

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

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CRI-2018-087-2244
[2021] NZHC 2747**

THE QUEEN

v

HARRY CLEMENTS MATCHITT

Hearing: 14 October 2021
Counsel: R W Jenson for Crown
R O Gowing for defendant
Sentence: 14 October 2021

SENTENCING NOTES OF TOOGOOD J

Solicitors:
Crown Solicitor, Tauranga
Gowing & Co, Whakatane

[1] Harry Clements Matchitt, you appear for sentence having been found guilty by a jury of the manslaughter of Brian Hilton at Opotiki on 7 July 2016.

[2] I begin by acknowledging the presence in the courtroom of one of Mr Hilton's daughters, Anmea Hoskin, also your former partner, Mary-Ann Herbert, and your three daughters. I acknowledge also that Mr Hilton's other daughter Celeste and his son Lance have been able to view this hearing remotely:

Ngā mihi nui ki a koutou.

[3] It is unfortunate that, because of COVID-19 response restrictions, it has been necessary to conduct this sentencing while you are in custody at Mt Eden Correctional Facility, Mr Matchitt, and I am in Auckland. It is now over three months since the jury's verdict and the interests of justice require that the sentencing should not be left hanging over you until some uncertain time in the future when we could have all been present in court together.

The offending

[4] It is necessary, first, for me to describe the facts on which you are to be sentenced. I am required to accept as proved the facts that are essential to your guilt,¹ and also to make findings, based on the evidence, of those facts I find to be proved beyond reasonable doubt so long as they are consistent with the jury's verdict.²

[5] You killed Mr Hilton by brutally attacking him in his own home at around 8.30 pm on 7 July 2016. You were a guest there, spending some time drinking with Mr Hilton. For reasons that are not clear, you beat him violently around the head, striking him several times with such force as to cause fractures to his facial bones, both eye sockets and his nose, and an injury behind his right ear. What was described by the pathologist, Dr Stables, as a complicated and quite significant fracture pattern was so severe that it resulted in Mr Hilton's mid-face, upper jaw and nose no longer being connected to his skull. The force you applied was of a kind seen in high-trauma situations such as motor vehicle accidents. You appear to have used your fists – you

¹ Sentencing Act 2002, s 24(1)(b).

² *Edwardson v R* [2017] NZCA 618 at [105]–[107].

may have kicked Mr Hilton when he fell to the ground – but there is no evidence that you used a weapon.

[6] When Mr Hilton was found the following morning, he was lying where you left him, deeply unconscious. He was battered, severely bruised and covered in blood, with blood on the floor around him and blood spatters on the walls. His state was such that he was unable to clear his airway adequately in the hours that he lay there so he developed bronchial pneumonia and, despite medical treatment, died a few days later.

[7] Mr Hilton was a frail, 77-year-old man weighing only 49 kilograms. He was unwell and suffered from severe emphysema. Although the state of his health may have contributed to his death, there is no doubt that he would not have died but for your brutal assault. At that time, you were 49 – much fitter and stronger than your victim.

[8] How did this terrible death come about? I am satisfied from the evidence, as the jury must have been, that on the night of 7 July 2016, you were visiting family members at your former partner's home just a few doors down the road from Mr Hilton's place in Church Street, Opotiki. You were captured on CCTV leaving the driveway to the family's property and walking up the road towards the place where you were staying, but also in the direction of Mr Hilton's home. You were recorded crossing the road and entering the driveway to his property at around 8.30pm. You departed about an hour later.

[9] In a statement to the Police, the partner of one of your daughters said that you left the house in Church Street that night drunk and angry. He said he had speculated after Mr Hilton was found that you might have been responsible for the attack on Mr Hilton. In evidence at your trial, he was vague about what he could recall of that night, but I am satisfied that he told the truth to the Police initially. I am satisfied also that Mr Hilton and you had one or two drinks together that evening. Two beer bottles were found in the lounge that had not been there earlier in the day. One of them had your DNA on it. You said Mr Hilton was not a beer drinker. You have a serious drinking problem, Mr Matchitt, as your record of offending shows, and you have a propensity to act violently when drunk.

[10] I am aware from dealing with you over a bail issue that, in March this year, you assaulted people while drunk awaiting your trial. Your former partner, Mary-Ann, told Police that you frequently assaulted her while drunk until about five years ago when she made it clear to you that you would have no relationship with her or the family if that continued. You have over 20 convictions for actual or threatened violence among the long list of other offending. Many of your prior convictions related to your driving while drunk.

[11] The evidence satisfies me, as I believe it satisfied the jury, that for some reason you got into an argument with Mr Hilton, a man you said was your friend, and you beat him severely. You did not say, and there is no evidence, that he provoked your attack in any way and nothing could justify it. The only explanation is that it was a violent, drunken outburst.

[12] I infer that the jury accepted that, Mr Matchitt, because you were extremely fortunate not to be convicted of murder. The nature of your attack on a vulnerable, unwell old man was such that the jury would have been entitled to conclude that, if you did not actually intend to kill him, the brutality of your assault was such that you must have known that you would be likely to cause his death and were reckless about it. It seems, however, that the jury was not sure that reckless murderous intent was proved and so you were convicted of manslaughter. That must have been, in my view, because the jury considered your state of intoxication was such that you were not able to fully appreciate, to the extent the law requires for a murder conviction, the consequences of what you were doing.

[13] Nevertheless, a drunken intent to beat someone severely about the head is a culpable or blameworthy intent and the fact that you were drunk provides no defence or excuse.³

Victim impact

[14] Mr Hilton was a somewhat eccentric character who lived alone but who had regular visitors – members of your family and you included, and others who cared for

³ Sentencing Act 2002, s 9(3)

him. I have read, and now heard again, the victim impact statement prepared by Mr Hilton's daughter, Celeste, which she wrote on behalf of her brother Lance, and Mr Hilton's other daughter, Annea. I note that they were present in court throughout your trial – two of them having come from overseas to see some measure of justice done for their father.

[15] The statement emphasises Mr Hilton's vulnerability at the time of your attack because of his mental health struggles. While I infer that Mr Hilton's children were somewhat estranged from him, he was their father and they cared about him. His premature death prevented them from having an adult relationship with him in the last years of his life.

[16] You denied being responsible for Mr Hilton's death and you were not arrested and charged for over two years. Mr Hilton's family had to endure the uncertainty of that period and then wait the remaining two and a half years to your trial and conviction for any degree of closure. It was a stressful time for them, adding to their loss and their suffering. They say that they have ahead of them a lifetime of healing from the traumatic circumstances of their father's death.

Your personal circumstances

[17] I have received a pre-sentence report written by a Probation officer and a report under s 27 of the Sentencing Act 2002 devoted to explaining something of your cultural and personal background. I have taken the contents of those reports into account.

[18] You have not had an easy life. Your mother died when you were only four and you say that your life may have been very different if she had been able to bring you up. Your father sent one of your brothers and you to live with relatives in Northland after your mother died. You were shaped by an upbringing characterised by consistent and sustained periods of physical abuse and mistreatment. From a young age, you were expected to work on the dairy farm where you were living. You were thrashed daily. No one intervened to help you, partly because you kept the violence to which you were subjected to yourself and your teachers knew nothing of it.

[19] You ran away from Whangārei to Opotiki when you were 12 and eventually resumed living with your father whom you describe as a good, nurturing and non-violent man; a fisherman for whom you worked. You reconnected with your other siblings. You did not have much of an education and you left school when you were 16.

[20] You were 15 when you first appeared in the Youth Court and in all you have amassed a total of 177 convictions leading to your serving 64 sentences of imprisonment in the nearly 40 years since your first appearance. Many of the convictions relate to drunk driving, but you also have convictions for dishonesty, drug dealing, fisheries offences and, as I have said, violence. There is no doubt that it is the combination of your addiction to alcohol and a violent temper that has caused you to use your fists far too often, frequently on those family members who have continued nevertheless to love you and support you. As well as imprisonment, you have received sentences from the courts that have been designed to help you change your ways and undergo some rehabilitation, but there is little evidence that you have seriously engaged in any treatment. You have simply not been motivated to become a different and better person, though things might have changed now.

[21] Head injuries you have suffered as a result of assaults and a motor vehicle accident have created difficulties for you and you have never had a full assessment of the long-term consequences of those injuries. In that respect, you are like so many of the prison population who have suffered from traumatic head injuries. The s 27 report outlines the extreme abuse of alcohol during much of your life since you started drinking in your early teens, and you rightly associate your binge drinking with much of your offending. You have also been a long-term user of cannabis and you have used other drugs to some extent. As I have noted earlier, you have not benefitted from any significant or long-term alcohol or other substance abuse treatment during your periods in prison. Although you have been a patched gang member, that does not seem to have any significance in relation to your present offending.

[22] The outlook has improved for you recently, particularly in your relationship with Mary-Ann [redacted]. She and your children supported you throughout your trial and continue to support you, and I have read Mary-Ann's letter and the other

supporting letters provided this morning. You appear to have persuaded your family that you are innocent.

[23] You have expressed a wish to remain sober and free from alcohol. You want to re-engage fully with your whānau, to get back into meaningful employment once you are released and to be an example to younger people. It is a sign of the dysfunction in your life that, in spite of your many driving offences, you have never held a legal licence and obtaining one is an ambition you hold.

[24] It is encouraging that you have expressed this desire to change and to use what therapeutic means and rehabilitative means are available to you to do so, so that you can become a contributing member to your whānau and to the community. That will require a great deal of effort on your part, Mr Matchitt; ending the association with alcohol long-term will be a difficult but significant step.

The sentencing approach

[25] The process by which I reach the appropriate sentence for your offending involves, first, setting a starting point that reflects the seriousness of your offending. I need to impose a sentence that is consistent with sentences imposed in similar cases and the starting point should also reflect any aggravating or mitigating features of your offence. From the starting point, I am required to make adjustments, either up or down, that take account of your personal circumstances.⁴

[26] I am required to have regard to the statutory purposes and principles of sentencing.⁵ I must hold you accountable for your offending and encourage you to be responsible for and acknowledge the harm you have caused. The sentence must be sufficient to denounce your conduct and protect the community. I am required also to consider the impact of your offending on your victims – Mr Hilton and his family – and to impose the “least restrictive” sentence that is appropriate in the circumstances, consistently with appropriate sentencing levels.

⁴ *Moses v R* [2020] NZCA 296 at [46]–[48].

⁵ Sentencing Act 2002, ss 7 and 8.

The starting point

[27] There is no tariff for manslaughter sentences because of the infinite variety of circumstances in which manslaughter verdicts are given and because, although the maximum penalty for manslaughter is life imprisonment, some manslaughter cases warrant much less severe penalties. The approach which the Crown submits I should follow, with which your counsel agree, is that I should consider the assessment of aggravating and mitigating factors in serious violence cases in the way set out by the Court of Appeal,⁶ and assess also your culpability by referring to comparable cases.⁷

[28] Counsel agree that four of the identified aggravating features in the guideline judgment are present in your case. First, there is the extreme violence that was involved in your attack on Mr Hilton. It is accepted that you punched Mr Hilton multiple times and it is entirely possible, although one cannot be sure, that you may have kicked him while he was on the ground. I make that observation because there is no evidence that you suffered any injury in the attack and there was an injury to one of Mr Hilton's legs, but I do not think it matters whether you kicked him or not. The consequence for Mr Hilton was that he received several violent, traumatic impacts causing serious head injuries and severe bruising to other parts of his body, notably his arms and hands where the bruising has a defensive quality. There is no evidence of any provocation and the only conclusion to be drawn is that this was simply an angry attack fuelled by alcohol. Moreover, after you had attacked Mr Hilton you callously left him for dead, abandoning him grievously injured.

[29] Next, the primary focus of your attack was to Mr Hilton's head, which is recognised as a serious aggravating factor.

[30] Third, Mr Hilton was 77 years old, almost 30 years older than you, frail and vulnerable.

[31] Fourth, the serious consequences of the attack – the extent of the injury and loss – was such that Mr Hilton died. I do not accept the observation by counsel for

⁶ *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

⁷ *Everett v R* [2019] NZCA 68.

the Crown that the injuries inflicted were not themselves fatal. Mr Hilton's emphysema was a factor that contributed to his death but, as Dr Stables' evidence makes clear, he died from bronchial pneumonia caused by the deep state of unconsciousness which followed your violent attack.

[32] I agree with Mr Gowing that the offending did not involve a breach of trust, but you were a guest in Mr Hilton's home, a place where he was entitled to feel safe and secure. In my view, that is also an aggravating factor.

[33] Counsel for the Crown has submitted that a starting point in the region of six to seven years' imprisonment is warranted. Mr Gowing and Ms Gentleman submitted in their written submissions that a starting point of between five and a half and six years is appropriate, although Mr Gowing quite properly and responsibly acknowledges that there are two Court of Appeal judgments to which I have referred counsel which affect the starting point and suggest one higher than initially proposed by your counsel. But I do not agree with either counsel on this matter.

[34] On the basis of the aggravating factors I have mentioned, I place your offending at the top of band two and at the bottom of band three of the guideline judgment, meaning that a starting point of between nine and ten years' imprisonment is appropriate. In taking that view, I have had regard to the discussion by the Court of Appeal in a domestic violence case that involved the death of a woman from serious head injuries inflicted by her partner.⁸ For reasons that are different from those that apply here, the Court of Appeal placed that offending also on the border of band two and band three. The Court said that a starting point in the region of nine to ten years would have been in range if the victim had not died and the sentence was instead for an offence of wounding with intent to cause grievous bodily harm. The Court described the starting point taken by the sentencing Judge of seven years and six months' imprisonment as "lenient". Having regard to those observations, I assess the appropriate starting point – judged by *Taueki* principles – to be nine years' imprisonment.

⁸ *Everett v R*, above n 7, at [38].

[35] I have tested that in comparison to other cases, including those referred to by counsel, in which violence of this type – without a weapon but involving at least four of the identifiable aggravating features – was involved. In my view, your attack on Mr Hilton was more serious than the assaults in two of the cases mentioned specifically.⁹ I note that in another case of a very drunk offender who punched his victims several times in the face, in a prolonged attack in retaliation for being squirted by a water pistol, the sentencing Judge placed the offending in the middle of band two of the guideline. Mr Gowing has referred to that case which involved the victim being trapped in his car by a seatbelt. He was vulnerable. So, too, was Mr Hilton. A starting point of eight years' imprisonment was upheld by the Court of Appeal.¹⁰ That case did not involve some of the other aggravating features of this one so I regard the appropriate starting point by reference to other decisions as being somewhere between eight years and the nine to ten years indicated by the Court of Appeal in *Everett*.

[36] I therefore fix the appropriate starting point as one of nine years' imprisonment.

Personal circumstances

[37] I then turn to consider your personal circumstances. First, I have regard to your history of violent offending. It does not appear to be characterised by violence as extreme as that which you inflicted on Mr Hilton, but your history of offending warrants an uplift to reflect the greater need for deterrence. The appropriate uplift from the starting point is one of six months' imprisonment.

[38] I am mindful, however, that your alcohol addiction and the offending to which it has led, is a product of your early difficult life; the violence to which you were subjected as a child; and the lack of a nurturing environment until you returned to live with your father when you were a teenager. You suffered the additional trauma of his death some 22 years ago when you must have been in your mid- to late-20s, aggravating your sense of loss from the death of your mother when you were a small child. I regard those factors as justifying a discount of 12 months from the starting point, bringing the sentence back to one of eight years' and six months' imprisonment.

⁹ *Blackler v R* [2019] NZCA 232; *Turi v R* [2014] NZCA 254.

¹⁰ *Felise v R* [2020] NZCA 60.

[39] Moreover, you spent two years and four months on restrictive electronically monitored bail. There were minor breaches during that period but you breached the terms of your bail more seriously in March 2021 in a way that would have resulted in your being remanded in custody were it not for your former partner's [redacted] and her undertaking, with other members of the whānau, to accommodate you and ensure that no further breaches of bail occurred. You complied with the terms of your bail during the period to trial, which was in other respects reformatory for you. I discount from the starting point by a further nine months in that regard to produce an end sentence of seven years nine months' imprisonment.

MPI

[40] Under s 84(1) of the Parole Act 2002, you would be entitled to consideration for release after having served one third of your sentence; that is, after 32 months. You denied responsibility for killing Mr Hilton and, indeed, it was part of your defence that another person also known to Mr Hilton might have been the offender. That proposition was properly rejected by the jury, but it demonstrates you have not reached a point of accepting responsibility or accountability that signals you are genuinely on a path to rehabilitation. You have expressed no remorse for Mr Hilton's death. The absence of insight and remorse does not lead to a heavier penalty but, together with the violence of your attack and your callousness in leaving Mr Hilton where he lay, fatally injured, your failure to accept responsibility indicates that the possibility of release after only 32 months would not be adequate to meet the sentencing purposes of accountability, denunciation, deterrence and community protection.¹¹ I direct that you should serve about half of your sentence before being eligible for parole.

Sentence

[41] Accordingly, Mr Matchitt, I sentence you to seven years nine months' imprisonment, of which you must serve a minimum of three years and nine months.

¹¹ Sentencing Act 2002, s 86(2).

[42] I direct that the cultural report of 4 October 2021 describing your issues with alcohol and your head injuries should be made available to the Department of Corrections so that you might undertake appropriate rehabilitative treatment.

[43] [Redacted]

[44] I thank counsel for their assistance throughout the trial and with the sentencing process. I will retire, Madam Registrar.

Toogood J