IN THE COURT OF APPEAL OF NEW ZEALAND

CA344/2014
[2016] NZCA 363

BETWEEN	KAVEINGA HELOTU LAVEMAI Appellant
AND	THE QUEEN Respondent

Hearing: 20 July 2016

Court: Randerson, Fogarty and Collins JJ

Counsel: A J Ellis for Appellant
M A Corlett QC for Respondent

Judgment: 28 July 2016 at 10:30 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] The appellant Mr Lavemai was convicted after a jury trial before Gilbert J on one count of theft and one count of murder. He was sentenced on 16 April 2014 to life imprisonment with a minimum period of imprisonment of 17 years.[1]

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[1] *R v Lavemai* [2014] NZHC 797.

[2] Initially, Mr Lavemai appealed against both conviction and sentence but he has formally abandoned his conviction appeal. Despite the abandonment of the conviction appeal, the sentence appeal is primarily advanced on the basis of alleged counsel incompetence. The usual ground that the sentence was manifestly excessive is advanced only on a secondary basis.

[3] The appeal was filed out of time but the Crown does not oppose an extension of time. We grant an extension of time to appeal accordingly.

The facts

[4] In sentencing Mr Lavemai, Gilbert J succinctly summarised the facts in these terms:

> [2] On 11 October 2012, you spent most of the day drinking alcohol. There is some suggestion that you were also using methamphetamine but you cannot recall this. You were under pressure to pay a debt you owed for the supply of drugs. At about 6pm that day you went to your neighbour's property intending to steal something which you could then offer in part payment of the debt. The victim, Mr Lees, was staying temporarily at this address with two of his friends although they were not present at the time. Mr Lees came to the door when you arrived. He was polite and invited you in. Without warning, and without any provocation on Mr Lees' part, you punched him almost immediately upon entering the premises. You landed Mr Lees on the couch with your first punch. He was soon knocked unconscious and was unable to defend himself or offer any resistance as you continued to punch him repeatedly on the head and neck.
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> [3] You left Mr Lees in a slouched position on the couch, struggling for breath, as you unplugged the stereo and took those components and a PlayStation back to your house. Despite returning several times for this purpose, you made no attempt to assist Mr Lees or seek assistance for him. When his friends arrived back the following morning they found Mr Lees dead on the couch where you had left him. This was obviously a shocking and deeply troubling experience for them.
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> [4] You told one of your friends the following morning that you had "punched and punched and punched" and that you had "wanted to stop but couldn't". You said that there was a voice telling you to "just punch, don't stop, just carry on". You told another person that "after a while you started enjoying it" and you "wanted to just keep punching and punching and punching him" because it gave you a "thrill". It is clear from the pathologist's evidence that you inflicted a minimum of eight blows to Mr Lees' head and a minimum of three blows to his neck.
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> [5] Mr Lees sustained a subdural haemorrhage and multiple fractures to the left and right side of his face which are likely to have caused significant internal bleeding. The pathologist considered that Mr Lees would have been

> unable to lift his head, probably because he was knocked unconscious. He would have swallowed and inhaled a great deal of blood and this, combined with the swelling caused by his injuries, would have obstructed his airways and ultimately prevented him from breathing. The pathologist considers that Mr Lees would have lived for at least 30 minutes after the attack, but it could have been longer.

The Judge's approach to sentencing

[5] There was no dispute that the mandatory sentence of life imprisonment was to be imposed. The focus at sentencing was on whether a minimum period of imprisonment of at least 17 years was required in terms of s 104 of the Sentencing Act 2002. The Crown submitted that Mr Lavemai's offending came within s 104 for one or more of the following reasons:

(a) There was an unlawful entry by Mr Lavemai into the victim's dwelling house with the intention of stealing property.

(b) The offending was committed in the course of another serious offence, namely robbery.

(c) The offending was particularly brutal and callous.

(d) The victim was particularly vulnerable.

[6] The sentencing notes do not record the minimum period of imprisonment sought by the Crown but the Crown's written submissions at sentencing show that the Crown suggested a minimum period of 18 years would be justified.

[7] The sentencing notes confirm that Mr Lavemai's then counsel, Ms Stoikoff, accepted the Crown's submission that his offending fell within s 104 because the victim was vulnerable and the offending was brutal. Gilbert J also recorded that Ms Stoikoff accepted it would not be manifestly unjust to impose a minimum period of 17 years imprisonment.

[8] While the Judge accepted that the victim was vulnerable, he did not consider he was a particularly vulnerable person. Nevertheless, the Judge accepted that

Mr Lavemai's offending came within s 104. His conclusions were expressed in these terms:[2]

> [17] … Mr Lees was a 55 year old man who weighed 102 kilograms. He received medication at about 11am which would have made him drowsy and he probably slept for most of the day. However, at the time you first attacked him, I would not characterise Mr Lees as a particularly vulnerable person. Once you had knocked him down, Mr Lees was defenceless and unable to offer any resistance to your continued punches to his head and neck. By then, he was clearly vulnerable, but I do not consider that this engages s 104 of the Act.
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> [18] Rather, I consider that this murder was committed with a high level of brutality and callousness because you continued to punch Mr Lees with the extreme force required to cause his extensive injuries while he lay unconscious and defenceless on the couch. Your attack was particularly brutal as is clear from the nature and extent of the injuries you inflicted against a defenceless victim. It was also callous. You did not do anything to assist Mr Lees even though you could see that he was struggling for breath. You told others that you had enjoyed punching him and had found it thrilling. That is why you persisted.

[9] Gilbert J agreed it would be wrong in the circumstances of the case to double count vulnerability and brutality as the Crown had acknowledged. However, he accepted that the murder was committed in the course of another serious offence, namely robbery and that this was a further factor bringing Mr Lavemai's offending within s 104.

[10] Gilbert J said at sentencing he had considered relevant authorities submitted to him by the Crown and by Mr Lavemai's counsel as to the appropriate minimum period of imprisonment on the basis that s 104 applied. The Judge did not refer to these cases in the body of his sentencing notes but did so in footnotes when the sentencing notes were completed and issued in written form. The Judge was satisfied the appropriate minimum period of imprisonment in Mr Lavemai's case was a term of 17 years. Gilbert J then concluded his sentencing remarks, expressing the view that a minimum period of 17 years imprisonment would not be manifestly unjust:[3]

> [22] Even if, contrary to my assessment, the appropriate minimum period of imprisonment would have been less than 17 years imprisonment without the operation of s 104 of the Act, I would still be obliged to impose a

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2 *R v Lavemai*, above n 1. Footnote omitted.
3 *R v Lavemai*, above n 1. Footnote omitted.

> minimum period of 17 years imprisonment unless this would be manifestly unjust. Your counsel accepts that it would not be manifestly unjust to impose a minimum period of imprisonment of 17 years in your case. I agree.

The affidavit evidence filed in this Court

[11] Mr Lavemai filed an affidavit in this Court raising a series of complaints about his lawyers Ms Stoikoff and Mr Retzlaff. In summary these were:

(a) Although he was expecting a long sentence and had been told it would be life imprisonment, he said Mr Retzlaff had told him the Judge would probably order him to serve 12 to 14 years minimum.

(b) He was surprised when the minimum period was fixed at 17 years. Ms Stoikoff had not consulted him before acknowledging to the Court at sentencing that a 17-year minimum term was appropriate.

(c) He accepted the Crown would not agree to a guilty plea to manslaughter but said he was never told it was possible he could plead guilty to murder with a different summary of facts. He did not know whether the prosecution would have agreed to a revised summary of facts but, given he had accepted what he had done at the outset, he considered a guilty plea to murder might have resulted in a minimum term of no more than 12 to 14 years. The possibility of a guilty plea on this footing had not been raised with him.

(d) Although the Judge had accepted he had punched the victim at least 11 times, a pathologist's report obtained after his appeal was lodged suggested it was possible the victim may only have been punched three times.

[12] Ms Stoikoff provided an affidavit in response to Mr Lavemai's affidavit. In summary she deposed:

(a) Mr Lavemai's instructions were that he delivered only three "drunken sloppy punches" to the victim.

(b) The pathologist called by the Crown at trial, Dr Garavan, confirmed that three punches could not have caused death. However, he had given evidence that at least 11 blunt force traumas were delivered to the victim's head and neck.

(c) The issue at trial was not about the number of blows but the number of blows delivered by Mr Lavemai. The defence theory was that after Mr Lavemai had inflicted the three punches he acknowledged, someone else was responsible for the victim's death by inflicting the further blows that caused his death. Dr Garavan's expert evidence on this topic therefore supported the defence theory.

(d) The number of punches inflicted by Mr Lavemai was the basis on which counsel had cross-examined the Crown witnesses and the basis on which she closed to the jury.

(e) Mr Lavemai had never indicated that he wished to plead guilty to murder on the basis of an amended summary of facts reflecting three rather than 11 punches. Rather, his instructions throughout were that he did not hit the victim hard and had no intention to kill him.

(f) Given Dr Garavan's evidence that three punches would not have caused the victim's death, the jury must either have accepted that Mr Lavemai had inflicted the 11 blows Dr Garavan had identified or rejected his evidence that three punches would not have caused death.

(g) There were multiple grounds to conclude that s 104 was patently engaged in Mr Lavemai's case: his unlawful presence in the victim's sleep out; the murder was committed in the course of another serious offence (robbery); and the victim's vulnerable state.

(h) Mr Lavemai had not provided any instructions as to his personal circumstances that would have rendered the imposition of the minimum term of imprisonment of 17 years manifestly unjust.

(i) She had not at any stage advised Mr Lavemai that an MPI of between 10 to 14 years was likely, or even possible. Mr Retzlaff had never communicated to her, or suggested, that he had advised Mr Lavemai he would probably receive a minimum term of 14 years or less.

The arguments on appeal

The number of punches

[13] Mr Ellis for Mr Lavemai submitted that the sentencing outcome might have been very different if the three-punch scenario had been accepted. Counsel referred to a report dated 22 December 2015 provided by a forensic pathologist, Dr Stuart Hamilton, after Mr Lavemai's appeal was filed. In that report, Dr Hamilton expressed the opinion that:

> It would seem at least possible that the distribution of injuries could be the result of three punches as described by Mr Lavemai.

[14] As to the timing of the injuries, Dr Hamilton's opinion was:

> The injuries would be consistent with all having occurred at the same time and during the incident in question. However, from a purely pathological view the possibility that some or all of the injuries occurred at a different time cannot be excluded.

[15] Counsel's submission leads nowhere for these reasons:

(a) Dr Hamilton's view about whether three punches could have caused the victim's death is no more than an untested theory obtained after trial.

(b) It is contradicted by Dr Garavan's unchallenged evidence at trial which was plainly accepted by both the jury and the Judge.

(c) Even if such evidence had been obtained prior to trial, it would have contradicted the defence theory of the case that someone else had inflicted the additional blows after the three punches admitted by Mr Lavemai.

(d) It is inconsistent with the evidence at trial that Mr Lavemai had told one of his friends the day after the killing that he had "punched and punched and punched" and that he had "wanted to stop but couldn't" and that he wanted to keep punching because it gave him a "thrill".

(e) The abandonment by Mr Lavemai of his conviction appeal means that his sentence appeal must be determined on the footing that he has been found guilty of murder and theft on the basis of the facts found by the sentencing Judge. In short, it is simply not possible to advance another version of the facts for the purposes of his sentence appeal. The Judge is entitled under s 24(1)(b) of the Sentencing Act to accept as proved any fact disclosed by the evidence at trial.

Guilty plea on a different summary of facts

[16] Counsel's submission that the Crown might have been willing to accept a guilty plea to murder on the basis of a different summary of facts fails for at least two main reasons. First, after the Crown had rejected the approach for a guilty plea to manslaughter, Mr Lavemai's instructions to his lawyers were to defend the murder charge. Second, it is purely speculative to suggest that the Crown might have been willing to amend the summary of facts to the effect that the victim's death resulted from three punches rather than 11. On the basis of Dr Garavan's evidence, it would have been quite improper for the Crown to have agreed to a summary of facts to that effect since there was no evidence to the contrary at the time of trial.

[17] Mr Ellis also suggested that a guilty plea could have been entered to the charge of murder with Mr Lavemai seeking a disputed facts hearing. Again, this possibility would be excluded for the same reasons we have just discussed. On the evidence, the Court could not have accepted that three punches would have caused the victim's death.

The Judge's failure to ask the jury to identify the legal basis for the murder conviction

[18] At trial, the Crown did not rely on murder in terms of s 167(a) of the Crimes Act 1961. Rather, the Crown relied on the victim's death arising during the course of a robbery in terms of s 168 of the Crimes Act or alternatively due to recklessness under s 167(b). Mr Ellis submitted that the Judge ought to have asked the jury to identify whether their verdict was founded upon s 128 or s 167(b). We accept it may sometimes be helpful to a sentencing Judge to be aware of the legal and factual basis upon which a murder conviction occurs. This is because it may be relevant to determining the level of culpability for sentencing purposes.

[19] However, a Judge is not obliged to seek an indication to this effect and, in any event, on the facts of this case, a conviction for murder on either basis would not have been material for sentencing purposes. Here, the Judge had the benefit of hearing all the evidence adduced at trial and made the factual findings we have identified at [4] above. His sentencing was based on those factual findings. For sentencing purposes, it was therefore immaterial whether the jury's verdict was reached under s 168 or s 167(b). Both would clearly have been open on the facts.

Counsel's acceptance that a minimum term of 17 years was appropriate

[20] Mr Ellis was critical of Ms Stoikoff's acceptance for sentencing purposes that a minimum term of 17 years imprisonment was appropriate. Counsel submitted there was no evidence that Ms Stoikoff had informed Mr Lavemai in advance that this was her intention and she had not obtained his instructions to make this concession. Mr Lavemai understood he would be sentenced to life imprisonment but on the basis of Mr Retzlaff's advice that he would likely receive a minimum term of 12 to 14 years. Mr Retzlaff did not file an affidavit denying this.

[21] Neither counsel sought to cross-examine Mr Lavemai or Ms Stoikoff on the content of their affidavits filed in this Court. The information we have is therefore limited to that disclosed in the affidavits. But, assuming for the purposes of the appeal that Mr Lavemai's evidence on these points is true, the real question is whether there are any grounds to disturb the sentence. That depends on two issues.

First, whether s 104 of the Sentencing Act was engaged in the circumstances of the case. Second, whether there are any circumstances that would render it manifestly unjust to impose the minimum mandatory term of 17 years imprisonment.

[22] Addressing the first issue, we have no doubt that the Judge was right to conclude for the reasons he gave that s 104 was clearly engaged. This was a particularly brutal and callous murder carried out in the course of a robbery. This conclusion was clear as the Judge said from the nature and extent of the injuries inflicted and Mr Lavemai's failure to do anything to assist the victim even though he could see he was struggling for breath. His admission to others that he enjoyed punching the victim and could not stop is a chilling feature of the offending. Although the Judge did not find that the victim was a particularly vulnerable person, we are satisfied that conclusion would have been open to him. It follows that Ms Stoikoff's acceptance that s 104 was engaged was entirely appropriate even if, as Mr Corlett QC accepted for the Crown, other counsel might have been inclined to argue the point.

[23] As to the second issue, there were no circumstances relating to the offence or the offender which might have rendered the imposition of the 17-year minimum term manifestly unjust. The appellant was aged 29 years at the date of sentencing. He had a difficult upbringing but the probation officer reported to the Court that he did not suffer from any physical or mental health issues. Although he had relatively few previous convictions, the probation officer assessed him as having a medium to high risk of re-offending because of his abuse of drugs, including alcohol and methamphetamine.

[24] On appeal, Mr Ellis has not advanced any grounds upon which a finding of manifest injustice might have been founded. Rather, he drew our attention to a number of cases where minimum terms of less than 17 years had been imposed.[4] He submitted a minimum term of 13 to 14 years would be appropriate.

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[4] *Boyes-Warren v R* [2010] NZCA 395; *R v McSweeney* [2007] NZCA 147; *Lane v R* [2010] NZCA 245; *R v Kinghorn* [2013] NZHC 3216; *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446; *R v Smail* [2007] 1 NZLR 411 (CA); *R v Gottermeyer* [2014] NZCA 205; *Manukau v R* [2011] NZCA 108; and *R v Slade* [2005] 2 NZLR 526 (CA).

[25] We observe that the cases to which Mr Ellis referred have all involved features not present in the present case. The cases have recognised that features such as a guilty plea, youth, and mental health issues may justify a reduction in the mandatory minimum term of 17 years on the grounds of manifest injustice. No features of that type are present in this case.

[26] On the other hand, Mr Corlett drew our attention to several cases in which minimum terms of 17 years have been upheld in similar circumstances. Two of these involved the unlawful entry into a dwelling house. In *R v Shepherd*, this Court upheld a minimum term of 17 years where the offender had entered a house unlawfully and thrown the victim in a river.[5] In *R v Tuporo*, while intoxicated, Mr Tuporo had unlawfully entered a house where a party was going on.[6] He struck the victim with a wrench and stabbed him with a knife until he died. This Court upheld a minimum term of 17 years imposed under s 104.

[27] Mr Ellis also submitted the Judge had not followed the two-step process for sentencing in s 104 cases discussed in *R v Williams*.[7] We do not accept that submission. The Judge turned his mind to the issue of the sentence that would have been appropriate in the absence of s 104 and concluded the issue did not need to be explored in the circumstances of the case. We agree there was nothing in the circumstances of the offence or the offending or in the arguments advanced at sentencing to warrant further analysis.

[28] We are satisfied the sentence imposed by the Judge was appropriate and has certainly not been shown to be manifestly excessive or wrong in principle.[8]

The remaining issues

[29] Mr Ellis raised several other issues. We do not intend to discuss these at any length since they have no bearing on the outcome of this appeal.

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5 *R v Shepherd* [2008] NZCA 17.
6 *R v Tuporo* [2008] NZCA 22.
7 *R v Williams* [2005] 2 NZLR 506 (CA).
8 For the purposes of this appeal, s 385 of the Crimes Act 1961 applies.

[30] First, Mr Ellis submitted the Judge had failed to provide adequate reasons for the sentence imposed. It was submitted there was a breach of s 31 of the Sentencing Act in that respect. Counsel referred to this Court's decision in *R v D* where, in the context of a sentence of preventive detention, this Court said the appellant was entitled to know in some detail why the sentence was being imposed.[9] Mr Ellis further submitted that the Judge was required to pronounce his sentence in public and that it was a breach of s 341 of the Criminal Procedure Act 2011 to include relevant authorities in a footnote rather than referring to them in Court during sentencing.

[31] We accept Mr Corlett's submission that the Judge gave a fully reasoned decision. In particular, he identified clearly the basis upon which he considered s 104 was engaged. There was no need to go further to give reasons why it was not manifestly unjust to impose the mandatory minimum term of 17 years. That was because Ms Stoikoff had conceded that a 17-year minimum was appropriate and because there were no circumstances advanced which could have supported a submission based on manifest injustice.

[32] As to the use of footnotes, we accept that, in terms of s 341(3) of the Criminal Procedure Act, a judgment (including a sentence) is to be delivered orally in open court. There may be room for argument about the extent of the permissible use of footnotes in the sentencing context, but it is unnecessary for us to enter this debate since we are satisfied the judgment itself set out fully and properly all relevant reasons for the decision.

[33] The final point raised by Mr Ellis was that the indictment or charge sheet should have alerted Mr Lavemai to the risk of a minimum term of imprisonment being imposed under s 104 of the Sentencing Act. Again, it is unnecessary for us to offer any view on this point since it is clear on Mr Lavemai's own evidence that he knew he was facing a maximum term of life imprisonment and that a minimum term of imprisonment in excess of 10 years could be imposed.

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9 *R v D* [2003] 1 NZLR 41 (CA) at [60].

[34] We note there is nothing on the face of s 24(a) of the New Zealand Bill of Rights Act 1990 and s 17(4) of the Criminal Procedure Act to suggest the existence of an obligation to disclose details of the sentences available for the crimes charged. These provisions refer respectively to the detail of the nature and cause of the charge and to an obligation to provide sufficient particulars to fully and fairly inform the defendant of the substance of the offence alleged.

Result

[35] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent