IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2018-096-3977
[2019] NZHC 1499

THE QUEEN

v

EUGENE DANIEL BAKER

Hearing:	28 June 2019
Counsel:	G J Burston for Crown B A Crowley and C O Thorburn for defendant
Sentence:	28 June 2019

SENTENCING NOTES OF DOBSON J

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[1] Mr Baker, you have pleaded guilty to murder and that means that the mandatory sentence is one of life imprisonment. The issue I have to decide is the minimum period of imprisonment, that the lawyers call MPI. That is, the length of time that you have to serve before you would be eligible for parole. This is to be decided by considering the circumstances of the offending and, to an extent, your circumstances as the offender.

[2] You will have heard both counsel this morning referring to s 104. That is a reference to s 104 of the Sentencing Act 2002 (the Act) which provides for the higher MPI of 17 years where certain features of the most serious cases of murder are present. In this case, the Crown argues that a number of the factors of s 104 are present to an

extent that, by comparison with other serious murder sentences, I should adopt a starting point for the MPI of 19 years.

[3] On your behalf, Mr Crowley accepts, quite realistically, that this is a murder to which s 104 applies, so that the starting point is appropriately 17 years. However, he argues that there are circumstances justifying a reduction and says that an MPI of around 15 years is appropriate.

[4] You, Mr Baker, may only be interested in the answer as to how long it will be before you are eligible for parole. However, I cannot just think of a number and I have to set out the steps in my analysis that are required by the law to explain what that decision is.

[5] I do so first by assessing the nature of the offending, including the impact it has had on the victims, to assess it against the s 104 factors that may be relevant. I do that to set a starting point for the appropriate MPI, in part by relating the relative seriousness of the features of this murder against those present in other sentencings, particularly sentencings that have been reconsidered by the Court of Appeal, which is obviously concerned to ensure that there is a measure of consistency between the MPIs that are imposed.

[6] After that, I will reflect on your circumstances as the offender, drawing on all the information that is available to me and also take into account your guilty plea.

The offending

[7] As to the offending, in November last year you and your victim, Mr Frank Tyson, were both small-scale synthetic cannabis dealers operating from blocks of Housing New Zealand flats in Petone. A testy relationship between you got worse when you and your family were served with notice evicting you from your apartment and you blamed the eviction on Mr Tyson because you thought that he was an informant to Housing New Zealand. On 28 November 2018, you sent threatening texts to Mr Tyson.

[8] The next day, on 29 November 2018, you were involved in a fight with Mongrel Mob members and associates. Witnesses to that incident suggest that you were a reluctant participant, and you were beaten and kicked by gang members and after it you were angry with Mr Tyson whose flat was above the outside area where the assault had taken place. You were heard to yell upwards towards Mr Tyson's flat "I'm going to take your head".

[9] The next morning, 30 November 2018, in the course of removing your family's belongings from the flat you were being evicted from, you abused Mr Tyson, calling him a nark. During that day, you also sent a text to an associate of the Mongrel Mob describing Mr Tyson as a "trusted nark and information provider", and stating that you were still going to de-head him. That afternoon, you also slashed all four tyres of Mr Tyson's car that was parked nearby.

[10] About 5.20 pm that evening, Mr Tyson returned to the block of flats with a large quantity of synthetic cannabis. He apparently called out to some of the residents that he would have the synthetic cannabis prepared for sale shortly after that. You saw him returning home and, armed with a knife, pressured your way into Mr Tyson's flat by intimidating the boarder who was there. You demanded that Mr Tyson hand over the synthetic cannabis, but he refused, claiming that he would phone the Police. You advanced on Mr Tyson and stabbed him five times in the chest with one of the blows striking his heart. The boarder had barricaded himself inside his bedroom, but you punched a hole through the bedroom door and threatened him with violence to get him to come out of the bedroom and you yelled at the boarder to leave the flat otherwise he would be witnessing you cut off Mr Tyson's head. According to the boarder, Mr Tyson was still able to raise his head from where he had collapsed on the floor to urge the boarder to leave.

[11] You then took the boarder's cell phone and keys and forced him out of the flat, escorting him from the apartment block. You threatened that if he was to say anything about what he had seen, he would be dead. I appreciate, as Mr Crowley has re-emphasised this morning, that you dispute aspects of the boarder's recollections, claiming that he was unreliable. However, I treat the essence of these observations as being essentially correct.

[12] Ten or 15 minutes later you returned to Mr Tyson's flat, letting yourself in with the key that you had taken when you left shortly before. This time you brought a white plastic bag and a large serrated bread knife with you. You used the knife to cut right through Mr Tyson's neck, removing his head from his torso. You then wrapped Mr Tyson's head in a towel, placed it in the plastic bag, you stole synthetic cannabis and cash you found in the flat and locked the door, keeping a set of keys, apparently intending to return later to clean up the scene of the murder.

[13] You went back to your flat and the Police reconstruct that you attempted to clean the blood off your face and arms, but you were interrupted by a screaming resident. A number of the residents who had been concerned went to Mr Tyson's flat and found him on the floor of his apartment and it was one of these residents that you pulled into your flat to calm her down and persuade her to stop screaming. You acknowledged to that resident that you had killed Mr Tyson and that you would clean the scene up in a few days. You remained in the area and spoke with several more residents, including making further admissions that you had killed Mr Tyson and that you would clean it up later. A little after 8.00 pm that evening you took the bag and walked down Jackson Street, Petone swinging it. You were observed apparently raising it towards an address known to be the home of Mongrel Mob members. You discarded the bag with the head in it somewhere in the area, but by the time the Police arrived at around 10.00 pm, someone else had returned the bag containing the head to your address where it was located by the Police alongside a large quantity of synthetic cannabis.

The s 104(1) features

[14] So in light of those circumstances of the killing, I turn to the s 104 features that may apply. The first s 104 feature the Crown says was present here was calculated or lengthy planning. The Crown relies on the threats you made against Mr Tyson in the days before the murder, that arguably you prevented an escape by car by slashing the tyres on his car, and the steps you took after the murder in cutting off his head.

[15] I agree with Mr Crowley that those circumstances do not make out the sort of calculated or lengthy planning contemplated by s 104(1)(b). Mr Crowley referred me

to the case of *Desai v R*, where the Court of Appeal acknowledged that in the earlier notorious case of *R v Weatherstone* a defendant acquiring a knife and placing it in his laptop case, and planning a means of getting access to the victim's home, did demonstrate some degree of planning but did not have the hallmark of a carefully planned and orchestrated murder.[1] In *Desai*, the Court of Appeal observed:[2]

> The planning does not of course have to be competent or sophisticated to qualify as planning but must be present to a heightened degree, either because of the period of time over which it has taken place or because of the degree of thought which has gone into it.

[16] Your planning here does not qualify under that feature.

[17] The second s 104 feature is the involvement of an unlawful entry into, or unlawful presence in, a dwelling place. I am satisfied that this did occur here and is material to evaluating the relative seriousness of the murder. This was a form of home invasion. You are a big man of physically imposing stature, and I am satisfied you were able to intimidate the boarder and then obviously completely dominate Mr Tyson. He was 74, there was no suggestion he was armed, and you were carrying a knife. I do not accept Mr Crowley's point that Mr Tyson was less entitled to feel secure in his flat when he was using it for dealing illegal drugs. Certainly, that activity provides some context but it does not eliminate the feature that this murder occurred in the residential flat where Mr Tyson ought to have been entitled to feel safe.

[18] The next s 104 factor raised by the Crown is that the murder was committed in the course of another serious offence. That is, aggravated burglary. Those in the vicinity were advised that Mr Tyson was in possession of a quantity of synthetic cannabis and that he was going to package it, ready for sale. When you entered his flat, you demanded that he hand it over in circumstances that, had he agreed to your demand, would have been a case of aggravated burglary because you were armed. The Crown is entitled to treat this as another of the s 104 factors that was present, although I acknowledge Mr Crowley's point that the circumstances of the aggravated burglary were so closely connected to your intent to attack Mr Tyson that it is easy to double-

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1 *Desai v R* [2012] NZCA 534.
2 At [59].

count the relative seriousness of the aggravated burglary that was really a side show to your carrying out your threat to kill him.

[19] The last s 104 factor cited by the Crown as relevant is a high level of brutality, cruelty or callousness.[3] These features can be present not only in the lead up to the killing, and the way in which it occurred, but also steps after the death has occurred.[4]

[20] The circumstances of the stabbing itself where you, having the strength and dominating size to overpower any opposition Mr Tyson might raise, inflicted five stab wounds to his chest, might not, of itself, achieve the high level of brutality contemplated in this feature. It would be borderline. However, I am satisfied that the feature was present by taking into account the callousness of your action in carrying out the threats made in the previous days to cut Mr Tyson's head off. It would have taken substantial strength and determination to do that with a bread knife, and then using the head like a trophy, walking around in that part of Petone, was a seriously gross indignity to the victim, showing a high level of callousness.

[21] In this regard, I acknowledge the victim impact statements we have heard this morning. You can have copies of them and there is a third which Mr Crowley will hopefully be able to provide to you, and I invite you to reflect on them. Every murder leaves friends and loved ones bereft, but the callousness of the indignities you inflicted on Mr Tyson's body make the pain that those suffering the loss feel a lot greater.

[22] I therefore accept that s 104 applies, meaning that the MPI must be at least 17 years. Now the Crown has cited a number of appellate reviews of murder sentencings where MPIs of 17 years were upheld.[5] Mr Burston has submitted that the offending here is relatively more serious than those other cases, in particular because:

- of the callous way in which you warned others before attacking Mr Tyson that you were going to behead him;

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3 Section 104(1)(e).
4 For example, *Carroll v R* [2018] NZCA 320 at [15], [16].
5 *Baker v R* [2015] NZCA 306; *Pahaau v R* [2011] NZCA 147 and *Carroll v R*, above n 4.

- on the boarder's recollection, you made that threat in Mr Tyson's hearing between stabbing him and his death; and

- you carried out the threat and used his decapitated head like a trophy.

[23] Now on the other side, Mr Crowley has invited comparison with other cases where the MPI was set at no more than 17 years, which he says are even more serious. It is a very difficult comparison to make between the circumstances of these cases but I cannot accept Mr Crowly's point that others, where the MPIs stayed at 17 years, were more serious than this.

[24] I do consider that the features that the Crown has emphasised do warrant an uplift from 17 years and I settle on a starting point for the MPI of 18 years.

Your circumstances

[25] I then come to consider your circumstances as the offender. You are, I understand, 42 years old, you have revealed a troubled childhood where you suffered abuse yourself, and you resorted to sniffing solvents and then using drugs from a relatively young age. You have a number of prior convictions, but they are all comparatively minor and mostly a long time ago so I can ignore them. You have also been a man who has pursued employment and, as I understand it, more or less regularly been employed.

[26] In the period leading up to the murder, you were apparently using increasing quantities of synthetic cannabis, and also methamphetamine. When you were initially assessed for mental health purposes after your arrest, the psychiatrist's opinion was that you were still affected by illicit drugs in your system to such an extent that it would prevent him making a meaningful assessment of your mental health condition. The psychiatrist then undertook a further assessment several weeks later. As Mr Crowley says, the increasing drug intake caused your sense of morality to unravel. You should know that while the fact that you were under the influence of synthetic cannabis and methamphetamine at the time of the murder may provide some explanation for what is otherwise completely inexplicable conduct, it cannot, as a matter of law, amount to an excuse.

[27] When you were interviewed by a Probation officer a week or so ago for the preparation of a report for the Court, you were not prepared to engage fully with him. Understandably, the report is limited as a result.

[28] Mr Crowley advises that you have now had a change of heart, first seeing your offending in a different light and now being very remorseful for what you have done. Related to that, you asked to put off the sentencing so that you could have a more meaningful interview with the Probation officer on a second occasion. I was not prepared to grant an adjournment when the request was made so close to the sentencing, but I have heard from Mr Crowley on your change of attitude. I also have the advantage of the more extensive background about you in the psychiatrist's reports that might in other circumstances have been included in the Probation officer's report.

[29] I also have read the written apology which you have tendered this morning. You will have heard that, in the judgement of the officer-in-charge of the case, not appropriate to pass it on, but I have read it and reflected on it.

[30] If, indeed, Mr Baker you do now have insight into just how serious your offending was, then that is a positive sign which should help with your eventual rehabilitation. Given your attitude at the time, which showed no sympathy for the victim and his family, and where that has persisted until very recently, I cannot treat remorse as a mitigating factor in your favour that is deserving of any significant weight. At the time, and for a period thereafter, you committed a violent and brutal murder, with apparent disregard for Mr Tyson and the huge hurt and loss for friends and family left behind. The change of heart is to be encouraged, but in my sentencing analysis it cannot carry great weight.

[31] So that brings me to your guilty plea. A discount is always given for a defendant who pleads guilty, especially where the plea is entered at a relatively early stage. In doing so, the defendant relieves everyone else who would have been involved in a trial of the stress of it and also avoids the resources required to arrange and conduct a trial, and the delay in concluding it. The extent of a discount depends on a number of factors, including the strength of the Crown case. If, as I assess to be

the case here, the Crown case was compellingly strong so that the chances of a conviction after trial would have been high, then the discount is generally lower.

[32] Discounts for guilty pleas in murder charges are substantially less than the proportionate reductions in sentences that can be given in less serious cases.

[33] Here, your guilty plea was offered at an early stage, but in the situation of a strong Crown case. It is an indication that you have faced up to the consequences of your offending. Now that, more recently, you appear to have seen the seriousness of your offending and the consequences of it for others in a new light so that you regret that conduct and are remorseful for it, those matters can add somewhat to the appropriate discount for your guilty plea.[6]

[34] I have decided that a year's reduction is the appropriate extent. Even if I decided that the appropriate credit for your recently claimed remorse and your guilty plea was somewhat more than one year, I would not reduce your end sentence below the MPI of 17 years. That represents the level set by s 104 and I would not be persuaded that the prospect of a larger discount from the starting point of 18 years would be justified to an extent that it would then be manifestly unjust to maintain the MPI at that level. The outcome therefore is, Mr Baker, an MPI of 17 years.

[35] Would you stand please. On your conviction for murder you have previously been issued a first strike warning. I now sentence you to life imprisonment and you are to serve a minimum period of 17 years' imprisonment. You may stand down.

Dobson J

Solicitors:
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6 Compare *R v Williams* [2005] 2 NZLR 506 (CA) at [73].