

**THIS IS A REDACTED VERSION OF THE JUDGMENT. PARTS OF
PARAGRAPHS [14] AND [37] HAVE BEEN REMOVED.**

**ORDER PROHIBITING PUBLICATION OF PARTS OF PARAGRAPHS [14]
AND [37] OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL
PROCEDURE ACT 2011.**

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

**CRI-2015-409-241
[2017] NZHC 178**

THE QUEEN

v

TANIELA KOTOITOGA DAVEN TIAKO WAITOKIA

Hearing: 16 February 2017
Counsel: M Zarifeh for Crown
J Eaton QC for Defendant
Judgment: 16 February 2017

SENTENCING REMARKS OF MANDER J

[1] Taniela Waitokia, you are for sentence this morning for the murder of Harold Richardson in his home on the night of 1 August 2015.

Factual background

[2] At the time that you committed this offence you were 16 years of age. Mr Richardson was an elderly 87 year old man who lived alone. He was a person known to you. You, like a number of other youths, would visit Mr Richardson to sell him stolen property and to carry out odd jobs for money, such as mowing his lawn or taking him to the supermarket.

[3] During the trial there was some dispute as to the circumstances relating to your visit to Mr Richardson's home on the evening you attacked him. There is some controversy as to whether you broke into his house or gained access as a result of

Mr Richardson answering the door as you claimed to the police. I will return to that issue shortly.

[4] Whatever the situation in that regard, in my view it is clear that you went to Mr Richardson's house that night with the intention of stealing from him or robbing him. It is apparent from discussions that you had with associates shortly before you set off that you were prepared to physically confront Mr Richardson and assault him in order to carry out the robbery.

[5] You attacked Mr Richardson with a bottle. You struck him at least 14 times. Defensive injuries to Mr Richardson's hands reveal that he sought to protect himself during what was a sustained and brutal attack. It is not clear whether the jury's verdict reflects a finding of your intention to cause Mr Richardson grievous bodily harm for the purpose of robbing him, or that in attacking Mr Richardson you took the conscious risk of him dying. Both, in my view, were available on the evidence and they are not mutually exclusive. Mr Richardson received grievous and fatal head injuries, including a stab wound to his head. Your attack went well beyond what was necessary to enable you to steal from him.

[6] Before leaving the house you took electrical equipment and alcohol. Mr Richardson was located the next day, lying on the floor of his lounge where you had attacked him.

[7] Other aspects of your conduct and behaviour that night I will refer to in the course of my sentencing remarks.

The victim

[8] Mr Richardson was at the time of his death something of a recluse who had no close relatives living in New Zealand. However, I have the benefit of a victim impact statement prepared by Mr Richardson's brother who lives in the United Kingdom. I am grateful for the insight he has provided into Mr Richardson's life.

[9] It is apparent that in recent times Mr Richardson's psychological state had deteriorated. His social contact with the wider community had declined, as had his

level of care both for himself and his property. There is reference in his brother's statement to a personality change in Mr Richardson, and he began hoarding or collecting items of property. Mr Richardson's contact with young people who visited his address appears related to this development. However, his association with them, as with you, also extended to them helping him carry out various domestic tasks.

[10] These circumstances prior to his death belie the life of a man who joined the British Army after leaving school, and after immigrating to New Zealand served with the New Zealand Prison Service until his retirement. While Mr Richardson had no children he apparently had a close relationship with a woman who he nursed for many years when she became very ill before her death. He is remembered by his UK family who last met him in 1996 as a well-dressed, friendly and likeable man. Neighbours who lived close by him for some 20 years have spoken of him as a kindly man up until his deterioration some five or so years ago.

[11] I mention these details because it is important that you appreciate, whatever the context of your relationship with Mr Richardson, he is remembered by his brother and his family as a person who had led a full and productive life and whose violent death came as a great shock to them which has caused deep sadness.

Personal circumstances

[12] At the time of this offending you were 16 years old. You are now 18. During your childhood and early teenage years you were exposed to violence, gang culture, criminal offending and drug use. You have used cannabis and alcohol since your pre-teen years and participated in the daily use of cannabis and synthetic cannabis for many years prior to this offending. You left school at a young age and have frequently appeared before the Youth Court, resulting in periods of time in Youth Justice facilities.

[13] Because of your behavioural and drug problems you have come to the attention of Youth Mental Health Services. You have been diagnosed with cannabis and synthetic cannabis dependence, conduct disorder and attention deficit hyperactivity disorder, commonly known as ADHD, for which you have received

continued medication. You have a history of suffering periodically from lowered mood and suicidal thinking.

[14] Your youth offending does not include violence, however you acknowledge frequent fighting at school, and in youth facilities [■]. Your tendency to quickly revert to violence remains an ongoing concern. Attempts to engage you in treatment for your behavioural and drug problems have, unfortunately, largely proved unsuccessful. I am advised that having turned 18 you now meet criteria for the diagnosis of an anti-social personality disorder marked by impulsivity, problems with irritability and aggressiveness, and a reckless disregard for the safety of yourself and others. You have features of a borderline personality structure characterised by a pattern of unstable and intense interpersonal relationships, recurrent suicidal behaviour, and inappropriate and difficult to control anger.

Minimum period of imprisonment

[15] It is not contested the sentence I must impose upon you is one of life imprisonment. This means you will be detained for life, or until such point as the Parole Board concludes that you no longer represent an undue risk to the community. Once you are released, you may be recalled to prison if your behaviour in the community warrants it.

[16] I am required to impose on you a minimum period of imprisonment of at least 10 years. However, in certain circumstances the law requires the imposition of a minimum period of imprisonment of at least 17 years unless such a sentence would be manifestly unjust.¹

[17] The Crown contends that you are eligible to be sentenced to a minimum period of imprisonment of at least 17 years because your killing of Mr Richardson involved the unlawful entry or unlawful presence in his house, and because the murder was committed in the course of a robbery.² Mr Richardson was an elderly man of 87 years of age with limited mobility who used a walking stick and was therefore particularly vulnerable because of his limited ability to resist or physically

¹ Sentencing Act 2002, s 104.

² Section 104(1)(c) and (d).

protect himself.³ That is another factor which triggers the imposition of a 17 year minimum period of imprisonment.⁴

Unlawful entry or unlawful presence in a dwelling house

[18] When you spoke to the police you maintained that Mr Richardson had let you into the house. There is evidence that suggests you gained entry through a kitchen window, however, you told police that was the means by which you exited the property rather than broke into it. The fact remains that when you gained entry to the house you had an unlawful intent which, as I have remarked, at the very least was to rob Mr Richardson. In my view, whether or not Mr Richardson allowed you entry into his home, he was in no position to have resisted you once you were inside. Whether or not your initial entry was unlawful, the purpose for which you visited him was unlawful. Your presence in the house certainly became unlawful once your attack on Mr Richardson commenced.⁵

[19] It is not necessary for me to come to any concluded view regarding the circumstances of your entry or presence at Mr Richardson's home because the 17 year minimum period of imprisonment provision applies as a result of other applicable factors. That you attacked Mr Richardson in his own home however remains a serious aggravating feature.

Murder committed in the course of another serious offence

[20] I am satisfied Mr Richardson was killed in the course of you carrying out your objective to rob or steal from him. When you fled his house you took with you electronic items and bottles of alcohol. There is evidence of your prior statements to associates about your intention to rob Mr Richardson and of possibly doing harm to him. Associated with that discussion was talk of the possibility of him having a safe which you yourself refer to in the course of your police interview. I accept the safe likely never existed but it is relevant to what you were about that evening.

³ *R v Nelson* [2012] NZHC 3570.

⁴ Sentencing Act 2002, s 104(1)(g).

⁵ *R v Cummings* [2016] NZCA 509.

Deceased particularly vulnerable

[21] I have already noted the vulnerability of Mr Richardson because of his age and infirmity. You knew he would be alone in the house and unable to physically protect himself.

The question of manifest injustice

[22] Because of these factors it follows that I am obliged to sentence you to a minimum term of imprisonment of at least 17 years unless it would be manifestly unjust to do so.

[23] The assessment of whether the imposition of a minimum period of imprisonment of at least 17 years would be manifestly unjust is a factual one for me to determine. It is one that must be clearly demonstrated before I may exercise my discretion to impose a lesser minimum term, and the statutory minimum is not to be departed from lightly.⁶ In examining that issue I must have regard to the purposes and principles of sentencing set out in the Sentencing Act. These include the need to hold you accountable for the harm that you have done, to denounce your senseless crime, and to deter such offending. I have to bear in mind your potential rehabilitation and reintegration into the community but, at the same time, balance that against the need to protect the community.

Features of the offending

[24] I have already identified the most salient aggravating features of your offending. There are, however, other relevant factors relating to the commission of this murder. The first is that your assault on Mr Richardson involved serious violence. You targeted the head of your victim. You repeatedly struck him and I am satisfied you continued with the blows after Mr Richardson had been rendered defenceless.

[25] The attack involved the use of a weapon, namely a bottle, which it appears you continued to use after it had shattered. I note, however, that you did not bring

⁶ *R v Harrison* [2016] NZCA 381.

the weapon to the house. It is likely that it was an item which was close at hand. While that is a strong indicator of a lack of any preconceived idea to cause Mr Richardson lethal or perhaps even serious harm, the intention to rob him in his own home was, in my view, premeditated.

[26] One of the features of your movements that night is that prior to meeting with associates and going to Mr Richardson's house you went to Odyssey House Youth Unit. You were unable to talk to anyone that you knew there but you left a handwritten note. You wrote that you needed help. You had previously, and unsuccessfully, attended that facility and you requested that you be able to, in your written words, "join again". I will refer again to this aspect of your conduct that night later in my remarks.

[27] When you subsequently met up with your friends you were observed as being heavily intoxicated. You were described as "amped" and "hyped". I have no doubt you were under the influence of drugs on the night you killed Mr Richardson. You have an established longstanding history of abusing drugs, to which you were first exposed at a very young age. There is a pattern of daily use of synthetic cannabis, and it is apparent that on this night you were under the influence of that drug. It is likely you were also under the influence of other drugs, particularly given the way you were described as behaving shortly before going to Mr Richardson's house. You have, however, provided conflicting accounts to the pre-sentence report writer and the consultant psychiatrist as to whether you were affected by methamphetamine.

[28] While your drug use is a feature which I can take into account as part of your personal background, the fact you were affected by the consumption of drugs at the time of committing the offence is not something which I am permitted to take into account by way of mitigation.⁷

[29] After you left Mr Richardson's house you again went to Odyssey House and identified yourself as the person who had earlier left the note. You presented on that occasion as polite and friendly, yet you also returned to your friends and it appears, gladly showed your associates what you had taken from Mr Richardson's house.

⁷ Sentencing Act 2002, s 9(3).

Similarly, when you later went to your Aunt's house where you were staying at the time, you made bizarre admissions of having tied up and assaulted two men that were in bed, and eagerly sought to share the stolen property. Your behaviour was odd and unpredictable.

Features of the offender

[30] In assessing whether it would be manifestly unjust to fix the minimum term of imprisonment at 17 years or more an important consideration is your age at the time you committed the murder. It is a factor which I am required by statute to have particular regard.⁸

[31] The Crown have pointed out to me there is no youth exception which displaces the mandatory minimum term, and young persons have in the past been sentenced to serve a 17 year minimum term.⁹ Sadly, there are many cases where this Court has been required to consider the sentencing of young offenders who have committed murders that qualify for a 17 year minimum term.

[32] It has been recognised by the Court of Appeal that age and immaturity of an offender are matters which must be taken into account. It has been accepted that this is because the brain development of young people is ongoing and that, because of the relative immaturity of the brain, adolescents may be impulsive, display immature judgment and lack insight and restraint; traits which are likely to be compounded by the use of alcohol and drugs. It is also recognised that young people have greater capacity for rehabilitation, particularly given that the character of the juvenile is not as well informed as that of an adult.

[33] Long sentences for young people can be crushing. It is considered that young people are unable to cope with a sentence which is likely to be comparable to their present lifetime. You fall into that category of offender and, having read the psychiatric reports, I have no doubt these considerations bear heavily on the way I should approach the question of the imposition of a minimum term of imprisonment.

⁸ Section 9(2)(a); New Zealand Bill of Rights Act 1990, s 25(i); see *R v Kelekolio* [2014] NZHC 1791.

⁹ *R v Luff* HC Palmerston North S4/02, 18 September 2002; *R v Cummings* [2016] NZCA 509.

[34] Combined with your age are those matters relating to your personal background and situation to which I have already made reference, namely your fractured upbringing and your transitory and unstructured lifestyle both as a child and teenager. They are relevant to how you came to be before the Court this morning on this very serious charge. You had learning difficulties at school marked by truancy, aggressive behaviours, and expulsions. You were a frequent youth offender, committing thefts and burglaries. You had been in a volatile intimate relationship and there was evidence that shortly before this offending this was a source of particular stress for you. Overarching these issues and the barriers to your normal development have been the constant consumption of cannabis and synthetic cannabis, which no doubt has aggravated the variable state of your mental health. Unfortunately, as I have previously noted, past treatment for your alcohol and drug problems have proved to be unsuccessful.

[35] I consider it is of some significance that on the night, prior to going to Mr Richardson's home, you went to Odyssey House and sought help. It appears you had some sense of being perhaps out of control and in crisis. You were looking for help. Such was your volatile state, however, this insight appears to have been transitory. Your presentation and conduct over the course of the evening appears to have fluctuated greatly. Having sat through your trial and heard from various witnesses, including associates, family members, and others who had contact with you, it appears your conduct and presentation both before and after the commission of this offence is consistent with your difficult personal situation and immaturity.

[36] You have expressed remorse for Mr Richardson which appears genuine, however, you appear to lack insight into how you came to cause Mr Richardson's death. You refuse to engage in discussion regarding the circumstances of the offending. Having made that observation, I acknowledge the submission, based on the scene evidence, of Mr Richardson's head having been found resting on squabs from the couch. This small piece of evidence was a matter traversed with the officer in charge of the scene, and it appears uncontested that the only reasonable explanation for their positioning was that they were placed there by you prior to leaving the address. I accept that is indicative of immediate remorse. It is also another example of your contradictory behaviour that night.

[37] You are assessed as being at high risk of reoffending and as presenting a very high risk of harm to others. It appears you have gang connections in prison. You have made varying statements as to whether you wish to align yourself with such influences. [REDACTED] In contrast to what has been described as these “aggressive behaviours and bravado”, you are reported as having low mood and suicidal ideation. Again, this presentation is consistent with your personal history and immaturity.

Sentencing decision

[38] I have reviewed a significant number of sentencing decisions that have grappled with the issue of the appropriate sentence to be imposed on a young person eligible to be sentenced to a minimum term of imprisonment of 17 years.¹⁰ The individual circumstances of both the offending itself and the offender will almost invariably be different from one case to the next, and no two cases are the same. It is important however that there is, as best there can be, consistency in the approach to sentencing, and in particular to the considerations that bear on the imposition of a minimum term of imprisonment on a young offender for the offence of murder. Those cases have assisted me in assessing whether it would be manifestly unjust to impose a minimum period of imprisonment of at least 17 years in the circumstances of your case and, in the event of such a finding, the minimum term that should be imposed.

[39] Age does not excuse your responsibility for the commission of such a grave crime as murder, but your culpability must be assessed against your relative immaturity at the time. There are some indications that you are prepared to seek assistance and address the drug issues that bear so heavily on your behaviour and have brought you to this situation. The door must not be shut on the rehabilitation of a person of your age.

¹⁰ *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446; *R v Te Wini* [2012] NZHC 1593; *R v Pomare* [2016] NZHC 1346; *R v Kelekolio* [2014] NZHC 1791; *R v Lo* [2014] NZHC 1117; *R v Herewini* [2013] NZHC 2570; *R v Job* HC Whangarei CRI-2009-029-1324, 7 October 2010; *R v Rehwa-Te Wara* HC Hamilton CRI 2010-019-005681, 30 September 2011; *R v Kriel* HC Whangarei CRI-2008-027-2728, 23 March 2010; *R v Boyes-Warren* HC Christchurch CRI-2008-009-19959; *R v Slade & Hamilton* [2005] NZLR 526; *Te Wini v R* [2013] NZCA 201; *R v Smith* [2016] NZHC 2581; *R v Trevithick* HC Auckland CRI-2207-244-000009, 19 June 2007; *R v Natrass-Bergquist & Wallace-Loretz* [2016] NZHC 1089; *R v Churchis* [2014] NZHC 2257; *R v Adams* [2014] NZHC 1117.

[40] Taking into account all the matters that I have traversed this morning, I am satisfied that the case does not fall within the band of culpability that was intended to qualify for a minimum sentence of imprisonment of 17 years.¹¹ My overall assessment is that a minimum period of 17 years would be manifestly unjust in this case. I consider the appropriate minimum period is one of 11 years and six months. In my view that is the least that I am obliged to impose.

[41] Mr Waitokia, could you please now stand.

[42] Mr Waitokia, you are sentenced to life imprisonment for murder. I direct that you are to serve a minimum period of imprisonment of 11 and a half years.

[43] For completeness, I note that because of your age at the time you committed the offence you are not subject to the three strikes law for this offending.¹²

[44] You may stand down.

Solicitors:
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Jonathan Eaton QC, Christchurch

¹¹ *Malik v R* [2015] NZCA 597 at [32]; *R v Williams* [2015] 2 NZLR 506 (CA) at [57].

¹² Sentencing Act 2002, s 86A.