

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

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

**CRI-2019-009-012005
[2020] NZHC 3203**

THE QUEEN

v

KAINE VAN HEMERT

Hearing: 4 December 2020
Counsel: D L Elsmore for the Crown
J Rapley QC for Mr Van Hemert
Judgment: 7 December 2020

SENTENCING NOTES OF DOOGUE J

Introduction

[1] Kaine Van Hemert, you appear for sentence having pleaded guilty to one charge of murder.¹

Background

The offending

[2] Over the period of Christmas 2019, you were experiencing a deterioration in your mental health. Mental health services were notified, and they attended on you on 30 December 2019. They decided, in consultation with your family, that your

¹ Crimes Act 1961, s 172; maximum penalty life imprisonment.

mental health could be managed with medication and a voluntary appearance at Hillmorton Hospital the following day.

[3] At approximately 3.47 am the following day (31 December 2019), you were seen driving your vehicle in the area of Manchester Street, Christchurch. Around 4.00 am, you fixed a different number plate to your vehicle, using cable ties, effectively concealing the correct registration of your vehicle.

[4] At this time, the victim, Bella Te Pania, was working on Manchester Street as a sex worker, standing between Aberdeen Street and Salisbury Street. You stopped and spoke to her briefly, before she got into the front passenger seat of your vehicle. You drove to an unidentified location, near Grahams Road in Burnside, and had a discussion about payment and services offered by Ms Te Pania.

[5] You stated that Ms Te Pania attempted to strike you with a weapon. You then pulled out a large knife with a 20 cm blade, similar to a fish filleting knife, and stabbed Ms Te Pania multiple times. You also hit her on the head with a weapon, more than once.

[6] Your vehicle was then tracked on CCTV footage driving erratically through the wider Christchurch area. You drove north out of Christchurch, and then back towards the airport. At about 6.45 am, you drove into the secure Air New Zealand engineering site at Orchard Road, Christchurch, where Air New Zealand staff called the police.

[7] Ms Te Pania was found in the front passenger seat of your vehicle. The front windscreen of your vehicle was smashed. A footprint from Ms Te Pania's shoe was detected on the windscreen. A search of the vehicle revealed two knives, an awl, and a rock in the vicinity of the passenger seat of the vehicle. A sledgehammer was found in the rear of the vehicle. The rock found in the passenger seat of the vehicle was found to contain both your blood and Ms Te Pania's blood, and could have caused some of Ms Te Pania's injuries.

[8] Ms Te Pania suffered extensive external injuries, of both sharp force cutting and blunt force, as follows:

- (a) A large slash wound to the lower lateral left thigh, which penetrated deeply into the lateral quadriceps muscle.
- (b) A stab wound to the right side of the face over the angle of the jaw.
- (c) A stab wound to the central upper abdomen, so deep it exposed her small bowel.
- (d) A 30-millimetre stab wound passing through the full thickness of the abdominal wall.
- (e) A very large and deep cutting slash wound to the left and centre throat, cutting entirely through the sternum mastoid muscle on the left and through about half the thickness of the same muscle on the right side. The trachea had virtually completely severed as had the thyroid gland. The right internal jugular vein was virtually completely severed.
- (f) Ten cutting wounds on left hand and six cutting wounds on the right hand, as well as two cutting wounds to the back of left forearm, described as defensive.
- (g) Seven stab wounds to the front of the chest, which did not penetrate the chest cavity.
- (h) A stab wound to the front of the left upper thigh.
- (i) Twelve stab wounds to the front of the face.
- (j) Blunt force injuries.

[9] Ms Te Pania died as a result of the multiple stab wounds and blunt force injuries. The major operating cause of death was external blood loss and respiratory

obstruction from blood flooding her upper airway, as a result of the significant wound to her throat.

[10] When interviewed by police later that morning, you said you had had an altercation with Ms Te Pania over the details of the transaction for sexual services. You said Ms Te Pania attacked you, and you acted in self-defence. You said you had stabbed her numerous times, and stated “I sliced and diced her” and “I murdered her”. You stated that you both “saw red”. You said you freaked out afterwards and drove all over Christchurch disposing of her cell phones, and ended up at the Air New Zealand engineering yard. You had a V shaped laceration on your left hand, requiring surgery.

Mr Van Hemert's mental health

[11] It is important to view the offending under the overarching matter of your history of bipolar affective disorder. On 29 December, your mental health had declined significantly. Your friends and family saw that you were deteriorating and became very concerned. Your former partner called the police multiple times, telling them you were in a manic state.

[12] You began acting bizarrely, including texting and calling your family asking for a time machine. You dialled 111 and spoke to the police; you asked how you could become a police officer, and rambled about drugs and narks. You requested a time machine so he could go back in time and shoot your father. You were clearly paranoid, and the call taker suggested you call the mental health triage line.

[13] Your brother and sister-in-law went to your home, where they found you in the shower, swearing, ranting, and banging your head against the walls. You had been in the shower for hours. Your brother called the mental health crisis team, who attended.

[14] You were assessed by a crisis mental health team, and significantly you were considered by them to be a risk to yourself and others. A nurse filed and signed a s 8(a) application for assessment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Act). She said, “I believe [Mr Van Hemert] to be mentally disordered and apply to the Director of Area Mental Health Services to have

that person assessed”. She noted that you were “psychotic, preoccupied with responding to voices, remaining in his shower naked for hours, effected by cannabis abuse, no sleep overnight, no food or fluids today. No risk to others evident”.

[15] A doctor filled out and signed a s 8(b) certificate supporting the application for assessment. The doctor declared that he had examined you, and he considered “there are reasonable grounds for believing the proposed patient may be mentally disordered”. He set out as required his reasons being:

Kaine is acutely psychotic, characterised by delusions and disorder of perception. Kaine exhibited paranoia and was talking incoherently to himself as if responding to voices. In my opinion, Kaine poses a risk to himself due to his reduced ability to perform self-cares.

[16] Once this step was taken and these opinions were formed, the Act required that you were assessed by the Director Area of Mental Health Services forthwith.

[17] The attending mental health crisis response teams phoned the police and sought assistance to commit you under s 9 of the Act. The nurse told the police operator “he isn’t aggressive, although I wouldn’t like to get close to him, he is psychotic”. The police call taker told the nurse there was going to be delay, and that the police could not attend immediately. Sometime later, the doctor phoned the police back and updated them. The doctor said they would give you medication to see if that settled you down, and if it did they would not commit you. The crisis medical team wrote a script for Lorazepam and Risperidone for you. Family members filled that prescription, and your brother managed to give you your medication. You were put to bed later that afternoon.

[18] The mental health workers phoned the police and said they had given you medication, and they cancelled the request for police assistance. They decided you could remain at your home, and an appointment was made for you to voluntarily go to the mental health facility the following day. The mental health workers left and said they would find your brother to check on you.

[19] Later that day, at 8 pm, someone from the mental health team phoned your brother. He told them that you were in bed asleep. Your brother said he was told if

you took your medication you would be sedated, and it would be alright for you to be left alone for the night. You should not have been left home alone. The subsequent events demonstrate that the committal assessment process ought not have been delayed; and because it was, you should have had someone supervising you up to the point when it commenced.

[20] Later that night, you woke up. You were still seriously mentally unwell. You armed yourself with weapons and drove yourself into town. As I have said, you changed the number plates on your vehicle several times. I do not believe, as the Crown suggested, that this was done in a premeditated way so as to elude detection after having committed a violent crime; rather, I believe changing the number plates was an exhibition of your paranoia. You told police that the weapons were taken to protect yourself from pimps, which I consider to be yet another manifestation of your paranoia.

[21] You have stated that in the early hours of 31 December, whilst in the throes of a major psychotic episode, you were going into town to have revenge sex with someone, in order to “level the playing field” with your ex-partner.

Impact on victims

[22] I have heard from a number of victims today. I wish to, as best I can, encapsulate what they have said to the Court. They have said that Ms Te Pania was a loyal person who sacrificed herself for others. She accepted those that society discarded. They wanted it pressed home today, and it should be, that sex workers should be safe in their workplace. They stress that society needs to value young Māori such as Ms Te Pania on the journey to making good with their lives, and society should do that.

[23] I have heard, also, from Ms Te Pania’s teenage niece who described the heartache she has suffered and how her aunt’s death has made her fearful and has affected her own mental health. I want to acknowledge her courage in reading out not only her victim impact statement but also her mother’s.

[24] I treat Mr Te Pania's haka today as his victim impact statement. It was an expression of grief, agony, and anger at his and his family's loss in a way that is most appropriate to his culture and language. All of the victims describe the trauma and pain that they have experienced and will experience for the rest of their lives.

[25] I wish to acknowledge Bella and highlight particularly the sad fact that she worked on a project to end the kind of violence that she was subjected to at your hands to end violence against sex workers. I want to publicly state and commend the fact that she won a Volunteering Canterbury award for her contribution to the community.

[26] Bella's sister now appears for her two-year-old daughter. No one can bring that little girl's mother back. She is no longer the happy, easy going little girl that she was. Her life was changed forever, not only in the everyday absence of her mother but also as her niece has said and her sister has said in the all important milestones, such as being in the classroom the first time she goes to school, and perhaps even one day having children herself.

Submissions

[27] Ms Elsmore, counsel for the Crown, submitted I should impose a sentence of life imprisonment.

[28] Your counsel, Mr Rapley, submitted a sentence of life imprisonment would be manifestly unjust; primarily because your actions were the result of an inadequately treated serious mental illness.

Life imprisonment

[29] The maximum penalty for a charge of murder is imprisonment for life.² A conviction for murder attracts a presumption of life imprisonment, unless a sentence of imprisonment for life would be manifestly unjust.³ The threshold for manifestly unjust is very high threshold, and it is crossed only rarely and in exceptional cases.⁴

² Crimes Act 1961, s 172.

³ Sentencing Act 2002, s 102.

⁴ *R v Rapira* [2003] 3 NZLR 794 (CA) at [121].

[30] If life imprisonment is imposed, the Court must order a minimum period of imprisonment of at least 10 years; and in certain circumstances, must impose a minimum period of imprisonment of at least 17 years (which the Crown is not calling for in this case).⁵ A sentence of life imprisonment has been considered manifestly unjust because the defendant was suffering from a serious psychotic illness.⁶ The Court of Appeal provided the following guidance:⁷

[16] ... Parliament has mandated that life imprisonment should be the standard sentencing response to a conviction for murder, reflecting society's recognition of the sanctity of human life and its condemnation of anybody who wrongfully takes another life. Life imprisonment is the ultimate penal sanction available, reinforcing the purposes of deterrence, denunciation, protection of society and accountability.

[17] However, Parliament has deliberately empowered High Court judges to impose a lesser sentence according to the all-encompassing criterion of manifest injustice. Its terms authorise a sentencing judge to take into account other relevant sentencing purposes, in particular aggravating and mitigating factors relating to the offence and offender. ...

[31] I have reached the conclusion that, because of the extent of the psychiatric illness you were suffering from at the time of the offending, it would be manifestly unjust to sentence you to life imprisonment. I have no doubt that you would not have killed Ms Te Pania but for your illness and the seemingly inadequate supervision that you were under between the assessment process and the dreadful event. Having said that, you were not so unwell as to be able to advance the defence of insanity, so you are being sentenced to a term of imprisonment.

[32] Ms Te Pania's death was not just an unfortunate event as a result of the train of events that occurred after you became unwell. It was an event that was caused in part by choices that you made.

[33] Since the dreadful event, you have been receiving treatment, and your mental condition has improved and you are not currently a risk to yourself or others (although, it is obvious that you have a long term need for continuing treatment). The attack on Ms Te Pania was totally out of character, and entirely out of step with your general life

⁵ Sentencing Act, s 104.

⁶ *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

⁷ *R v Cunnard* [2014] NZCA 138 (footnotes omitted).

patterns up to that point. That is the reason why I consider there are exceptional circumstances in this case and this does not require a sentence of life imprisonment.

Finite sentence

[34] However, I must hold you accountable for what you have done. I take into account that, although the psychiatric illness motivated the killing, you nevertheless intended to take Ms Te Pania's life and did so knowing it was wrong to take her life. I must look to the protection of the public by ensuring that you get the continuing treatment you need, and I must also look at your rehabilitation and eventual reintegration into the community.

[35] I therefore have to determine a finite sentence, having regard to the purposes and principles set out in the Sentencing Act 2002. In determining your finite sentence, I take a two-step approach.⁸ First, I will adopt a starting point with regard to any aggravating and mitigating features of the offending. Second, I will consider your personal aggravating and mitigating factors.

Starting point

[36] Turning first to the starting point, I have considered various cases where a starting point of between 10 and 14 years has been adopted,⁹ and cases where an end sentence of between 10 and 18 years was imposed.¹⁰

[37] In terms of aggravating features of the offending, I note first the extreme violence and use of a weapon.¹¹ The injuries Ms Te Pania sustained show how brutal the attack was, and of course the offending has resulted in the most serious harm – the loss of Ms Te Pania's life.¹² There is also no doubt that Ms Te Pania was vulnerable – she worked in an industry where the workers are vulnerable.¹³ She was a very slight person, so the physical imbalance between the two of you also made her vulnerable.

⁸ *Moses v R* [2020] NZCA 296 at [46].

⁹ *R v Madams* [2017] NZHC 81; *R v Cole* [2017] NZHC 517; *R v Rihia* [2012] NZHC 2720.

¹⁰ *R v Reid*, above n 6; *R v Cunnard*, above n 7; *R v Nelson* [2012] NZHC 3570.

¹¹ Sentencing Act, s 9(1)(a).

¹² Section 9(1)(d).

¹³ Section 9(1)(g).

She was trapped in the vehicle with you, another manifestation of her vulnerability. I do not accept that you were acting in excessive self-defence in those circumstances.

[38] Given all these factors, I adopt a starting point of 18 years' imprisonment.

Personal factors

[39] I turn now to your personal mitigating factors.

[40] The first mitigating factor I consider is your mental health. The Court of Appeal has held that mental health issues may mitigate offending because, if causative of the offending, they moderate an offender's culpability.¹⁴ Although there is no formal limit on the amount of discount mental health issues can warrant, discounts ranging from 12–30 per cent have been appropriate in other cases.¹⁵ You were the subject of a serious psychotic episode, as I have described. I also note that you gave yourself up, and your remorse is palpable.¹⁶ Your motivation for the murder was solely as a result of your mental illness. I consider a discount of four years, six months (25 per cent) is appropriate for your mental health issues.

[41] The second mitigating factor I consider is your guilty plea.¹⁷ You have saved the state and others the pain and trauma of a trial, and I consider a discount of three years, six months (approximately 19 per cent) is appropriate for your guilty plea.

Final finite sentence

[42] This results in a finite term of imprisonment of 10 years.

Minimum period of imprisonment

[43] As I have sentenced you to a finite term of imprisonment of more than two years, I may order than you serve a minimum period of imprisonment.¹⁸ That

¹⁴ *E (CA 689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68].

¹⁵ At [71]; *Orchard v R* [2019] NZCA 529 at [48].

¹⁶ Sentencing Act, s 9(2)(f).

¹⁷ Sentencing Act, s 9(2)(b); *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].

¹⁸ Sentencing Act, s 86.

minimum period in your case cannot exceed two-thirds of your finite sentence.¹⁹ I am satisfied that a minimum period of imprisonment is necessary in your case, for the purpose of holding you accountable for the harm done, denouncing your conduct, and deterring others from committing the same or a similar offence.²⁰

[44] I impose a minimum period of imprisonment of six years, eight months.

Result

[45] Mr Van Hemert, for the murder of Ms Te Pania I sentence you to 10 years' imprisonment.

First strike warning

[46] I will now give you your first strike warning. Given your conviction for murder, you are now subject to the three strikes law. I am going to give you a warning of the consequences of another serious violence conviction. You will also be given a written notice which contains a list of these serious violent offences.

[47] If you are convicted of any one or more serious violent offences other than murder, committed after this warning, and if a Judge imposes a sentence of imprisonment then you will serve that sentence without parole or early release. If you are convicted of murder committed after this warning then you must be sentenced to life imprisonment without parole unless it would be manifestly unjust to do so. In that event, the Judge must sentence you to a minimum term of imprisonment.

Doogue J

¹⁹ Section 86(4).

²⁰ Section 86(2).