IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CRI-2018-019-001105
[2019] NZHC 744

THE QUEEN

v

TENESHIAH PUHINAHINA PATANGATA

Hearing:	9 April 2019
Counsel:	L Dunn for Crown MJ Dyhrberg QC for Defendant
Judgment:	9 April 2019

SENTENCING REMARKS OF DOWNS J

Solicitors/Counsel:
Crown Solicitor, Hamilton.
MJ Dyhrberg QC, Auckland.

[1] I begin by acknowledging the presence of whānau and how this is a difficult day for everyone. I thank you for your participation.

Facts

[2] Ms Teneshiah Patangata, you are for sentence for manslaughter. On 1 January 2018, you stabbed your partner, Mr Peter Savage, to the neck with a butcher's knife. The wound you inflicted cut Mr Savage's jugular vein, carotid artery and into his fifth vertebrae. Mr Savage quickly lost consciousness. And died.

[3] You had been in a relationship with Mr Savage for approximately two years. Trial evidence revealed he was an excellent step-father to your four young children. But, your relationship with Mr Savage could be turbulent. I return to this later.

[4] You committed this offence in the wake of a New Year's Eve party, attended by whānau and friends. You and Mr Savage had been drinking. And arguing. The argument escalated to violence when you slapped Mr Savage to the face. You and he then hit each other. Mr Savage twice kicked your legs. He also grabbed your throat with one hand, choking you, albeit not for long. The fight then moved near a barbeque. You and he continued to hit each other. On the wall above the barbeque was a set of knives. You grabbed one and—as I have said—stabbed Mr Savage to the neck. You held Mr Savage as he died. Members of his family tried to save him—but could not. Only immediate medical attention might have saved his life.

[5] Police were quickly on the scene. You made a video-recorded statement that evening. You said everything had been "good" at the party before you and Mr Savage began arguing. You described slapping Mr Savage and the ensuing fight. But, you denied stabbing him. You said you had nothing in your hand when he fell to the ground, fatally injured. You said you did not know what caused him to fall, or the cause of his injury.

[6] You were charged with murder. You advanced many defences at trial. I use the term "defences" broadly, and not in a technical sense. You argued Mr Savage might have killed himself with the knife, as he had been very unhappy six weeks

earlier. You also raised self-defence, and the possibility you had not intentionally stabbed him. You disputed murderous intent too. You did not testify.

[7] The jury found you not guilty of murder, but guilty of manslaughter. It follows the jury concluded you killed Mr Savage by stabbing him, without intending to cause him injury known to be likely to cause death.

[8] I am sure the verdict does not reflect manslaughter by another pathway: namely an assault absent *intentional* knife use.[1] I left this possibility to the jury at your lawyers' request, but they did not advance it with vigour. Understandably so. The case for it was weak. The knife was not on you. You had to get it, from the wall behind the barbeque. You then had to wield it, and strike. This implies deliberation. True, you had been drinking, but not so much you did not know what you were doing.

[9] Your Police interview is instructive. You displayed a clear recollection of events, including the names you and Mr Savage had been calling each other during the argument. Your claim you had nothing in your hand, and did not know how he died, sat awkwardly with an otherwise detailed, timely and apparently reliable account.

[10] A final point cements this analysis—and completes the narrative. You told Police you were your "usual angry … and annoyed" self when the argument began. This has significance, as you have a history of using knives in anger, after drinking.

[11] In 2010 you were at a party with your boyfriend—I stress, not Mr Savage. You and he had been drinking heavily. Your boyfriend had a knife. He attacked that victim. But, the victim overpowered him. You twice stabbed the victim with your boyfriend's knife; once to the back and once to the shoulder. You had to be pulled away. The victim suffered two lacerations and required 11 stitches. You pleaded guilty to injuring with intent to cause grievous bodily harm, a first-strike offence. You were only 19.

[12] In late 2014 you went to a party. You were told to leave. You attacked the female victim with an empty bottle. With it, you struck her to the head. You did

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1 See *R v Patangata* [2019] NZHC 226 at [11]–[13].

likewise with a ceramic pot. You then punched the victim to the face, twice. You threatened to kill her. When the victim attempted to walk away, you confronted her with a kitchen knife and made slashing motions toward her face. You pleaded guilty to charges of assault and possession of an offensive weapon. You were then 23.

[13] You were 27 when you killed Mr Savage. Manslaughter is your second-strike.

Victim impact

[14] I have received three victim impact statements: one from Mr Savage's whāngai mother, Ms Helen Sisley; one from his sister, Ms Matewawe Savage; and one on behalf of his whānau. All three were bravely read this morning. Mr Savage leaves behind him a three-year-old daughter. She will grow up without her father—or memory of him.

[15] The victim impact statements are united by grief, trauma, anxiety and pain. Mr Savage was much loved. You have taken not only a father, but a son, brother, nephew, cousin and friend. You have caused great, enduring harm.

[16] These statements also recognise the inability of this process to capture the significance of the victims' loss.

Starting point

[17] The parties disagree about the starting point—the length of your sentence before consideration of things that make your offending less serious. The exercise is uneasy: manslaughter can be committed in many ways and no higher Court judgment is directly on point. So, the parties rely on other manslaughter cases,[2] a higher Court judgment involving the infliction of really serious bodily harm,[3] and reasoning by analogy.

[18] The parties agree your offending falls into band two of the higher Court's judgments referred to. It attracts starting points of between five and 10 years'

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2 *R v Paton* [2013] NZHC 21, *Woods v R* [2011] NZCA 573, *R v Langley* [2016] NZHC 2791, and *R v Hu* [2012] NZHC 54.

3 *R v Taueki* [2005] 3 NZLR 372 (CA).

imprisonment. They agree your offending is made more serious because you used a dangerous weapon, attacked Mr Savage to the head and caused extreme harm, indeed death. However, the Crown says your offending approaches the upper end of the band and should attract eight or nine years. Ms Dyhrberg QC places it at the bottom of the band; she argues for a starting point of five years' imprisonment.

[19] This contest reflects two disagreements. First, whether Mr Savage was a vulnerable victim. Second, whether your culpability is diminished for reasons I shall come to shortly.

[20] The Crown acknowledges Mr Savage was not physically vulnerable. But, it contends he was unaware you had a knife, taken by surprise, and had no opportunity to defend himself. In other words, the Crown argues Mr Savage was vulnerable because of circumstance. Ms Dyhrberg argues this analysis is speculative because no witness saw the attack.

[21] I consider Mr Savage would have been taken by surprise because of your use of a knife given the sequence you described to Police and that described by others. Things had otherwise been good. Everything happened quickly. It follows Mr Savage was defenceless—or at least at a serious disadvantage. However, I do not consider this aspect adds much. Your fatal use of a knife against an unarmed victim *is* largely captured by the aggravating factors I have referred to: use of an inherently dangerous weapon, an attack to the head, and extreme harm.

[22] This leaves the prospect of diminished culpability. A little more background is required here. You told Police you were "scared" when Mr Savage briefly grabbed your throat. You also told them you and he "argued all the time", and "fought every now and then". You elaborated you and Mr Savage would occasionally hit each other after "rark[ing] ... each other up". You said when this happened, the fight would end with one of you leaving and coming back "when we've cooled down". An admitted fact must be added to this mix. It is common ground Police were called to your home four times. By whom is not clear.

[23] Ms Dyhrberg contends your offending occurred in the context of a violent relationship; involved "excessive self-defence"; provocation on Mr Savage's part because of his violence against you that day; or some amalgam of all three.

[24] The Crown disputes this analysis. It highlights your acknowledgement to the Police you were your "usual angry … and annoyed" self at the time; your disposition to use knives in anger, particularly when intoxicated; your description of the fights as just that; the fact *you* initiated the violence on this occasion; and the jury's rejection of self-defence beyond reasonable doubt.

[25] Before identifying my conclusions, I record recent events for reasons that will become clear:

(a) Ms Katherine Coates prepared your pre-sentence report. You told her things were "good" between you and Mr Savage. You also told her the relationship was "nurturing". However, other members of your family told Ms Coates they were concerned Mr Savage was not treating you well and there "had been domestic violence in the relationship".

(b) Ms Shelley Turner prepared a cultural report about you. You told Ms Turner that Mr Savage "was obsessed, possessive and controlling". You also told her "domestic violence was typical of our relationship"; "his physicals got worse and worse" as the year progressed; you and Mr Savage had "fought for 10 days" before the offence, and you still had "bruising on my face" from an assault by Mr Savage. No trial witness described such bruising or was asked about it.

[26] I adjourned sentencing. I noted you had not given evidence at trial and a defendant may not testify through others.[4] I offered you a disputed-facts hearing on the basis this history, *if* correct, may mitigate your offending. Last week, you confirmed you did not want a disputed-fact hearing. You have since written a letter describing Mr Savage as "very caring".

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[4] See my Minute (No 3) of 22 March 2019 at [5].

[27] I return to the question of diminished culpability. I accept Mr Savage briefly grabbed your throat, which frightened you. I also accept he kicked you, twice. I accept too the obvious: Mr Savage was larger than you. However, I do *not* accept you stabbed Mr Savage because you were attempting to defend yourself from him. Indeed, you never said this to Police. Or, for that matter, anyone else.

[28] On your own account, the fight continued to another area, where you both continued to hit each other. Your account also implies nothing about this fight was any different from your earlier fights with Mr Savage. As the Crown emphasises, you described these as "fights"; not as Mr Savage attacking you. And, as I said to the jury when summing up, implicit to your description to the Police was the proposition these fights were not particularly serious, at least as far as you were concerned.

[29] Your force was grossly disproportionate. Mr Savage was unarmed. You grabbed a knife and stabbed him to the neck. Potential help was immediately available had you truly been in danger. Family and others were nearby, albeit not watching. You described them all as "good people" to the Police. I have no doubt they would have come to your aid. All of which the jury presumably recognised in rejecting self-defence, a defence I described as "precarious at best" in one of my rulings.[5]

[30] To summarise, I do not accept your offending involved "excessive self-defence". Nor do I accept it is mitigated by a context of domestic violence in the sense this term is usually used and understood: violence by a male against a female partner, typically with an associated dynamic of dominance and control. Your fights with Mr Savage cannot be neatly compartmentalised because you hit each other, ordinarily without causing apparent harm, absent any obvious power imbalance. As I said earlier, the evidence revealed Mr Savage as an excellent step-father to your children. All this suggests a difficult and occasionally violent relationship, but one distinguishable from the all-too-many in this country in which women are subjugated and battered by men.

[31] Which introduces my conclusion: I consider you stabbed Mr Savage because you were angry before the fight began; because Mr Savage's violence during the fight

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5 *R v Patangata*, above n 1, at [10].

scared you but also exacerbated your anger; and because of your unfortunate disposition to use knives when you have been drinking. It follows Mr Savage's conduct in kicking and briefly choking you modestly tempers the starting point because he used violence, and it aggravated your state of mind.[6]

[32] As to the starting point, I consider the Crown's eight or nine years too long. A sentence at this level would fail to reflect the impulsive nature of your offending, and the aspect to which I have just referred—Mr Savage's conduct. Five years is too low for the reasons I have explained and given aggravating factors: the lethal nature of your violence, your weapon-use, and your blow to Mr Savage's neck. Six years is appropriate.

[33] This figure is consistent with the most similar case *overall*; one not cited by the parties.[7] In 2008, Ms Jessie Brown stabbed her partner once to the chest, killing him.[8] She was 23. Like you, Ms Brown had been drinking. And like you, Ms Brown had previously been violent. Ms Brown's victim was behaving provocatively at the time. Her relationship with the victim was turbulent too, albeit not violent. Justice Simon France adopted a starting point of six years' imprisonment on a manslaughter charge.

Uplift?

[34] The Crown contends your earlier convictions for violence should attract an increase of 10 to 12 months' imprisonment. Ms Dunn observes in addition to the offences I spoke of earlier, you injured someone with intent to injure in 2008. That offence attracted home detention. Detail is not before me. The Crown emphasises your offending is getting worse.

[35] I decline to approach things this way for four reasons. First, I have factored your violent tendency with knives into the six-year starting point as this tendency played a role in your commission of this offence. A discrete increase here would involve an element of double-counting. Second, you will not be eligible for parole

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6 *R v Taueki*, above n 3, at [32](a).
7 The next most similar is *R v Paton*, above n 2.
8 *R v Brown* HC Napier CRI-2008-020-3130, 24 November 2009.

because manslaughter is your second-strike. A higher Court has cautioned of the danger of disproportionate sentences in this context.[9] Third, this was the approach adopted in Ms Brown's case, the one I just spoke of. Fourth, none of your earlier offending, bad as it was, attracted imprisonment.

Mitigating factors

[36] You are Tuhoe and Ngāti Awa. Again, you have four children. They are in the care of your grandmother and godmother.

[37] I mentioned Ms Turner earlier; she prepared your cultural report. You spoke to her in largely positive terms about your mother and stepfather. That said, your childhood appears to have been marred by an environment that promoted consumption of alcohol and drugs. You became wayward as a teenager, missing school to use both. Unsurprisingly, trouble with Police followed. You tried methamphetamine while still a teenage. You say you continued to use it until recently.

[38] Aspects of your life appear to have been influenced by gangs. Your second partner was a gang member. You describe serious violence at his hands. You describe lesser violence from your first partner. You told Ms Turner, Mr Savage was like a "rainbow": he was neither a gang member nor gang affiliated. I place no weight on your untested and unfavourable observations about Mr Savage for the reasons I explained earlier; you may not testify by proxy and you did not want a disputed-facts hearing.

[39] You present as intelligent and capable. You have had meaningful employment and worked hard. You are capable of better. This you know.

[40] Ms Dyhrberg contends this mix warrants significant discount: 25 percent. Ms Dunn on behalf of the Crown submits little if any discount is appropriate given the background nature of the matters identified by Ms Turner.

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9 *Wipa v R* [2018] NZCA 219.

[41] Please forgive me while I make some general observations about these arguments. First, an offender's background is relevant at sentencing. The law takes a broad view of what comprises such background. It includes not just the offender's personal background, but matters in relation to her or his family, whānau, community and cultural background.[10]

[42] Second, an offender's background may arguably extend to what is described as systemic disadvantage, meaning longstanding deprivations that affect—and afflict—some groups, at least when that background may relate to the commission of the offence.[11]

[43] Third, an offender's ethnicity cannot justify a sentencing discount. So, for example, the mere fact an offender is Māori is not a basis for a lesser sentence or different treatment.[12]

[44] Fourth, the factors to which I have been referring are likely to have only a modest effect on sentence when the offending involves serious violence or serious sexual offending. Indeed, such factors may have little application, if any.[13] Frequently, other sentencing principles will prevail, especially denunciation and community protection. Equally importantly, the law does not accept some groups may use violence—but not others.[14] No other approach is conceivable.

[45] Fifth, discounts in this context require care. Correlation and causation are not synonymous. Many people with disadvantaged backgrounds do not commit criminal offences, and many law abiding people remain so despite difficult lives. Excessive discounts risk undermining the criminal law's precepts of human agency and choice. This is not to deny the importance of upbringing or circumstance; it is to maintain perspective.

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10 Sentencing Act 2002, s 8(i).

11 Sentencing Act 2002, s 27(1)(b); *Solicitor-General v Heta* [2018] NZHC 2453 and cases cited therein.

12 *Mika v R* [2013] NZCA 648 at [12].

13 *Keil v R* [2017] NZCA 563 at [58]; *Solicitor-General v Heta*, above n 11, at [57]; and *R v Misitea* [1987] 2 NZLR 257 (CA).

14 *Keil v R*, above n 13, at [58].

[46] Nothing about your background bears directly on your killing of Mr Savage. Your exposure to domestic violence from your first and second partners, coupled with your use of drugs and alcohol from a tender age, perhaps provides a very broad explanation for your offending. So too, arguably, your related tendency for violence. That said, Ms Coates, the writer of your pre-sentence report, considers this tendency "somewhat puzzling". In any event, no explanation for either is complete without recognition of a matter I mentioned earlier: choice.

[47] Ms Turner considers you are "motivated to engage with rehabilitative programmes", but your engagement with alcohol and drug programmes thus far has not borne fruit. She assesses you as presenting "medium risk of re-offending", and a "high risk of harm to others".

[48] All this means some discount is appropriate, but not at the level advanced by Ms Dyhrberg. I adopt 10 percent, largely because of your age and potential, should you be able to abandon drugs, alcohol—and related violence. The significance of this challenge should not be underestimated.

[49] You were on restrictive electronically monitored bail from 17 April 2018 until 20 February 2019. So, just over 10 months. It is common ground some allowance ought be made.[15] One of your remarks to Ms Turner could be taken as implying you used methamphetamine while on electronically monitored bail.[16] Ms Dyhrberg has helpfully clarified this morning that is not so. I accept what she says about that. I deduct four months here.[17]

[50] Ms Dyhrberg's written submissions sought a deduction for an offer to plead guilty to manslaughter. I directed the lawyers confer and file a joint memorandum, so I knew exactly what passed between them.

[51] The position is this. Approximately two weeks before your trial, Ms Dunn raised the issue of a manslaughter plea with Ms Dyhrberg. However, Ms Dunn told

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15 Sentencing Act 2002, s 9(3A).
16 Cultural report, para 2.22.
17 Sentencing Act 2002, s 9(3A); *Parata v R* [2017] NZCA 48 at [15].

her the Solicitor-General would not likely accept such a plea given the circumstances of your case, including your previous offending. Ms Dyhrberg told Ms Dunn *if* the Solicitor-General were prepared to accept a plea of guilty to manslaughter, she would immediately seek your instructions and recommend a guilty plea. It follows there was never an offer by you to plead guilty to manslaughter. I understand Ms Dyhrberg to now accept as much. The point falls away.

[52] Ms Dyhrberg says you are remorseful for your offending, hence I should discount your sentence by a further five percent. The Crown accepts you regret killing Mr Savage, but notes you defended the charges. It offers no strong opposition to discount but urges caution.[18]

[53] It is clear a discount for remorse can be given in addition to a discount for a guilty plea. But it is not entirely clear a Judge may give a discount for remorse when the defendant defends the charges and denies even killing the victim.[19] I have not been able to find an example of this. None was cited. I assume for the sake of argument a Judge may do so.

[54] You held Mr Savage as he died. You were very distressed at the scene. That distress remained evident during your Police interview. I have no doubt you immediately regretted killing Mr Savage. However, this regret did not extend to an admission you killed him. You told Police you did not know how he died, when you did. You could not bring yourself to acknowledge the enormity of what you had done. That remained the position at trial, to the distress of Mr Savage's whānau.

[55] To be clear, a defendant is entitled to a trial; no penalty ever attaches to defending criminal charges. But defending the charges, including by arguing Mr Savage might have stabbed himself, is difficult to reconcile with what is now sought. Your answer is that you have no memory of stabbing Mr Savage. You said as much to Ms Coates. I do not accept this because your prompt video interview contains a full account of all material events before and after the stabbing. For example, you

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18 A Judge is not bound by a Crown concession; see *Haarhaus v R* [2010] NZCA 41 at [5] and [25].
19 Sentencing Act 2002, s 9(2)(f); *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

told Police you were fighting Mr Savage immediately before he fell, and what happened after he did. I do not consider trauma explains such dissonance.

[56] Your letter to me, which I have read and re-read, has the same feature. You express what I consider to be genuine grief and anguish at Mr Savage's death. And, you acknowledge the great harm his death has caused his whānau. However, you do not unequivocally say you killed Mr Savage. Your letter presents as guarded and ambiguous, as if you have a forensic eye to the future.

[57] I find your remorse significantly qualified, hence undeserving of discount.

[58] The final issue concerns the effect of your second strike. A higher Court has held parole ineligibility through a second strike may, in exceptional circumstances, cause manifest injustice, an outcome to be avoided.[20] I consider your case unexceptional. The things that make your offending less serious are primarily matters of background. You have a history of violence with knives; indeed, your first strike was for just that. You pose a medium risk of re-offending, with a high risk of harm to others. I conclude with the obvious: your offending is not far removed from murder. You stabbed an unarmed victim to the neck with a butcher's knife, largely because you were angry. Human life is sacrosanct. For these reasons, a minimum period of 60 percent would otherwise have been required.[21]

Sentence

[59] Ms Patangata, I adopt a six-year starting point; deduct 10 percent for your background and prospect of rehabilitation; and a further four months for your time on electronically monitored bail. I round down the balance of the remaining month to avoid messy maths. The result is a five-year sentence of imprisonment.

[60] Please stand. For the manslaughter of Mr Peter Savage, I sentence you to a term of five years' imprisonment, all of which you must serve.

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20 *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49.
21 Sentencing Act 2002, s 86C(6).

[61] Stand down.

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Downs J