IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA18/2018
[2019] NZCA 35

BETWEEN	SAMEH KHALIL SALEM ALI Appellant
AND	THE QUEEN Respondent

Hearing: 14 February 2019

Court: Miller, Simon France and Peters JJ

Counsel: P K Hamlin for Appellant
E J Hoskin for Respondent

Judgment: 6 March 2019 at 4.00 pm

JUDGMENT OF THE COURT

A The minimum period of imprisonment is quashed.

B The appeal is otherwise dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Ali was convicted after trial of the attempted murder of his former partner's new partner.[1] He appeals his sentence of eight years nine months' imprisonment with a minimum period of four years, four months' imprisonment.[2]

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1 Crimes Act 1961, s 173.
2 *R v Ali* [2017] NZHC 2973.

The facts

[2] On the evening of 20 October 2016 Mr Ali was staying with his former partner, with whom he remained on cordial terms. Later in the evening she went into her bedroom with the victim. Believing they were about to become intimate, Mr Ali went into the darkened room with a knife or similarly sharp object and cut the victim to the right side of his neck, inflicting a large and deep wound.

[3] Mr Ali fled the scene and threw away the weapon. He admitted to others, and indicated to police, that he had committed the offence, but at trial he denied being the person responsible. He maintained that denial at sentencing, but we are told he now accepts responsibility.

The sentence

[4] Downs J adopted a nine-year starting point by reference to *R v Taueki*, placing the offending within Band Two.[3] The aggravating features were the use of a weapon, the attack to a vulnerable part of the body, the physical and psychological harm caused, and the element of premeditation. The Judge made a modest allowance of three months for the fact that until then Mr Ali had lived a largely blameless life.

[5] The Judge concluded that a minimum period was necessary, reasoning that the attack was a clinical attempt to kill using a weapon chosen for that purpose and observing that offending of this type still shocks the community.

The appeal

[6] On appeal, Mr Hamlin, for Mr Ali, focused on the minimum period, submitting that the Judge failed to apply the statutory criteria and its length was inconsistent with previous comparable sentencing decisions. The determinate sentence was sufficiently long to meet the statutory purposes of accountability, denunciation and deterrence, and Mr Ali's reoffending risk was not assessed as high. Counsel emphasised that Mr Ali, who is an Egyptian national, has no relevant convictions in New Zealand, where he

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3 *R v Taueki* [2005] 3 NZLR 372 (CA).

has lived since 2006, and offered a number of testimonials to his qualities as an employee.

[7] With respect to the determinate sentence, Mr Hamlin submitted that while it was appropriate to rely on *Taueki*,[4] less weight ought to have been placed on the aggravating factors. Targeting a vulnerable part of the victim's body is a normal feature of the offence of attempted murder and a degree of premeditation is inevitable insofar as the offender sets out to achieve a particular result. He submitted that the starting point ought to have been eight to eight and a half years' imprisonment.

The starting point

[8] We do not accept that the starting point was excessive. The Judge did not place too much weight on the aggravating features he identified. The presence of a specific intent to kill does not warrant a lower starting point. On the contrary, it may justify a longer sentence.[5] Comparable cases indicate that the starting point was within range.[6]

The minimum period

[9] We take a different view of the minimum period of imprisonment. In our view the determinate sentence adequately meets the statutory purposes of accountability and denunciation.[7]

[10] Ms Hoskin, for the Crown, argued that Mr Ali's denials warranted an increased minimum period. We accept that an offender's continued denials may evidence a need for community protection,[8] and also specific deterrence,[9] both of which may justify an increased minimum period. In both cases the underlying rationale is the offender's elevated risk of reoffending. Sentencing judges must focus on that risk because the offender cannot be punished for exercising the right to trial even where, as in this case, conviction was inevitable. We do not suggest that Downs J made that mistake.

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4 *R v Taueki,* above n 3.
5 *Taylor v R* [2017] NZCA 53 at [21].
6 *Shen v R* [2017] NZCA 103; and *Hu v R* [2011] NZCA 412.
7 Sentencing Act 2002, s 86(2).
8 *R v Taupau* HC Auckland CRI-2005-090-9395, 2 May 2008 at [40]; and *Pomare v R* [2015] NZCA 191 at [11] citing *R v Wellm* [2009] NZCA 175 at [18].
9 Sentencing Act, s 86(2)(c).

[11] On the merits, we do not accept Ms Hoskin's submission that reoffending risk warranted an increased minimum period. The bare facts of this case indicate Mr Ali may pose a risk of violent reoffending, but as the Judge recognised, he has lived a largely blameless life, which points to the existence of control factors. Downs J aptly described Mr Ali as a paradox, and the offending as an aberration (albeit a very serious one).

[12] The only other assessment of risk was that of the probation officer, who thought it medium. However, that opinion takes us no further because it was based on nothing more than the facts of this offending and Mr Ali's denials. In the circumstances of this case we consider that the denials do not point to an elevated risk of reoffending; rather, they are cause for inquiry. We observe that he admitted responsibility initially, before denying it at trial, and we note Mr Hamlin's instructions that he no longer maintains that denial.

[13] The Parole Board is equipped to undertake the necessary risk assessment. In our opinion it should be left to do so in the normal course of events. To state the obvious, it does not follow that Mr Ali will be admitted to parole at the first opportunity (or at all, for that matter). Our decision establishes only that on the limited information available to the courts, the risk of reoffending is not high enough to justify imposing an increased minimum period at sentencing.

Result

[14] The minimum period of imprisonment is quashed.

[15] The appeal is otherwise dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent