

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

CRI 2009 078 0809

QUEEN

v

GARY LAWRENCE MCKINLEY

Hearing: 23 October 2009

Counsel: M W Snape for the Crown
P Paino for the Prisoner

Sentencing: 23 October 2009

SENTENCING NOTES OF MILLER J

[1] Mr McKinley, you appear for sentence on one charge of causing grievous bodily harm with intent to cause grievous bodily harm.

The facts

[2] On Boxing Day 2008 you were serving a sentence of life imprisonment at Rimutaka Prison. You had begun that sentence in 1986, and by 2008 you were housed in the self-care unit. As its name suggests, that is an environment in which prisoners live when they are close to release or their security classification is low.

[3] You had formed a deep attachment to a cat which frequented the self-care unit. That attachment appears to have become particularly important to you after a woman to whom you had been close for some 12 years, and who had supported you in prison, had died of cancer in August 2008. It seems clear that you were very much affected by her death.

[4] The victim of the present offence was also an inmate in the self-care unit. It appears that you had complained to prison staff that he had been bullying you over a period of some months. The bullying was said to involve belittling and cruel comments made about the death of your female friend, and threats to kill the cat. He claimed to have killed a cat of his own in a particularly cruel manner. I have read your letter to me in which you detail these matters. The complaints to prison staff were not acted upon because you were unwilling to formalise them, concerned that you did not want to be seen as a 'nark'.

[5] On the day of the offence, the victim was sitting in the lounge area and the cat came in through the door. The victim said to have scared the cat away. You retrieved it and placed it in your bedroom, apparently to protect it, and then confronted the victim, demanding to know why he had scared the animal. You picked up a knife from the kitchen bench and asked the victim "do you want me to stab you". He continued to watch TV, and you approached him from behind, lunging at him with the knife. He suffered two stab wounds to the neck and another to the upper chest. A second inmate intervened, and the victim fled the unit. It also appears that the knife broke. You made some attempt to hide part of it. When asked what had happened, you replied "I will do anything to protect the cat, it's all I've got". You also told the prison staff that you tried to kill the victim. I accept the Crown's characterisation of the attack as a frenzied one, in which it is fortunate that the victim survived.

[6] There is no victim impact statement. I am told that the victim has suffered no lasting injuries.

[7] You pleaded guilty, on 9 June 2009. You had been charged initially with attempted murder, and indicated that you were prepared to plead guilty to the present

charge in March. The information was laid in April. In the circumstances I will treat your plea as having been entered at the earliest reasonable opportunity.

Previous relevant convictions

[8] Your earliest relevant conviction was in 1981, for aggravated assault. In the same year, you had a series of 12 convictions for burglary, theft, or entering with intent.

[9] In September 1986 you committed another burglary and two offences of wounding with intent to cause grievous bodily harm. You were not apprehended and convicted in respect of these matters until 1991.

[10] In November 1986 you committed the rape and murder for which you are presently serving a life sentence.

[11] In September 2003 you were sentenced to six months imprisonment for escaping custody.

[12] Accordingly, you have five previous convictions for serious violence, involving three incidents in all.

[13] You are now aged 48.

Health reports

[14] Notwithstanding that you are serving a life sentence, the Crown has sought preventive detention. The law requires that two health reports be prepared. The first report was written by Elizabeth Waddington, a registered psychologist with Community Probation and Psychological Services, which is a branch of the Corrections Department. She interviewed you at length and reviewed your file and the circumstances of the previous offences. She also examined previous psychological reports. You co-operated with her.

[15] I observe that Mr Paino suggested in his written submissions that had he been consulted he would have sought an independent psychologist in lieu of Ms Waddington. The appointment of health assessors under s 88 is not part of an adversarial process. They are not Crown witnesses. Rather, the Court itself commissions the reports. It is for the Judge to direct such reports as he or she thinks fit. If counsel have suggestions to make about the appropriate Court-appointed assessors, they should be made when the offender is remanded for sentence. Absent a specific direction from a Judge, the registry usually seeks a psychological report from Community Probation and Psychological Services and a psychiatric report from another provider, usually a District Health Board. That is done because the Court benefits from the different perspectives that those disciplines bring to the risk assessment. Such reports do not lack independence, contrary to counsel's submission, merely because the health professionals who prepare them are employed by an agency of the state. It is of course open to the Crown and the offender to commission their own reports; the legislation does not limit the number that the Court may consider.

[16] In her helpful and not unsympathetic report Ms Waddington recounts an unsatisfactory family background, in which your parents, particularly your mother, were uninterested and cold. By aged six you had developed behavioural problems such as stealing and running away from home. You say that as a child you yourself were a victim of both bullying and sexual abuse. Even when you left school you were subjected to bullying by an employer and one of your brothers.

[17] She reviews your previous offences. It appears that you committed burglaries for money and for the pleasure of risk taking, especially when dwellings were occupied at night. The 1981 conviction involved breaking into a house and physically assaulting a woman, who you punched in the face and knocked to the ground before fleeing. The September 1986 offences similarly involved a break-in, in which you assaulted the female occupant of a house. You strangled her to the point of unconsciousness and removed her clothing with a view to raping her, refraining only because you found she was menstruating. You left her unconscious in the house, with a child.

[18] The rape and murder two months later displayed very similar features. The victim was jogging through a New Plymouth park, in which you had been living rough, when you attacked her, strangling her to unconsciousness and raping her. She was found later the same day but died from hypoxia resulting from the strangulation.

[19] You told Ms Waddington that in the early years of your sentence there were incidents involving aggression towards other inmates, particularly those convicted of abusing children. The escaping custody offence occurred in 2003, when you were working outside the secure perimeter of Wanganui Prison. You were found about eight kilometres away, trying to hitch-hike.

[20] So far as the present offence is concerned, Ms Waddington found your account largely consistent with the summary of facts, but observed that you placed great emphasis on the victim's role in the assault. She accepts that your fears for the safety of the cat were well-founded.

[21] Turning to your prison history, Ms Waddington notes that you have progressed to self-care units, and there appeared to make positive progress. Your behaviour was appropriate, and you were regarded by staff as having a positive attitude. You kept yourself busy by creating and tending to a large vegetable garden and donating fresh produce to local charities. It is evident that you gained some real satisfaction from the knowledge that you were helping others. You had gained the privilege of working outside the prison boundary in the joinery and weekly shopping trips to Upper Hutt.

[22] You have some history of treatment in prison. Although you found it difficult to engage with psychological treatment at first, you developed insight over time into factors that contribute to your behaviour, and you have been motivated and engaged. There is considerable work yet to be completed with respect to your sexual offending, but it is noted that you are more open when discussing violence. Apart from psychological treatment, you have engaged in other group and individual treatment including the violence prevention programme. You expressed regret that you had lost control, lamenting that it meant loss of privileges that you had worked hard to gain.

[23] Ms Waddington assessed your reoffending risk using various actuarial measures. On the automated sexual recidivism scale you were assessed as being in the medium to low risk category. You have a moderate to low risk of reimprisonment on the RoC*RoI scale. However the violence risk scale indicates that there are factors consistent with violent re-offending; violent lifestyle, criminal attitudes and use of interpersonal aggression, limited emotional control, use of violence during your imprisonment, history of weapon use, limited insight and community support, history of impulsivity, and cognitive distortions. The psychopathy checklist screening version, which she also applied, is consistent with a high risk of re-offending. Overall, she concludes that you are at high to very high risk of serious violent re-offending while in the community, probably in response to your perception of being wronged. Your risk of sexual re-offending is assessed as moderate to low. She recommends that you resume treatment.

[24] I record at this point that you now have the support of another woman with whom you hope to establish a life once you are released. She is a social worker. She has written to me. She feels that you have been let down by Corrections, which ought to have dealt with your complaints of bullying. I observe that she is not in Court today. I direct that the Registrar is to send her a copy of these sentencing notes. I have also considered a letter from a man who is willing to support you.

[25] The second report was prepared by Dr Nic Judson, a consultant psychiatrist. He also interviewed you and read your previous history and medical files. Dr Judson records that documents from Lake Alice hospital, to which you were referred in 1978, include considerable detail of your family background. Your family was well known to welfare agencies because of emotional deprivation in the home, and your attitude to your mother, now deceased, is one of marked rejection and anger. To Dr Judson you described a period of intense grief following the death of the woman whom you describe as your partner, and you experienced a loss of motivation. It was in these circumstances that you developed your deep attachment to the cat.

[26] Dr Judson characterises you as a rather unusual man. You present as someone who has suffered emotional deprivation and has considerable difficulty in sustaining meaningful relationships. You have a need to treat relationships as more

fulfilling and intense than they are in reality. He accepts that you appear to have been suffering significant grief reaction at the time of the present attack. Your history indicates that you are capable of extreme violence in response to situations where you feel emotionally abandoned. Your serious offending in 1986 appears to have occurred in circumstances where you felt yourself abandoned by your girlfriend of some years, and were destitute. This is not due to a psychiatric disorder, but your history and presentation do suggest a significant personality disorder, which is not likely to be susceptible to real change. It is said that your efforts should be focused on assisting you to develop the capacity to form more appropriate relationships and to invest those relationships that you do have with less intensity and dependence.

[27] It is because of those conclusions that Dr Judson reached that I have directed that the sentencing notes be sent to the woman who is now supporting you.

[28] I find that the reports and the facts together present a complex picture. You are capable of extreme violence when in emotional distress, and because of your need to read too much into your relationships you are at risk of experiencing such emotion. Your present risk of violent reoffending must be considered high for that reason. At the same time, Ms Waddington's report is rather more optimistic than that of Dr Judson. She finds that you have responded positively to treatment over a period of some years, and you appear to have prospects of continuing to do so. You have earned that position of trust in the prison environment, and your behaviour in the self-care unit was appropriate. You were, I accept, provoked by the victim's callous and bullying behaviour toward you.

Preventive detention

[29] There is no dispute that you are eligible for preventive detention, the purpose of which is not to punish you but to protect the community from those who pose a significant and ongoing risk to its safety.

[30] The question that the Sentencing Act poses is whether I am satisfied that you are likely to commit another qualifying violent offence if released at the sentence expiry date of any determinate sentence that I might impose. The law requires that I

take into account any pattern of serious offending, the seriousness of the harm that your offending has caused to the community, information indicating a tendency to commit serious crimes in future, the absence or failure of your efforts to address the causes of your offending, and the principle that a lengthy determinate sentence is preferable if it provides adequate protection for society.

The determinate sentence

[31] It is necessary to begin by considering the length of the appropriate determinate sentence, since the assessment of risk must be carried out as at the expiry date of that sentence.

[32] I agree with both counsel that your offending falls into a category that attracts a starting point of 5-10 years imprisonment.¹ That is so because it was characterised by several aggravating factors: use of a weapon, serious injury, and extreme violence. Contrary to Mr Snape's submissions, I do not accept that there was any significant element of premeditation, nor do I consider that the victim was particularly vulnerable. Certainly there was no pre-existing vulnerability. I observe too that there was no lasting injury. An allowance is not normally made for the victim's provocative conduct in such cases, but I do propose to make some allowance here. Although your reaction was out of all proportion to what he did, the victim taunted you and threatened the cat over a period of time, causing you considerable distress, while you had limited opportunity to escape his behaviour in the prison environment. That provocation was a real cause of the violence.

[33] Having regard to comparable cases, which I will list in my sentencing notes, I will adopt a starting point of five years imprisonment.² That includes a deduction of one year for the provocation.

[34] To that starting point there would have to be an uplift for your previous convictions for serious violence, including sexual violence. It is true that there has

¹ *R v Taueki* [2005] 3 NZLR 372

² *R v Konui* [2008] NZCA 401, *R v Moa* HC AK CRI-2008-92-1318 23 April 2009, *R v Takiaho* HC ROT CRI-2005-044-114 12 December 2005

been a long gap since your last such offence, but the increase must be significant because those convictions reflect the same underlying characteristics and propensity for violence that you manifested on this occasion. As you have acknowledged, yourself, you ought to have known better. I would fix the uplift at one year.

[35] In mitigation, you would be entitled to credit of about 33% for your guilty plea. You acknowledged at the time that you should not have done it, and you have written a letter to me expressing remorse. I view all that with scepticism because I think the remorse you feel is for the impact of your actions upon yourself. The discount for the guilty plea makes adequate allowance for remorse.

[36] There are no other mitigating factors. I am not prepared to make an additional allowance for the fact that you admitted what you had done; denying it would have been pointless.

[37] The end sentence would be four years imprisonment.

Risk of reoffending at expiry of determinate sentence

[38] The next question is whether you are likely to commit further qualifying violent offences if released at the expiry of the determinate sentence. This calls for judgement about the risk that you will present in the future, after imprisonment and after treatment within the prison system.³

[39] I find that you are likely to commit further qualifying violent offences if released now. I accept that the risk is to some extent capable of being addressed by continued treatment. You have also demonstrated that you have the ability and commitment to respond to treatment. The present offences, as I have said, were the result of some provocation. However, I conclude, by a small margin, that you will remain likely to offend violently at the expiry of a determinate sentence. That is so because you are at risk of getting into situations where you react violently to perceived insults or injustices, and the violence that you employ is extreme. That is attributable to a deep-seated personality disorder which is likely to endure.

Treatment may mitigate that risk by teaching you to avoid situations where you are a danger to others, but a risk will remain.

Preventive detention: decision

[40] That is not the end of the inquiry, however. The Court has a discretion whether to impose preventive detention. As I have said, I must also have regard to the principle that a lengthy determinate sentence is preferable if it sufficiently protects the community.

[41] It was held under former legislation that the fact that a prisoner is already serving a sentence of life imprisonment, under which he has no right to release, does not preclude preventive detention.⁴ The Court of Appeal reasoned that every offence requires an appropriate response although the sentence may have no practical effect. Naturally I accept the general principle that every crime requires an appropriate sentence. Further, it might be argued that although the assessment of risk must be undertaken at the expiry of a determinate sentence, you become eligible for parole after serving a minimum period which might differ from the parole eligibility date under preventive detention.

[42] However, it does not follow that preventive detention is the appropriate sentence in your case. Under the Sentencing Act preventive detention serves a protective purpose. The question is whether the prisoner is likely to commit further qualifying offences “if ... released” at the expiry of any determinate sentence the Court might impose. In other words, the legislation assumes a counterfactual under which, but for preventive detention, the prisoner would be released into the community at the sentence expiry date, whatever the risk he might pose to the community at that time. The counterfactual changes where the prisoner is still serving a life sentence at the expiry of any determinate sentence. That is so because the Parole Board may deny parole on the same ground – risk of reoffending – that would ensure his continued detention had he been sentenced to preventive

³*R v Leitch* 1 NZLR 420, 428

⁴*R v Mackrell* (1998) 16 CRNZ 1

detention.⁵ The Sentencing Act focuses on the expiry date of the determinate sentence rather than the parole eligibility date, presumably because the legislature assumed, having regard to the criteria for parole, that a prisoner will be denied parole under a determinate sentence so long as he remains likely to commit further qualifying offences.

[43] What all of this means for you, Mr McKinley, is that if you remain likely to commit offences of serious violence four years in the future, the Parole Board may decide that you must remain in custody.

[44] I have decided not to sentence you to preventive detention, for three reasons. The first is the combination of the circumstances of the offence and your acceptance of responsibility as evidenced by your guilty plea. That makes a determinate sentence an appropriate response. It is relevant that the appropriate determinate sentence is less than the minimum period of five years that I would have to impose if I sentenced you to preventive detention. I say that because the minimum period is fixed by reference to the gravity of the offence, as well as the need to protect the community.⁶ The second reason is that the risk assessment is finely balanced. You have responded well to treatment, and it may be that with continued treatment your risk can be reduced to acceptable levels. The third reason is that, as I have just explained, because you are presently serving a life sentence, preventive detention is not necessary to protect the community should you continue to pose a risk of serious violent re-offending at the end of a determinate sentence.

Sentence

[45] Mr McKinley, your sentence is four years imprisonment.

⁵ Sections 7 and 28(2) Parole Act 2002

⁶ Section 89(2)

Minimum period of imprisonment

[46] Counsel agreed that a minimum period beyond that applicable under the Parole Act may be appropriate. I accept that a minimum period does serve a useful purpose in this case. It affects the date on which you would otherwise be eligible for parole under the determinate sentence, and I will assume that you will be eligible to seek parole under the life sentence at the same time.

[47] An extended minimum period is appropriate because the offence does call for accountability and deterrence.⁷ These are important considerations when such an offence is committed in a prison environment, especially one in which prisoners have been placed in a position of trust. I have already mentioned the aggravating factors relating to the offence itself, such as your use of a weapon, and your previous convictions. I agree with Mr Snape that there is an absence of genuine remorse. Your reaction was out of all proportion to the victim's behaviour. Making an allowance for the element of provocation, I set the minimum period at 50% of the sentence.

[48] Stand down.

Miller J

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⁷ Section 86(2)