

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

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

**CRI-2017-092-007313
[2018] NZHC 1577**

THE QUEEN

v

SILAPEA MOMOISEA

Hearing: 29 June 2018
Counsel: GR Kayes for Crown
JJ Corby and M Cross for Defendant
Judgment: 29 June 2018

SENTENCING REMARKS OF DOWNS J

Solicitors/Counsel:
Crown Solicitor, Manukau.
JJ Corby, Auckland.
M Cross, Auckland.

Introduction

[1] Ms Momoisea, you are for sentence in relation to one charge of murder and one of attempted murder. You pleaded guilty to both. It is a common ground you will be sentenced to life imprisonment. The only issue today is the number of years you must serve before you may receive parole. The law calls this a minimum period of imprisonment.

Facts

[2] You and Mr Frazer Ah'Kee were in a relationship for approximately five years. In 2016, he married the other victim of your offending, Ms Milo Poe-Paila. He was then 54; she 39; you were 41.

[3] On 24 June 2017, you told your daughters Mr Ah'Kee had ended things with you to be with his wife. You also told one of your daughters you were going to kill Mr Ah'Kee because he had hurt you, and if he did not die, you would kill yourself.

[4] At 8.00 am on 26 June 2017, you left your home carrying a sports bag in which you had put a large knife. After walking your children to school, you went to Mr Ah'Kee's home in Otara. But, he was not there. You left.

[5] You went to the Otara Town Centre. You told your pastor's wife you intended to kill Mr Ah'Kee. She told others what you had said, including your pastor. But as with your daughter two days earlier, no one believed you.

[6] You went home. Your son opened the bag and found the knife. He took it. He told you to think of your grandchildren. And, not to hurt Mr Ah'Kee. You did not listen.

[7] At 4.00 pm you again left for Mr Ah'Kee's home. You took with you a large knife, which you hid in your clothing.

[8] Once at Mr Ah'Kee's home, you went into the garage. It has been converted to a bedroom for an acquaintance of Mr Ah'Kee's. The garage also provides access to the home from a service lane behind the garage.

[9] The acquaintance told you to leave. You refused. The acquaintance later left.

[10] You sent the acquaintance a text message saying you would wait for Mr Ah'Kee until 10 o'clock that night. You sat waiting, in the dark.

[11] Mr Ah'Kee and his wife came home at 6.50 that evening. You watched them through a gap in the wall. You readied yourself for an attack: you held the knife in your right hand, and waited on a bed in the garage.

[12] When Mr Ah'Kee entered, you lunged at him. You stabbed him once to the chest. You then stabbed Ms Poe-Paila twice. One of your blows pierced her heart. She fled—and survived. But only through chance and emergency heart surgery.

[13] I return to the sequence. You then stabbed Mr Ah'Kee again, and pushed him onto the bed. He fell to the floor. As he tried to get up, you repeatedly stabbed him.

[14] You dropped the knife and left. You discarded your bloodstained clothing in a nearby street or streets. At 7.02 pm, you telephoned your family and arranged for them to collect you. You then went to a home where you showered, and then to another where your shoes and pants were destroyed. During this sequence, you told your daughter what you had done and you were no longer in pain because Mr Ah'Kee was dead.

[15] After being telephoned by the Police later than night, you surrendered. You admitted the offending on video. You said you wanted to kill Mr Ah'Kee because he had been using you and taking your money. You said you wanted to kill Ms Poe-Paila too.

Victim impact statements

[16] I have read the victim impact statement of Ms Poe-Paila. You heard read this morning the victim impact statements from two of Mr Ah’Kee’s daughters.

[17] Mr Ah’Kee has six children: a 14-year-old daughter to Ms Poe-Paila and five other children aged between 24 and seven. You took their father. And, as one daughter said, their “lovable hero”. They have suffered financially. You also took Ms Poe-Paila’s husband. She too relied on him financially. And of course, Ms Poe-Paila suffered your terrible attack on her. I understand she has returned to Samoa.

[18] All these people are victims. They cannot understand why you did this. Unsurprisingly, they have suffered—and continue to suffer—great trauma. Remarkably, Ms Poe-Paila said she forgives you. So too the two daughters of Mr Ah’Kee who made victim impact statements.

[19] Before leaving the topic of victim impact, I note Mr Ah’Kee also has grandchildren. You took their grandfather.

Minimum period of imprisonment

[20] I must sentence you to life imprisonment unless that sentence would be manifestly unjust.¹ No-one contends it would. As I said, the real question is your minimum period of imprisonment, the time you must serve before you may obtain parole.

[21] Your offending has factors that make it more serious than many cases of murder. You planned to kill Mr Ah’Kee; you killed him at his home; and you did so in cold-blooded fashion. You also tried to kill Ms Poe-Paila. Again, only by chance and prompt surgery did she survive. It follows your minimum period of imprisonment would be much longer than 10 years irrespective of what I am going to discuss next.

¹ Sentencing Act 2002, s 102.

[22] The law also requires a minimum period of imprisonment of not less than 17 years if the murder is especially bad.² The prosecution submits your offending is especially bad for four reasons.

[23] It submits your murder of Mr Ah’Kee involved lengthy planning.³ While you unquestionably planned to kill him, I am not satisfied your planning was *lengthy*.⁴ You first spoke of killing him two days earlier. I consider your timeline approaches the threshold, but falls just short of crossing it.

[24] The prosecution also submits the murder involved a high level of brutality and callousness.⁵ It was plainly brutal and callous. And, other things too. You stabbed Mr Ah’Kee seven times with a large knife, having waited for him in the dark—ready to strike. There was little chance he would survive your attack. All your blows landed on his chest, back and upper arms. Your later actions were callous too. As I have said, you arranged to be collected and then destroyed your clothing.

[25] However, I am not satisfied your offending reaches the level required by law on this aspect. Sadly, some murders in this country are especially brutal and callous.⁶ Bad as this case is, it does not quite reach the standard identified.

[26] However, I am satisfied your murder of Mr Ah’Kee is especially bad for two other reasons advanced by the prosecution. First, in the same event, you attempted to murder another person—Ms Poe-Paila. And, you very nearly did.⁷ Second, your offending involved unlawful presence in Mr Ah’Kee’s home.⁸ You had been told to leave it, but would not. Your purpose was also unlawful. It could not have been more so. You were waiting to murder. The fact you waited in a garage used as a bedroom, and for access to the home, does not take your case outside of the reach of this arm of the law.⁹

² Sentencing Act 2002, s 104.

³ Sentencing Act 2002, s 104(b).

⁴ *Desai v R* [2012] NZCA 534 at [60].

⁵ Sentencing Act 2002, s 104(e).

⁶ *R v Gottermeyer* [2014] NZCA 205 at [80]–[82].

⁷ Sentencing Act 2002, s 104(i) and *R v Mason* [2012] NZHC 1849 at [43].

⁸ Sentencing Act 2002, s 104(c).

⁹ *R v Scott* [2016] NZHC 290 at [36] and [57].

[27] To recapitulate or summarise, I consider your offending within the especially bad murder provision because you very nearly murdered a second victim, and your murder of Mr Ah'Kee involved unlawful presence in his home. I am not persuaded your offending involved lengthy planning or a high level of brutality or callousness, albeit your offending approached these thresholds without crossing them.

Analysis

[28] I am now required to consider similar cases to see whether the minimum periods imposed in those are consistent with the period to be imposed in yours.¹⁰ The Crown has referred me to three cases involving the murder of a former partner, and attempted murder of another. It submits these demonstrate a minimum period of 16 years' imprisonment is required for your offence of murder alone, and *irrespective* of the 17-year minimum provision I have been talking about.¹¹

[29] There are conceptual difficulties in determining what the minimum period should be without reference to the 17-year benchmark, when two of the like cases were caught—and informed by—that benchmark.¹²

[30] Your case is less serious than *R v Scott*, which involved extensive planning and two attempted murders.¹³ A minimum period of 17 years was adopted there for the murder charge. It is also less serious than *R v McLean*, in which the same minimum period was adopted on the charge of murder.¹⁴ Mr McLean restrained and assaulted his wife before killing her. However, contrary to Mr Corby's submission, I consider your case is more serious than *R v Singh*, in which a minimum period of 12 and a half years was adopted.¹⁵ Mr Singh planned the murder for only a few hours, and did not commit it in the victim's home. He was not caught by the section I have been talking about.

¹⁰ *R v Williams* [2005] 2 NZLR 506 (CA) at [52] and *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [41]–[42].

¹¹ *R v Singh* [2015] NZHC 2369; *R v Scott* [2016] NZHC 290 and *R v McLean* [2017] NZHC 3183.

¹² *R v Williams* requires as much. And this approach made obvious sense when the regime was new.

¹³ *R v Scott* [2016] NZHC 290.

¹⁴ *R v McLean* [2017] NZHC 3183.

¹⁵ *R v Singh* [2015] NZHC 2369.

[31] But for the 17-year benchmark, a 15-year minimum period would be apposite for your murder of Mr Ah’Kee.

[32] The minimum period must be increased because you also attempted to kill Ms Poe-Paila. I increase it by two years, mindful of the cases I have just spoken of.¹⁶

[33] The prosecution contends this increase should be from the minimum period of 17 years; the benchmark I have been talking about, and not the 15-year figure. I disagree with the prosecution. An important reason your case engages the especially bad murder provision is because you attempted to murder another, and further increase for that offence would involve double-counting.

[34] In any event, I am satisfied a minimum period of 17 years’ imprisonment properly reflects all features of your offending that make it particularly serious. Overall, your offending is less serious than that in *Scott* and *McLean*. In each, 19 years’ imprisonment was the minimum period adopted (before assessment of matters that reduced seriousness). So, no increase from the benchmark is required.

Mitigating factors

[35] You are now 43. You are a stranger to the courts: you had not committed any offence before these dreadful ones. You have five children; your youngest is nine. You have four grandchildren. It is common ground you do not pose a danger to the community; your offending was out-of-character.

[36] Mr Corby submits I should reduce your minimum period to as little as 10 or 11 years’ imprisonment because:

- (a) Your culpability or blameworthiness is diminished, as you believed Mr Ah’Kee had “used you”, including financially.
- (b) You pleaded guilty, and are remorseful.

¹⁶ *R v Singh* [2015] NZHC 2369; *R v Scott* [2016] NZHC 290 and *R v McLean* [2017] NZHC 3183.

(c) You were of good character.

(d) And because of Ifoga and banishment.

[37] I may reduce your minimum period below 17 years only if it would be “manifestly unjust” to impose that term.

Reduced culpability?

[38] Unsurprisingly, your Police interview focused on the circumstances of the offences. However, you told Police you wanted to kill Mr Ah’Kee as you felt he had betrayed you, by choosing his wife over you. You also said Mr Ah’Kee used your money, of which you had little, on himself and his wife. Mr Corby also observes Mr Ah’Kee might have been unfaithful to you with other women too. He described Mr Ah’Kee today as a “known philanderer”.

[39] I have no doubt you were very upset by Mr Ah’Kee’s decision he no longer wanted to be with you. However, I do not accept this aspect or the other matters to which I have just referred make your offending less serious. Why?

[40] Many relationships fail. Some fail because one party has been seeing someone else, or because a party has been less than fair with money. Break-ups of this nature can be very distressing, but they do not mitigate murder. People from all walks of life and cultures accept—without resorting to lethal violence—the end of a relationship, and related feelings of betrayal, hurt and inadequacy.

[41] Mr Corby stressed Samoan principles of love, mutual respect and reciprocity, which you believed had been breached. But these principles animate *all* intimate relationships across cultures. They are universal. As observed, so too self-restraint when relationships end badly, even when someone has behaved poorly within the relationship.

[42] Moreover, provocation as a partial defence to murder no longer forms part of the law. And, a high degree of provocation is now required by law to mitigate a sentence of murder.¹⁷ Nothing Mr Ah’Kee allegedly did approaches that threshold.

[43] I note too you were examined by Dr Duff, a consultant psychiatrist. Dr Duff observes while there is considerable evidence you were angry and shocked Mr Ah’Kee had resumed his relationship with his wife, your account tended to minimise your actions and place blame on others. Dr Duff considers you have a history of “externalising blame”, with an allied reluctance to acknowledge your own “angry and dysregulated behaviours”.

[44] You implied to Dr Duff, to the writer of the cultural report, and to me in your sentencing letter, Mr Ah’Kee was physically abusive of you. And, perhaps psychologically abusive. Mr Corby does not rely on these observations for good reason: there is no evidence to support them. You said no such things to the Police; you never called Police about Mr Ah’Kee; and you have not sworn an affidavit or entered the witness box. I raise this topic to make clear your offending is very different from the many sad cases in this country in which a woman kills to protect herself or her children from a controlling and violently abusive male partner. Nor does this case have any like dynamic. You killed in anger—not in the face of anger.

Guilty plea

[45] You were charged on 27 June 2017. You pleaded guilty on 22 February 2018. Your plea was reasonably prompt, but made in the face of overwhelming evidence, including your own confession, Ms Poe-Paila’s eye-witness account, CCTV footage of you walking to Mr Ah’Kee’s home, and your statements to others of murderous intent before the murder. However, your plea also spared the need for a trial, and the giving of distressing testimony.

[46] Contrary to Mr Corby’s submission, potential discount in this context is much constrained.¹⁸ A higher Court has said it is normally confined to one or two years.¹⁹

¹⁷ *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [71]–[74].

¹⁸ *R v Williams* [2005] 2 NZLR 506 (CA) at [73].

¹⁹ *R v McSweeney* [2007] NZCA 147 at [10]; *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR

Remorse

[47] After killing Mr Ah’Kee, you told your daughter your pain was gone now he was dead.

[48] The pre-sentence report writer said she could not assess whether your expression of remorse to her was genuine, but she noted she was speaking to you through an interpreter.

[49] Dr Duff’s report is also relevant to remorse. Dr Duff said you:

- (a) Described the killing as an accident, and minimised “issues around planning” the offence.
- (b) Expressed no remorse for your actions beyond concern for yourself and likely consequence.
- (c) Told her that had you been in the Islands, you “could have completed your actions without being caught”.
- (d) Expressed no remorse in relation to Ms Poe-Paila.

[50] In your letter to me you say you are very remorseful. The balance of your letter does not suggest that. Much of it is about how Mr Ah’Kee was to blame. And, you say in your letter you are not a murderer. Overall, your letter is consistent with concern about your predicament. In reaching this conclusion, I have not overlooked English is very much your second language.

[51] In summary, I find you are not remorseful, and I make no allowance for remorse.

Good character

[52] This brings me to your prior good character. Again, potential discount in this context is necessarily confined. A higher Court has repeatedly said this factor would rarely displace the benchmark of 17 years.²⁰

Ifoga and banishment

[53] You were born and raised in a Samoan village. You moved to New Zealand seven years ago or so. But, you have tended to mix only within the Samoan community. As observed, your English is poor. Because of your offending, you have been banished from your village. This is significant. In traditional Samoan culture, being part of the village is part of a person's identity. You and your children will not be able to return. Accordingly, you cannot visit or care for your parents when you are eventually released from prison. Unless, of course, the village decides to accept you. That remains possible.

[54] Because of what you did, your family has engaged in Ifoga, a Samoan cultural process that involves seeking forgiveness. I have been told your family were, or at least felt, humiliated and have suffered financially. I am also told Mr Ah'Kee's family accepted the Ifoga.

Assessment of mitigation

[55] The prosecution argues the factors I have referred to should not result in a reduction of the minimum period below 17 years, as it would not be manifestly unjust to impose the benchmark minimum period. As observed, Mr Corby submits you should receive substantial discount, from 17 years to 10 or 11.

[56] The correct position lies somewhere in-between. I consider a 17-year minimum period would be manifestly unjust because of your guilty plea, prior good character and the cultural dimension discussed just a little earlier (see [53]–[54]) when all those things are taken together. However, your murder of Mr Ah'Kee and

²⁰ *R v Williams* [2005] 2 NZLR 506 (CA) at [66] and *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [87]–[88].

attempted murder of Ms Poe-Paila were particularly serious, and this overarching consideration properly limits applicable reduction. This because of the sanctity of human life, and the way you took another's life.

[57] I reduce your minimum period by two and a half years—18 months for your guilty plea; and a total of 12 months for your earlier good character and the cultural matters—which leaves a minimum period of imprisonment of 14 and a half years.

Sentence

[58] Ms Momoisea, please stand.

[59] On the charge of murder, I sentence you to life imprisonment. You must serve at least 14 and a half years before you may get parole.

[60] On the charge of attempted murder, I sentence you to 10 years' imprisonment. This sentence will be served at the same time as the murder sentence.

[61] You may stand down.

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Downs J