing I or anyone else can say or do can bring him back. I express my sympathy to all the family of Mr Tue Fa'avae.

Pre-sentence reports

Siuaki Lisiate

[56] Mr Lisiate is 30 years old and of Tongan descent. He was born and raised in South Auckland. He says that although in the past he has placed blame on his upbringing, in reality he had a good childhood but he simply chose the wrong crowd. He says he joined the Crips gang in late 1993 but claims he has been "out of the gang" since being charged with the murder of Mr Tue Fa'avae.

[57] Mr Lisiate has an extensive criminal record dating from 1996. He has a number of matters in the Youth Court and has subsequently amassed 26 convictions ranging from dishonesty offences, property offences, sexual offences and non-compliance offences.

[58] Significantly, Mr Lisiate has a number of previous violent convictions:

(a) Assault with blunt instrument in 1998.

(b) Aggravated assault (manually) in 2001.

(c) Two charges of common assault and threatening to kill in 2002.

(d) Two charges of aggravated robbery with a firearm and two charges of aggravated robbery with a weapon in 2002.

[59] He is currently serving concurrent sentences of 10 years imprisonment on the four charges of aggravated robbery. A minimum period of imprisonment of five years was imposed on sentencing, which I understand has been served.

[60] Mr Lisiate does not accept his conviction and claims it was based on a misinterpretation of Tonga prison argot. The report writer considers Mr Lisiate's level of insight is questionable although he expressed remorse for his actions. His risk of reoffending is assessed as high. The probation officer also assesses his motivation to change as high despite his lack of insight.

PF

[61] PF is 20 years old and is of Niuean and Tongan descent. He was born and raised in South Auckland, the youngest son of seven children. He recalls a positive childhood. He says he has been involved in gang culture from a young age but claims he is not longer affiliated to the Crips gang.

[62] PF has four previous convictions all arising out of the same incident for which he is serving a sentence of life imprisonment for murder with a minimum period of imprisonment of 11 years. This sentence was imposed in July 2008 after PF was found guilty at trial of killing a 14 year old in what the sentencing Judge described as "a one-man rampage". At the time of that murder he was only 16 years of age. He has now served approximately five years and five months of the minimum period of imprisonment imposed in July 2008.

[63] PF continues to deny any active involvement in the murder of Mr Tue Fa'avae. He said he could empathise with the family of the deceased. He is assessed in the pre-sentence report as at high risk of reoffending.

Eneasi Finau

[64] Mr Finau is 29 years of age and of Tongan ethnicity. He is the second eldest of five siblings. He was born and raised in Tonga and was sent to New Zealand to live at the age of 13. He appears to have had difficulty adjusting to New Zealand life and quickly became immersed in gang culture. He has been a member of the Crips gang since the age of 13.

[65] Mr Finau's criminal record dates from 1998. He has 12 previous convictions which have escalated from burglary and theft convictions to convictions for serious violent offending. These convictions include aggravated robbery and attempted murder in 2001 and causing grievous bodily harm in 2008 when he attacked a corrections officer. For the 2001 offending he was sentenced to 11 years imprisonment with a minimum period of imprisonment of 6 years 6 months, which has been served. He was sentenced for the 2008 offending to 5 years imprisonment cumulative on the existing sentences. He will be deported at the end of his sentence.

Sentencing purposes and principles

[66] Counsel have helpfully referred to the purposes and principles governing sentencing in ss 7 and 8 of the Sentencing Act. Those relevant in this case are that the prisoners must be held accountable for the harm done to the victim and the victim's family. The sentence must seek to promote in them a sense of responsibility for and an acknowledgment of the harm done. Importantly, it must denounce and deter such offending and the sentence must seek to protect the community from the offenders.

[67] The Court must take into account the gravity of the offending in the particular case including the degree of culpability of the offender, the seriousness of the offending in comparison to other offences (we are dealing here with the most serious offence in our law, the crime of murder), and the general desirability for consistency with appropriate sentencing levels. The Court must impose the least restrictive outcome that is appropriate in the circumstances.

Aggravating and mitigating factors of the offending

[68] The Crown submits the following are aggravating features of the offending in terms of s 9 of the Sentencing Act.

(a) The use of weapons in the attack (s 9(1)(a) of the Act). The Crown also referred to the use of actual violence but as submitted by the defence this feature is inherent in the crime of murder. The evidence

established that Mr Finau used the radio cable that had been obtained by PF to strangle the victim in cell 46 after catching him unawares. The medical evidence was that he was strangled from the front, that it is probable that the victim would have been rendered unconscious within 10 to 20 seconds and that for death to follow, pressure would have been required for 1 to 2 minutes.

(b) Planning and premeditation (s 9(1)(i) of the Act). The Crown submits that the evidence makes it clear this was no random event occasioned in the heat of the moment but that this was a very cold and calculated killing in deliberate retribution for the earlier assault on Lava Savelio. I have previously made findings that this murder involved extensive planning and premeditation.

(c) Resulting loss or harm (s 9(1)(c)). The loss of the life of Mr Tue Fa'avae for his family is evidenced graphically by their victim impact statements.

(d) Particular vulnerability of the victim (s 9(1)(g)). Section 9(1)(g) includes as an aggravating factor that "... the victim was particularly vulnerable because of his age or health or because of any other factor known to the offender". The Crown submitted that the situation Mr Tue Fa'avae found himself in could be characterised as "situational vulnerability". This was said to arise from his being in a cell alone with members of an opposing gang because of the trust Mr Finau and PF had developed with him. He was thus in a defenceless situation as a result of careful orchestration, without any support to which he could turn.

[69] In the context of vulnerability the Crown referred to the remarks of Randerson J in *R v Burton*[3] that prison inmates are entitled to protection from attacks by violent offenders. Randerson J said that:

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3 *R v Burton* HC Auckland CRI-2008-044-10515, 19 February 2010 at [26].

> … prison offenders are, in one respect, more vulnerable than members of the public since, in the prison environment they have nowhere to run when faced with an attack in circumstances such as this. Effectively, the victim was bailed up on the landing where you attacked him with nowhere to go".

[70] This is exactly the situation in this case. Mr Tue Fa'avae was "bailed up" by Mr Finau and PF in cell 46. He was taken by surprise given the relationship of trust they had carefully developed with him and he certainly had nowhere to go. I do not accept Mr Lance's submission that Mr Tue Fa'avae knew the danger of "kicking back" and took the risk. He was lured into the situation of risk by those be believed he could trust, as they well knew and intended.

[71] I consider that in the circumstances of this case, particular vulnerability is an aggravating factor falling within s 9(1)(g). I note that Mr Glubb did not advance "particular vulnerability" as a factor under s 104(1)(g).

[72] There are no mitigating features of the offending, as counsel for the prisoners accept.

Personal aggravating and mitigating features

[73] The prisoners were at the time of the murder each serving a sentence of imprisonment with a minimum period of imprisonment for other serious violent offending, an aggravating factor pursuant to s 9(1)(c).

[74] Each prisoner also has relevant previous convictions, which must be taken into account under s 9(1)(j). I have referred to these above.

[75] Turning to remorse, the Supreme Court in *Hessell v R*[4] said that "a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse", and thus justify a sentencing credit.

[76] The expressions of remorse by the prisoners are limited. To his credit Mr Finau expressed in Court his apologies to the family of Mr Tue Fa'avae for his

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4 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].

"reckless act that caused death to another human life". Given the circumstances of the murder, including particularly the planning and premeditation involved, the remorse expressed has a hollow ring. Although Mr Finau expressed to the writer of the pre-sentence report his shame at his actions, she said that he appears to lack insight into his offending behaviour and does not have the skills to avoid further offending. I do not consider the remorse or the regret expressed by Mr Finau to be of such an exceptional nature as would warrant a discount on sentence.

[77] Age of the offender (s 9(2)(a)): PF was aged 18 years at the time of the murder of Mr Tue Fa'avae. I shall refer to this in considering his sentencing.

Approach to sentencing for murder

[78] The Sentencing Act sets out a tiered regime in sentencing for murder:

- Section 102 of the Sentencing Act provides for a presumption in favour of life imprisonment for murder unless a sentence of life imprisonment would be manifestly unjust. There have been no submissions that a sentence of life imprisonment would be manifestly unjust.

- Under s 103 a sentence of life imprisonment with a minimum term of imprisonment of 10 years or more must be imposed when sentencing an offender to life imprisonment for murder. In determining the length of the minimum term of imprisonment, the Court is required to take into account the following purposes:

    (a) Holding the offender accountable for the harm done to the victim and the community by the offending;

    (b) Denouncing the conduct in which the offender was involved;

    (c) Deterring the offender or other persons from committing the same or a similar offence; and

(d) Protecting the community from the offender.

- Section 104 provides that a sentence of life imprisonment with a minimum term of imprisonment of at least 17 years must be imposed where the case fulfils one or more of the criteria in s 104(1)(i) unless such a minimum term would be manifestly unjust.

[79] The first step is therefore to consider under s 102 whether a sentence of life imprisonment would be manifestly unjust. The threshold is high and none of the parties suggest that a sentence of life imprisonment would be manifestly unjust in the circumstances of this case.

[80] Because s 103 is subject to s 104, I next consider whether s 104 applies in the circumstances of this case.

[81] Section 104 provides:

> **104 Imposition of minimum period of imprisonment of 17 years or more**
>
> (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
>
> (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
>
> (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
>
> (c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or
>
> (d) if the murder was committed in the course of another serious offence; or
>
> (ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or

(e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or

(f) if the deceased was a member of the police or a prison officer acting in the course of his or her duty; or

(g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or

(h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or

(i) in any other exceptional circumstances.

[82] The leading authority on the imposition of a minimum period of imprisonment under ss 103 and 104 is *R v Williams* which sets out a two stage process:[5]

(a) First, the sentencing Judge is to consider the degree of culpability of the offender in relation to the "standard" range of murders having regard to s 104 aggravating factors and any other aggravating or mitigating factors, to decide whether a minimum period of imprisonment of 17 years or more is justified in the circumstances.

(b) Where a minimum period of imprisonment of 17 years or more is not justified even though s 104 is satisfied, the sentencing Judge is to consider whether it would be manifestly unjust to impose a minimum period of imprisonment of 17 years.

[83] Adopting the approach in *R v Williams* the following questions need to be addressed in respect of each of the prisoners:

(a) Are one or more of the s 104 criteria present?

(b) What minimum period is justified?

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5 *R v Williams* [2005] 2 NZLR 506(CA) at [52]-[54].

(c) If the minimum period so justified is less than 17 years, is the imposition of a minimum period of imprisonment of 17 years or more manifestly unjust?

Are one or more of the s 104 criteria present?

[84] The Crown submits that:

- s 104(1)(b), calculated or lengthy planning, applies in the case of Mr Lisiate and Mr Finau only.

- Section 104(1)(h), being convicted of two or more counts of murder, applies to PF only. This is a non-evaluative criterion. PF is currently serving a sentence for murder and clearly falls within this factor.

- Section 104(1)(i), in any other exceptional circumstances. The Crown submits this provision applies to Mr Lisiate and Mr Finau principally but submits that it could also apply to PF although he became a party to the plan at a later stage.

Section 104(1)(b) : calculated or lengthy planning

[85] I have previously referred in some detail to the nature and extent of the plan to murder the deceased and its implementation. The plan was conceived and carried out within the confines of the maximum security prison. It had to take into account the restricted periods of unlock available to the prisoners and the deceased, the prison routines, the supervision of the prisoners' movements and activities undertaken by corrections officers, the need to lure Mr Tue Fa'avae into Mr Finau's cell where he would be killed, and limited access to items that might be used as a murder weapon. All these features were carefully factored into the plan developed by Mr Lisiate and Mr Finau. It was a high risk plan, as they appreciated. Mr Lisiate stated in a text message that implementation of the plan could result in his receiving "lyfy" (life imprisonment). Mr Finau also recognised that it could mean doing another 10 years, but he said "so be it".

[86] Mr Lisiate and Mr Finau disputed the Crown's version of the facts and in that respect I have previously made findings. They also submitted that while there was some premeditation this was not sufficiently "exceptional" to bring this case within s 104(1)(b).

[87] Unsurprisingly, cases with comparable facts are not readily available. In *R v Chow*,[6] Mr Chow carried out a contract killing firing one shot into the deceased's chest after following him and observing his movements. The sentencing Judge described the killing as a "well planned and calmly executed murder for money". She noted that s 104(1)(b) specifically refers to an arrangement under which money passes from one person to another. Life imprisonment with a minimum term of imprisonment of 17 years was imposed.

[88] In *R v AJN*[7] a group had become dissatisfied with the deceased in relation to his supply of methamphetamine to them. AJN and three others arranged for the deceased to be lured to an address having indicated they were in possession of a large sum of money and wanted to buy a quantity of methamphetamine. On arrival at the address the deceased was struck in the head with a cricket bat and subsequently with a tomahawk. He died soon after from the injuries. The sentencing Judge held that that killing resulted from a calculated plan and was premeditated. He also considered the murder was committed with a high level of brutality, cruelty and callousness. He referred to the attempts to hide the deceased's body in a vehicle which was subsequently abandoned. In that case guilty pleas were entered by the two persons convicted of murder. Taking into account those pleas and other specific personal factors, the Court imposed minimum periods of imprisonment of 10 years and 12 years, finding in the circumstances of the case that a minimum period of imprisonment of 17 years would be manifestly unjust.

[89] *Chow* as I said involved a contract killing which is not the situation here. But I consider the level of planning and premeditation in this case to be at least the equivalent, and probably greater than in *AJN*. Here, in order to set up the lure for Mr Tue Fa'avae, it was necessary to gain his confidence and trust over a period. This

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6 *R v Chow* HC Auckland CRI-2006-032-356, 15 February 2007.
7 *R v AJN* HC Hamilton CRI-2009-019-9786, 30 September 2010.

part of the plan was deliberately put into effect by Mr Finau, and later PF. In dumping the body in the shower, there was no respect or dignity shown to Mr Tue Fa'avae.

[90] I find there was calculated and lengthy planning by Mr Lisiate and Mr Finau such that s 104(1)(b) applies in the circumstances of this case.

Section 104(1)(i) : Exceptional circumstances

[91] The Crown submitted that the following factors make this murder exceptional in terms of the motive, context and location of the murder:

- The element of gang retribution. The Crown points to the direct nexus between the assault of Lava Savelio and the killing of the victim who had no association with the previous assault except as a member of the Bloods gang and his untimely remark "B's up".

- The motive in sending a clear and unambiguous message to opposing gangs both inside and outside the prison community, of the dominance of the Crips gang. To that end the focus was on the "snakes" or the "slobs" without discrimination.

- The maximum security context, which adds an exceptional quality as the inmates are confined and can be vulnerable to acts of violence. That can be particularly so if inmates are targeted and deliberately separated from their support network, as occurred in this case. (This is a reference to "situational vulnerability", to which I have previously referred).[8]

- Aggravating features including the callousness of the killing, the gratuitous "mutilation, as the Crown described it, of the deceased's body and the subsequent bragging by Mr Finau that the murder "… went down like mafia style".

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[8] See [68](d) above.

- The prisoners being subject to lengthy sentences of imprisonment for other serious violent offending which, the Crown says, adds to their identifiable risk and also to the exceptional nature of this offending.

[92] In *R v Wilson*[9] the Court of Appeal considered the concept of "exceptional circumstances" in s 80 of the Criminal Justice Act 1985. It said:

> It is equally difficult to attempt to define what factors would constitute a murder as being exceptional. Some which may be relevant to the inquiry could include an unusual level of premeditation, extraordinary brutality, depravity or callousness, and multiple killings. What is required is an objective assessment of the whole of the circumstances surrounding the murder to determine whether they are extraordinary to the extent that for the purposes of punishment, denunciation and possibly also deterrence, an extension of the statutory non-parole period should be immediately recognised. The wording of s 80(2) is designed to ensure the power is used sparingly, and that must be recognised by a sentencing Court.

[93] Consistent with those observations, "exceptional circumstances" have rarely been found to exist. *R v Reid* is such a case, but is the only such authority I have been able to locate where exceptional circumstances have been found.

[94] In *R v Reid*[10] Mr Reid had raped and murdered a profoundly deaf woman. Nine days later he raped, strangled and left another woman for dead. The Court found exceptional circumstances under s 104(1)(i) because of the associated rapes, premeditation, extreme violence, that there were two victims and that it was entirely fortuitous there were not more than two deaths. In that case a minimum period of imprisonment of 26 years was reduced on appeal to 23 years.

[95] In *R v Wallace*[11] three members of the Mongrel Mob were found guilty of murder following a "drive by" shooting of a Black Power member's property which resulted in the death of a two year old girl. Gendall J considered that on the facts, "if the line of exceptional circumstances is not crossed it is very near". However, for the purposes of sentencing he did not consider that exceptional circumstances in terms of s 104(1)(i) as envisaged by Parliament were established.

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9 *R v Wilson* [1996] 1 NZLR 147 (CA).
10 *R v Reid* [2009] NZCA 281.
11 *R v Wallace* HC Wellington CRI-2007-083-1608, 20 February 2009.

[96] In *Pahau v R*[12] four members of the Black Power gang killed a victim who had connections with Mongrel Mob members. The group from Black Power had pursued a Mongrel Mob group and Mr Pahau had caught and stabbed the deceased with a knife on the deck at the deceased's property. Only Mr Pahau, who was aged 21 at the time of the offence, was found guilty of murder. Asher J found that s 104(1)(c) applied and there had been unlawful entry into, or unlawful presence in, a dwelling place (the home invasion criteria). However, he noted that if s 104(1)(c) did not apply for technical reasons then s 104(1)(i) would apply because a 17 year minimum period of imprisonment should apply where there is an affront to the sanctity of the home. The Court of Appeal considered that s 104(1)(c) applied and did not have to consider the application of s 104(1)(i). A minimum period of imprisonment of 17 years was imposed on Mr Pahau.

[97] The facts in *Reid* cause it to stand out as a case where the circumstances qualified as exceptional under s 104(1)(i). As in *Wallace*, the combination of aggravating features in this case must bring it close to crossing the line where the circumstances will be considered exceptional. But I am not satisfied that for the purposes of sentencing the circumstances are sufficiently extraordinary or exceptional that s 104(1)(i) should be invoked. I do not find the circumstances of this case exceptional in terms of s 104(1)(i).

[98] In summary I conclude that s 104(1)(b) applies in relation to the sentencing of Mr Lisiate and Mr Finau. Section 104(1)(h) applies in relation to PF.

What minimum term is justified?

[99] The *Williams* approach requires the Court to consider the degree of culpability in the instant case having regard to other sentences imposed for murder and taking into account all relevant aggravating and mitigating factors.

[100] I have considered the numerous cases referred to me by the Crown and defence and some from my own researches. I have already referred to the facts of

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[12] *Pahau v R* [2011] NZCA 147.

Wallace where a sentence of life imprisonment with a minimum period of imprisonment of 15 years was imposed on Mr Wallace and his co-offender who directed him to fire the shots at the address. In *Pahau* the starting point taken was life imprisonment with a minimum period of imprisonment of 15 years, had s 104 not applied. The final sentence was life imprisonment with a minimum period of 17 years. The presumption of a 17 year minimum under s 104 was found not to be displaced on the grounds of manifest injustice. The Court took into account Mr Pahau's good character outside his gang life, but although he was aged only 21 no allowance was given for youth because he was considered to be sufficiently mature, given the seriousness of the crime.

[101] In *AJN*, which has some factual similarities to this case, a minimum period of 17 years would have been imposed if not for features of the offenders which made it manifestly unjust to do so. The Court took into account in that case guilty pleas by both offenders, health factors and the lesser role of Mr Manukau in the offending in imposing minimum periods of imprisonment of 10 years for AJN and 12 years for Mr Manukau.

[102] I have also considered *R v McCallum*,[13] *R v Moala*[14] and *R v Pukeroa*,[15] cases of murder where gang retribution was involved. The Crown referred to *R v Peach*[16] but the facts of that case are readily distinguishable although there was the relevant element of the victim being lured to a location for the murder to take place. Mr Peach contacted the Cats Unloved Society and requested that a volunteer uplift a cat from his flat. The deceased went to Mr Peach's address where he attacked and strangled her. She also received injury to her arms, mouth, neck, a bruise to one of her breasts and a small injury to her vagina. Her body was dumped down a bank. There were specific aggravating factors in that case being the extreme vulnerability of the victim who was a tiny woman who went to Mr Peach's flat alone and as a volunteer, the sexual dimension to the attack and also Mr Peach's offending profile.

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13 *R v McCallum* HC Wanganui CRI-2008-083-2794, 12 February 2010.
14 *R v Moala* HC Auckland CRI-2006-092-461, 12 December 2007
15 *R v Pukeroa* HC Rotorua CRI-2009-063-697, 10 December 2010.
16 *R v Peach* HC Christchurch CRI-2008-009-13852, 3 December 2009.

The Court adopted a starting point for the minimum period of imprisonment of 14 and a half years and reduced it to 13 years to take account of a late guilty plea.

[103] The Crown submitted that on the basis of the relevant authorities and taking into account the aggravating features of the offending and the offenders, a starting point of between 15 to 16 years imprisonment would be appropriate if s 104 were not engaged. For the prisoners, lower starting points were advanced which reflected their submissions on the facts of the offending and the levels of involvement of each of the prisoners in the offending. I have referred to these matters in considering the disputed facts and reaching my findings on them.

[104] Ms Dyhrberg's submission as to the appropriate starting point for Mr Lisiate was 12 to 13 years. I interpret her submission to be that a minimum period of imprisonment of 12 to 13 years would be appropriate given a subsequent submission made orally that a 10 year minimum period of imprisonment would adequately reflect the circumstances of the murder in this case.

[105] For Mr Finau, Mr Lance submitted that a 12 year starting point would adequately reflect the matters referred to in s 103 and that an uplift of approximately 12 months could properly be imposed given Mr Finau's previous convictions.

[106] Those submissions were, of course, on the basis that s 104 is not engaged, a submission I have rejected.

[107] Mr Niven for PF, accepted that s 104 is engaged in his case. His essential submission in relation to sentence is that this is "a ten year murder". I return to his submissions subsequently.

[108] I consider that to reflect the factors in s 103 – accountability, denunciation, deterrence and protection of the community – and to take account of the aggravating factors of the offending which I have previously identified,[17] a starting point for the minimum period of imprisonment would be in the range of 14 to 15 years for Mr Lisiate and Mr Finau and 12 to 14 years for PF. These starting points would be

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[17] See [68] above.

subject to an uplift for the prisoners offending while subject to sentence, and for their previous convictions which include serious violent offending, over a lengthy period in the case of Mr Lisiate and Mr Finau and murder in the case of PF. An uplift in the region of two years would in my view be appropriate, resulting in a minimum periods of imprisonment in the range of 14 to 17 years.

Is the imposition of a minimum period of imprisonment of 17 years or more manifestly unjust?

[109] Given my conclusion as to the range of the minimum period of imprisonment that would be appropriate on application of step one in the process set out in *Williams*, it is necessary that I go on to step 2 and consider whether it would be manifestly unjust to impose the minimum term of 17 years or more. In *Williams* the Court of Appeal set out the test to be applied:

> [66] … the specified minimum period may not be departed from lightly, as the Court is bound to give effect to the legislative policy of ensuring a 17-year minimum for the most serious murder cases. The reasons must withstand scrutiny. Marginal differences in personal circumstances or degrees of participation by co-offenders would not normally qualify. In *Parrish* at [21] this Court indicated that the presence of mitigating factors under s 9(2) which related to the personal circumstances of an offender would rarely displace the presumption. Powerful mitigating circumstances bearing on the offence are more likely to do so.
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> [67] We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.

[110] There is nothing in the circumstances of this offending which would suggest to me as a matter of overall impression, that a minimum term of imprisonment of 17 years would be manifestly unjust for this murder. Denunciation, deterrence and ultimately protection of the community from these violent offenders must be key purposes in sentencing. This was a gratuitous, deliberate, cold-blooded and callous

murder the motive for which was gang retribution. I consider it falls within the most serious category of murders to which the legislative intent of s 104 is directed.

Sentencing

Mr Lisiate

[111] Mr Lisiate was involved in the planning of this murder from the start. He had the status in the Crips gang within the prison to give directions and this he did. He applied pressure on Mr Finau to follow through on the plan they had devised to kill Mr Tue Fa'avae. I take a starting point of 17 years imprisonment. No uplift is required for the aggravating factors of the offending because they are appropriately reflected in the 17 years minimum period of imprisonment under s 104. For Mr Lisiate's history of serious violent offending I apply an uplift of one year. The sentence is therefore life imprisonment with a minimum period of imprisonment of 18 years.

Mr Finau

[112] I turn to Mr Finau whose role in the calculated planning and premeditation for this murder also brings his offending within s 104. Not only was Mr Finau party to the plan developed with Mr Lisiate to kill Mr Tue Fa'avae but he was the pivotal actor. He secured PF as "muscle" to ensure that the plan would not falter or fail in its implementation. He followed up the murder by gratuitously defacing, with cuts made by the shank or shard, the deceased's face, eyes and chest. Whether that was part of the plan or an insult added by Mr Finau, we do not know. We do know, however, his pride in the success of the plan: "… it went down mafia style".

[113] I have considered whether an uplift should be applied to reflect that Mr Finau was involved in the planning with Mr Lisiate, and also in putting the plan into effect including the befriending and ultimate luring of Mr Tue Fa'avae into cell 46 where his premeditated fate awaited him. Then in strangling him to death and later defacing the deceased's face and upper body. His conduct was extremely deliberate and callous. Ultimately I have decided that in sentencing, the parts played by Mr

Lisiate and Mr Finau should not be distinguished. Their roles were different but each was critical in the development and implementation of the plan.

[114] The minimum period of imprisonment of 17 years will be uplifted by one year to take account of Mr Finau's history of offending and particularly serious violent offending. Thus the sentence imposed for the offence of murder is life imprisonment with a minimum period of 18 years imprisonment.

[115] Mr Finau must also be sentenced on the charge of attempting to dissuade a witness to give evidence, for which the maximum sentence is 7 years imprisonment. Section 23 of the Sentencing Act provides that no sentence of any kind may be imposed cumulatively on an indeterminate sentence of imprisonment which of course life imprisonment is. Thus, the sentence imposed must be concurrent with the sentence of life imprisonment.

[116] This offending is at the lower end of the range for this type of offending. I have referred by way of comparable cases to *R v Brown*,[18] *R v Kadosh*[19] and *R v Barratt*.[20] I impose a sentence of 12 months imprisonment to be served concurrently with the sentence of life imprisonment. The appropriate way to reflect this further offending which, while it arose out of the same events, was subsequent to and independent of the murder offending, would be by way of an uplift to the minimum period of imprisonment. However, given the significant minimum period of imprisonment imposed for murder, I do not propose to apply an uplift for this further conviction.

PF

[117] As I have previously determined, PF came into the planning of the murder, possibly as late as the day before. He was enlisted by Mr Finau to ensure the plan was successfully carried into effect. He was complicit in the later planning and he knew what was intended. He obtained the murder weapon, the radio cord, and took

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18 *R v Brown* [2009] NZCA 481.
19 *R v Kadosh* CA367/04, 15 April 2005.
20 *R v Barratt* CA164/01, 27 August 2001.

it to Mr Finau's cell. He covered up one of the CCTV cameras. He was present in cell 46 when Mr Tue Fa'avae was strangled to death with the weapon he provided, and he assisted in dragging the body to the shower.

[118] I consider PF's more limited role in the planning may have warranted consideration of a slightly lesser minimum period of imprisonment than his co-offenders. He did not know Lava Savelio and it appears he became involved in the plan simply because of his association with the Crips gang. However, because PF has previously been convicted of murder, under s 104(1)(h) a minimum period of imprisonment of 17 years must be imposed unless to do so would be manifestly unjust.

[119] PF is still serving the minimum period of his life sentence for the first murder. He was sentenced in July 2008 to life imprisonment with a minimum period of imprisonment of 11 years along with concurrent sentences for wounding with intent to cause grievous bodily harm and assault with a weapon in respect of a second victim. He was convicted following trial of the murder, which involved the unprovoked stabbing of a defenceless 14 year old boy outside a church organised dance competition in Auckland in 2006. The sentencing Judge observed that it was difficult to pinpoint the cause of the incident. He noted that PF was only 16 years of age at the time of the murder. He said that alcohol undoubtedly played its part but also noted that of considerable significance was PF's allegiance to the Crips gang. That allegiance and loyalty seems to have persisted and was again a significant factor in PF's involvement in the murder of Mr Tue Fa'avae. The probation report after the first murder recorded a worrying indication that PF's risk of reoffending would remain high in the future.

[120] PF's circumstances are unique in that this murder, the second murder, was committed while he was still serving a life sentence for the first murder. The case of *R v McKenzie*[21] provides guidance as to the appropriate approach to sentencing in such a case. Mr McKenzie had killed two people, about four years apart. The first killing was because the victim was homosexual and the second killing was because

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[21] *R v McKenzie* HC Greymouth CRI-2008-018-981, 5 December 2008.

the victim was Asian. Although Mr McKenzie had committed both murders before being sentenced for the first murder, he had served four years of a minimum period of imprisonment of 14 years imposed for the first murder before he was sentenced for the second murder. The sentencing Judge, Simon France J, adopted for the second murder a minimum sentence starting point of 24 years, having regard to the motive, Mr McKenzie's abhorrent beliefs and the lack of humanity shown to the victim. That starting point was reduced to 21 years on account of Mr McKenzie's guilty plea and co-operation with the authorities.

[121] Simon France J noted that Mr McKenzie had served four years of the sentence on the first murder. He said his task was not to resentence him for both killings. The limited question was whether the appropriate sentence for the second murder, when placed alongside time served on the other offending, produced a total sentence that was excessive for the total offending. He said:[22]

> Twenty-five years is a long time, even for two murders. However, it is not, in my view, too long given the nature of these two murders and given the risk you pose to society.

[122] Mr McKenzie appealed against his sentence of life imprisonment with a minimum period of imprisonment of 21 years from the date of sentence. The issue on appeal was whether the minimum period of imprisonment of 21 years should run from sentencing or from Mr McKenzie's initial date of incarceration. The Court of Appeal said:[23]

> [27] As the sentencing Judge acknowledged, 25 years in prison is a lengthy incarceration, but we are satisfied that it is appropriate and necessary in the circumstances.
>
> [28] The crux of Mr King's submission was whether the 21 years which the Judge had determined should be imposed (and which we endorse) should have been structured so that it encompassed the period which had already been spent in custody. That could be achieved by a minimum non-parole period of 17 years on the life sentence imposed in 2008.
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> [29] We agree with Simon France J that such an approach was not appropriate. Each of these killings was callous, wanton and despicable. The total effective sentence was no more than was needed to reflect the total culpability.

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22 At [24].
23 *R v McKenzie* [2009] NZCA 169.

[123] On the basis of *McKenzie* the correct approach in sentencing PF is:

(a) To set the appropriate sentence for this murder; then

(b) To consider whether the total sentence, when added to time already served for the other offending, is excessive having regard to the gravity of the overall offending.

[124] The Crown submitted that an appropriate starting point for this murder is 20 to 21 years which would result in an effective minimum period of imprisonment of 25 to 26 years.

[125] Mr Niven contended that from a starting point of 10 years for this murder under s 103, the period of imprisonment already served should then be added giving a total of approximately 15 years minimum period of imprisonment. Because s 104 requires that a minimum period of 17 years must be imposed, the sentence for this offending then has to be adjusted upwards to 12 years so that the total minimum period of imprisonment of 17 years is achieved.

[126] That was effectively the approach advocated for Mr McKenzie which was rejected by the Court of Appeal. I also reject it.

[127] Turning to the appropriate sentence for this murder, under s 104 the minimum period of imprisonment is 17 years unless to impose that period would be manifestly unjust. PF's sentencing comes under s 104 under only one of the criteria, the non-evaluative criteria in s 104(1)(h), that he has been convicted of two or more counts of murder. There is thus no basis on which to apply an uplift for PF's criminal history. The four charges of which he was convicted in 2008 (including murder), all arose out of the same incident in 2006. Because that offending is the catalyst for the application of s 104, it would be wrong to also apply an uplift for that offending.

[128] I next turn to consider the factor of youth. When Allan J sentenced PF for the 2006 offending, having noted that he was just 16 years old at the time of the offending, he took into account his relative youth and the fact he had no previous

convictions, while noting that he was bound to impose a minimum period of imprisonment that generally accorded with sentences imposed in other like cases. A 12 year minimum period was reduced to 11 years on account of those factors.

[129] The Crown accepted that PF's youth would definitely have been a relevant factor in sentencing for the previous murder and submitted that it was duly taken into account by Allan J in reaching the view that the appropriate minimum term of imprisonment was 11 years. But Mr Glubb submitted that while PF was still a young man, aged 18 years at the time of this offending, given his past conduct and the clear risk he poses, his youth cannot be a factor accorded weight in this sentencing. Mr Glubb referred to *R v Kee*[24] where the appellant was one of five persons involved in an aggravated robbery of a South Auckland liquor store in the course of which one of the owners of the store was shot and later died. In dismissing the appeal against sentence the Court of Appeal said:

> The appellant was one month short of his 21st birthday at the time of the offending. While youth may properly be taken into account as a mitigating factor in this context, we are not persuaded that it is a material factor in the present case.

[130] Mr Glubb also referred to *R v Green & Morice*[25] where a defenceless homeless person was murdered by the two young appellants, aged 18 and 17 at the time. In considering the youth of the offenders in respect of a sentence of life imprisonment with a minimum period of imprisonment of 17 years, the Court of Appeal cited the following passages from *R v Slade*:[26]

> Personal circumstances of extreme youthfulness had been held not to meet a threshold for departing from the presumption in favour of life imprisonment in *R v Rapira* and *R v O'Brien.* Nor, in a s 104 context, was this held to be a reason for departing from the 17 year minimum in *R v Luff*.
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> … as the Court has already had occasion to say in other cases, … this Court cannot, as it were "create" a youth exception as such. The Parliamentary language is general in its application.
>
> [footnotes omitted]

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24 *Kee v R* [2011] NZCA 229 at [24].
25 *R v Green* CA461/04, 2 June 2005.
26 *R v Slade* [2005] 2 NZLR 526 (CA) at [22] and [48].

[131] Mr Glubb also referred to the recent decision of the Court of Appeal in *Churchward v R*[27] upon which Mr Niven for PF placed considerable reliance. Mr Glubb suggested it was difficult to reconcile the approach taken in that case with the above judgments, but noted that the appellant, Ms Churchward, as well as being a young offender (she was aged 17) had a number of other factors including mental health issues and her upbringing which the Court considered to be relevant in reducing from 17 to 13 years, the minimum period of imprisonment. Mr Glubb submitted there is no such overlay here as there was in *Churchward* as PF is not a first offender but significantly, has previously been involved in serious violent offending including murder.

[132] Mr Glubb also referred to a grievous bodily harm charge PF faces in respect of another inmate, Mr Lotto Anau. The alleged offending took place only about a month apart from this offending. He noted that PF does not dispute his involvement in this offending but rather claims that he acted in self-defence. He submitted this offending is relevant in assessing the ongoing risk of PF to the community. I believe Mr Glubb accepted in the course of oral submissions that this alleged offending cannot be taken into account in any assessment on this sentencing. The charge against PF awaits trial. The matter cannot have proper relevance for this sentencing.

[133] Mr Niven obtained for sentencing purposes reports from Dr Andrew Immelman, a child and adolescent psychiatrist, and from Dr Joseph Sakdalan, a consultant clinical psychologist. Dr Immelman had seen PF previously on two occasions in 2009 and at Auckland Prison on three occasions during August and September 2011. His report is detailed. Dr Immelman notes that its focus is on PF's risk to others. He refers to Dr Sakdalan's findings in his most recent report. Both Dr Sakdalan and Dr Immelman conclude that PF is not suffering from a diagnosable personality disorder.

[134] Dr Immelman concludes that PF's summary risk rating for violence is currently in the moderate range. He notes the inherent difficulties in modifying the

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[27] *Churchward v R* [2011] NZCA 531.

social/contextual domain components of the assessment while PF is in a prison environment, and that historical factors, by definition, cannot be changed.

[135] Dr Sakdalan carried out testing using the PCL-SV screening tool to assess psychopathic traits. He concludes, as noted in Dr Immelman's report, that based on the PCL-SV profile PF does not appear to meet the threshold for the consideration of psychopathy. However, his profile indicates that he possesses some PCL-SV factors such as antisocial behaviours (adolescent and adult), some impulsivity, some degree of irresponsibility, and lacking of goals. He assesses that PF tends to minimise some aspects of his offending while at the same time indicating that he takes responsibility for his actions.

[136] Dr Sakdalan concludes on the basis of the risk assessment findings and other material available to him that PF carries a moderate risk of violent recidivism. He considers he is likely to benefit from participation in the Violence Prevention Programme. But he noted that his eligibility for the programme would require assessment at a later date.

[137] I note that the conclusion of the psychologists that PF is of moderate risk of violent recidivism contrasts with the conclusion of the writer of the probation report, that his statistical risk of further offending is assessed as high as evidenced by the serious nature of his criminal history and the active charge that remains to be heard.

[138] In the recent judgment of the Court of Appeal in *R v Churchward*,[28] the Court considered in detail the relevance of youth to sentencing. The Court stated that youth is relevant in the following ways:

(a) There are neurological differences between young people and adults, leading young people to be more vulnerable to negative influences and more impulsive than adults.

(b) The effect of imprisonment on young people is harsher and more crushing.

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[28] *Churchward v R* [2011] NZCA 531 at [76]-[92].

(c) Young people have greater capacity for rehabilitation because their characters are not as well formed.

[139] Youth is said to be a larger concept than childhood (as defined in the United Nations Convention on the Rights of the Child) and extends past 18 years of age.[29]

[140] In *Churchward*, the Court of Appeal considered how the three factors applied to the 17 year old offender. Combined with her mental health issues and upbringing, it was said that her culpability was lower than if she was an adult, there was a risk that a 17 year minimum period of imprisonment would have a crushing effect and that there were indications that her criminal activity was "adolescent limited" (rather than "life course persistent"). The Court considered it would be manifestly unjust to impose a 17 year minimum period of imprisonment (which the sentencing Judge, Venning J had already reduced from a starting point of 19 years for youth). The minimum period was reduced to 13 years.[30]

[141] The three factors identified in *Churchward* all appear to be present to some extent in the case of PF. The psychological reports tend to indicate that those factors are present and operative or potentially operative in his case.

[142] I have given careful consideration to the psychologists' reports and to the observations of the Court of Appeal as to the relevance of youth in sentencing. However, I consider there is only a limited extent to which the factor of youth and its implications can be recognised in sentencing in a situation such as this.

[143] PF's situation is considerably different from that of Ms Churchward. At the age of only 18 years he had been convicted of two murders and other violent offending arising out of the 2006 incident. While there may have been an element of impulsivity in the 2006 murder, his involvement in the murder of Mr Tue Fa'avae was deliberate, calculated and planned, albeit that it was at the behest of others. He well knew the consequences of this most serious of criminal offending, having served about five and a half years in a maximum security prison of his sentence for

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29 At [98].
30 At [104]-[108].

the first murder. His capacity for rehabilitation has to be assessed against the fact of the second murder committed in prison while he was serving his sentence for the first murder. Further, there are not present in the case of PF the multiple factors including mental health issues which persuaded the Court of Appeal in the case of Ms Churchward that it would be manifestly unjust to impose a minimum term of imprisonment of 17 years.

[144] While the length of the sentence which PF's offending necessarily warrants, must undoubtedly have a harsh effect on him, it is the inevitable consequence of his serious offending and the risk to the community he undoubtedly presents.

[145] For all those reasons I accept the Crown's submission that PF's youth is not a factor that can be accorded weight in this sentencing. I conclude that it does not provide a justification for departing from the minimum period of imprisonment of 17 years under s 104.

[146] Finally, I must then stand back and consider whether the sentence of life imprisonment with a minimum period of imprisonment of 17 years for this murder when placed alongside the time served on the first murder produces a total sentence that is excessive for the total offending. This is essentially a totality consideration. The question I must ask myself is whether the period of approximately 22 years five months is excessive or disproportionate for the totality of PF's offending being the two murders of which he has been convicted. Almost twenty two and a half years is a very lengthy minimum period of imprisonment but I do not consider the period excessive or disproportionate given the circumstances of the murders and the continuing risk which PF poses to society.

[147] Would you all please stand.

Result

[148] The sentences to be imposed for the murder of Mr Tue Fa'avae are as follows.

(a) Mr Lisiate, life imprisonment. I order that you serve a minimum period of 18 years imprisonment.

(b) PF life imprisonment. I order that you serve a minimum period of 17 years imprisonment. For the avoidance of doubt, that period runs from the date of sentencing.

(c) Mr Finau, life imprisonment. I order that you serve a minimum period of 18 years imprisonment.

On the charge of attempting to dissuade a witness Mr Finau you are sentenced to 12 months imprisonment to be served concurrently with the life sentence for murder.

[149] Please stand down.