

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2020-092-11967
[2024] NZHC 374**

THE KING

v

SEAN ANDREW HAYDE

Hearing: 29 February 2024

Appearances: N Fletcher, and A Al-Janabi for Crown
J-A Kincade KC, E Priest and P Wilks for Defendant

Judgment: 29 February 2024

SENTENCING NOTES OF VENNING J

Solicitors: Kayes Fletcher Walker Ltd, Manukau, Auckland
Counsel: J-A Kincade KC/E Priest/P Wilks/A Tibbotts, Auckland

[1] Sean Hayde, you are for sentence this morning for the murder of Wiremu Arapo on 20 October 2020 and the associated charge of attempting to pervert the course of justice by setting fire to his home at Minerva Terrace. You are also for sentence on representative charges of assaulting and threatening to kill your former partner.

[2] The maximum penalty for murder is life imprisonment. Your counsel realistically and properly concedes a sentence of life imprisonment for the murder of Mr Arapo cannot be said to be manifestly unjust and that is the sentence the Court will impose on you. The issue for the Court this morning is the minimum period of imprisonment to be attached to that sentence of life imprisonment.

[3] First I acknowledge the family of the deceased, Mr Arapo, who are in Court today and who made a victim impact statement. The sentence the Court imposes today is imposed on behalf of society in response to Mr Hayde's actions. It is not an attempt to be a measure or value of Mr Arapo's life. It never could be. I also acknowledge that I have read the other victim impact reports even though they are not present.

[4] Mr Hayde, I start with a summary of the background to the offending. You met Mr Arapo through a gym. He was your boxing trainer. You and Mr Hart were friends from school days. In the first half of 2020 you introduced Mr Hart to Mr Arapo. In about July 2020 Mr Hart moved into Minerva Terrace and became Mr Arapo's flatmate. Coincidentally they had both previously served in the New Zealand Army. At about the same time Mr Arapo introduced you to his friend, Jenifer McManus with whom he had shared a brief sexual relationship in the past. At the time you were in a relationship with the victim of your domestic violence offending, Ms O'Shea. You moved into a property at Bucklands Beach with her.

[5] Despite your relationship with Ms O'Shea, from about mid-August 2020, you and Ms McManus began a sexual relationship. Around this time Mr Arapo and Mr Hart's relationship as flatmates deteriorated for a number of reasons. Your former friendship with Mr Arapo had also completely broken down. You had ceased communicating with each other via text messages or Facebook. Your relationship with Ms McManus and your jealousy of Mr Arapo's connection and influence over her

seems to have been at the heart of the issue. When you talked about Mr Arapo with Mr Hart you referred to him in a disparaging way.

[6] On 17 October 2020, you exchanged text messages with Ms McManus about the 2020 election referendum. It seems the exchange led to you becoming particularly annoyed at the influence you perceived Mr Arapo still had over Ms McManus. You then texted Mr Hart:

Mate its time to move out NOW

Im about to turn on the black arse. And you should know its not good to be on my wrong side? Hence move out asap so I can kick his teeth out

His saving grace atm is that if I fuck him up now, that he might be more of a cunt to you. Bro the day you get your bond back ill actually kick his teeth out, lol

[7] Matters were exacerbated by a communication from Mr Arapo to you on 19 October 2020, the first in some time. Mr Arapo effectively warned you about how to treat Ms McManus. That message seems to have been the tipping point. You became aggravated to the stage that the next day you convinced Mr Hart to join you in your plan where the two of you would go to Mr Arapo's property at Minerva Terrace and give him a beating. You needed to enlist Mr Hart's assistance because Mr Arapo was very a fit person and an accomplished boxer.

[8] On 20 October 2020, the next day, you spent the afternoon drinking with Mr Hart at your flat in Bucklands Beach Road. By late afternoon you were both affected by alcohol. The two of you then travelled to and from the Minerva Terrace property although without going inside it until the last occasion. Mr Hayde, you were the instigator of the events that day. You intended to assault Mr Arapo, and, as I have said, you enlisted Mr Hart to help you. You arrived at the property at about 5.55 pm and very shortly after arriving you began your planned assault on Mr Arapo. Mr Hart joined in.

[9] Once you were arrested, some time later, you turned on Mr Hart. You concocted a fanciful story that he had killed Mr Arapo and during the trial you gave evidence to that effect. Like the jury I reject that evidence and explanation. I find that you were the instigator and that Mr Hart assisted you to assault Mr Arapo. Those

assaults were to his head and neck. In Mr Hart's words, you "just lost it" in the course of the assault. What started as an assault to teach Mr Arapo a lesson became a murderous attack. The assault became a prolonged attack on him by the two of you which involved a number of blows to his head and face. During the course of the assault you inflicted severe and fatal injuries on Mr Arapo's face and head. The injuries were inflicted with significant force.

[10] For present purposes I accept that you may not have intended to kill Mr Arapo at the outset, but you certainly intended to cause him bodily injury, which, considering the extent of the injuries to his head and the force involved in their infliction, you must have known were likely to cause death and you were reckless whether you actually killed him.

[11] As soon as you realised you had killed Mr Arapo, you knew the consequences that would follow. I find that you then decided to set his home on fire in an attempt to cover up your crime and to avoid the consequences. You did so knowing and intending that Mr Arapo's body would be burned in the process. You also staged the knives, and turned the gas on the oven to make it look like the fire was caused by Mr Arapo himself during some sort of cannabis spotting incident. Given the empty petrol can in the back of the car, the petrol found on Mr Hart's shoe, and the description of the scene by the fire experts, I accept that an accelerant was used to start the fire. Again I find you were the leader and convinced Mr Hart to assist you in setting the fire to cover up what you had done. You and Mr Hart then effectively staged a performance for the neighbours and other people involved, including the first responders, by running around the property on the pretence of trying to get into the house to assist Mr Arapo, when you knew full well he was already dead and that you had killed him.

[12] You and Mr Hart then both lied to the Police and others about your involvement in Mr Arapo's death and the fire.

[13] As to the charges involving your former partner, Ms O'Shea, on 31 August 2020 you assaulted her in a number of ways while she was getting ready for work. During the incident you pulled her off the toilet by her hair, pushed her up against a linen cupboard by her upper chest and neck, held her down on the bed by her wrists

and kicked her from behind and in her back while she was attempting to pack and leave. You also threatened to kill her, by threatening to set the house on fire and not let her leave, all of this, less than two months before you killed Mr Arapo. You were on bail for that offending when you killed Mr Arapo.

[14] In sentencing you the Court is required to have regard to the purposes and principles of the Sentencing Act 2002. The primary purpose of the sentence in this case must be to denounce your conduct and hold you accountable for the harm that you have done and caused to Mr Arapo, his fiancée and family and the community by your killing of him. Similar considerations apply to your offending against Ms O'Shea. You have heard from the victim impact report this morning how your offending has affected Mr Arapo's family. I hope your counsel has shown you the victim impact statements from Mr Arapo's fiancée and that of Ms O'Shea.

[15] The sentence should also promote in you a sense of responsibility for the harm you have caused. I note you continue to deny your role in this offending. You seek to minimise your role. You still do not accept full responsibility for your criminal actions towards either victim. The sentence imposed should also carry elements of denunciation and deterrence to deter others from acting in similar ways.

[16] As to the particularly relevant principles of sentencing in this case, the Court must take into account the gravity of your offending which has led to the death of Mr Arapo, and in particular, your culpability. As I have said and as the jury found, you were the principal offender. The Court must also have regard to the seriousness of the offences themselves. Murder is of course the most serious crime.

[17] I am also required to consider other comparative cases and I have considered the cases counsel have referred to.¹

¹ *Malik v R* [2015] NZCA 597; *R v Gottermeyer* [2014] NZCA 205; *R v Shaheem* [2019] NZHC 1200; *R v Uhrle* [2015] NZCA 412; *Solicitor-General v Hutchison* [2018] NZCA 162; *Taylor v Police* [2014] NZHC 1139; *R v Robertson* [2016] NZCA 99, *R v Gossett* [2019] NZHC 1366 (CA); *R v Whenuaroa* [2023] NZHC 3620; and *R v K* [2020] NZHC 233.

[18] The first consideration is whether s 104 of the Sentencing Act 2002 is engaged. If it is the minimum non-parole period must be at least 17 years unless that would be manifestly unjust.

[19] The Crown says that s 104 of the Sentencing Act is engaged and argues for a minimum non-parole period of 18 years to reflect the entirety of your offending.

[20] For you Ms Priest submits s 104 is not engaged. She argues for a minimum non-parole period of 11–12 years for the murder and, after taking account of the additional offending and your personal mitigating factors, suggests that an end minimum non-parole period of somewhere in the region of 13 years might be appropriate.

[21] The Crown submits that s 104 is engaged in this case in two ways. First it says your murder of Mr Arapo was committed with a high level of brutality, cruelty, depravity or callousness so that s 104(1)(e) applies. The Crown refer to a number of cases to support that submission,² and note the forensic evidence of the injuries to Mr Arapo. The injuries were severe and included a number of fractures to his face and head and the hyoid bone in his neck.

[22] Section 104(1)(e) applies to murders that have a particularly high level of brutality or callousness. It is invidious to attempt to compare the circumstances of cases involving the killing of others. Despite the Crown's submissions, however, in my judgment the killing of Mr Arapo itself lacked the additional aggravating features such as in *Marong v R* and *R v Frost*,³ where there was a particular callousness or cruelty. Similarly, the case is different to that of *Kumar & Permal v R*,⁴ where the victim was alive at the time the fire was set. Unlike that case I do not consider that you purchased the petrol and took it there for the specific purpose of setting fire to the house and to Mr Arapo. In *R v Gibson-Park & Patuwai*,⁵ the victim was left to suffocate on his own blood. The assault lasted for approximately half an hour during

² *Marong v R* [2020] NZCA 179; *R v Frost* [2008] NZCA 406; *Kumar v R* [2016] NZCA 329; *R v Carroll* [2017] NZHC 2691; and *R v Gibson-Park & Patuwai* [2021] NZHC 675.

³ *Marong v R*; and *R v Frost*, above n 2.

⁴ *Kumar v R* [2016] NZCA 329.

⁵ *R v Gibson-Park & Patuwai*, above n 2.

which the victim was heard to cry out, asking for the assailants to stop. Perhaps the closest case is that of *R v Carroll*.⁶ In that case the offender had taken a wheel lock with the deliberate intention of attacking the victim's head. But, in *Carroll* the victim was heard to have begged for his life and Carroll simply told him callously to stop resisting. As noted, in this case, I accept you initially went to Mr Arapo's home to assault him, not to kill him. I consider your offending in the present case falls short of the level of brutality or callousness in relation to the murder itself.

[23] In some cases post-offending conduct has been accepted as an aggravating feature which may support a finding s 104(1)(e) is engaged. However, I accept your decision to set fire to the house was made after the killing and in response to the circumstances you found yourself in.

[24] So while by a small margin I do not consider s 104(1)(e) is engaged, I do however consider that s 104(1)(c) applies. The killing involved the unlawful entry into or unlawful presence in Mr Arapo's home. While Mr Hart was Mr Arapo's flatmate and you came and went from the property from time to time, on the evening that you killed Mr Arapo, you and Mr Hart went there with the view to commit an illegal act, namely to assault him. Your presence in his house was for an unlawful purpose.

[25] Ms Priest has referred to and relies on the case of *R v Eddy*.⁷ In that case Mr Eddy went to his former partner's home at about 4.00 am. The Judge thought it highly likely he took a knife with him. The forensic evidence supported a scenario where Mr Eddy assaulted the victim once he was in the main bedroom and that he then stabbed her before slitting her throat.

[26] The Judge noted it was not clear how Mr Eddy had gained entry early in the morning. The possibilities were that he had a key, or the door was unlocked and he let himself in, or conceivably the victim let him in. The Judge considered that if the victim had not let him in Mr Eddy's presence would clearly have been unlawful but the evidence in that case did not enable her to be sure about it. The Judge was not

⁶ *R v Carroll*, above n 2.

⁷ *R v Eddy* [2014] NZHC 1543.

prepared to accept the Crown submission that any implied licence would necessarily have been revoked once Mr Eddy started to attack the victim describing that as a rather technical approach. I consider the case of *Eddy* can be distinguished from the present.

[27] I have found as a matter of fact that you and Mr Hart went to Mr Arapo's home with the intent of committing a crime, namely to assault him. In my judgment that squarely engages s 104(1)(c) in this case. As you went there to commit an assault, entering Mr Arapo's home with that intent, or being in his home with that intent, was unlawful. I consider such a finding to be consistent with the objective of the subsection. It recognises that people such as Mr Arapo should be safe in their home against offenders who come to their home intending to do them harm. It is not, as Ms Priest suggests, limited to cases of home invasion.⁸

[28] As an aside I note that ultimately in Mr Eddy's case the Judge imposed a sentence of a minimum non-parole period of 17 years after taking a starting point of 15 years for the murder itself, noting the serious aggravating feature of the victim being killed in her own home.

[29] As I consider s 104 is engaged a minimum period of at least 17 years' imprisonment is required for the murder unless it can otherwise be said to be manifestly unjust. That is without directly considering the additional offending of the attempt to pervert the course of justice and the domestic violence offending. That offending would warrant a further modest uplift, taking account of totality.

[30] To test that outcome, the Court is required to consider the minimum period of imprisonment that would be appropriate for the offending in the event s 104 was not engaged, in order to determine if the minimum non-parole period of 17 years or more would be manifestly unjust in all the circumstances.⁹ Alternatively, the Court could undertake the three stage test suggested in *Davis v R*.¹⁰ Both require consideration of the notional MPI that would apply under s 103 having regard to the considerations under s 103.

⁸ *R v McLean* [1999] 2 NZLR 263 (CA); and *Cummings v R* [2016] NZCA 509.

⁹ *R v Williams* [2005] 2 NZLR 506 (CA).

¹⁰ *Davis v R* [2019] NZCA 40.

[31] As to that I agree with the Crown submission there are a number of aggravating features in this case.

[32] First, the serious violence that I have described involved in the attacks to Mr Arapo's head. Next, there were two of you involved in the assault on Mr Arapo. As noted, the fact that you attacked him in his home, a place he was entitled to feel safe, is particularly aggravating. Also, while as I have found, you may not have set out to kill Mr Arapo, you deliberately went to his home to assault him, and you convinced Mr Hart to go along with you. You had planned to attack him. As I said when sentencing Mr Hart, that finding is supported by the background circumstances and the evidence of the neighbours, in particular, Mr and Mrs Dammert. The assault commenced very shortly after you arrived at Mr Arapo's home.

[33] Given the circumstances of Mr Arapo's killing, I consider a starting point of a minimum of 13 years at least would be required for your lead role in his killing. I consider your case to be more serious than that of Mr Callaghan where a combined starting point of an MPI of 15 years for the murder and attempting to pervert the course of justice was taken.¹¹ Mr Callaghan's killing was a spur of the moment act. Unlike that case, you deliberately went to Mr Arapo's home to assault him.

[34] Given your lead role in the charge of attempting to pervert the course of justice also I consider a starting point would be six years. I consider this to be one of the most serious examples of such offending and s 8(d) of the Sentencing Act would be engaged.¹² After killing Mr Arapo, you deliberately set fire to his home in an attempt to destroy evidence of your offending and to avoid a prosecution for murder. You showed no regard or respect for Mr Arapo's body. You knew it would be burned in the fire. Indeed that was your aim. The house itself was effectively destroyed by the fire. You could have faced a charge of arson. To reflect totality as the Court of Appeal noted in *Pukeroa v R*,¹³ however, and to recognise that the sentence is directed at your MPI, I uplift the MPI in relation to the attempting to pervert the course of justice by four years.

¹¹ *R v Callaghan* [2012] NZHC 596.

¹² Sentencing Act 2002, s 8(d).

¹³ *Pukeroa v R* [2013] NZCA 305.

[35] In addition, a further uplift to the MPI of four months is required to take account of the offending against Ms O'Shea and two months to reflect the fact that you killed Mr Arapo while on bail.¹⁴ They reflect uplifts of six months and three months respectively in ordinary terms.

[36] Taken together that would lead to a minimum non-parole period of 17½ years. That confirms a minimum period of 17 years or more under s 104 is not manifestly unjust in your case. Indeed, as noted, a longer MPI period of 17½ years is justified as a starting point.

[37] I turn to your personal circumstances. You are 35 years old. You were born and raised at Mangere Bridge. Your parents separated when you were 12 years old. You remained with your father. Your three younger brothers lived with your mother but you kept in close contact with your mother and brothers and are particularly close to your youngest brother. While you were living with your father he suffered a very serious workplace accident and you supported him through that. You attended St Peter's College, which you acknowledge was a good school. It was there you met Mr Hart.

[38] Mr Hayde, unlike a number of people who come before this Court for sentence you have had a relatively privileged background. You have had opportunities in life. You have had a supportive family. You have had schooling opportunities. You have had significant periods of employment, but by the time of this offending you had frittered those advantages away and appear to have been spending a lot of your time sitting about taking drugs and abusing alcohol.

[39] Counsel has provided a report from Ms Visser, a clinical psychologist. Ms Visser says your interpersonal style is best characterised as cold and unfeeling. You have a propensity to make others around you feel uncomfortable and uneasy. You have a history of anti-social behaviour. Ms Visser considers that you were affected by your parents' separation and your father's subsequent accident. She suggests that you have made some progress with your reliance on alcohol and drugs, and notes since

¹⁴ To reflect a notional penalty of six years and three months respectively.

your arrest you have the strong support of family and your partner, and I note the lengthy time you were on EM bail and there was no issue of involvement with alcohol.

[40] Your family and partner have written to the Court, expressing their support of you. You are fortunate to have that support. I note you now have a child with your partner. I acknowledge that you will not see that child or your partner outside the prison environment for many years.

[41] Mr Hayde, you are not entitled to any good character discount. You have previous convictions, including a conviction for speaking threateningly and behaving threateningly in a family violence context.

[42] While Ms Visser suggests you are remorseful and Ms Priest submitted the Court could consider you were, and I also note you have suggested meeting with the victim's family, the short point is you continue to deny your responsibility for killing Mr Arapo and, just as important, your role in it. Your narrative to Ms Visser about the incident was the same narrative that you gave to the jury. You still blamed Mr Hart for the killing. That was the narrative the jury rejected. You have no genuine remorse. You are yet to accept the full extent of your actions and take responsibility for them.

[43] I do however give you a limited credit to the MPI for your personal circumstances considering them all overall, of three months and the time spent on EM bail of three months. As those reductions relate directly to the minimum term of imprisonment they are significant reductions.

[44] Mr Hayde please stand.

[45] For the murder of Wiremu Arapo, you are sentenced to life imprisonment. You are to serve a minimum non-parole term of 17 years. On the charge of attempting to pervert the course of justice you are sentenced to six years. On the representative charges of assault and threatening to kill you are sentenced to six months. The sentences are concurrent.

[46] Stand down.

Venning J