

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

**CRI 2008-092-019108  
[2012] NZHC 42**

**THE QUEEN**

v

**OLINALE AH YOU**

Hearing: 2 February 2012

Appearances: K Raftery and A McClintock for Crown  
S Cassidy for Prisoner

Judgment: 2 February 2012

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**SENTENCING NOTES OF ANDREWS J**

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Counsel/Solicitors:

Shane D Cassidy, PO Box 26172, Epsom, Auckland 1344 [sdassidy@xtra.co.nz](mailto:sdassidy@xtra.co.nz)

Meredith Connell, PO Box 2213, Shortland Street, Auckland 1140

[kieran.raftery@meredithconnell.co.nz](mailto:kieran.raftery@meredithconnell.co.nz) [alysha.mcclintock@meredithconnell.co.nz](mailto:alysha.mcclintock@meredithconnell.co.nz)

## **Charges**

[1] Mr Ah You, you appear for sentencing today having been convicted by a jury on a charge of murdering Mrs Yan Ping Yang.

## **Maximum Sentences**

[2] Under s 102 of the Crimes Act 1961 you must be sentenced to life imprisonment unless, given the circumstances of your offending, and your own circumstances, that would be manifestly unjust. Your counsel, Mr Cassidy, accepts that a sentence of life imprisonment is appropriate. That is a proper submission. The question, as you know from having heard the discussion with counsel today, is what period I should specify as the minimum period of imprisonment you must serve before you can be considered for release on parole.

## **Relevant Facts**

[3] The relevant facts can be set out reasonably briefly. During the day of 11 June 2008, you went to a house in Manurewa, intending to steal from it – in other words to commit a burglary or robbery. The timing of the incident is not entirely clear – it appears to have been sometime between early afternoon and early evening. Mrs Yang was alone in the house at the time. She was 80 years old and all of the family who lived with her were out at the time.

[4] Mrs Yang was in an upstairs lounge when you confronted her. You grabbed her neck from behind and put your hand over her mouth, then forced her down two flights of stairs to her bedroom, where you tried to push her onto her bed. She tried to resist. You said something to her, but she could not understand what you were saying, as she only had a limited knowledge of English.

[5] You then tried to force Mrs Yang into the wardrobe in the room. The wardrobe was full with various items, and there was not enough room for her. At one point Mrs Yang fell to the ground, and you tried to push her into the wardrobe again, to shut her in. You pushed or stomped on her chest with your foot. Mrs Yang

lost consciousness. You left Mrs Yang lying on the floor and left the house, taking about \$1,200 that you had taken. It was money saved by Mrs Yang's grandson.

[6] Mrs Yang's family found her when they returned to the house that evening. She was taken to hospital where she died three days later. However, she was able to tell her family what you had done to her.

[7] The post-mortem examination indicated that Mrs Yang had suffered multiple blows to her head and chest, as well as a fracture to her neck. She had a total of 38 fractures to her ribs. The pathologist's evidence was that some of the fractures would have required a severe degree of force. The pathologist also noted a fracture to Mrs Yang's neck, such as is commonly found in cases of strangulation. The evidence of the emergency specialist was that Mrs Yang's rib fractures were like those usually seen in high-speed road crashes, and when someone has fallen from several metres.

[8] You said in evidence to the jury that you collided with, or barged into, Mrs Yang when you were going down the stairs after stealing the money. You described yourself to the jury as "rushing through her" as you went down the stairs. You said that you then tried to push Mrs Yang into the wardrobe so that you could get away, and pushed at her with your foot when trying to shut the wardrobe door on her. You denied punching, kicking, hitting, or stomping on her. The jury clearly accepted the evidence of Mrs Yang's injuries, and the evidence of what she said about it, in deciding what had happened. The jury's verdict shows that it did not accept your evidence of an accidental encounter.

### **Victim impact statements**

[9] I have read a very careful and detailed victim impact statement provided by Mrs Yang's youngest granddaughter, Ms Su. I congratulate and thank Ms Su for the care that she has taken, on behalf of her family, in preparing the victim impact statement. It is dignified, and it appropriately expresses the loss, the sorrow, and trauma the family has suffered as a result of what you did.

[10] Ms Su discusses how Mrs Yang was a fit and healthy 80-year-old woman, who was kind, caring, and greatly loved and respected as the eldest member of their family. She was the head of the family in their Chinese culture.

[11] Mrs Yang had been in New Zealand for nearly 20 years and looked forward to seeing her grandchildren grow up and to watch over her own children's futures. Ms Su talked about the many things that will not now be able to happen. Mrs Yang was expected to live well into her nineties, as other relatives had done. However, now, Ms Su and Mrs Yang's other grandchildren will not be able to look after her and show her how much they loved her, and they will not be able to take care of her as she took care of them. Mrs Yang will not see any of her grandchildren graduate, she did not see her favourite grandchild's wedding, and she did not live to see her first great-grandchild, due only a few weeks after the murder. Mrs Yang was not able to travel, as she wanted to. The family will not be able to have the family get-togethers, to celebrate Mrs Yang's birthdays and other important occasions.

[12] Ms Su said that the murder of Mrs Yang has deeply traumatised and scarred her family. Ms Su herself had a very close bond with her grandmother and would visit her at least twice a week. She describes the thought of her grandmother being murdered in her own home as causing the most horrible and indescribable pain.

[13] Ms Su also describes how her family members no longer feel safe in their own homes, they feel deeply the invasion of their privacy and security.

[14] Ms Su referred to the traumatizing experience of being required to attend at Court for the second trial. This brought up all of the emotional pain for them, a second time.

### **Personal circumstances**

[15] I turn now to consider your own personal circumstances. I refer first to the pre-sentence report prepared for this hearing.

[16] You are 32 years old, and you were born in Western Samoa. You moved to New Zealand with your family when you were eight. You are the youngest of eight siblings, and you told the probation officer that you are close with your family. I understand from the report that your wife and your elderly parents and siblings continue to support you but understandably they are shamed by your offending.

[17] You said to the probation officer who prepared the report presented to me, that you were expelled from school during your sixth form year due to truancy, and that you were then sent to live in Australia with an older brother. It appears from material referred to me today that you have given different accounts in earlier reports and Mr Raftery, on behalf of the Crown, referred to that in the context of accepting statements that you have later made with respect to your offending. In any event, it was in Australia that you first became involved in crime and you said that was to support a gambling habit. You were sentenced to imprisonment in 1999 and it appears you served three and a half years on a charge of aggravated robbery, and were deported to New Zealand after your release.

[18] Your wife described you to the probation officer as a good father, although frequently absent due to clubbing, gambling and drug-taking. She told the probation officer that there was no abuse in the marriage and that she was shocked at your offending. She said she witnessed a change in you when you left Australia, and that you associated with what she described as “bad” people in New Zealand.

[19] As to the offending, you told the probation officer that you were not aware the house was occupied when you went into it. You said you were nervous and jumpy, partly due to the influence of methamphetamine. You claimed that you did not want to hurt Mrs Yang but that you panicked and freaked out when you saw her. You said that you accept responsibility for Mrs Yang’s death and you told the probation officer that you still have nightmares about it. However, the probation officer noted that this acceptance arose only after your detection, and that less than three weeks after Mrs Yang’s murder, you committed an aggravated robbery at another occupied residential address.

[20] Since returning to New Zealand, you have accumulated over 20 convictions, mostly for dishonesty offences, although also for matters of non-compliance in terms of sentences, and for violent offending. You have convictions for aggravated and non-aggravated robberies in 2006, 2007, and 2008. You are currently serving a 12-year sentence with a minimum period of imprisonment of eight years, imposed on 15 May 2009 by Potter J for two aggravated robberies and three robberies committed between 2005 and 2008.<sup>1</sup> At the time of the offending for which I am sentencing you today, you were subject to community-based sentences of supervision and community work.

[21] According to Corrections Department records you are a compliant and well-trusted prisoner. You have indicated a willingness to participate in a number of rehabilitative programmes, and I understand that over the last two years you have attended courses in literacy and numeracy and undertaken a certificate in woodworking. The probation officer reports that you are at a medium risk of re-offending, but that the risk is higher should you return to the community without relevant rehabilitation.

### **Sentencing process**

[22] I turn now to the process of sentencing. As I said earlier, Mr Cassidy acknowledged that a sentence of life imprisonment is appropriate. What I am required to do today is to decide what minimum period of imprisonment should be imposed.

[23] In sentencing you I have to take into account the purposes and principles of sentencing. With respect to the purposes of sentencing, I have to hold you accountable – what that means is I have to make you responsible for your offending. I also have to consider deterrence – of you and others – and I must provide for the protection of the community. I also have to denounce your offending. What this means is that I have to tell you in plain words that your offending is not acceptable. I must also provide for the interests of the victims of your offending.

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<sup>1</sup> *R v Ah You* HC Auckland CRI-2008-092-2028, 15 May 2009 (Upheld: [2009] NZCA 534).

[24] In your case the relevant principles of sentencing are the gravity of your offending, including your own culpability, and the seriousness of your offending in comparison with other types of offences. I must take into account the general desirability of consistency in appropriate sentencing levels, and any information I have been given about the effect of your offending on the victims.

[25] I also take into account the aggravating features of your offending – they are those which make your offending more serious than it might otherwise be. The particularly significant features of your offending are that it involved a home invasion, in that you were unlawfully in Mrs Yang’s home. Whether or not the ranch slider door to the living area was unlocked, you had no right to be in the house, and you went there intending to commit an offence. Secondly, your victim was particularly vulnerable. She was an 80-year old woman, alone in her home. She was said to be fit and active for her age, but although she attempted resistance, she was clearly no match for your much younger age, and greater strength. I also take into account the violence of your offending, and the fact that your offending has clearly had a profound and lasting effect on the victims.

[26] I am required to take into account any mitigating factors there are relating to your offending. I am satisfied that there are none. You told the probation officer that your offending was influenced by your having taken methamphetamine. That is not something that I can take into account as a mitigating factor.

### **Minimum period of imprisonment**

[27] I come now to the minimum period of imprisonment. Under s 104 of the Crimes Act the Court must impose a minimum period of imprisonment of at least 17 years if one or more of a number of factors are present, unless that would be manifestly unjust. Counsel for the Crown, Mr Raftery, submitted that your offending involved your unlawfully entering the house (that is the home invasion), and that Mrs Yang was particularly vulnerable because of her age. Counsel also referred to other matters specified in s 104, such as that your attack on Mrs Yang was for the purpose of avoiding detection, that when you attacked Mrs Yang it was in the

course of committing another serious offence, and that there was a high level of brutality or callousness involved.

[28] Mr Raftery submitted that I could see from the convictions that you have accumulated, that you have engaged in a pattern of violent conduct that has gone on since your conviction in Australia. He referred me particularly to the fact that, about only two weeks after you killed Mrs Yang, you committed an aggravated robbery in another house which involved your threatening a young woman and a child with a knife. He also referred me to an aggravated robbery committed about nine months before you went to Mrs Yang's house, which also involved a vicious attack.

[29] Mr Raftery submitted that I should adopt a minimum period of imprisonment, before considering any adjustments that might be made, of 18 to 19 years. He submitted that you are a particularly violent and dangerous offender, that you are capable of very violent offending against occupants of houses you choose to go into for the purpose of committing offences, and that you will go to extreme lengths to achieve what you want.

[30] Mr Cassidy acknowledged that s 104 of the Crimes Act applies, but he submitted that the appropriate minimum period of imprisonment should be 17 years. He submitted to me that under s 104 a long period must be imposed as a minimum period of imprisonment, if there are certain features indicating a higher level of culpability. In that respect he invited me to take into account, in your case, your own level of culpability. He submitted that you did not intend to take Mrs Yang's life, and that to that extent what happened was an accident. He submitted that if the circumstances were that this had not occurred in the course of going into the house to commit an offence, a manslaughter verdict would have been available.

[31] So Mr Cassidy submitted that I should not impose a minimum period of imprisonment of more than 17 years because your actions in assaulting Mrs Yang which led to her death were impulsive rather than planned, and your object was to stop her from raising the alarm so that you could get away, not to kill her.

[32] Further, Mr Cassidy submitted that a minimum period of imprisonment of 17 years is a stern sentence in itself. He submitted that it can be left to the Parole Board to consider when you should be released after that time.

[33] Before I go on, I will refer to the sentence imposed by Wylie J after your first trial. He sentenced you to life imprisonment, adopting first a starting point for the minimum period of imprisonment of 19 years. He increased it by 12 months to 20 years to take account of the additional deterrence required because of your previous convictions, the fact that you were subject to community based sentences at the time, and the extent of pre-meditation involved. Although I may pay due regard to his Honour's views I am not bound by that sentence. I must reach my own conclusions as to the appropriate sentence.

[34] I consider that the most significant elements of your offending were Mrs Yang's vulnerability, and the fact that your offending involved a home invasion. These two factors clearly point to a minimum period of imprisonment of at least 17 years.

[35] I have considered the minimum periods of imprisonment that were imposed in cases where the circumstances were in some way similar to yours. I have been referred to many cases but the ones that I will refer to, there are four, have, I consider, the most similarity. Of course, no two cases are evidence exactly the same.

[36] In the case of *Goodman*,<sup>2</sup> Ms Goodman was convicted of the murder of an 83 year old woman after entering her home with intent to commit a crime, a theft. The attack involved fractures to the victim's skull and other head injuries. While the victim was lying unconscious or semi-conscious on the ground Ms Goodman found a knife and inflicted six stab wounds to the victim's heart. The minimum period of imprisonment imposed there was 19 years.

[37] In the case of *Job*,<sup>3</sup> Mr Job pleaded guilty to the murder of a 70 year old widow living alone. He had gone to the victim's house to commit a burglary but

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<sup>2</sup> *R v Goodman* [2008] NZCA 384.

<sup>3</sup> *R v Job* HC Whangarei CRI-2009-029-1374, 7 October 2010.

when confronted by the victim he struck her to her head, her arm and her hands with a bottle, and placed her in a headlock and punched her several times. This caused her to lose consciousness. The victim also suffered a number of rib fractures. In that case the starting point for the minimum period of imprisonment was 19 years but it was adjusted downwards because of particular circumstances relating to the youth and background of the offender.

[38] In the case of *Churchward*,<sup>4</sup> two girls beat a 78 year old man to death with a wooden staff and a rod, after breaking into his home to steal money. The victim was hit at least 20 times and he sustained at least 12 separate severe injuries. In that case the Judge adopted a starting point of 19 years for the minimum period of imprisonment. Although that starting point was upheld on appeal the Court of Appeal considered that there should have been an adjustment downwards on account of the youth of the two offenders.

[39] In the case of *Skilling*,<sup>5</sup> the offender pleaded guilty to murder, burglary and unlawfully taking a car. The offender broke into the victim's home to commit a burglary and entered the victim's bedroom and struck her repeatedly on the head with a hammer. The victim suffered 11 blunt-force injuries which quickly led to her death. The offender then stole various items and took them away in the victim's car. The minimum period of imprisonment there was 20 years and was upheld on appeal.

[40] I am satisfied that there are no circumstances that would make it unjust to impose a minimum period of imprisonment of at least 17 years. The aspects of Mrs Yang's vulnerability, the home invasion, and the extent of the injuries she suffered at your hands, make a minimum period of imprisonment of at least 17 years essential to meet the purposes and principles of sentencing.

[41] I have concluded, taking into account what differences I can discern between your offending and the offending described in the cases I have referred to, that the appropriate starting point for the minimum period of imprisonment to be imposed in your case is 18 years imprisonment. That takes into account the need for additional

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<sup>4</sup> *R v Churchward* HC Tauranga CRI-2008-270-361, 18 December 2009.

<sup>5</sup> *R v Skilling* [2011] NZCA 462.

deterrence and the protection of the public required, as shown by your previous convictions.

[42] However, I consider that an uplift of six months is required on account of the fact that your offending in respect of Mrs Yang was committed while you were subject to a community-based sentence. That results in an adjusted minimum period of imprisonment of 18 years and six months.

[43] I have carefully considered whether a discount should be applied on account of the remorse that you have now expressed and the willingness you have expressed to undertake various rehabilitative programmes. Mr Raftery submitted that I should take little account of your expression of remorse. Indeed, Wylie J in your earlier sentencing did not accept that you were genuinely remorseful, and Potter J also expressed caution as to whether your statements of remorse could be accepted. Mr Raftery submitted that any remorse that you now expressed does not justify any discount and it should be seen as having been dictated by the circumstances you now find yourself in.

[44] In this respect Mr Cassidy submitted that the author of the pre-sentence report provided to me had had access to all of the information which is presently before the Court, including records concerning your conduct and your response to your present prison sentence. He submitted that the probation officer who prepared the report was well able to assess whether you do, genuinely, now feel remorseful. Mr Cassidy submitted also that your genuine willingness to engage in rehabilitative programmes shows that, although it has come rather late in life, you had now begun to understand the effects of your offending.

[45] I note also that I have taken the time to read a letter that you have addressed to me. In that letter you say that you are deeply sorry for what you have done. You say that you truly never meant for it to happen. You acknowledge that you are never going to be able to express your feelings with words, as there is nothing else you can say other than that you are sorry. You say that you have strong family support and you will keep in contact with your support people in the community, and that you will take all of the help that you can get, and you want to make positive changes in

your life. You ask to be given a second chance in life, to be a father and a husband to your wife and children who you have also put through a lot of pain and suffering.

[46] I am prepared to accept, Mr Ah You, that you may now, finally, feel genuinely remorseful. However, I find it difficult to reach any conclusion that I should allow any discount in the minimum period of imprisonment as a result of what you have said. I acknowledge the positive steps that you have taken and I hope that you will continue to take them. However, I do not feel able to apply any discount to the minimum period of imprisonment that I have previously referred to.

[47] Would you please stand.

### **Sentence**

[48] Mr Ah You, on the charge of murder, you are sentenced to life imprisonment. I direct that you serve a minimum period of imprisonment of 18 years and six months before you become eligible for consideration for release on parole.

[49] Stand down.

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Andrews J