

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CRI-2021-004-7677
[2023] NZHC 946**

THE KING

v

JONIERO JOE IRVING

Counsel: R M Gibbs for Crown
L O Smith for Defendant

Sentenced: 27 April 2023

Charges: Manslaughter

Plea: Not Guilty

SENTENCING NOTES OF BREWER J

Solicitors/Counsel:
Meredith Connell (Auckland) for Crown
Lorraine Smith (Auckland) for Defendant

Introduction

[1] Mr Irving, you were found guilty by a jury of the manslaughter of James Jenkins. I have to sentence you for that crime.

[2] The maximum penalty for manslaughter is life imprisonment.¹

The facts

[3] On 7 October 2019, you were socialising with friends at the Andrew Andrew Bar at the Viaduct, located in Auckland Central. Mr Jenkins came to the same bar with his partner. At around 3.30 am he approached you and your friends, and had a brief conversation.

[4] You have never given any sort of account as to what happened during that conversation or what it was that motivated you in your later actions. But I am satisfied that there was some sort of history between you and Mr Jenkins which made him wary of you. I am satisfied that Mr Jenkins thought you might try to make him hand over to you jewellery he was wearing. Inside the bar, where you could not see him, he took off his Rolex watch and heavy gold necklace and slipped them into his partner's handbag. But he kept on his two gold rings, each of which contained a gold Sovereign coin.

[5] Later, around 4 am, when Mr Jenkins and his partner were leaving, you saw Mr Jenkins outside. You began acting aggressively towards him. Mr Jenkins, already wary of you, decided to leave the area. He ran. You chased after him. Because of fear of you and your pursuit, Mr Jenkins decided to dive into the cold water of the harbour to get away from you. But you stalked and shadowed Mr Jenkins from the land. You were not alone. Your friend, Mr Pure, was with you.

[6] Mr Jenkins eventually swam to a nearby terminal. A ferry company employee, Ms Iizuka, heard him calling for help. She told him to swim towards a ladder leading up to the pier beside the ferry she was on. You had run around to that pier and you were waiting for him. Mr Jenkins climbed part-way up the ladder and remained there

¹ Crimes Act 1961, ss 158 and 171.

for some time. During this period, Mr Karaitiana and Mr Singh, security guards, overheard you making various threats, including saying: “I’m going to fucking smash you, I want to fucking kill you”. CCTV footage shows you hiding behind various objects and looking at Mr Jenkins.

[7] Mr Jenkins eventually climbed up the ladder and went onto the ferry which Ms Iizuka was working on. You approached the ferry and tried to board it. Ms Iizuka tried her best to stop you from boarding and she was successful. From the pier you continued making threats and demands to Mr Jenkins. You wanted him to hand over his gold rings. He complied and he handed you the two gold rings.

[8] But that did not stop you. You wanted the necklace (which he no longer had). Mr Jenkins initially tried to escape to the pier, but you went and blocked him from doing so. You continued making further demands and threats. You made a move as if to climb onto the ferry. Mr Jenkins at once jumped back into the harbour. He swam towards the bow of the ferry. You watched him a short time before leaving. Mr Jenkins weakened in the water. He did not respond to efforts to help him. He drowned. You were responsible for his death.

Victim impact statements

[9] You have heard the three victim impact statements. In particular, you have heard the pain you have caused his mother, who continues to live with that pain as does his family. I know that the sentence I will impose on you will not make up for their pain. That would be impossible. I simply have to do what the law requires.

Sentence structure

[10] I will take a two-step approach to decide your sentence. First, I will set a starting point for your sentence by analysing your offending and, in doing so, I will take into account other cases similar to yours. Second, I will look at your personal circumstances to see to what extent the starting point should be reduced.

Starting point

[11] Each case of manslaughter has to be assessed individually. Your case falls in the “fright-response” manslaughter category. The lawyers have referred me to the few manslaughter cases of this type which they say are similar to your case and which I should use to guide me in assessing the starting point for your offending. I have read these cases² but their facts are very different to your case. I have to look at what you did and sentence you individually.

[12] The Crown submits that the starting point should be up to five years’ imprisonment. Mrs Smith on your behalf submits a starting point of four years is more appropriate.

[13] I will look at the elements of your offence and consider to what extent they are aggravated:

- (a) First, your threats and your pursuit plainly caused significant fear in Mr Jenkins as he twice decided to seek safety in the harbour, which is an inherently dangerous environment. This factor is significantly aggravating;
- (b) You threatened death on more than one occasion and you pursued Mr Jenkins over a prolonged period. The seriousness of your conduct is another aggravating factor;
- (c) The fear you caused in Mr Jenkins was the sole cause of his response. This factor is significantly aggravating;
- (d) Mr Jenkins’s response to your threats was reasonably foreseeable. In fact, as Mr Jenkins had previously tried to escape by the water his response to your last set of threats, including appearing to try and board the ferry, was arguably a very foreseeable outcome. This is a significant aggravating factor; and

² *R v Teo* [2023] NZHC 700; *R v Marshall* [2015] NZHC 2016; *R v Lucas* [2017] NZHC 651; and *R v Te Tomo* [2017] NZHC 1628; *R v Liev* [2017] NZHC 2253.

(e) Your offending was the substantial cause of Mr Jenkins's death.

[14] A further significant aggravating feature is that in the course of your conduct you extorted two rings from Mr Jenkins. But you continued to threaten him. I say "extorted" because I do not know enough about your history with Mr Jenkins to call it robbery. But, clearly, your motive was financial. You wanted to force Mr Jenkins to give you his jewellery.

[15] Because of those factors, I will adopt a starting point of five years and six months' imprisonment. I consider that standing back and looking at the totality of your offending, that is within range.

Mitigating factors

[16] I now turn to look at your personal characteristics. I have to decide whether there are matters personal to you which should reduce the starting point.

[17] First, you have a criminal history. There are 16 notations in the Youth Court, 14 of which are for burglary. In 2013 you were sentenced to home detention for another burglary. Your most recent previous conviction was in 2020 for wilful damage. Your offending now is in a very different category. You are not entitled to a discount for good character, but I will not increase the starting point because of your previous offending.

Youth

[18] You were 23 years and seven months old at the time of your offending. The Court of Appeal in *Dickey v R* has recently reaffirmed that offenders up to the age of 25 may receive discounts for youth.³ The basis of these discounts is to reflect the incomplete neurological development which is associated with youthful impulsivity and susceptibility to negative influences. Young people also are more receptive to treatment and therefore have better prospects of rehabilitation than adult offenders.

³ *Dickey v R* [2023] NZCA 2.

[19] Mrs Smith submits a discount of 10 per cent is warranted. The Crown says you should only receive a modest discount. It submits that as your offending was relentless, persistent, determined and financially motivated a lesser discount is appropriate. But, I have to avoid “double counting”.

[20] However, I do not see in your behaviour that night the hallmarks of impulsivity and risk-taking associated with some offending by young people. Rather, your conduct was deliberate. You had plenty of time to stop. You carried on even after you got the rings. You were 23. I will not give a youth discount. The law is not yet at the stage where an offender aged 23 years and seven months is entitled automatically to a discount for youth. However, I will be giving you a discount for your cultural factors and I will bear in mind your youth when I set that discount.

Cultural factors

[21] I have read a report prepared under s 27 of the Sentencing Act which talks about your background with an emphasis on your cultural deprivation. Mrs Smith, this morning, has referred to some of the contents.

[22] The law is that evidence of social, cultural or economic deprivation “that has a demonstrative nexus with the offending” can be considered as mitigating in the course of sentencing.⁴

[23] I am sorry to use that sort of language, Mr Irving. It is not the everyday language that people use to communicate with. But that is how they use language in the Court of Appeal and the Supreme Court and so I am just having to make it clear which part of the law I am applying. Really what it means is this. Very few people who were brought up by close and loving parents and who were treated with respect and encouraged to be their best go on to commit the sort of offending you have. Almost always people sitting in the dock where you are come from dysfunctional and abusive backgrounds where their future behaviour can be predicted by how they were themselves treated in the past. So, the law does recognise that a person who commits

⁴ *Kreegher v R* [2021] NZCA 22, (2021) 29 CRNZ 622 at [44], citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [162]; and *Berkland v R* [2022] NZSC 143.

offending coming from such a background can be said to be less blameworthy than somebody who came from a better background.

[24] In your case you were physically disciplined and abused by your father. From what I read he appeared to suffer from substance abuse and anger management issues. Through your father's associates you were exposed to gangs from a young age and it is reported that you began to idolise those gangs. At 14, as Mrs Smith has said, you were found to have learning difficulties. You were acting violently at school and you were expelled. You began using methamphetamine in your teenage years and by age 17 you say you were using a gram a week. Your drug usage continued to increase and you resorted to burglary and theft to pay for your addiction. And, to sustain your way of life.

[25] It is to your credit, as Mrs Smith reported, that after your sister took you in you stopped using methamphetamine, became much more interested in the gym and began to turn your life around.

[26] Mr Irving, I accept that your background contributed to your present offending. You were brought up to believe that violence is an appropriate and acceptable way to treat others. However, the motivation behind your pursuit of Mr Jenkins was clearly financial. There is no evidence that you were driven by drug addiction. Mrs Smith has asked for a 40 per cent discount to reflect these matters. Such a discount would be the maximum available and I do not consider it would be warranted. Discounts of 15 per cent are often made under this head, with room for more in appropriate circumstances.⁵ I will apply a 15 per cent discount. I have seen descriptions of dislocation and deprivation significantly worse than yours.

[27] Mrs Smith submits I should also discount your sentence by 10 per cent because you are remorseful and have letters of support which speak well of your character. Well, it is easy to write a letter expressing remorse after you have been found guilty of a serious charge. And the fact that in some aspects of your life you behaved well is not by itself a factor warranting a sentence discount. I am reminded of your text message exchange with Mr Pure later in the morning of the incident. Of course, you

⁵ *Tipene v R* [2021] NZCA 565 at [22]–[23], citing *Carr v R* [2020] NZCA 357 at [65]–[66].

didn't then know that Mr Jenkins had drowned, but your attitude was not one of remorse. Nor have you returned the rings or disclosed what you did with them.

[28] I will not allow a discount for remorse.

Result

[29] Mr Irving, please stand. On your charge of manslaughter, I sentence you to a term of four years and eight months' imprisonment.

[30] You may stand down.

Brewer J