

**IN THE DISTRICT COURT
AT AUCKLAND**

**CRI-2017-029-000809
[2018] NZDC 5442**

THE QUEEN

v

CALVIN RIHARI

Hearing: 21 March 2018
Appearances: J Barry for the Crown
M Pecotic for the Defendant
Judgment: 21 March 2018

NOTES OF JUDGE E P PAUL ON SENTENCING

[1] Calvin Rihari appears today for sentence on one charge of wounding with intent to cause grievous bodily harm to [the victim] in Auckland on 30 July 2016. The maximum penalty for this charge is 14 years' imprisonment. Calvin was only 16 years of age at the time of the wounding.

[2] This case has some history. The charges were laid against Calvin and there is also a second charge relating to his [close family member] – he referred to him as [name deleted] – who was also injured during the attack. Ultimately that charge was withdrawn and Calvin pleaded to the wounding charge.

[3] The matter then proceeded to a disputed facts hearing before me on 23 November. The issue there being whether it was Calvin who brought the knife to the wounding or the victim, [the victim]. Ultimately in my decision I found it was Calvin.

[4] Then the matter proceeded to a jurisdictional hearing where I determined it could only be dealt with in the District Court and the matter was transferred here for sentencing.

[5] Since that time I have had the benefit of counsel's submissions, a pre-sentence report and latterly a s 38 report prepared at the Court's request in terms of the type and length of sentence that might be imposed on Calvin as part of as a condition of a sentence or order.

[6] I agree with counsel that that report is somewhat rudimentary. Ultimately the report writer's recommendations are that Calvin would benefit from a community-based sentence delivered in a kaupapa Māori framework with a strong emphasis on work and vocational training which I have got to say Calvin has excelled in when he has been given that opportunity and even Crown counsel today observed that while at the [service deleted] that Calvin acquitted himself well in that very structured environment.

[7] I also have received the victim statement for [the victim]. In short the long-term consequences for him of this wounding has been the obvious scarring he has to now carry and he says loss of strength and having to make different employment choices and his account that he does not wish to show his face in public because of how he appears as a result of the injuries and scarring to his face.

[8] The police in their submissions have sought a starting point of 10 years' imprisonment. They maintain that today. They say the aggravating features here are the extreme violence employed in terms of the multiple stab wounds with the knife including to the victim's face. The level of premeditation where threats to shank the victim followed by the taking of the knife downstairs and then the Crown refer to the injuries to the victim which were potentially fatal and the permanent impact on his quality of life and, as I have already referred to, the ongoing issues he has as a result of the scarring and I have previously observed that it was good fortune the victim was discovered across the road given the level of blood loss and the potential for a fatality. The Crown also refer to the use of the knife and as I already said the attack to the head.

[9] The Crown in their submission reject provocation as a mitigating factor of the offending and have maintained that position today. They justify that on the basis of Calvin arming himself, the earlier threats to shank [the victim], and the subsequent threat in the bedroom.

[10] The Crown have referred to a number of authorities in their submissions which support a starting point in terms of *R v Taueki*¹ in band 3 which is the nine to 14 years' imprisonment starting point.

[11] The Crown properly acknowledge the personal mitigating features for Calvin, his young age – he was 16 years at the time, his guilty plea and submit a discount of 10 to 15 percent for that. The Crown say if the Court adopts their approach, there is no likelihood of an electronically monitored sentence.

[12] The Crown have also responded to defence submissions today critical of *R v Hill*² and again refer me to the *R v Konui*³ and *R v Tui*⁴ decisions which fall within that band 3 of *R v Taueki*.

[13] Ms Pecotic for her part has on Calvin's behalf, and this has always been the case, that Calvin used excessive force that night, that he is remorseful for his actions and in particular the harm he caused to [the victim].

[14] Ms Pecotic traversed the circumstances around the night in particular, the intoxicated state of the adults that night, the fact the victim was significantly intoxicated and that was borne out by his own evidence at the disputed facts hearing and also her criticism of the adults' behaviour in permitting and it seems encouraging the teenagers and young people, including Calvin, to consume alcohol that night.

[15] She referred to the argument, it appears initiated by [the victim] in terms of his own personal jealousies over a relationship he believed there was between Calvin and his own partner at the time. She refers to [the evidence of a witness to the victim]

¹ *R v Taueki* [2005] 3 NZLR 372; (2005) 21 CRNZ 769 (CA)

² *R v Hill*

³ *R v Konui* [2008] NZCA 401

⁴ *R v Tui*

egging Calvin on, using words such as, “Come on boy, just you and me.” This I understand occurring at the table while everyone was drinking.

[16] She also referred to the ongoing animosity exhibited by [the victim] towards Calvin and that must be so and it was apparent from even the young boys in the household that this was well known, how [the victim] treated Calvin and Ms Pecotic has expanded on that point.

[17] In her submissions and again today she has pointed out that Calvin had retreated downstairs to his bedroom with [name deleted] and that it was [the victim] who came downstairs after and effectively confronted Calvin in or about the room.

[18] Ms Pecotic has referred to a number of authorities, the decision in *R v Hill* but also other authorities such as *R v Konui* and *R v Kerr*⁵. She acknowledges the seriousness of the injuries, the use of the knife, and invites me to fix a starting point in the order of five years in terms of band 2 of *R v Taueki* and she says that is informed by also the provocation that Calvin had experienced, not only that night but earlier in the household and his excessive use of self-defence.

[19] In terms of personal mitigating features, Ms Pecotic has outlined Calvin’s youth, his remorse, the way he has since conducted himself in terms of his rehabilitation while being in custody and also reminds me of Calvin’s age at the time of the offending and she says the importance of the Bill of Rights as it applies to young persons and also the convention on the Rights of Children in terms of their best interests.

[20] In effect, the Crown position is some distance from defence. That is obvious and those positions are maintained today. If I were to adopt the Crown’s approach potentially there would be a sentence of something like six and a half years’ imprisonment. If I adopted Ms Pecotic’s approach, potentially there could be an end sentence of something like two years.

⁵ *R v Kerr* HC Hamilton CRI-2004-019-007319, 21 September 2005

[21] I should also refer to the pre-sentence report which again identifies that Calvin can be successful in a rehabilitative environment where there are boundaries placed on him.

[22] In terms of fixing a starting point for Calvin, I have identified three features; the knife is obvious. Secondly, the extreme level of violence with repeated stab wounds inflicted upon the victim and obviously the potential for a fatality given the harm caused to the victim.

[23] Those in my view are the standout aggravating features of this offending. Against that, despite the Crown's submissions, I find there was an ongoing level of intimidation towards Calvin by the victim and that the attack by Calvin could only have occurred as a result of the provocation inflicted on him by the victim.

[24] This is informed by all the evidence I heard in the disputed facts hearing and that I have been supplied throughout these proceedings where it cannot be argued there was ongoing animosity by the victim towards Calvin. It also must be recognised the victim was a mature man with no doubt significant life experience. However, the way he conducted himself on that night demonstrates really his ongoing attitude of animosity towards Calvin.

[25] That animosity was fuelled by a belief by the victim that Calvin, the 16 year old, was having an ongoing affair with his partner who also lived in the household from time to time. Counsel is correct that there was a clear imbalance, Calvin was the child here and the victim was the adult. I sat through Calvin's interview and one can see, although a healthy 16 year old, in no way could you compare him in frame, stature or maturity to the victim.

[26] Also, the evidence was clear that during the course of this drinking session upstairs, it was the victim who started the argument, again pursuing this issue about Calvin having an affair with his partner.

[27] I have got to say the events of that night painted something of a sad picture for a disparate family. It started with the three adults who should have known better than

drinking at the dinner table and the evidence was, was the young people and children cooking the meal and feeding the younger ones. It was only after they had attended to those responsibilities, which should have been the adults, that the young people were invited to join the adults for drinking and the evidence was that the victim took some of those young people later in the evening to the liquor store to purchase more alcohol. I am sure Calvin and the other young people were willing, but that is not the point.

[28] It seems to me this tragedy could have been avoided if the adults took their responsibilities a little more seriously that night. Those are the circumstances and the setting of this offending. It is a little informative.

[29] We then have these threats, arguments, and Calvin appears to have responded in kind to the arguments upstairs. My sense was he was not prepared to back down and it seems to me, after the way he had been treated in that household, that it was not surprising.

[30] Calvin did arm himself but at least he retreated downstairs with [name deleted]. It was the victim who went downstairs and who did confront Calvin and who did impose himself upon Calvin in a very physical and threatening way when he used his head to push Calvin's head. Clearly there would have been a physical disparity between these two and also one must be mindful of the circumstance Calvin found himself in, facing the older man in a relatively confined space.

[31] Calvin did respond by stabbing him and it is accepted he went beyond what could ever have been justified and the stabbings were serious but when I factor in that provocation, those particular circumstances as Calvin found them that night, it seems to me it mitigates any starting point that the Crown has relied on today in terms of *R v Taueki* and there is ample authority for me to do that. Sentencing is not a science, various factors can be taken into account and given appropriate weight. I take the view that the circumstances Calvin found himself in do amount to provocation and the events leading up to that were part of the picture that night in terms of that provocation. There is no doubt Calvin was being confronted by a heavily intoxicated man intent on imposing himself on Calvin.

[32] In those circumstances, I fix a starting point of five years' imprisonment which would fall within band 2 of *R v Taueki*. Having done that, I must look to the mitigating features; significantly is Calvin's age and part of that is also Calvin's background. Calvin has moved through various schools over his young life, he appears to have also been passed between caregivers and yet I get a sense from reading the pre-sentence report that Calvin is not bitter about that and in some ways takes a mature approach to those who have had the responsibility for his care.

[33] It would be fair to say, though, Calvin has not had the best start to life. At the time of this offending he was living in a household which was a family that he had joined although no actual blood relationship to those in that household, but he had formed a close bond with some of them.

[34] I also take account of the fact that he was only 16 years at the time. I also take account of the fact that youth can indicate an ability for a person to be rehabilitated. I am satisfied we have seen evidence of that in Calvin during the period he spent at the Youth Justice Facility where he did very well in that restrictive environment. So there is in my view hope for Calvin and a positive future.

[35] I also note there is no outer limit in terms of the discount I can give for youth. When I take all those factors into account, I would extend a 25 percent discount to Calvin for his youth, remorse and ability to be rehabilitated. In terms of his guilty plea, he is entitled to a discount but it cannot be ignored, effectively we were required to run the trial and make the witnesses, including the child witnesses, come to Court, give their evidence and it was apparent to me, at least for the youngest witness, it was quite upsetting for him to recount what he saw that night in terms of the shanking and the blood and so on. So I would extend to Calvin a 15 percent discount for his guilty plea.

[36] It is difficult to give a discrete discount for good character given Calvin has been before the Youth Court, although there is nothing to suggest there was ever a notation. I simply treat that as a neutral factor on this occasion.

[37] By my count, that would be a discount from a five year starting point of 40 percent which would take the sentence to one of three years' imprisonment. There is the burglary that occurred which I need to deal with today, it would appear that occurred while Calvin was facing this far more serious charge and I have got to say, on the facts, where Calvin while in Kaitaia was hungry and broke into a petrol station to get some small amount of food makes sad reading indeed when it is probably reflective of Calvin's circumstances back then; in the circumstances I have already referred to in terms of what support if any he was really getting at the time of this offending.

[38] That burglary cannot be ignored, but I simply uplift the three years by a three month term to mark that out. That would be an end sentence of three years three months' imprisonment. I simply make the comment, and this is really for the Parole Board when they see Calvin, that the psychiatric report recommends any community-based sentence be delivered in a kaupapa Māori framework, the strong emphasis on work and vocational training. When it comes time to be seen by the Parole Board, I ask that a copy of that report is made available to them and they give consideration to those particular recommendations.

[39] For today, however, I cannot see any other way to reduce the end sentence. I have taken account of keeping the sentence as short as possible so it will not crush Calvin but ultimately the end sentence is one of three years and three months in prison.

[40] So that is the end sentence today and it will be for the Parole Board when you are eligible to see them to determine whether you can return to the community.

E P Paul
District Court Judge