

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

CRI 2008-025-3614

QUEEN

v

LEON DAVID FALLOW

Hearing: 14 December 2009

Counsel: M-J Thomas and M A Mika for the Crown
J M Ablett-Kerr QC and L I Macris for the Prisoner

Sentencing: 14 December 2009

SENTENCING NOTES OF MILLER J

[1] Mr Fallow, you appear today for sentence for the manslaughter of Darnell Leslie on 27 September 2008.

The facts

[2] I will begin by outlining the facts, about which there was much dispute at trial. What I am going to record is the view that I take of the evidence. It is consistent with the verdict of the jury, which found you not guilty of murder but guilty of manslaughter.

[3] Until August 2008 you had been in a long term relationship with Gemma Adam. There are two surviving children of that relationship. The family went through many trials, including the death of a baby and the very serious ill health of your oldest child, who has undergone repeated heart surgery in Auckland. Ms Adam coped with these traumas because, as she put it in evidence, she had to. You were not able to cope. You became a regular user of cannabis, contrary to her wishes, and in March 2008 you were violent towards her, albeit the offence was a minor one of its kind. When you were in custody as a result of that incident you attempted suicide. You were emotionally dependant on Ms Adam; for example, she managed your finances and took you to appointments even after you had separated.

[4] It is I think important to record these matters, because on the one hand you have quite properly highlighted the enormous stress that your family had been under, while on the other you have attributed blame to Ms Adam for what followed. It is true that she and Mr Leslie later treated you badly, but it is also true that she had carried the family through great adversity, and at least in recent times she had done so more or less singlehandedly.

[5] Eventually Ms Adam had had enough. By about June or July 2008 she found solace in the company of Mr Leslie, who was a workmate of yours. You and Mr Leslie strongly disliked one another.

[6] About 9 August Ms Adam moved out of your family home at 78 Tanner Street, and went to live with her mother. On 5 September she took the tenancy of a property at 16 Charles Street. Throughout this time she continued to see Mr Leslie. Your case at trial was that she also maintained a relationship with you, in that you not only saw the children very regularly but also stayed over at the house. She denied that, and I need not resolve that dispute. It is enough that I accept you believed the relationship was not finally over, and hoped that it would resume. For his part, Mr Leslie was still in a relationship with his partner of some time, Teri Bergman.

[7] About 21 September, Ms Adam forced Mr Leslie's hand by telling Ms Bergman about the relationship. Ms Bergman threw him out.

[8] At about 6pm on Thursday 25 September, Mr Leslie showed up at Charles Street while you were visiting the children. You immediately realised that he was seeing Ms Adam, although she denied it. That evening she took you to a Stopping Violence course which you were undertaking, as she normally did, and you pleaded with her not to move on with Mr Leslie. By that time you were extremely distressed.

[9] At about midday on the Friday you went to Charles Street and found Mr Leslie moving in. You knew by then that there was a sexual relationship, but this development was most unwelcome. It confirmed that your own relationship with Ms Adam was at an end. Ms Adam or Mr Leslie also acknowledged at this time that it was a sexual relationship. You punched Mr Leslie a few times. He did not retaliate, but held you off, saying it was not your house.

[10] These matters should have ended. But that evening you became very intoxicated on alcohol and cannabis. You had also been taking an antidepressant, paroxetine, which should not be combined with alcohol. You drank at a local bar, and there behaved aggressively towards another patron. You went home to Tanner Street sometime around midnight.

[11] You called Ms Adam at 12.40am. She hung up after a brief discussion. You called her again at 12.43am. There is a dispute about what was said. Her evidence was that you abused her for moving on with Mr Leslie, and she said it was not like that. It was put to her in cross-examination that she taunted you, saying that she was having sex with Mr Leslie at the time and inviting you to kill yourself. I see you have repeated that suggestion to the probation officer. Ms Adam firmly denied making those remarks, and I am not prepared to find that she did so. You chose not to go into the witness box, and you must live with the evidence as it stands.

[12] What is clear is that you were not prepared to accept her relationship with Mr Leslie, and to that end you took matters into your own hands. You took two steak knives from your kitchen at Tanner Street and walked or ran the 800 metres to Charles Street.

[13] Ms Adam heard footsteps running up the path beside the house, realised that it was you, and immediately made a 111 call. As the call was connected you burst into the house by breaking the glass windows of the back door. While you were doing so you gashed your right arm very seriously, and immediately began to bleed profusely.

[14] That did not slow your progress, however. You went immediately to the bedroom, and forced the door, which Mr Leslie tried to hold against you. You burst in and immediately began stabbing him. Your case at trial was that you acted in self-defence, in that your right arm was effectively incapacitated and Mr Leslie attacked you once you got into the bedroom, so that you had to use the knives. I do not accept that there was any element of self-defence about it at all. You were the aggressor. Mr Leslie was larger than you but he was naked and unarmed. He was trying to protect Ms Adam, and trying to defend himself from a frenzied attack. I also find that although your right arm was impaired and you were bleeding heavily you were able to use both arms. Specifically, I accept Ms Adam's evidence that you stabbed him using your right arm, and I note that the forensic evidence supports her account. He grappled with you and the struggle moved around the bedroom before he fled, following Ms Adam, into the lounge. She left through the back door and ran to the house next door. You caught up with Mr Leslie in the lounge, and there was a further struggle before he too was able to flee the house.

[15] All of this happened very quickly. One minute and 24 seconds after Ms Adam connected the 111 call she was at the neighbours' house.

[16] Mr Leslie collapsed on the street outside. When the police arrived he told them that if Ms Adam was still inside she would be dead. You remained in the lounge, where you were found by the Armed Offenders Squad lying on the carpet in a bad way. You had suffered serious blood loss. The knives were found beside you.

[17] Mr Leslie suffered many injuries. They included 10 stab wounds, three of which were to vital internal structures, and some 11 incised wounds. Some of his wounds were plainly defensive in nature. He died in the ambulance from blood loss.

[18] At the trial you accepted that you had killed Mr Leslie, but you pleaded self-defence, denied murderous intent, and raised the partial defence of provocation. The jury must have rejected self-defence. It cannot be known whether they did so because you were not acting in self-defence or because the force used was excessive, but it is open to me to take any view of the evidence that is available and consistent with their verdict. I have made it clear that I regard self-defence as untenable, and there is compelling evidence that you acted with murderous intent towards Mr Leslie. The most likely explanation for the verdict is that the jury found the Crown had not excluded provocation. I am going to sentence you on that basis.

[19] I also think that this is one of those cases in which provocation was just barely available. It is not a case of diminished responsibility; rather, your behaviour was fuelled by alcohol and drugs that you chose to consume.¹ There was a substantial element of premeditation, in that you decided to bring knives from Charles Street. I do not accept that you did that for self-harm or self-defence. Further, your attack was clearly focused on Mr Leslie, and the only provocation he had offered was that of forming a sexual relationship with Ms Adam and moving in with her. The evidence does not persuade me that concern for your children living with Mr Leslie was a significant factor; you were focused on your own relationship with Ms Adam. I allowed the jury to treat her acts in the hours preceding the killing as inseparable from those of Mr Leslie, and you asserted special characteristics, albeit the evidence was slender. Even so, a sober person would not ordinarily be taken to lose the power of self-control in that situation. It is the sort of thing that happens every day. And it is a significant point that the provocation was not sudden. It took place over a period of some time, since the Thursday evening. It had been more than 12 hours since you learned that Mr Leslie was moving in.

Victim impact statements

[20] I turn now to the victim impact statements. There are statements from Mr Leslie's parents, his sister, Ms Bergman and Ms Adam.

¹ Cf *R v Rongonui* [2000] 2 NZLR 385 (CA)

[21] The accused takes centre stage at trial, because the Crown must prove his guilt. Even at sentencing, I must place your crime in context by acknowledging that you were provoked.

[22] But it is timely now to acknowledge the suffering that Mr Leslie's death has caused. I have heard two members of the Leslie family speak today. I recognise how difficult it must have been for his parents to sit through the trial, at which the details of their son's death were exhaustively rehearsed and his character was put in issue, with no opportunity to respond. The family are plainly close-knit and their victim impact statements speak of trauma, illness and helplessness, and a profound and enduring sense of loss. They also relate the good things about Darnell, things that did not emerge during the trial; in particular, his loyalty to his family, and his sense of humour. I have already said that I accept he was trying to protect Ms Adam. It is plain from what he said to the police when they arrived that he mistakenly believed she was the object of your attack. His courage in doing that must be acknowledged. His parents and Ms Bergman have also suffered substantial financial losses and other difficulties to do with the sorting out of his affairs.

[23] Ms Adam has also suffered a great deal, not only as a victim of the crime in her own right, but also in the aftermath. I wish to make it clear that responsibility for Mr Leslie's death does not rest with her. It rests with you, and you alone.

The pre-sentence report

[24] You were aged 26 at the time of the killing. The pre-sentence report records that you had a poor upbringing, in that your parents separated. Counsel supplements that by telling me that you were the subject of a custody dispute, and had numerous stepfathers and stepmothers. You ended up living with your father and a stepmother with whom you did not get along. You did not do well at school, and have been employed since by your father and latterly as a freezing worker or gibstopper. Fortunately you now enjoy a good relationship with your mother, who supported you throughout the trial. I acknowledge her presence today. You will have need of that support in the years ahead. I have read references to your reliability and conscientiousness as an employee and I have also read a thoughtful reference from

your grandmother who says that you are not a bad person, but a victim of circumstance. The first part of that proposition I can accept, you do have good qualities. But I do not regard you as a victim of circumstance.

[25] To the probation officer, you accounted for the killing by maintaining you just wanted answers and saying you were provoked by Ms Adam in the final phone call. You claimed that you had the knives for self-harm and protection, and you insisted that you used them because Mr Leslie started attacking you as you went to the bedroom. I have already rejected that account.

[26] I accept that you have expressed great regret at what you have done. The probation officer believes you were thinking of yourself rather than Mr Leslie and his family. There is some force in that, because I observe that initially you advanced a false account of what had happened in the house, saying that Mr Leslie attacked you in the kitchen, where you found the knives. Only belatedly did you concede at trial, confronted with the irrefutable physical evidence, that you had brought the knives to the house. You also maintained throughout that you acted in self-defence. However, I have read a letter of apology that you have written to the Leslie family, and I do accept that there is a degree of genuine remorse.

[27] You have a very harmful pattern of alcohol and drug use. You also have convictions for male assaults female, threatening to kill, disorderly behaviour, offensive behaviour, resisting police, burglary and theft, cannabis possession, driving with excess alcohol, and various other minor driving matters. There are some 15 previous convictions in all, but only two are for violent offences. You are assessed as a moderate reoffending risk.

The starting point

[28] It is necessary to set a starting point that takes into account all of the features of the crime. It is called a starting point because it takes into account the offence and is then adjusted for your personal aggravating and mitigating factors.

[29] The maximum sentence for manslaughter is life imprisonment. The Crown invites me to impose it. To do that, however, would be to overlook the jury's verdict, and to ignore comparable cases in which lesser sentences have been imposed. In the alternative, the Crown suggests a starting point of 12-14 years combined with a minimum period of imprisonment.

[30] Mrs Ablett-Kerr, on the other hand, invites me to adopt a starting point of 5-8 years, submitting that you were greatly provoked. I reject that. A starting point of 8 years would not accurately reflect your culpability.

[31] Mrs Ablett-Kerr has also drawn my attention to cases in which the Court has taken a very merciful approach to sentencing.² That is sometimes the right thing to do in manslaughter cases, but this is not such a case. It is true that you were provoked, and I accept that your background and family circumstances call for sympathy. But this manslaughter was very close indeed to murder.

[32] I have considered comparable cases which I will list in my sentencing notes,³ identifying those that I think most similar.⁴ I have also considered two judgments of the Court of Appeal in which sentencing levels for manslaughter were discussed.⁵ These authorities point quite clearly to a starting point in the range 10-12 years in a case, such as this, where the offender was provoked but a knife was taken to the scene and the loss of control was toward the least justifiable end of the range. The element of premeditation is an aggravating factor. So too are the use of weapons, the home invasion, the vulnerability of the victim, who was defenceless, and the extreme violence used.

[33] The starting point is twelve years imprisonment.

² For example, *R v Fate* (1998) 16 CRNZ 88 (CA)

³ *R v Edwards* [2005] 2 NZLR 709 (CA), *R v Blackmore* CA29/05 18 May 2005, *R v Jarman* HC CHCH T81/02 1 August 2003, *Robertson v R* CA472/04 14 December 2005, *R v Leonard* CA269/95 6 September 1995, *R v Fate* (1998) 16 CRNZ 88 (CA), *Rongonui, R v Ambach* HC AK CRI-2007-004-027374 2 July 2009, *R v Nepia* [1983] NZLR 754 (CA), *Morabito v R* [1992] 62 A Crim R 82 (NSWCCA), *R v Emery* HC AK CRI-2008-092-001285 13 February 2009, *R v King* CA71/06 11 August 2006, *R v Rauf* HC WN T2433/00 23 March 2001

⁴ *Blackmore, Jarman.*

⁵ *Edwards, Blackmore*

Aggravating and mitigating factors

[34] Your previous convictions for violence are an aggravating factor, but I will not add anything to the starting point on account of them.

[35] The principal mitigating factor is your willingness to plead guilty before trial to manslaughter. That offer was conveyed, albeit informally, as early as 23 October 2008. A guilty plea at the earliest opportunity ordinarily leads to a discount of about thirty percent. In this case your decision to go to trial was vindicated by the verdict, notwithstanding that you attempted to escape liability entirely by pleading self-defence. I must make a substantial allowance for your willingness to plead to the charge on which you were eventually convicted.

[36] I acknowledge that your own children will suffer from your imprisonment. That factor has weighed with me. However, in that respect you are not different from any other people who are sentenced to imprisonment. The sentence must fairly reflect your culpability. I will make such allowance as I can but it must be very modest.

[37] I have recognised in selecting the starting point that you were provoked, and will not double count that by making an extra allowance in mitigation. I have also acknowledged your remorse, but that is taken into account in the allowance for your willingness to plead. Nor can you claim credit for previous good character, since you have a history of minor offending. Lastly, I accept that but for your intoxication you would not have behaved in this way, but counsel will have explained to you that the law does not recognise self-induced intoxication as a mitigating factor.

[38] The total allowance for mitigating factors is four years.

Minimum period of imprisonment

[39] The Crown invites me to impose a minimum period of imprisonment to hold you accountable and denounce your conduct, to deter you and others, and to protect the community.

[40] Your reaction to the failure of your relationship does call for accountability and denunciation, because violence can never be a socially acceptable response to a woman's decision to end a long term relationship.

[41] I must accept that you were provoked, however, and I do not think the community needs protection from you. With treatment for your alcohol and drug problems, your reoffending risk should be low. I also recognise that your family circumstances will continue to be difficult. Sadly, it does not seem that your son's health problems are at an end. I understand that Ms Adam, understandably enough from her perspective although perhaps not from that of the children, has denied you contact with them.

[42] However, the need for denunciation and deterrence must predominate. A minimum period of imprisonment is necessary; it will be two-thirds of the sentence that I have imposed.

Decision

[43] Accordingly Mr Fallow, you are sentenced to eight years imprisonment. You will serve two-thirds of that sentence as a minimum period.

[44] You may stand down.

Miller J

Solicitors:
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