

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

CRI-2008-004-6716

THE QUEEN

v

**AHMAD MATLOBYAYGAZWINI
TUALE JOE FUIMAONO
ALI RAFIEE**

Hearing: 18 November 2009

Appearances: Ms K A Lummis for Crown
Mr B Hart for Matlobyaygazwini
Mr S B W Grieve QC and Ms F B Farry for Fuimaono
Mr M Gibson and Mrs Lowe for Rafiee

Judgment: 18 November 2009

SENTENCING REMARKS OF LANG J

Solicitors:
Crown Solicitor, Auckland
Counsel:
Mr B Hart, Auckland
Mr H Lawry, Auckland
Mr S B W Grieve QC, Auckland
Ms M Pecotic, Auckland
Farry & Co, Auckland
Mr M Gibson, Auckland
Mrs M-A Lowe, Auckland

[1] Mr Fuimaono, Mr Matlobyaygazwini and Mr Rafiee, you were originally charged with murdering a person by the name of Bjorn Henderson. After a jury trial lasting more than three weeks you were acquitted on that charge but you were all convicted on the included charge of manslaughter. The maximum sentence for that offence, as you know, is one of life imprisonment.

[2] You were originally scheduled to be sentenced in this Court on 21 October 2009. Because the jury's verdicts left a number of factual scenarios open, counsel sought a ruling from me regarding the factual basis upon which I proposed to sentence you. I then heard submissions from your counsel and the Crown on 21 October. At the conclusion of that hearing I delivered an oral decision in which I set out the factual findings that I made based on the evidence and the jury's verdicts. It is based on those conclusions that I now propose to sentence you today.

Factual background

[3] Because of the detailed nature of the findings that I have already made, I do not need to traverse the evidence in any great detail today. It suffices to say that the incident that led to you being charged had its genesis in an incident that occurred a few days earlier. During that earlier incident Mr Henderson had come to Mr Matlobyaygazwini's motel unit in the early hours of the morning accompanied by some other men. There they assaulted Mr Matlobyaygazwini and stole money and drugs from him.

[4] This led to a series of events that occurred on the afternoon of 9 March 2008. Earlier that day Mr Matlobyaygazwini had learned that Mr Henderson was in the Auckland area. He made efforts to ensure that Mr Henderson came to an address on the Ellerslie-Panmure Highway where an associate of Mr Matlobyaygazwini's was living. Mr Matlobyaygazwini then went round to collect Mr Rafiee from his home address. When Mr Rafiee got into the vehicle, I am satisfied that he was carrying a pistol and also another form of weapon, the precise nature of which I have never been able to determine.

[5] They went back to the address at Ellerslie-Panmure Highway and awaited the arrival of Mr Henderson. When Mr Henderson arrived, Mr Matlobyaygazwini immediately confronted him in his vehicle. Quite clearly he was terrified because he tried to reverse his vehicle in an effort to escape. He was unable to successfully accomplish that objective and collided with another vehicle owned by one of the occupants or visitors at the address. At about this time Mr Fuimaono's vehicle arrived in the address and Mr Henderson's vehicle collided with that as well.

[6] I have found that Mr Fuimaono's attendance at the address arose following a telephone discussion between Mr Fuimaono and Mr Rafiee that occurred at 3.59 pm. Mr Fuimaono called Mr Rafiee and I am satisfied that Mr Rafiee must have told him what was about to occur. Mr Fuimaono then made the conscious decision to come to the address at Ellerslie-Panmure Highway in order to be part of the party that was going to confront Mr Henderson there.

[7] Mr Henderson eventually escaped by running through a hedge and into a neighbour's property. He then ran across the Ellerslie-Panmure Highway. He was closely followed by Mr Matlobyaygazwini, and Mr Rafiee was also in pursuit. They followed Mr Henderson across the road and into a driveway of a property on the other side of the road. There Mr Matlobyaygazwini began punching Mr Henderson. It seems that Mr Rafiee remained in the area around the entrance to the driveway of that address.

[8] Mr Fuimaono in the meantime had got in his vehicle and left the address in Ellerslie-Panmure Highway. As he was driving down Ellerslie-Panmure Highway he saw what was happening in the driveway of the property over the road. He did a U-turn and brought his vehicle back to that driveway. He then got out of the vehicle and a short time later a confrontation occurred between himself and Mr Henderson. That ended when Mr Fuimaono used an instrument, such as a stick, to strike Mr Henderson on the head. It seems that he struck him on more than one occasion on his own admission.

[9] Once the incident ended, Mr Fuimaono and Mr Rafiee left the address. Mr Matlobyaygazwini remained in the vicinity. Unfortunately, those who were

responsible for Mr Henderson's welfare after that point did not take him to the hospital. He remained in their care for some hours before finally being taken to the hospital at about midnight. By that stage the injuries that he had received were too severe for him to be successfully treated and he died as a result of his injuries a short time later.

[10] It is no real answer to the charges against you to say that he may have lived if he had received prompt medical attention. You had a responsibility, along with others, to ensure that that occurred and you did not accept that responsibility. I am also satisfied on the evidence that, even if Mr Henderson had survived the injuries that he received, it is highly likely that he would have had reasonably significant brain injury as a result.

[11] It is against that broad factual background, outlined in much greater detail in my earlier findings, that I now sentence you.

Sentencing Act 2002

[12] In any case involving the infliction of blows with fatal consequences issues of deterrence and denunciation arise. Society simply does not accept that one person should be entitled to take the life of another regardless of the reason that that might occur. In any case where somebody inflicts a blameworthy death then the Court must act in a way that both denounces their conduct, holds that person responsible for what they have done and also imposes a sentence that deters others from acting in a similar way.

[13] The Court must also, when imposing sentence, have regard to the interests of the victim of any offending. In this case, of course, the primary victim of your offending is Mr Henderson himself. At a very young age he has been robbed of that most precious commodity, namely his life. He will never know what it is like to advance through the years, seeing members of his family mature and develop, to enjoy the closeness of family relations and to watch offspring come into being and then develop themselves.

[14] I have had the benefit of reading very detailed but balanced victim impact statements from members of Mr Henderson's family. These make it clear that he was a loved member of their family. He spent a lot of time with them and was clearly cherished by them. They, in a broader sense too, are very much the victims of your offending because they have lost a loved son and brother. They will never be able to share family moments with him again and that damage is irreplaceable and incalculable.

[15] Having said that, I have been heartened to learn during sentencing submissions that, during the course of the trial, members of the Henderson family were able to meet and mix with members of your families. This may well have had some degree of cathartic or remedial impact for them although, of course, nothing can take away the fact that they have lost forever a member of their family.

[16] The sentence that I impose on you must be consistent so far as it can be with sentences imposed in other broadly similar cases. That is difficult in this area, as I shall shortly outline. Finally, I need to impose a sentence that is the least restrictive outcome that is possible in the circumstances. In the circumstances of your offending, as your counsel responsibly recognise. This really means that I have to select a sentence of imprisonment that is as short as possible bearing in mind the nature of your offending and also your personal circumstances.

Starting point

[17] In any case where an offender is to be sentenced on a charge of manslaughter, the Court is faced with immediate difficulties. There is no "tariff", or guideline, judgment from our Court of Appeal dealing with the offence of manslaughter. The Court of Appeal has steadfastly declined to issue a guideline judgment in this area because the circumstances in which the crime of manslaughter can be committed varies so widely: *R v Edwards* [2005] 2 NZLR 709 at 713.

[18] In some cases, a very short sentence of imprisonment may be imposed or, even a non-custodial sentence. At the other end of the scale, sentences of 16 years to life imprisonment have been imposed. Given that scenario, it is not surprising that

the Court of Appeal has emphasised that when sentencing an offender on a charge of manslaughter, it must impose a sentence that reflects the purposes and principles of the Sentencing Act and yet is broadly consistent with other similar cases. Having said that, the cases that I have reviewed in preparing for this sentencing demonstrate that the circumstances of no two cases are ever exactly the same.

[19] All counsel have referred me to a number of other cases in which this Court has sentenced people who have been convicted of manslaughter. I do not propose to go through the details of those other cases in any depth today. I consider that the circumstances of the present case are perhaps less serious than the first two cases cited by the Crown namely *R v Grace & Heta* HC AK CRI 2006-092-016632 24 March 2009 Winkelmann J and *R v Challis* CA500/08 and 518/08, 6 November 2008.

[20] In *Grace & Heta* the Court was dealing with a home invasion context where the victim had been overpowered and his arms had been bound behind the back with duct tape. His eyes and mouth were also gagged, and during the struggle that led to this occurring he was stabbed in the arm. The principal offender in that case was sentenced to life imprisonment and in the case of the co-offenders the sentencing Judge took a starting point of nine years imprisonment. As I have said, I consider that the circumstances of that case are slightly more serious than those in the present case.

[21] Similarly, the case of *R v Challis* involved the use of a firearm and the persons who were convicted as parties to that offence knew that the principal assailant intended to use the gun. In that case a starting point of ten years imprisonment was adopted.

[22] I have also concluded, however, that the case of *R v Matautia* HC AK CRI 2006-092-013486 29 November 2007 Lang J to which counsel have also referred, is slightly less serious. That involved the opportunistic robbery of a vulnerable intoxicated victim. He died as a result of a punch that caused him to fall to the pavement and thereby suffer another blow to his head. Although that case did have sinister overtones, I am satisfied that it is less serious than your case. In that case I

was the sentencing Judge and selected a starting point in the case of the principal offender of six years three months imprisonment.

[23] I have found perhaps the greatest assistance from the case of *R v Hughes and Shortland* HC WHG CRI 2005-088-4349 11 May 2007 Keane J. That, too, was a street attack and in that sense it differed from the circumstances of this case. The offenders in that case had been walking about town accosting potential victims. When they approached their final victim they punched him numerous times and he fell down striking his head on the pavement with significant force. In that case the sentencing Judge selected a starting point of seven years imprisonment.

[24] I consider that your offending is slightly more serious than that in *R v Hughes and Shortland*. I say that because your offending involved elements of premeditation that were not present in *Hughes and Shortland*. I will return to this issue shortly in relation to the starting point that I select in relation to each of you because the elements of premeditation differ. Secondly, your offending involved the carriage of a lethal weapon to the scene and also the use of a weapon, namely an object like a stick, in the events that led to Mr Henderson's death. Neither of those factors was present in the case of *Hughes and Shortland*.

[25] It is necessary to deal with the starting point that I select in relation to each of you separately because you each participated in the events that led to Mr Henderson's death in a different way.

Mr Fuimaono

[26] So far as you are concerned, Mr Fuimaono, you were convicted as the principal offender. This means that you were the person who actually struck the blow or blows that led to Mr Henderson's death. For this reason you are primarily responsible for the situation that has occurred and I take the view that the sentence that must be imposed on you should be greater than that imposed on Mr Rafiee and Mr Matlobyaygazwini.

[27] In assessing the starting point to be adopted in your case, I accept your counsel's submission that any premeditation on your part must have arisen relatively shortly before the attack on Mr Henderson began. You cannot have known what was to occur until you made the telephone call to Mr Rafiee at 3.59 pm. That call is likely to have been in relation to a matter completely unrelated to the events that were about to unfold in relation to Mr Henderson. By that stage, however, the events were well in train and Mr Henderson's arrival at the address must have been expected. You then consciously and deliberately decided to involve yourself in those events by driving from West Auckland to the Ellerslie-Panmure Highway.

[28] In my earlier findings I have concluded that I cannot say that you deliberately waited outside the address until Mr Henderson arrived and then drove up the driveway so as to block his vehicle and thereby prevent it from leaving. Nevertheless, you made a deliberate decision to involve yourself in an incident that you knew was going to involve violence for sure.

[29] You then had a second opportunity to extricate yourself from those events when Mr Henderson ran away. You did not follow on foot but, rather, left the property in your car. It was open to you at that time to continue driving and if you had done that you would never have been involved in these criminal proceedings. Instead, you saw what was happening in the driveway and you elected to return and become involved in those events.

[30] In my earlier factual findings I have said that I cannot discount the possibility that Mr Henderson may have armed himself with a stick after he went up the driveway at the address over the road from the property from which he had fled. He may also have advanced towards you brandishing that stick. In that sense, you say, that you acted in a form of self-defence or, at the very least, provocation.

[31] I have accepted that, to a very limited extent, that may be the case but that this does not really remove much of the culpability of your actions. This is because Mr Henderson had been chased by several people from that driveway. He knew from what had occurred earlier that he was in physical danger from a number of assailants. He had also, by that stage, been the subject of an assault by Mr

Matlobyaygazwini. In those circumstances it is hardly surprising that he may have armed himself with whatever implement was available in the vicinity to defend himself against the actions of the members of your group.

[32] I therefore discount to a large extent any degree of provocation that may have occurred as a result of the fact that there is a reasonable possibility that Mr Henderson armed himself with a stick.

[33] The blows that you struck to Mr Henderson's head were struck using a weapon. The pathologist told the Court that the fatal blow was sufficient not only to cause a significant laceration to Mr Henderson's scalp, but also to cause significant fractures of his skull. The pathologist described the force required to inflict such a blow as being "moderate". That is the language that pathologists use, but in lay terms I am satisfied it must have been a reasonably significant blow to cause the type of damage that occurred.

[34] The pathologist also told the Court that there were bruises to Mr Henderson's face and I take the view that these are likely to have been caused by Mr Matlobyaygazwini when he punched Mr Henderson. There was also damage to a rib but I am unable to lay the blame for that injury at the hands of any of you although, clearly, one of you must have inflicted it.

[35] So you used an object such as a stick to strike a forceful blow to a very vulnerable part of Mr Henderson's anatomy. Although you did not intend to cause death and may not have appreciated that death was a likely result, nevertheless the actions that you took in striking him in that way led directly to his death and in that sense are extremely culpable. They also occurred in the context of an incident in which you had willingly involved yourself from a distance, and to which you had re-attached yourself after having had an intermediate opportunity to depart from the scene.

[36] Taking all of those matters into account, I have reached the view that an appropriate starting point so far as you are concerned is a sentence of eight years imprisonment.

Mr Matlobyaygazwini

[37] I now need to consider your culpability, Mr Matlobyaygazwini. As my earlier findings indicate, you were in a large sense the prime architect of what occurred here. It is not surprising that you were angry and upset about what Mr Henderson had done to you in your motel unit a few days earlier. The desire for revenge and retribution was no doubt uppermost in your mind from that point onwards. As I am sure you now appreciate, the appropriate way to deal with that matter was not to seek revenge yourself but to place matters in the hands of the authorities. It is perhaps not surprising that you did not adopt that course of action, though, because that would necessarily have probably required you to tell the police that you were involved in drugs.

[38] Nevertheless, my earlier findings indicate that any desire for revenge probably was in an unformed state until the afternoon of 9 March. When you learned that Mr Henderson was in Auckland, however, I am satisfied that you began to plan your retribution. You were involved in the efforts that were made to have him come to the Ellerslie-Panmure Highway. You then went to enlist the aid of Mr Rafiee to assist you in what I am satisfied was a plan at that stage to inflict a reasonably serious assault on Mr Henderson.

[39] In his written submissions, your counsel suggested that it is unlikely that you became aware of the weapon that Mr Rafiee was carrying until some point after you had left Mr Rafiee's house. I do not accept that submission. Mr Banarfard saw the two weapons as Mr Rafiee got into the vehicle. I am sure that you, Mr Matlobyaygazwini, would have known of the existence of the weapons and the fact that Mr Rafiee was carrying them from the point at which you left his house.

[40] When Mr Henderson arrived you, Mr Matlobyaygazwini, were the person who immediately confronted him in what I am satisfied was an extremely aggressive manner. You could see at that point that he was terrified and was trying to escape. When he eventually made his escape you did not allow him to get away. You immediately chased him from the property and chased him across the road. There you began to punch him.

[41] I am satisfied that you were not carrying any weapon. Indeed it seems that the attire that you were wearing was wholly inappropriate for the implementation of a planning involving the infliction of violence. It seems that you had bare feet and you were wearing no shirt. Nevertheless, you knew that Mr Rafiee had a weapon and you knew that Mr Fuimaono was also coming to lend his assistance to your plan. You were therefore fully involved in the events that led up to the critical period of time in which the fatal blows were inflicted on Mr Henderson. Indeed, it may be that Mr Fuimaono saw you fighting with Mr Henderson in the driveway and that this is what caused him to turn back.

[42] In those circumstances I have concluded that you are not as culpable as Mr Fuimaono because you did not inflict the fatal blows. Nevertheless, you created the circumstances in which that was likely to occur.

[43] I am therefore satisfied that a starting point of seven years imprisonment is appropriate so far as you are concerned.

Mr Rafiee

[44] Mr Rafiee, your position has given me pause to reflect. In the earlier findings that I delivered on 29 October 2009, I said that I was satisfied that your culpability was less than that of Mr Fuimaono and roughly equal with that of Mr Matlobyaygazwini. Your real culpability arises from the fact that you were clearly willing to involve yourself in a situation that would inevitably involve the infliction of violence on Mr Henderson. You had known about the earlier incident because you made phone calls to Mr Henderson immediately after it in which you made comments to him that could be taken as threats. You were also willing to become involved as soon as Mr Matlobyaygazwini came to your house on the afternoon of 9 August.

[45] Your counsel is perhaps correct when he says that it may be coincidence that you became involved. This is because the phone call evidence establishes that you were in the City at about 3 pm. Had you remained there, it may be that you would never have been involved in this incident. It is now not possible, however, to turn

the clock back. The fact is that you were at your residence and you were prepared to become involved in Mr Matlobyaygazwini's plan.

[46] The single aggravating feature about your involvement is the fact that you were prepared to carry a firearm and another form of weapon to the address at Ellerslie-Panmure Highway. That gives some indication about the level of violence that was possible, although I accept of course, that the weapon was never used. Had it been used, Mr Rafiee, no doubt you would all be facing sentences on a charge of murder. The carriage of the firearm to that address was a significant aspect of your involvement and one that calls for recognition in the starting point that I adopt.

[47] It is clear from the evidence, however, that you played no part at all, other than providing your mere presence, in the events that actually led to Mr Henderson's death. You did not strike any blows and instead you left the scene with Mr Fuimaono as soon as the incident was over.

[48] In your case, and after considerable reflection, I have concluded that a starting point of six years imprisonment is warranted.

Aggravating factors

[49] I now need to consider whether the starting points that I have selected should be increased to reflect aggravating factors that are personal to you. I say at the outset that the only such feature could be the existence of previous convictions. You all have previous convictions but these differ widely.

[50] I have reached the conclusion, as indicated during the hearing today, that I do not propose to apply an uplift in relation to previous offending by Mr Rafiee and Mr Matlobyaygazwini. Although they both have previous convictions they are of a different type and gravity to the offending for which they appear for sentence today. Predominantly they are driving offences and I do not consider that they would justify any form of uplift.

[51] Mr Fuimaono, your position is different because you have now amassed more than 50 convictions. Some of these are for offences involving violence or threatened violence. You have been convicted on a charge of threatening to kill. You have also received a significant sentence of being a party to an aggravated robbery.

[52] You must know now that choosing to involve yourself in crimes of violence is a hazardous exercise. The Court must now take the view in your case that you have elected to involve yourself in violence when you know that the Court views it extremely seriously.

[53] The imposition of an uplift does not operate to punish you again in relation to past offending. Rather, it reflects the fact that your current offending is made more serious by the existence of your previous convictions. It shows that earlier sentences have not worked. It shows that you know what is likely to happen if you involve yourself in crimes of violence. It shows that you are prepared to take the consequences of what happens if you become involved in that type of offending.

[54] This was a deliberate choice to become involved in serious offending in light of the fact that you had received significant sentences in the past for earlier offending involving violence, whether actual or threatened. I take the view that your previous sentences are such that they warrant an uplift of 12 months to reflect that fact.

Mitigating factors

[55] I now need to consider whether there are any mitigating factors that operate to reduce the starting points that I have selected. In this context I have had the benefit of helpful pre-sentence reports in relation to all of you.

Mr Matlobyaygazwini

[56] So far as you are concerned, Mr Matlobyaygazwini, you appear for sentence at the age of 35 years. You have some difficulties in this country in that you come from another country. The pre-sentence report does not make flattering reading. It suggests that you remain full of grandiose ideas, that you have no real insight into

your current offending and that you remain at high risk of offending again in the future.

[57] The latter comment appears to be driven principally by the fact that you have been involved in drugs and that you also surround yourself with associates who become involved in criminal offending. That really can be the only basis upon which that prediction can be made because your past history does not demonstrate a commitment to serious offending, and this is usually the best predictor so far as serious offending is concerned.

[58] Your counsel has submitted that I should make some allowance for the fact that the Crown rejected an offer by Mr Fuimaono to plead guilty to the charge of manslaughter. He submits that, if the Crown had accepted that offer, then all of the accused would have benefited from it.

[59] An important factor, however, in an offer to plead guilty is the fact that it represents an acceptance of responsibility for offending. In your case, your counsel properly concedes that you never made any offer to plead guilty to any charge. Indeed, my own recollection of your stance at the beginning of the trial was that you considered the charge to be frivolous and that it had no basis whatsoever. I therefore doubt very much whether, even if the Crown had offered to accept a plea of guilty to a charge of manslaughter, that it would have been accepted in your case.

[60] Putting that matter to one side, the reality is that you did not ever offer to plead guilty to any charge. You did not therefore accept responsibility for your offending prior to the trial and for this reason I cannot give you any form of discount in relation to that factor.

[61] The reality also is that the existence of your previous convictions means that I cannot give you a discount in relation to a previous clean record either. For that reason I regret that I find myself unable to apply any discounting factor in your case.

Mr Rafiee

[62] Mr Rafiee, you appear for sentence at the age of 29 years. You come from Iranian extraction and by accounts you come from an honest and hardworking family. Your counsel suggests that in recent times you have been somewhat out of control and if this is the case I have no doubt it is because of your involvement in methamphetamine. You do have previous convictions and these mean that I am unable to offer you a discount on the basis of a hitherto clean record.

[63] Like Mr Matlobyaygazwini you did not offer at any stage to plead guilty to any charge so I am unable to take that matter into account either. Again, as in the case of Mr Matlobyaygazwini, I find that I am left in your case with the starting point that I have selected.

Mr Fuimaono

[64] Mr Fuimaono, your position is different because you did, through your counsel, attempt to engage the Crown in negotiations regarding a plea of guilty to a charge of manslaughter.

[65] On 9 June 2009 your junior counsel wrote to the Crown offering to plead guilty to manslaughter. The offer was not an unconditional offer, in the sense that it did not definitively state that you were prepared to plead guilty to a charge of manslaughter. Nevertheless, the letter makes it clear that counsel anticipated being able to ensure that you pleaded guilty to manslaughter in the event that the Crown was prepared to accept a plea to that charge.

[66] The Crown did not formally respond to that offer, but I am advised that Crown counsel advised your senior counsel orally that the Crown wished to proceed to trial on the charge of murder. The Crown was, of course, quite entitled to do that and I can understand, in the circumstances of the present case, why the Crown wished the verdict to be one of the jury rather than a decision by the Crown to accept a plea to a lesser charge than murder. Nevertheless, the authorities make it clear that

an offer to plead guilty to a charge of manslaughter can be taken into account by a sentencing court when fixing sentence: *R v Edwards* (supra) at [38] to [41].

[67] In your case, my own factual findings broadly mirror the version of events such as it was, that you gave to the police at the time of your arrest. I have not accepted your explanation as to why you went to that address and that is a significant matter that would have needed to be resolved before, I am sure, any plea was entered. Nevertheless, I have ultimately concluded that it is reasonably possible that your version of events in relation to the critical aspects of the incident may well be correct.

[68] In those circumstances, I consider that I am entitled to provide you with a discount in relation to your attempt to plead guilty prior to trial. Had that offer been explored and accepted it would, of course, have saved the State the cost of a trial.

[69] The recent decision of the Court of Appeal in *R v Hessel* CA170/09 2 October 2009 sets guidelines for the way in which an offer to plead guilty prior to trial can affect the ultimate outcome of a sentence. The Court of Appeal has said that an offer to plead guilty at first callover in this Court will attract a discount of 20 per cent, whereas an offer to plead guilty within two weeks of the trial will only result in a ten per cent discount being given.

[70] In your case the first callover in this Court occurred on 12 November 2008. Your offer, such as it was, was not made until 9 June 2009, which was just two months prior to the trial. Nevertheless, the Court of Appeal in *Hessel* has made it clear that a sliding scale operates between the point at which first callover occurs and plea entered on the eve of trial. In your case, therefore, any discount to be applied falls toward the ten per cent end rather than the 20 per cent end of the scale.

[71] Your counsel has also referred today to the fact that you have been prepared to make an offer of reparation in the sum of \$2000 to the Henderson family. That, of course, can in no way provide them with any meaningful recompense for the harm that they have suffered. It also occurs in the context of an offer made immediately prior to sentencing. That makes it very difficult for the Court to give any meaningful

weight to the offer to pay a small amount of reparation. Your counsel responsibly accepts that that must be the case, and that it could only marginally affect the overall sentence that I impose.

[72] Taking those two factors in the round, I propose to provide you with a discount of 12 months to reflect the mitigating factors to which I have referred.

Sentence

[73] Mr Fuimaono, on the charge of manslaughter you are sentenced to eight years imprisonment.

[74] Mr Matlobyaygazwini, on the charge of manslaughter you are sentenced to seven years imprisonment.

[75] Mr Rafiee, on the charge of manslaughter you are sentenced to six years imprisonment.

Minimum term of imprisonment

[76] The Crown has also submitted that I should give consideration to imposing a minimum term of imprisonment. I have the power to do that under s 86 of the Sentencing Act 2002 in any case where I am satisfied that it would be inappropriate for you to be able to apply for parole in the usual way after serving one-third of your sentence. I can make such an order when I am satisfied that it is required to denounce your conduct, to deter you and others from engaging in similar behaviour, to hold you responsible for your conduct and/or to protect the community.

[77] The Crown submits that this offending is sufficiently serious that it warrants the imposition of a minimum term of imprisonment. It has referred me to a number of cases where minimum terms have been imposed when an offender has been sentenced on a charge of manslaughter.

[78] In your case, I am not satisfied, perhaps with the exception of you, Mr Fuimaono, that you present a risk to the community in the future. The present

offending did not occur in a situation where there was any degree of threat to members of the public, other perhaps than those in the immediate vicinity of the driveway where the fatal blows were inflicted. It arose out of a discrete situation in which you decided to take the law into your own hands to exact retribution for the events that had occurred a few days earlier.

[79] The real issue is whether the offending is sufficiently serious to cross the line requiring the Court to impose a minimum term of imprisonment to mark the need to deter, denounce and hold the offenders responsible for their acts. As I said during the hearing, your case lies at the margin. I say this because it involved significant elements of premeditation. It involved also the carriage of a weapon to the place where a confrontation was to occur, and it involved reasonably persistent attempts to confront Mr Henderson.

[80] Having said that, the most significant degree of premeditation came from Mr Matlobyaygazwini and then Mr Rafiee. The principal offender, Mr Fuimaono, probably had the least premeditation of any of you. Then there is the fact that you, Mr Rafiee, did not actually take the weapon to the incident that was ultimately used. You did not participate at all, either, in the incident that led to Mr Henderson's death. And similarly, you, Mr Matlobyaygazwini, did not contribute in any meaningful way to the physical events that led to Mr Henderson's death.

[81] This Court, unfortunately, sees many case involving violent death. They come in many shapes and forms and all of them are distressing and filled with trauma for everybody involved. That does not mean, however, that every case in which a person meets a violent death will result in a minimum term of imprisonment being imposed on the offenders.

[82] In broad terms, this involved a pursuit and a street fight between Mr Matlobyaygazwini and Mr Henderson. Mr Fuimaono then joined that confrontation. I have found that he may have been confronted by Mr Henderson wielding a stick, although that is not surprising given the situation in which he was in. It was at that point that I found that it is reasonably possible that Mr Fuimaono obtained possession of the instrument and inflicted the fatal blows on Mr Henderson.

[83] When I take those matter into account, I cannot say, bad as they are, that the circumstances of this particular offending are sufficiently serious that I should impose what amounts to an additional penalty on the prisoners in the form of a minimum term of imprisonment. I have therefore concluded that it would not be appropriate in the circumstances of this case to impose the minimum term that the Crown seeks.

Reparation

[84] I make an order that Mr Fuimaono is to pay reparation in the sum of \$2000 to the family of Mr Henderson. That payment is to be facilitated between counsel for Mr Fuimaono and counsel for the Crown.

Lang J

THE QUEEN

V

AHMAD MATLOBAYAYGAZWINI
TUALE JOE FUIMAONO
ALI RAFIEE

Date of hearing: 21 October 2009

Counsel: Mr D G Johnstone and Ms K A Lummis for Crown
Mr B Hart and Mr H Lawry for Matlobyaygazwini
Mr S B W Grieve and Ms M Pecotic for Fuimaono
Mr M Gibson and Mrs Lowe for Mr Rafiee

Date of minute: 20 October 2009

FACTUAL FINDINGS OF LANG J
[following jury's verdicts]

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[1] On 22 September 2009 a jury convicted Mr Fuimaono, Mr Matlobyaygazwini and Mr Rafiee on charges of manslaughter. They found all three accused not guilty on the primary charge of murder that the Crown had laid. They were convicted at that time and remanded until today for pre-sentence reports and sentencing.

[2] Over the last few days I have received memoranda from counsel for the prisoners indicating that they needed to receive various factual findings from me in order to properly prepare their submissions for their respective clients on sentencing. For that reason it was agreed that a hearing would be held this morning at which counsel would present submissions in relation to the factual scenarios that were open on the evidence and the jury's verdicts.

[3] After hearing those submissions I now present my factual findings in relation to the issues that are relevant for sentencing purposes. I reach my conclusions based on the evidence and on the jury's verdicts. Whilst I have approached my task on the basis that I am free to reach my own conclusions regarding facts that are not evident from the jury's verdicts, I also bear in mind the provisions of s 24 of the Sentencing Act 2002. In dealing with aggravating factors the onus is on the Crown to prove the existence of those factors beyond reasonable doubt.

[4] The incident that led to the charges against the accused occurred on the afternoon of 9 March 2008. That incident had its genesis, however, in a series of events that had occurred over the preceding days. It is clear from the evidence that Mr Matlobyaygazwini and the deceased, Mr Bjorn Henderson, had a reasonably close relationship. The principal nexus between the two appears to have been a common interest in dealing in drugs, and methamphetamine in particular. It seems that Mr Henderson would acquire methamphetamine from time to time from Mr Matlobyaygazwini.

[5] In the early hours of 7 March 2008, Mr Henderson went to Mr Matlobyaygazwini's motel unit where he was then staying. He entered the unit accompanied by three associates. He immediately became aggressive towards Mr Matlobyaygazwini. He and/or others assaulted Mr Matlobyaygazwini. The most serious assault appears to have been a blow to Mr Matlobyaygazwini's head with a

pistol. This caused a laceration to Mr Matlobyaygazwini's scalp that was still visible some days later. When Mr Henderson left the motel unit, he took with him drugs and cash belonging to Mr Matlobyaygazwini.

[6] Mr Rafiee was not at the motel unit when the incident occurred. Instead he was in the City with associates. It seems, however, that he was called back to the unit shortly after the incident ended. When he arrived he found Mr Matlobyaygazwini in an injured state. There appears to be no dispute that, at some time shortly after his arrival back at the unit, Mr Rafiee telephoned Mr Henderson. He said words to the effect that Mr Henderson should not try to hide in Hamilton because it was a small place. He also said that Mr Henderson "did not know who he had ripped off".

[7] The evidence from Mr Henderson's partner, Ms Ware, was to the effect that Mr Henderson did not appear to take these words particularly seriously. He treated them as some kind of a joke. Nevertheless, I have no doubt that Mr Rafiee intended that his words be taken seriously and that by making those telephone calls he showed that he had some interest in the outcome of the incident in the motel unit, even if he did not have any proprietary interest in the items that had been taken.

[8] I do not consider that the evidence establishes that Mr Rafiee and Mr Matlobyaygazwini formed a definite intention at that time to assault Mr Henderson. I have no doubt, however, that Mr Matlobyaygazwini in particular was very angry about what had happened and that he and Mr Rafiee had reached a view that, when an opportune moment arose, they would exact retribution in some form or other. I do not consider, however, that the plan was any more formalised than that at that stage.

[9] There is no indication over the next two days of any advancement in the plan to exact retribution on Mr Henderson. I am satisfied, however, that Mr Fuimaono came to know of the incident in the motel unit at some stage during this period. I put to one side a telephone call conversation that Mr Fuimaono and Mr Rafiee appear to have had at approximately 12.44 am on the morning of 7 March. That telephone conversation may well have occurred prior to the assault in the motel unit.

Nevertheless, there were two telephone calls shortly after midday on 7 March 2008. There were also some other calls over the next 48 hours. Given the undoubted importance of the incident to Mr Matlobyaygazwini and Mr Rafiee, I have no doubt that Mr Fuimaono came to learn during these telephone conversations of what had happened to Mr Matlobyaygazwini in the motel unit.

[10] On the afternoon of 9 March 2008, Mr Matlobyaygazwini went to the address of 408 Ellerslie-Panmure Highway. That address was occupied by Mr Malikshahi. I am satisfied that his purpose in going to the address was to have some work carried out on his motor vehicle. It seems that Mr Malikshahi is something of a mechanic and was wont to carry out repairs and maintenance on motor vehicles belonging to friends and associates.

[11] Whilst Mr Matlobyaygazwini was at that address, he learned from Mr Malikshahi that Mr Henderson was to be in the Auckland area that day. He was accompanied by an associate of Mr Malikshahi by the name of Mr Mokhtari. A series of telephone calls took place during the course of the day on 9 March 2008 between Mr Malikshahi and Mr Mokhtari. I am satisfied that Mr Malikshahi, at the behest and encouragement of Mr Matlobyaygazwini, encouraged and persuaded Mr Mokhtari to bring Mr Henderson to 408 Ellerslie-Panmure Highway later in the day. It seems that the purpose of that visit was related to the acquisition of drugs by one party or the other.

[12] I am satisfied that once Mr Matlobyaygazwini knew that it was likely that Mr Henderson would be coming to the address, he drove to Mr Rafiee's address in Pakuranga. Mr Rafiee had earlier in the day been in the City, where he had spoken to an associate from whom he had obtained a top-up for his cellphone. I accept that he may well have returned home shortly before Mr Matlobyaygazwini arrived.

[13] Mr Matlobyaygazwini went into Mr Rafiee's address and then came back to the vehicle accompanied by him. Also in the vehicle at that time was an associate of Mr Malikshahi's by the name of Amir Banafard. He was sitting in the rear of the vehicle and Mr Rafiee joined him in the back seat.

[14] Mr Banafard's evidence at trial was that when Mr Rafiee got into the vehicle he saw what appeared to be a pistol in the pocket or in the waistband of his trousers. He also said that Mr Rafiee was carrying another weapon, although his description of that weapon leaves one with a total inability to come to any conclusion as to its identity.

[15] My conclusion on this point is that when Mr Matlobyaygazwini went to Mr Rafiee's address he and Mr Rafiee formed a common intention to exact retribution on Mr Henderson. The exact form of that retribution was probably not known, but it no doubt involved physical violence and the jury's verdict as to the common intention that they reached confirms the type of intention that they had.

[16] There was a significant contest at trial in relation to Mr Banafard's evidence that he had seen a weapon or weapons in the possession of Mr Rafiee when he got into the car. I, myself, am sure that he was telling the truth in relation to that issue. In reaching that conclusion I acknowledge that Mr Banafard had on earlier occasions said that he was not sure whether it was a real pistol or a toy pistol, and that he was unsure as to whether it was a cellphone or a pistol. When he was confronted on these issues at trial, he said that he had made those comments because he was scared of the people with whom he was dealing.

[17] One of the issues that the jury had to decide was whether Mr Matlobyaygazwini and Mr Rafiee knew that either he or another member of his group was in possession of a weapon at the time that they began to carry out the common unlawful purpose after Mr Henderson ultimately arrived at 408 Ellerslie-Panmure Highway. The jury obviously answered this question in the Crown's favour by virtue of the fact that they brought in verdicts of guilty of manslaughter.

[18] The only evidence of any weapon in the possession of any of the prisoners at the critical time came from Mr Banafard. Like the jury, I accept his evidence that Mr Rafiee got in the vehicle to go back to 408 Ellerslie-Panmure Highway carrying one or more weapons, one of which was a pistol.

[19] After the men got back to 408 Ellerslie-Panmure Highway they went inside Mr Mokhtari's address. There they engaged in general conversation and some methamphetamine was smoked. It appears that at about this time Mr Jason Suttie and his brother also arrived at the address. Shortly after that, Mr Mokhtari arrived with Mr Henderson in the passenger seat of his vehicle.

[20] The evidence makes it clear that Mr Matlobyaygazwini immediately went out of the address and approached the vehicle. I am satisfied that Mr Rafiee also approached the vehicle, but I am not satisfied that he did anything at that point other than observe what was going on.

[21] The evidence given by Mr Malikshahi and Mr Banafard satisfies me that those who were present at the address knew that trouble was brewing, and that it was likely that violence would occur if and when Mr Henderson arrived at the address. Although some of them made reference to the fact that Mr Matlobyaygazwini only wished to talk to Mr Henderson about what had happened in the motel unit, their demeanour and the manner in which they gave their evidence, and the evidence itself, makes it clear that they knew that it was likely that violence would occur after Mr Henderson's arrival.

[22] That apprehension is borne out, in my view, by the events that occurred after Mr Matlobyaygazwini approached Mr Henderson's vehicle. It is clear that he was very angry and immediately began talking in that tone of voice to Mr Henderson. It is equally clear that Mr Henderson was terrified. He tried to gain a measure of protection by winding up the windows and locking the door of the vehicle so that Mr Matlobyaygazwini could not gain access to him. I am satisfied that Mr Matlobyaygazwini did not merely wish to discuss the earlier events with Mr Henderson. Instead, he wanted to begin the process of exacting physical retribution on Mr Henderson for what he had done to him in the motel unit a few days earlier.

[23] Mr Henderson then tried to escape by reversing his vehicle down the driveway. In doing so, he collided with Mr Banafard's vehicle. At this point, also, Mr Fuimaono's vehicle came up the driveway and was virtually immediately involved in a collision with Mr Henderson's vehicle.

[24] I am satisfied that Mr Fuimaono did not arrive at that address by way of coincidence. He became aware of what was to happen at the address by way of a telephone conversation that he had with Mr Rafiee at 3.59 pm. Although I accept that it was Mr Fuimaono who called Mr Rafiee and not the other way around, I am satisfied that he was told during that telephone conversation of what was to occur and that he immediately drove from his then location in West Auckland to 408 Ellerslie-Panmure Highway.

[25] I do not consider that he went there for the purpose of obtaining a Waste Gate part for his motor vehicle. At 4 pm Mr Rafiee and Mr Matlobyaygazwini were no doubt anxiously awaiting the arrival of Mr Henderson. I am satisfied that the provision of motor vehicle parts would have been the furthest thing from Mr Rafiee's mind at that time. In my view the only reason that Mr Fuimaono went to the address was because Mr Rafiee had told him what was happening and what was to happen when Mr Henderson arrived. I am satisfied that Mr Fuimaono went to 408 Ellerslie-Panmure Highway with the intention of becoming involved in the incident that he knew was about to occur.

[26] I am not sure, however, as to whether he deliberately parked his vehicle outside the address and waited for an opportunity to block Mr Henderson's escape from the address. It may be that he coincidentally arrived at the address at the same time that Mr Henderson was trying to back his vehicle down the driveway.

[27] Nevertheless, it is clear that as soon as the collision occurred Mr Fuimaono got out of the vehicle. At about that time Mr Henderson managed to escape from the vehicle by climbing through the front passenger door window. He then made a spectacular exit from the address through a nearby hedge and into a neighbouring property.

[28] The evidence is somewhat unclear as to exactly what happened next, but it is clear that Mr Rafiee and Mr Matlobyaygazwini virtually immediately pursued Mr Henderson. There was some suggestion that Mr Matlobyaygazwini went through the hedge after Mr Henderson and pursued him through the neighbouring property and out onto Ellerslie-Panmure Highway. Other evidence suggested that he went down

the driveway with Mr Rafiee. It probably does not make a great deal of difference one way or the other, but the preponderance of the evidence was to the effect that the latter occurred. It appears that they were followed a short time later by Jason Suttie.

[29] What is clear is that Mr Henderson endeavoured to escape by running across Ellerslie-Panmure Highway. I am satisfied that he was followed in close order by Mr Matlobyaygazwini and Mr Rafiee, who were endeavouring to catch him. Again, I have no doubt that their intention was not to have a rational discussion with him about what had occurred in the motel unit. Rather, the rapidity with which they pursued him suggest that they were implementing their common intention to exact revenge.

[30] Mr Henderson ran up the driveway of 513-515 Ellerslie-Panmure Highway. He was followed closely by Mr Matlobyaygazwini. There, I am satisfied that Mr Matlobyaygazwini began punching Mr Henderson. This continued for a short while before he broke off the assault and ran back down the driveway. Mr Rafiee remained towards the end of the driveway at all material times and did not embark on any assault of Mr Henderson in the driveway.

[31] It is also clear from the evidence of motorists who passed by at the time that this incident occurred that none of the persons who ran across Ellerslie-Panmure Highway were carrying weapons of any description.

[32] Mr Fuimaono did not follow the others on foot. Instead, he reversed his vehicle out onto the road and then drove a short distance up the road. He clearly saw, however, what was happening the driveway of 513-515 Ellerslie-Panmure Highway. He then did a U-turn in Burke Street and returned to that driveway. It appears that he parked in or about the entrance to the driveway. He then approached the area where Mr Henderson had been confronted by Mr Matlobyaygazwini.

[33] The next issue that I need to determine is whether I should give credence to the version of events that Mr Fuimaono gave to the police. This is a reasonably important issue because, other than the prisoners, no one witnessed what was happening in the driveway of the address.

[34] In short, Mr Fuimaono said that when he got up the driveway Mr Henderson was armed with a stick. Mr Henderson advanced upon him and swung it at him. Mr Fuimaono said words to the effect that Mr Henderson was clearly affected by drugs and that he was acting in a crazed or wild state. Mr Fuimaono said that he was able to wrest the stick from Mr Henderson as he swung it towards him. He then hit Mr Henderson on the head with the stick. He said that he hit Mr Henderson with the stick on three separate occasions. He said that after Mr Henderson fell to the ground on the first occasion he appeared to be getting up and coming towards him again. It was in those circumstances that he administered further blows after having already struck him on the head on the first occasion.

[35] It is clear from the pathological evidence that Mr Henderson must have been struck with a blunt object with reasonable force. There is no evidence, however, as to where that object came from. The most that can be said is that it must have come from the vicinity of the area in which the confrontation took place in the driveway of 513-515 Ellerslie-Panmure Highway. There is no evidence to suggest that Mr Fuimaono took a stick with him in his motor vehicle when he left 408 Ellerslie-Panmure Highway and drove across the road.

[36] The defence submission is that I should accept, as being reasonably credible, Mr Fuimaono's narrative. The importance of this is that it shows that Mr Henderson was armed with a stick and advanced towards Mr Fuimaono in a menacing way. Indeed, he actually swung the stick at Mr Fuimaono and it was in that context that Mr Fuimaono grabbed the stick and then hit Mr Henderson with it.

[37] Counsel submitted that, although the jury obviously rejected self-defence, nevertheless there is no indication that it did so on the basis that it did not believe Mr Fuimaono's version of events. Counsel submitted that it is open to me to conclude that the jury may have rejected the defence because of the fact that Mr Fuimaono acted disproportionately in striking Mr Henderson again even after he had effectively disabled him with the first blow. Counsel submitted that this was an important distinction for sentencing purposes.

[38] There is no evidence to contradict the version of events given by Mr Fuimaono. There is also some support for it in assertions made by the other prisoners, although at trial that was not admissible in relation to Mr Fuimaono. In those circumstances I cannot be sure that Mr Fuimaono was the aggressor throughout this situation. I therefore proceed on the basis that Mr Henderson may have had the stick at some stage before being disarmed by Mr Fuimaono. Indeed, he may have been endeavouring to strike Mr Fuimaono in the way that Mr Fuimaono described.

[39] Having said that, I accept that there is force in the Crown's submissions that that is probably an unlikely scenario. I say that because all of the evidence points to Mr Henderson doing everything he could to run away from his pursuers throughout the scenario that I have just described. It would be surprising, in my view, if he was to suddenly become the aggressor.

[40] This observation really leads to my next comment. If Mr Henderson did become the aggressor, then I am satisfied that he only did so in the context of defending himself against the attack that had already begun by Mr Matlobyaygazwini and which he knew would be continued once Mr Fuimaono arrived.

[41] This is not a situation in which Mr Matlobyaygazwini and Mr Fuimaono were advanced upon whilst going about their lawful business. They were involved in carrying out an unlawful purpose, namely a serious assault, on Mr Henderson. The implementation of that purpose had already gone some distance. It had involved the confrontation at the vehicle. It had involved the pursuit of Mr Henderson as he ran across the road and the confrontation of him in the driveway of the address.

[42] From Mr Fuimaono's perspective it is made all the more culpable by the fact that he had the opportunity to leave the scene and not join in what happened in the driveway. He had the ability to continue driving down Ellerslie-Panmure Highway and divorcing himself from what happened. Instead, he elected to divert his journey and drive into the driveway of the address. He then got out of the vehicle and joined in what was happening. The jury's verdicts in relation to Mr Matlobyaygazwini and

Mr Rafiee make it clear that at that point he was involved in implementing the common purpose that had earlier been agreed between the three prisoners.

[43] So, whilst I accept that there is room for the view that Mr Henderson may have advanced upon Mr Matlobyaygazwini and Mr Fuimaono with a stick, I place those actions in the context of a man trying to defend himself against a determined pursuit and assault by not one, but three, attackers. Placed in that context, the fact that Mr Fuimaono's possession of the weapon may have arisen as a result of him taking it from Mr Henderson robs that factor, in my view, of much of its mitigating effect.

[44] At the end of the day, the prisoners cannot have been surprised by the fact that, once ultimately cornered and confronted in the driveway, Mr Henderson would take whatever steps were open to him to defend himself against attack. If a stick was lying around it is not surprising that he had resort to it to defend himself. So I propose to impose sentence on that factual basis.

[45] Once Mr Henderson was on the ground, Mr Fuimaono and Mr Rafiee left the address in Mr Fuimaono's vehicle. Mr Fuimaono says that he believed that Mr Henderson was, in his words, "All right" because he was groaning. It must have been reasonably clear to them both, however, that Mr Henderson was in a reasonably bad way.

[46] Mr Matlobyaygazwini remained in the vicinity. His counsel points to the fact that he made enquiries as to the welfare of Mr Henderson and did what he could to ensure that Mr Henderson was cared for. Unfortunately, that proved not to be the case. Mr Henderson was placed in a vehicle and then driven to another address. It was not until much later in the evening that he was ultimately taken to hospital. By that stage it was not possible to reverse the damage that had already been done.

[47] I have to say that I do not regard Mr Matlobyaygazwini's apparent concern for Mr Henderson after the assault of being of great mitigating weight. The only way, realistically, in which Mr Henderson could have been helped at that stage by

any of the people around him, including Mr Matlobyaygazwini, was for him to have been taken directly to a hospital.

[48] The final issue that I need to determine at this stage is where I see the respective culpability of the three prisoners. Obviously, Mr Fuimaono stands apart to some extent because he alone delivered the blow or blows that led directly to Mr Henderson's death. He was charged as a principal and convicted as a principal. Having said that, I accept that his involvement in any plan arose relatively late in the piece, namely at around 4 pm on 9 March 2008.

[49] So far as Mr Matlobyaygazwini is concerned, I accept that his culpability is less than that of Mr Fuimaono simply by virtue of the fact that he did not strike the blow or blows that caused Mr Henderson's death. It is clear to me, however, that Mr Matlobyaygazwini was the architect of this whole incident. He was the one who had suffered the physical injuries and loss of property as a result of the incident in the early hours of 7 March 2008. I am satisfied that he made the decision at 408 Ellerslie-Panmure Highway to seize the opportunity to confront Mr Henderson when he arrived at the address. He then provided himself with an ally by going to get Mr Rafiee. He also led the charge, so to speak, in confronting Mr Henderson when he arrived at the property.

[50] Having said that, I accept that he was not dressed in attire that would lend itself readily to inflicting a savage beating on another person. He appears to have been shirtless and in bare feet at the time that Mr Henderson arrived. He knew, however, that Mr Rafiee was carrying one or more weapons when he arrived back at 408 Ellerslie-Panmure Highway. Mr Matlobyaygazwini also led the pursuit of Mr Henderson across the road and was the first to confront him across the road. I accept, however, that he did not strike blows that led to Mr Henderson's death.

[51] All of those factors persuade me that, in terms of culpability, Mr Matlobyaygazwini is not very far behind Mr Fuimaono in terms of culpability.

[52] Mr Rafiee is probably least culpable in terms of the incident that actually led to Mr Henderson's death. I say this because he does not appear to have been one of

the persons who confronted Mr Henderson when he arrived. He appears to have been slightly behind Mr Matlobyaygazwini in terms of pursuit, and it is also clear that he remained at the foot of the driveway whilst the incident that gave rise to Mr Henderson's death took place. Having said that, he was the person who, I am satisfied, took a weapon to the address and that in itself lends significantly to his culpability.

[53] As matters currently stand, and I am prepared to receive submissions on the topic, I view Mr Rafiee and Mr Matlobyaygazwini's culpability as roughly equal and slightly below that of Mr Fuimaono.

[54] Having delivered these findings, counsel for Mr Fuimaono indicates that he would like some time to consider the impact of them. That is a fair request and needs to be accommodated. It is also important that all accused are sentenced together, because issues of parity arise. I propose to postpone sentencing. The prisoners will now be sentenced at **9 am on Wednesday 18 November 2009**. They are remanded in custody until then.

Lang J