

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI 2018-055-0930
[2019] NZHC 501**

THE QUEEN

v

SYDNEY JAYDEN KOKIRI

Hearing: 20 March 2019

Appearances: E J McCaughan for Crown
I Jayanandan for Defendant

Judgment: 20 March 2019

SENTENCING REMARKS OF JAGOSE J

Solicitors/Counsel:
Kayes Fletcher Walker Limited, Auckland
I Jayanandan, Barrister, Manukau

[1] Mr Kokiri, you are here to be sentenced on one charge of manslaughter.¹ You pleaded guilty after I indicated your likely sentence on 11 December 2018.² I entered your conviction and I gave you a first strike warning at that time.

[2] I indicated you were likely to receive a sentence of imprisonment for a period of up to three years and nine months, with the possibility of meaningful adjustments for your personal factors and your guilty plea. For the benefit of those in the room now, I will explain my calculation again, but I see no reason to move from it. The new issues for today are the extent of any discount.

The offending

[3] Your offending leading to the manslaughter charge occurred on the morning of 2 May 2018. You were then 17 years old. The agreed summary of facts records you went into a Countdown store with your mother, your girlfriend, and another woman, who went on to do their shopping. The store's alarm rang when you left the store separately, with a stolen packet of razors and a charity donation box.

[4] A store guard, Goran Milosavljevic, and another staff member confronted you. When Goran stood in front of you to prevent you walking off, you tried to push him out of the way, but Goran stood his ground. You swung a punch at Goran, but it did not connect.

[5] Goran reacted by hitting you in the face, before the other staff member separated the two of you and you started to move away. Goran re-engaged with you. He grabbed you around your neck, and held you against Countdown's front window, telling you to leave. The staff member intervened to separate you again. A crowd, including your mother, now had gathered around the three of you.

[6] As you walked away, Goran and the crowd followed you. You turned back to Goran and punched him in the side of his head with your closed fist. Goran fell to the ground, where he hit his head on the concrete pavement. Your mother encouraged you

¹ Crimes Act 1961, ss 171, 160(2)(a) and 177. Maximum penalty is life imprisonment.

² *R v Kokiri* [2018] NZHC 3247.

to leave the scene, and you ran down the road. You bumped into someone you knew and changed shirts with them, telling someone else you met you had just knocked out a security guard.

[7] Meanwhile, Goran was transported to hospital, where he was treated for skull and occipital fractures. He was pronounced dead the next morning. The pathologist's evidence is Goran died from blunt force trauma to his head. The pathologist does not say whether that was from your punch or from Goran's fall to the ground, but you are equally responsible for both.

Victim impact statements

[8] As you have heard Mr McCaughan read out, Goran's sons, Aleksandar and Stefan, have given victim impact statements, detailing the devastating effects of their father's death on them. They had little contact with their mother, who divorced Goran before Stefan was born. Goran moved to New Zealand for work. The brothers continued to live in Serbia with their grandparents.

[9] In 2017, their grandparents died in a car accident. Goran relocated his sons to live in New Zealand with him, where they were happily reunited. Now they have lost him too, leaving Aleksandar "broken" and far from other family, and turning Stefan's new life in New Zealand into "a horrible nightmare".

[10] Mr Kokiri, I do need not to emphasise the enormous pain you have caused these already-traumatised young men, finding their place in New Zealand. I take that impact into account in determining your sentence. But Aleksandar and Stefan are right to rejoice in their father's memory rather than to seek any comfort from your sentencing.

Approach

[11] Sentencing involves a three-stage process.³ First, I decide the starting point your offending attracts. Second, I adjust that up or down to take into account your personal circumstances. Third, a discount applies to reflect your guilty plea.

³ *R v Taueki* [2005] 3 NZLR 372 (CA); *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

[12] I must consider the usual purposes and principles of sentencing.⁴ As Goran has died because of your actions, there is a strong need to denounce your conduct, to hold you accountable for it, and to promote in you a sense of responsibility for the harm you have caused. But, especially given your youth, there also is a need to provide for your rehabilitation and reintegration into the community. Overall, the sentence must be the least restrictive outcome appropriate in all the circumstances.

Starting point

[13] As I explained in giving my sentence indication to you, cases of manslaughter vary widely. Caution must be exercised. The Court of Appeal has said:⁵

It does not follow that where a death results from a violent act the culpability of the offender is to be set higher than that of an offender who intentionally inflicts grievous bodily harm. In manslaughter, the unlawful act, even if violent, may be comparatively minor...

I must focus on that aspect of your conduct which was intentional, actually creating the risk of Goran's death.

[14] Your offending fell squarely into the category of single-punch manslaughter. A starting point ranging from three to four years' imprisonment generally has been considered appropriate in these cases.⁶ But each case must be assessed in light of its own circumstances.

[15] As there is no tariff case for manslaughter, I identified the aggravating and mitigating features of your offending, in comparison to other cases.⁷ Those aggravating features were:

- (a) you attacked Goran's head;
- (b) Goran was vulnerable as a security guard tasked with keeping order in situations like these;⁸

⁴ Sentencing Act 2002, ss 7 and 8.

⁵ *R v Leuta* [2002] 1 NZLR 215 at [62]–[63].

⁶ The Court of Appeal made this general observation in *Murray v R* [2013] NZCA 177 at [21].

⁷ *R v Bennet* CA457/03, 23 September 2004 at [68]; *Murray v R*, above n 7 at [27]; and *Cooper v R* [2014] NZCA 275 at [9].

⁸ Geoffrey G Hall *Hall's Sentencing* (online ed, LexisNexis) at [I.5.7(b)].

- (c) your assault on Goran was committed in the course of other illegal activity, namely your theft of items from Countdown; and
- (d) you did not provide any assistance to Goran after he fell to the ground: instead, on your mother's urging, you ran away, changing clothes with someone you met, and boasting to someone else about your actions.

But I rejected the Crown's submission the extent of the harm caused was additionally aggravating; the fact of someone dying is inherent in a manslaughter charge.

[16] I reviewed a regrettable number of 'one punch' authorities.⁹ I considered the seriousness of your offending was uniquely aggravated by the fact you assaulted a security guard in the course of committing other offending.

[17] On the other hand, Goran's contributions to the scuffling between you was more significant than made by the victim in those other cases.¹⁰ Although you were aggressive from the outset, and initiated the violence by attempting the first punch, Goran followed quickly with his own punch. He then followed you outside and held you by the neck against the store's front windows. Although telling you to leave, he continued to follow you, with a crowd of onlookers. I see your final punch as provoked by and part of that continuing commotion, rather than being your renewed and separate assault on Goran.

[18] I indicated a starting point of three years and nine months' imprisonment was likely, toward the higher end of the range indicated by the cases.

Adjustments for personal factors

[19] Mr Kokiri, I told you some discount from that was likely – for a combination of your youth, your mental health, your remorse, and your rehabilitative prospects – depending on the results of any further psychiatric assessments and the details of a pre-sentence report. No further psychiatric assessments appear to have been undertaken. But, in addition to the psychiatrist's report I had at the time of your

⁹ *R v Needham* HC Wellington CRI-2010-085-5780, 14 December 2010; *R v McFarland* [2014] NZHC 1106; *R v Ovaleni* [2018] NZHC 2034; and *R v Tarawa* [2018] NZHC 3205.

¹⁰ See *R v McFarland*, above n 9; and *R v Tarawa*, above n 9.

sentencing indication, I also now have the Department of Corrections' pre-sentence report, and your own commissioned s 27 background report. And I have the short story you wrote to me before I gave your sentencing indication, as well as the documents your lawyer has provided to me today, all of which show a degree of insight into your offending and indicating your strong motivation to change.

—*psychiatrist report*

[20] The psychiatrist says you do not currently meet the criteria for any psychiatric condition, or severe cognitive impairment, or fetal alcohol spectrum disorder. But the results of psychometric testing indicate your composite IQ is very low, with 96 per cent of people your age scoring higher than you. The psychiatrist recommended further assessment, especially if your condition deteriorates.

—*pre-sentence report*

[21] The pre-sentence report says you present a medium to high risk of harming others, and a high risk of reoffending. The two non-association orders you have acquired in prison contribute to that assessment. The report notes your present offending is an escalation from your previous burglary and driving convictions. It attributes your present offending to your methamphetamine habit, your poor impulse control, your offending-related attitude, your propensity for violence, and your anti-authority stance.

[22] The report also records details of your personal life. You believe yourself to be a bad influence on your friends, the “black sheep” of your family, your whānau being “good people who do not get into trouble”. While your father was in prison for most of your life, your uncle provided you with paternal guidance. In the short time since leaving high school, you have worked for a concrete company and on a salmon farm. You would like to get a mechanic's apprenticeship and have interests in plumbing. You have a partner with whom you have two children. The birth of your older daughter caused you to reduce your offending and change your lifestyle. Your younger son was born while you were in prison for your current offending.

[23] The report writer is optimistic, with the support of your whānau, you successfully would rehabilitate into the community with home detention and community work sentences. This is particularly so away from the South Auckland community in which you have poor influences. Alternatively, you may be imprisoned with release conditions prohibiting your resort to drugs, alcohol and violence. Programmes are available in prison and outside to help you make better choices than those that have led you here, before me, today. You have embarked on some of those programmes and I see your progress and I commend you for it.

—*section 27 report*

[24] You also asked I consider a report into your background, for which you were interviewed on 5 February 2019 by Shelly Turner, a specialist report writer with undergraduate and postgraduate degrees in management.

[25] You are of Māori and Cook Islands descent, but with limited knowledge or appreciation of that heritage. Your partner of over three years says you are “an amazing dad” and understandably wants you to help raising your children.

[26] Your own childhood was difficult. Your parents separated when you were very young. You saw your father inflict significant family violence on both your mother and his subsequent partner. You are close with your wider whānau, who generally are supportive of you. You lived with your mother and her parents in Papakura, although fallings out there saw you having to live elsewhere from time to time. Your juvenile car-related crime led to your placement in a number of different boys’ homes in Auckland, as well as a South Auckland youth justice facility. Your father encouraged you to follow him into active gang membership from the time you were 14 or 15.

[27] You struggled in school, but excelled in sport, being scouted for a Sydney junior league team. That was around the same time as your schooling came to end due to your fighting and truancy. You have no formal qualifications. Your league trial came to nothing given your then developing alcohol and drug abuse. That reduced when you relocated with your partner and new-born daughter to work in Nelson. But, on a visit to Auckland, you were arrested on historical burglary charges and bailed to your

mother's address. From there you fell back into your old ways, which led to this offending.

[28] Ms Turner considers you to be "very remorseful". I am less sure: your comments to the two report writers are more about the position you find yourself in, than that in which you have put Goran Milosavljevic, his sons here in New Zealand and his wider family overseas, and your own family. You want to be a better father and role model. Your partner thinks you have "learned [your] lesson". You have pro-social goals for the future, which you are progressing through programmes in prison, as is indicated by the documents you have provided to me.¹¹ You must avoid a return to methamphetamine, which has plagued your whole family and which Ms Turner describes as the 'impetus' for your offending. She considers continued participation in rehabilitation and reintegrative programmes will be critical to prevent your reoffending.

—*aggravating factors*

[29] Your previous offending is limited to three burglary convictions and three driving convictions. They bear no relationship to your current offending. My indication said I would uplift the starting point by one month to reflect your offending while on bail. So that is now three years and ten months' imprisonment.

—*mitigating factors*

[30] The primary mitigating consideration is clearly your youth.¹² The Court of Appeal has noted the radical effect an offender's youth can have on sentence, even where offending is serious.¹³ But, equally, youth "cannot be accorded presumptive, let alone paramount, weight."¹⁴

¹¹ These include a 'Manhood' programme designed to 'see a new pathway', a parenting programme, a meditation programme, a Thinking Hats programme, and commencing study towards NCEA. As the Crown notes, documentation outlining the nature of these programmes (and their completion) has not been provided.

¹² Sentencing Act 2002, s 9(2)(a).

¹³ *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868, at [96].

¹⁴ At [96].

[31] You were 17 years old at the time of your offending, you are 18 now. Your offending bears well-recognised hallmarks of youthful immaturity and neurological underdevelopment, exacerbated by your dramatically low IQ.¹⁵ Your prospects of rehabilitation appear hopeful according to the pre-sentence report, which accords with the idea young people have a greater capacity for rehabilitation.¹⁶ The promise of your short story has been borne out by your participation in prison programmes. In broadly comparable cases, a discount of 20 per cent has been allowed in recognition of a defendant's youth.¹⁷

[32] Your composite IQ is far lower than most people your age. That affects your ability to make good judgements. But your behavioural control was within the average range. The psychiatrist did not think you had any psychiatric condition. Although finer testing may be more informative, you do not show any severe cognitive impairment, intellectual disability, or executive dysfunction. There is no causative link between your diminished intellectual capacity and your offending.

[33] Real and tangible expressions of remorse generally warrant a discount of around five to eight per cent.¹⁸ I accept you realise the bad consequences of your actions extend beyond your own imprisonment. You know what it is like to be without a father, which is what you have caused to Aleksandar and Stefan forever more, and to your own children at least for the period of your incarceration. You have offered to participate in restorative justice. While I do not elevate all of that to Ms Turner's "very remorseful", I accept some discount for remorse is available.

[34] You were exposed to violence, methamphetamine use, and gang influences from a young age. The Crown accepts this indicates the presence of systemic disadvantage in your background. The Court of Appeal in *Arona v R* recently stated:¹⁹

¹⁵ *Churchward v R* [2011] NZCA 531 at [76]–[92].

¹⁶ At [77].

¹⁷ *Palmer v R* [2016] NZCA 541 (the defendant was 16 years old); *R v Tarawa*, above n 9, at [31] (the defendant was 22 years old); and *R v Feleti* [2019] NZHC 94 (the defendant was 17 years old). A discount of 15 per cent was allowed in *Wharerau v R* [2015] NZCA 29 (the defendant was 20 years old).

¹⁸ *Poi v R* [2015] NZCA 300 at [7]–[8]; *McArthur v R* [2013] NZCA 600 at [13]; and *Rowles v R* [2016] NZCA 208 at [18].

¹⁹ *Arona v R* [2018] NZCA 427 at [59].

As recently explained in *Solicitor-General v Heta*, s 27 rests on the premise that systemic deprivation affecting Māori generally is traceable to linkages between that deprivation, the offender and the offending.

[35] Evidence, which need not to be elaborate, is necessary to establish the linkage in any particular case.²⁰ Some of the ‘symptoms’ of systemic deprivation are identified in Ms Turner’s report.²¹ But she does not rely on them in direct explanation of your offending, and the necessary linkage is difficult to discern.²² Ms Turner says the impetus for your offending, against the backdrop of your disadvantaged upbringing, is your methamphetamine addiction. Methamphetamine use at the time of the offending cannot be taken into account as a mitigating factor.²³ In any event, these factors can only have a modest effect on sentence (if any) when the offending involves serious violence.²⁴

[36] Viewed overall, I think a global discount of 25 per cent for your personal circumstances is appropriate.²⁵ In particular, this reflects your youth, your remorse, and your prospects for rehabilitation.

Guilty plea

[37] As everyone agrees, you also are entitled to the full 25 per cent discount for your early guilty plea.²⁶

²⁰ At [50]; see also *Mika v R* [2013] NZCA 648 at [11]-[12]. In *Mika v R*, a s 27 report was not before the Court – the offender submitted a 10 per cent discount was warranted to reflect his Māori heritage and its ‘associated social disadvantages’.

²¹ See *Solicitor-General v Heta* [2018] NZHC 2453 at [50]. The Court held symptoms of systemic Māori deprivation included alcohol or drug abuse by whānau and by the offender from an early age, and violence in the home.

²² See *R v Jolley* [2018] NZHC 93 at [79]. Katz J acknowledged the deprivation the offender had suffered but did not think it warranted a discrete sentencing discount.

²³ Sentencing Act 2002, s 9(3).

²⁴ *R v Duff* [2018] NZHC 2690.

²⁵ In *R v Palmer* [2016] NZHC 1962, discounts of 20 per cent for youth (encompassing prospects of rehabilitation), five per cent for remorse and five per cent for good character were given. When addressing the matter in totality, the Judge allowed a further discount seemingly in consideration of the effect of imprisonment on the young defendant. The discount was not challenged on appeal; *Palmer v R*, above n 17. In *R v Faletolu* [2014] NZHC 2218, a discount of 25 per cent was applied for youth (he was 20 years of age), remorse, good character, and the fact reparations were paid.

²⁶ *Hessell v R*, above n 3.

End sentence

[38] The traditional approach in sentencing is to make any other adjustments to the initial starting point, and then to apply the guilty plea discount.²⁷ Such an approach is consistent and transparent, but not mandatory.²⁸ Doing so in your case:

- (a) increases your initial 45-month sentence to 46 months by the one month for offending while on bail,
- (b) then reduces it to 34-35 months by the 25 per cent discount for your personal factors, and
- (c) reduces it again to 25-26 months by the 25 per cent discount for your guilty plea.

[39] Subject to roundings, the end result would be a little over two years' imprisonment. That would disqualify you for any sentence of home detention.²⁹ Another approach would be to apply the two 25 per cent discounts together to the longest period of imprisonment identified for you. Such would reduce your 46-month sentence to 23 months – just under two years' imprisonment, qualifying as a short-term [sentence] of imprisonment. Given that choice, I must stand back and decide “whether the outcome of the process followed is the right sentence”.³⁰

[40] You seem a good candidate for home detention in a supportive environment, desirably away from South Auckland, because you are young, capable and motivated to change, with achievable aspirations for work and family, and seeking to redress the effects of your offending. Another judge has observed:³¹

[I]f the only matter standing in the way of the availability of home detention is whether the guilty plea discount is applied at the same time as other discounts or afterwards, then the evaluation must be to apply it at the same time to enable “the right sentence” to be imposed.

²⁷ At [21].

²⁸ At [72]-[77].

²⁹ Sentencing Act 2002, s 15A.

³⁰ *Hessell v R*, above n 3, at [77].

³¹ *Reweti v R* [2018] NZHC 809 at [24].

In my view home detention would be the right sentence for you if a suitable residence had been available. I am aware various attempts have been made to locate a suitable residence, as yet unsuccessfully. Otherwise I would split the difference between the two calculations to impose a 24-month period of imprisonment.

Outcome

[41] Mr Kokiri, please stand.

[42] I sentence you to two years' imprisonment, with the special conditions outlined in the pre-sentence report.³²

[43] I grant you leave to apply to this Court for cancellation of that sentence and substitution of a sentence of home detention if you are able to find a suitable residence at a later date.³³

[44] Mr Kokiri, you may stand down. Good luck.

—Jagose J

³² Sentencing Act 2002, s 93.

³³ Section 80I.