

**THE NAMES OF THE VICTIMS ON THE MURDER AND
SEXUAL OFFENDING CHARGES ARE SUPPRESSED.**

**THE NAMES OF THE PROPERTY OWNERS
(CHARGES 2, 3 AND 10) ARE SUPPRESSED AS IS THE STREET NUMBER.**

**SOME DETAIL OF THE OFFENDING ON THE 12-YEAR-OLD VICTIM IS
SUPPRESSED, AS DETAILED ON THE SUMMARY OF FACTS.**

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

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

**CRI-2019-085-897
[2019] NZHC 2662**

THE QUEEN

v

JOSEPH WILLIAM BORTON

Hearing: 18 October 2019

Counsel: G J Burston for Crown
E A Hall for Defendant

Sentencing: 18 October 2019

SENTENCING REMARKS OF SIMON FRANCE J

[1] Mr Borton, now aged 31, has pleaded guilty to what can only be described as an horrific incident of violence and sexual abuse on a mother and her daughter. There are a number of charges, the most serious of which are murder of the mother, and sexual violation and serious violence on the 12-year-old daughter.

[2] The offending received considerable publicity at the time of the plea. I will today recount the offending to the extent necessary to explain the sentencing, but no more than that.

[3] In the lead-up to the offending the victims were living for a week in the house next door to where Mr Borton was living. They became acquainted during this time. The victims then vacated the property which was owned by a family member. However, circumstances caused them to return to the house on occasions, be it to tend to pets or use the laundry.

[4] The 4th April was one such visit. The victims were observed by Mr Borton, who armed himself with a mallet he had stolen some time previously from another adjoining property. The mallet has a wooden handle and heavy metal head. Mr Borton then let himself into the house where the victims were, using the back door as an entrance.

[5] He first encountered the 12-year-old, who greeted him but then turned away to carry on with what she was doing. Mr Borton hit her on the back of the head with the mallet. He then applied pressure to her mouth and throat. The girl resisted and managed to scream. Mr Borton again hit her with the mallet. This caused a skull fracture and rendered the girl unconscious.

[6] Alerted by the scream, the mother came to the scene. Before she could do anything, Mr Borton struck her a number of times, incapacitating her. There were at least eight blows to the head, causing a skull fracture and heavy blood loss. Mr Borton would later admit to having attacked the mother so he could sexually assault the 12-year-old.

[7] The mother lived for some time, making groaning noises that would be heard at various points by the daughter. At some point Mr Borton removed the injured, probably unconscious, woman's clothing, both to look at her breasts and to pose her sexually so he could see her genital area. Mr Borton then covered her with clothing and linen from a basket. The mother was dead when authorities arrived.

[8] In terms of the duration of this event the initial assault on the girl was at 6.30pm on a Thursday evening. Mr Borton was to contact police around 1pm the following afternoon, so some 18 hours later. During that time he had made attempts to clean up the scene, and had also gone to his own place to shower before returning. Mr Borton said the mother died around 3.30am to 4am.

[9] Returning to the 12-year-old, throughout the period she drifted in and out of consciousness. Early on she vomited, and for some period she heard her mother making noises that would seem to be groaning. At various points she could see her mother, or at least her legs, lying on the floor.

[10] Over the course of the event Mr Borton sexually assaulted the girl, with both oral and digital violations. Some of his conduct had a depraved exploratory aspect to it, and some of his comments suggest a complete unawareness of the depravity of what he was doing.

[11] Near the end of the event Mr Borton gave the girl her phone but she was unsuccessful in her attempts to call people. Mr Borton then went outside and called 111. He advised them he had killed someone and that he had been a “peeping Tom”.

The charges

[12] From this sequence, Mr Borton was charged with and pleaded guilty to:

- (a) murder, and indecent assault of the mother;¹
- (b) two counts of sexual violation and one of indecent assault in relation to the 12-year-old;²

¹ Crimes Act 1961, ss 172 and 135.

² Sections 128(1)(b), 128B and 134(3).

- (c) wounding the young girl with intent to cause grievous bodily harm;³ and aggravated burglary, being the entry into the house with the mallet.⁴ There is also a charge of earlier stealing the mallet.⁵

[13] There are also other charges, not directly related to the main offending, but some of which are relevant to the overall sentencing outcome.

[14] On a prior occasion Mr Borton had stolen photography equipment from a nearby property.

[15] A further charge relates to theft of a dressing gown and school blazer from a different property, probably about three months earlier. On Mr Borton's phone were peeping Tom images of a young woman in the stolen dressing gown. Mr Borton also stole her school blazer. There are subsequent images on his phone which depict his penis with the blazer in the background, and then an image of the blazer with what appears to be semen on it.

[16] As noted, Mr Borton is 31 years old with no previous offences. His parents separated when he was young. By the time of the offending he was largely estranged from his family and was living in a sleep-out. He was no longer in paid employment but was doing some online currency trading. He has a history of depression and appears in the weeks leading up to the offending to have become increasingly isolated. He was using cannabis regularly.

Reports

[17] As occurs on these occasions the Court receives information from many sources.

[18] I want to comment first on the statements filed by the deceased's loved ones – her husband, and other family members and, bravely, the young girl so cruelly treated by Mr Borton. Those of us lucky enough not to have experienced events such as these

³ Section 188(1).

⁴ Section 232(1)(a).

⁵ Section 231(1)(a).

can only imagine how devastating and life changing it is. On behalf of the community, I extend our deepest sympathy to you.

[19] It is too early to say what the long-term impacts will be on young girl, who has a plate in her head, and damage to sight and hearing. The emotional impact of what she has been through will undoubtedly be great, as of course it is for the deceased's husband and other members of the family. You have lost a wife, mother, sister and daughter, and the community also has lost an obviously talented and caring person. I note also the less obvious but important impacts such as on those of you whose home it was.

[20] The second collection of information are the reports of several mental health assessments that have been undertaken. They provide background on the offender and here assist the Court with what is the necessary type of sentence.

[21] It is clear that Mr Borton's offending is not usual – he has no previous offending and yet has embarked on this episode of extreme violence and what I regard as sexual depravity. A common theme that emerges from the reports is that there is no ready explanation. There are doubts, which I very much share, as to whether Mr Borton is yet being honest about his thoughts and motivations. It is clear that much more intervention and exploration are required before any clear picture emerges, if ever it does.

[22] The reports disclose cause for concern, a fact that is clear from the offending itself, given its unprovoked nature, and the extreme nature of it. Mr Borton has a very dysfunctional personality and the strong suspicion is that there is sexual deviancy. The report writers consider Mr Borton is minimising, or, I would say, not yet being honest, about his sexual fantasies and proclivities. In this regard, one must note a recent history of voyeurism, and the conduct regarding the school blazer.

[23] I accept there were things going on in his life or his head that all contributed frustration over some things, jealousy perhaps at what he perceived as others having a better life, and anger at what he perceives to be life's injustices to him. These are matters taken from the reports and do not represent a diagnosis or explanation. Rather,

it is to acknowledge there were a lot of complex things going on and perhaps coming together. Obviously, something triggered this conduct.

[24] I will address the future risks Mr Borton poses later, but turn first to the sentence to be imposed for murder.

Sentences

Murder

[25] The sentence for murder is life imprisonment and that will be imposed.⁶

[26] The law requires the Court to consider whether a minimum period of imprisonment greater than the default period of 10 years is required in order to properly denounce the conduct and hold the offender accountable.⁷ That is needed here.

[27] The aggravating features of the offending are numerous:

- (a) it began with you breaking into a house armed with a weapon;
- (b) you took the lethal weapon for the express purpose of incapacitating those present in order to commit sexual offending on a child;
- (c) you killed the child's mother in order to make the sexual assault possible;
- (d) you used brutal force in doing so. The scale of the violence is such that I have no doubt you knew you were killing the victim;
- (e) you left the victim badly injured and did not get help; and
- (f) you committed sexually motivated indignities on her while she lay mortally injured; and

⁶ Crimes Act 1961, s 102.

⁷ Sections 103 and 104.

(g) you sexually assaulted her daughter while she lay there.

[28] The law identifies a number of factors, any one of which being present requires a minimum sentence of 17 years unless that would be manifestly unjust.⁸ Mr Borton accepts several of those factors are present and that the minimum jail time must be at least 17 years. The question is whether it should be longer.

[29] In discussing that, I need to point out that Mr Borton is entitled to credit for his early guilty plea, and that is right and proper here. I recognise the case against him was overwhelming but hopefully the early acknowledgment of his offending to the police and then the guilty pleas lessened some of the anxiety of what might follow in terms of the Court case.

[30] Taking into account that plea, Ms Hall, for Mr Borton, contends for a final outcome of 17 years, and Mr Burston, for the Crown, submits somewhere in the order of 19-20 years.

[31] I need to have regard to similar cases and the sentences imposed there. Consistency is important, and counsel have referred me to a number of comparable cases. I do not intend to dwell on these now; some will be noted in a footnote. The violence here was brutal but of a relatively short duration, and the sexual offending, though gross given the circumstances, was not of the worst type. Balanced against this, regard must be had to the motivation for assaulting the victims; it is in my view a seriously aggravating feature as is the callousness of leaving the mother for several hours until she died, and doing what you did, Mr Borton, in that period.⁹

[32] I take a starting point of 21 years and give a two-year credit for the guilty plea.

[33] I need at some point to address the question of remorse. It is a factor that can lead to a reduction in sentence. One of the Victim Impact Statements indicates the family belief Mr Borton is not showing or feeling remorse, and on his behalf Ms Hall wishes to say that is not correct. The reports note Mr Borton struggles to articulate

⁸. Crimes Act 1961, s 104.

⁹ I place the case as more serious than *R v Skilling* [2011] NZCA 462, and not as serious as cases such as *Robertson v R* [2016] NZCA 99 and *R v McDonald* [2014] NZHC 2056.

these things. She notes the early admissions and the guilty pleas as indicators of his remorse.

[34] My assessment is that Mr Borton presently has little real understanding of the impacts of what he has done. His is a very disturbed personality and make-up. He tries to intellectualise things and there is, I suggest, still a large degree of denial or incapacity to understand and empathise. Perhaps with assistance that will change; I do not know – that is for the experts. What I am trying to say in my layman’s way is that I doubt there is real remorse but it is a product of his present very disturbed psychological make-up.

[35] This being so, no further reductions are appropriate and so on the murder the final sentence is life imprisonment with a requirement that you serve at least 19 years before you can be considered for release.

Sexual offending

[36] The Crown seek a sentence of preventive detention. I accept that is available, notwithstanding that I am sentencing you to life imprisonment.¹⁰

[37] The law requires me to first identify what finite sentence I would impose if not imposing preventive detention. The idea is that one needs to know what the finite sentence would be in order to assess whether it offers sufficient protection.

[38] The aggravating features of the offending are:

- (a) it was premeditated;
- (b) the plan involved incapacitating both a 12-year-old girl and her mother;
- (c) the method selected carried great and obvious risk of serious harm, and that is what happened;

¹⁰ *R v Mackrell* (1998) 16 CRNZ 1 (CA); and *Stroobant v R* [2018] NZCA 10.

- (d) the violence used on the girl was severe and could easily have killed her;
- (e) the sexual offending was serious in itself;
- (f) the sexual offending occurred while the girl was seriously injured and in and out of consciousness;
- (g) during the offending the girl was aware of what had happened to her mother and could hear her in distress; and
- (h) the incident lasted 18 hours.

[39] The case is not the most serious because there are examples where this type of offending carries on for years with multiple violations. However, the context, the accompanying violence and the condition of the victim at the time place it in the near to most serious group.¹¹

[40] For all the offending in relation to this victim, and including the offending relating to the blazer, I would take a starting point of 15 years. That would reduce to 12 years for the guilty plea. I consider for reasons of denunciation and, most importantly, protection of the public, the maximum minimum non-parole period of nine years would be appropriate.

[41] I turn now to whether I should impose that sentence or the alternative of preventive detention. That is a sentence that authorises your detention until such time as those charged with making the decision are satisfied it is safe to release you. It has the potential to see you remain in jail for a very long time, given you have not long turned 31, and I need to bear that in mind. The law says that a finite sentence is preferable if it offers adequate protection.¹²

¹¹ Sentencing Act 2002, s 8(d)

¹² Sentencing Act, s 87(4)(e).

[42] The law identifies various topics I must have regard to.¹³ They are designed to inform the two assessments I must make – first, whether you are likely on release to commit another sexual or violent offence; and, second, if so, whether this sentence is required.

[43] In terms of the factors I must have regard to, I note this is your first offence, and there has never been any treatment attempted in relation to whatever it is that caused this offending. These factors tell against a sentence of preventive detention because they offer some hope that things could change.

[44] The next topic is what information is available on whether you exhibit a tendency to commit such offences in the future. This is an inquiry into whether what is known about you, your personality, your mental health and your past and present actions point to what you might do in the future. The experts have identified common factors that are present in reoffenders and, likewise, factors that tend to suggest the risk is lesser. Models have been developed to bring all this together and they inform some of the information given to the Court.

[45] Here I have three expert reports and it is a slightly mixed package. Ms Brown assesses you, Mr Borton, as being a moderate-high risk of further sexual harm, but a low risk of further violent offending unless accompanied by sexual offending. Any such offending is likely to involve great harm. Dr Duff says, however:

Mr Borton is likely to show unpredictable and unexpected violence if he is socially isolated, living in his fantasies, feeling lonely and ostracised.

[46] Dr Duff considers it cannot be shown that a finite sentence offers inadequate protection.

[47] Dr Barry-Walsh considers too little is yet known about what drove this offending to make assessments as to future conduct. He would no doubt reinforce this now it is known that Mr Borton will spend at least 19 years in jail before any assessment of release arises. Much will have happened in the interim. Dr Barry-Walsh concludes, however:

¹³ Section 87(4) of the Sentencing Act.

I consider it reasonable to advance that considerable concern has to be expressed for the possibility of Mr Borton engaging again in similar behaviour were he to be released. There has to be a distinct possibility that over the course of time he would again move down a pathway which could lead to further serious sexual violence.

[48] Against that background I turn to my assessment. Predicting what someone may do in 20 years' time is difficult. That is more so when it is known that during that period efforts will be made to unlock the drivers of this offending and, if discovered, to offer such treatment and assistance as is available. Mr Borton, as Dr Barry-Walsh notes, is even more difficult because his offending is not typical. It is a common theme of the reports that the authors are tentative in their assessments because it is not really clear what has driven this.

[49] I consider the starting point must be the harm caused by Mr Borton's actions and, with that, the need to protect society from any repetition. I am concerned that the report writers all share the suspicion that you are downplaying or not disclosing, Mr Borton, the sexual fantasies which are suspected to underlie this. Ms Brown notes how you denied having them but that, when reading her report, you did at that late stage acknowledge some deviant sexual fantasies. I appreciate it is early days, but this apparent lack of honest engagement does not provide any comfort for the future.

[50] I consider preventive detention is exactly the right sentence here. The risks you pose, the possibility you may do this again, and the terrible cost that would be, need not be risked. If you change and open up to treatment, and if whatever it is can be treated so as to make your release safe, then that can occur. The prospect is there. But if that does not happen, then protection of society is paramount and so this sentence is necessary and appropriate.

[51] The minimum period will be the same as I would have imposed on the finite sentence, but it will be concurrently served at the same time as the 19-year term.

[52] Please stand.

- (a) on the charge of murder I sentence you to life imprisonment. I make an order that you serve 19-years' imprisonment before being eligible for release;
- (b) on the two charges of sexual violation I sentence you to preventive detention. I make an order that you serve a minimum of nine years' imprisonment on this sentence. That minimum is concurrent with the minimum term imposed on the offence of murder.
- (c) on the charge of aggravated burglary I sentence you to five years' imprisonment.
- (d) on the charge of wounding with intent to cause grievous bodily harm I sentence you to six years' imprisonment.
- (e) on the charge of sexual conduct with a young person I sentence you to two years' imprisonment.
- (f) on the charge of indecent assault, three years' imprisonment.
- (g) on the charge of theft of the camera, three months' imprisonment.
- (h) on the remaining theft charges, conviction and discharge.

[53] All jail terms are concurrent.

[54] I order your name be placed on the Child Sex Offender Register and order destruction of the mallet.

Simon France J

Solicitors:
Crown Solicitor, Wellington
E A Hall, Wellington