IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

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

CRI-2018-063-2979
[2019] NZHC 3194

THE QUEEN

v

WARREN UATA KIWI

Date of hearing: 5 December 2019

Appearances: C H Macklin for the Crown
G R Tomlinson for Mr Kiwi

Date of sentencing: 5 December 2019

SENTENCING NOTES OF JAGOSE J

Solicitors/Counsel:
Gordon Pilditch, Rotorua
Gowing & Co Limited, Whakatane

[1] Mr Kiwi, as you know, I am now to sentence you on your convictions for conspiring to murder,[1] and attempting to murder,[2] Karl Nyman. I know you maintain you are not guilty, but the jury found you guilty of those offences. In sentencing you, I must accept as proved all facts that are essential to its findings.[3]

[2] I have considered what counsel have had to say, both for you and for the Crown. They recommend starting points of eight and a half to nine years' imprisonment; your counsel, Gene Tomlinson, seeks an additional twelve-month discount for you.

[3] I am not bound by their recommendations. I must satisfy myself of the appropriate sentence for the gravity – the seriousness – of your offending, including your culpability – your responsibility – for it.

Background

[4] The charges against you arose out of events in 2002.

[5] Toward the end of May that year, you met with someone as yet unidentified, and agreed to kill Karl Nyman for them. For that, you were to receive five pounds of cannabis. You and Mr Nyman did not know each other. You were given Mr Nyman's address in Rotorua. He worked for a local trucking company and regularly started work at 4.30 am. How you were to kill Mr Nyman was left to you.

[6] In the early hours of Wednesday, 31 July 2002, you travelled from Tauranga to Rotorua, parking near a reserve next to Mr Nyman's street. You pulled on a tightly-secured balaclava or facemask. Carrying a semi-automatic .22 rifle, with a sock secured over its ejector port to catch spent bullet casings, you crossed the reserve and hid in bushes beside Mr Nyman's driveway, waiting for him to leave his house.

[7] Mr Nyman came down his driveway at about 4.15 am. He walked toward his truck, parked on the street. As he reached the footpath, you emerged from the bushes.

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1 Crimes Act 1961, s 175. Maximum penalty 10 years' imprisonment.
2 Section 173. Maximum penalty 14 years' imprisonment.
3 Sentencing Act 2002, s 24(1)(b).

You pointed the rifle at Mr Nyman. You directed him into the bushes. At some point, Mr Nyman lunged for the rifle. The two of you struggled. A shot is said to have been discharged during the struggle, although no bullet has been found, and there is some dispute if that discharge occurred at all.

[8] The struggle spilled out onto Mr Nyman's property, where the two of you became separated on either side of the driveway. Mr Nyman ran toward his house. You followed and fired the rifle, hitting Mr Nyman in his right upper arm. Mr Nyman's partner was inside the house, and Mr Nyman yelled for her to call police and remain inside.

[9] The two of you struggled for control of the rifle again, starting close to the house, but moving down the drive and back out to the truck. You were left holding the barrel end of the rifle, which by now was pointing up underneath your chin. Mr Nyman dislodged the magazine from the rifle. You sought to withdraw, saying "Sorry bro", you had the wrong man and the wrong address. You ran back through the reserve to the car.

[10] At the time, in 2002, there was insufficient evidence to identify who had assaulted Mr Nyman. But, in 2018, you indicated your involvement to someone. After further investigation, you were charged with the offences of which you now have been convicted.

Victim impact statements

[11] Mr Nyman and his partner have provided me with statements about the effects on them of your offending. Beyond the physical injuries caused to Mr Nyman's arm – and to his knee in the struggle, which led to him being unable to work for over four months – an ongoing emotional toll from your long-term anonymity also is significant.

[12] Both Mr Nyman and his partner became hypervigilant against another attack for an extended period, and they continue to take additional precautions for their safety. Their anxiety was heightened, and persisted, by being target of your unidentified attack on them. Your subsequent naming and convictions, and perceived connections between you, have led to tensions in their extended family relations.

Personal circumstances

[13] The pre-sentence report assesses you as presenting a low risk of re-offending, but a high risk of harm to others if you re-offend. That reflects your present age of 58, your diminished health, your reduced offending over the years, and the extended period since you committed the offending for which I now am sentencing you. Consistently with your 'not guilty' stance, the report writer considered you displayed minimal remorse for that offending.

[14] Only limited information could be gleaned from your pre-sentence interview. You descend from Ngāti Ranginui and Ngāti Pūkenga iwi. You are affiliated with the Tahuwhakatiki and Te Whetū o Te Rangi marae to the south of Tauranga. You are a type 2 diabetic, and suffer from blood clots and high blood pressure. You have experienced recent heart pain, which you attribute to your present stresses before me.

[15] You have four children, now aged 24, 27, 28 and 30 years old. You had been their main carer since their mother left when they were much younger. You worked as a truck driver for some years, although your employment and income history is erratic. You stopped working to look after your younger daughter, who requires special care, now to be provided by your older daughter.

Approach to sentencing

[16] Mr Kiwi, I approach your sentencing in two steps.[4] With reference to relevant cases, I first decide the starting point your offending attracts. Then, I adjust that up or down to take into account your personal circumstances.

[17] I must have regard for the statutory purposes and principles of sentencing.[5] I must hold you accountable for your offending, and encourage you to be responsible for and acknowledge the harm you have caused. Your sentence should be sufficient to denounce your conduct and protect the community. I must consider the gravity and seriousness of your offending, and take into account its impact on victims. The

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4 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

5 Sentencing Act 2002, ss 7 and 8. Despite coming into force on 30 June 2002, after the agreement to kill Mr Nyman had been made, the Act still applies: s 5(3).

sentence is to be the "least restrictive" appropriate in the circumstances, consistent with appropriate sentencing levels.

Starting point

[18] I will impose concurrent sentences for both conspiracy to murder and attempted murder convictions.[6] While the offences are "different in kind", meaning cumulative sentences generally are appropriate,[7] they also inherently are connected. Not only was the attempt made in furtherance of the conspiracy, but arguably each is inchoate, as preliminary to an ultimate murder. As such "a connected series of offences", despite not being "of a similar kind", concurrent sentences are appropriate here.[8]

[19] I take your attempted murder conviction as the lead charge. There is no guideline judgment for attempted murder. But, in setting a starting point for such offending, I refer to Court of Appeal approved bands of sentencing for conduct with intention to cause grievous bodily harm, also attracting a 14-year maximum sentence, adjusted to recognise your specific intention here to kill.[9]

[20] Two aggravating factors clearly are present – your premeditation and your use of a lethal weapon you had brought to the scene. You made arrangements for travel to and from Rotorua. You arrived at Mr Nyman's address for a time you knew he would be leaving for work. Your face was hidden from identification; the rifle was modified to minimise the risk of leaving physical evidence behind. Your attack came two months after you agreed to carry it out, suggesting at least some preparation for it.

[21] But I do not count that agreement as contributing to the degree of premeditation. Instead I will address your conspiracy conviction with a separate uplift. Similarly, while the transactional nature of your attempt to murder Mr Nyman is particularly aggravating, that also is better reflected in an uplift for the conspiracy conviction.

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6 Sentencing Act 2002, s 83(5).
7 Section 84(1).
8 Sections 84(2) and (3).
9 *R v Taueki,* above n 4, at [9]; see also *Ali v R* [2019] NZCA 35; *Marsters v R* [2011] NZCA 505; and *R v Beerens* [2018] NZHC 2669 at [20].

[22] The Crown suggests your offending is "at least akin to a home invasion", justifying a higher starting point. Entry on to a victim's property may be characterised as a home invasion, but it is a factual question to be resolved having regard to the particular circumstances.[10] Here, there was no entry into the home; your offending commenced, and could have occurred completely, outside the bounds of Mr Nyman's property. The home invasion label is not appropriate in these circumstances.[11] I will instead treat your conduct of 'lying in wait' for Mr Nyman at the edge of his property as more properly going to the degree of your premeditation, which is significant. But it is a close-run thing: your armed pursuit of, and shooting, Mr Nyman on the driveway of his home as he sought to seek shelter from your attack could easily have borne the additional aggravation of home invasion.

[23] While attempted murder always will be 'inherently serious', given it involves an intention to kill, "some attempts come much closer to success than others; and some leave the victim with much more serious physical consequences than others".[12] Your attempt was not sophisticated, but its lack of success was in large part due to Mr Nyman's forceful response. Your attempt on his life had serious emotional if not physical consequences for him and his partner, especially over the ensuing 16 years of uncertainty.

[24] I put your offending toward the top end of the Court of Appeal's band 2, providing for five to ten years' imprisonment for two or three aggravating factors. To the extent the two aggravating factors I have identified may have been addressed lower in the scale, your intention to kill Mr Nyman justifies their higher placement. Having regard also for comparable case law,[13] I adopt a starting point of eight and a half years'

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10 *Pahau v R* [2011] NZCA 147 at [72]–[73], discussing *Simeon v R* [2010] NZCA 559 and *Katene v R* [2010] NZCA 394.

11 *Waterhouse v R* [2012] NZCA 500 at [24].

12 *R v Finau* (2003) 20 CRNZ 333 at [19].

13 *R v Garlick* HC Nelson CRI-2008-042-1111, 13 March 2009 (starting point six years' imprisonment: victim not shot with discharged .22 rifle due to intervention of bystander); *R v Nicol* [2014] NZHC 2110 (starting point of 11 years' imprisonment: the offender invited the victim to go for a drive with him, and shot him in the head using a .22 rifle after asking him visually to check the car's parking; the victim survived, but a bullet remains lodged in his head); *R v Hughes* [2014] NZHC 3208: starting point of eight years' imprisonment; *R v Wyant* [2015] NZHC 3076 (a starting point of eight years' imprisonment would was held appropriate (before discounting for mitigating factors); the intoxicated offender drove to the victim's house with a loaded .22 rifle and after arguing with him, shot him in the chest before attempting to shoot him again); and *Ali v R,* above n 9 (on appeal, a starting point of nine years' imprisonment was upheld; the offender

imprisonment. The covert nature of your attack distinguishes it from those of less premeditated attackers in known dispute with their victims. You are very lucky Mr Nyman was not more seriously injured.

[25] That starting point must be uplifted to reflect your conspiracy to murder conviction. The fact you agreed to kill someone for reward exacerbates the gravity of your offending. The transactional nature of your offending is significantly aggravating: on no basis can you being a gunman for hire be downplayed; a standalone sentence for that conviction would involve more than a short term of imprisonment, at least for deterrent purposes.[14] But, keeping in mind the principle of totality, I increase your starting point only by six months to nine years' imprisonment.

Adjustment for personal factors

[26] I now turn to consider your personal circumstances to see if I should adjust that starting point up or down.

—aggravating features

[27] You have over 40 previous convictions. Your most recent convictions were entered in 2012 for a spate of drug offending in mid-2011. You then were sentenced to two years and eight months' imprisonment. But most of your convictions are even more historical, and few involve violence. Those that do are far less serious than the present offending. Prior to your 2011 offending, you had not offended since 2002 (which is when the current offending occurred), and then previously since the early 1990s. Your 2002 offending stands out like rain in the middle of an 18-year drought, after reasonably persistent nuisance offending since the mid-1970s. An uplift for your previous convictions is not warranted given the disconnection both in relevance and time.

[28] There are no other aggravating features.

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surreptitiously made his way into his ex-partner's bedroom and stabbed the victim in the neck; while the offending involved an attack to a vulnerable part of the body, there was far less premeditation).

14 See *R v Apostolakis* (1997) 14 CRNZ 492 at 497–498 (albeit in the context of an attempt to procure murder (which carries the same maximum penalty as a conspiracy to murder)).

—mitigating features

[29] No discount is available for any rehabilitative effort on your part. I recognise you would have attended the restorative justice conference, but only to apologise on your brother's behalf, who you say was responsible for the attempted murder. That is to exacerbate your offending's 16-year concealment, on which Mr Nyman sought to obtain "closure" by agreeing to attend the conference.

[30] Mr Tomlinson seeks a 12-month discount for your age, ill-health, and low likelihood of re-offending. None of those justifies any discount either. Age can be a mitigating factor, for offenders "at either end of their life span".[15] At 58 years old, you do not fall within that category. The only evidence of your health issues is as discussed in the (brief) pre-sentence report, and they seem adequately managed with appropriate oversight and medication.

[31] An offender's age and ill health "are to be taken into account … to the extent they are applicable and if not recognising them would render an otherwise appropriate sentence disproportionately severe".[16] As I have said, they are not applicable here. Where discounts have been given to reflect the offender's age and associated health difficulties, offenders have been (far) older and the reductions in sentence were limited.[17] There can be no suggestion disregard of those factors for you would make your sentence disproportionately severe.

[32] Last, I have limited insight into what might be described as your previous good character. There are some indications of your good standing in, and significant contribution to, your immediate family. You have extensive periods without coming into contact with the justice system. But those are to be set off against also your fractured history of repeated low-level drug and other anti-social offending, before and after the offending for which I now am sentencing you.

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15 *C v R* [2017] NZCA 58 at [22].

16 *M (CA91/2012) v R* [2013] NZCA 325 at [52].

17 For example, see *M (CA91/2012) v R,* above n 16, at [54]; *Tranter v R* [2017] NZCA 45 (appellant was 65 years old; a discount of ten per cent upheld); *Rippey v R* [2018] NZCA 306 (appellant received a six-month discount from a starting point of 18 years' imprisonment for the following factors: he was 61 years old, had a heart condition, and had displayed previous good conduct); and *Wilson v R* [2018] NZCA 489 (appellant was 64 years old; a discount of roughly 7 per cent was given for his age).

[33] I can identify no mitigating features personal to you.

Result

[34] Mr Kiwi, please stand.

[35] On your conviction for attempted murder, I sentence you to nine years' imprisonment.

[36] On your conviction for conspiracy to murder, I sentence you to two years and six months' imprisonment,[18] to be served at the same time as the prior sentence.

[37] You may stand down.

—Jagose J

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[18] *R v Apostolakis,* above n 14; and *R v Cullen* HC Christchurch CRI-2005-009-005165, 31 March 2006.