



five years' imprisonment with a minimum period of two years and six months' imprisonment. A third defendant, Stoyan Militch, was sentenced to eight years and four months with a minimum term of five years' imprisonment. There was no uplift for the perverting the course of justice charge, all three defendants receiving a concurrent sentence of one years' imprisonment.

[2] Before examining the facts in more detail, we set out a broad outline of events. We take these largely from the sentencing remarks of Ronald Young J,<sup>2</sup> who had the benefit of hearing a number of witnesses for the first three days of hearing. After three days there was an amendment to the indictment from murder to manslaughter, and pleas of guilty were entered by all three defendants to those new charges.

### **Background**

[3] The sequence of events that led to Michael Valentine's death was initiated by a belief on the part of Mr Zimmerman that persons associated with Mr Valentine had urinated on Mr Zimmerman's partner's toothbrush. Mr Zimmerman and Mr Windley had been at a family barbeque in Levin and had discussed this trivial incident. Mr Zimmerman became angry about it. Mr Windley also had a grudge against Mr Valentine's fiancé, Elizabeth Ham. She had taken a hard drive belonging to him without his permission because he had earlier taken her hard drive and broken it and he had refused to replace it. The Judge commented that at this point Mr Zimmerman seemed to be particularly angry.<sup>3</sup>

[4] Mr Zimmerman and Mr Windley initially confronted a man who was said to have urinated on the toothbrush, but he denied doing so. Mr Zimmerman and Mr Windley then decided they would have it out with Mr Valentine and Ms Ham. Someone present at that initial confrontation became sufficiently concerned about their conduct to send a text warning to Mr Valentine that they were coming over to the house. The text message warning to Mr Valentine recorded that "Zimmerman coming out home with braden 'parantly he want a scrap watch out man".

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<sup>2</sup> *R v Windley*, above n 1.

<sup>3</sup> At [3].

[5] When Mr Valentine got that text warning he telephoned Mr Zimmerman. The two proceeded to have an argument on the telephone, abusing and threatening each other. Mr Zimmerman and Mr Windley decided to go to Mr Valentine's house. They had consumed a considerable amount of alcohol. Mr Zimmerman contacted Mr Militch, and he agreed to assist them. Mr Militch agreed to assist with kicking "some arse" and told Mr Zimmerman that he "had his back". The three then discussed taking weapons to Mr Valentine's house and agreed that they should do so. Mr Zimmerman went to his home and tried to take a small knife or a screwdriver from the address, but his partner told him not to do so. However, Mr Militch obtained at least two knives.

[6] The knife that inflicted the fatal blow was a white-handled knife. There was no finding by the Judge as to who owned or obtained that knife and the Judge did not sentence on the basis that any one of the three was responsible for bringing it along. Two pitbull dogs and a ceramic sharpening steel were also brought along.

[7] The three travelled to Mr Valentine's address in Mr Zimmerman's car, which Mr Militch drove. There was evidence that they skidded to a stop when they arrived, and the three got out of the car and immediately went towards Mr Valentine. There was then an exchange which the Judge described as "heated". However, the Judge observed that Mr Valentine "did not react violently" and the evidence of the witnesses was that the initial exchange between Mr Zimmerman and Mr Valentine was not confrontational. Mr Zimmerman was described as "pretty calm", but Mr Windley was described as "really aggressive".

[8] Mr Militch struck Mr Valentine with the sharpening steel hitting him on the top of the shoulder. The steel shattered. Mr Militch then moved away holding the white-handled knife.

[9] Mr Windley then began abusing Ms Ham and threatening her. Mr Valentine heard the threats and pushed Mr Windley away. Mr Windley stumbled off the deck and Mr Valentine began wrestling with him on the ground. Mr Valentine was getting the better of the fight which moved towards where Mr Militch was standing holding

the white-handled knife. Mr Zimmerman in the meantime was not involved in the fight, but was standing nearby watching it.

[10] At some stage Mr Militch intervened. There was an exchange of blows and Mr Militch stabbed Mr Valentine in the back of his right hand and then fatally in the chest, puncturing his chest wall, lung and right pulmonary vein. Mr Valentine collapsed against Mr Militch. Mr Zimmerman grabbed hold of him and lowered him to the ground with Mr Militch.

[11] Messers Zimmerman, Windley and Militch did not try to help Mr Valentine who lay on the ground bleeding profusely. They were focussed on leaving. Mr Zimmerman made a statement to the others that they should grab the white-handled knife so that no evidence would be left. The three drove away in Mr Zimmerman's car taking the white-handled knife with them. Two other knives were left behind at the scene. As they drove they threw the white-handled knife out of the vehicle. This was the subject of the conspiracy to obstruct justice charge. When they got home they showered and washed their clothes and made no effort to contact the police.

### **Grounds of appeal**

[12] Mr Winter, on behalf of Mr Zimmerman, submitted that the starting point of eight years' imprisonment was manifestly excessive in the circumstances of Mr Zimmerman's case, principally because the Judge erred in assessing the relative culpability of Mr Zimmerman as against that of Mr Windley. He argued that save for Mr Zimmerman's comments about removing the knife shortly before the group left, there was an evidential foundation for an argument that Mr Zimmerman had withdrawn from the attack. He relied in particular on the quiet nature of the initial discussion between Mr Zimmerman and Mr Valentine. Mr Winter disputed the Judge's suggestion that Mr Zimmerman was "looking for a physical confrontation".<sup>4</sup>

[13] Mr Winter also relied on evidence that Mr Zimmerman said words to Mr Windley in the course of the fight to the effect of "get him off" or "get off him

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<sup>4</sup> At [30].

Mike”. He submitted that all three of the defendants had formed a common intention to go to Mr Valentine’s address and inflict some injury on him, that all three were involved in planning that, and without Mr Windley’s escalation of the situation the homicide may well not have occurred.

[14] It is a principle of sentencing that it is generally desirable that there be consistency of sentencing levels between similar offenders committing similar offences in similar circumstances.<sup>5</sup> However, a difference in the sentences imposed on co-offenders must be “unjustifiable and gross” and be sufficiently significant “to bring the administration of justice into disrepute” before the Court will make an adjustment on the grounds of disparity.<sup>6</sup> The threshold for adjustment was described in *R v Lawson* this way:<sup>7</sup>

It is not merely whether the offender thinks that he has been unfairly treated but whether there is a real justification for that grievance; whether a reasonably minded independent observer aware of all the circumstances of the offence and of the offenders would think something had gone wrong with the administration of justice.

## **Decision**

[15] Ronald Young J summed up Mr Zimmerman’s involvement in this way:<sup>8</sup>

As far as you are concerned Mr Zimmerman, you have significant responsibility for beginning these events, planning them, gathering the people and taking them there. You were looking for a physical confrontation. You knew knives had been taken and you were prepared to invade Mr Valentine’s property. You were primarily responsible for the three of you being present at Mr Valentine’s that day.

I accept you were not significantly involved at the scene but the events would simply not have occurred if not for your involvement. I consider a proper starting point for you is eight years’ imprisonment. I accept that you have remorse and you pleaded guilty during trial. I deduct 12 months.

[16] He went on to say that he regarded Mr Windley as the least culpable, being not particularly involved in the planning of events, although he was mainly responsible for “upping the level of aggravation”.<sup>9</sup> He did not use a knife.

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<sup>5</sup> Sentencing Act 2002, s 8(e).

<sup>6</sup> *R v Lawson* [1982] 2 NZLR 219 (CA) at 222–223.

<sup>7</sup> At 223.

<sup>8</sup> *R v Windley*, above n 1, at [30] and [31].

<sup>9</sup> At [33].

[17] The Judge was in a good position to make this assessment of relative culpability, given that he had heard three days of evidence and in particular the evidence of the main eye witnesses, apart from the defendants themselves. The evidence heard by the Judge related primarily to the fight and events immediately thereafter, rather than events prior to the altercation. In regard to those earlier events, the Judge had before him the summary of facts. In our assessment his conclusions were consistent with the evidence and the summary of facts. It is clear that Mr Zimmerman set up the confrontation. The following factors can be highlighted:

- (a) Mr Zimmerman was the person who initially became angry at the persons associated with the toothbrush incident. The text sent from the party shows him to be initiating a confrontation.
- (b) Mr Zimmerman contacted Mr Militch and arranged for him to join him and Mr Windley.
- (c) It was Mr Zimmerman's car that was used.
- (d) The parties stopped at Mr Zimmerman's house on the way to get weapons (although because of his partner's intervention none were taken by him).
- (e) When the fighting broke out Mr Zimmerman stayed within metres of the fighting parties.
- (f) Mr Zimmerman was no more than a metre or two away at the time Mr Militch became involved with the knife.
- (g) Although Mr Zimmerman may have made a statement at some stage suggesting that the parties back off the altercation, he made no move to physically intervene.
- (h) Following the infliction of the fatal blow Mr Zimmerman helped remove Mr Valentine who had slumped over Mr Militch.

- (i) Mr Zimmerman appeared to take charge of matters when it came to fleeing the scene, instructing his co-defendants to grab the knife so that no evidence was left.

[18] In an overall assessment of culpability it is clear that Mr Militch, who had control of the knife throughout the visit and used it to inflict the fatal blow, was the most culpable. However, on the facts as we have outlined them the Judge was clearly entitled to reach the conclusion that Mr Zimmerman had organised the three of them to go to Mr Valentine's home armed with weapons, intent on some sort of confrontation, where the infliction of violence was at least a possibility. Further, his continued proximity and lack of positive action to stop matters escalating meant that there was no withdrawal. After the infliction of the fatal wound he continued his management of the confrontation by directing the others get the knife before they departed.

[19] While Mr Windley had significant culpability in the sense that he had been more aggressive to Mr Valentine during the physical confrontation and fighting him, he did not, as the Judge observed, plan the events. He did not stab Mr Valentine. It was Mr Zimmerman who can be seen as having been effectively in charge of an attack bearing knives that led to a homicide, and he must bear a greater burden of responsibility.

[20] Before us Mr Winter did not press his written argument that, putting consistency to one side, a starting point of eight years' imprisonment on the manslaughter count was manifestly excessive. Given the senseless and reckless nature of the confrontation, and the tragic consequences, that sentence was well within the range.

## **Result**

[21] The appeal against sentence is dismissed.

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