IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2011-085-6023
[2013] NZHC 221

THE QUEEN

v

NICHO ALLAN WAIPUKA

Hearing: 15 February 2013

Counsel: G Burston and B Tompkins for Crown
P Paino for Prisoner

Sentencing: 15 February 2013

SENTENCING NOTES OF MILLER J

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[1] Nicho Waipuka, you appear today for sentence for the manslaughter of Phillip Cottrell. You committed this crime on Boulcott Street not long after dawn on the morning of 10 December 2011.

[2] I will begin by spending some time on the facts. I need to make some findings which have an important bearing on your sentence.

[3] You lived in the Hutt at the time, and you had come to town with your co-accused, Manuel Robinson, about 10.00 pm the evening before. You were somewhat intoxicated and looking for fights. You boasted to friends that you were keen to knock someone out. I do not consider that that was an idle statement, as an incident with a couple at the James Cook Hotel evening demonstrates. You went to an apartment on the Terrace and there spent some time with two girls before they

required you to leave the apartment while they went into town. That was about 4.40 am. You walked along Lambton Quay towards Courtenay Place. You tried three times to withdraw ever-decreasing sums of money from your own bank account at an ATM. All of these attempts failed. The last was for just $20.

[4] You then walked back towards The Terrace to meet up with the girls when they returned to the apartment. Your route took you up the western side of Boulcott Street.

[5] Mr Cottrell was a journalist with Radio New Zealand, whose premises are on The Terrace. He finished a night shift at about 5.30 am and began to walk home, down the eastern side of Boulcott Street. He carried two wallets. In one of them he had placed $80 that a workmate had just paid him for some duty free goods that he had purchased for her on a recent trip.

[6] As you walked up Boulcott Street you encountered Phillip Barton, who was going to work. He was crossing the street. Seeing him, you issued a challenge, shouting "what the fuck are you looking at". You wanted a pretext to attack him. Fortunately for him, he was some distance behind you, further down the street, and he chose not to respond.

[7] It must have been only a matter of seconds later that you encountered Mr Cottrell as he passed you on the other side of the street. Unquestionably you challenged him. There are suggestions that he may have replied, although you conceded at trial that he did nothing to provoke you. You crossed the street and you attacked him.

[8] Much of Boulcott Street is covered by CCTV cameras associated with business premises. The scene of the attack is 33 metres from the field of view of one of these cameras, at Telecom House. We know from footage of Mr Cottrell walking down the street and you and Mr Robinson entering the field of view of the same camera as you ran up the street after the attack that you had a small window of opportunity, just 38 seconds in your case and eight seconds less for Mr Robinson. In that time you and Mr Cottrell reached the same place on the eastern side of the street, you attacked

and disabled him, you robbed him of his brown wallet, and you fled the scene. There was evidence that you may have been in the same place as Mr Cottrell for as little as eight seconds, although that evidence rested on questionable assumptions that everyone moved at the same pace at all times as they did when they passed through the CCTV field of view.

[9] The attack was not only swift but also brutal. Mr Cottrell suffered terrible injuries. His skull was shattered into many pieces and his wrist and upper arm were badly broken. An important issue at trial was whether these injuries resulted from a single punch to the head followed by a fall, as you alleged, or from a punch followed by kicking or stomping to the head and arm, as the Crown alleged. The issue was complicated because Mr Cottrell suffered from a very unusual variant of a condition, itself rare, called osteogenesis imperfecta. It is a defect in collagen the effect of which is to make bones brittle. Mr Cottrell himself said that he had "old lady's bones". His condition was the primary cause of a conflict of evidence among the medical witnesses called for the Crown: the pathologist who conducted the post-mortem, the neurosurgeon who tried to save Mr Cottrell, and an orthopaedic surgeon. Also called, although less expert on this aspect of the case, was the doctor who treated Mr Cottrell for his condition.

[10] I invited counsel to address me on this issue today and they did so in written submissions. Having considered what they have to say, I am satisfied to the criminal standard that you inflicted not only the punch but also one kick or stomp which shattered Mr Cottrell's skull as he lay on the ground and one kick which broke his arm. There may have been other blows too. In making those findings I prefer the evidence of the neurosurgeon, Mr Hunn, and the orthopaedic surgeon, Mr Willis, to that of the pathologist, Dr Feeney. Dr Feeney's opinion commands respect but I did not find it persuasive. It was apparently not formed until she elaborated on her report just before trial. I accept Mr Hunn's opinion that the fracture and associated tenting of the skin and scalp tissue were caused by an object such as a shoe, not the near-flat and smooth surface to which Mr Cottrell fell. Consistent with that is Mr Willis's evidence that the badly broken upper arm is not consistent with a fall, although the shattered wrist is. In my opinion Mr Cottrell was punched in the face and fell to the ground, fracturing his wrist as he broke his fall. Only then was the

fatal injury inflicted. Mr Hunn and Mr Willis considered that real force would be required to cause such injuries, notwithstanding Mr Cottrell's medical condition. I accept that evidence. I note that both are very familiar with the sort of gross trauma that Mr Cottrell suffered. Neither they nor Dr Feeney had previously dealt with a patient with this condition. But Mr Hunn said that the skull is up to a centimetre thick at the point of impact and when he operated on Mr Cottrell the bone felt normal; that is, strong and tough.

[11] Support for the conclusions I have just drawn is found in three other parts of the evidence. The first is that you admitted kicking Mr Cottrell in the head. After the attack you went quickly to the apartment, where you told the girls repeatedly that you had done so. You demonstrated the kicking action with a lot of force, using the words "yeah, bang". You later admitted to your partner, when in a state of some anxiety, that the attack involved kicking, although you told her that it was Mr Robinson who did it.

[12] The second aspect is your desire to knock someone out. You had made that clear earlier in the evening. To the girls afterward you said that you had knocked him out but also that you did not know whether it was the punch or the kick that had that effect. That is entirely plausible because the whole incident happened very quickly.

[13] The third aspect is your motive of robbery. I am satisfied, again to the criminal standard, that by the time you delivered the fatal blow you intended not merely to beat Mr Cottrell but to rob him. That required that he be disabled so he could not resist. I have mentioned your attempts to get money from your own account. It is utterly implausible that you suddenly formed the intention to rob him after delivering the fatal blow. Indeed, Mr Paino acknowledged the inevitability of this conclusion in his sentencing submissions. I record at this point that you also boasted at the apartment that you had got $80 from Mr Cottrell, and you showed the wallet. You refused to share the money with Mr Robinson because you said it was you who had taken it. When you went back to the Hutt later that morning you tried without success to withdraw money from Mr Cottrell's account at the Railway Station, using his credit card.

[14] You did nothing to get help for Mr Cottrell, who never recovered consciousness. An ambulance was called when a passing taxi noticed him. He was taken to hospital, where Mr Hunn performed emergency surgery to relieve pressure from severe bleeding and swelling in the brain, but it was soon clear that his injury was non-survivable.

[15] You learned that Mr Cottrell had died and that the police were looking for you. You took steps to cover your tracks, asking you partner to give you an alibi, and you appear to have evaded the police until you were arrested several days later. The evidence showed that you were anxious, but only for yourself. I have read your letter to the Court, but I do not accept that you felt remorse then, or that you do so now. You expressed no concern for Mr Cottrell at the apartment after the attack. Far from it, you tried to impress the girls by boasting about it. At no point have you taken responsibility for your actions. You have never come clean about what you did, and in interview with the probation officer you still minimise your culpability.

[16] It follows from what I have just said that your culpability is very high. The killing was characterised by a series of aggravating features. There are the dual motives of recreational violence and robbery, the associated element of premeditation, the vulnerability of the victim, in which I include not only his helpless state when you kicked him on the ground but also his medical condition, and the callousness that you exhibited immediately afterward.

[17] Your culpability is not reduced at all for Mr Cottrell's osteogenesis imperfecta. I accept that you did not know of it, and we cannot know whether he might have survived the attack but for his condition. But you intended to knock him out and rob him, you deliberately kicked him in the head with that objective in mind, and injuries of the sort you inflicted can kill or maim anyone. You have sought to excuse yourself by claiming that 100 per cent of the time people whose heads you attack do not die. This is an assertion that Mr Cottrell died only because of his medical condition. It presumes that you can and did calibrate your violence so as to knock a normal person out but not cause serious injury or death. In fact people often do die from attacks to the head in a street violence situation. In my opinion, those who choose to offer that sort of violence should not be permitted to excuse themselves by

claiming ignorance of the risk they are taking with someone else's life or by pointing to some unexpected vulnerability of the victim.

[18] You were charged with murder, jointly with Mr Robinson. You offered to plead to manslaughter in March 2012, before committal, but the Crown understandably did not accept that offer.

[19] The trial was a difficult one from the Crown's perspective. It was notable for the unwillingness of many of your associates to give evidence at all, or to tell the truth when they were compelled to enter the witness box.

[20] Both accused claimed that Mr Cottrell died from a single punch that you inflicted. Mr Robinson was acquitted of murder and manslaughter. He too had made admissions, but in his case the window of opportunity may have been too small for him to cross the street with you to join in the attack. If that were so, the jury were told, he was not guilty of either murder or manslaughter. The explanation for the acquittal for murder in your case is, in my opinion, that the jury were not sure you had the necessary subjective awareness that what you did might well kill. As I have just said, no reasonable person could fail to appreciate that an attack of this kind may well kill, but your behaviour in the apartment immediately afterward is open to the interpretation that you did not in fact appreciate it.

[21] Mr Cottrell was 43. He edited news bulletins at Radio New Zealand. The evidence at trial showed that he was a talented and gentle person who was held in very high regard by work colleagues and friends. The Court has heard today powerful accounts of his character, and his life, and his family, and his passion for travel. The impact of your actions on his family has been immense. His elderly parents learned of his death in England, and his mother is now said to be too depressed to leave the house. His only sister and his brother in law were summoned to Wellington where they experienced the trauma of seeing his injuries and enduring an intensive care vigil that ended in the worst way possible. The impact upon them is obvious from what they have said today. I acknowledge that the trial itself was, inevitably, an ordeal for them. No verdict, no sentence, could compensate them for their loss.

[22] I turn to your personal circumstances. You were born on 1 April 1992, so you were 19 at the time of the crime. Although you report nothing abnormal in your background, the current presentence report, and an earlier report which I have also considered, paint a picture of a young man with no prospects and no interest in rehabilitation. You have no educational achievement, no connection with your Maori heritage, no meaningful history of employment, and no real family support. What you do have is a connection to a gang, the Killer Beez, a problematic pattern of alcohol and drug abuse, and a substantial conviction history for a man of your age. There are 24 previous convictions since July 2009; they include three for offences of violence, two for resisting police, and five for offences of dishonesty. You were on intensive supervision at the time of the offence, having been sentenced on 22 November 2011 in the District Court for a spate of offences which included assault and threatening to kill. An earlier probation report described "totally entrenched offending-supportive thought processes". You conceded in interview for this offence that you drink heavily, and you use violence when you get angry, and you can't stop the violence once you get started. I think it is worse than that. I think that you enjoy violence, and you use it casually or to get what you want. As I noted earlier, you conceded at trial that the attack was entirely unprovoked. Had you not made that concession, the jury would have heard propensity evidence about other incidents which had been the subject of a pre-trial ruling.

[23] All in all, I see nothing in your background or attitudes or character to suggest that you want to reform yourself. The most that can be said for you is that you are still young, and young men often grow out of offending behaviour. That is a generalisation which does not always hold good; it depends on the offender's character, family support, employment prospects and the like. Certainly youth is not a mitigating factor in this case.

[24] I am now going to talk about sentencing policy for manslaughter. I do realise, Mr Waipuka, that you are not a lawyer and this will not mean very much to you at present but it will be reduced to writing so that you and others can review it later. It is important that I explain myself because I intend to impose a long sentence, longer on one view of it than is customary for this sort of offence.

[25] When sentencing for manslaughter Judges very often remark that the maximum sentence is life imprisonment, but they almost never impose that sentence. I have thought carefully about whether I ought to do so in your case.

[26] Culpable homicide – that is, murder and manslaughter – is distinguished from other violent offences by the loss of human life, and it occupies a special place in the criminal law. It is unique among crimes of serious violence in that the Court may sentence an offender to indefinite and perhaps lifelong detention without first satisfying itself that he is likely to commit more such offences upon release, if sentenced to a fixed term.

[27] The availability of life imprisonment for manslaughter shows it may be an appropriate sentence although the offender killed without murderous intent. I note too that under the Crimes Act a person who inflicts grievous bodily harm for the purpose of robbery, as you did, may be guilty of murder although he lacked murderous intent.[1] At the same time, there are many manslaughter cases in which there can be no question of imposing the maximum penalty or anything like it. Sometimes the offender's culpability was low notwithstanding loss of life, as where death was an unexpected and unlikely consequence of an unlawful act which was not inherently serious. In such cases the offender may not go to prison at all. This extreme diversity of options makes sentencing for manslaughter especially difficult.

[28] The few cases in which life imprisonment has been used for manslaughter exhibit two qualities: the crime was very close to murder,[2] or a protective sentence was needed because the offender presented a high risk of committing further serious offences of violence on the expiry of a fixed term sentence.[3]

[29] Those cases are also old. So far as I am aware this Court has not imposed life imprisonment for manslaughter since the Sentencing Act was passed more than a decade ago.

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1 Crimes Act 1961, s 168. The Crown did not rely on this provision at trial, presumably because it anticipated difficulty proving that the purpose was robbery rather than recreational violence.

2 *R v Wickliffe* [1987] 1 NZLR 55. I note that in *R v Witika and Smith* [1993] 2 NZLR 424 the Court indicated that life would have been appropriate had it been clear which offender was the principal.

3 *R v Lory* [2005] 1 NZLR 462.

[30] I am not aware of anything in the cases suggesting that the absence of life sentences for manslaughter reflects any deliberate policy decision. Indeed, modern sentencing law exhibits features that might facilitate use of the maximum penalty. Some years ago the law was changed to allow the Court to fix minimum periods of imprisonment longer than those that normally apply under the parole legislation.[4] The Court may impose a minimum period for a variety of reasons, including denunciation, accountability, deterrence, and protection of the community. For murder, the Court must now impose life with a minimum period of not less than 10 years. Where life imprisonment is imposed for manslaughter the offender also serves a minimum of 10 years, but that minimum period is not fixed by the Court.[5]

[31] Minimum periods bring parole eligibility into the sentencing equation, especially so when the Court is deciding whether to impose an indeterminate sentence.[6] They allow the Court to recognise that while an offender sentenced to life will not be released unless the Parole Board so decides, most offenders will in fact be released unless they continue to present a high risk of reoffending or commit further offences while in prison. So the Court might distinguish between murder and manslaughter when imposing life imprisonment. In most cases a murderer is sentenced to life with a minimum period of at least 10 years, and in some cases the minimum is not less than 17. Indeed, the Court may now impose life imprisonment without parole for murder. In this case, for example, had you been convicted of murder the minimum period would have been about 12-14 years, materially longer than the minimum 10 years you would serve if sentenced to life for manslaughter.

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4 Under the Criminal Justice Act 1985 an offender sentenced to life was eligible for parole after seven years. The legislation was amended in 1993 to introduce a 10 year minimum for murder. This period was not imposed by the Court, but the Court could increase it in exceptional circumstances. In 1999 the Act was further amended so the Court could increase the 10-year minimum period for murder if the circumstances were sufficiently serious. The position is now governed by s 86 of the Sentencing Act 2002 for most offences, including manslaughter where the sentence is a determinate one. The minimum period under this provision cannot exceed 10 years. The minimum period for murder is addressed in ss 103-104, and where life is imposed for manslaughter the minimum period is governed by s 84 of the Parole Act 2002.

5 Parole Act 2002, s 84(3). As the presence of this provision in the Parole Act indicates, and the explanatory note to the Sentencing and Parole Reform Bill 2001 confirms, the drafter chose not to confer jurisdiction upon the Court to impose a minimum period for an offender sentenced to life, unless the crime was murder. I note that life imprisonment is also available for the most serious drug dealing offences, some forms of treason and piracy involving acts likely to endanger life.

6 *R v Lory* [2005] 1 NZLR 462 at [12].

[32] However, it does seem to me that several features of current sentencing law and practice may have contributed to the dearth of life sentences. The first is that Judges now select a starting point by reference to features of the offence, then adjust it for aggravating features of the offender and for mitigating features. This methodology is designed to achieve transparency and consistency. It results in a starting point calculated as a fixed term of imprisonment, which (in simplified terms) is then scaled by periods calculated as percentages of the starting point. Life imprisonment does not readily fit this methodology. It is likely to be justified by features of the offence and the offender together, and it is not readily susceptible to comparison.

[33] The second feature is that it is now usual to check manslaughter sentences against guidelines used for crimes of serious violence where the victim survives.[7] Those guidelines strictly do not limit maximum sentences for manslaughter, which in a case of serious violence should reflect both the significance that the criminal law attaches to homicide and the maximum penalty. The Court of Appeal has repeatedly made it clear that there is no tariff for manslaughter and limited guidance to be had from other cases.[8] However, the Court does seek consistency among cases, and in practice sentences for serious violent offences do tend to constrain manslaughter sentences.[9]

[34] The third feature is that if indefinite detention is thought appropriate in any given case of manslaughter the Crown does have the option of seeking preventive detention, and the procedures associated with that sentence ensure that it will not be imposed without benefit of psychiatric assessments.[10]

[35] This analysis leads me to the conclusion that while it would be a most exceptional thing to do, I might properly pass a sentence of life imprisonment upon you in this case. It might be warranted for several reasons. First, this case is very close indeed to murder. On the evidence the jury might well have drawn the inference that you did appreciate that what you did might kill. To say that is not to

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7 *R v Taueki* [2005] 3 NZLR 372.
8 See for example *R v Bennet* CA457/03, 23 September 2004 at [68].
9 See for example *R v Jamieson* [2009] NZCA 555 at [34]; *R v Donnelly* [2011] NZCA 433.
10 In that case the minimum period of imprisonment must not be less than five years.

reject their verdict. Second, I have found that you deliberately did very serious harm to Mr Cottrell for the purposes of robbery and recreational violence. He was a mere passerby who, as Mr Burston said today, did nothing at all to put himself in harm's way. The crime deserves special condemnation. Third, I think that you present a high risk of violent reoffending.

[36] However, I have decided not to impose that sentence for three reasons, the first two of which are related. The first is that you were 19 when you committed this offence. The second is that there is something in Mr Paino's submission that I cannot be sufficiently sure that you will still present a high risk of reoffending when you reach the expiry date of a long fixed sentence. Your criminal history is relevant and busy but not especially serious in itself, and you have not previously experienced imprisonment. Given that record, I cannot be sufficiently sure without benefit of psychiatric assessments that your risk will remain high at the end of a fixed sentence. The third reason is that you did offer to plead guilty to manslaughter before committal, and a significant allowance must be made for that.

[37] So it is necessary to fix the term of your sentence. You have heard discussion this morning about other cases. They were referred to in counsels written submissions. Counsel urged them upon me as guidance to the sentence in this case. I have read all of the cases to which counsel referred me,[11] and some others,[12] which I will mention in my sentencing notes, but I do not propose to sentence you by closely comparing them. Other cases do offer guidance, but they vary widely. Cases that offer superficial similarities turn out to be less serious when examined more closely.[13] The ultimate question is what sentence meets these facts. As I said earlier, this crime is very close to murder, and it calls for a sentence that denounces

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[11] *R v Matautia And Anor* HC Auckland CRI-2006-092-013486, 29 November 2007; *R v Taueki* [2005] 3 NZLR 372 (CA); *R v Tai* [2010] NZCA 598; *R v Jamieson* [2009] NZCA 555; *Kepu v R* [2011] NZCA 104; *R v Leuta* [2002] 1 NZLR 215 (CA); *R v Rapira* [2003] 3 NZLR 794 (CA); *R v Edwards* [2005] 2 NZLR 709 (CA).

[12] *R v Jarman* HC Christchurch T8102, 1 August 2003; *R v Francis* HC Wellington T1176/02, 2 May 2003; *R v Curtis* CA193/88, 24 November 1989; *R v Moala & Ors* HC Auckland CRI-2006-092-000461, 12 December 2007; *R v Kengike* [2008] NZCA 32; *R v Townley* HC Wellington CRI-2009-085-7527, 6 May 2011; *R v Atkinson* HC Christchurch CRI-2004-009-015365, 30 September 2005; *R v Sullivan* HC Wellington CRI-2009-485-00086, 10 February 2010; *R v Hughes and Shortland* HC Whangarei CRI-2005-088-4349, 11 May 2007.

[13] For example, *R v Matautia and Anor* HC Auckland CRI-2006-092-013486, 29 November 2007 and *R v Hughes and Shortland* HC Whangarei CRI-2005-088-4349, 11 May 2007.

your conduct and emphasises personal and general deterrence. The appropriate starting point is 15 years imprisonment. In reaching that conclusion I have considered other cases in which 15 years was seen as an upper limit for manslaughter.[14]

[38] To that starting point I would add one year for your previous history and the fact that you were on intensive supervision at the time of the killing. I accept Mr Burston's submission that the proximity and relevance of these matters to the crime justify a substantial uplift.

[39] The allowance for your offer to plead guilty will be approximately 20 per cent. That is debatably generous. There are no other mitigating factors. That means, Mr Waipuka, that your sentence is 12 years and 10 months imprisonment.

[40] I turn to the question of a minimum period. I have already spoken about why the Court imposes those. It is beyond doubt that this case calls for a minimum period longer than that which you would otherwise serve before becoming eligible for parole. That is so both because the community must be protected from you for the foreseeable future and because the need for accountability and denunciation is exceptionally high for all the reasons I have given. The minimum period will be the longest that the law permits me; that is, two-thirds of the sentence I have just passed upon you. Not until you have served eight and a half years will you first become eligible for parole.

[41] Stand down.

Miller J

Solicitors:
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[14] *R v Crutchley* (1989) 4 CRNZ 487 (CA); *R v Leonard* CA269/95, 6 September 1995.