

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

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

**CRI-2018-004-10572
[2019] NZHC 2670**

THE QUEEN

v

MICAH SHANNON SANTOS

Hearing: 18 October 2019
Counsel: H Steele for Crown
M Pecotic for Defendant
Judgment: 18 October 2019

SENTENCING NOTES OF WHATA J

Solicitors Meredith Connell, Auckland

Fakatapu kihe 'Otua mafimafi – acknowledging god/heavenly father

Fakatapu kia hou'eiki mo ha'a matapule – nobility and chiefs

Fakatapu kihe faifekau – Church minister

Fakatapu kihe family - family

Kae 'ata mo 'oku keu fai atu hoku fatongia – to clear the way for me to carry out my duty/obligation

[1] Mr Santos, you have pleaded guilty to one charge of attempted murder. I must now fix your sentence. To do this I must set out what you did, and I must talk about your personal circumstances. I will then talk about the factors that are important in terms of setting a sentence for you. Finally, I will fix an end sentence.

Summary of facts

[2] First, the facts of your offending and I know this will be distressing for the victim but it is something that I have to do.

[3] You and the victim were in a relationship for eight to nine months. On 17 November 2018, the victim posted photos on her Snapchat story showing her with other males. This angered you, but when you attempted to contact her on Facebook, the victim told you she wanted to end the relationship and blocked you from contacting her.

[4] On 19 November 2018, the victim spoke to you on the phone and again stated that the relationship was over. You then created a false Facebook account with the name “Sarah Hussein”, and contacted the victim, saying “Sarah” was your friend and suggesting that the two of you meet up and talk.

[5] On Thursday, 22 November, you, posing as “Sarah”, arranged to meet the victim on Anzac Avenue. On arrival you approached the victim and you began arguing. You then told the victim you wanted to kill her and put your hands around her throat.

[6] You released the victim and pulled a carving knife from your bag. The victim told you “you don’t have the guts to do it”. You put the knife away and a further argument ensued. The victim attempted to walk away, but you grabbed her and tried to pull her into the parking lot, stopping only when the victim began to scream. The

victim continued to yell at you, and you turned around while holding the knife in your sleeve. The victim saw the knife and asked, “are you serious Micah, would you do that to me?”

[7] You then grabbed the victim by the neck and stabbed her in the stomach. You struck her repeatedly with the knife about her torso as she fell to the ground and continued to strike her as she lay prone. At one point you paused to put the knife in your opposite hand, before continuing to stab the victim. In total you stabbed her upwards of twenty times, inflicting life-threatening injuries.

[8] After several members of the public began yelling at you, you dropped the knife and ran away. You later phoned the police and told them that they would be looking for you because you had stabbed the victim.

Personal Circumstances

[9] I now turn to your personal circumstances. You are a young man. You are Tongan. You have a supportive and loving immediate family, including your mother, father, two brothers, your sister and a cousin who lived with you at your home. You also have a very supportive extended family.

[10] Your mother has written a letter in your support. She did so for herself and for your father. She notes the “utter shock and disbelief at hearing what had happened” and says that you do not have violent tendencies and your actions were uncharacteristic. She says you had a Christian and stable upbringing and that you are supportive around the home, most recently, for example, during a time of sadness for your family, when a nephew, your cousin, was lost through illness. She speaks of the difficult time you have had in the youth prison but says that you have shown maturity in dealing with those problems, including acts of aggression from other inmates.

[11] I have also read several letters from your uncles and aunts, cousins, siblings, family friends, teachers, all of whom speak of you in glowing terms – they say, for example, that you are a kind, loving, respectful, considerate, polite and caring young man. They say you always have time for your family, including for your nana who has dementia.

[12] Some speak of your struggles, including with dyspraxia and the effect this has had on your self-esteem. But they also say you are a quiet achiever, intelligent, courageous, and have demonstrated leadership qualities. Many also say that they were shocked by what had happened, and express disbelief about it, and that you have been deeply affected by what you did and that you are deeply remorseful; that you fully understand and accept responsibility for what you have done.

[13] I also have the benefit of a PAC report, psychologists' reports, and a s 27 report. It is unnecessary to traverse them in detail. I simply record the general impressions I have taken from them.

[14] You were brought up in a Tongan family, that adheres to Tongan social and family norms. While positive in terms of providing a stable environment, those norms included a strictly hierarchical relationship between children and parents, as the report sets out:

There is an obligation of *faka'apa'apa* (respect) on all Tongan children to their father (who has the highest rank in the immediate family) and their mother (who also has a high rank but lower than that of their father). Often Tongan children misunderstand the concept of *faka'apa'apa* to mean that they do as their father says and strict obedience. This often creates distance between children and their fathers in the Tongan family.

[15] This distance existed between you and your father, which made it difficult for you to communicate about difficult issues and caused you to internalise your problems from a young age. You appear to be disconnected from your Tongan values, despite the strong connection your family has to their values.

[16] School life was also difficult for you at times, sometimes involving conflict with other students, teachers and others in positions of responsibility. One incident with a person in authority, which involved you not being permitted to re-enrol in school, is said to have had a very significant impact on you – that it left you feeling powerless.

[17] Unfortunately, this coincided with a major event in your life, the passing of your grandfather which, given the very heavy responsibilities of the family, meant you were not given much needed support at this time.

[18] It appears also that about this time you started your relationship with the victim, which was the first of its kind for you. There was a pattern of making up and breaking up. You were ill equipped to cope with it, and the offending was the culmination of the emotional turmoil you were coping with.

[19] What the reports ultimately reveal is a difference between how you behaved at home – where, as mentioned already, your family describe you as a loving, kind and considerate person– as against your behaviour in public, where you appear to have felt isolated at times, and acted in rule-breaking or aggressive ways.

[20] I note several further observations from the reports. You take responsibility for what you have done but are still coming to grips with the full impact of your actions. You are clearly on the pathway to rehabilitation. You have made some comments to report-writers which suggest you still attribute blame to the victim for what has happened, though I acknowledge your counsel's submission that these comments were made prior to counselling. You are open to rehabilitative treatment and you should be given the opportunity to participate in a suitable treatment plan. You may suffer from Developmental Dyspraxia, a neuro-development disorder that affects the process of ideation, motor planning and execution. Emotional instability and an inability to cope with the relationship breakdown and your youth are identified as major contributing factors to your offending. These may also contribute to your tendency to continue, if you do, to blame the victim for your offending. Your family has acknowledged your need for more support and they are there to provide it for you.

[21] I now want to spend a bit of time on your mental health at the time of the offending and now. In his report of 8 October, Dr Thompson reports that dyspraxia compounded your sense of incompetence and you felt different and separated from your peers. You coped, however, by working hard to get things right and supporting other people. However, you also developed a tendency to suppress emotional responses and separate yourself from family when upset. This background, he says, may have contributed to a general lowering of mood and, more recently, an ambivalent attitude to life and suicidal ideation.

[22] Your emotional suppression is said to have made it difficult for you to cope with what was an emotionally charged relationship with the victim and then how you dealt with her. On the day of the incident, what happened suggested you had become emotionally overwhelmed.

[23] Dr Thompson provides, with respect, a rather vague assessment of the risk you present. He refers to the presence of low to medium influence of static risk factors, noting the absence of a significant history of violent behaviour and no overt pattern of unstable relationships. He notes that you have responded well to therapy and that this is a positive factor. He also says you do not have active symptoms of mental illness, but that your flat mood seems to be the driving force behind your passive contemplation of suicide. He says your acute risk of violence in the future will be attenuated by an increase in emotional maturity.

[24] Finally, I note that Dr Thompson assesses you as having an ongoing moderate risk of suicidal behaviour. This is said to reflect a coping strategy of using suicidal ideation to moderate your emotional state and a continuation of passivity about being alive.

Victim impact statement

[25] I turn now to refer to the victim of your offending. She is a young Tongan female of about 18 or 19. You have heard her speak today. She was brave in doing so and I commend her for it, and for the considerate way that she conveyed her hurt and suffering. She refers to the many serious injuries you inflicted on her. She had to go directly to surgery. She endured terrible pain. She was hospitalised for 12 days before she could go home. She has ongoing nightmares of you harming her and is terrified. She could not finish her course that she was on at the time. She cannot dance and finds it difficult to do simple things like look after children. She is still struggling with all the scars and pain. She remains very afraid of you, but also expressed forgiveness for what you have done.

Sentencing Approach

[26] I turn then to your sentence. In fixing a sentence, Mr Santos, I must be guided by the purposes and principles of sentencing. I must hold you accountable for the harm that you have done, I must provide for the interests of the victim, I must denounce your conduct, deter you and others from repeating such offending and I must look to protect the community. I must also assist in your rehabilitation and reintegration into society and I must carefully assess the gravity of your offending, but also consider your personal circumstances and your family and cultural background with a rehabilitative purpose.

[27] In fixing a sentence, I will take three steps. I will first fix a starting point for a term of imprisonment. In doing this, I am assessing the gravity and severity of your offending. This will involve identifying the seriously bad or, what judges call, the aggravating features or factors of your offending and then compare your offending to other offending of similar kind. This is important because whatever starting point I adopt must be broadly consistent with the starting point adopted in similar cases.

[28] I will then identify any factors of the offending or personal factors that should mean that the start point should be reduced. These are called mitigating factors.

[29] Finally, I will apply a discount to the starting point for your sentence for your guilty plea before arriving at an end sentence.

[30] At times I will refer to case law. This may not make much sense to you, but it is important that the public know what case law I have referred to when fixing the sentence.

Starting point

[31] Turning then to set a starting point for your sentence.

[32] Mr Santos, this was very, very serious violence. A stern starting point is needed. In this regard, I consider the following aggravating factors are present:

- (a) Your attack was pre-planned.
- (b) You were jealous – this is a common feature of fatal offending of this kind and a major risk factor in offending that must be deterred.
- (c) There was extreme violence – this was a frenzied attack with up to twenty stabbing wounds.
- (d) There were serious injuries – while serious injury is an aspect of the charge, the nature and number of the injuries inflicted were very serious.
- (e) Vulnerability – the victim was unsuspecting, as most evident from her questions to you at the time of the offending.
- (f) And, finally, your use of a lethal weapon.

[33] This combination of aggravating factors is similar in kind and number to the offending in other cases such as *Walker*¹, *Ae*² and *Iosefo*³ where start points of 10 years, 9 years six months and 8 years six months, respectively, were adopted. They were based on the upper range of Band Two and the lower range of Band Three in *Taueki*.⁴

[34] I consider, however, your offending is worse than the offending in *Ae*, having regard to the nature of the attack and injuries caused. Further, while it might be said the callous nature of the offending in *Iosefo* (which involved targeted attacks to the limbs of the victim, including with a machete) is worse than the present offending, I am not satisfied the 8-year six month starting point used in that case is adequate to reflect the seriousness of the offending here. While the offending in *Walker* involved luring the victim to the offender's home, an aggravating feature not present here, I consider the nature, scale and severity of that offending to be the most like the present offending.

¹ *R v Walker* [2015] NZHC 3214.

² *R v Ae* [2016] NZHC 965.

³ *R v Iosefo*, [2018] NZHC 1570.

⁴ *R v Taueki* [2005] 3 NZLR 372.

[35] I therefore settle on a start point of 10 years' imprisonment.

[36] For completeness, I distinguish *Owens*⁵ and *O'Kane*,⁶ where higher start points of 10 years 9 months and 11 years six months, respectively, were adopted, because there were elements of home invasion (and heightened vulnerability) in those cases.

Mitigating factors

[37] I now turn to the mitigating factors. As noted, I have the benefit of detailed psychological reports and a s 27 report about you. I conclude that the following factors should reduce the starting point of the sentence:

- (a) Your youth is a mitigating factor – you were 18 at the time of the offending and were not thinking like a mature adult might think, an immaturity exacerbated by a very structured, hierarchical home life where feelings and emotions were not addressed;
- (b) You were unable to cope emotionally with the breakup with the victim, and what you had perceived had been her unfaithfulness, and hurtfulness to you the time of the offending;
- (c) You now have a better understanding of what caused your offending and are taking steps to address it, which helps to reduce the likelihood of this type of offending happening again;
- (d) You remain at risk of suicidal ideation which, in turn, suggests that a lengthy term of imprisonment may have a disproportionate impact on you;
- (e) You have a very supportive family, including an extended family, which bodes very well for your rehabilitation back into the community; and
- (f) You are remorseful.

⁵ *R v Owens* [2017] NZHC 319.

⁶ *R v O'Kane* HC Dunedin CRI-2009-002-190, 2 April 2009.

[38] Overall, your offending has the hallmarks of a very young man who lost control of his emotions and, while your actions were planned, you were not thinking with any form of mature appreciation of the significance of your actions for yourself or for the victim. As set out in *Churchward* and many cases since, these are important mitigating factors, along with your very supportive family, that go both to your culpability and to your capacity to rehabilitate.⁷ There is and should be much hope for you, Mr Santos, and the prospect of your rehabilitation should be duly weighed in the assessment, even though this is a very serious violent offence. Having said that, I do not think a separate discount for mental health is available to me. It cannot be said that mental illness of any formal kind was causative of your offending.

[39] I therefore consider that a discount of 25 per cent, comprising 15 per cent for youth, 5 per cent for the need to acknowledge and facilitate your potential for rehabilitation and 5 per cent for remorse, is appropriate.

[40] There should also be a guilty plea discount of 20 per cent. The delay in plea is largely explained by the time taken to complete your mental health assessments.

[41] In the result, Mr Santos please stand, I impose a sentence of 6 years' imprisonment. This comprises a start point of 10 years or 120 months, less a discount of 25 per cent for personal mitigating factors of 30 months, to arrive at a combined starting point of 90 months. Less a discount of 20 per cent for guilty plea, or 18 months, results in an indicative end sentence of 72 months or 6 years' imprisonment.

[42] Mr Santos, I must also give you what is a first strike warning, given your conviction for attempted murder. I am now going to give you a warning of the consequences of another serious violence conviction. You will also be given a notice outlining these consequences, which lists the 'serious violent offences'.

[43] If you are convicted of any serious violent offences other than murder committed after this warning and if a Judge imposes a sentence of imprisonment, then you will serve that sentence without parole or early release.

⁷ *Churchward v R* [2011] NZCA 531 from [76].

[44] 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.

[45] My final comment is that, if at all possible, you be given the fullest opportunity to rehabilitate and placed within an environment that reflects your youth, suicidal ideation and your capacity for rehabilitation.

[46] Mr Santos, please stand down.