

**THE QUEEN**

**v**

**MARK TAITO MAHAKI  
ROSEANNE TE MONI**

**Coram**        **Eichelbaum CJ  
Blanchard J  
Heron J**

**Hearing**     **8 April 1998**

**Counsel**     **L C Ord for Mahaki  
R M Lithgow for Te Moni  
K G Stone for Crown**

**Judgment**   **8 April 1998**

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**JUDGMENT OF THE COURT DELIVERED BY EICHELBAUM CJ**

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The full facts of the offending giving rise to the sentences now under appeal can be found in the judgment of this Court delivered on 19 December 1997, dealing with the appeals against conviction. They relate to the bungled armed robbery of the Naenae branch of Trustbank on 29 January 1997. Matenga, who had been recruited while in prison, entered the bank carrying a loaded, cut-down, double barrelled shotgun. He was described as nervous, erratic and dangerous. He took as hostages a number of persons

present, tellers and customers, eventually herding them into the bank tea-room. He allowed various persons to leave, but later when only three were left, one of them, Mr Brown, made a dive at Matenga. The latter fired hitting Mr Brown at close range and killing him instantly. Matenga then surrendered to the police, some 34 minutes after entering the premises.

The evidence clearly showed that Mahaki, on his own admission a professional robber, was the organiser. He provided the gun and ammunition. Through the network of his gang he recruited Matenga, being assisted by Lemalie on the ground, and Te Moni behind the scenes. Lemalie met Matenga on his release from prison, which happened only on the morning of the robbery, supplied him with the gun and some clothing, and drove him to the scene. Lemalie stayed outside, keeping in touch with Te Moni by cellphone thus enabling her to relay information as to what was happening to Mahaki. Te Moni also monitored police messages over a scanner, and had the means to contact Matenga through a pager.

Matenga and Lemalie were convicted of murder, while Mahaki and Te Moni, who were also charged with murder, were found guilty of manslaughter. All four were found guilty of aggravated robbery. Although only Mahaki's and Te Moni's sentences are presently in issue it will be helpful to set out all those imposed, as this shows the overall pattern of the sentencing:

	<b><u>Homicide</u></b>	<b><u>Aggravated robbery</u></b>
Matenga	Murder - life	8 years
Mahaki	Manslaughter - 14 years	10 years
Lemalie	Murder - life	10 years
Te Moni	Manslaughter - 10 years	7 years

At the outset it is convenient to deal with a criticism both counsel made regarding one aspect of the Judge's sentencing remarks, where he stated that each appellant had known that someone's death was a real possibility. Counsel pointed out that in regard to manslaughter, the way the Judge had put the case to the jury was that the accused had engaged in an enterprise which envisaged some degree of violence, albeit nothing more

than fright. However, another way of putting manslaughter is foresight of a real risk of a killing short of murder: *R v Tompkins* [1985] 2 NZLR 253, 256. For sentencing purposes the Judge was entitled to record his opinion, as a matter of fact, that each of the accused knew that a death was a real possibility. Indeed, as regards Mahaki the pre-sentence report recorded him as virtually admitting as much. On behalf of Te Moni Mr Lithgow submitted the evidence did not justify any such finding, but we are satisfied that given Te Moni's situation, the inference was well open. There was nothing to be put on the scales to the contrary. The view expressed by the Judge laid emphasis on the fact that certainly so far as Mahaki was concerned, the margin between murder and manslaughter must have been a fine one indeed.

Mahaki is aged 37, with a long list of convictions extending over a period of 20 years. The offences have been at the lower end of the scale, the most serious being a conviction for aggravated robbery (1 years imprisonment) and various assaults for which the longest sentence was 6 months. The pre-sentence report refers to his remorse, but given the circumstances of the offending, and the appellant's background, we do not feel this can be accorded much weight. This apart the report did not bring out any positive factors.

Ms Ord submitted that given particularly that Mahaki was not present at the scene, his level of culpability should be regarded as at the lower end of the scale. We are quite unable to accept that submission. To the contrary, having recruited an inexperienced young man to carry out a bank robbery, on a basis that had him entering a bank alone, with a loaded weapon, he launched an enterprise full of danger for bank staff and customers. We do not propose to give the slightest encouragement to any view that those who mastermind serious crimes of this kind can lessen their culpability by remaining a safe distance from the action.

In his submissions on behalf of the Crown, Mr Stone laid emphasis on the deterrent aspect. In Te Moni's case he pointed out that Mahaki had absented himself to attempt to arrange an alibi, leaving her virtually in charge. It was only an accident of timing that he returned while the robbery was in progress. At the least, in Mr Stone's contention, Te Moni was the electronic age equivalent of the lookout. He argued that all

the sentences were appropriate.

Manslaughter sentences are notoriously difficult to classify, and none of the decisions to which we have been referred in argument concerned a similar set of facts. Fourteen years puts the case in the top category, but terms of that length, and longer, have been imposed in the most serious cases, as reference to decisions listed in *R v Wickliffe* [1987] 1 NZLR 55 and *R v Grey* (1992) 8 CRNZ 523 will show. Further, here the sentences for the manslaughter convictions were not concerned with that offence alone. They had to reflect the offender's total culpability, meaning in Mahaki's case, proper allowance for his role as organiser of what was intended to be a major armed robbery.

Ms Ord felt unable to advance any submissions against the 10 year term imposed for the aggravated robbery. Given the trend of decisions in this Court that was understandable but taking into account the need for the sentencing overall to reflect a serious case of manslaughter, this rather points up the appropriateness of the 14 year term selected for the manslaughter conviction. Bearing in mind the total absence of mitigating factors it cannot be regarded as excessive. Mahaki's appeal is therefore dismissed.

From the point of view of personal circumstances there is much more to be said on behalf of Te Moni. She is aged 38, with sons aged 18, 15 and 12. For 9 years she has lived with Mahaki. The pre-sentence report described this relationship as violent and controlling, Te Moni saying that she felt intimidated to the point where she had little ability to make her own choices or decisions. The writer of the report had independent testimony regarding the violence and abuse suffered, clearly pointing to Te Moni's situation as a battered spouse.

While we have given only a brief summary it is apparent that Te Moni has suffered a difficult and dysfunctional life, heavily overlaid by both the nature of her relationship with Mahaki, and the latter's gang associations. From remarks made during sentencing it is evident that the Judge had these circumstances in mind and took them into account in fixing a term significantly below Mahaki's. In his submissions Mr Lithgow stressed what he described as the minor role she played, and as well, the

personal circumstances.

Conviction as a party presupposes a sufficient knowledge of the proposed offence, or type of offence. In the more sophisticated robberies a number of persons may be involved, some playing supporting roles at locations away from the main action. Again, we do not wish to encourage any notion that remoteness from the scene of armed robberies is any guarantee of immunity from the kind of sentence imposed on secondary parties more closely connected with the central event.

We think that Mr Lithgow's submissions rather underplayed the significance of Te Moni's role. Also, we recognise the trial Judge's advantage in assessing the respective degrees of culpability. That said however we have been persuaded that compared with Mahaki's 14, Te Moni's 10 year sentence valued the extent of her culpability disproportionately. Accordingly we allow her appeal, quash the sentences, and replace them with terms of 9 years for manslaughter, and 6 years for aggravated robbery.

Solicitors

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