

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

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CRI-2019-009-10349
[2022] NZHC 2251**

THE QUEEN

v

**THOMAS ISSIAH ELLERY
SARAH ELIZABETH BARRY**

Hearing: 5 September 2022

Appearances: B Hawes and A L Mills for Crown
K J Beaton QC and A L Hollingworth for Defendant Thomas
Ellery
R G Glover and A C Kelland for Defendant Barry
N Rout and M Rout for Interested Party

Judgment: 5 September 2022

SENTENCING REMARKS OF EATON J

Introduction

[1] Mr Ellery and Ms Barry, you may remain seated until I ask you to stand.

[2] Thomas Issiah Ellery you have pleaded guilty to a charge of murdering Jared Little on 20 October 2019.

[3] Sarah Elizabeth Barry, you have pleaded guilty to the manslaughter of Mr Little.

Facts

[4] Although you both will be very familiar with the facts, as will Mr Little's family, it is important that I address those facts in this public forum. I adopt the facts as they were set out at the sentence indication.

[5] Mr Ellery and Ms Barry commenced a relationship in August 2019. Mr Little was an ex-partner of Ms Barry. Mr Ellery did not know Mr Little at all. During October 2019, Mr Little had attempted to rekindle his relationship with Ms Barry but she had resisted his advances.

[6] On 7 October 2019, a brick was thrown through the bedroom window at Ms Barry's address and the windows of a van belonging to Mr Ellery were also smashed. Ms Barry and Mr Ellery believed that Mr Little was responsible for those acts. They sought to locate him to obtain retribution. Ms Barry contacted associates in an effort to find Mr Little and, on 10 October, they visited a house where he was believed to be. On that occasion, Mr Little hid and Mr Ellery and Ms Barry left shortly after. On 12 October, Ms Barry's mother sent a Facebook message advising where Mr Little could be located and stated "... he needs a beating ... [f]or yr window".

[7] On 20 October, Ms Barry texted her mother asking: "is Jared still living with Steve", to which she responded "[y]es definitely" and then said "[g]o ad get him at his house". About 7 pm that same day, Ms Barry and Mr Ellery travelled to the nominated address where Mr Little was staying. They parked their vehicle on the street and walked up the driveway to Mr Little's flat. Mr Little and his flatmate were present. Ms Barry started banging on the door, yelling out to Mr Little to: "Wake up you bastard". She called out "We're going to get you anyway". Mr Little, seeing Mr Ellery and Ms Barry, became fearful and told his flatmate to hide in the bedroom.

[8] The details of what then occurred at the address are not entirely clear. It is accepted that Mr Little threw something through a window and then went outside. It is apparent an altercation occurred between Mr Ellery and Mr Little during which time Mr Ellery stabbed him with a knife. That knife is described as having a slim 19 to 23 mm long blade. Mr Little was stabbed 13 times. An examination of his body revealed:

- (a) a stab wound into the hollow of his right cheek;
- (b) a stab wound to the base of the right side of the back of his neck;
- (c) two stab wounds to the right upper arm forming entries and exits, passing through arm muscle;
- (d) four stab wounds to the back;
- (e) a stab wound on the back of the left upper arm; and
- (f) three stab wounds to the chest.

[9] The most significant of those wounds was to the left lateral lower chest. The knife blade passed through the seventh and eighth ribs entering the chest cavity and perforating the heart. The stab wounds caused severe internal and external bleeding and it is apparent from the scene that Mr Little, after receiving these wounds, staggered through his house, eventually collapsing on the floor of his flatmate's bedroom where he died.

[10] During that altercation Mr Ellery received a cut to his left forearm. He and Ms Barry travelled to an associate's address where Mr Ellery sought medical treatment for the cut before driving to a 24-hour surgery. At about 11.25 pm they drove back to Ms Barry's address where they were then located by police.

[11] Mr Ellery declined to make a statement to police. Ms Barry admitted going to the address with Mr Ellery, she said, to have a cup of tea with the Mr Little's flatmate. She stated that Mr Little began "hoofing" things through the window at her and she further stated she heard an altercation between Mr Ellery and Mr Little but could not see what was happening.

Victim impact statements

[12] Prior to coming into Court this morning I have read four victim impact statements and this morning those statements have been read either in person or by

others on behalf of the victims. Those are statements from Jared's parents, Diane and John, from his older sister Hayley and from Emma Brewer, who is the mother of Jared's daughter. It is clear to me that Jared was a much-loved son, brother and father. He had very close relationships with his parents and his death has left them feeling lost and confused. Hayley has lost her only sibling and is deeply pained by the memories of Jared's last minutes. [His daughter], of course, has lost her father.

[13] The family will forever treasure the last contact that they had with Jared. He will be in their thoughts every day. Having heard from the families this morning, I understand and acknowledge the grief and hurt that they feel and I thank them for their victim impact statements.

Approach

[14] In imposing sentence on both prisoners today I will fix, first, the appropriate starting point and then apply any uplifts or discounts to reflect personal factors. Mr Ellery, I will impose sentence on you first.

Mr Ellery

Starting point for murder

[15] As I am sure you will understand, I am compelled by law to sentence any person who is convicted of murder to life imprisonment unless it would be manifestly unjust to do so. It is not suggested in your case that it would be manifestly unjust to impose that sentence.¹ It follows that the focus of your sentencing is on the minimum period of imprisonment (MPI). That is the time you must serve before you can be considered for release on parole from the sentence of life imprisonment. The law says that the MPI must be no less than 10 years.² There are some circumstances where the Court is required to impose an MPI of not less than 17 years.³ Counsel are all agreed in this case that the circumstances of your offending do not fall within that category and I share that view. But I say to the families, that determination, of course, does not diminish the impact the offending has had on you all.

¹ Sentencing Act 2002, s 102(1).

² Sections 103(1) and 103(2).

³ Section 104(1).

[16] The issue I must determine is how much more than the 10-year MPI I should impose in order to achieve the relevant purposes of sentencing. That includes denouncing your offending and holding you accountable for the terrible harm you have caused. It includes imposing a sentence that promotes within you a sense of responsibility. The sentence must deter you against any future offending. It must deter others. I must consider the protection of the public but I also must have regard to your personal circumstances, including your history and your prospects of rehabilitation. The sentence that I impose should be consistent in kind and length with other comparable cases for persons who have committed similar offences. And I must consider any circumstances that are particular to you that might have a bearing on the sentence I should impose.

[17] But first of all, I must fix the MPI by reference to your culpability and, in doing so, I have regard to the aggravating and any mitigating facts of your offending. In this case, there are four aggravating factors that have been identified and agreed.

Aggravating factors - offence

[18] First, is the use of serious violence. Mr Little suffered 13 stab wounds to various parts of his body. That included his face, his neck, his back and his chest. That indicates to me a very high level of violence was involved. You say you were acting in self-defence but you accept the violence you inflicted went well beyond any force that might have been reasonable, even if you were acting in self-defence.

[19] The second aggravating factor is premeditation. And I exercise some care when I talk about premeditation, because there can be no doubt that both of you went to the address for the purpose of confronting Mr Little in order to seek retribution on behalf of both of you. At the very least, I am of the view you went there to physically assault Mr Little. But you were armed with a knife. You may not have arrived at the address with any intention of using that knife, but that you were armed tells me that you are always willing and prepared to use it as you saw fit.

[20] The third aggravating factor, and I accept some of these overlap, is that you did use a weapon at the address and you used it on Mr Little on multiple occasions. As the summary of facts makes clear, exactly what took place after you and Ms Barry

arrived at the address and initially engaged with Mr Little is not entirely clear. But what is clear is that Mr Little came outside. I acknowledge that you received a knife wound to your arm, but you stabbed Mr Little multiple times and, as a consequence, he died.

[21] The practice of young men carrying knives far too frequently leads to lives being lost, other lives being ruined and so often with little forethought, and in response to situations that bear absolutely no correlation whatsoever to the traumatic and permanent consequences that result. As you said, Mr Ellery, to your probation officer—albeit not in exactly these words—you have now “stuffed up your life” and Mr Little has lost his life “over something so stupid”. There does need to be a very clear message, in particular to young men, that if you arm yourself with a knife as a matter of course, no matter what excuse you might offer for being in possession of that knife, you put yourself on a path where you are going to either end up seriously injured or dead, or standing in the dock of this Court.

[22] Mr Ellery, I acknowledge that you say you did not ever intend to kill Mr Little, but this was a vicious and inevitably deadly knife attack.

[23] The final aggravating factor is that this offence took place at Mr Little’s home. Because the offending took place on, rather than in, the property, the Crown accepts that this was not a home invasion but it, nevertheless, aggravates your offending that you committed the offence on Mr Little’s property.

Mitigating factors – offence

[24] Ms Beaton QC, has been careful in her submissions not to advance factors that might be taken as suggesting there is mitigation in the offence. She refers to the fact that throughout the reports you have referred to self-defence, to Mr Little throwing items from the upstairs bedroom window at you and of him being armed with a knife. I do not make any finding as to whether he was armed with a knife or not but I do note that there was no knife found at the scene.

[25] I accept that he did respond to your presence by throwing items at you from an upstairs window and that he came outside, no doubt to confront you. That you then

stood your ground speaks to your willingness and intent to engage physically with Mr Little. I think you would have taken comfort knowing that you were armed with a knife. Your guilty plea is an appropriate and responsible acknowledgment that even if you were acting in self-defence initially, the force you used was excessive.

[26] But I do not consider, and it is not suggested, that the circumstances I have outlined justify any reduction in the starting point that was indicated at your sentence indication. And that reflects my view that it was you who deliberately went onto his property, that you were armed with a knife and you were intent on engaging in a physical confrontation. Those are the aggravating factors.

Comparison with other cases

[27] When I fix the MPI, it is appropriate I have regard to comparable sentences that have been imposed in cases with broadly similar features. These are cases that were mentioned at the sentence indication hearing. I have read those authorities. They were cases provided by both the Crown and by your counsel.⁴ On my review, the lower end starting point is 11 years—as was adopted in *R v Locke* where there were fewer blows and the mitigating features of immediate remorse and of rendering medical assistance.⁵ And 14 years seems to be the upper level which was adopted in *R v Price*, in a murder that engaged a particularly high level of brutality and an invasion of the victim’s houseboat home.⁶ Your offending falls within the middle of that range and justifies a starting point MPI of 12 years, six months.

Personal considerations

[28] I then turn to consider whether your personal circumstances justify any uplift in the MPI. The Crown submits an uplift is necessary to reflect your previous convictions. That is for violent offending involving knives. In November 2018 you were convicted of injuring with reckless disregard when you used a knife to stab a victim and, in 2019, you were convicted of male assaults female, common assault,

⁴ *R v Daken* HC Christchurch CRI-2008-009-009576, 2 October 2009; *R v Locke*, [2021] NZHC 1843; *R v Eaton* [2021] NZHC 3357; *Fraser v R* [2010] NZCA 313; *R v Herkt* [2016] NZHC 284; *Price v R* [2021] NZCA 568; and *R v Webber* [2020] NZHC 2328.

⁵ *R v Locke*, above n 4.

⁶ *Price v R*, above n 4; and *R v Webber* [2020] NZHC 2328.

possession of an offensive weapon and wilful damage where you presented a knife during an assault. Notwithstanding your assertion in your pre-sentence report that you carry a knife for work purposes, your history indicates that you have a clear predilection to carry and use knives and, in my view, your criminal history does warrant a six-month uplift to the MPI. That results in an MPI of 13 years.

[29] As you know, at the indication, it was left open what credit might be given for personal factors and I have the benefit now of some detailed reports about you. It is accepted you are entitled to a reduction of 12 months for your guilty plea and I adopt that. Your counsel, Ms Beaton, submits that a further credit of about 15 per cent should be applied to recognise your age, your remorse, and more particularly the various personal factors that are outlined both in a November 2018 psychologist report of Craig Prince and a very recent August 2022 report of consultant clinical psychologist Ghazi Metoui. Mr Hawes, for the Crown accepts that a discrete credit is available for those personal factors. He leaves it to the Court to quantify what that level of discount should be.

[30] Mr Ellery, those reports tell me that until the age of 13 you lived with your biological family, however, after this you lived between homes. You did not get on well with your family, and you describe various forms of abuse at their hands, and at the hands of a neighbour. You were raised in an environment that was characterised by violence. That led to you being anxious around men in positions of authority, and you learnt to react in an aggressive manner, or by presenting with a tough exterior and fearlessness. Your father taught you to be staunch.

[31] You found respite from your family at the home of a woman named Belinda White, who strikes me as a very kind woman, who took on the role of a mother figure to you. She has also provided information to this Court. One of the things she has told me is that she observed you had a tendency to form intense relationships with your partners. She believes that is what occurred with Ms Barry. I know you give a different account of the relationship because you downplay the level of investment you had, but I wonder if she might be right about your relationship.

[32] The reports I have also record a history of alcohol and drug abuse that is, tragically for this Court, just all too familiar.

[33] Mr Metoui records that you were diagnosed with a post-traumatic stress disorder. That stemmed from you being the victim of a severe stabbing in 2016 when you were 19 years old.

[34] In Mr Metoui's report, it is recorded that you do maintain that you acted in self-defence and you did not intend to kill Mr Little. And in terms of remorse that was being spoken of, he records that you are "conflicted" as you are remorseful for the fact that Mr Little died and the suffering caused to his family, but you believe, certainly currently believe, that Mr Little also shares in the responsibility for how the events unfolded. I note that you have qualified this by stating that you "needed more time to think about that issue" and that your position may change in the future.

[35] Mr Ellery, I do encourage you to continue on that path of reflection, remembering that Mr Little was at home, minding his own business with his flatmate, when you arrived on the property, seeking a confrontation. And you were armed with a knife that you were ready to use. So Mr Little was not responsible for what happened. And I think that deep down you know that, and I am optimistic you will resolve that conflict you currently express.

[36] Your potential for rehabilitation is relevant to the sentencing process.⁷ Mr Metoui has stressed the importance of successful treatment in order to reduce the high risk that you pose of further offending. He records that you are amenable to such treatment and he tells me that when you can develop trust you are, in his words, "entirely reasonable, amiable, reflective, calm and willing to be challenged". Mr Metoui thinks your anti-social personality structure should recede with your maturity. The challenge you face Mr Ellery, is to allow yourself to trust those others who want to help you. You are a young man and you do have the potential to change. And if you can, then the risk of you re-offending can be reduced.

⁷ *Carr v R* [2020] NZCA 357 at [63]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [70].

[37] I accept you are remorseful. It comes through in the reports strongly. I accept you are genuine in your willingness to engage in restorative justice but I understand why it is too early for that type of process, given the views or the conflict that you have expressed as regards the role of Mr Little. It may be that in the future, once you resolve that conflict, restorative justice could take place.

Conclusion - personal considerations

[38] I accept that you had a traumatic and disadvantaged childhood, and that has shaped you as a young man. I agree with your counsel there is a link between your background and this offending. The fact that you so instinctively resort to act violently stems, at least in part, from your past. I also acknowledge that you suffer from PTSD and although that was in remission at the time of the offence, I accept it makes things tougher for you serving a lengthy sentence of imprisonment.

[39] When I stand back and consider all the personal factors that Ms Beaton has advanced, I fix a further reduction at a total of 12 months. That reduces the MPI to one of 11 years.

[40] But I emphasise that the sentence I impose is one of life imprisonment. That means you will remain in prison until, following the expiration of the MPI, a Parole Board determines that you can be safely released into the community.

Result

[41] Mr Ellery, will you please stand.

[42] On the charge of murdering Jared Little, I sentence you to life imprisonment with a minimum period of imprisonment of 11 years.

[43] You may stand down.

Ms Barry

[44] Ms Barry, I now turn to the appropriate sentence for you following your guilty plea to the charge of manslaughter. Manslaughter carries a maximum sentence of life imprisonment.⁸

[45] I have referred previously to the summary of facts. You had been in this relationship with Mr Little for about two years. He was about 10 years older than you. It was your mother who introduced you to him. That relationship had ended several weeks prior to his death. I have acknowledged that he wanted to rekindle that relationship and you did not. But you had been trying to locate him for several days before the fateful visit. You did so because you wanted to find him to obtain retribution in the form of physical harm for past events.

[46] There can be no doubt that you went to his address knowing Mr Little was going to be subjected to an assault. You were involved personally with threatening behaviour on arrival at the address. I accept, as does the Crown, there is no evidence you knew Mr Ellery was armed with a knife, and it is not suggested you were involved in, or even witnessed, the fatal assault.

Starting point

[47] There is no tariff case for sentencing in relation to manslaughter. That is because there can be so much variance in the circumstances of each offence and the individual offender's culpability. That means there is limited assistance in referring to other cases in trying to fix the proper sentence for you. I have however considered the cases of *R v Pomare*⁹, *R v Innes*¹⁰ and *R v Chourn*¹¹. Those were cases that involved offenders whose culpability has some similarity to yours. In each case the offender assisted an associate to deploy a plan that involved causing violence, but did not play a physical role in the fatal assault and did not ever contemplate that the assault might cause death. In those cases, a starting point of between four and four and half years was taken.

⁸ Crimes Act, 1961, s 177.

⁹ *R v Pomare* [2016] NZHC 1346.

¹⁰ *R v Innes* [2016] NZHC 1195.

¹¹ *R v Chourn* [2021] NZHC 1528.

[48] As was discussed at your sentence indication hearing, your offending does seem to fall at the midpoint of those cases, meaning an appropriate starting point is one of four years and three months' imprisonment.

Personal considerations

[49] The next step is to consider whether there should be any uplifts or discounts from that starting point because of factors that are personal to you. I agree with Ms Kelland that there is no reason to uplift the sentence.

Background and the need for rehabilitation

[50] Ms Barry, I have got a number of reports in relation to you. That includes a pre-sentence report, a cultural report, a psychiatric assessment and an ACC report. They all detail your personal circumstances. Each of those reports provides insight as to your background, the trauma you have faced throughout your life and your struggles. The reports provide me with some insight as to you as a person and help me determine your prospects for rehabilitation.

[51] Ms Kelland, who has advanced oral submissions on your behalf over and above the written submissions, submits that a significant discount ought to be permitted to recognise those factors. Mr Hawes, on behalf of the Crown, responsibly accepts that you are entitled to credit for those personal factors, including particularly a deprived upbringing and the positive steps you have taken towards rehabilitation. He, however, urges care when I come to fixing the level of discount given this is a case that involved very serious offending and the loss of life.

[52] The reports I have read depict your account of a very difficult childhood. You grew up in an environment where drugs and alcohol were prevalent and you were forced to use substances. You describe being psychologically abused by your mother, being physically neglected from the age of six years old and being assaulted by your mother's friend.

[53] At age 12 you were put into foster care, which was a loving and caring environment, something you were not accustomed to. But, unfortunately, you were later moved to a new foster home at age 14, where you were exposed to further abuse.

[54] Following foster care you returned to your original foster mother, where for a period you thrived—you gained two diplomas in that period. But, at the age of 16 you turned back to drugs to cope with your past trauma, eventually becoming addicted to methamphetamine and using opiates intravenously. The cultural report records that the birth of your daughter caused you to start methadone treatment and refrain from other drug and alcohol use and that lasted for some years.

[55] You have described in the various reports a pattern of violence and intimidation against you by Mr Little, in which you became so fearful that you refused to have children in the house and you tried to manage the situation by reference to a trespass order. You have described calling the police regularly for assistance and having a fear for your own safety because the authorities were slow to respond. And you say you became so stressed by the situation that you relapsed and resorted to methamphetamine to stay awake.

[56] The psychiatric assessment concluded you do suffer from severe PTSD, with symptoms associated with that condition possibly being present at the time of the offending. You have previously suffered from major depression, but it was not possible to determine whether that was a factor at the time of this offending. It is reported that counselling and medication have successfully addressed both disorders.

[57] The report also indicates that you have suffered from Methamphetamine Use Disorder and Opiate Misuse. You report that you have now been abstinent from methamphetamine since you were imprisoned and you are undertaking a methadone programme to manage your opiate addiction. In fact, I understand that might have been why you were late this morning.

[58] Ms Barry, your cultural report also touches on the steps you have taken towards rehabilitation. You have completed now about two and a half years of counselling from which you are said to have received considerable insight. You have completed

various programmes such as Stopping Violence, understanding red flags in relationships, and parenting courses whilst you have been on EM bail. You have completed a rehabilitation programme and you continue to attend regular aftercare sessions. You are attending weekly AA meetings and you have got a sponsor who you regularly see. You also do volunteer weekly work at the Salvation Army, which provides an opportunity for prosocial engagement.

[59] You have care for your seven-year-old daughter at the weekends and you look after your nine-year-old step-brother for periods of time and it is very clear from the reports that you are dedicated to them.

[60] When I look at that background, and factor it into what happened to Mr Little, I do see a nexus or a connection between your background and your offending.

[61] A real feature of the reports that I have read is a strong sense of optimism about your prospects. The report writers share a view that you have been open and honest with them and that is important and helps me in my assessment as to the prospects you have of overcoming the drug dependency that has haunted you throughout your life.

[62] But the reports do tell me that you have done more than simply “talk the talk”. You have gone beyond simply engaging with the counsellors and other health providers. You have worked to improve yourself and have got these qualifications that I have referred to.¹² I note you have also got a certificate of achievement for a year of sobriety as at 14 October 2020. So I do recognise the efforts you have made. I commend you for those and the milestones that you have reached.

Remorse

[63] The pre-sentence report records that having witnessed the grief and pain caused to the family during hearings in this Court, you felt compelled to express your desire

¹² The Court was provided with certificates from Takahi te Taniwha; a certificate of attendance for a parenting information programme provided by Presbyterian Support Upper South Island; Ka Rere (facilitated by He Waka Tapu); a certificate from the Storytime Foundation Taonga mō ngā Tamariki Programme; a certificate from a Parenting Skills Education Programme provided by Plunket; a certificate of completion for the Hapori Ora Intensity Outpatient Programme facilitated by Odyssey house; and a record of attendance for the Growing Great Brains in our Children by Brainwave.

and willingness to attend a restorative justice conference. However, Restorative Justice Services concluded the case was not suitable for such a meeting. I can understand why that was.

[64] I am mindful there is a clear need for a proper and robust assessment of all the circumstances to determine if there is genuine remorse.¹³ When I carefully consider the various reports I accept your remorse is genuine. I do not think it warrants a discrete discount, but the credit which I will recognise for that will be captured within the credit for your personal circumstances.

Bangkok Rules

[65] A matter not referenced in oral submissions, but referenced in the written submissions is the Bangkok Rules. Ms Kelland, on your behalf, referred to those rules and submitted a discrete credit should be allowed to recognise that you have a dependent child. In *Theodore v Police* this Court considered whether discounts are available for the impact incarceration has on a defendant's dependent children.¹⁴ In doing so, the Court canvassed the international position and the discounts given by New Zealand courts in similar situations.

[66] The Bangkok rules are predicated on the notion that women prisoners are a vulnerable group with specific needs. Relevantly, r 64 provides that non-custodial sentences shall be preferred for women with dependent children where possible and appropriate, but with custodial sentences being considered where the offence is serious or violent or the women represent a continuing danger. Of course, your offence was both serious and violent.

[67] In New Zealand we have not ratified those rules. But, as Ellis J also noted in *Theodore*, s 8(j) of the Sentencing Act 2002 requires a sentencing court to consider the circumstances of an offender if they would render an otherwise appropriate sentence disproportionately severe, which she identified encompassed the impact of sentence on dependent children.

¹³ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].

¹⁴ *Theodore v Police* [2018] NZHC 2364.

[68] I am not convinced in this case that you warrant a discrete discount by reference to the Bangkok rules. I regard this offending as being at a level of seriousness beyond that contemplated. Further, when I have regard to the letter from the father of your daughter and the fact there are no specific reports about the child-mother relationship, I am very conscious that the child does have a supportive father who is presently the primary caregiver.

[69] I think the real relevance of you having a dependent child is tied into the issue of your rehabilitative prospects. On my reading of the reports, as I have said, the birth of your daughter was the catalyst for you to stop taking drugs and your relationship with your children, that is your daughter and your step-brother, seems to me to be a major motivator with your rehabilitation. So I think it more appropriate to recognise your relationship with your daughter more generally within your personal circumstances. So those are the personal factors.

Level of credit for further mitigating factors

[70] The question is what level of credit is appropriate. The Court of Appeal in a case called *McMillan v R* recently gave guidance as to the appropriate level of credit.¹⁵ The Court said this in relation to one of the defendants:¹⁶

[148] Mr Philip had the advantage of a thorough and supportive s 27 report that disclosed a traumatic childhood with intergenerational history of social and economic deprivation leading to dependence on drugs for most of his adult life. The Judge allowed a 30 per cent discount for these personal factors. *This Court treats 30 per cent as being at the upper end of discounts available for such personal factors, with 15 per cent being a much more usual discount in cases where a causal link is made out between offending and seriously disadvantaged personal backgrounds.*

[149] Notwithstanding the compelling case made out for a meaningful discount in the s 27 report and other materials before the Court, it is inarguably generous.

[71] And in another case called *King v R*, the Court highlighted the importance of rehabilitation in assessing credit for personal factors.¹⁷

¹⁵ *McMillan v R* [2022] NZCA 128.

¹⁶ Emphasis added, footnotes omitted.

¹⁷ *King v R* [2020] NZCA 446.

Conclusion - personal considerations

[72] When I consider the credit that might properly be given to recognise your personal history, I recognise a causal link between your upbringing and this offending. I also factor in your prospects of rehabilitation. As you will be only too well aware, it is your rehabilitation that ultimately will define you, both as a law-abiding member of the community and as a mother.

[73] Nevertheless, the gravity of this offending does temper the credit that I might otherwise allow. I have concluded the appropriate credit to recognise all personal factors, including remorse, is 15 per cent.

Guilty plea

[74] You are also entitled to credit for your guilty plea and the appropriate credit will usually reflect the timing of that plea. The opportunity for you to plead guilty to manslaughter only arose after Mr Ellery indicated a willingness to plead guilty to the charge of murder. Your plea was then entered at the first reasonable opportunity and it is not suggested the circumstances that gave rise to the reduction in your charge should diminish the credit for your guilty plea. I agree and allow the full 25 per cent discount.

Time spent on EM bail

[75] The final matter to consider is the time you spent on EM bail. I am conscious that you spent five and a half months in custody, and then a little over 16 months on EM bail when you were on remand. The Sentencing Act does not allow the Court to take into account time spent in custody on remand in fixing the length of a sentence of imprisonment.¹⁸ But the Court must take into account any time spent on EM bail.¹⁹ At the sentence indication, the Judge was led to understand that you had been on EM bail for four months and the Judge fixed a reduction of two months to reflect that period. Now that we know it was over 16 months, it is accepted that you are entitled to further credit.

¹⁸ Sentencing Act, s 82.

¹⁹ Section 9(2)(h).

[76] There is no mathematical formula for the Court to apply to fix the appropriate deduction for time spent on EM bail.²⁰ As the Court of Appeal has recently confirmed in *Shramka v R*²¹ the Court must engage in an evaluative assessment of all the circumstances in s 9(3A) of the Sentencing Act, that is:

- (1) the period of time on EM bail;
- (2) the restrictiveness of the EM-bail conditions;
- (3) the extent to which the EM-bail conditions were complied with; and
- (4) any other relevant matter. Discounts allowed for time spent on EM bail commonly range between 30 and 50 per cent, and discounts of up to 50 per cent are not uncommon.²²

[77] I have reviewed your bail history. It seems to me that the conditions you faced were restrictive with a 24-hour curfew. The leave that you were permitted from the property was limited to medical matters to do with methadone, banking and essential shopping and for any approved interviews. On my reading, you were compliant other than one minor breach with those restrictive conditions for over 16 months. I accept that EM bail was a significant constraint on your liberty. I fix a discrete discount of six months' imprisonment.

End sentence

[78] So, Ms Barry, where does that leave you? Well, from a starting point of four years and three months' imprisonment I allow a 40 per cent credit to reflect your guilty plea and all other personal factors including remorse. When I round that up that reduces the end sentence to one of 30 months' imprisonment and with the further six-months reduction for time spent on EM bail the end sentence is one of 24 months' imprisonment.

²⁰ Although mandatory considerations are set out at s 9(3A) of the Sentencing Act.

²¹ *Shramka v R* [2022] NZCA 299, at [61].

²² *Paora v R* [2021] NZCA 559 at [53].

[79] And, as you will be aware, I am sure, a 24 months' sentence is a short-term sentence²³ and one that permits this Court to commute the sentence of imprisonment to one of home detention.²⁴

Is home detention appropriate?

[80] As I said at the outset, I have found this sentencing exercise difficult. On the one hand, I recognise the very significant disadvantages that you had as a young person and which did, in my view, play a causative role in this offending. On the other, you played a primary role in encouraging Mr Ellery to confront Mr Little. And, of course, it was that confrontation which led to Mr Little's death.

[81] Should I commute a 24 months' sentence to one of home detention? There is nothing in the statutory sentencing regime that would warrant a presumption for or against home detention in any particular category of case.²⁵ That includes cases of manslaughter. The pre-sentence report recommends imprisonment given the gravity of this offending and that is understandable, however, as Mr Hawes has acknowledged, home detention for manslaughter, whilst unusual, is not unprecedented.

[82] In a case called *Doolan v R*, the Court of Appeal said:²⁶

In our view the critical point is that the sentencing decision as between imprisonment or home detention involves a discretionary exercise that necessarily engages all of the principles and purposes in ss 7 and 8 in the Sentencing Act. Those provisions of the Sentencing Act do not accord greater weight to factors such as denunciation or deterrence than the personal circumstances of the offender. ...

[83] In considering whether a sentence of home detention is appropriate in your particular circumstances, I have regard to the need for accountability, deterrence and denunciation. But that must be balanced against the obvious need for rehabilitation. Of course, these principles and purposes do not eclipse the remainder of those set out

²³ Sentencing Act, s 4, definition of "short-term sentence".

²⁴ Section 15A.

²⁵ *R v Vhavha* [2009] NZCA 588 per William Young P. Although William Young P was in the minority, his dissent has since been endorsed in *Osman v R* [2010] NZCA 199 at [20]; *ZZ (CA369/2011) v R* [2011] NZCA 662 at [35]; *Manikpersadh v R* [2011] NZCA 452 at [14]; *Palmer v R* [2016] NZCA 541 at [19]; and *Parkin v R* [2018] NZCA 404 at [42].

²⁶ *Doolan v R* [2011] NZCA 542 at [38], citing *Osman v R*, above n 25, at [20] (footnote omitted).

in the Sentencing Act, which are also applicable, but the ones I have referenced are the most relevant.

[84] The reports I have make it clear that you are working hard to take steps towards rehabilitation and dealing with your addiction to methamphetamine. It appears that counselling has helped to identify ways you can make better choices and to process some of the events from your past. I hope that is the case, because at 28 years of age you have the capacity for change.

[85] What that tells me is that there is a strong rehabilitative prospect here.

[86] And in exercising my discretion, I also think it significant that you spent five and a half months in custody on remand. Until this offence you had a very limited criminal history. You had never been held in custody. And I do not doubt that a lengthy custodial remand, separated from your daughter, had a significant impact on you and has been effective in ensuring that you commit to a path that requires you to confront your unhappy and traumatic past and to continue your path towards rehabilitation. To that extent the sentencing purpose of deterrence has been addressed.

[87] Where an offender is serving a short term sentence of imprisonment, that is 24 months or less, that offender is automatically released having served half of the sentence.²⁷ This means you have already effectively served a sentence of 11 months, nearly 12 months' imprisonment. If I were to sentence you to prison today, you would be close to having served one-third of a provisional sentence of 24 months' imprisonment. As Ms Kelland recognised, you would be going before the Parole Board very shortly. That is because the nearly six months in custody would be deemed time served and would be deducted from the time that you would serve from the date of sentencing.²⁸

[88] Whilst I acknowledge that a case involving the killing of another person by stabbing could be seen as a circumstance that would render a sentence of home

²⁷ Parole Act 2002, s 86.

²⁸ Section 90.

detention inappropriate, I have ultimately concluded, by a fine margin, that the least restrictive appropriate outcome in your case is one of home detention.

[89] The term of that sentence will be adjusted to recognise the custodial remand.

Result

[90] Ms Barry can you please stand.

[91] On the charge of manslaughter, I sentence you to seven months' home detention on the standard conditions and on those further conditions that are specified in the pre-sentence report.

[92] Finally, I note that both defendants were given a strike warning at the time pleas were entered and convictions entered. Given the repeal of the Three Strikes law, there is a jurisdictional question that arises as to whether that warning should be revoked.²⁹ I will reserve my position in relation to that issue and I will deal with it by way of a minute at a later date.

[93] You may stand down.

.....
Eaton J

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²⁹ Three Strikes Legislation Repeal Act 2022.