

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

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CRI-2013-069-001200
[2019] NZHC 1021**

THE QUEEN

v

HENDRIX JOHN KAHIA

Hearing: 10 May 2019

Appearances: C Macklin and M Jenkins for Crown
E Hall for Defendant

Sentencing: 10 May 2019

SENTENCING NOTES OF WYLIE J

Solicitors:
Crown Solicitor, Rotorua
E Hall, Wellington

Conviction/strike warning

[1] Mr Kahia, I did not enter a conviction against you after the jury gave its verdict because the Crown was unable to advise me as to what type of strike warning was required. The law states that the strike warning has to be given at the time the conviction is entered. The Crown has now clarified the position. It is necessary to provide you with a first stage strike warning.

[2] Accordingly, I now enter a conviction against you for the murder of Wiremu Birch.

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

- (a) If you are convicted of any 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.
- (b) If you are convicted of murder committed after this warning then you must be sentenced to life imprisonment. That will be served without parole unless it would be manifestly unjust. In that event the Judge must sentence you to a minimum term of imprisonment.

[Court hears submissions from counsel].

Sentencing/Introduction

[4] Let me start by welcoming both Mr Birch’s whanau and Mr Kahia’s whanau to the Court. It is a sad series of events which brings you here today. It is my duty to now proceed to sentence Mr Kahia.

[5] Mr Kahia, you appear for sentence today having been found guilty, following a trial before a jury, of one charge of murder.

[6] I will briefly set out the relevant facts.

Relevant facts

[7] In the early hours of the morning on 11 October 2013, the deceased – a 19 year old man – Wiremu Birch, was stabbed to death in Taupo.

[8] Mr Birch had been drinking throughout the night and he was grossly intoxicated. He was also very aggressive.

[9] Mr Birch and his partner went to a property in a residential area. It belonged to a senior member of the Mongrel Mob gang. Mr Birch was not a member of that gang, but he wanted to join. People at the property – who were more or less closely associated with the Mongrel Mob gang – tried to calm Mr Birch down and they offered him a bed. He declined. Instead, he jumped over the rear fence and into the back yard of another property which faced onto another street. There was a gathering in progress at this property. A number of persons present were associated – again more or less closely – with the Black Power gang.

[10] Mr Birch started yelling out Mongrel Mob slogans. He leered into a toilet window where the female occupier of the property was going to the toilet.

[11] The alarm was raised and a confrontation then occurred between persons from both properties. The confrontation occurred on the street although the house occupied by the people associated with the Black Power gang was also entered. Weapons were brandished. A fight ensued between your brother, Raymond Kahia and Mr Birch. The fight was defused shortly thereafter. It seems that there was broad agreement between the two factions that the matter would be sorted out by a “one on one” fight the next day between Raymond Kahia and Mr Birch.

[12] You were not present at this stage. You were at another house a short distance away with a number of associates. The evidence at trial suggested that you and your associates were consuming methamphetamine at that house.

[13] You and your associates heard about the fight and you went around to the scene at around 3.00am in the morning. You were a member of the Black Power gang at the

time. It is not clear whether or not you were a patched member of the gang. Even if you weren't a patched member you were clearly closely associated with the gang.

[14] After a brief discussion with the other persons who were associated with the Black Power gang, you, together with your brother Raymond and two others, Mr Tawaka and Mr Tareha, drove around to the property which belonged to the senior Mongrel Mob member. The evidence suggested that you and the others wanted to organise the "one-out", or one-on-one fight, between your brother and Mr Birch the following day.

[15] The lights were off at the Mongrel Mob property and you did not stop. Rather, you continued down the road. You and your associates saw Mr Birch and his partner walking down the road. They were heading in the direction of Mr Birch's partner's father's home.

[16] The vehicle was being driven by Mr Tareha. He stopped the car and he and your brother Raymond, were the first to get out of the vehicle. A fight took place between Mr Birch and Raymond Kahia. It was a fist fight only. Neither had a weapon. There was conflicting evidence as to whether Mr Tawaka became involved. It was however clear that, at least initially, Raymond Kahia and Mr Birch were the main protagonists. In the course of the fight, you became involved. You ducked in and out and around your brother, and you stabbed Mr Birch three times with a knife. One of the stab wounds was to the chest area. Mr Birch retreated and then collapsed. You and your associates left the scene, leaving Mr Birch's partner to get help for him. Mr Birch died at the scene a short time later.

[17] The evidence suggested that there were attempts to clean the car the following day and to dispose of various items of clothing. Your involvement in this was not clear. There was also discussion about how you and the others might avoid becoming implicated in the stabbing and death of Mr Birch. Again, your involvement in this was unclear at trial.

Pre-sentence report

[18] I have received two pre-sentence reports, one prepared this year and the other in February 2015.

[19] When the probation officer tried to re-interview you for an updated report this year, you refused to cooperate. The report writer simply noted that you have a long history of violent offending, starting when you were 16 years of age, and that there has been an escalation in your violence related offending from that point on. He also referred to file notes from your remand in custody which refer to your ongoing use of aggression and verbal abuse towards those in positions of authority.

[20] The fuller pre-sentence report prepared in February 2015 sets out various social and cultural factors, and records that you were then a patched member of the Black Power gang in Taupo. You were assessed as posing a high risk of reoffending and of harm to others. The frequency of your offending prior to your remand in custody was noted, along with the levels of violence you have used and your difficulties in maintaining stability in the community. It was also noted that you used violence and intimidation in the prison environment, directed to both other prisoners and staff. It was nevertheless recorded that you then had a willingness to engage in rehabilitation.

Section 27 report

[21] I have received a lengthy but helpful report prepared under s 27 of the Sentencing Act. That report records that you continue to deny your involvement in the offending, and that you intend to appeal your conviction. It was noted that to some degree, that limited the scope of the s 27 report.

[22] Nevertheless, as I have indicated, the report is helpful, given the relative paucity of information contained in the pre-sentence reports. The report writer had the advantage of a face-to-face interview with you, which had been denied to the probation officer.

[23] The report sets out your personal, family, whanau, community and cultural background, the way in which that background may have related to the commission of the offence and how your whanau may be able to help to prevent further offending

by you. It is suggested that your violent behaviour has been precipitated by your binge use of alcohol and methamphetamine, and notes that you have both expressed the desire, and demonstrated a commitment, to confront those behaviours and to make change. It advocates for you suggesting that you hold a “moral compass” and that deep down you are imbued with what are called “primary pro-social values”. It argues that you have developed a deep philosophical perspective on life while incarcerated and that your narrative to date whilst in prison is encouraging, hopeful and full of purpose.

Victim impact statements

[24] I have received two victim impact statements – one from Mr Birch’s partner, and the other from his sister, who I understand is in Court today

[25] It is clear that your offending has had a significant affect upon Mr Birch’s partner. She saw the stabbing and was present when her partner died. Her emotional grief is exacerbated by the fact that she had a child by Mr Birch. Her grief has been deep and she has turned to alcohol and drugs to try and cope.

[26] Mr Birch’s sister notes that Mr Birch was killed only a few months after their mother had passed away, and that it was hard for the family to take. She reports that the family has had its sad days and that they cry a lot more as a result of what has happened. Her two oldest boys miss Mr Birch – he was, of course, their uncle.

Submissions

[27] Mr Macklin, for the Crown, reminded me of the statutory presumption in favour of life imprisonment. He noted that this sentencing follows a re-trial; that you were found guilty at the original trial, and that Woolford J sentenced you on 4 March 2015 to a minimum period of imprisonment of 13 years, pursuant to ss 102 and 103 of the Sentencing Act. He accepted that s 104 of the Act does not apply, and he submitted that there is no reason to depart from the sentence imposed by Woolford J. He argued that there were various aggravating features to your offending, including gratuitous violence and the use of a weapon, multiple attackers and vulnerability, the gang dimension to the offending and the fact that you were subject to release conditions at the time the murder was committed. He accepted that Mr Birch’s behaviour on the

night was concerning, but submitted that the appropriate way to proceed was to approach the police, rather than for you to take the matter into your own hands. He argued that you have a demonstrated propensity towards violence, referring to your past convictions. He argued that the end sentence should be one of life imprisonment, with a minimum period of imprisonment of 13 years.

[28] Ms Hall, on your behalf, accepted that a sentence of life imprisonment will be imposed. She focused her submissions on the appropriate minimum period of imprisonment. She argued that the minimum term should be not more than 11 years. She accepted that a knife was used, and that, on the jury's verdict, Mr Birch was stabbed by you while he was fighting with your brother. She argued however that this factor made little difference to the overall killing. She submitted that Mr Birch could not be said to be a vulnerable victim, noting that he had been involved in a series of fights and that he had been abusive to everyone that he had encountered that night. She asserted that the fight was not gang warfare, and disputed the gang dimension referred to by the Crown. She said that the evidence was that Mr Birch was peeping through the toilet window, and that it was that which resulted in the brawl in the street and the fight between Mr Birch and your brother. She accepted that you were subject to release conditions at the time, but said that prior to the present offending, your compliance had been good. She suggested there were various mitigating factors, including Mr Birch's behaviour on the night. She referred to the delay in obtaining the re-trial and other factors personal to you. She put it to me that your upbringing was dysfunctional, that your father was affiliated with a gang, as were many of your older male relatives, and that casual violence, alcohol and drugs were key features in your childhood. She noted that you did not cope well at school, that you were expelled, but that you are a hard worker. She also suggested that you are willing to engage in rehabilitation and that you have successfully combated drug addiction since the offending occurred. She advised me that you have also left the Black Power gang. She also noted that you were on EM bail for a period of some 21 to 22 months, and that you have not, since 2013, been charged with any further offending. She submitted that the appropriate sentencing outcome is life imprisonment, with a minimum period of imprisonment of no more than 11 years.

Purposes and principles of sentencing

[29] In sentencing you, I have considered the principles set out in ss 7 and 8 of the Sentencing Act. I have had regard to the need to hold you accountable for your offending, the need to promote in you a sense of responsibility for and an acknowledgment of that offending, and the need to denounce the conduct in which you were involved. I have also been mindful of the need to deter others from committing the same or similar offences. This is particularly important given the gang context in this case. I have taken into account the gravity of the offending with which you were involved, including your culpability. I have considered the seriousness of your offending, and the general desirability of consistency of appropriate sentencing levels between similar offenders committing similar offences. I have also considered the various matters set out in s 9 of the Act.

Analysis

[30] In sentencing for murder, the Sentencing Act requires that a sentence of life imprisonment be imposed, unless to do so would be manifestly unjust. The threshold for establishing manifest injustice is high, and there is no dispute that you do not meet it. It was common ground that you should be sentenced to life imprisonment, and I will shortly be imposing that sentence.

[31] The question I have to consider is what minimum non-parole period should be set. Section 103 of the Sentencing Act requires that I impose a minimum non-parole period of at least 10 years. Section 103(2) provides that the minimum period of imprisonment must be the minimum that the Court considers necessary to satisfy all or any of the following purposes:

- (a) to hold you as the offender accountable for the harm done to the victim and to the community by your offending;
- (b) to denounce the conduct in which you were involved;
- (c) to deter you and others from committing the same or a similar offence;
and

(d) to protect the community from you.

[32] The Court of Appeal has provided the following guidance for determining minimum periods of imprisonment. It said as follows:¹

First, the judge should compare the offender's culpability with cases of murder that attract the statutory minimum of 10 years, which serves as a datum point or benchmark. Second, the judge should decide whether an additional minimum period is needed to satisfy the sentencing purposes of accountability, denunciation, deterrence and community protection. When following these processes the judge must apply the legislative policy that, in general, the presence of one or more s 104 factors justifies a minimum period of not less than 17 years; and further, that there may be cases in which the sentencing purposes in s 103(2) require that the sentence be served without parole. Third, the judge should compare sentencing decisions in other cases for reasonable consistency of outcome. ... the primary comparison is between the individual case and the 10-year datum point. Comparison with other cases is a secondary requirement, albeit necessary and important as a check.

[33] I am satisfied that the statutory minimum of 10 years non-parole would not suffice in your case. There were a number of aggravating features to your offending, which require a minimum term of imprisonment of more than 10 years, to satisfy the sentencing purposes of accountability, denunciation, deterrence and community protection.

[34] First, there was the use of the weapon. You took a knife to a fist fight. The evidence at trial suggested that even your associates were not aware that you had a knife with you. Mr Birch was unarmed. The wounds inflicted were serious, with a depth of between 9 and 11 centimetres. The use of a knife to inflict three separate wounds was a serious escalation in the context of a fist fight, albeit a violent one.

[35] Secondly, there is the fact that you became involved in violence which had nothing to do with you. Your involvement was unnecessary and gratuitous. You were not protecting your brother. On his own account at trial, he was well able to look after himself. Your actions were those of a vigilante. You took matters into your own hands, rather than involving the appropriate authorities.

¹ *Robertson v R* [2016] NZCA 99 at [80].

[36] Thirdly, there is the fact that there were multiple attackers. While Mr Tawaka's involvement was unclear, Mr Birch was nevertheless facing attack not only from you, but also from your brother.

[37] Fourthly, there was the gang dimension. I accept Ms Hall's submission that this was not gang warfare and that it was not gang related retribution. Nevertheless, I do not accept that the gang dimension was irrelevant. The evidence at trial suggested that you were wearing Black Power branded clothing on the night in question. Mr Birch was seeking to become a member of the Mongrel Mob gang. The situation was inflamed by Mr Birch's yelling of Mongrel Mob slogans, the overreaction of the Black Power associates and by the simmering gang rivalry. As is noted in the s 27 report, the two gangs have had ongoing tensions and skirmishes in Taupo. I have no doubt that but for the gang rivalry, matters would not have escalated as they did.

[38] I do not consider that there were any mitigating factors to the offending. I agree with Ms Hall that Mr Birch was aggressive on the night, that he was grossly intoxicated and that aspects of his behaviour were obnoxious. These matters however did not justify what occurred. As I have noted, the two factions involved in the initial street brawl had dispersed. Your brother had matters in hand, but you nevertheless gratuitously stepped in and inflicted the fatal blow.

[39] I have considered the various authorities referred to me by counsel.² I have also considered other authorities,³ and I have read the sentencing notes of Woolford J when he sentenced you in respect of this same offence after the first trial back in March 2015.⁴

[40] Each case depends very much on its own facts. In some cases the offending was more serious, in others less so, or the gang factor was more or less to the fore or not present at all, or there were other matters – such as disposing of a body in a

² *Pukeroa v R* [2013] NZCA 305; *R v Taoho* HC Rotorua CRI-2009-263-163, 12 December 2013; *R v Pahau* HC New Plymouth, 16 August 2010; *Selby v R* [2010] NZCA 313; *R v Faave* HC Auckland CRI 2006-204-748, 10 July 2008; *R v Pepene* HC Auckland CRI-2209-044-7883, 13 December 2010; *R v Wilton* [2015] NZHC 2642.

³ *R v Karaka* HC Wellington, CRI-2007-091-4694 15 May 2009; *R v Herkt* [2016] NZHC 284; *R v Tetomo* [2015] NZHC 2671; *R v Moala* HC Auckland CRI-2006-092-461, 12 December 2007; *Fraser v R* [2010] NZCA 313.

⁴ *R v Kahia* [2015] NZHC 344

demeaning and brutal way. Minimum periods of imprisonment have ranged from eleven through to seventeen years. I also have information which was not before Woolford J. Nevertheless, my starting point is the same as his – a minimum period of imprisonment of thirteen years.

Personal factors

[41] First, I note that the offending took place while you were subject to a supervision order for a previous charge of injuring with intent to injure. That is an aggravating factor.

[42] Further, there is the fact that you have an extensive criminal record, involving a number of incidents of violence. Your offending began as long ago as 2000. You have convictions for assault, for fighting in public places, injuring with intent to injure, and the like. You have been incarcerated before, and it is clear from the pre-sentence report that your violent and aggressive ways have carried through into the prison environment. This is also an aggravating feature.

[43] You have not acknowledged your offending. Indeed, you continue to deny it. Your trial strategy was to try and fix liability on Mr Tareha. You told the writer of the s 27 report that you do not accept the jury's verdict and that you will be appealing. You have expressed no remorse.

[44] On the other hand, I note that you have expressed a willingness to engage in rehabilitation programmes. Ms Hall tells me that you now no longer use drugs and that you do not drink alcohol. She also tells me that you have left the Black Power gang. These matters are reinforced by the s 27 report. They help demonstrate that you have belatedly accepted that you need to change your lifestyle and that you are capable of change.

[45] I have considered your background. In this regard the s 27 report was very helpful. Although you have no complaints about your upbringing – indeed you describe it as “good” – I accept that you had something of a dysfunctional childhood. Your father was a patched member of Black Power as were other members of your extended family. This is likely to have exposed you to gang related activity including

violence from an early age, and I suspect that you were brought up in an environment where violence was normalised. I am not, however, persuaded that your background explains or justifies your decision to become involved in the attack on Mr Birch, let alone in deciding to use a knife.

[46] Ms Hall suggested the delay in obtaining a retrial was a factor which should entitle you to a reduction in the minimum period of imprisonment.

[47] A retrial was ordered by the Court of Appeal in December 2016,⁵ after fresh evidence became available. The retrial did not take place until February 2019. I accept Ms Hall's submissions that the time you spent awaiting retrial is likely to have been stressful for you, particularly when the outcome, if you were found guilty, was a sentence of life imprisonment. The retrial had to be adjourned twice, through no fault of yours. I accept that the delay in obtaining a retrial is a matter which can properly be taken into account.

[48] I also accept that you were on EM bail, subject to restrictive conditions, for a lengthy period and that there were no difficulties with your compliance with the bail conditions over that period. Again, this is a relevant favour.

[49] Taking both the aggravating and mitigating personal factors into account, I am persuaded to reduce the minimum period of imprisonment by one year, primarily to recognise the time you spent awaiting retrial and to recognise the lengthy period you spent on EM bail.

Sentence

[50] In respect of the murder of Wiremu Birch, I sentence you to life imprisonment. I direct that you are to serve a minimum period of imprisonment of 12 years.

General

[51] I stress that the sentence is one of life imprisonment. You will remain in prison for the rest of your life unless you can convince the Parole Board, at the expiry of the

⁵ *Kahia v R* [2016] NZCA 601.

12 year minimum term of imprisonment, that you no longer present a threat to the community. If you continue to behave in a threatening and violent way while you are in prison, rather than take advantage of the opportunities that will be offered to you to engage productively in rehabilitative programmes, you are unlikely to be released by the Parole Board once you have served the minimum period of imprisonment.

[52] You have expressed a willingness to rehabilitate and you have taken two significant steps down that path. I trust that you will follow through with your attempts to turn your life around.

[53] Mr Kahia, you may stand down.

Wylie J