IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2007-083-001608
CRI-2008-085-002762
CRI-2008-085-002981

THE QUEEN

v

HAYDEN JOHN WALLACE
KARL UNUKA CHECK
RANJI TANE FORBES
GODFREY THOMAS MURAAHI
ERUETI CHASE NAHONA
RICHARD ANTHONY PUOHOTAUA

Counsel: G J Burston, D La Hood and J M Webber for Crown
P G Mabey QC and N J Sainsbury for Prisoner Wallace
C Stevenson for Prisoner Check
I M Antunovic and C L Parkin for Prisoner Forbes
C P Brosnahan and E Hall for Prisoner Muraahi
M Bullock for Prisoner Nahona
P M Keegan for Prisoner Puohotaua

Sentence: 20 February 2009

SENTENCING NOTES OF GENDALL J

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[1] Hayden John Wallace, Karl Unuka Check, Ranji Tane Forbes, Godfrey Thomas Muraahi, Erueti Chase Nahona and Richard Anthony Puohotaua, you all appear for sentence for crimes that you committed on the night of Saturday 5 May 2007 in Wanganui. Then members of rival gangs were prepared to conduct

open warfare in Wanganui City streets, resulting in the tragic death of a two year old infant child.

[2] Hayden Wallace, the jury found you guilty of the crimes of murder and participation in an organised criminal group. Karl Check, the jury found you guilty of the crimes of murder, participation in an organised criminal group and assault. Ranji Forbes, you were found guilty of the crimes of murder and participation in an organised criminal group. Richard Puohotaua, you were found guilty by the jury of the crime of participation in an organised criminal group. Convictions followed upon the jury's guilty verdicts after a five-week trial involving you and others in the High Court at Wellington.

[3] Godfrey Muraahi and Erueti Nahona, you are to be sentenced for the crimes of manslaughter and participation in an organised criminal group and further, for you Mr Nahona, for the crime of assault. Each of you pleaded guilty to those crimes during the course of and very close to the end of the criminal trial. For you Mr Muraahi, your plea came on the 19th day of the trial after the Crown had closed its case and after one of the accused, Mr Wallace, had given evidence. For you Mr Nahona, your plea of guilty came on the 22nd day of the trial after the Crown and counsel on behalf of two of the accused had addressed the jury. So those pleas could hardly have been later.

[4] The facts upon which I sentence you are, of course, well known to me. I have already sentenced other co-offenders, James Challis and Tyrone Box, for their crimes of manslaughter. I have had the benefit of reading the sentencing notes of Ronald Young J in respect of three other participants who were sentenced for participation in a criminal group and of course I presided at your trial.

[5] During late 2006 and 2007 gang warfare and tension between the Mongrel Mob and the Black Power gangs and other gangs escalated in Wanganui. Why that should be the case is difficult for sensible members of the community to fathom. But I draw the obvious conclusion that each gang somehow adopted the stance that its members and leadership had some form of territorial ownership or control over the community or aspects of it. Those approaches are not limited to

Wanganui. They apply, regrettably, in a large number of communities in New Zealand.

[6] In Wanganui the Mongrel Mob and Black Power, for primitive reasons, thought violence and intimidation on each side could establish their supremacy. Revenge was always on their minds. As a result a number of violent acts between the gangs occurred, including fights, disorder, confrontations at Court, at homes, in public, and shootings, both at vehicles and at houses. That is apparent from the sentencing remarks of Ronald Young J on 23 May 2008. Gangs were prepared to conduct their warfare in the city streets of Wanganui where innocent persons could be harmed and indeed, that was the tragedy that occurred, when this young child was killed. While counsel has said that there is only anecdotal material to support the view that there has been constant gang warfare in Wanganui, this Court is well aware, from actions that have happened in the precincts of the Wanganui Court and other Courts, and having to deal with pre-trial applications, bail and other matters, and other cases as well as documented data, that gangs in Wanganui have pursued lawless, violent, criminal activity to the severe detriment of that community.

[7] Three of you, Karl Check, Godfrey Muraahi and Erueti Nahona, were patched members of the Mongrel Mob gang. Hayden Wallace may have been a prospect of an allied group. It seemed he was not a patched member, but aspired to become a full member of a chapter of the Mongrel Mob so as to have the power and status that foolish men such as you think it is carried by it. Mr Wallace, you yourself in texts after the killing as the gang endeavoured to hide what had happened, you referred to yourself as "Mobster 13" and the number "13" is the 13th letter in the alphabet which signifies the letter "M". Ranji Forbes and Richard Puohotaua were sympathisers or associates of the gang, but not prospects or patched members. But you aligned yourselves with the gang activity involving excessive drinking, drug consumption and disorderly actions. Belligerent posing by members of both gangs and their supporters led to lawless and intimidatory actions, which plagued Wanganui and escalated to the calamitous events of 5 May 2007.

[8] Whilst tensions had been simmering for some time Mongrel Mob members, namely you Karl Check, Godfrey Muraahi and Erueti Nahona, accompanied at least

by Hayden Wallace, became involved in a confrontation with some Black Power members at a rugby league event in Wanganui. The father of the baby, who was later to lose her life, was among the members of the rival group involved in the confrontation. It did not involve physical violence but there was threatening, posing, posturing, intimidatory and aggressive behaviour from both sides. Thereafter, a group of Mongrel Mob members and their supporters were bent upon looking for trouble. A number drove to an area where some Black Power members, including the father of the victim lived. Aggressive comments occurred and several Mongrel Mob members forced themselves into a house and attacked a person thought to be a gang member and assaulted him in the sanctuary of that home. Karl Check and Erueti Nahona were involved in that act for which you were found guilty of assault. The evidence was clear that Messrs Muraahi and Wallace were nearby in a vehicle, which had transported all four, but neither participated in the actual assault.

[9] Thereafter, a gathering occurred at a hotel where alcohol and cannabis was consumed. Mr Puohotaua had become intoxicated so his friend Mr Karamaina, later to be a Crown witness, drove Mr Puohotaua's car with some associates. Ranji Forbes had his vehicle, which he drove. Karl Check's four-wheel drive vehicle was driven by another gang associate, Shane Roberts, later to become a Crown witness. In the meantime, the Black Power associates expecting further trouble from the Mongrel Mob had gathered at an address in suburban Puriri Street and armed themselves with bricks and bottles. As the three vehicles drove by that house, bricks and other objects were thrown at the vehicles. Mr Check's vehicle was damaged and had a broken window screen and Mr Forbes' vehicle had a rear passenger window broken. So revenge and retaliation was planned. The evidence satisfied me that the retaliation, revenge and planning were instigated by Karl Check. He needed another car and sought the assistance of Noel Broughton, who brought his car to the location where the Mongrel Mob associates and supporters had gathered. It was in that car that Karl Check rode when the three vehicles were driven to the drive-by shooting. As I said, the evidence satisfied me, and the jury's verdict reflects this, that Karl Check ordered and directed the shooting. You Mr Check, were the initial prime moving force.

[10] Ranji Forbes, your car was used and you were the driver of it. Hayden Wallace was the front seat passenger armed with a powerful .303 rifle and a magazine, which contained at least five rounds. In the back of that vehicle were Messrs Box and Challis, who pleaded guilty to manslaughter and who I sentenced to seven years' imprisonment on 11 July 2008. Also in the back was Mr Wiremu Karamaina, not a gang member and who gave evidence for the Crown.

[11] As I have said, Karl Check was in the car of Mr Broughton and also in that car was Mr Church. The third car was being driven by another man, Shane Roberts, and that was the car of Mr Puohotaua. Shane Roberts was later to be a Crown witness. In Mr Puohotaua's car, apart from himself, were Messrs Muraahi and Nahona.

[12] So in total, the three car convoy carrying 14 men bent upon exacting retribution and revenge against Black Power members set out in what was intended to be serious violence. Some did not know about the firearm in the car and they included Messrs Church, Broughton and Kumeroa, who were sentenced by Ronald Young J for participation in an unlawful criminal group. The jury's verdict means that it was not established that Mr Puohotaua knew of the firearm in the car. All of them were sentenced on the basis that they went with the group having an objective of serious violence and being reckless as to their contribution to it. Others knew of the presence of the weapon and its likely use whether to threaten or otherwise, but without belief as to it being used with a murderous intent. They included Messrs Box and Challis, and of course, now, Messrs Murrahi and Nahona, who pleaded guilty to manslaughter on that basis.

[13] The three found guilty of murder, Messrs Wallace, Check and Forbes were found guilty of murder because you knew not only of the presence of the lethal weapon, but of its intended use with a murderous intent and on the evidence entitled the jury to reach convictions for murder.

[14] The group of 14 men in the three cars travelled from East Wanganui across the city to the Castlecliff area intending to attack Black Power members outside the

home of one of them. The Black Power members and supporters suspected the advancing onslaught and were gathering in a group to meet it.

[15] The evidence which I accept as accurate, was that prior to the convoy setting out, Karl Check approached the front car and instructed Hayden Wallace, the front seat passenger who had the rifle with him, using words to the effect of "'shoot them' in the head". As the convoy proceeded across Wanganui it stopped at an address close to the Gonville TAB approximately 300 metres from the location at which the attack was to occur. It is likely that was a pre-arranged place. There was evidence that you Karl Check got out of your motor vehicle and approached the car in which Messrs Muraahi and Nahona were seated. I am satisfied, and the jury's verdict makes it clear, that they both knew of the existence of the weapon. As the vehicle convoy travelled across Wanganui, one of Nahona or Muraahi, either one of them, was heard to remark that the driver of the vehicle, who was a Crown witness, did not have to be concerned about not having a weapon in that car as Mr Wallace in the front car would see to that. After the final regrouping of the cars near the Gonville TAB, they proceeded to the Castlecliff area and from a point of about 100 metres from the home of a Black Power member in Puriri Street, Hayden Wallace prepared the weapon so as to be able to fire it.

[16] As the convoy travelled down Puriri Street and close to the home of the Black Power member, the lead car turned off its headlights and engine and coasted towards its intended target. Whilst still moving and approaching the target, Mr Wallace discharged the .303 rifle with a shot that went through a fence and into a neighbouring property. Fortuitously, no one was struck with that bullet. Thereafter, Ranji Forbes stopped the car and Hayden Wallace discharged two further rounds from the rifle at members of the Black Power who were outside the home and gathered on the front lawn metres from where the shots were fired awaiting the anticipated enemy. Both shots missed those persons, one lodging in a fence post in the driveway of the property of a Black Power member. Another penetrated a wooden pallet, then the front window of the home and a sofa, upon which the infant Jhia Te Tua, by all descriptions a beautiful two year old child was sleeping, passed completely through her chest, killing her instantly. That might give you some indication of the force and lethal nature of the weapon used.

[17] None of the Mongrel Mob members of course knew then that a baby had been killed at that time. But the convoy departed at high speed to leave the area and as it raced down an adjoining street, Mr Wallace was seen to be hanging out the window discharging the .303 rifle into the air twice with one shot severing power lines. Two cartridge cases were found in that area. Other members were heard to cry, "patch him up" signifying an approval of Wallace's actions and to give him the accolade or status of a patched member. Mr Wallace was seen to be hanging out the front window of the car gesticulating and making war cries and gang sounds.

[18] Most members of the Mongrel Mob then regrouped at the gang headquarters to drink, party and celebrate. The evidence was that Hayden Wallace was bragging "Did you see me, did you see me?" The evidence is that Karl Check asked him:

> "…'Did you get one?'…Did we get one?"

[19] Hayden Wallace was heard to say in answer to a question of what did he do it for? (and I quote from the evidence):

> "'To shoot the niggers', just Karl [Check] and – were giving Hayden the big sign – Hayden just walked past me, you know just showed up to them and they just like beating, 'did you see me?' you know, 'did you see me?'".

[20] It was then conveyed to the group that a two year old child had been killed and the evidence was that Karl Check and Godfrey Muraahi then walked inside the pad and the witness said:

> "Everyone just carried on drinking, just carried on drinking and happy as."

[21] A comment was made by one member, not an accused, that the baby:

> "…was just growing up to be a nigger baby anyway."

And the evidence was, that you, Mr Muraahi was heard to respond:

> "True bro, yeah true."

And the evidence was that:

> "They just carried on giving their mob salutes and that."

[22] That evidence was given in a credible way and it reveals a chilling and inhuman side of gang and mob mentality of some people. It may just have been bravado and bragging for the esteem of gang members, but it was disgraceful and lamentable.

[23] The ages of all of you involved, and others who have been dealt with, range from 19-26 years. Messrs Wallace and Muraahi were aged 26; Karl Check is aged 25; Mr Puohotaua was aged 27; Mr Nahona was aged 19; Mr Forbes was aged 20; and Mr Box aged 19 and Mr Challis aged 20. It matters not who started the confrontation or whether both gangs bear responsibility because that does not lessen the culpability of those convicted of murder and manslaughter. It highlights what Ronald Young J said when sentencing Messrs Church, Broughton and Kumeroa, that the escalating events were:

> "…inevitably going to result in some sort of tragedy that day given the provocative actions of both gangs, Mongrel Mob and Black Power, leading to this final confrontation…The two gangs and their associates and others seemed only too happy to escalate the violence and arm themselves [each one of you] would have known about the conflict between the two gangs over many months in the Wanganui area. Whether you were members of the gang, associates of the gang or just hanging out with the gang that day you were all part of a gang confrontation by choice….You were prepared to be involved in a violent confrontation in a public street in Wanganui where the innocent public could easily be victims of your violence."

And further:

> "The loss of this child of course has shattered this family. The mother of the child in her victim impact report sees and understands the evil of these gangs and their associates. Both were after revenge; both looking for violence; both gangs prepared to conduct their warfare in city streets where anyone – even a young child – could and did die."

[24] It was inevitable that where violent, lawless, criminal gangs engage in mayhem armed with a high powered rifle in a residential suburb where a number of people have congregated, that people are likely to be killed as happened here. It was only by chance that the first bullet into the neighbouring property did not injure or kill someone and again only by chance the two shots discharged at the home and the Mongrel Mob members hit none of those intended victims. The outcome that a child was not meant to be killed does not lessen your responsibility, nor mitigate in the slightest against the gravity of what you were involved in. Three of you were

involved in aiding – that is you Mr Forbes; encouraging, ordered, assisting and performed – that is you Mr Karl Check; and Mr Wallace, the act of shooting, knowing of the murderous intent.

[25] When I sentenced Messrs Box and Challis to seven years' imprisonment I said this offending was placed at the high end of the scale, being deliberate participation and attack upon a rival gang. Your courage was obtained through weight of numbers and behaviour was lawless, violent, premeditated, with the use of a lethal weapon. It was an aggravating feature that you were involved in a gang members' group attack involving gang warfare, pursuit and retaliation with a loaded weapon, knowing that serious violence was likely to occur.

[26] As long ago as 1993 Henry J when delivering the judgment of the Court of Appeal on *R v Biddle* (CA279/93, 25 November 1993) where a Mongrel Mob member was killed after confrontation with a lead offender in the Black Power gang, armed with a shotgun, said:

> "The use of a loaded firearm, all too common in this sort of situation, must be viewed seriously whether or not gangs happen to be involved."

[27] That was in 1993. It is sad to say the "all too common" situation continues. Stern sentences are required to be imposed in order to stop this. Deterrence not only towards you, who will be imprisoned, but also to other gang members, whoever they may be, is vital. Those who sympathise with such groups must understand that the citizens of Wanganui and other communities throughout New Zealand can no longer be terrorised and lives and property put at risk through this gangster like activity. It must cease, otherwise those responsible for it or who encourage it, will go to prison for very lengthy periods.

[28] I need to say something briefly about counsel's contentions that two of you claim to have acted under provocation. That is by counsel for Karl Check and Richard Puohotaua. It is claimed that because vehicles had been damaged in the gang conflict they were provoked into seeking revenge. If there was any validity in that claim I would have thought Ranji Forbes might have made it also, given that a rear window of his car was smashed. But he and his counsel very properly did not

advance this. This was not provocation. It was revenge. Neither of you, Puohotaua as Karl Check, claimed to the police or otherwise, that your actions arose from provocation. Obviously, the jury rejected counsel's submission on your behalf Mr Check, that your crime of murder should be reduced to manslaughter because of provocation. The culpability of you both for your particular crimes cannot be minimised by any claim now by counsel that you were provoked.

[29] The victim impact reports, particularly those of Jhia's mother and grandmother, make depressing reading. They have suffered enormous grief, loss and financial consequences out of the dreadful crimes of these gang members and supporters. It is clear that this child was a happy, buoyant, beautiful infant whose expected life of over 70 years was brutally ended. As the grandmother says they live with this pain and loss forever and she says, perceptively in my view, that the only true regret is being caught and any guilty pleas have been brought, in the hope of a lesser sentence. The grandmother expresses views, which she is entitled to have heard. They parallel some of what I have said. She says:

> "The people on the street don't have the power to deal with gangs. Gangs exist because they are allowed to. We need to break down the power and influence that gangs have and make it less attractive to be a member of a gang. One option is sentencing and the court has power to send a loud and clear message to gang members that this sort of action will not be tolerated. We have had enough."

[30] It is not only in Wanganui that gang violence occurs – to Courts it has become widespread throughout New Zealand and the people of New Zealand require the Courts to impose stern sentences, within the limits that the law allows of course. If stern sentences are required to deter others from this lawless activity and the killing of people out of revenge then so be it. But the Court can only act, as I have said, as the law currently permits. Sentencing is an application of the law to the circumstances of the crime, the victims and the criminals.

[31] Before I sentence each of you individually, I want to acknowledge also what Jhia's grandmother has said in respect of a Crown witness, Wiremu Karamaina, who was one of the persons in the cars that night. She said:

> "…[did stand up to the gang] and I will be forever grateful to him for having the courage to do what he knew was the right thing. He placed his own

> safety at risk but he came forward because it was such a shocking and despicable crime. So too the other witnesses."

I simply add that those comments may also apply to Shane Roberts.

[32] I now turn to consider each of you individually.

Richard Anthony Puohotaua

[33] You were found guilty not of the lead crimes but on a similar basis to which Messrs Church, Kumeroa and Broughton. They had pleaded guilty. It was your car that was brought to the house, which took members of the group to the Black Power area knowing there was to be a serious violent confrontation. I accept that you had been drinking and your judgement was badly impaired. But as was clear from the evidence you came to realise that you could have stopped what occurred and you said that to someone who you thought was a prisoner in the cells, but in fact was an undercover officer. The basis of the jury's verdict, I have no doubt, was simply that it was not satisfied beyond reasonable doubt that you were aware of the presence of the firearm and its probable use. Only you know how fortunate that might be.

[34] You are aged 27. You do not have a criminal history except for gang and lawless activity. You have four previous convictions, two for theft and one excess breath alcohol. You have not been imprisoned before. You are described in the probation officer's report as at medium risk of re-offending and display "no remorse or insight into [your] offending."

[35] Your counsel on your behalf has said that a starting point of two and a half years as fixed for Mr Church is binding on the Court. That is not correct. It overlooks the fact that at the same time Ronald Young J fixed a starting point for Mr Kumeroa and Mr Broughton at three years and reduced Mr Church's only because, the Judge said, he was at "the peripheral of this lawfulness." You were not. As with Mr Broughton your car was used. So the starting point is three years.

[36] Your counsel says that his instructions are that you are remorseful. I do not discern that in the slightest from your lengthy interview with the police officer to

whom you lied repeatedly to avoid responsibility. Your remarks to the undercover officer in the cells are not in my view expressions of contriteness or sorrow. They were simply regret that you had been caught and were facing very serious charges. The probation officer comments that you still deny the offence have no remorse or insight into your offending.

[37] As I have said, your involvement, however, was not peripheral and you were involved from the gathering at the hotel onwards. There is evidence you said you wished to "smash someone over". You were heard by others to be eager for a confrontation, you permitted your car to be used in the convoy and returned to the gang pad after the shooting, remaining there for some hours celebrating and "big noting" with other offenders. You were heard at the pad later to proclaim:

> "Who do I have to smack over to be a patched member, what do I have to do to get my patch….I want a mobster's patch."

[38] The maximum penalty for the crime of participating in a criminal group is five years' imprisonment. Mr Kumeroa received two years three months' imprisonment; Mr Broughton two years' imprisonment and his vehicle forfeited; and Mr Church to 18 months' imprisonment. The Judge made adjustments for their guilty pleas. You of course can have no credit for pleading guilty and there is no basis upon which I am prepared to depart from the Judge's starting point of three years' imprisonment.

[39] You may not be aware but the Government introduced on 10 February 2009 the Gangs and Organised Crime Bill, which if passed, increases penalty for participation in an organised criminal group from five to 10 years' maximum. That is double. That may give you some idea of the attitude that may be taken by the community or the legislation for this type of behaviour.

[40] As Mr Broughton was treated on the basis of taking a vehicle to the scene a starting point of three years' imprisonment was appropriate with the only mitigating factor being the guilty plea. You can receive no deduction through having pleaded guilty and I do not see your circumstances justifying any discount. You are

sentenced to three years' imprisonment. There will be an order for forfeiture of your motor vehicle registered no. SL7325.

Godfrey Thomas Muraahi and Erueti Chase Nahona

[41] Messrs Muraahi and Nahona, I now sentence you both based upon your pleas of guilty to the crime of manslaughter and participation in an organised criminal group. As well Mr Nahona, there is your conviction for assault.

[42] As I have said Mr Muraahi, it was after 19 days when the Crown had closed its case that you pleaded guilty, and for you Mr Nahona, it was after 22 days, shortly before your counsel was to close.

[43] The starting point for your sentences in the crime of manslaughter must be 10 years' imprisonment. That was the starting point taken in the sentencing for manslaughter of your co-offenders James Challis and Tyrone Box. As the Court of Appeal said in upholding that approach::

> "…the very serious offending in this case, involving a gang confrontation, having elements of serious lawlessness required [that there be taken] a stern approach."

[44] I am satisfied on the evidence that you knew of the presence of the gun and its intended use. You were both patched members of the Mongrel Mob closely involved with Mr Karl Check in the lawless activities of that night. You were involved with gang members in a group attack where force of numbers was aggravating seeking to pursue gang warfare in retaliation, and anticipating serious violence with the use of a weapon.

[45] You are not entitled to the same discount that Challis and Box received through having pleaded guilty. At most a discount of up to one-third is available for pleading guilty at the earliest opportunity. Although you both eventually pleaded guilty to the crime of manslaughter, it came many months after committal for trial, after multiple pre-trial applications had been made and dismissed; after a vigorous defence had been mounted (which you are entitled to pursue) in front of a jury and after almost three weeks of trial and very close to its final conclusion.

[46] I do not consider that your pleas of guilty indicate genuine remorse. They came in order to avoid the real risk of you being found guilty on the counts of murder. Whether any discount for the guilty pleas should be given is indeed debatable. In England there is a general guideline that a maximum of 10% discount might be afforded if there are guilty pleas at the Court door or during a trial might attract a maximum of 10%. That is not the case here. Your guilty pleas came only when the inevitability of serious convictions for serious crimes was apparent after the Crown's case had been closed and sternly tested by the defence.

[47] You, Mr Muraahi, pleaded guilty only after one accused had given evidence and three others had elected not to call evidence. Mr Nahona's plea came even later after the Crown and all defence addresses, bar three, had been completed. Nevertheless, I am prepared to allow both of you the smallest of discounts simply to reflect the fact that you may have finally acknowledged guilt – although, as I have said Mr Nahona, you said something to the probation officer, which would seem you want to have a "bob each way" at that. I fix a starting point of 10 years for you and allow a discount of nine months for you both. Sentencing is not a mathematical process but if you care to do the maths it reflects 7½%. In my view it is the absolute maximum to which you are entitled and simply reflects a final acknowledgement of guilt.

[48] I turn to consider your personal features.

Godfrey Thomas Muraahi

[49] Godfrey Muraahi, your personal circumstances are that you are aged 26 and amongst the more mature of the group. You are a patched member of the Mongrel Mob gang and have 41 previous convictions acquired over a period of approximately 10 years. They include 13 for burglary, three for theft, four for offences of violence such as assault, one for aggravated assault, for which you were imprisoned and one for possession of an offensive weapon and presenting a firearm.

[50] Your probation officer describes you as having a high-risk of re-offending, having been a patched member of the Mongrel Mob and you consider the gang to be

your family. The officer says you have a tendency to hold members of the Black Power responsible for what occurred and that your loyalty to the Mongrel Mob gang and culture remains strong. You have expressed determination to remain in the gang and whilst you say you have remorse over the death of the child, this is mixed with strong loyalty to the gang and anger or antipathy towards the child's father. You view events:

> "as an unavoidable and even necessary consequence of gang life."

[51] None of that signifies to me any remorse and paints a gloomy picture.

[52] I regard the aggravating features of your previous convictions require an uplift of 15 months' imprisonment. The participation in an organised criminal group and a conviction for that crime I am prepared to regard as being encompassed by the manslaughter actions and justifying only concurrent sentences. Accordingly, on the crime of manslaughter you are sentenced to 10 years six months' imprisonment. On the count of participation in an organised criminal group you are sentenced to three years' imprisonment. Those terms are to be concurrent.

Erueti Chase Nahona

[53] For you Mr Nahona, you are a patched member of the Mongrel Mob and according to the probation officer achieved that at a young age and have been "immersed in the Mongrel Mob lifestyle since birth". It has not served you well. You are now aged 20. You have previous convictions but only in relation to driving offences and excess breath alcohol, but you were sentenced to terms of imprisonment as recently as 18 February 2007 and your crimes for this case occurred on 5 May 2007. As I have said, you somewhat benevolently are to receive the same discount of nine months in respect of your pleas of guilty to the crime of manslaughter.

[54] The probation officer says that you claimed to him or her that you were not guilty and were pushed to plead guilty and showed no remorse or insight and acceptance of responsibility and claimed to be innocent. If that is the case you are not entitled to a discount at all. That is why I specifically asked your counsel,

Mr Bullock, as to whether his instructions from you were that you sought a discount and you said "yes" and I take that to mean that you do accept some contrition and acceptance and that is why you got the discount. But count yourself fortunate. I am not prepared to give you Mr Nahona any concession or discount by reason of your age, given your eagerness to participate with it. It was aggravated by your invasion into the home of another person earlier that day and assaulting the person inside.

[55] As I have said, do not delude yourself about your guilt. You acknowledged that having heard the Crown and I am satisfied it was a proper acknowledgement simply to ensure that you did not face a risk of being found guilty of murder. But I do not distinguish between you and Mr Muraahi in terms of the 7½% discount.

[56] Mr Nahona, for participation in an organised criminal group, you too are to be subject to a concurrent sentence. That activity was part and parcel of what took place. The separate aggravating feature of the crime of assault, however, does require an uplift. It was a separate offence and on a separate victim in the pursuit of your lawless violence. It may well require a cumulative sentence, but I simply regard it as an aggravating feature of your overall criminal offending over that night. It requires an uplift of 12 months' imprisonment so as to balance out in part the earlier discount given. Accordingly, you are sentenced to 10 years three months' imprisonment on the crime of manslaughter, three years' imprisonment on the crime of participation in an organised criminal group and six months' imprisonment on the crime of assault. All terms are to be concurrent.

[57] In respect of you both I impose minimum non-parole periods on the crimes of manslaughter. In respect of Messrs Box and Challis these were fixed at four years, which was upheld by the Court of Appeal. The need for denunciation and deterrence for the lawlessness of your actions requires a minimum non-parole period on the count of manslaughter of six years. Let me make it quite clear that that is not your sentence, but simply the time which must pass before the Parole Board can even consider your eligibility for parole.

[58] I now turn to Messrs Hayden Wallace, Karl Check and Ranji Forbes.

Hayden Wallace, Karl Check and Ranji Forbes

[59] Each of you were convicted on the count of murder. Section 102 of the Sentencing Act 2002 provides a presumption that there be life imprisonment, which can be only be displaced if the Court considers it would be "manifestly unjust". No one has argued otherwise. The circumstances of this dreadful offending, your personal circumstances and your ages do not make life imprisonment manifestly unjust. It is required for each of you for your crime.

[60] As I have said, you Wallace were the shooter, acting with the required murderous intent in respect of persons outside the property. I do think that it was your idea alone. You were acting with the incitement and encouragement of some other or others, but that does not alter the position.

[61] For you, Ranji Forbes, you were the driver of the car. It was more than being a getaway car or your acting as a lookout. It was active assistance in transporting the shooter and the weapon to the scene, and the jury's verdict makes it clear that you had knowledge that it was to be used for the necessary murderous intent. You are not a gang member but liked to associate with some of them and got caught up in the events of that night. But you made a choice and now you must answer to that choice.

[62] For you, Karl Check, I am satisfied, and the jury's verdict supports the view, that you were an active party in the offending and indeed the prime mover and instigator. That you were not in the lead car in your circumstances makes not the slightest difference. As was said in another context in *R v Mako* [2000] 2 NZLR 170 (CA) at [64]:

> "…this Court [has] made clear…there is no justification for treating those assigned roles other than of confronting the victims as less culpable unless they are truly less than full participants. The lookout, the getaway driver, may in fact be the ringleader."

[63] In your case I am satisfied that you were the prime mover having been bent on seeking revenge and retribution against members of the Black Power group. That is obvious from your conviction for assault arising out of your actions at another

place earlier in the evening. It was retribution executed for damage to your vehicle. There is evidence, I have no doubt accepted by the jury, and which I too found credible, that you gave certain instructions to Mr Wallace to shoot at your perceived enemy. You asked him later "had he got one". Your culpability is equal to that of Mr Wallace.

[64] Accordingly, each of you three men are sentenced to life imprisonment for the murder of Jhia Te Tua.

[65] The issue then arises as to whether there should be imposed minimum non-parole periods.

[66] Let me make it clear at this stage. As I have already said, the purpose in sentencing is not revenge. Let me make it also clear at this stage, to the family of the victim and members of the community and others, that your sentence is life imprisonment. That means there is no release date and you will serve that sentence for the remainder of your life. Minimum non-parole periods are not sentences in themselves but simply directions that require the Parole Board not to even consider an application for parole within a certain period of time. The law provides that for life imprisonment for murder the minimum non-parole period may not be less than 10 years. Section 103 of the Sentencing Act now provides that the period that the Court imposes must be as is necessary to satisfy all or any one of the following purposes:

(a) to hold the offender accountable for the harm done to the victim and to the community by the crime;

(b) to denounce the conduct;

(c) to deter you and others from committing such offences; and

(d) to protect the community from you.

[67] You have heard the submissions and argument as to the validity of s 104 and that will have been explained to you. It requires the Court to impose a minimum

non-parole period of 17 years or more in certain circumstances and the Crown says that three of these apply, and much of counsel's submissions have been in relation to whether that section applies. It says that one of these is whether a deceased is particularly vulnerable because of age/or any other factor. The Crown contends the child falls into that category because of her vulnerability within the house at which the attack took place.

[68] Further, the Crown says murder of the child involved unlawful entry into a dwelling place, relying it says upon the authority of *R v Clayton* HC WN 22 June 2007 MacKenzie J where molotov cocktails were thrown through the window of a house infringing its security and leading directly to the death of the victim. Lastly, the Crown says that the provision of s 104 which relates to "exceptional circumstances" applies because of the the combination of features of gang warfare conducted in a busy residential neighbourhood in Wanganui, using a high-powered rifle and the killing of a child must fall into that category of exceptional circumstances. They say a need for a strong response was the overall policy of the minimum non-parole provisions in s 104.

[69] A sentencing Judge and Court is not the place for definitive analysis to difficult, complex legal issues that may arise. Time and resources do not permit that. If a sentence is manifestly too high or too low the parties may appeal and the Court of Appeal is the place for intricate decisions on the meaning of particular consequences. Despite the Crown's arguments, some of which may well carry some weight obviously in some way, it is not possible in my judgement to stretch the law to the factual circumstances here so that the provisions of s 104 are directly engaged. Where offenders are outside a property – that is, outside "the place" and they never intended to intrude onto the dwelling place – its grounds or otherwise – it is hard to envisage that s 104 would normally apply.

[70] Intrusion onto a place envisages an offender from going onto that place. Vulnerability must be a question of fact and the victim's age alone without more does not place him or her (whether aged 2, 22 or 102) into the category envisaged by Parliament. If Parliament had wanted that to be the case that age = vulnerability then it would have said so. Of course, the position of a victim is taken into account in

sentencing and it may be aggravating but that is reflected in the sentence that the Court imposes and not necessarily engaging s 104.

[71] So, I am not satisfied those provisions are directly engaged and I do not do so. But that, of course, does not mean that a minimum non-parole period of 17 years or more, or whatever level, cannot be imposed in appropriate circumstances. As I said, she was an innocent member of the public not because she was the target of criminal actions. The discharge of the weapon was at the gathering of Black Power members who were outside the house. It may have been a "place" but not on these facts a dwelling. They were the intended victims, which had to be the case if there was to be murderous intent. The murderous intent was not directed at the inhabitants of the house, even though of course the bullet had infringed the security of the house.

[72] I recognise a stern response to gang violence is required. Where a murder arises because of petty rivalries created by gangs and perpetrated to justify the existence of one, and a child victim is killed in her own home, then if the line of exceptional circumstances is not crossed it is very near. But for the purposes of sentencing I do not consider the exceptional circumstances envisaged by Parliament exist.

[73] As I have said, however, it is beyond doubt that a minimum non-parole period is required for each of you and it will substantially exceed the statutory minimum of 10 years. It is necessary to deter escalating violence and to hold you accountable to the victim, her family, the community and the wider community at least in Wanganui, whose streets you have turned into dangerous battlegrounds. As I have said, it is necessary to deter you and others (and they will know to whom I am referring) from committing the same type of attack in public residential areas by gang members in lawless groups acting with savagery and using high-powered weapons with murderous intent. It puts the safety of members of the community at risk and has to be denounced and you and others are to be deterred.

[74] As I related when reading a victim impact report from the grandmother of the deceased when she says:

> "The Court has the power to send a loud and clear message to gang members that this sort of action will not be tolerated. We have had enough."

[75] Let the message be loud and clear. The cycle must stop. Failing which, the protection of a civilised community will require very stern responses from the Courts and perhaps Parliament. I will return very shortly to the minimum non-parole periods that are imposed in respect of your crimes of murder.

[76] Mr Wallace, you have got 48 previous convictions and are now aged 27. By and large your convictions are at the lower end of the criminal calendar but you have served terms of imprisonment for offences of dishonesty, disobedience of Court orders, burglary and assault.

[77] The probation officer refers to the fact that you continued to deny your part in the offending. You gave evidence to the jury as you are entitled to do but you produced a concocted story, which they clearly rejected as a tissue of lies. That does not signify any remorse on your part, but rather an absence of remorse.

[78] Mr Check, you have 17 previous convictions and are aged 27. You have served terms of imprisonment and been convicted of demanding to steal (taxing) which is a well-known gang criminal activity. You have convictions for behaving threateningly with a firearm, which occurred about six months before this murder and a variety of other crimes. The probation officer's report says your risk of re-offending is high and unlikely to diminish. You want the Court to know you are not a senior patched member of the Mongrel Mob. You were the leader of this group on that day and whatever your hierarchy might be in the gang, that does not lessen in any way your culpability.

[79] You stated to the probation officer that you were very remorseful for what happened, but as I commented when sentencing Messrs Challis and Box, I do not accept that your remorse arises out of what you did. Your regret is only that the wrong victim was killed and that you were caught and convicted. Genuine remorse could have been displayed by an acceptance of your responsibility, an acknowledgement of guilt, an expression of sorrow to the family and the seeking of

forgiveness. I do not accept your claim of remorse is genuinely based and it is self-serving so as to minimise the sentence that must be passed.

[80] Mr Forbes, you have 11 previous convictions. You are aged 22, but aged 20 at the time of offending. You have convictions for violence, including three of assault and one of assault with intent to injure, which occurred less than two months prior to this crime for which you are to be sentenced. You were on bail for that crime when this murder occurred. Your other convictions occurred when you were very young when you were aged 14.

[81] It was argued on your behalf Mr Forbes that your participation was less, being only the driver of the car. But it is hard to ignore the fact that as the driver you deliberately slowed down the car so the rifle could be discharged into or at people at the adjoining property.

[82] Whilst it is suggested that you did not know of the presence of the firearm until 100 metres from the targeted address, I find you were aware of it before that, given the evidence of the direction conveyed to Hayden Wallace. I accept you are not a patched member, nor a prospect of the Mongrel Mob, although have some wider family connections with it. You were doing very well up until 1984 and I am moved by the references that counsel has given to me today. But somehow you moved away from your whanau and those who were helping you make a good life and things in recent years have gone downhill.

[83] I accept, however, that you, unlike the others, did not take refuge in the code of silence by refusing to say anything or co-operate with the police. You of course were careful not to "nark" or identify others and that is not particularly unusual in the gang context. But you and you alone did confess to being the driver of a vehicle and expressed some regret. I viewed your videotaped interview with the police several times and accept there is genuine remorse not just for the outcome but for your part in it. You were under the influence of alcohol and cannabis through excessive consumption during that day. But that is not mitigating and I observe that you were also on bail and in breach of your curfew conditions.

[84] I have given anxious thought as to whether I should make any distinction between you and Messrs Wallace and Karl Check in fixing a minimum non-parole period. On the one hand, I am distinctly troubled by three features, namely

(1) Your role in driving the vehicle, knowing what was intended to happen, namely the discharge of the rifle;

(2) Your recent past criminal history. That is simply the assault with intent to injure; and

(3) The fact that you were on bail at the time.

[85] On the other side of the coin I balance the fact that you were not a gang member and were not committed to a life of crime judging from your previous convictions. You were then aged 20 and you did show some acknowledgement of responsibility in your interview to the police. You co-operated to some extent with them, although, of course, you deny acknowledging murder but you acknowledged manslaughter and I was able, because of your interview, and how you presented not just to the police, and to me, to discern considerable remorse and I am satisfied genuine remorse. So I feel able to grant you a small indulgence in fixing the minimum non-parole period from that which I fix in respect of the other two, namely the instigator and prime mover and secondly, the shooter.

[86] There are a number of examples of length for minimum non-parole periods imposed for gangland killings such as this. They include *R v Grant* (CA326/01, 16 April 2002) a gang shooting where three were involved which, as was your case, revealed

> "…utter contempt, not only for the law, but also for public safety."

Other examples include *R v Bucknall & Nathan* (CA248/01 & 251/01, 18 December 2001) – 13years; *R v Moala & Ors* HC AK CRI-2006-092-000461 & CRI-2007-404-000028 12 December 2007 Courtney J – 12 years. I think *Grant* was also 13 years but all cases are different. Yet, there must be some parity.

[87] The only discount or amelioration for a minimum non-parole period would be expressions of remorse. But as I said, your regret is, you killed the wrong person and that applies to Mr Check. The minimum term I fix takes into account the harm you have done in killing this child, denouncing your conduct, expressing the community's outrage at it and the need to deter others, and also you in a personal way, to protect the community.

[88] Counsel for Mr Wallace originally submitted a period of 13-14 years but he now corrects this to 12-14 years.

[89] I fix the minimum non-parole period at 15 years. For you Mr Forbes, because of the distinguishing features that I have mentioned, I fix it at 12½ years. That is one representing a half between the minimum 10 years and the 15 years fixed in respect of Messrs Wallace and Check. As I have said, that is not your sentence, which is one of life imprisonment. That simply fixes the time, before which you can even apply for parole. Whether or not you are released then will depend upon the Parole Board's assessment of your risk to the community at that time, but you will be subject to the sentence of life imprisonment for the remainder of your life.

[90] Mr Check, you were also convicted by the jury of assault earlier that evening. It is not possible to impose a cumulative sentence upon a sentence of life imprisonment. Accordingly, on the count of assault you are sentenced to six months' imprisonment to be served concurrently with your term of life imprisonment. On the count of participation in an organised criminal group you pleaded guilty. You are sentenced to two years' imprisonment from a starting point of three years with a discount to reflect your guilty plea. You are sentenced to that term to be served concurrently with your life sentence.

[91] Hayden Wallace, on the charge of participation in an organised criminal group you are sentenced to three years' imprisonment to be served concurrently with your life sentence.

[92] Ranji Forbes, you also are sentenced to three years' imprisonment on the charge of participation in an organised criminal group to be served concurrently with

your life sentence. There will be an order for confiscation of your motor vehicle registered no. XI7794 used in the commission of the crime of murder.

J W Gendall J

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