IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA321/2017
[2019] NZCA 41

BETWEEN	JAMES WILLIAM MANUOA TE HIKO Appellant
AND	THE QUEEN Respondent

Hearing:	13 February 2019
Court:	Miller, Simon France and Peters JJ
Counsel:	DRF Gardiner for Appellant K S Grau for Respondent
Judgment:	8 March 2019 at 10.00 am

JUDGMENT OF THE COURT

A The application for leave to adduce new evidence is granted.

B Both appeals are dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Te Hiko appeals both his conviction for the murder of Nina Thompson and the minimum period of 17 years attached to his sentence of life imprisonment. He admits manslaughter but says that because he was impaired by alcohol and drug use he lacked murderous intent, and he claims that the evidence does not sustain an inference that he used a weapon (a steel pipe or bar). He says that trial counsel did not

adequately advance his case on these issues. With respect to sentence, he says that the crime was not sufficiently brutal or callous to engage s 104(e) of the Sentencing Act 2002.

The Crown case

[2] Ms Thompson was killed at the home she shared with Mr Te Hiko. There were no eyewitnesses apart from Mr Te Hiko, whose evidence was plainly rejected by the jury, and also by the trial Judge, Gilbert J, at sentencing.[1] The Crown case rested on forensic evidence showing that Ms Thompson was beaten to death in the bedroom. A steel pipe was found with a hair and contact bloodstains on it. The blood was hers. She had many wounds, some defensive in nature. Head injuries caused her to lose consciousness and inhale blood, and perhaps vomit, which blocked her airways. Mr Te Hiko called the police the following morning. He admitted killing Ms Thompson with his hands and feet.

The trial

[3] The Crown called 24 witnesses, including a pathologist, Dr Simon Stables, who recounted Ms Thompson's injuries in detail. He counted at least 70 separate injuries. The pipe could have caused some of them, based on their size, depth and well-defined impact. There were no skull fractures, but deep injuries to the brain stem suggested that she had experienced blows that caused the brain to move and twist, with rapid loss of consciousness following. Under cross-examination Dr Stables accepted that most of Ms Thompson's injuries would not have caused death and he could not exclude other causes of brain trauma, such as falling against furniture.

[4] Mr Te Hiko deposed to his addiction to methamphetamine and abuse of alcohol and his efforts to seek treatment. He had been waiting for a place in a residential treatment facility at the time of the killing, which was triggered by conflict after Ms Thompson invited people around to drink, contrary to an agreed "safety plan" designed to keep him sober. He ended up drinking and he also smoked methamphetamine, as he was prone to do after drinking. An argument developed after

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1 *R v Te Hiko* [2017] NZHC 1260 [sentencing notes].

the guests left. He threatened to leave Ms Thompson, and she gave him to understand that she may have been unfaithful but refused to name the other man. He attacked her. This action he attributed to the effects of methamphetamine. The assault continued for maybe 30 minutes. He admitted punching her in the head and kicking her body but denied using the pipe.

[5] Mr Te Hiko's cross-examination did not go well for him. The prosecutor began by establishing that he claimed to have hit her many fewer than 70 times, then had him concede that he was acting purposefully, punishing her for refusing to name the other man. He admitted that he was very angry. He claimed that he never used the steel pipe. He claimed to have no memory of parts of the incident yet could recount how he had kicked her. He accounted for her blood on the pipe by saying the police or ESR must have planted it. There was evidence consistent with him having no methamphetamine that evening; he had texted someone asking if they could supply him.

[6] The defence advanced in closing was that the Crown could not establish that Mr Te Hiko acted recklessly, knowing that he might kill. Counsel argued that he was affected by intoxication, suggesting that he had no real understanding of how severe the beating was. Transference could explain blood on the pipe.

The appeal

[7] There are now three grounds of appeal. Mr Te Hiko first says he was not adequately prepared to give evidence, and so suffered in cross-examination. For this he blames trial counsel, Mr Edwards, saying that insufficient time was spent briefing him. Both men have sworn affidavits and Mr Edwards was cross-examined before us.

[8] Second, Mr Te Hiko says that the implications of his drug addiction for murderous intent were not adequately explained. He seeks leave to adduce the evidence of his drug counsellor, Tokerau Putai, who deposes to Mr Te Hiko's addiction and genuine attempts to gain control over it. He explains that psychosis was a risk factor for Mr Te Hiko when under the influence of methamphetamine. We observe that this evidence does not go so far as to suggest Mr Te Hiko may have lacked murderous intent.

[9] Finally, Mr Te Hiko contends that too much was made of the metal bar. He argues that it is unlikely to have been used. He points to blood spatter on the bedroom ceiling, suggesting that it was in a pattern inconsistent with use of the bar.

[10] As to sentence, Mr Te Hiko says that the killing lacked the degree of callousness and brutality required for s 104.

Conviction

[11] We deal first with the allegation of counsel error. We are satisfied that there was no error, still less of the magnitude necessary to occasion a miscarriage of justice.

[12] We begin by recording that Mr Edwards accepts it was not easy to meet Mr Te Hiko before trial. The trial was to be held at Rotorua, but Corrections held Mr Te Hiko at Rimutaka Prison and refused to transfer him to Waikeria Prison until shortly before trial. Mr Gardiner, for the appellant, sought to establish through Mr Edwards that Mr Te Hiko might have been moved earlier had counsel only tried harder.

[13] It may bear repetition that this Court has often said that deficiencies in trial counsel's effort or process do not suffice in themselves. On a counsel error appeal it is necessary to show that (a) but for counsel's failings something else likely would have happened and (b) there is a real risk that a miscarriage resulted.[2]

[14] Here the 'something else' was that, had counsel tried harder, Mr Te Hiko would have been made available for in-person meetings and would have been better briefed. Mr Gardiner put the first of these claims to Mr Edwards, but proof would have required evidence about Corrections' processes. There was no evidence that Mr Te Hiko's testimony would have differed either. The evidence actually was that Mr Te Hiko is an intelligent man who took a close interest in the case, and was made aware of the Crown evidence, and had a brief of evidence prepared based on his own diary of events

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2 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110] per Tipping J. See also *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312; *Loffley v R* [2013] NZCA 579; *Gosnell v R* [2014] NZCA 217, [2014] 3 NZLR 168; *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26; *Kaka v R* [2015] NZCA 532; *Langley v R* [2016] NZCA 71; and *Ross v R* [2017] NZCA 587.

as he recalled them. The brief was clearly written to advance the defence that in his intoxicated state Mr Te Hiko did not subjectively appreciate the risk that the beating might kill. He understood that murderous intent was the issue. Mr Gardiner was unable to point to any specific respect in which Mr Te Hiko's evidence would have differed from the brief, or from the account he gave in evidence.

[15] That being so, the argument came down to the proposition that, had Mr Te Hiko been better prepared, he would have presented more sympathetically to the jury. The short answer is that we accept Mr Te Hiko did not present well and we have noted that cross-examination went badly for him, but it could hardly be otherwise given the narrative he offered in evidence. The slightly longer answer is that Mr Edwards' testimony, which accords with our reading of the evidence at trial and on appeal, is that Mr Te Hiko is a strong-willed person who wanted to tell the story his way and was convinced the jury would believe him. We observe that this is not a case in which an appellant blames counsel for having advised him to give evidence, or for his failure to plead guilty in the face of an overwhelming Crown case. Mr Te Hiko's stance remains that he is not guilty of murder and his evidence ought to have been accepted.

[16] We turn to the claim that the steel pipe assumed more evidential significance than it could bear. Mr Gardiner did not suggest that the prosecutor misstated the evidence, or that the Judge did so in summing up. He argued rather that Ms Thompson's wounds did not necessarily prove the pipe was used and that, had it been used, there would have been more blood spatter. This reduces to an argument that it was not open to the jury to draw the inference that it was used. We do not agree. We find the inference well-nigh irresistible.

[17] As noted, Mr Putai's evidence does not assist Mr Te Hiko on the conviction appeal. It recounts sympathetically Mr Te Hiko's struggle with addiction and his efforts to get help, but that is all. The possibility that Mr Te Hiko was so affected by methamphetamine as to lack murderous intent was squarely before the jury. It cannot be said that their verdict was unreasonable.

Sentence

[18] Gilbert J found Mr Te Hiko a man of considerable intelligence and ability whose downfall is attributable to drug and alcohol abuse. Despite a disadvantaged background, Mr Te Hiko attained qualifications as a bushman and logger and a rigger and scaffolder, and he worked successfully for long periods in those industries.

[19] However, the Judge found that s 104(1)(e) of the Sentencing Act was "squarely engaged".[3] The murder was committed with a high degree of brutality and callousness:

> [28] You punched and kicked Ms Thompson at least 70 times with tremendous force. You lifted her off the ground by her hair on several occasions and continued to attack her while she was unconscious and completely defenceless. You also struck her several times with the heavy iron pole including on her head and body. It would have been clear to you that Ms Thompson was unconscious and fighting for her life, yet you chose not to seek medical attention for her.

[20] The Judge did not discern remorse; on the contrary, Mr Te Hiko sought to minimise what he had done and still had not accepted full responsibility. Nor did the Judge accept that Mr Te Hiko was heavily affected by drugs and alcohol at the time of the killing. He also noted that Mr Te Hiko has a number of convictions for male assaults female.

[21] As in the High Court, the argument that s 104 was not engaged proceeded before us on the premise that the facts were as Mr Te Hiko claims. We are satisfied that the facts were as the trial Judge found.

[22] However, we have recognised that Mr Te Hiko was trying to deal with his addiction and attempting to keep alcohol and drugs out of the home. There was no premeditation, and although he ought to have called an ambulance he evidently hoped Ms Thompson would recover. He did not deny that he had killed her. This is not a case in which the offender delayed seeking help, or interfered with evidence, to

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[3] Sentencing notes, above n 1, at [27].

distance himself from the crime, so adding callousness to brutality.[4] Murders in which death resulted from a severe or sustained beating are not uncommon, and they are not necessarily made more brutal because a weapon was used.

[23] We asked counsel to provide us with a table of comparable cases, so that we might test the proposition that this murder did not engage s 104(1)(e). We observe that in some of those cases MPI starting points of fewer than 17 years were adopted for murders in which victims were beaten to death,[5] but in others s 104(1)(e) was applied.[6] We have also considered some additional authorities in which starting points of 17 years or more were adopted in comparable circumstances.[7] The beating in this case was savage and prolonged. Having regard to the comparable cases, it cannot be said that the Judge erred by applying s 104(1)(e).

[24] Mr Gardiner did not invoke manifest injustice, but we record that Mr Te Hiko's personal and mitigating circumstances fall well short of establishing it here. He has some commendable personal qualities, and he was seeking to deal with the addiction that may have contributed to the murder, but these considerations are offset by his past history, absence of remorse, and the sheer brutality of the attack.

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4 See for example *Akash v R* [2017] NZCA 122. See also *R v Fenton* HC Whangarei CRI-2006-088-3599, 28 February 2007; *R v Haerewa* HC Wellington CRI-2010-085-4794, 6 September 2011; and *R v Eddy* [2014] NZHC 1543.

5 See for example *R v Ngeru* HC Wellington CRI-2008-085-5996, 11 December 2009; *R v Pirini* HC Whangarei CRI-2010-027-0448, 22 April 2010; *R v Berry* HC Auckland CRI-2010-092-2165, 7 December 2010; *R v Callaghan* [2012] NZHC 596; *R v Eddy* above n 4; and *R v Akuhata* [2015] NZHC 1098.

6 See *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602; *Lavemai v R* [2016] NZCA 363; and *Akash v R*, above n 4. See also *R v Uluakiola* HC Auckland CRI-2005-952-2580, 17 March 2006; *R v Fenton,* above n 4; *R v Arnopp* HC Palmerston North CRI-2006-054-5847, 29 February 2008; *R v Sikuvea* HC Wellington CRI-2007-032-1449, 25 July 2008; *R v Terewa* HC Rotorua CRI-2009-087-2744, 19 February 2010; *R v Haerewa*, above n 4, ; *R v Wara* HC Hamilton CRI-2010-019-5681, 30 September 2011; *R v Gosnell* [2013] NZHC 1313; *R v Findlay* [2017] NZHC 2551; and *R v Puna* [2018] NZHC 79.

7 *Akash v R*, above n 4; *Wallace v R* [2010] NZCA 46; and *R v Williams* [2005] 2 NZLR 506 (CA). Also see *R v Uluakiola*, above n 6; and *R v Haerewa*, above n 4.

Result

[25] The application for leave to adduce new evidence is granted.

[26] The conviction and sentence appeals are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent