

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

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

**CRI-2018-006-96
[2019] NZHC 2095**

THE QUEEN

v

ANN SHIRLEY BALKIND

Hearing: 23 August 2019
Counsel: J W Cameron for Crown
R A Harrison and E J Riddell for Defendant
Date: 23 August 2019

SENTENCING OF CLARK J

[1] Ms Balkind, you appear for sentence today having been found guilty of one charge of manslaughter by a jury on 6 June 2019. The maximum penalty for manslaughter is life imprisonment.

[2] The victim was Peter James McPherson, your husband. I wish to acknowledge Mr McPherson's immediate and extended family members who are attending today — here in Court, and by way of AVL. The event which sees us all here today is distressing — on many levels. The fact it has been said before, makes it is no less true that the law is scarcely adequate in responding to the emotional impact on those involved, of events such as these.

[3] Ms Balkind you have not appeared in the Courts in this way before, so you may not be familiar with the sentencing process. It is a public process and one that

requires me to step through certain matters and to assist your understanding of what those matters are I will briefly summarise them.

- (a) First, I will set out the background to the offending. The circumstances in which offending takes place are very relevant to deciding the appropriate sentence so I need to cover the background facts in some detail;
- (b) Then I will turn to victim impact statements;
- (c) I will then turn to the question of the appropriate starting point for your sentence and whether there should be any adjustments up or down from that starting point; and
- (d) Lastly, I will impose a final sentence.

Background

[4] Mr McPherson was known affectionately to his friends and family — and to you — as “Dingle”. He was referred to as Dingle throughout the trial and as that was his name in life I shall continue to refer to him as Dingle.

[5] On 27 January 2018 the two of you arrived in Kaikoura in your campervan. You checked into the motor camp on the afternoon of the 27th for two nights. A short while later you returned to reception to book an Albatross Encounter tour.

[6] Later that evening, in your campervan, you began to argue. You had both been drinking. It appears the argument may have initially over the cost of the Albatross tour. On your account, Dingle was shouting at you because of your drinking and then he started to go on about the cat and that you didn’t deserve the cat and he was going to kill the cat. You got up to see if you could find the cat and you said Dingle just started thumping you. You described it as a surprise attack. One you just didn’t expect. It came from nowhere. There was a knife on the bench and you grabbed it. Your evidence was that when Dingle tried to get the knife from you you both struggled for it and during the struggle you stabbed him.

[7] Dingle received a stab wound to the neck and then the chest. The first wound, through his neck, punctured Dingle's lung. The wound measured 3.5 cm in length and was 8.5 cm deep. The second stab wound penetrated his chest and diaphragm. As well, Dingle's left ear was cut and he received minor cuts and abrasions to his hands. In the pathologist's opinion they were the type of injuries sustained when one is trying to defend oneself from an attack by a person with a knife. Dingle fell to the ground and scrapped his right elbow, right shoulder and torso. Witnesses at the campground gave evidence of a domestic going on in your campervan.

[8] Several heard a man's voice saying "don't do it — or don't do this". Two of the witnesses described that voice as pleading. A witness then saw the door of the campervan open and Dingle, covered in blood, came out first, closely followed by you. He was seeking help. Your evidence was that you were trying to help Dingle in the campervan and when you tried to move him, he asked you to stop. You said this is what others heard. Nevertheless, it seemed to witnesses who went to Dingle's aid when he collapsed on the ground that you were still arguing, and angry with him. At some point you said to those who had gathered to help "I don't know why you're bothering with him, he doesn't care about me". As bystanders attempted to assist Dingle you came in and out of the campervan. You were upset and apparently angry telling Dingle "this is all your fault, you always do this".

Victim impact statements

[9] Turning to the victim impact statements, members of Dingle's family attest to the trauma and grief they have suffered as a result of his death. Ethan, Dingle's 29 year old son, says he has lost his main support system — not just his dad but one of his best friends who would be there for him in a heartbeat. Ethan believes he will never overcome hearing the details of his father's death and does not know how to get over the loss.

[10] Similarly, Hinewai — Dingle's daughter — writes of her heartbreak and how the day before her father's death was the last day she has spent without tears.

[11] Dingle's sister-in-law, Karen has suffered the loss of someone who was a brother to her and the adored and available uncle to their children. She would have

trusted her life to Dingle. Catherine, Dingle's former wife has written a tribute to him "in loving memory".

[12] In their grief, family members also feel confused, betrayed, and physically and emotionally exhausted.

Manslaughter: Starting point

[13] In sentencing you I am to be guided by the purposes and principles of the Sentencing Act 2002. The particular purposes and principles of the Sentencing Act that are at the forefront of my mind are:

- (a) the need to hold you accountable for the harm you have done and for the enduring impact of that harm on Dingle's loved ones; and
- (b) to denounce your violent offending.

[14] I need to have regard to all the factors relevant to your offending including what has been said in the reports that I have received. As well, your sentence must be broadly consistent with sentences others have received in similar circumstances.

[15] Because of the wide range of circumstances in which a person may be killed through an unlawful act, there is no tariff for sentencing in manslaughter cases. The approach that I must take therefore is to look at similar cases — cases involving facts that are comparable to the circumstances of your offending.

[16] Both Crown counsel and your counsel have put before me a number of cases they say have similar features to your circumstances. I have had particular regard to *R v Waa*¹ and *R v Rose*² which Mr Harrison relies on and *Wharerau v R*³ and *Woods v R*⁴ which Mr Cameron has referred to. I have summarised the essential features of these cases in an appendix to my sentencing remarks.

¹ *R v Waa* [2018] NZHC 1028.

² *R v Rose* [2017] NZHC 1488.

³ *Wharerau v R* [2015] NZCA 299.

⁴ *R v Woods* [2011] NZCA 573.

[17] There are particular features of your offending that aggravate its seriousness:

- (a) It involved extreme violence. The jury obviously accepted that you did not intend to kill Dingle or that when you stabbed him you knew there was a risk of killing him but you went ahead anyway. But, even without having any murderous intent, three blows with a knife were landed, with force to vulnerable parts of the body. It involved extreme violence
- (b) Secondly, even if you were acting in self-defence, you responded with grossly disproportionate force and the nature of the injuries tell against the kind of struggle narrated at trial.

[18] Mr Harrison points to the photographs taken by Constable Hendrikson and Detective McDougall in the days following the incident. They show bruising to your face and your eye tending to corroborate your evidence that you were hit about the head and face in the campervan on the night. Mr Harrison also submitted that the threat to kill the cat was an example of the power and control Dingle exerted over you. Evidence was produced at trial of some domestic violence towards you. Your friend of some 40 years spoke of yours and Dingle's visit to her in Scotland in 2013. She described Dingle pushing you in the chest with both hands with quite a lot of force and you fell to the floor. You had both been drinking.

[19] Another witness gave evidence of you calling him in 2015 saying Dingle had beaten you severely. The witness said you sounded distressed. A further witness said you went to her on New Year's Eve 2017 and asked her to call the Police because Dingle had been violent. She did not do so because she did not think the Police would come.

[20] As against that evidence a friend of yours and Dingle gave evidence that you had threatened him some three days before the incident saying you hated him and you were going to kill him.

[21] Even accepting instances of physical abuse by Dingle historically, and on the night he died, I am not convinced it significantly mitigates the offending bearing in

mind your established propensity for violence towards your partners. While I warned the jury that the evidence of your tendency or propensity to behave aggressively, and stab during domestic disputes — as previous partners testified during the trial — was only one item of evidence and should not be allowed to overwhelm a proper analysis of all the evidence, I am able to take it into account for the purposes of sentencing. And I do take it into account as being relevant to a consideration of the proposition that you acted out of fear for your safety.

[22] There is not the same evidence here of an extensive history of prolonged violence as there was in *Waa* and *Rose*. Severe physical abuse of Ms Waa had been a constant feature of their 20 year marriage. Major surgery was required at one stage for a broken cheekbone and she had been kicked in the stomach when pregnant.

[23] Ms Rose had been beaten immediately before stabbing her partner in the upper back with a small pocket knife. His injury was such that his friend had simply applied a band aid. He died unexpectedly from complications.

[24] Your circumstances are different from *Rose* which involved a single stab, with a small knife, and, as that Judge observed it was not directed to a particularly vulnerable area such as the chest and neck.⁵ Therefore I do not accept as appropriate a starting point of three years and nine months' imprisonment as was adopted in *Rose*.

[25] Having regard to all of the circumstances and the comparable cases, most particularly *Woods*, I do not think a starting point of less than four years nine months is available. A starting point of that length is within the range of three and a half to five and a half years' imprisonment frequently imposed for defendants who have killed abusive partners.⁶

[26] I adopt a starting point of four years and nine months but now turn to consider whether there are any aggravating or mitigating factors that are personal to you.

⁵ *R v Rose*, above n 2, at [38].

⁶ *R v Kirk* [2016] NZHC 1249 at [45] and [66].

Personal factors

[27] Three comprehensive medico-legal reports prepared by psychiatrists give consistent accounts of relevant background. I have had particular regard for the fact that as a child you were at times a witness to and a victim of family violence as your father was apparently consistently violent towards your mother. They provided little emotional support or affection towards you and you lost your father when you were only 15 years old.

[28] Between your late teens and early thirties you led a stable and productive life travelling around the UK and eventually to the United States where you set up a successful landscape gardening business. But from the age of 32 you experienced the onset of what Doctor Monasterio described as a “severe alcohol use disorder”. Since then there has been a persistent heavy use of alcohol and periods of depression. When Doctor Monasterio interviewed you earlier this month he did not assess you as currently presenting as an acute risk for suicide although at moderate potential risk in the long term should you relapse into alcohol use, enter into violent and dysfunctional relationships or experience exacerbation of mood and anxiety symptoms. The recommended interventions for the management of these risks was participation in a structured drug and alcohol treatment programme, and longer term psychological interventions to address complications arising from your history of childhood adversity and intimate partner violence. I endorse the specific recommendation for referral for an opinion on treatment interventions available through drug and alcohol treatment programmes as well as comprehensive treatment to address your long-standing severe alcohol addiction. While you have reported to specialists that you believe you will never drink again that promise to yourself may be challenging to keep if you return to the community unsupported. It is important that you receive the intensive support that is clearly mandated.

[29] The pre-sentence report by the Department of Corrections is consistent with the reports of the health professionals. The report is premised on an understanding that a sentence of more than two years will likely be imposed but otherwise offers little insight. It is relevant that you have received only two convictions in your lifetime both I understand involving alcohol.

[30] Under the law your good character prior to this most serious offending can be recognised by a deduction from the starting point. I consider a deduction of four months appropriately recognises the personal mitigating factors. I accept also having heard from Mr Harrison that serving a sentence of imprisonment will be significantly more difficult for you than for others. You have no family and no support network in New Zealand. I deduct a further two months from the starting point in acknowledgement of that fact.

[31] I do not propose to reduce the sentence any further on the grounds your counsel has advanced. It is said you are remorseful but if credit is to be given for it, the remorse must be demonstrated in a meaningful way. I accept Mr Harrison's submission that you were very upset and still grieving during the trial and that you loved Dingle. Mr Harrison points to your evidence during the trial that it was "just an accident" and "you didn't mean to do it" as indicative of remorse such that there should be a reduction in your sentence. In fact, as the context to that statement demonstrates, you were expressing upset and frustration that you did not know where Dingle was because nobody had told you and that you did not even know there was a funeral. I am unaware of any meaningful expression of remorse and am unable, therefore, to discount your sentence on that ground notwithstanding the "profound guilt" you were reported as experiencing in March 2018 by Mr Foulds to which Mr Harrison has just referred me.

[32] Nor are you entitled to a discount because you would have pleaded guilty to manslaughter had manslaughter been charged. The Court of Appeal rejected a similar argument in *Woods*. It saw no reason to impose an obligation on the Crown, to indicate a willingness to accept a plea to a lower charge, so as to provide an opportunity for an accused person to qualify for a discount for an early guilty plea.⁷

[33] Similar considerations apply here. There was sufficient evidence to support a charge of murderous intent, particularly in the depth of one of the wounds, and the Crown was entitled to proceed as it did.

⁷ *Woods v R* [2011] NZCA 573 at [16].

Sentence

[34] Ms Balkind would you please stand, you are sentenced to four years and three months' imprisonment on the charge of manslaughter.

[35] You may stand down.

Karen Clark J

APPENDIX

R v Waa [2018] NZHC 1028

Justice van Boheman found that the offender's history as a victim of domestic abuse was a mitigating factor. Ms Waa had experienced sustained physical and sexual abuse by the deceased. Severe physical abuse was a feature of their lengthy relationship. There was evidence of some eleven injuries serious enough to require medical attention, including a broken cheekbone requiring major surgery. The deceased was controlling and at one point when Ms Waa tried to run away he cut her Achilles tendon with a carving knife in an effort to stop her. He was sentenced to two years' imprisonment. The incident giving rise to the charges arose from an argument in the home one evening. The victim threw the offender across the room and held a bread knife against her throat and threatened to kill her if she did not do as he asked. As he placed the knife down to recommence his assault on her she picked it up and stabbed him, enabling her to get past him and leave the room. The stab wound severed several major arteries and he died from blood loss. A starting point of three years and nine months imprisonment was adopted.

R v Rose [2017] NZHC 1488

There was no evidence of an extensive history of prolonged family violence as there was in *Waa*, but Thomas J took into account the victim's conduct immediately preceding the attack when setting the starting point. In that case, an argument developed between the offender and her partner, the victim. The victim became violent and punched the offender around her head and body causing bruising and cuts around her eye. He sat down and continued to verbally abuse her, saying "you're gonna die bitch". She took a small pocketed knife from her pocket. He saw it and began to get up from his chair, laughing, saying "bring it on bitch". She lunged towards him and stabbed him with the knife on his upper back and fled the address. The victim later died in hospital from complications from the stab wound. Thomas J considered the earlier assault, the death threat and the further threat to be "highly relevant factors" and adopted a starting point of three years, nine months imprisonment.

Wharerau v R [2015] NZCA 299

The victim and the offender had been in a short-term relationship characterised by low-level domestic violence. On the night of the offending an argument had started over the use of the offender's phone. In the course of the argument the victim slapped the offender across the face. She punched him on the back in retaliation. She then tried to use her phone to contact a family member, but the victim took it from her and broke it. She went into the kitchen, closely followed by the victim who was very angry. She grabbed a knife from the kitchen bench and swung it in his direction. She said she was trying to scare him away but the knife stabbed the victim in the chest, puncturing his lung. He died later in hospital. A starting point of four years, six months imprisonment was upheld on appeal.

The appellant had been in a relationship with the deceased for 10 years. There was a history of violence in the relationship. On the night of the offending the two had consumed a large amount of alcohol at a family gathering. As the two drove home they began to argue. The victim assaulted the appellant by punching her in the face several times. She received a bloody nose and a swollen upper lip. When they arrived home the appellant hid in the garden. She went into the bathroom to wash off the blood on her face. The deceased went into the bathroom and continued arguing with her. He made derogatory comments about the injuries and said he would leave her. The two walked to the kitchen. The appellant grabbed a serrated knife from the top kitchen drawer and stabbed the deceased twice in his upper chest. One of the stab wounds penetrated the heart and was fatal. She tried to assist the deceased but he could not be revived. A starting point of four years, nine months imprisonment was upheld on appeal.