

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

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

**CRI 2014-083-957
[2019] NZHC 3454**

THE QUEEN

v

DAVID OWEN LYTTLE

Counsel: M M Wilkinson-Smith and C A Middleton for Crown
C W J Stevenson and E A Hall for Mr Lyttle

Date: 19 December 2019

SENTENCING NOTES OF MALLON J

Introduction

[1] David Lyttle, you appear for sentencing, having been convicted following a jury trial of murdering Bretton Hall.

Circumstances of offending

[2] You maintain you did not kill Mr Hall but you are to be sentenced in accordance with the jury's verdict and the facts established at trial in light of that verdict.

[3] You had known Mr Hall for many years. You were close friends and he was the best man at your wedding. The events that gave rise to you killing your friend date back to late 2010 and into 2011.

[4] At this time Mr Hall, who had spent some time in prison for drug offending, was on parole. He was living at his campsite, comprising a caravan and two sheds, on a property at Pitangi that he jointly owned with another man.

[5] The Pitangi property is rural and remote. It comprises many steep ridges and gullies and is largely covered by vegetation. It is accessed via the Pitangi Track which runs off the Whanganui River Road, about a 45 minute drive north of Whanganui. Access up the Pitangi Track is generally by four-wheel drive. At the top of the track is a flatter piece of grassed land where Mr Hall's campsite was.

[6] You were building a house for Mr Hall on this site. Mr Hall loved his piece of land and knew how to look after himself in this wild but beautiful setting. He was excited about and focussed on getting his house built.

[7] It is fair to say that the agreement you had with Mr Hall for the build of the house was a good one for him. He paid you cash to purchase the building materials and you were to be paid for your labour once the house was at the lock up stage. The overall price for materials and your labour to that stage was \$70,000. You were also to be paid for the petrol for the drive from your home in Halcombe to Pitangi.

[8] Progress with the build was much slower than Mr Hall anticipated for a range of reasons. You had a shoulder injury which limited your ability to do heavy work and you were incapacitated for period when you had surgery for that injury. Some of the issues with progress however, such as the title and plan issues, were not of your making but were a source of frustration for Mr Hall. Eventually the build got underway, but then Mr Hall became concerned that you were not using the money he gave you to buy building materials and, rightly or wrongly, thought you were ripping him off.

[9] A few weeks prior to 27 May 2011 Mr Hall demanded you pay him back some of the money and started visiting building suppliers to see what had been purchased. Again, rightly or wrongly, he was not happy to learn that the order for the roof was awaiting confirmation from you and had not been paid for. Mr Hall proceeded to

confirm the order and paid for it, apparently believing he had already given you the money to pay for it.

[10] At around the same time you were under pressure from another building client to get on with an extension to their property. That client had advanced money to you to purchase building materials for that work. However, that money was being used by you to pay day-to-day living expenses and to meet the mortgage payments on your family home. Even with the use of this money in this way, you were still struggling financially, and some mortgage payments were being dishonoured.

[11] A Council framing inspection of Mr Hall's property had been booked for 26 May 2011 at 10 am. At around 8 am that morning you telephoned the Council to cancel the inspection. There had been a period of heavy rain and that was the reason you gave to the building inspector for cancelling the inspection. You also had a little more work to do on the property for it to be complete to this stage. But this work was minor, involving at most a couple of hours work, and need not have held up proceeding with the next stage of the building. The evidence was that there was no issue with the workmanship of the building.

[12] After the framing inspection, the next stage was to involve closing up the house with cladding, a roof and the windows. Mr Hall was anxious to get on with this. The cladding had been purchased, Mr Hall had resolved directly the order and payment for the roofing, but the pressing problem for you was that you did not have the money to pay for the windows and Mr Hall had told you he was not providing you with any more money for the materials.

[13] On 27 May 2011 you were up at Pitangi with Mr Hall. You were seen there with Mr Hall by a neighbour as he moved his stock. After the neighbour had left, you killed Mr Hall and set up the campsite to make it look like he had gone hunting. Exactly what precipitated your actions in killing him, how you did so and what you did with his body requires some findings to be made by me.

[14] In 2014 you were the subject of a police undercover operation, known as a Mr Big operation. Over a period of months, as you were given to understand, you

were being recruited into a criminal group headed up by a person known to you only as Scott. The primary recruiter was a person you knew as Nick. You spent many hours with him assisting with the criminal group's various activities (in reality, all fake). At the end of the operation you had what you understood to be an interview with Scott at which he was to decide whether you would join the group. If you were permitted to join the group, you were given to understand that a great deal of money and other benefits would follow for you.

[15] You and your wife saw this, as you were meant to in accordance with the way the operation was intended to work, as a life changer. You would no longer have to do manual building work with a body that was not holding up for it and you would no longer have to worry about money. I hasten to add that your wife of course did not know the criminal nature of the group's supposed activities. Again, as the operation was meant to play out, it had become important to you that you pass the interview with Scott so that you would be able to join the group. In the course of the interview you told Scott that you had killed Mr Hall, that you had shot him, and you described how and why you did that and how you disposed of Mr Hall's body. You told him this believing it would get you into the group.

[16] The circumstances in which your confession to Scott was made gave rise to the risk that it was not reliable. The jury were instructed by me that they could not convict you on the basis of that confession alone. Because of this, and because the Crown accepted some of what you said to Scott may have been hyperbole and exaggeration, and because of the defence evidence which showed some of what you said could not have been true, it is necessary that I determine what I accept was proven to the beyond reasonable doubt standard, consistent with the jury verdict, in order to sentence you.

[17] Some months earlier you had purchased two firearms – .22 and a .223 – which were kept up at Pitangi. The firearms were used for hunting from time to time. In light of the jury's verdict, I find that you shot Mr Hall in the head with the .22 firearm. You told Scott you had used that firearm. That you used this firearm fits with the pathologist evidence that such a shot would leave only an entrance wound and at most a small trickle of blood at the entry wound, and the absence of blood found at the scene. It also fits with the detail you provided to Scott that Mr Hall did not die

immediately. The pathologist evidence was that it is not uncommon with a .22 shot to the head for the victim to become immediately unconscious but not dead, albeit that death will ultimately follow.

[18] It also fits with the evolving story you told the Police about the two firearms in the days and weeks following Mr Hall's disappearance as you sought to distance yourself from what you had done. It also fits with you having later volunteered to Nick that you knew where to find a .22 and .223 and you going with him on a trip to locate them. Those firearms were not found where you said they would be, but the evidence indicated you expected them to be there. And you did, together with Nick, locate the ammunition and other items for these firearms in the place you said they would be (hidden in a cemetery near your house).

[19] I find that your actions in killing Mr Hall were not premeditated. Rather, when you were with Mr Hall that morning, something happened between you that led to you suddenly deciding to kill him. It is not possible to be sure about the exact sequence of events. Mr Hall was still using methamphetamine to some extent, albeit that he was under control with that use at that stage as the evidence indicated, but he was using it and, as you told Nick, you did not approve of this. You told Scott that you killed Mr Hall because he wanted you to "get back into the drugs". If that part of what you told Scott was true, that may have been because Mr Hall wanted you to find a way to pay back the money you owed him by helping him with deliveries of drugs. Whether that was true or not, I find that it was the financial pressure you were under and what your good friend Mr Hall said to you about the money he believed you owed him that underlay whatever it was that suddenly sparked your decision to shoot him.

[20] I acknowledge that you also told Scott that you killed Mr Hall to get in first. You said to Scott that you had given Mr Hall a good hiding and although you made up after this there was still high tension. You said you were each were holding a gun (Mr Hall had the .223) and Mr Hall, to use your words, "might've been thinking the same thing about me for all I know ... and I thought fuck ya, I'm just gonna shoot ya, so I shot him". Your counsel submits the Crown accepted your motive in these circumstances was self-defence albeit excessive. I do not accept the Crown accepted

this. Rather they explained to the jury why this part of what you said, if they accepted it, did not amount to self-defence.

[21] It may be that you did wonder what Mr Hall would do to you if you couldn't pay him the money he wanted, and if he were to become unpredictable if he continued to use methamphetamine. But the circumstances as you understood them to be, and as you described them to Scott, fell far short of any imminent threat to your personal safety.

[22] You described to Scott having put a plastic bag over Mr Hall's head after you had shot him. This was because he remained breathing for a few minutes. This is consistent with the pathologist evidence that those who are shot with a .22 to the forehead will often remain breathing for a period but they are nevertheless not revivable. If this part of what you told Scott was true, I do not find this particularly aggravating. This is because you will have done so knowing at the time he was not going to live after you had shot him in the forehead.

[23] I do not find beyond reasonable doubt that you dismembered Mr Hall's body in the manner you described to Scott. The Crown opened and closed on the basis that the jury did not have to be sure of this. There is no physical evidence that independently corroborates it. While it may be possible to do this without leaving blood or any other matter at the scene, it would require some considerable skill to do this with a Stanley knife and a hacksaw (the tools available to you) as well as an attitude to a dead human body that would not come naturally. Although you had good practical skills with things such as building, livestock and fishing, the evidence of your skills with processing an animal was sketchy. There was also a risk that Mr Hall's neighbour would appear again at any minute.

[24] It is reasonably possible in my view that, rather than dismembering Mr Hall's body at Pitangi as you described to Scott, you did the more obvious and straightforward thing. That is, you wrapped him up, possibly with something from your work vehicle. With the adrenalin from the events that had unfolded, you managed to get him into your vehicle and hidden under other items in that vehicle. You then waited until the early hours of Sunday morning between 4 and 7.30 am to bury him.

You have never been able to give a credible account of your odd movements that morning as you drove back and forth around Turakina, and down back to Bulls and then on to Pitangi.

[25] You did not tell the truth to Scott and Nick about where you buried your former friend, probably because you did not fully trust them with this information. And to this day you have refused to tell the police where exactly you disposed of Mr Hall's body.

[26] It was a few days after you had killed Mr Hall that people realised he had disappeared. His disappearance sparked the largest search operation in the Central District's history. It was a massive and highly skilled operation. The head of that impressive operation was confident that Mr Hall would have been found in the search area, focussed around Pitangi, if that is where he was. No sign of him was found.

[27] You were involved in assisting the Police with that operation. During that operation you fed the Police false information and sought to distance yourself from any involvement and to point the finger at others. You apparently found it amusing, when recounting events to Scott, that a witness had apparently heard a call for help which was believed to be Mr Hall (the Crown called evidence that this was probably a goat) a few days after you had killed him and which had sparked off the search. Your conduct after killing Mr Hall is aggravating.

Circumstances of offender

[28] You are 54 years old. Your criminal history is minor and dated. You have had no convictions for around 26 years.

[29] I have read carefully all the letters submitted on your behalf. You have a loving and close family (your wife, three children and extended members of your family as well) and others who speak highly of you. Your brother, with whom you were also close, died suddenly earlier this month.

[30] There was considerable delay between your arrest in 2014 and your trial. The delay was primarily caused by a combination of disclosure issues and pre-trial

hearings that principally concerned disclosure and the Mr Big operation. Your trial took place in Wellington after a mistrial was ordered in an earlier trial that had commenced in Palmerston North.

[31] Following your arrest you were remanded in custody for a little over two years.¹ You were then on electronically-monitored bail for just over a year.² After this, for about two years, you were subject to a curfew between 10 pm and 8 am.³ Throughout your time on bail you were totally compliant.

[32] You were working as a builder at the time of the offending and also when you were on bail in the period leading up to the first trial but you were not able to work after that trial was abandoned. Your financial position is poor.

[33] You have been a heavy drinker of alcohol, but alcohol use was not directly involved in the offending.

Victim impact statements

[34] We have heard read in Court this morning victim impact statements from Brett's mother and his brother and also his ex-partner who is the mother of Brett's son Damian.

[35] They speak of the much loved person that Brett was. They speak of his dream for his life at Pitangi when you took him from them. They speak of their terrible grief and suffering from his loss and the immense toll the trial delays and the trial itself has had on them. You have heard how awful it is for Brett's mum (and the family) not to have Brett's body or know where he is so that she can lay her son to rest and their family can have some closure. You have not given them that closure.

[36] I want to acknowledge the bravery it takes for members of the family to put into words the impact the loss of Brett has had on them and to read them in Court today. I also want to acknowledge the bravery and composure they somehow managed

¹ Mr Lyttle was arrested on 27 June 2014.

² From 21 September 2016 to 27 October 2017.

³ The trial commenced on 16 September 2019 and concluded on 14 November 2019.

to maintain throughout the long trial they sat through and the difficulty for them in the delays that beset the prosecution of this charge through to a concluded trial.

[37] The sentencing process does not and cannot adequately respond to the loss of a loved one in such circumstances.

Life imprisonment

[38] The sentence for murder is life imprisonment unless that sentence would be manifestly unjust.⁴

[39] Your counsel submits life imprisonment would be manifestly unjust in your case. The factors advanced in support of this submission are:

- (a) first, that you must be sentenced on the basis that this was a pre-emptive strike;
- (b) secondly, that you are a man of otherwise good character, with no violence convictions, who has been a good and caring father and community member; and
- (c) thirdly, prosecution disclosure breaches have resulted in a lengthy delay to trial.

[40] I do not accept the overall circumstances of the offending and of your circumstances brings this case into the category where the standard sentence of life imprisonment would be manifestly unjust. As the Court of Appeal has said:⁵

Parliament has mandated that life imprisonment should be the standard sentencing response to a conviction for murder, reflecting society's recognition of the sanctity of human life and its condemnation of anybody who wrongfully takes another life.

[41] As I have discussed earlier, you were not facing any imminent risk to your own life. You were under significant financial pressure and Mr Hall was angry with you

⁴ Sentencing Act 2002, s 102.

⁵ *R v Cunnard* [2014] NZCA 138 at [16] citing *R v Law* (2002) 19 CRNZ 500 (HC) at [36] and [56].

about what his money for building materials had been spent on. Whatever he said to you about this up in Pitangi provoked you, but this was not provocation of a kind that could be regarded as diminishing the responsibility of your actions.

[42] I do accept the offending was aberrant. You are normally a peaceful, non-violent person who gets on with things that life throws up. I say that despite the apparently serious offending you were prepared to involve yourself in during the false world of the Mr Big operation.

[43] I also accept there has been significant delay to trial that was not of your making. These are matters appropriately taken into account when considering the minimum period of imprisonment. They are not sufficient to take your case out of what Parliament has determined is to be the standard sentence.

[44] I am therefore required to and do sentence you to life imprisonment.

Minimum period of imprisonment

[45] I am required to set the minimum non-parole period. This is not to be equated with the sentence, which is life. The minimum non-parole period is the period of imprisonment you must serve before you are eligible to apply for parole. Once eligible, the Parole Board determines your suitability for release, but when you are released you remain subject to the life sentence and may be recalled to prison.

[46] In some cases the minimum non-parole period must be at least 17 years.⁶ The Crown accepts, in light of the findings I have made of the evidence, that this is not such a case.⁷

[47] Because yours is not such a case, the law requires that the minimum period of imprisonment be set at 10 years or such longer period as is considered necessary to

⁶ Sentencing Act 2002, s 104.

⁷ In advance of having notice of those findings, it had accepted that s 104(1)(e) did not apply and put the matter no higher than that s 104(1)(a) “arguably” applies. In my view, it does not apply. In my view, the evidence does not establish that Mr Lyttle thought he had acted dishonestly with Mr Hall’s money such as to render his conduct an offence. See *Lyttle v Police* [2019] NZHC 2463 concerning Mr Lyttle’s view that the “deal was the deal”. The charges concerning the work for the Browns were brought after Mr Hall was killed.

hold you accountable for the harm you have done, to denounce your conduct, for deterrence, and for protection of the community.⁸

[48] To assist me with this, counsel have provided me with a number of cases from which comparisons can be drawn.⁹ Based on the cases it has put forward, the Crown submits the minimum period, before other factors are taken into account should be 12 to 13 years. To this, it submits there should be an uplift of at least one year for the fact that you have not revealed the location of the body.¹⁰ It submits there should then be a reduction to the minimum period of imprisonment of 18 months.¹¹ That would mean a minimum period of imprisonment of somewhere between 11 and a half to 12 and a half years.

[49] Your counsel submits the minimum period of imprisonment could not be more than 10 years.¹² This is partly based on its submission that you killed Mr Hall out of concern for your own safety. It is also based on the submission that Mr Hall was shot once, in contrast to some of the cases where higher minimum periods were imposed. Your counsel submits that there should be no uplift for the fact that you have not disclosed where Mr Hall's body is because you cannot disclose what you do not know and the Court cannot be sure that you know where the body is. Lastly, your counsel submits that the minimum period of imprisonment should be reduced by three years for the undue delay, with the spectre of prosecution for murder hanging over you for almost a decade.¹³ Your counsel submits there should be a further reduction of 18 months for the time you spent on electronically-monitored bail and the time you spent subject to a night time curfew. These submissions, if accepted, would bring the minimum period of imprisonment to under 10 years.

⁸ Sentencing Act 2002, s 103(2).

⁹ Especially, *R v Swain* [2015] NZHC 3241 and *R v Yates* [2018] NZHC 2600 in comparison with *Winders v R* [2018] NZCA 277; *R v Gosset* [2019] NZHC 1366; and *DD (CA595/2014) v R* [2015] NZCA 304.

¹⁰ See, for example, *R v Yates*, above; *R v Swain*, above; and *Roigard v R* [2019] NZCA 8.

¹¹ Counsel referred to *R v Bublitz* [2019] NZCA 364; *Williams v R* [2009] NZSC 41; *R v Smail* [2011] NZCA 403; and *R v Cho* [2018] NZHC 561. It accepts there was a period of undue delay represented in a table annexed as an appendix.

¹² Defence counsel refer to *Daken v R* [2010] NZCA 212; *Hamidzadeh v R* [2012] NZCA 550; and *R v Paewhenua* [2018] NZHC 301 in addition to the cases referred to by the Crown.

¹³ Counsel referred to *R v Askov* [1990] 2 SCR 1199 and *Burns v HM Advocate* [2008] UKPC 63 about the importance of the right to a trial without undue delay.

[50] My view of the facts in light of the jury's verdict is that you made a spur of the moment decision to kill Mr Hall as a result of the conflict that arose between the two of you over the money for his house and what Mr Hall wanted you to do about that. The firearm you used was to hand. There was no premeditation nor planning. It was a single shot. I do not accept this involved a breach of trust in the usual sense in that Mr Hall was a fit and strong man who was well capable of looking after himself. He was not dependent on you to look after him. Having said that, it was a betrayal of a close friendship. Mr Hall was good to you and did look after you and you were up there, alone with him, in that isolated place.

[51] Putting aside your conduct afterwards, that feature puts this a little beyond the 10 year minimum period, as does possibly what might be described as the execution style of the killing. Having said that, this was not a true execution style killing given the absence of planning and premeditation, but you deliberately used a lethal weapon and fired it at Mr Hall's forehead when there was no imminent threat to your own safety. I would therefore start at an 11 year minimum taking into account other cases for comparison.¹⁴

[52] However, that period should be increased because of what happened after killing Mr Hall. In addition to your conduct during the massive search operation and its aftermath, I am sure that, having killed Mr Hall, you must know where he is. As against that, it is accepted that there should be a discount for the undue delay to trial and that, apart from having this hanging over your head for a long time, you were also subject to electronically-monitored bail and a curfew. In my view these two factors, aggravating on the one hand, and mitigating on the other (or entitled to a reduction on the other) cancel each other out. The range for these two factors, on each side, as I say, aggravating on the one hand and reducing the period on the other, is in my view somewhere between one and two years on both sides. Taking the middle of this would mean an uplift of 18 months but a reduction by the same amount.

[53] So what all of that means is the minimum period of imprisonment is left at 11 years.

¹⁴ In addition to the cases counsel have referred to, I also considered *R v McDonald* HC Auckland CRI-2010-092-10476, 13 December 2011, Sentencing Notes of Ellis J.

Sentence

[54] Mr Lyttle, please stand. You are sentenced to life imprisonment with a minimum period of 11 years.

First strike

[55] Your conviction for murder means that you are now subject to the three strikes law. I am now going to give you a warning of the consequences if you are convicted of another serious violent offence. You will also be given a written notice outlining these consequences, which lists the “serious violent offences”.

[56] If you are convicted of any serious violent offence 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.

[57] 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.

[58] Stand down.

Mallon J

Appendix

[59] Table of trial dates allocated and vacated (the grey shading is the period the Crown accepts was undue delay caused to Mr Lyttle):

	Trial date	Reason for vacated date	Delay caused
1			From arrest to first trial date: 16 months.
2	27 October 2015	Adjourned to await <i>Wichman</i> decision related to admissibility of evidence.	Approximately four months to next trial date.
3	29 February 2016	Adjournment sought for defence to challenge admissibility of admissions.	Approximately 15 months to next trial date.

	Note: Defence counsel withdrawn 3 May 2016 Defendant released from custody 21 September 2016		
4	15 May 2017	Adjournment granted due to disclosure issues and inadequate time to prepare.	Approximately five and a half months to next trial date.
5	1 November 2017	Vacated due to disclosure issues, disclosure audit ordered.	Approximately 11 months to next trial date.
6	8 October 2018	Mistrial declared in second week of trial due to disclosure issue.	Approximately 11 months and one week to next trial date.
7	16 September 2019	Nine week trial, verdict given on 14 November 2019.	