IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CRI-2018-220-40
[2019] NZHC 78

THE QUEEN

v

HAAMI HANARA

Hearing: 5 February 2019

Counsel: S B Manning and C Stuart for Crown
E J Forster for Prisoner

Sentencing: 5 February 2019

SENTENCING NOTES OF CHURCHMAN J

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[1] Mr Hanara, please stand.

[2] Haami Hanara, you appear for sentence today having been found guilty by a jury of murder.[1] You had already pleaded guilty to the charge of burglary arising from the same incident.[2] The two main issues for me to decide today are whether, on the charge of murder, I sentence you to life imprisonment or to a finite term, and also what minimum term of imprisonment you should serve.

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1 Crimes Act 1961, ss 167(a) and (b), and s 172; maximum penalty life imprisonment.
2 Section 231(1); maximum penalty 10 years' imprisonment.

[3] I now need to explain to you, to the victim's family, and other members of the public the reasons behind the sentence that I will impose. It will be necessary for me to do that at some length, and unfortunately, there may at times be words that I use that you do not understand. But you have Mr Stephenson, your communication assistant, with you and he will be able to explain things to you that I am saying and be able to answer any questions you have afterwards. It is important though, that I explain myself in a way that can be understood by the people who have been affected by your actions and the wider public in general.

[4] Now while I do that, you may be seated beside Mr Stephenson.

[5] In sentencing you, I need to cover certain facts. I need to explain:

(a) your offending;

(b) the impact it has had on your victim's family;

(c) the purposes and principles of sentencing;

(d) the presumption of life imprisonment;

(e) the circumstances of the offending;

(f) your personal circumstances, in particular your youth and what has been described as the mental impairment; and

(g) the concept of the minimum period of imprisonment (MPI).

Your offending

[6] On Sunday 4 March 2018, you and four others went to the Flaxmere Tavern, intending to commit burglary. You came across the victim, Kelly Donner, in a caged service area at the rear of the tavern. You asked if you could borrow his torch. He handed it over to you. A short time later, he asked for his torch back but that request was refused. This led to a physical altercation between you and your group on the one

hand, and Mr Donner. That involved pieces of wood, bottles and even bits of broken concrete being thrown at Mr Donner.

[7] You, however, had a knife. You hid behind a wall and, as Mr Donner retreated, turning away from you and the group, you followed him, and you stabbed him four times in the upper chest and neck.

[8] As he lay on the ground bleeding, you, together with the others, stomped, punched and kicked him, to both the head and the body. You then left him where he lay and you ran off.

[9] One of the stab wounds severed his carotid artery, and he died due to blood loss caused by the wounds, in particular that wound.

Victim impact statements

[10] As you heard this morning when Carmen Donner read out the statement, members of Mr Donner's extended whanau have provided the Court with victim impact statements, detailing the emotional harm that his murder has caused to them. It is noted that, while he lived a different lifestyle and preferred not to stay in a house, he had two daughters that he loved dearly. As you have heard, his whanau are hurt, grieving, and saddened, not only by his death, but also by how it occurred.

[11] I acknowledge Mr Donner's whanau, those in Court today and those who were in Court during the trial. I acknowledge the moving, dignified and balanced victim impact statements they have provided. They have recognised that not only is this a tragedy for their whanau, but it is also a tragedy for you and for your whanau.

Sentencing purposes and principles

[12] I turn now to the purposes and principles of sentencing, and a number of those a relevant:

(a) to hold the offender (and the offender in this case is you), accountable for harm done to the victim and the community by your offending;[3]

(b) to promote in the offender a sense of responsibility for, and acknowledgement of, that harm;[4]

(c) to denounce the conduct in which the offender was involved;[5]

(d) to deter the offender and other persons from committing the same or a similar offence;[6]

(e) to protect the community from the offender;[7] and

(f) to assist in the offender's rehabilitation and reintegration.[8]

[13] The reason for the relevance of the last factor is because ultimately, no matter how long a period of imprisonment you serve, you ultimately have to return to, and live, as a part of this community.

[14] The applicable sentencing principles are:

(a) to take into account the gravity (that means the seriousness), of the offending, including your degree of culpability;[9]

(b) to take into account the general desirability of consistency with appropriate sentencing levels in respect of similar offenders committing similar offences in similar circumstances. That means when one person commits the same sort of offence, the other person, generally speaking, and subject to a number of matters that the lawyers

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3 Sentencing Act 2002, s 7(1)(a).
4 Section 7(1)(b).
5 Section 7(1)(e).
6 Section 7(1)(f).
7 Section 7(1)(g).
8 Section 7(1)(h).
9 Section 8(a).

have spoken about, can expect to receive a similar sort of penalty for the same offence;[10] and

(c) finally, the Court must take into account any particular circumstances of the offender that would mean that a sentence that would otherwise be appropriate would, in the particular circumstances, be disproportionately severe.[11] And that is the matter that Mr Forster, your lawyer, has spent much of his time this morning talking to me about.

Life imprisonment

[15] I can start with the concept of life imprisonment.

[16] Under s 102 of the Sentencing Act 2002, there is what is called a presumption in favour of life imprisonment for murder "unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust".

[17] The threshold to displace, and that means the hurdle that is required to be met, the presumption of life imprisonment, is high and is only likely to be met in exceptional cases. The Court of Appeal in *R v Rapira* said this:[12]

> The test is that the sentence of life imprisonment is manifestly unjust. That conclusion has to be made on the basis of the circumstances of the offence and the offender. It is an overall assessment. The injustice must be clear, as the use of "manifestly" requires. The assessment of manifest injustice falls to be undertaken against the register of sentencing purposes and principles identified in the Sentencing Act 2002 and in particular in the light of ss 7, 8 and 9. It is a conclusion likely to be reached in exceptional cases only, as the legislative history of s 102 suggests was the expectation.

[18] In determining whether or not that presumption is displaced, I have to consider any mitigating factors relating to you that reduce your culpability in the context of the offending. The Court of Appeal in another case in *R v O'Brien* said:[13]

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10 Section 8(e).
11 Section 8(h).
12 *R v Rapira* [2003] 3 NZLR 794 (CA) at [121]. This passage was approved by the Court of Appeal in *R v Wihongi* [2011] NZCA 592.
13 *R v O'Brien* (2003) 20 CRNZ 572 at [36].

> There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment.

[19] It is important to note, however, that the test of manifest injustice involves a consideration of both the offence itself, that is what you did, and the offender, that is of your personal circumstances. In another relevant case, the Court of Appeal in *Te Wini v R* said:[14]

> [57] For all the reasons advanced by counsel, life imprisonment may well be manifestly unjust if it were only the circumstances of the offender – Ms Te Wini – that the Judge needed to consider.
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> [58] But that was not the position. The Judge needed also to consider the circumstances of the offence. And, along with Ms Churchward, Ms Te Wini was involved in brutally murdering a defenceless old man in his bed in his own home at night. As counsel for Ms Te Wini rightly acknowledged, it was a "dreadful" crime.

[20] There are, as your lawyer has drawn to my attention in both his written and oral submissions, some cases where it has been determined that a sentence of life imprisonment for murder would be manifestly unjust. Those cases indicate the high threshold for displacing the presumption. I am aware of only some 10 such cases since the current Act came into force in 2002. As the Crown pointed out in its submissions, these cases involve things like mercy killing,[15] battered defendants suffering severe and prolonged abuse from the person that they killed,[16] offenders suffering from major psychotic illness,[17] offenders who were secondary parties,[18] and one offender who Mr Forster made submissions to me about, who was only 13 years of age at the time of the offence, putting him into a special class of people aged under the age of 14 years.[19]

The circumstances of the offending

[21] If I can start now by analysing the circumstances of the offending.

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14 *Te Wini v R* [2013] NZCA 201.
15 *R v Law* (2002) 19 CRNZ 500; *R v Knox* [2016] NZHC 3136.
16 *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *R v Rihia* [2012] NZHC 2720.
17 *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011; *R v Cole* [2017] NZHC 517.
18 *R v Cunnard* [2014] NZCA 138; *R v Innes* [2014] NZHC 2780; *R v Madams* [2017] NZHC 81.
19 *R v Nelson* [2012] NZHC 3570.

[22] Mr Forster has suggested that Kelly Donner provoked the attack and was aggressive to you. A number of the submissions he has made, both in his written submissions and in what he said to me this morning, have been made on the basis that an element of provocation directly impacts on the appropriate sentence that I should impose. I state clearly, I do not accept that there was provocation on the part of Mr Donner.

[23] In particular, as to how the events started, I rely on the evidence given by NG. Her evidence, both in chief and under cross-examination from Mr Forster, was clear. It was only after your group threw bottles at Mr Donner that he retaliated by throwing bottles back. I found NG to be a credible witness and I accept that her account of what transpired is the most accurate account.

[24] As we saw from the CCTV evidence, Mr Donner responded by throwing bottles back, but that was a response rather than an initiation, and by the time you stabbed him, he had stopped throwing anything and was walking away from you.

[25] You chose to wait, out of his sight, until he had turned away and was moving away from you and the others who had been attacking him. It was only then, when you were under no threat, that you chose to follow him, and stab him four times. The number of the wounds, their location, being to the neck and the chest, and the force that you used to inflict them, indicates to me that you intended to kill him. You then chose to punch and kick him as he lay bleeding on the ground, before running off, without rendering any assistance to him.

[26] This was, as Mr Manning for the Crown submitted this morning, a brutal attack.

[27] It is my view the circumstances of the offending itself are not such that it would be manifestly unjust to impose a term of life imprisonment.

Circumstances of the offender

Offending whilst on bail

[28] I am now obliged to consider whether your circumstances, as opposed to what you did, have the result of rendering a sentence of life imprisonment manifestly unjust.

[29] The first circumstance is that the offending occurred while you were on bail for another serious offence, that was of injuring with intent to cause grievous bodily harm. This offending had taken place only two weeks before the murder. Your bail conditions, that you were in breach of, were that you not associate with EG, who is one of the youths who took part with you in the attack on Kelly Donner. This is an aggravating factor which the Court must take into account in sentencing, although for the reasons put forward by Mr Forster, and they relate to the placement that had been made with your mother, and the circumstances in which that had come to an end, I accept that, in this case, it is not as important a factor as a number of the others that I have to deal with.[20]

Youth

[30] I turn now to your youth.

[31] You were only 14 years of age at the time of the offending. Youth is clearly recognised as a mitigating factor that this Court must consider in coming to an appropriate sentence.[21] However, having said that, the Act contains no restriction on a sentence of life imprisonment for a young person and, where a young offender has been convicted of murder, while youth is a factor to be taken into account, it is not sufficient, of itself, to render life imprisonment manifestly unjust.[22] Although Article 37 of the United Nations Convention on the Rights of the Child prohibits life imprisonment without the possibility of parole for those under 18, eligibility for parole for those sentenced to imprisonment for life in New Zealand arises, normally, after 10 years.[23] There is also the possibility that, where developing maturity and positive

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20 Sentencing Act, s 9(1)(c).
21 Sentencing Act, s 9(2)(a).
22 *R v Rapira* [2003] 3 NZLR 794 (CA) at [122]-[123].
23 At [122].

response to correction indicates it is appropriate to do so, an offender might be referred early for consideration to the Parole Board.[24]

[32] Other than the one case that we have discussed where the offender was aged 13,[25] others offenders aged 16 years or younger have generally received sentences of life imprisonment for murder.[26]

Mental impairment

[33] The next matter I must address is what is being referred to as mental impairment. While an offender's mental impairment has been taken into account in determining that it would be manifestly unjust to impose a sentence of life imprisonment, in those cases there was a direct link between the mental illness or the mental impairment, and the killing, with the mental illness being a significant contributor to the offender's decision to kill.[27] It is also of significance that in each of those cases, the offender was or had been attacked by the victim with whom they were closely connected. Those facts do not exist in the present case. You had no reason to harm Mr Donner. He was someone who you knew, but someone who had not previously done you any harm.

[34] Prior to trial, you had been assessed by two health assessors, one a forensic psychiatrist and the other a clinical psychologist. The reports of the specialists were of relevance when the issue of whether you were fit to stand trial was considered. It is accepted by all the specialists who had looked at you that you have a mental impairment, and that impairment, in their view, exists in three areas:

(a) alcohol related neuro development disorder;

(b) attention deficit hyperactivity disorder; and

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24 At [124]; Parole Act 2002, s 25.

25 *R v Nelson*, above n 19. Mr Nelson was sentenced to 18 years' imprisonment, with no MPI.

26 *R v Rapira*, above n 22; *R v O'Brien* (2003) 20 CRNZ 572 (CA); *R v Slade* [2005] 2 NZLR 526 (CA); *R v Fa'avae* HC Auckland CRI-2006-204-748, 10 July 2008; *R v Trevithick* HC Auckland CRI-2007-244-000009, 19 June 2007; *R v Broughton* HC Rotorua CRI-2008-269-62, 26 March 2009; *Te Wini v R*, above n 14; *R v Waitokia* [2017] NZHC 178.

27 *R v Wihongi*, above n 16; *R v Rihia*, above n 16; *R v Cole*, above n 17.

(c) intellectual disability.

[35] The extent to which those impairments existed has been explained in each of the reports, the clinical psychologist, for example, commenting as follows:

> Whilst an overall IQ score of 73 could, in theory, meet the criterion of significantly sub-average intelligence required in the broader assessment of intellectual disability, Haami's overall cognitive profile does not appear to reflect permanent cognitive impairment resulting in extremely low general intelligence… I would suggest that whilst Haami is of modest intelligence his lowest scores on testing are more the result of environmental factors (significantly disrupted education) than a permanent impairment that results in extremely low general intelligence…

[36] The Court has also received a report from the Child Development Service of the Hawke's Bay District Health Board, summarising its earlier report on an assessment of you when you were aged 10. It states that at the time of that assessment in 2014, you were someone who would have difficulty staying calm in a highly charged environment.

[37] The Crown submits that, there is no doubt that you have an intellectual impairment, but says such impairments are, sadly, far from rare in cases involving youths who commit serious crime. And indeed, I have been referred to a number of such cases in this Court over the past 12 months.

[38] The Crown submits that there is no direct link between your impairment and the offending itself. No direct link that would be so obviously influential in the offending that would create a clear injustice of a sentence of life imprisonment. It is conceded that the individual circumstances that you have will always have an impact on offending, but the Crown argues that what is important, applying the legislation, is whether the effect is so significant, and so connected to, the offending that it would clearly result in an injustice if a life sentence were to be imposed.

[39] Your personal circumstances have some similarities to a number of other cases, one in particular the case of *R v O'Brien*.[28] In that case, the defendant, who had been aged some 14 years and nine months at the time of the offending, had, along with two

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[28] *R v O'Brien* (2003) 20 CRNZ 572.

friends of a similar age, attempted to steal the victim's car. The plan had been to trick the victim into leaving the vehicle. When this failed, Ms O'Brien struck the victim in the head seven or eight times with a hammer and the teenagers, assuming he was dead, placed him in a nearby river, going on the intended joyride. On appeal, it was submitted for Ms O'Brien that the sentencing Judge had been wrong to conclude there was nothing really exceptional about the appellant or the murder, and her young age and intellectual impairment, specialist reports having disclosed mild intellectual disability, not dissimilar to yours, which would mean that a sentence of life imprisonment was manifestly unjust.[29] The Court of Appeal said this:

> [36] Youth is not necessarily immune to wickedness and, regrettably, that is demonstrated in this case. In our view, low intellectual capacity unrelated to the mental elements of criminal responsibility, is seldom likely to justify a departure from the statutory presumption. It is to be remembered that the fact of conviction for murder will have excluded mitigating features such as provocation, and disease of the mind amounting in law to insanity. There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment. This is not such a case, particularly when the circumstances of the offence, which must be considered along with the circumstances of the offender, demonstrate premeditated brutality. The offenders decided to steal Mr Pigott's car simply so they could go for a joyride in it. They conceived a plan to steal his keys and money card and by some trick to lure him from his vehicle so they could take it. Upon learning of the hammer, the appellant obtained it, practised striking, and then repeatedly struck Mr Pigott's head with it. … There is nothing about the circumstances of the offence or the offender which would make a sentence of imprisonment for life unjust.

[40] In this case, you are 14 years of age. You have some degree of cognitive impairment, and you had that when you made the decision to stab the victim. While your personal circumstances are agreed by both the lawyers who have addressed me as having been tragic, and indeed they are (on their own they may have been sufficient to rebut the presumption of life imprisonment), I am required, as the Court of Appeal has in the passage I have just read out to you, to have regard to the facts of the murder itself, and not just your personal circumstances.

[41] In this case, it was not an act of self-defence. The victim, Mr Donner, was retreating. It was, as I have said, a brutal murder and a sentence of life imprisonment,

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[29] At [33].

which results in the lifetime power to recall the offender, will provide the public with the necessary protection from such behaviour in the future. Your youth and mental incapacity do not make a life sentence manifestly unjust. However, these are factors that I must, and will, give recognition to, when I consider the duration of the minimum period of imprisonment that I am obliged to impose.

Minimum period of imprisonment

[42] Section 103 of the Act provides that, where life imprisonment is to be imposed, the Court must order that the offender serve a minimum period of imprisonment under that sentence. The period imposed must be no less than 10 years and must be the minimum term considered necessary to satisfy all or any of the following purposes:[30]

(a) holding the offender accountable for the harm done to the victim and the community by the offending;

(b) denouncing the conduct in which the offender was involved;

(c) deterring the offender or other persons from committing the same or a similar offence; and

(d) protecting the community from the offender.

[43] In some circumstances, it will be necessary for the Court to impose a minimum period of imprisonment of 17 years or more.[31] There were some circumstances in this case, particularly the brutality of the offending, that may have justified the Crown in seeking this Court to invoke that 17-year minimum period. However, the Crown and your counsel have both submitted that, in this case, the 17-year minimum period is not necessary, and I accept that submission.

[44] I then have to work out what minimum period is required.

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30 Sentencing Act 2002, s 103(2).
31 Section 104.

[45] The Court of Appeal has said that the primary question in fixing a minimum term is how much more than the minimum 10 years is required in order to achieve the purposes of punishment, denunciation and deterrence.[32] I must first look at the aggravating factors of the offending itself before then making adjustments for aggravating and mitigating factors of the offender.

[46] It is my view that the main aggravating factors of the offending are:

(a) that the victim was retreating and had his back to you when you attacked him;

(b) the fact that there were four stab wounds to the neck and head;

(c) the location of those stab wounds; and

(d) the kicking of the victim as he lay on the ground bleeding to death after you had stabbed him.

[47] I have to weigh up all those aggravating factors. However, it is my view that your youth, the intellectual impairment that has been discussed and is set out in detail in all of the reports that I have read, and your personal background, and that includes all those factors – your social background, your family situation, and the other broader factors – mean that a minimum period of imprisonment of higher than 10 years is not justified.

Conclusion

[48] The offending justifies a term of life imprisonment because of the circumstances of the offending and your circumstances do not make it manifestly unjust for that to be imposed.

[49] But while the circumstances of the offending would normally justify the imposition of more than a minimum period of 10 years, a combined effect of your

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[32] *R v Howse* [2003] 3 NZLR 767 (CA) at [61].

youth, your mental impairment, and personal circumstances are mitigating factors that I have concluded justify a reduction of a minimum period of imprisonment to 10 years.

[50] Mr Hanara, if you would now stand and please resume your position in the dock.

[51] Haami Hanara, I hereby sentence you to life imprisonment on the charge of murder. There will be an order for a minimum period of imprisonment of 10 years. On the charge of burglary, I sentence you to three months' imprisonment, to be served concurrently.

[52] You may now stand down.

Churchman J

Solicitors:
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