IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA151/2024
[2024] NZCA 522

BETWEEN	MANU HORI IONGI Appellant
AND	THE KING Respondent

CA162/2024

BETWEEN	FALALA'ANGA OMOOMI IONGI Appellant
AND	THE KING Respondent

Hearing:	4 September 2024
Court:	Cooke, Collins and Grice JJ
Counsel:	K E Hogan and T Hu for Appellant in CA151/2024 B J Meyer for Appellant in CA162/2024 N E Walker and S E Arnerich for Respondent
Judgment:	16 October 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal against conviction and sentence by Manu Iongi is dismissed.

B The appeal against sentence by Falala'anga Iongi is allowed. The minimum period of imprisonment of 17 years is quashed and substituted with a minimum period of imprisonment of 15 years.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Meliame Fisi'ihoi lived at 73 Calthorp Close in Māngere with members of her family, including her son, Stephen Fisi'ihoi, who lived in a portable cabin (Portacom) on the front lawn of the family's property. On the night of 14 January 2020, Mrs Fisi'ihoi was in the lounge of her home. At about 2.45 am on 15 January 2020, her attention was drawn to sounds outside the front of her house. When Mrs Fisi'ihoi pulled back the curtains, she was shot in the head by a person firing a shotgun through the window, no further than two metres from the window. She died instantly. Following a fifteen-month investigation, police arrested Falala'anga (known as Falala) Iongi, his younger brother Viliami Iongi, and their cousin, Manu Iongi, for the murder of Mrs Fisi'ihoi.

[2] Falala and Viliami Iongi were found guilty of having murdered Mrs Fisi'ihoi while Manu Iongi was found guilty of manslaughter. In the same trial, Falala and Viliami Iongi were also found guilty of reckless discharge of a firearm with intent to cause grievous bodily harm and wounding with intent to cause grievous bodily harm.

[3] The charges of reckless discharge of a firearm with intent to cause grievous bodily harm and wounding with intent to cause grievous bodily harm related to events that occurred on 4 December 2019 when Falala and Viliami Iongi went to 73 Calthorp Close with shotguns to confront Stephen Fisi'ihoi. Viliami Iongi fired two shots, one of which was aimed at Stephen Fisi'ihoi who escaped injury. George Vuna, an associate of Stephen Fisi'ihoi, was shot in his lower abdomen. He suffered severe injuries but survived.

[4] The defendants were sentenced on 23 February 2024 by Powell J:[1]

(a) Falala Iongi was sentenced to life imprisonment with a requirement that he serve a minimum period of imprisonment (MPI) of 17 years before

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1 *R v Iongi* [2024] NZHC 304 [sentencing notes].

he is eligible to apply for parole for the murder of Mrs Fisi'ihoi.[2] He was also sentenced to concurrent sentences of eight years' imprisonment for discharge of a firearm with intent to cause grievous bodily harm and 10 years' imprisonment for wounding with intent to cause grievous bodily harm.[3]

(b) Viliami Iongi was sentenced to life imprisonment with an MPI of 15 years for the murder of Mrs Fisi'ihoi.[4] He was also sentenced to concurrent sentences of eight and 10 years' imprisonment for the shooting offences committed on 4 December 2019.[5]

(c) Manu Iongi was sentenced to eight years and six months' imprisonment with an MPI of four years and three months for the manslaughter charge arising out of Mrs Fisi'ihoi's death.[6]

[5] Manu Iongi has appealed both his conviction and sentence. His sentence appeal is based on the contention that the sentence imposed on him was manifestly excessive. Manu Iongi's conviction appeal is advanced on three grounds:

(a) The High Court erred when it ruled evidence from another cousin, Havea Iongi, was admissible under s 30 of the Evidence Act 2006. We set out the relevant parts of that section at [19]. For present purposes, we observe that without Havea Iongi's testimony there was no case against Manu Iongi.

(b) The jury's verdict was unreasonable.

(c) Powell J failed to adequately summarise Manu Iongi's case in his summing up to the jury.

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2 At [71].
3 At [72]–[73].
4 At [76].
5 At [77]–[78].
6 At [81].

[6] Falala Iongi has appealed his sentence only, based on the argument that the 17-year MPI was manifestly excessive.

[7] There is no appeal from Viliami Iongi.

Background

[8] Falala, Viliami and Manu Iongi, together with Stephen Fisi'ihoi, were members of a sub-group of the Crips gang called the "Three-Six" or "36" faction. Falala and Viliami Iongi knew Stephen Fisi'ihoi and at one point Falala and Stephen Fisi'ihoi were friends. There is no evidence about whether or not Manu Iongi knew Stephen Fisi'ihoi.

[9] At some stage in late 2019, the friendship between Falala Iongi and Stephen Fisi'ihoi broke down. Their dispute arose after Falala Iongi had supplied methamphetamine to Stephen Fisi'ihoi in exchange for a shotgun. Falala Iongi became dissatisfied with the shotgun and wanted Stephen Fisi'ihoi to return the methamphetamine. Stephen Fisi'ihoi said that there were "no refunds". There was a confrontation between Stephen Fisi'ihoi and Falala Iongi and two associates outside Stephen Fisi'ihoi's Portacom.

[10] The dispute between Falala Iongi and Stephen Fisi'ihoi continued to escalate. A disturbing milestone in that escalation was the shootings that occurred on the evening of 4 December 2019. Those events were summarised in the following way by Powell J in his sentencing notes:

> [10] … Around 9:30 pm that evening Stephen was at 73 Calthorp Close along with two associates, George Vuna and Arbaaz (Baz) Sheikh. Just as Stephen, George and Baz were about to go out for the evening, Falala and Viliami arrived at the address in Falala's black BMW. After a couple of brief discussions, Falala and Viliami, both armed with firearms, started advancing up the driveway towards the Fisi'ihoi home. When George ill-advisedly started running from the house towards [the Iongi brothers], Viliami shot him with a shotgun, hitting George with multiple pellets in the lower stomach and right groin area. Viliami then fired a second shot at Stephen, but this missed as Stephen sought shelter inside the Portacom.

[11] The dispute between Falala Iongi and Stephen Fisi'ihoi continued to simmer, culminating in the killing of Mrs Fisi'ihoi in the early morning of 15 January 2020.

[12] The evidence concerning the killing of Mrs Fisi'ihoi can be summarised in the following way:

(a) At some time in the early hours of 15 January 2020, Falala, Viliami, and Manu Iongi left their homes in Flatbush and drove to 73 Calthorp Close in Falala Iongi's black BMW. Falala Iongi was the driver that night.

(b) Neighbours heard a car drive slowly into Calthorp Close a little after 2.30 am and two people get out. The car's engine was left running. Powell J was satisfied that it must have been Viliami and Manu Iongi who got out of the car and that one of them, in all likelihood Viliami, was armed with a shotgun.[7]

(c) A neighbour heard someone knock on the Portacom door and another neighbour heard someone ask "are you home?", but there was no answer.

(d) Mrs Fisi'ihoi, who was in the lounge, "must have heard something and pulled open the curtains to look".[8]

(e) Viliami Iongi fired the fatal shot from a very short range, less than two metres from the window. Pellets from the shotgun cartridge were discharged into Mrs Fisi'ihoi's head.

(f) After the shooting, neighbours heard two people run back to the car, a person yell out to "hurry up" and two doors to the car were heard closing.

(g) Neighbours then heard a vehicle being driven away at high speed.

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7 At [15]–[16].
8 At [15].

(h) After leaving Calthorp Close, Falala Iongi drove his car to the home of their cousin, Havea Iongi, which was about a 10-minute drive from Calthorp Close.

[13] Havea Iongi was spoken to by the police on 22 April and 29 July 2020. He was spoken to again on 16 December 2020. We will return to the circumstances surrounding that interview. Suffice for present purposes to say that Havea Iongi told police on 16 December 2020 that sometime between 3 and 4 am on 15 January, he and his partner were woken by Viliami Iongi who signalled to Havea to accompany him. Havea followed Viliami outside where he saw Falala Iongi in the driver's seat of his black BMW and Manu Iongi in the front passenger seat. He described being asked by Falala to hold onto something, at which point Viliami, who was by this stage in the backseat, handed Havea a gun wrapped in a towel. Havea said the barrel of the gun was hot like a "hot cup of tea". Havea also told the police the Iongi brothers looked panicked and that Manu Iongi was very quiet.

[14] On 15 January 2020, Havea Iongi heard about the shooting at Calthorp Close and he sent a text message to Falala Iongi to come and pick up his "stuff". About 15 minutes later, Manu Iongi arrived in a light brown van and said that he had come to "pick that up" from Havea Iongi. Havea Iongi went and got the gun from where he had hidden it in the ceiling of his home and handed it to Manu Iongi. As he got the gun, he saw some ammunition fall from the towel that was wrapped around the gun. The ammunition comprised one shotgun shell and four bullet shells taped together.

[15] The trial commenced before Powell J and a jury on 30 May 2022 but was aborted on 27 June 2022 when it became apparent there was not sufficient time available to complete the trial.[9] This was because considerable time had been taken up over issues relating to the admissibility of the evidence of a number of witnesses who had given statements to the police.

[16] Powell J used part of the time that had been allocated for the trial to consider defence applications to have the evidence of a number of witnesses, including that of Havea Iongi, ruled inadmissible under s 30 of the Evidence Act.

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9 *R v Iongi* [2022] NZHC 2014.

[17] In a judgment dated 14 August 2023, Powell J ruled that Havea Iongi's principal statement to the police had been improperly obtained, but that it was nevertheless admissible after weighing the admissibility considerations set out in s 30 of the Evidence Act.[10] For completeness, we note that on 18 October 2023, this Court declined applications by all three defendants to appeal this ruling because the retrial was imminent.[11]

[18] The retrial commenced on 30 October 2023 and concluded on 6 December 2023.

Appeal against conviction — Manu Iongi

First ground of appeal: admissibility of Havea Iongi's police statement

[19] As we have noted, Powell J ruled that the principal statement made by Havea Iongi to the police was admissible.[12] That ruling was made pursuant to s 30(2)(b) of the Evidence Act. The relevant parts of s 30 of the Evidence Act state:

> **30 Improperly obtained evidence**
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> (1) This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
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> (a) the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
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> (b) the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
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> (2) The Judge must—
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> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
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> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the

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10 *R v Iongi* [2023] NZHC 2165 [admissibility judgment] at [164]–[168], [210]–[216], and [218(d)].
11 *Iongi v R* [2023] NZCA 505.
12 Admissibility judgment, above n 10.

impropriety and takes proper account of the need for an effective and credible system of justice.

(3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

(4) The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

(5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—

(a) in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or

…

(c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[20] Section 30 of the Evidence Act sets out the sequential steps required to determine whether or not evidence has been improperly obtained, and if it has been

improperly obtained, whether or not it is nevertheless admissible. It is a two-step process:

(a) First, Powell J was required to determine on the balance of probabilities whether or not the principal statement made by Havea Iongi was improperly obtained.[13] In this case, evidence of a witness could be improperly obtained if it was gathered in breach of the witness' rights under the New Zealand Bill of Rights Act 1990 (NZBORA) or otherwise obtained unfairly having regard to the Chief Justice's Practice Note concerning the making of statements to the police.[14]

(b) Secondly, if the statement was improperly obtained, Powell J was then required to undertake a balancing exercise to determine whether or not excluding the statement was proportionate to the impropriety.[15] The balancing exercise requires appropriate weight to be given to the impropriety and for proper account to be taken of the need for an effective and credible system of justice. The matters set out in s 30(3) may be relevant to the balancing exercise undertaken pursuant to s 30(2)(b).

[21] Although this Court has discouraged the use of s 30 by defendants to challenge statements made by witnesses,[16] we are satisfied that the plain meaning of ss 30(5)(a) and (c) means those provisions may be engaged where the statement that is challenged was made by a witness rather than a defendant.[17]

[22] To understand the first ground of appeal, we shall first explain the basis of the Judge's ruling.

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13 Evidence Act 2006, s 30(2)(a).
14 Section 30(5)(a) and (c).
15 Section 30(2)(b).
16 *R v Lethborg* [2008] NZCA 236 at [17].
17 *R v Hsu* [2008] NZCA 468 at [30]; *R v Lethborg*, above n 16, at [17]; and *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [76]–[78] per William Young P and Glazebrook J.

The admissibility ruling

[23] As the first trial unfolded, issues began to emerge concerning the statements obtained by the police in relation to 11 witnesses and the extent to which the Crown could rely on those statements. By the time Powell J heard the application to rule those statements inadmissible, the defendants no longer challenged the statement of one of those witnesses and the Crown had decided not to call four of the witnesses whose statements were disputed. Thus, Powell J only considered challenges to the statements obtained from six witnesses.[18]

[24] The Crown accepted that Havea Iongi had been either arbitrarily arrested or unlawfully detained in breach of s 22 of the NZBORA when he made his formal statement of 16 December 2020 and that as a consequence, his statement was obtained improperly under s 30(5)(a) of the Evidence Act.[19] The Crown submitted that the statement was nevertheless admissible pursuant to s 30(2)(b) of the Evidence Act.

[25] Powell J heard substantial evidence and submissions relating to the admissibility of the challenged statements. The evidence heard by the Judge included evidence from detectives involved in the two investigations and some of the witnesses whose statements were challenged.

[26] The evidence from the senior police officers who oversaw the inquiries can be summarised in the following way:

(a) police believed that potential witnesses with gang connections would be reluctant to cooperate with the police;

(b) police enquiries revealed that a number of potential witnesses were possibly implicated in offending unrelated to the shooting offences committed on 4 December 2019 and the murder of Mrs Fisi'ihoi; and

(c) the police teams investigating the shooting offences and the murder executed search and arrest warrants in relation to potential witnesses

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18 Admissibility judgment, above n 10, at [2]–[4].
19 At [162].

and then interviewed those witnesses, not only in relation to the unrelated criminal activities, but also the shooting and murder cases.

[27] Powell J explained that the:

> [28] … unrelated or collateral offending gave Police the opportunity to take those suspected of having information that could assist the two investigations to the Manukau Police Station, either while under arrest or voluntarily, in order to find out what information they were able to provide about the [shooting and murder] investigations and where possible, to then obtain a formal written statement confirming what they knew.

[28] Ultimately, none of the witnesses whose statements were the subject of challenge were prosecuted in respect of the unrelated offending.[20]

[29] Havea Iongi provided seven statements to the police.[21] In his first statement, made on 22 April 2020, he denied knowing about the shooting on 4 December 2019 or the murder of Mrs Fisi'ihoi. He told police that he had never seen Falala or Viliami Iongi with a firearm but he did confirm that they and Stephen Fisi'ihoi were members of the 36 Crips faction.

[30] He was spoken to again on 29 July 2020 when he was arrested for damaging some windows. He was taken to a police station and later said he was surprised to be asked at this time about his involvement in the murder of Mrs Fisi'ihoi. He said that he did not think that Falala or Viliami Iongi had anything to do with the murder.

[31] Havea Iongi's next statement was made on 16 December 2020. This was his principal statement in which he explained the matters we have summarised at [13] and [14]. In his 16 December 2020 statement, Havea Iongi also:

(a) described how he had previously seen Viliami carrying a "long" single barrel shotgun that looked to be new;

(b) looked at still photographs taken from a TikTok video and confirmed the images showed Manu Iongi holding a shotgun wrapped in a towel

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20 At [165].
21 At [135].

and said "that's the exact same gun and towel that [was] brought to [his] house in January";

(c) looked at photos of some bullets located by police at Manu Iongi's address and said they were the same bullets that fell from the towel when he gave the gun and ammunition to Manu Iongi; and

(d) drew a sketch plan for police of the way Falala Iongi's BMW was parked when Havea Iongi received the shotgun wrapped in a towel.

[32] Havea Iongi's other statements to the police were made on 21 December 2020 and in February and April 2021. Powell J summarised those statements in the following way:[22]

> [142] In his 21 December 2020 statement Havea Iongi noted that on the morning after he had received the firearm he was visited by a friend and he told him what had occurred. Havea Iongi also described how he had been asked by Falala Iongi to take the rap on an earlier firearms charge and that Falala Iongi had said he would give him $2,000 if he did that. However, after talking to his partner, Ms Lamkum, Havea Iongi told Falala that he would not go through with it.
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> [143] The fourth statement was taken on 4 February 2021. In this statement Havea Iongi confirmed that photos of a vehicle he was shown by Detective Starr was the same as the vehicle Manu Iongi had arrived in to pick up the firearm on 15 January 2020. In the fifth and sixth statements, both provided on 12 April 2022, Havea Iongi provided explanations with regard to intercepted phone calls and his preferred mode of evidence respectively, while the seventh and final statement about the murder was dated 28 April 2022. This provided feedback on yet another intercepted phone call, this time between Havea Iongi and Ms Lamkum.[23]

[33] The circumstances in which Havea Iongi made his principal statement to the police were as follows:

(a) Detective Barnett prepared a written plan for interviewing Havea Iongi. The plan related to the murder of Mrs Fisi'ihoi, the relationships

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22 Footnote in original.

23 It is noted that Havea Iongi also signed entries in Detective Sergeant Rice's notebook on 27 June 2022, but this related to issues of alleged intimidation during the first trial rather than his evidence with regard to the murder.

between Falala Iongi, Viliami Iongi and Stephen Fisi'ihoi, the shooting of George Vuna, and "drug dealing", among other topics.

(b) At 7.40 am on 16 December 2020, Detectives Starr and Barnett together with approximately 10 other police officers arrived in four police cars at a house where Havea Iongi was staying and arrested him for dealing in cannabis in April 2020. He was handcuffed and placed in a police car.

(c) According to her notebook, Detective Starr cautioned Havea Iongi in respect of the drug dealing matter and any discussion she might have with him about the murder. Havea Iongi later said he thought he had been arrested in relation to the murder of Mrs Fisi'ihoi.

(d) Havea Iongi was taken to the Manukau Police Station by Detectives Starr and Barnett. On the way, Detective Starr asked Havea Iongi two questions about his involvement in drug dealing. Those were the only two questions she asked about this topic. He responded to the effect that he didn't know what the Detective was talking about.

(e) Detective Starr then asked Havea Iongi about the murder of Mrs Fisi'ihoi and recorded the following questions and answers:

Q: Were you involved in the murder of Meliane Fisi'ihoi

A: No, why would you think I was.

Q: Were you in the car, the black BMW, the night of the murder?

A: No, no, I wasn't in the car, but I know who was.

(f) When they arrived at the Manukau Police Station at 8 am, Detective Starr recorded the following:

0802 Discuss briefly his knowledge of events around time of murder. Named: Falala, Viliami and Manu Iongi as coming to his house the night of the murder in Falala's black BMW & asking him to hold onto a gun.

> Asked if he would provide a statement regarding these events, & advise that any statement is voluntary & that does not have to provide one. Any charges relating to drug charges/dealing aren't impacted in any way by giving or not giving a statement in relation to the murder.
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> HS: "I want to do the right thing & tell you what I know"
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> Q: Police spoke to you previously about the murder, why did you not say these things then?
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> A: Because I was scared for me & my family but now they're in Australia, I feel like they're safe & it's time.

[34] Detective Starr then spoke to Detective Sergeant Hunkin who was the officer responsible for suspects and persons of interest. At this stage, the police decided to regard Havea Iongi as a witness and not a suspect.

[35] The taking of Havea Iongi's statement commenced at 9.02 am and finished at 4.27 pm. The interview was not recorded. The completed 17 page statement was read through by Havea Iongi and signed by him at 5.04 pm.

[36] Havea Iongi was not told he was no longer under arrest for the drug offending and free to leave the police station until after his statement was completed, at which point arrangements were made to take him home.

[37] Havea Iongi was granted immunity from prosecution for his role in receiving the firearm in the early hours of 15 January 2020.

[38] When he gave evidence in the admissibility hearing, Havea Iongi denied telling Detective Starr on 16 December 2020 that he knew who was in the car, but he accepted that he told her he wanted "to do the right thing" and that he would tell her what he knew. He also said that the police "kept pushing [him] and pushing [him] and then [he] just broke and [he] just said: 'I'll tell you what I know'".

[39] At the admissibility hearing, the Crown said there was sufficient evidence to arrest Havea Iongi for the cannabis offending. As noted above, the Crown nevertheless accepted that Havea Iongi's statement dated 16 December 2020 was improperly obtained. This acknowledgment was based on the absence of any evidence

that Havea Iongi was told he could leave the police station once the police decided — at about 9 am — not to prosecute him with the drug dealing offences for which he had been arrested.[24] As a consequence, Havea Iongi was unlawfully detained when he made his principal statement, thereby breaching his rights under s 22 of the NZBORA not to be arbitrarily arrested or detained.

[40] Powell J was satisfied that the circumstances under which Havea Iongi's statement of 16 December 2020 was made meant that it was improperly obtained.[25] The circumstances identified by the Judge mirrored the Crown's acknowledgement that we have set out at [39].

[41] The Judge was also satisfied that:

(a) there was no evidence of police harassment before Havea Iongi made his principal statement;[26]

(b) there was no evidence of unreasonable pressure being applied by police to Havea Iongi and any pressure that was applied did not lead him to tell the police what he knew about the murder of Mrs Fisi'ihoi;[27]

(c) although Havea Iongi spent in excess of eight hours at the Manukau Police Station on 16 December 2020, his decision to cooperate with the police was made at the beginning of his interactions with Detectives Starr and Barnett;[28] and

(d) it was therefore incorrect to say that Havea Iongi cooperated with the police as a result of having been "broken" by police pressure.[29]

[42] Powell J concluded that "the balancing process overwhelmingly favours retention of [the] formal statements [made by Havea Iongi] at the retrial".[30] Although

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24 Admissibility judgment, above n 10, at [162].
25 At [164]–[167].
26 At [165].
27 At [165].
28 At [166].
29 At [167].
30 At [216].

Havea Iongi's right not to be unlawfully detained was "of fundamental importance",[31] the evidence had a high probative value, it was critical to the prosecution, and the offending was very serious.[32]

[43] Havea Iongi's statement was ruled admissible and he gave evidence at the retrial.[33] The transcript of his evidence shows that his evidence in chief was largely consistent with the statement he made to the police on 16 December 2020. At two points in his evidence in chief Havea Iongi was allowed to refer to his 16 December 2020 statement to help him recall events about how Manu Iongi retrieved the shotgun from Havea Iongi's house on 15 January 2020.

Submissions on appeal

[44] There were two parts to Ms Hogan's submissions in support of the first ground of appeal. First, she submitted that Powell J under-assessed the level of police impropriety when he accepted that Havea Iongi's 16 December 2020 statement was obtained improperly by the police. Secondly, she submitted that the Judge erred when he ruled under s 30(2)(b) of the Evidence Act that Havea Iongi's 16 December 2020 statement was admissible.

[45] The Crown agrees that the evidence was improperly obtained but submits, however, that Powell J was correct to rule the evidence admissible. Ms Walker, counsel for the Crown, concedes that if Powell J erred when he ruled Havea Iongi's principal statement admissible under s 30(2)(b) then, Manu Iongi's appeal must be allowed and his conviction quashed.

[46] We will deal first with the scope of the impropriety that occurred when police obtained Havea Iongi's statement before turning to the issue of the admissibility of the statement under s 30(2)(b) of the Evidence Act.

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31 At [214].
32 At [214]–[215].
33 At [216] and [218(d)].

Scope of impropriety

[47] Ms Hogan's submission was predicated on two arguments:

(a) First, that the police improperly led Havea Iongi to believe he was in significant jeopardy in relation to the murder of Mrs Fisi'ihoi. This alleged impropriety included Havea Iongi believing he had been arrested for murder. This meant that he had not voluntarily submitted to the interrogation process.

(b) Secondly, that the lack of documentation and video recording of Havea Iongi's interactions with the police on 16 December 2020 was concerning, and "[a]ny ambiguity arising out of their failing to comply with their record-keeping obligations should be construed against them". Ms Hogan submitted that the ambiguity in this case suggests the police conduct was unlawful.

[48] Ms Hogan carefully analysed the evidence which supported these contentions. In particular, she noted the following:

(a) The interaction between Mr Iongi and police on two occasions prior to the 16 December 2020 interview. We have explained those interactions at [29]–[30].

(b) The circumstances of Havea Iongi's arrest on 16 December 2020 which involved a significant number of police officers surrounding the house where he was staying and him being placed under arrest and handcuffed. He believed he had been arrested for the murder of Mrs Fisi'ihoi.

(c) When he was in the interview room, he was spoken to by Detective Ika in Tongan who talked to him about Tongan cultural matters and encouraged him to "tell the truth".

(d) The fact he was detained for more than eight hours.

(e) He was only told that he was free to leave the police station after he had signed his statement just after 5 pm.

[49] In summary, Ms Hogan submitted that the police had a plan to arrest Havea Iongi in relation to his alleged cannabis dealing and to use that arrest to pressure him into talking about the murder of Mrs Fisi'ihoi. It was argued that this meant that the statement he made on 16 December 2020 was made under duress.

[50] Ms Hogan was also critical of the fact that the police had only minimal records of the police interactions with Havea Iongi on 16 December 2020.

[51] Ms Walker also comprehensively reviewed the circumstances surrounding the making of Havea Iongi's statement on 16 December 2020. In summary, she submitted as follows:

(a) The failure to advise Havea Iongi that he was no longer under arrest before making his statement of 16 December 2020 was an understandable oversight given that Havea Iongi had revealed significant information before he was questioned further about the murder of Mrs Fisi'ihoi.

(b) There was only a weak causative link between the impropriety and the obtaining of the statement.

(c) It is relevant that Havea Iongi was prepared to disclose important new information to police very early on in his interactions with them on the morning of 16 December 2020.

(d) There were sound evidential reasons to arrest Havea Iongi in connection with cannabis dealings. The fact that he was not prosecuted for that offending was of no moment.

(e) The arrest of Havea Iongi for cannabis dealing was not a ruse. The first questions Detective Starr asked him on the morning of 16 December 2020 were about cannabis. When she got answers that

were not helpful, she turned to the murder of Mrs Fisi'ihoi. When Havea Iongi said that he knew who came to his home with the shotgun it was entirely understandable that the murder became the priority for police and eclipsed the cannabis dealing issue.

(f) The stated purpose for the arrest for the Havea Iongi was a "legitimate law enforcement purpose".

(g) There was nothing improper about the limited notes made by police concerning their interactions with Havea Iongi on 16 December 2020. The notes were accurate and once Havea Iongi was assessed as being a witness and not a suspect. There was no obligation to record his statements or make comprehensive notes.

Analysis

[52] As we have noted, when he gave evidence at the retrial, Havea Iongi's evidence in chief substantially reflected the statement he provided on 16 December 2020. His evidence appears to have been given without difficulty, although he did refresh his memory on several occasions by referring back to his 16 December 2020 statement.

[53] The Crown concedes that if the 16 December 2020 statement was inadmissible, then Havea Iongi's subsequent evidence was also inadmissible. We will reserve for another occasion the question of whether or not a witness who gives evidence in circumstances where their statement to police is ruled inadmissible is nevertheless able to give evidence that reflects the contents of their statement. As will become clear, we do not need to address that issue in this case.

The impropriety

[54] In *R v Williams*, this Court explained that a collateral purpose for a search warrant does not necessarily render an otherwise lawful search unreasonable.[34] Similar considerations apply to a collateral arrest.[35] The Court said:[36]

> [36] … While we accept that in extreme cases police bad faith may render an otherwise lawful search unreasonable, merely having a dual purpose for a search is not sufficient, even where there are insufficient grounds for applying for a warrant for one of those purposes. …

[55] The Court qualified these observations with two caveats: that the collateral purpose must be "a legitimate law enforcement purpose",[37] and that the collateral purpose must not be a "mere ruse".[38]

[56] The following evidence establishes that the police decision to arrest Havea Iongi for cannabis dealing was collateral to the primary objective, namely, to question him about the murder of Mrs Fisi'ihoi:

(a) Detective Barnett pre-prepared a written interview plan, the majority of which related to the murder investigation.

(b) On the morning of 16 December 2020, police arrived in significant numbers at the address where Havea Iongi was staying. The house was described as being surrounded by police. This is not the sort of conduct police would normally engage in when intending to arrest a suspected cannabis dealer.

(c) Havea Iongi was arrested and placed in handcuffs. He was cautioned in respect of both the cannabis dealing and the murder investigation.

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34 *R v Williams*, above n 17, at [36] per William Young P and Glazebrook J.

35 *Winders v R* [2016] NZCA 350 at [54]–[55]. See also *R v Briggs* HC Whangarei CRI-2008-027660, 14 May 2009 at [98]; and *Police v McFadyen* [1982] 2 NZLR 641 (CA) at 647.

36 *R v Williams*, above n 17, per William Young P and Glazebrook J.

37 At [37]. We note that the threshold to constitute an illegitimate purpose as elucidated by the Court is high, with examples being given of using a search power to harass an ex-partner or punish the person whose premises are being searched: see [37], citing *Crowley v Murphy* (1981) 34 ALR 496 at 521 (FCAFC), which was cited with approval in *Wilson v Maihi* (1991) 7 CRNZ 178 (CA) at 180–181.

38 *R v Williams*, above n 17, at [43].

> On being told this, it is not surprising that Havea Iongi thought he was under arrest for murder.

[57] The police had sufficient cause to arrest Havea Iongi for cannabis dealing based on text message evidence. The fact that he was not prosecuted with this offending underscores that the cannabis offending was a minor issue in the minds of the responsible police officers on 16 December 2020.

[58] The fact that the cannabis dealing offending was a minor concern for the police did not necessarily render unlawful the arrest of Havea Iongi for that offending. As was explained in *Williams*, provided a collateral purpose involves a legitimate law enforcement purpose and is not a ruse, it will be lawful.[39] But, as the Judge's conclusions in relation to the inadmissibility of other statements record, the arrests here occurred as part of an extensive pre-planned operation designed to gather information concerning the murder.[40] The cannabis arrest was merely a device to provide police the opportunity to seek to gather that evidence. The arrest would never have occurred but for this plan. It is one thing to legitimately arrest someone to see what might be revealed after their arrest. It is another to engage in a pre-planned operation under which an arrest is used as mechanism to pressurise the provision of statements. We consider that the arrest here can properly be considered as a ruse to provide the opportunity to obtain statements about the murder.

[59] As Powell J found, however, the pre-planned interview which "may well have involved attempting to place unreasonable pressure on Havea Iongi" was not carried out because of his early decision to cooperate.[41]

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39 At [37] and [43] per William Young P and Glazebrook J.
40 Admissibility judgment, above n 10, at [23]–[28].
41 At [166].

[60] Like Powell J, we do not accept Ms Hogan's submissions concerning other possible improprieties.[42] We will briefly address the other alleged improprieties:

(a) The failure to adequately record the statements engages r 5 of the Chief Justice's Practice Note on Police Questioning.[43] However, in *R v Perry*, a majority of the Supreme Court said that the primary focus of 5 of the Practice Note concerns statements given by a suspect in relation to offending.[44]

(b) The failure to record in more detail the interactions between the police and Havea Iongi on 16 December 2020 is also not as important as Ms Hogan submitted. This Court has previously noted that not everything that occurs needs to be recorded by police officers in their notebooks.[45] What is necessary is that police officers make a proper record of key developments that arise during the course of an inquiry.

(c) The time that Havea Iongi spent in the police station on 16 December 2020 would have been a concern had he not volunteered to Detective Starr at about 8 am that day that he knew the identities of those who were in the "black BMW [on] the night of the murder". Because Havea Iongi made clear to the police from about 8 am that he was willing to tell them what he knew, it is not significant that it took eight hours to write up his 17 page statement. The time it took to obtain Havea Iongi's statement on 16 December 2020 was not in itself an impropriety.

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42 At [164]–[168].

43 *Practice Note — Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297. Rule 5 of the Practice Note provides: Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.

44 *R v Perry* [2016] NZSC 102 at [53] per William Young, Arnold and O'Regan JJ.

45 *R v Avenell* [2007] NZCA 532 at [20].

[61] As Powell J explained, the only relevant impropriety in this case occurred when police failed to make clear to Havea Iongi before he made his statement on 16 December 2020 that he was no longer under arrest for the cannabis offending and that he was free to leave the police station.[46] From the point when the police decided not to pursue the drug dealing charges until when he was advised he was free to leave, Havea Iongi was arbitrarily detained in contravention of s 22 of NZBORA.

[62] We are satisfied, however, that there was nothing sinister in the police's failure to properly explain to Havea Iongi his legal status before he made his statement. He had volunteered to police that he knew who was in the black BMW on the night Mrs Fisi'ihoi was murdered and that he was willing to tell the police what he knew. His cooperation appears to have caught the police off guard. They jettisoned their planned interview. This suggests that the failure to tell Havea Iongi that he was no longer under arrest was a relatively benign error rather than a cynical ploy.

The connection between the impropriety and the statement

[63] Section 30(5)(a) of the Evidence Act requires a causal link between the breach of the witness' rights and the obtaining of the disputed evidence.[47] The Supreme Court has also said in relation to s 30(5)(c) that there "must almost always be a causative link between the unfairness and the impugned evidence".[48]

[64] Contrary to Ms Walker's submission for the Crown, we think it likely there was a causal connection between the original arrest and the subsequent police failure to tell Havea Iongi that he was no longer under arrest and him making the 16 December 2020 statement. If he had not been arrested, it is reasonable to assume that no statements would have been made. It is also reasonable to assume that if he had been told at 9 am that he was free to leave the police station, he was likely to have

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46 Admissibility judgment, above n 10, at [164].

47 *Boskell v R* [2014] NZCA 497 at [9], citing *R v Hennessey* [2009] NZCA 363 at [28]; and Richard Mahoney and others (eds) *Evidence Act 2006: Act and Analysis* (3rd ed, Thomson Reuters, Wellington, 2014) at [EV30.07(1)].

48 *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [47] per William Young, Glazebrook, Arnold and O'Regan JJ.

done so. This is a factor that can properly be taken into account when weighing the matters relevant to the decision to admit the statement.[49]

The balancing exercise

[65] We can succinctly summarise our reasons for agreeing with the conclusions reached by Powell J when he undertook the balancing exercise required by s 30(2)(b) of the Evidence Act.

[66] Havea Iongi's right to be informed that he was free to leave the police station at about 9 am was also an important right and one that the police should have honoured before Havea Iongi made his statement.[50]

[67] We accept that there was an element of pre-meditation involved in the unlawful arrest, although given that the existing principles allowed such an arrest provided it was not a "ruse", we do not accept that police were aware their actions were unlawful.[51] There were then significant revelations made by Havea Iongi to Detectives Starr and Barnett during the early stages of their dealings with him on 16 December 2020 and he was willing to very quickly tell the police what he knew.

[68] As we have explained, we also consider that, absent the breach of Havea Iongi's rights under the s 22 of the NZBORA, he may well have left the police station before making his 16 December 2020 statement. That however does not elevate the nature of the impropriety.

[69] The evidence obtained from Havea Iongi was important not only to the prosecution of Manu Iongi, but also in relation to the prosecution of Falala and Viliami Iongi, who Havea Iongi identified as bringing a hot shotgun to him approximately 10 minutes after Mrs Fisi'ihoi was shot dead with a shotgun. The evidence obtained is therefore properly categorised as being of high quality and essential to the prosecution of Manu Iongi.[52]

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49 At [61] per William Young, Glazebrook, Arnold and O'Regan JJ, referring to *R v Williams*, above n 17, at [79]–[103] per William Young P and Glazebrook J.
50 Evidence Act, s 30(3)(a).
51 Section 30(3)(b).
52 Section 30(3)(c).

[70] It is axiomatic that the crime of murder is particularly serious.[53] No other techniques were known to be available and not used when Havea Iongi's statement was obtained.[54] As Powell J explained, there are no alternative remedies to excluding the evidence that could adequately provide redress for the impropriety.[55] The other matters listed in s 30(3)(g) and (h) of the Evidence Act are not engaged in this case.

[71] Overall, the relevant factors favour admission of the evidence.

Conclusion

[72] We agree with the conclusions reached by Powell J that the impropriety in this case was the failure by the police to advise Havea Iongi that he was no longer under arrest and free to leave the police station before he commenced making his statement to the police on 16 December 2020.[56] There is a causal link between that established impropriety and the making of Havea Iongi's statement on that day. However, Powell J reached the correct conclusion when he ruled the statement made on 16 December 2020 by Havea Iongi to be admissible at the retrial after undertaking the balancing test.

[73] Accordingly, the first ground of appeal against conviction fails.

Second ground of appeal against conviction

[74] The second ground of appeal against conviction is that, even allowing for the admission of Havea Iongi's evidence, the conviction of Manu Iongi for the manslaughter of Mrs Fisi'ihoi was against the weight of the evidence.

[75] This ground of appeal has been pursued in the context of an application during the trial under s 147 of the Criminal Procedure Act 2011 to dismiss the charge against Manu Iongi. That application was dismissed by Powell J.[57] This ground of appeal expands upon the s 147 application.

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53 Section 30(3)(d).
54 Section 30(3)(e).
55 Section 30(3)(f).
56 Admissibility judgment, above n 10, at [164]–[168].
57 *R v Iongi* [2024] NZHC 172 [Section 147 judgment].

Summary of submissions

[76] In summary, Ms Hogan submits as follows:

(a) There was no evidence that Manu Iongi had any criminal involvement in the shooting of Mrs Fisi'ihoi.

(b) The Crown could not show that his presence was intended to encourage Falala and/or Viliami Iongi to shoot Mrs Fisi'ihoi or any other person.

(c) There was no evidence that Manu Iongi joined a plan to shoot anyone.

(d) Manu Iongi had no motive. There was no evidence he knew Stephen Fisi'ihoi and he was not involved in the 4 December 2019 shooting.

(e) Havea Iongi's evidence only places Manu Iongi in Falala Iongi's car after Mrs Fisi'ihoi was shot.

(f) even if Manu Iongi was in the car that went to 73 Calthorp Close, there is no evidence that he:

(i) got out of the car;

(ii) handled the shotgun; or

(iii) took any action to help encourage or persuade Falala and/or Viliami Iongi to shoot anyone at 73 Calthorp Close;

(g) Havea Iongi's identification of the shotgun seen in Manu Iongi's possession in the TikTok was undermined by:

(i) inconsistencies in the length of the shotgun described by Havea Iongi;

(ii) the absence of a modification to the shotgun seen in the video; and

(iii) Havea Iongi's mistaken evidence that the shotgun seen in the video was wrapped in a towel.

(h) Havea Iongi's identification of the van Manu Iongi was in when he collected the shotgun was undermined by evidence from the owner of the van that she had the vehicle with her in Wellington in January 2020, and that Manu Iongi only used the van when she was with him and she had never been to Havea Iongi's house.

[77] Ms Hogan accepted that whoever shot Mrs Fisi'ihoi had murderous intent. Thus, the jury could only have convicted Manu Iongi of manslaughter on the basis of party liability under either s 66(1) or s 66(2) of the Crimes Act 1961. Ms Hogan submitted, however, there was no basis for the jury to infer that if Manu Iongi was in Falala Iongi's car before the shooting that he knew of the intention to shoot or kill someone at 73 Calthorp Close.

[78] Ms Walker agreed that the jury could only have convicted Manu Iongi on the basis that he was a party under either s 66(1) or s 66(2) of the Crimes Act.

[79] Ms Walker emphasised the following evidence to support the jury's conclusion that Manu Iongi was a party to the shooting of Mrs Fisi'ihoi:

(a) the evidence of Mrs Fisi'ihoi's neighbours that:

(i) they heard a car drive slowly into Calthorp Close;

(ii) the engine of the car was left running;

(iii) after the gunshot, two sets of footsteps were heard running back to the vehicle; and

(iv) a voice was heard to say "hurry up" before two car doors closed and the vehicle sped off; and

(b) CCTV footage showed Falala Iongi's BMW arrived at Havea Iongi's house about 10 minutes after Mrs Fisi'ihoi was shot. Manu Iongi was in the car.

[80] She submitted that the jury were entitled to conclude that the three occupants of the car seen at Havea Iongi's place with the "hot" shotgun were the same three people who had been at the scene of the murder. The jury were also justified in concluding that Manu Iongi was either one of the two people who got out of the car at 73 Calthorp Close or he was the driver. Either possibility provided a clear basis for Manu Iongi's liability under s 66(1) or s 66(2) of the Crimes Act.

Analysis

[81] This ground of appeal relies on s 232(2)(a) of the Criminal Procedure Act 2011, which provides that we must allow the appeal if we are satisfied that "having regard to the evidence, the jury's verdict was unreasonable".

[82] In *R v Owen*, the Supreme Court said that a verdict will be unreasonable "if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty".[58] The Supreme Court provided supplementary guidance to bear in mind when assessing whether or not a verdict is unreasonable:[59]

(a) The appellate court is performing a review function, not one of substituting its own view of the evidence.

(b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.

(c) The weight to be given to individual pieces of evidence is essentially a jury function.

(d) Reasonable minds may disagree on matters of fact.

(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

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58 *R v Owen* [2007] NZSC 102, [2008] NZLR 37 at [5] and [17].

59 At [13], endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

(f) An appellant who invokes s [232(2)(a)] must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[83] As we have noted, both counsel accept that the only basis upon which Manu Iongi could be convicted was as a party. In order to be convicted of manslaughter as a party under s 66(1) of the Crimes Act, the jury had to be satisfied that Manu Iongi:

(a) intentionally helped, encouraged, or otherwise procured Falala or Viliami Iongi to fire a shotgun at Mrs Fisi'ihoi;

(b) when he did so he knew that the shooter would cause more than trivial harm; but

(c) he did not know the shooter had murderous intent.

[84] In order for Manu Iongi to be convicted of manslaughter as a party under s 66(2) of the Crimes Act, the jury must have been satisfied that:

(a) Manu Iongi formed a plan with Falala and/or Viliami Iongi to fire a shotgun at a person at 73 Calthorp Close and agreed to assist each other in carrying out that plan;

(b) Manu Iongi agreed with Falala and/or Viliami Iongi to help each other achieve that plan;

(c) any one of the three persons who went to Mrs Fisi'ihoi's home shot her in the course of carrying out that plan;

(d) when this happened, Manu Iongi knew a probable consequence of the plan was that the shooter would inflict more than trivial harm; but

(e) Manu Iongi did not know that a probable consequence of the plan was death.

(a) Evidential analysis

[85] We agree with Ms Walker that the jury were entitled to infer that the three men who went to Havea Iongi's place, approximately 10 minutes after Mrs Fisi'ihoi was shot, were involved in the shooting of Mrs Fisi'ihoi. The reasons for this can be succinctly summarised:

(a) Mrs Fisi'ihoi was killed with a shotgun;

(b) Falala, Viliami, and Manu Iongi were seen together at Havea Iongi's place in Falala Iongi's black BMW approximately 10 minutes after Mrs Fisi'ihoi was shot; and

(c) a hot shotgun was in the possession of at one least of the three men.

[86] This evidence was sufficient to enable the jury to infer that Manu Iongi was one of the men who went to Calthorp Place approximately 10 minutes before he was seen in the car at Havea Iongi's place.

[87] If Manu Iongi remained in the car, with the engine running, the jury could reasonably have inferred that he intentionally assisted the killing of Mrs Fisi'ihoi by enabling the shooter and the other member of the group to make a swift getaway.

[88] If, however, as Powell J concluded,[60] Manu Iongi was one of the two who got out of the vehicle, the jury could reasonably have inferred that he intentionally assisted the shooter by his presence or by allowing the principal to proceed more effectively with his criminal plan.

[89] Under either scenario, the jury were entitled to convict Manu Iongi of manslaughter pursuant to s 66(1) or 66(2) of the Crimes Act.

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[60] Sentencing notes, above n 1, at [15].

[90] The proposition advanced by Ms Hogan that Manu Iongi was a mere bystander whose presence did nothing to assist the shooting is difficult to reconcile with the broader evidence of the offending. The jury were entitled to place weight on the evidence that:

(a) all three defendants had travelled to the address of Mrs Fisi'ihoi in the early hours of the morning armed with a shotgun;

(b) they went there against the background of the hostilities between Falala Iongi and Stephen Fisi'ihoi;

(c) the attack must have been planned; and

(d) all three men must have been aware of and participated in the planned attack.

(b) The identification of Manu Iongi in the TikTok footage

[91] At trial, Ms Hogan cross-examined Havea Iongi extensively over differences between his evidence and that of his partner concerning the delivery of the shotgun to Havea Iongi early on the morning of 15 January 2020.

[92] Ms Hogan also submitted to both the jury and to us that there were significant inconsistencies concerning the shotgun held by Manu Iongi in the TikTok and the description Havea Iongi gave of that shotgun. Those differences were as follows:

(a) The length of the shotgun. Ms Hogan submitted the shotgun in the video was in the vicinity of 1 metre, whereas the shotgun described by Havea Iongi was approximately 60 to 70 centimetres long.

(b) The shotgun received by Havea Iongi had a screwdriver inserted into the loading mechanism whereas there was no screwdriver in the shotgun seen in the TikTok video.

(c) The white material around the shotgun in the TikTok was a piece of clothing, not a towel.

[93] While Havea Iongi's evidence that the shotgun he saw in the video in Manu Iongi's possession may not have been identical to the description he gave of the shotgun he received from Manu Iongi, this was a matter for the jury to consider when assessing Havea Iongi's reliability. The jury also had to assess whether any inconsistencies between the descriptions Havea Iongi gave of the shotgun and the gun seen in the TikTok video undermined the evidence that we have summarised at [85]–[90].

[94] Similarly, Havea Iongi's identification of the van that Manu Iongi was in when he collected the shotgun from Havea Iongi was squarely before the jury.

[95] It was for the jury, as the trier of fact, to decide what weight they placed on Havea Iongi's evidence and whether his evidence undermined the Crown case against Manu Iongi. If there were issues with Havea Iongi's identification of the shotgun and the van, that was for the jury to resolve.

Conclusion

[96] There was more than sufficient evidence for the jury to be satisfied that Manu Iongi was present at 73 Calthorp Close when Mrs Fisi'ihoi was shot and that he was liable under either s 66(1) or s 66(2) of the Crimes Act for the manslaughter of Mrs Fisi'ihoi.

[97] The fact that Manu Iongi was convicted of manslaughter and not murder suggests the jury engaged in a careful analysis of the respective roles of the three defendants and determined that Manu Iongi was less culpable than Falala and Viliami Iongi. The distinction drawn by the jury between the culpability of Manu Iongi compared to his cousins can be explained on the basis that Manu Iongi was not previously involved in the dispute between the Iongi brothers and Stephen Fisi'ihoi. The jury may reasonably have concluded that Manu Iongi accompanied his cousins on the fateful night to lend them his support to extract

revenge on Stephen Fisi'ihoi but that he did not appreciate that they had murderous intent, or at least that the Crown was unable to prove that he had that appreciation.

[98] This analysis may generously favour Manu Iongi. It is, however, not an approach that undermines the reasonableness of the manslaughter conviction. In reaching our conclusion, we have borne in mind the cautionary advice in *Owen*, and in particular that the test under s 232(2)(a) of the Criminal Procedure Act requires us to recognise that the weight to be given to individual pieces of evidence is a function for the jury.[61]

[99] For the reasons we have explained, the threshold for a successful appeal under s 232(2)(a) of the Criminal Procedure Act has not been reached. Accordingly, the second ground of appeal against conviction fails.

Third ground of appeal against conviction

[100] The third ground of appeal alleges Powell J failed to adequately sum up Manu Iongi's case to the jury.

[101] There were two parts to the Judge's summing up of Manu Iongi's case. First, when addressing the question trails for the respective charges, Powell J summarised the competing position of the Crown and defence in relation to the essential elements of each charge. Secondly, additional directions were given at the request of Ms Walker after the summing up.

[102] When addressing the question trails, Powell J made several comments which reflected Manu Iongi's defence. First, the Judge reminded the jury that "[a]s Ms Hogan pointed out to you being a mere passive bystander is insufficient".

[103] The Judge went on to explain the defence contention that Havea Iongi's evidence was unreliable and that he had been pressured by police to make his

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61 *R v Owen*, above n 58, at [13(c)], endorsing *R v Munro*, above n 59.

16 December 2020 statement. In particular, he was not told that he could leave the police station before making his statement. The Judge said:

> As you heard, all defence counsel gave detailed submissions as to why you should not rely on either Havea Iongi or [his partner]'s evidence. They say the differences between Havea Iongi and [his partner]'s evidence also cannot be reconciled, and that [the partner] also lied and was discredited.

[104] After going through each of the questions in the question trail concerning the murder charge against Falala Iongi, Powell J told the jury that they then had to "move on and work through the same questions with regard to [the murder charge] for Viliami Iongi … and then Manu Iongi".

[105] The Judge also reminded the jury that Ms Hogan had submitted there was "insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention in terms of any of the alternatives in Question 11", which primarily concerned the various party scenarios under s 66(1) and s 66(2) of the Crimes Act.

[106] In his additional directions given to the jury after they had retired, the Judge said:

> [4] … With reference to the position of both Viliami Iongi and Manu Iongi, and out of an abundance of caution so as to avoid any misapprehension about the arguments advanced in relation to those defendants, I make the following additional comments with regard to the question trail as it applies to both Viliami Iongi and Manu Iongi:
>
> (a) First, the Crown and defence position for Viliami Iongi reflects the summaries that I gave in the course of my discussion of the question trail in relation to [the murder charge] for Falala Iongi with regard to both involvement and intention, including the criticisms of the evidence of Havea Iongi and [his partner], and the evidence of what Falala Iongi and Viliami Iongi said they were doing at the relevant times, as well as that there was insufficient evidence to infer intention noting that Viliami Iongi was not identified as the driver of the BMW.
>
> (b) Secondly, and likewise, those summaries that I gave you also apply in the same way to Manu Iongi but in the event that you reject Havea Iongi's evidence that Manu Iongi was in the BMW there is no other evidence of involvement. Alternatively, even if Havea Iongi 's evidence was accepted and Manu Iongi was found to be in the car, I remind you of Ms Hogan's submissions that there is otherwise no evidence by which Manu Iongi could be inferred as being anything other than a "passive bystander", and that in any event, there was insufficient evidence to support any conclusion or inference that Manu Iongi had the necessary intention in terms of any of the

> alternatives in Question 11. What I am doing is just setting out, again, in a slightly more detailed way the summary of Manu Iongi's position on that issue and as I said throughout my summing up, I was not intending to go through in detail the detailed submissions that all counsel made about all of the issues.
>
> [5] All of the comments I have made are very much in a summary vein, it's for you to decide whether you accept or reject any evidence, and whether you accept or reject the arguments that particular counsel have made in respect of that evidence.

Summary of submissions

[107] Ms Hogan noted that the jury had heard close to six weeks of evidence and that the issues concerning party liability and the various routes to potential verdicts would have been difficult concepts for the jury to come to terms with.

[108] Ms Hogan submitted that the summing up reduced the crux of Manu Iongi's case to very brief references to counsel's submissions. She also submitted that the additional directions given at the suggestion of Crown counsel did not rectify the shortcomings in the summing up.

[109] Ms Hogan argued:

> The Judge only gave a cursory reference to counsel's submission about the lack of evidence from which it could be inferred that Manu was anything other than a passive bystander. …
>
> (a) Havea's evidence, taken at its highest, allowed the jury to infer that Manu voluntarily got in Falala's car, and stayed in the car. That is it.
>
> (b) There was no evidence Manu was involved in the shooting; that he took any action to help, encourage or procure Falala or Viliami to shoot anybody; that he was involved in any discussions prior to the shooting or entering into any kind of plan.
>
> (c) There was no evidence about what Manu did, knew or thought.
>
> (d) Absent any evidence that Manu was the driver, the route and speed of the vehicle did not bear on his actions or state of mind. Manu may not have known where the car was going if he was not driving. He had no control over the car's speed.
>
> (e) Manu may have thought the trip was for an entirely unrelated purpose, or simply to scope out Stephen Fisi'ihoi's property (which may require a gun for self-defence), or to wilfully damage that property, or to intimidate him using standover tactics short of actually shooting him or even physically hurting him. If that is the case, Manu would

not have been part of a plan to shoot somebody at 73 Calthorp Close, or have had any knowledge that a shooting was intended.

(f) The shotgun may not be visible to Manu. There is no evidence about where the shotgun was, prior to Havea seeing it in the backseat with Viliami after the shooting.

[110] Ms Walker for the Crown submitted that the Judge's summing up, whilst not containing a detailed analysis of Manu Iongi's defence, nevertheless provided the jury with a fair and balanced understanding of his defence. Furthermore, Ms Walker submitted that the additional directions to the jury more than adequately placed before the jury the crux of Manu Iongi's defence.

Analysis

[111] It is established law that a summing up must explain each party's case to the jury. In *R v Shipton*, this Court said:[62]

> [33] The underlying principle is that it is the absolute duty of a trial Judge to identify and adequately remind the jury of the defence case in relation to each defendant. It follows that a failure to refer in the summing up to a central line of defence that has been placed before the jury will generally result in the conviction being set aside, and a new trial ordered.
>
> [34] These obligations on a trial Judge are not contingent, in any case. They are a fundamental obligation on the Court in relation to a fair trial. As was said in *R v Marr* …:
>
> > "It is … an inherent principle of our system of trial that however distasteful the offence, however repulsive the defendant, however laughable his defence, he is nevertheless entitled to have his case fairly presented to the jury by counsel and by the judge."
>
> Hence the duty prevails even where the grounds for defence are "weak or improbable" … and even if there is no real address to the jury from the defence …
>
> [35] There never has been, and is not now, any dispute as to the character of this fundamental requirement of a summing up. The difficulty in the vast majority of cases which advance on appeal under this head has lain rather in what is required in the fact-dependent circumstances of each case.

[112] While the Judge deliberately did not engage in a detailed analysis of the competing positions of the Crown and defence counsel, the question trail and his additional comments made after the jury had retired adequately explained to the jury

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62 *R v Shipton* [2007] 2 NZLR 218 (citations omitted).

the essence of Manu Iongi's defence. The case against Manu Iongi hinged upon the evidence of Havea Iongi which had been thoroughly challenged in both cross-examination and in closing addresses. The Judge made this point abundantly clear during the course of his summing up. It was also made clear that it was ultimately for the jury what, if any, weight they placed on his evidence.

[113] Whilst the summing up could be described as holistic and based on an overview of the case rather than a finely nuanced recitation of the evidence, had the Judge delved into the detail now urged by Ms Hogan, the Judge may have been obliged to provide an equally detailed analysis of the Crown's contentions.[63]

[114] In a case such as this, where the defence case had been thoroughly presented by competent counsel, it was permissible for the Judge to give a general overview of the defence case rather than a granular analysis.

Conclusion

[115] We are therefore satisfied that the combined effects of the Judge's explanation of the question trail and his additional directions to the jury ensured that no miscarriage of justice occurred through the way the Judge summed up Manu Iongi's defence.

[116] The third ground of appeal against conviction also fails.

Appeal against conviction

[117] None of the grounds of appeal against conviction succeed. The appeal against conviction is therefore dismissed.

Appeal against sentence — Manu Iongi

[118] When sentencing Manu Iongi, Powell J concluded that Manu Iongi was in the car driven by Falala Iongi when it entered Calthorp Close and that Manu and Viliami Iongi got out of the car while Falala Iongi stayed in his vehicle with the engine

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63 *Keremete v R* CA247/03, 23 October 2003 at [18].

running to affect a quick getaway.[64] As we have noted, the Judge was satisfied that Viliami Iongi was likely to be the person who had the shotgun.[65]

[119] In setting the starting point for the sentence imposed upon Manu Iongi, the Judge again addressed Ms Hogan's submissions in which she maintained the jury's verdict meant Manu Iongi could only have had limited involvement in the events that led to the shooting of Mrs Fisi'ihoi.[66] The Judge said:[67]

> [49] Having considered the submissions of counsel I do not accept Ms Hogan's submissions with regard to the extent of your responsibility and culpability. It is clear that in finding you guilty of manslaughter the jury could not be satisfied that you had murderous intent from the available evidence. However, given the wording of the Question Trail the jury nonetheless must have accepted that you knew a shooting was intended, just not that there was an intention to cause death, or that death was a likely consequence or that a fatal shooting was a likely consequence of any plan that you were aware of.[68]
>
> [50] Likewise, and contrary to Ms Hogan's submission, as I have previously detailed there was substantial evidence before the Court to conclude that Falala was the driver of the black BMW on the night of the murder. While the jury were not able to be sure that you had the requisite intent, your presence was as additional muscle to assist Viliami while Falala waited in the car with the engine running. It follows that while there was no evidence that you knew Stephen, knew of the feud [with] Stephen, or (unlike Viliami and Falala) had been to Calthorp Close before or otherwise understood the context to the mission that you were brought into, you clearly knew that a shooting of some type was intended.

[120] Based on his assessment of Manu Iongi's role in the death of Mrs Fisi'ihoi, the Judge adopted a starting point of 10 years imprisonment.[69]

[121] When considering adjustments to reflect Manu Iongi's personal circumstances, Powell J addressed his age, gang affiliation and lack of remorse.

[122] At the time of the offending, Manu Iongi was 18 years old. Powell J recognised that a discount can be available for young offenders to reflect the age-related

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64 Sentencing notes, above n 1, at [15].
65 At [16].
66 At [46]–[48].
67 Footnote in original.
68 If Ms Hogan submissions had been accepted, it would seem that this would work against Manu, as it suggests he should have been found guilty of murder given the [j]ury's finding on the Question Trail that he knew there would be a shooting.
69 Sentencing notes, above n 1, at [52].

neurological differences between young people and adults, the fact that imprisonment is likely to be disproportionately severe for young people, and that young people have greater capacity for rehabilitation.[70]

[123] The Judge was concerned that, despite efforts of his family and Ms Hogan, Manu Iongi continued to maintain his connections to the Crips gang and had not expressed genuine remorse for his actions. The Judge said:

> [63] … you had a number of opportunities [when on bail] and it is clear that both your aunt and Ms Hogan worked very hard to help you with those opportunities, however, your persistence in continuing to communicate with Falala and Viliami meant that there was no alternative but to recall you to prison. Your letter to me gives rise to similar concerns: while you express sorrow for Mrs Fisi'ihoi's death as any stranger might, you do not accept any responsibility for any actions on your part, let alone identify what those actions were. As a result, whatever you have expressed in your letter cannot be categorised as any form of genuine remorse at what you have done, a conclusion that is only confirmed by your stated intention of remaining with the Crips.

[124] Taking into account Manu Iongi's age, his continued gang affiliations, and his lack of genuine remorse, Powell J adopted a global discount of 15 per cent to reflect Manu Iongi's personal circumstances.[71]

[125] This produced an end sentence of eight years and six months' imprisonment.[72]

[126] The Judge was satisfied that the criteria for imposing an MPI set out in s 86(2)(b) and (c) of the Sentencing Act 2002 were engaged and that an MPI of 50 per cent was warranted. As a consequence, the MPI imposed was four years and three months' imprisonment.[73]

Submissions on appeal

[127] There were two parts to Ms Hogan's submissions in support of the appeal against sentence. First, that the Judge erred when he concluded Manu Iongi got out of

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70 At [54], citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [76]–[92].
71 Sentencing notes, above n 1, at [64].
72 At [64].
73 At [69].

the car at Mrs Fisi'ihoi's home, and secondly, that the starting point adopted by the Judge was manifestly excessive.

[128] As to the first point, Ms Hogan submitted that, because the jury found Falala and Viliami Iongi guilty of murder, the jury must have decided that it was either Falala or Viliami Iongi who shot Mrs Fisi'ihoi. From this proposition, Ms Hogan reasoned that it could only have been Falala and Viliami Iongi who got out of the car with the shotgun and that Manu Iongi must have stayed in the car throughout the time it was at Calthorp Close. This scenario was, in Ms Hogan's submission, the logical basis upon which the jury convicted only Manu Iongi of manslaughter, and that it was wrong of Powell J to have reasoned that Manu Iongi was with the person who shot Mrs Fisi'ihoi.

[129] As to the starting point, Ms Hogan examined a number of what she submitted were comparable cases in support of her contention that the appropriate starting point for Manu Iongi was, "at most four and a half years' imprisonment".[74] For completeness, we record Ms Hogan took no issue with the mitigating adjustments applied by Powell J.

[130] Ms Walker referred to the evidence we have traversed at [79] and [85]–[90] when she said there was a firm evidential basis to conclude that Manu Iongi was one of the two people who got out of the car at 73 Calthorp Close and was therefore present when Mrs Fisi'ihoi was shot, most likely by Viliami Iongi.

Analysis

[131] This Court must allow a sentence appeal only if it is satisfied that there is an error in the sentence imposed and that a different sentence should be imposed.[75] The "focus is on the sentence imposed rather than the process by which the sentence is reached".[76]

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74 Ms Hogan referred to *R v Innes* [2016] NZHC 1195; *R v Ahsin* [2015] NZHC 1884; *R v Madams* [2017] NZHC 81; and *R v McNaughton* [2012] NZHC 815.

75 Criminal Procedure Act 2011, s 250(2).

76 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

The Judge's findings on the evidence

[132] It is well established that when sentencing a defendant following a trial, the Judge is entitled to reach his or her own conclusion on the evidence provided those conclusions are properly available and consistent with the jury's verdict.[77] This principal reflects s 24(1)(a) of the Sentencing Act, which provides that a court in determining a sentence "may accept as proved any fact that was disclosed by evidence at the trial".

[133] We have previously explained that, in order to have found Manu Iongi guilty of manslaughter as a party, the jury must have inferred that he was present at 73 Calthorp Close when Mrs Fisi'ihoi was shot and that he either:

(a) got out of the car and accompanied Viliami Iongi to the house in order to provide support for Viliami Iongi, but did not know Viliami had a murderous intent (s 66(1)); or

(b) remained in the car as the "getaway driver" knowing that Viliami and Falala Iongi planned to inflict more than trivial harm, but did not know their plan was to shoot someone with murderous intent (s 66(2)).

[134] Although Powell J concluded Manu Iongi accompanied the shooter to Mrs Fisi'ihoi's home, he would, in our assessment, have been just as culpable had he remained in the car as the getaway driver. Both scenarios summarised at [133] involve significant culpability on the part of Manu Iongi.

Starting point

[135] It has often been observed that "manslaughter encompasses conduct across a wide range of culpability and sentences in other cases give a general guide at best".[78]

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77 *R v Lunjevich* [2012] NZCA 454 at [9]; and *B (CA58/2016) v R* [2016] NZCA 432 at [75]–[76], citing *R v Connelly* [2008] NZCA 550 at [14].

78 *Te Hiko v R* CA402/01, 30 April 2002 at [19]. See also *R v Wickliffe* [1987] 1 NZLR 55 (CA) at 62.

Sentences for manslaughter have ranged from discharge without conviction through to life imprisonment.[79]

[136] Powell J referred to three manslaughter cases when adopting the starting point of 10 years' imprisonment for Manu Iongi:[80]

(a) *R v Challis*, where this Court upheld 10-year starting points in the context of a gang shooting where the appellants sat in the back seat of a car while the shooter, who was in the front seat, fired a rifle at a house, killing a baby girl;[81]

(b) *Afamasaga v R*, where this Court upheld a nine-year starting point for a gang-related shooting;[82] and

(c) *Pahau v R*, where this Court upheld a 10-year starting point for a gang-related killing of a rival gang member.[83]

[137] Ms Hogan drew support from a number of other manslaughter cases including the following:

(a) *R v Ahsin*, in which the High Court adopted a five-year starting point for the driver of a car of gang members.[84] The car did a U-turn and stopped next the victim. Mr Ashin's associates got out of the car and beat the victim to death for wearing rival gang colours.

(b) *R v Madams*, in which the High Court adopted a four-year starting point for the defendant's role in chauffeuring his associate to a violent brawl where the victim was killed.[85]

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79 See for example *R v Wickcliffe*, above n 78, where a sentence of life imprisonment was upheld; and *R v T* [2021] NZHC 64, where a discharge without conviction was imposed.
80 Sentencing notes, above n 1, at [44] and [51].
81 *R v Challis* [2008] NZCA 470 at [11] and [22].
82 *Afamasaga v R* [2015] NZCA 615, (2015) 27 CRNZ 640 at [110] and [113].
83 *Pahau v R* [2011] NZCA 147 at [81] and [87].
84 *R v Ahsin*, above n 74, at [10].
85 *R v Madams*, above n 74, at [56].

(c) *R v McNaughton,* in which the High Court said that for a principal offender who killed someone in a brawl, a starting point of nine to 14 years will be appropriate, but that for parties a significantly shorter starting point may be adopted.[86] In that case, Mr Perry, a co-accused, received the benefit of a starting point of three years' imprisonment.[87] He was described as being the least culpable offender "by a clear margin";[88]

(d) In *R v Fore*, this Court reviewed sentences for manslaughter in the context of gang-related killing.[89] There are some similarities between that case and the one before us. In particular, *Fore* involved members of a gang setting out to "tax" the victim over his involvement in drug dealing. The sentencing Judge adopted starting points of eight to nine years' imprisonment for those who participated in the incident.[90] On appeal, this Court said that the starting points adopted in *Fore* were at the lower end of the available range.[91]

[138] We are satisfied the starting point adopted by Powell J in this case was arguably at the higher end of the available range. It was, however, not manifestly excessive.

[139] When we apply a cross-check against the aggravating factors set out by this Court in *R v Taueki*,[92] we are satisfied that Manu Iongi's offending would have placed him on the cusp of bands 2 and 3 of *Taueki*. The most significant aggravating factors, in our view, were that:

(a) Mrs Fisi'ihoi was the innocent victim of a dispute between gang members;

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86 *R v McNaughton*, above n 74, at [36].
87 At [92].
88 At [89].
89 *R v Fore* [2021] NZCA 28.
90 At [24].
91 At [42].
92 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

(b) Manu Iongi participated in a plan to exact revenge against Stephen Fisi'ihoi over his failure to return methamphetamine to Falala Iongi;

(c) Mrs Fisi'ihoi was shot in her own home in the early hours of the morning; and

(d) although convicted only of manslaughter, Manu Iongi was a party to the killing of Mrs Fisi'ihoi through either one of the scenarios we have summarised at [133], both of which involve significant culpability on his part.

[140] Manu Iongi's offending involved going to the victim's home in the early hours of the morning to extract revenge over a drug deal knowing Viliami Iongi had a shotgun and that a wholly innocent person was shot dead in her home. On this basis, had he been sentenced under the *Taueki* methodology, his offending would likely have attracted a starting point of eight to 11 years.

[141] Ultimately, we are satisfied that, whilst the sentence imposed on Manu Iongi was on the higher side of the range available, it was not manifestly excessive.

Conclusion

[142] Manu Iongi's appeal against sentence is dismissed.

Appeal against sentence — Falala Iongi

[143] When sentencing Falala Iongi for the murder of Mrs Fisi'ihoi, Powell J proceeded on the basis that the murder took place in the context of an escalating dispute between Falala Iongi and Stephen Fisi'ihoi, the details of which we have previously traversed.[93]

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[93] Sentencing notes, above n 1, at [29]–[30].

[144] There was no dispute that Falala Iongi had to be sentenced to life imprisonment. The only issue was the length of any MPI that should be imposed.[94]

Was s 104 of the Sentencing Act engaged?

[145] In the High Court, Ms Walker submitted that the murder of Mrs Fisi'ihoi engaged s 104 because the murder "involved unlawful entry into, or unlawful presence in, a dwelling place".[95] Therefore, an MPI of at least 17 years needed to be imposed, unless such a sentence was manifestly unjust.

[146] Powell J explained that, although Mrs Fisi'ihoi was shot in her house, there was no evidence that any of the defendants had entered her dwelling place and that therefore s 104(1)(c) did not apply.[96]

[147] In this Court, Ms Walker again submitted that s 104(1)(c) was engaged.

[148] In *Pahau v R*, this Court noted that s 104(1)(c) was enacted following the introduction of the Crimes (Home Invasion) Amendment Act 1999.[97] When introduced, the Bill that preceded that Act defined "dwellinghouse" as including an "enclosed yard", but that definition was amended during the course of the passage of the legislation to exclude an enclosed yard. We therefore agree with Powell J's reasoning that the legislative history to s 104(1)(c) of the Sentencing Act strongly suggests that an enclosed yard is not part of a dwelling place for the purposes of s 104(1)(c) of the Sentencing Act.

Section 103 and the appropriate MPI

[149] Having concluded that s 104 of the Sentencing Act did not apply, the issue for Powell J to resolve was the appropriate MPI that should be imposed under s 103 of the Sentencing Act.

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94 At [23].
95 At [26]; and Sentencing Act 2002, s 104(1)(c).
96 Sentencing notes, above n 1, at [26].
97 *Pahau v R*, above n 83, at [68].

[150] The Judge referred to Falala Iongi's previous convictions for serious violence and firearms offending.[98] At the time of the murder of Mrs Fisi'ihoi, he was on release conditions following his release from prison for firearms offending.[99] The Judge found that there was nothing in Falala Iongi's personal background to reduce the MPI that would otherwise be imposed.[100]

[151] The Judge summarised in the following way the features of Falala Iongi's role in the murder of Mrs Fisi'ihoi:[101]

> …
>
> (c) The murder involved the use of a weapon, the shotgun used to kill Mrs Fisi'ihoi, and the fact that you did not personally fire the weapon is irrelevant.
>
> (d) On the contrary, there is no doubt that you were the leader of what can only be described as the attack on 73 Calthorp Close on 15 January. You were by far the senior member of the Crips gang present and it is clear from the evidence that Viliami, and almost certainly Manu, were prepared to defer to you in all things. As the leader it was you who had issues with Stephen, issues that were not resolved at the first confrontation nor in the December shooting. I accept that it was primarily your desire to settle with Stephen that led to the murder of Mrs Fisi'ihoi.
>
> (e) It is clear from the evidence that you had previously been to 73 Calthorp Close, at the very least at the first confrontation and again at the December shooting. You knew that Stephen did not live there alone at the property, but with other family members, including Mrs Fisi'ihoi, who were entitled to feel safe in their home. You knew the very close proximity of Stephen's Portacom to the house and the presence of the rest of Stephen's family. The layout of the property with three separate residential buildings on the property means that your entry on to the property if not actually resulting in entering into a dwelling house certainly had a pronounced home invasion type quality.
>
> (f) The December shooting had made it clear that Viliami, on your instigation, was prepared to shoot anyone present at 73 Calthorp Close and not just Stephen.
>
> (g) The deliberation with which you assembled and armed your associates, and drove your car to 73 Calthorp Close at a time that would mean that the intended victim (and indeed anyone else present) was at maximum vulnerability, speaks to a significant level of

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98 Sentencing notes, above n 1, at [30(a)].
99 At [30(b)].
100 At [31].
101 At [30] (footnotes omitted).

> premeditation to kill somebody at 73 Calthorp Close that night. As the jury accepted, you intentionally assisted someone to fire a shotgun at a person with the intention of killing them or causing injury likely to kill them and were prepared to run that risk, or at the very least were part of a plan with Viliami, the probable consequences of which would be a fatal shooting that the shooter would have murderous intent. On any of those scenarios you planned to kill somebody that night.
>
> …

[152] Powell J explained that pursuant to s 103(2) of the Sentencing Act, an MPI greater than 10 years had to be imposed to adequately hold Falala Iongi accountable for his offending, denounce his behaviour, deter others, and protect the community.[102] In setting an MPI of 17 years, Powell J was most concerned about the need to protect the community, noting that on two occasions, Falala Iongi had instigated an attack at 73 Calthorp Close and that on both occasions innocent people had been shot, with one victim being seriously wounded and the other murdered.[103]

[153] For completeness, we note the lower MPI of 15 years imposed on Viliami Iongi was justified by Powell J by reference to Viliami being 20 years old at the time of the offending (he was seven years younger than his brother) and that he was to some degree under the influence of Falala Iongi when he was introduced into the Crips gang.[104]

Submissions on appeal

[154] Mr Meyer submitted on behalf of Falala Iongi that Powell J erred by placing excessive weight on aggravating factors, no weight on mitigating factors, and did not ensure consistency with comparable cases.

[155] Mr Meyer said that Falala Iongi's prior offences had already been addressed and punished with substantial sentences. Mr Meyer said:

> … While the prior offences provide some relevant context, they should not have been used as the primary basis for significantly elevating the MPI beyond what is warranted by the facts of the murder itself.

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102 At [32].
103 At [32].
104 At [35]–[36].

[156] It was also submitted that Powell J excessively factored in the December 2019 offending and that the Judge "effectively double-counted these incidents in determining the MPI for the murder".

[157] In relation to mitigating factors Mr Meyer submitted that Powell J overlooked the following relevant factors:

> a) The appellant's mother died when he was 19. This had a profound effect on his life, leading to his first imprisonment and further distancing him from pro-social influences.
>
> b) The appellant has expressed genuine remorse for his actions and a strong motivation to lead a pro-social life. He actively participates in rehabilitation programs, such as Saili Matagi, providing insights into his behaviour and strategies for change.
>
> c) The appellant was raised in a religious, upstanding family with strong cultural and Christian values. Despite involvement in crime, he maintained respect for his family and did not bring gang activities home. Furthermore, he maintained a connection to his Mormon faith.
>
> d) The appellant engages in constructive activities such as exercise, reading motivational books, and playing chess to maintain mental and physical health.
>
> e) The appellant has expressed his intent to distance himself from the Crips gang. He plans to formally communicate his decision to leave the gang at an appropriate time. He has stated that his gang days are behind him.
>
> f) The appellant has clear goals for the future, including getting a job in construction and abstaining from criminal activities and substance abuse. He is dedicated to being a supportive father, with strong family support encouraging his pro-social behaviour.

[158] Mr Meyer drew attention to other cases in which gang members convicted of murder were sentenced to MPIs under s 103 of the Sentencing Act ranging from 13 to 14 years.[105]

[159] In addition to her submissions that s 104(1)(c) of the Sentencing Act was engaged, Ms Walker submitted that it was appropriate for the Judge to have incorporated the December 2019 shootings into the MPI. Ms Walker submitted that the December 2019 offending was serious and that the Judge could equally have

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[105] Mr Meyer referred to *R v Tinei* [2021] NZHC 556; *Afamasaga v R*, above n 82 ; and *R v Te Aonui-Tawhai* [2022] NZHC 2169.

imposed an MPI separately for the murder and then uplifted it for the December 2019 shooting.[106] Had he done so, an uplift of three to four years could not have been criticised.

[160] She also submitted that Powell J was correct not to adjust the MPI because of Falala Iongi's personal factors. As the Judge noted, nothing in the reports before the Court provided information on anything in Falala Iongi's background which might have had a significant causative contribution to the offending or which spoke to his rehabilitative prospects.

Analysis

[161] We respect the approach taken by Powell J when sentencing Falala Iongi, particularly as the Judge had the benefit of hearing many weeks of evidence over the course of two trials and exposure to that evidence enabled him to draw distinctions about the respective roles of the three defendants in the death of Mrs Fisi'ihoi.

[162] The Judge was correct to set an MPI under s 103 of the Sentencing Act that was far higher than 10 years to reflect the factors set out in s 103(2) of the Sentencing Act and, in particular, to protect the public from Falala Iongi.[107]

[163] We have concluded, however, that the MPI of 17 years was manifestly excessive. Our reasons for this can be distilled to two points. First, there are indications in the cultural report produced pursuant to s 27 of the Sentencing Act that Falala Iongi has finally seen the futility of continuing his gang connections and that he is now motivated towards a pro-social life.

[164] Secondly, we are also mindful of the fact that Falala Iongi was not the person who shot Mrs Fisi'ihoi and, although he was found guilty of her murder, a more proportionate response to his offending would have been to have sentenced him to life imprisonment with an MPI of 15 years; the same MPI as was imposed on his brother who, as Powell J reasoned, was the one who actually shot Mrs Fisi'ihoi.

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106 Relying on *Pukeroa v R* [2013] NZCA 305 at [40]–[43].
107 Sentencing Act, s 103(2)(d).

Conclusion

[165] We allow the appeal against sentence by Falala Iongi. The 17-year MPI is quashed and substituted with a 15-year MPI.

Result

[166] The appeals against conviction and sentence by Manu Iongi are dismissed.

[167] The appeal against sentence by Falala Iongi is allowed. The MPI of 17 years is quashed and substituted with an MPI of 15 years.

Solicitors:
Crown Solicitor, Manukau for Respondent