

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

**I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE**

**CRI-2020-027-510
[2021] NZHC 3327**

THE QUEEN

v

FREEMAN-JACK TIRITI TANGAROA MOANA-NUI PENE

Counsel: M B Smith for Crown
C S Cull for Defendant

Sentenced: 7 December 2021

Charges: Manslaughter; Male assaults female

Plea: Guilty

SENTENCING NOTES OF BREWER J

Solicitors/Counsel:
Marsden Woods Inskip Smith (Whangarei) for Crown
Catherine Cull (Kaikohe) for Defendant

Introduction

[1] Mr Pene, I now have to talk to you about your sentence. I cannot do that in two lines. I have to take some time to explain what I am doing and why.

[2] You have pleaded guilty to one charge of manslaughter¹ and one charge of male assaults female.² The maximum penalty for manslaughter is life imprisonment; the maximum penalty for male assaults female is two years' imprisonment. I have to decide what your sentence should be.

The facts

[3] On 6 June 2020, you went to a friend's birthday party. You were 18 years old.

[4] Another person at the party was a girl, De'jah. Your victim, Krillin, was De'jah's older brother. He did not go to the birthday party but he arrived around midnight to pick up De'jah.

[5] You either brought a knife to the party or found a knife at the party and took possession of it. According to the summary of facts, during the night you showed somebody else who was at the party a knife you had in your belt bag.

[6] De'jah went outside and spoke with Krillin when he arrived to pick her up. He was still in the vehicle. De'jah then ran back inside to get her belongings and in her hurry she knocked over a can of drink. You were also outside at that time and you became upset because De'jah knocked over the can of drink and you said to her:

Don't trash the house. It's not yours you stupid bitch.

[7] De'jah asked you, "what you going to do about it?", and you replied, "I will fuck you up". De'jah told you to, "go on then".

¹ Crimes Act 1961, s 171.

² Crimes Act 1961, s 194(b).

[8] By this time, you were standing on the front doorstep and De'jah was just inside the front doorstep. She tried to kick out at you but you grabbed her foot and dragged her down the front step onto the concrete porch. You then left her.

[9] De'jah picked herself up off the ground; she was moaning and crying (but did not have any injuries) and she went and told Krillin what had happened.

[10] Krillin walked over to where you and some friends were standing talking outside. There was an altercation which began on the driveway of the property but moved so that you and Krillin ended up at the rear of the house.

[11] You still had the knife in your belt bag. It has never been recovered but was described as being approximately 12 cm in length. During the altercation, you pulled out the knife and stabbed Krillin once in the upper right chest. You did so with such force that the knife penetrated Krillin's chest to an approximate depth of 11 cm. The knife went through the chest wall, through the intercostal space between the first and second ribs, pierced the right lung and the right atrium of the heart. The handle of the knife snapped off leaving the knife blade embedded in Krillin's chest.

[12] You then ran away.

[13] Krillin collapsed to the ground around the side of the house and he could not be saved.

[14] Shortly after the stabbing, you sent messages to a friend who was still at the party address. You told her that you had a lovely view of them. When your friend told you that Krillin had died, you replied:

Bruh my intent was not to murder bro, ... shit happens, life goes on, see you in the long run sweetie.

[15] In a phone call to an associate, you admitted stabbing and killing Krillin.

[16] Mr Pene, you surrendered yourself to the Kerikeri Police Station later in the day. You admitted pulling on De'jah's leg after she tried to kick you and you admitted stabbing Krillin.

Victim Impact Statements

[17] Your actions that night took an innocent young man's life. Your victim was your age, only 18 years old. You have heard from his whānau today. They are devastated and grieving. That is your doing.

[18] I say now that in sentencing you today I will not try to somehow compensate the whānau for Krillin's death. That would be impossible. Nothing I can do today will make up for Krillin's death. My job is to sentence you in accordance with the law. That is what I will do.

Sentence structure

[19] I will take a two-step approach to decide your sentence. First, I will set a starting point for your sentence by analysing your offending and, in doing so, I will take into account other cases similar to yours. Second, I will look at your personal circumstances to see to what extent the starting point should be reduced. I will include in this stage the discount you are entitled to for your pleas of guilty.

Starting point

[20] Each case of manslaughter has to be assessed individually. In your case, these are the factors which I think aggravate your offending:

- (a) You were carrying with you the knife you used to kill Krillin. Whether you brought it with you or whether you found it at the party does not really matter. You had the knife on you and it was concealed in your belt bag. You must have had it in case you wanted to use it.
- (b) Krillin was unarmed. There is nothing in the summary of facts to suggest he was threatening your life or threatening you with really serious harm. He could not have known you were carrying a concealed knife.

(c) Stabbing Krillin as you did was inherently lethal, although I acknowledge that I must sentence you on the basis that you had no murderous intent.

[21] The lawyers have referred me to a large number of manslaughter cases which they say are similar to your case and which I should use to guide me in assessing the starting point for your offending. I will not go through the cases with you (it would take too long), but I will note them in the written record of this sentencing.³

[22] I record that the Crown submits a starting point of seven years is appropriate. Ms Cull, on your behalf today, submits that an appropriate starting point is between five-and-a-half and six-and-a-half years' imprisonment.

[23] Against the facts of your offending, and the aggravating features I have identified, I will adopt a starting point of seven years' imprisonment.

[24] There is a case called *R v Taueki* in which the Court of Appeal set guidelines for sentencing in cases of serious violence.⁴ It does not apply directly to manslaughter cases but it can provide a useful crosscheck for a manslaughter case if appropriate allowance is made for the fact that the serious violence resulted in death. In your case, I consider the offending would fit within band 2 of *Taueki*. That is to say, it would attract a starting point of between five and 10 years' imprisonment. With the additional factor of death resulting from your violence, this gives me confidence that a starting point of seven years' imprisonment is appropriate.

Mitigating factors

[25] I now turn to look at your personal characteristics. I have to look at how you came to take Krillin's life and decide whether there are matters personal to you which should reduce the starting point. I have already said you are entitled to a discount for

³ *P (CA479/2015) v R* [2016] NZCA 128; *R v Raivarua* HC Rotorua CRI-2004-077-1667, 5 August 2005; *R v Ames* HC Rotorua CRI-2008-263-19, 30 October 2009; *R v Edwardson* HC Rotorua CRI-2006-069-1101, 27 April 2007; *R v UGT* HC Rotorua CRI-2011-263-73, 12 July 2011; *R v Eastham* [2013] NZHC 2792; *R v Olley* [2012] NZHC 40; *R v Hakopa* [2020] NZHC 2763; *R v Smith* [2014] NZHC 2091; *R v Emery* HC Auckland CRI-2008-092-1285, 13 February 2009; *R v Davies* [2020] NZHC 903; *R v Iraia* [2020] NZHC 1084.

⁴ *R v Taueki* [2005] 3 NZLR 275 (CA).

your pleas of guilty, and I accept you are entitled to the maximum discount of 25 per cent.

[26] Ms Cull has suggested you have six other mitigating features which should each attract a discount. I will look at each of them.

Youth at the time of the offending

[27] First, you were 18 years old at the time of the offending. It is well recognised that there are age-related neurological differences between young people and adults. These include that young people may be more impulsive than adults and more susceptible to negative influences and peer pressure. Further, long sentences can have a crushing effect on young people, who are generally recognised as having a greater capacity for rehabilitation than mature adults. There is a very real benefit to the community from achieving rehabilitation in a young person.

[28] As I will come to, you have mental health issues. I have read six mental health reports ranging in date from 25 September 2017 through to 20 October 2021. It seems, Mr Pene, you have limited scope for rehabilitation, and I agree with the pre-sentence report writer that you are at a high risk of reoffending. Really, as I will come to, your needs and those of society would be best served if you were in a structured and ordered environment with wraparound support for the foreseeable future.

[29] The reports also tell me that you are particularly impulsive and that when stressed your mental health conditions translate into you becoming reactive and aggressive.

[30] Against that, you were carrying a knife which indicates a potential for using it. You acted aggressively towards De'jah and stabbed Krillin after a period of altercation.

[31] I think you are entitled to a discount for your youth, but not a large one. I will allow a five per cent discount.

Mental health factors

[32] This leads further into your mental health factors. The Sentencing Act 2002 recognises diminished intellectual capacity or understanding as a specific mitigating factor.⁵ Diminished intellectual capacity may reduce an offender's moral culpability for offending.

[33] You have been diagnosed as having ADHD. You very likely have foetal alcohol spectrum disorder (FASD). Your mother was a binge drinker during her pregnancy and this almost certainly has damaged your brain. That is not something that is going to improve, although appropriate therapy can improve your skills. Nevertheless, you do not fit the criteria for intellectual disability, although you have diminished intellectual capacity. You do not have a mental disorder and Dr Duggal, in his report of 20 October 2021, does not consider you have any features of a serious mental illness or the traits of a personality disorder.

[34] Overall, I see a nexus between your mental health and your offending, particularly as it goes to poor decision-making and impulsivity, which I think makes you less morally culpable for what you did than somebody without your characteristics. I think your mental health is the greatest personal mitigating factor in your case, and it overlaps with some of the others, including your youth and cultural deprivation. I will allow a further 10 per cent discount.

Remorse

[35] Ms Cull suggests that you show genuine remorse for what you did to such an extent that a further discount should be awarded.

[36] I do not accept that submission. I have read all of the reports. I am not at all sure that you show any remorse at all, and that is not necessarily surprising given your background and mental health conditions. Whether I am right or wrong in that, there is nothing in your conduct or expression of remorse which would in the usual course of things justify a separate discount.

⁵ Sentencing Act 2002, s 9(2)(e).

Cultural factors

[37] Ms Cull submits that your cultural background justifies a further discount.

[38] I have read a report prepared under s 27 of the Sentencing Act which talks about your background with an emphasis on your cultural deprivation. Evidence of social, cultural or economic deprivation “that has a demonstrative nexus with the offending” can be considered as mitigating in the course of sentencing.⁶

[39] You had an unsettled childhood. It was to a great extent an unhappy childhood. You have moved around a great deal. The s 27 report, which is quite comprehensive, suggests that you suffered from the general effects of isolation from Te ao Māori. I accept that.

[40] I have reviewed a number of cases where discounts were given on account of a nexus having been drawn between cultural deprivation and offending. I will list them in the written record of this sentencing.⁷ I do not see such a nexus in your case:

- (a) Your background is relatively benign. Your parents did not subject you to the brutalising and degrading treatment that is often associated with cultural deprivation and which provides a nexus for what is often almost inevitable offending.
- (b) I am satisfied from the mental health reports that your mental state is what predisposed you to offending. Particularly, as I will accept on the balance of probabilities, your FASD. I have already allowed a discount for that.

[41] I will not allow a separate discount.

⁶ *Kreegher v R* [2021] NZCA 22, (2021) 29 CRNZ 622 at [44], citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [162].

⁷ *Mika v R* [2013] NZCA; *R v Rakuraku* [2014] NZHC 3270; *R v Takamore* [2019] NZHC 2315; *Carroll v R* [2019] NZCA 172; *Te Whata v Police* [2016] NZHC 1293; *Waipouri v R* [2015] NZHC 2029.

Failure of authorities to help

[42] Ms Cull submits that the authorities failed to help you when they should have. Ms Cull suggests this reduces your moral culpability for your offending and should qualify you for a separate discount.

[43] This submission arises from what happened to you in 2017. You were brought before the Youth Court on some 20 charges of dishonesty relating to cars and burglaries. These charges were later withdrawn and play no part in my sentencing today. However, you were assessed by Ms Fuchs, a psychologist, and by Dr McGinn, a neuropsychologist. It was Dr McGinn who provided a provisional diagnosis of FASD and made recommendations for your further assessment and how you should be cared for. No action was taken by the authorities to follow up on Dr McGinn's recommendations.

[44] Ms Visser, a clinical and neuropsychologist whose report on you is dated 21 October 2020, said that you fell through the cracks of care and this led to your current situation.

[45] In my view, it would be speculative to conclude that had the authorities acted on Dr McGinn's recommendations you would be in a different position now. I have already acknowledged your mental health conditions and how they reduce your moral culpability. A further discrete discount is not justified.

Co-operation with authorities

[46] Similarly, I do not accept Ms Cull's submission that your co-operation with authorities by handing yourself in justifies a separate discount. There was no doubt that you assaulted De'jah and then stabbed Krillin to death. Further, the 25 per cent discount for your guilty pleas is awarded on the basis that you did admit your offending at the first reasonable opportunity.

[47] Therefore, I will discount the starting point of seven years' imprisonment by a total of 40 per cent. That means your sentence (rounded down) will be four years and two months' imprisonment.

Minimum period of imprisonment

[48] The Crown submits I should impose a minimum period of imprisonment.

[49] An offender sentenced to a term of imprisonment of more than two years will normally be eligible for parole after they have served one-third of their sentence. The court may impose a minimum period of imprisonment if it is satisfied that the offending is sufficiently serious that serving the normal minimum period of imprisonment will be insufficient to meet one or more of four specified purposes – denunciation, accountability, deterrence and protection of the community.

[50] Here, the principal factor of your offending which calls for denunciation, accountability and deterrence is the fact that you were carrying a knife at a party. When you got into an altercation you had it immediately to hand and you used it. That is an inherently dangerous situation in a party where young people and alcohol are mixing.

[51] So far as protection of the community is concerned, your mental health reports, and the pre-sentence report, lead me to conclude that unless you receive significant long-term training, counselling and wraparound care you are at a high risk of reoffending.

[52] Normally, I am very reluctant to impose a minimum period of imprisonment on someone your age. Normally, I would grasp at the potential for rehabilitation and leave it entirely to the Parole Board to decide how long you should be imprisoned. But, in your case, and particularly for the protection of the community, I consider a minimum period of imprisonment is appropriate. I will impose a 50 per cent minimum period of imprisonment. I acknowledge that this will have little real effect on your potential for further violent offending unless you get the long-term care you need. I draw the attention of the authorities to the following paragraph from Dr Duggal's report of 20 September 2021:

80. I would recommend that after Mr Pene is sentenced, when the Department of Corrections plan his sentence, they prepare him for his first Parole Board hearing by providing him the opportunity to engage in programmes designed to address his substance abuse disorders. Doing so would be centrally important to reduce his risk of violence

towards others. Similarly, he would benefit from the opportunity to engage in programmes addressing his violent behaviour which could involve helping him to learn distress-tolerance and problem-solving skills. The programmes should be tailored to take into account Mr Pene's cognitive impairments if he is to benefit optimally from them.

[53] In addition, Ms Cull today has suggested I direct that the Parole Board be provided with copies of all your mental health reports. I think that is a very sensible suggestion, and I make that direction accordingly.

The charge of male assaults female

[54] If I was sentencing you for the charge of male assaults female alone, I would not impose a sentence of imprisonment. In the context of the associated manslaughter offending, I have to impose a short term of imprisonment but, on a totality basis, I consider that no additional penalty is required.

[55] I will impose a sentence of three months' imprisonment concurrent with your sentence on the charge of manslaughter.

Name suppression

[56] Mr Pene, you have had interim name suppression to this point. I am told that that is because you are facing a charge or charges of violence in the Kaikohe District Court. I am also told it is likely those charges will resolve, and it is common ground that in the small community of Kaikohe hardly anyone will be in ignorance of either the charge of manslaughter or the charge or charges you are still currently facing.

[57] I am satisfied that the interests of justice do not require the continuation of the interim name suppression, and I now lift it accordingly.

Sentence

[58] Mr Pene, on the charge of manslaughter, I sentence you to four years and two months' imprisonment. You will serve a minimum period of imprisonment of two years and one month.

[59] On the charge of male assaults female, I sentence you to three months' imprisonment, to be served concurrently with the other sentence.

[60] You may stand down.

Brewer J