

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA137/2011
[2011] NZCA 637**

BETWEEN GORDON WAYNE HIEATT
 Appellant

AND THE QUEEN
 Respondent

Hearing: 23 November 2011

Court: Chambers, Heath and Allan JJ

Counsel: P J Kaye for Appellant
 M D Downs for Respondent

Judgment: 12 December 2011 at 2 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Chambers J)

Murder or manslaughter?

[1] On 12 May 2009 police went to the flat occupied by Gordon Hieatt, the appellant, and his girlfriend, Nuttidar Viakaew, having been told by their landlord of his concern for Ms Viakaew’s welfare. Police found Ms Viakaew’s decomposed body on the bed covered in blankets. When questioned, Mr Hieatt said little to police beyond that he had had an argument with Ms Viakaew on 17 April that had “got out of hand” and that he had “choked her”. Mr Hieatt also said their relationship had been “quite troubled”.

[2] Police charged Mr Hieatt with Ms Viakaew's murder. He pleaded not guilty. He was tried before Priestley J and a jury.

[3] Just before counsel's final addresses, Mr Kaye, who appeared for Mr Hieatt both at trial and before us, submitted to the Judge that he ought to allow the partial defence of provocation to go to the jury. The Judge declined that application, giving reasons at a later date.¹ Counsel then addressed. The jury retired. They found Mr Hieatt guilty of murder.

[4] Priestley J later sentenced Mr Hieatt to life imprisonment.² In addition, he ordered, pursuant to s 103(2) of the Sentencing Act 2002, that Mr Hieatt was to serve a minimum period of imprisonment (an MPI) of 11 years.

[5] Mr Hieatt has now appealed against his conviction and his sentence. As to the appeal against conviction, there is only one issue. Was the Judge wrong not to leave provocation to the jury? On the appeal against sentence, the sole issue is whether the MPI should have been ten years instead of 11.

Was the Judge wrong not to leave provocation to the jury?

[6] Mr Kaye accepted the Judge set himself the right test when deciding whether to leave provocation to the jury. The Judge put it this way:

[14] So bundling these matters together I need to scrutinise, in assessing the s 169(3) question of law, whether there is a plausible narrative reasonably capable of leading the jury to find it a reasonable possibility that the accused Mr Hieatt, as a result of words or actions emanating from the deceased which were sufficient to deprive the ordinary New Zealander of the power of self-control, was in fact deprived of his power of self-control and thereby induced to murder the deceased.

[15] I have deliberately omitted reference to the characteristics of the accused because no such special characteristics were advanced, and I'm satisfied that no such characteristics arise from the evidence.

[7] The Judge then went on to set out the relevant evidence. He referred to Mr Kaye's submission in these terms:

¹ *R v Hieatt* HC Auckland CRI-2009-004-11969, 18 November 2010.

² *R v Hieatt* HC Auckland CRI-2009-004-11969, 25 February 2011.

[34] In Mr Kaye's submission there were two phases to the evidence. The first phase was the background which comprised the deceased's temper and her verbal attacks on him, followed (after dinner on the night of 17 April) by the accused's retreat into the bedroom. Mr Kaye categorised this as the "brooding phase". The second phase, based on the accused's evidence, comprised the argument over rent money; the deceased's assertion that it was her house and her rules; the accused not being able to stand her shouting at him anymore and wanting her to shut up; and the deceased being "on fire". The acts and words which Mr Kaye was obliged to point to were the deceased's struggling and her statements that the accused wanted to kill her. He pointed to the accused hearing his voice say "Yes I am going to kill you", and his perception that it was as if it were somebody else tightening the rope.

[8] The Judge's conclusions were as follows:

[37] It is the deceased who was on the receiving end of the accused's violence that night. There had been an argument, which went round and round, regarding rent payment and financial matters. Certainly the deceased's words and the manner of their delivery would have irritated the accused and would have resurrected his sense of injustice that he was unable, as payer of half the rent and outgoings, to use the deceased's home for his own purpose during daylight hours.

[38] But it was not that preliminary argument which comprised acts and words which precipitated the homicide. The accused's narrative, which he gave to the jury in a quiet, deliberate, and chilling fashion, shows that the accused was very much in control. He wanted to shut the deceased up. First, he retreated into his room to find some masking tape. Then he assaulted the deceased by placing the masking tape over her mouth. When she retaliated by ripping the tape off and scratching him, he punched her on a number of occasions causing her to bleed. From then on, his calculated strategy was to try to shut the deceased up and to ensure that she would not seek help from the neighbours or call the police. To that end he restrained her (using his superior height and weight) on the bed. When she escaped from the bed he deliberately followed her and pulled her back. He continued to restrain her. When she requested to be let go to the bathroom to clean herself up he took no notice. His avowed intention in continuing to restrain her was to try to negotiate some form of deal with her which included her not going to the police. He escalated his restraint by reaching for handcuffs and then a rope.

[39] It would, in my judgement, be idle, and totally contrary to the situations in which the partial defence of provocation was designed to operate and indeed has operated in past homicides, to say that in this situation, where the accused was the assaulter and the aggressor, that any subsequent acts or words of the deceased be provocative.

[40] And even if I was wrong in that assessment, the words on which the accused appeared to rely and which, on his evidence, led to him informing the deceased he would kill her and strangling her, those words, being "You want to kill me", could not possibly be construed as provocative.

[41] The deceased statement "You want to kill me" far from being provocative, in the context of a serious domestic dispute where the deceased

had already assaulted is, in my judgement, probative of fear of ongoing violence. I reject totally the accused's justifying interpretation of those words which he communicated to his step-sister whilst he was in prison that perhaps the words indicated that the deceased wanted to die, a hint of which view was to be found in the accused's evidence cross-examination set out [above].

[42] Overarching all that is the evaluative exercise. Were the deceased's acts and words on that evening, as detailed in the accused's narrative, sufficient to deprive a hypothetical person who had the power of self-control of an ordinary New Zealander (there being no special characteristics of the accused) of the power of self-control? I consider, as part of the necessary evaluative exercise, that such a conclusion is untenable. The accused's loss of control, on his narrative, came at the conclusion of a series of deliberate assaults which, after the masking tape incident, were part and parcel of a strategy to try to calm down the deceased and ensure she did not go to the police. The deceased three times said "You want to kill me". Far from causing an ordinary New Zealander, in the context of what was a domestic situation, to lose the power of self-control and to murder, the ordinary New Zealander would, in my view, be struck by the deceased's perception and act on it by ceasing the assaults, not by escalating them.

[43] I am fortified in this approach by the observations of the Court of Appeal in *R v Rogers*³ that nowadays merely abusive words or even an attack (in a domestic context) "cannot get near the threshold". A physical attack (such as in this case a scratch) which, although painful or containing an element of indignity, would not justify from an ordinary person a response beyond what was necessary for self-defence. Improved attitudes towards the dignity and rights of women are not to be sacrificed by a judicial application of s 169(2)(a) which "reads up justification of someone who considers himself provoked".

[44] Again, absent special characteristics, no ordinary New Zealander would, in the context of the accused's narrative, have snapped and committed a homicide.

[45] It was for these reasons that I decided, pursuant to s 169(3) that the accused's narrative did not constitute a credible narrative or evidence of provocation which would justify me leaving the partial defence to the jury.

[9] We have set out the Judge's reasoning at length because we cannot improve upon it. The Judge's reasoning was fully supported by the evidence in the case. Nothing Mr Kaye said to us on appeal came close to persuading us that the Judge had erred in any respect.

[10] We have no doubt the Judge was correct not to leave provocation to the jury. It follows that the appeal against conviction must be dismissed.

³ *R v Rogers* [2009] NZCA 387, (2009) 24 CRNZ 276 at [36]–[37].

Was the MPI too high?

[11] The minimum term of imprisonment cannot be less than ten years.⁴ At sentencing, Crown counsel sought a longer MPI because of a number of aggravating features. Priestley J weighed Mr Kaye's submissions to the contrary. He considered a number of cases. He concluded:

[33] The aggravating features in this case are clear. You were preventing your victim from escaping; the restraints; the blow to her mouth; and your self-interested motive of restraining her so she would not seek assistance from neighbours or report you to the police. I attach some significance to the fact that this homicide took place in a domestic setting and that the victim was the woman with whom you were living and in her home. As Clifford J observed in *Ngeru*,⁵ a murder committed in the context of a domestic relationship and in a shared residence requires a greater degree of emphasis on denunciation than in some other homicides.

[34] I am satisfied, having heard the evidence and read Dr Pillai's reports, that the out-of-body experience you described was very likely the product of the cannabis you had consumed that evening interacting with your personality disorder. But these factors cannot properly be seen as causative of the murder. Instead of stepping away from this small and vulnerable woman whom you say you loved, you strangled her and have, in a totally inappropriate way, tried to suggest this was something she wanted. I see the forces acting on you that night, as being cannabis and your personality disorder rather than some degree of diminished responsibility.

[35] Had your restraint of her and your attack on her been of a low order and less sustained I would have imposed the minimum 10 year term of imprisonment. However, given these aggravating features, having due regard to s 103(2) factors, and having regard to roughly comparable cases, including *R v Ryan*,⁶ I consider a small uplift is justified.

[12] The Judge imposed an MPI of 11 years.

[13] Mr Kaye challenged the Judge's reasoning, largely on the basis that the decision was out of line with two High Court cases, where the Judges concerned had imposed just the standard ten year MPI. Mr Kaye also submitted that the overall circumstances in *Ryan*, on which the Judge had particularly relied, were more serious.

⁴ Sentencing Act 2002, s 103(2).

⁵ *R v Ngeru* HC Wellington CRI-2008-085-5996, 11 December 2009 at [27].

⁶ *R v Ryan* HC Hamilton CRI-2005-019-9389, 26 July 2007.

[14] We do not accept Mr Kaye’s submission. We consider the Judge very carefully considered the overall circumstances and in particular the test set out in s 103(2) for uplift on the base figure. In our view, *Ryan* was, as Priestley J said, “roughly comparable”. Even if it was more serious, Ronald Young J in that case imposed an MPI of 12 years, which was higher than Priestley J’s MPI.

[15] Mr Kaye’s other two cases are not really comparable. The first was *R v Rukuata*.⁷ In that case, the prosecutor did not seek a higher MPI, presumably because of some mitigating factors, in particular the significant remorse Mr Rukuata had shown, culminating in an attempt to commit suicide.⁸ In the other case, *R v Seau*⁹, the Judge concluded that Mr Seau was not a threat to the community and was very remorseful.¹⁰ Mr Seau had no previous convictions of any kind and no history of violence towards his wife, whom he had killed.¹¹ Both cases are accordingly distinguishable.

[16] We are satisfied that Priestley J correctly evaluated all relevant factors and that the MPI he imposed was not excessive. Accordingly, we dismiss the appeal against sentence as well.

Solicitors:
Crown Law Office, Wellington for Respondent

⁷ *R v Rukuata* HC Auckland CRI-2005-092-13891, 29 May 2007.

⁸ At [16].

⁹ *R v Seau* HC Auckland CRI-2006-092-18372, 17 April 2008.

¹⁰ At [16].

¹¹ At [7].