IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA733/2021
[2022] NZCA 550

BETWEEN	DALLAS TIHINI FRASER HOHUA Appellant
AND	THE KING Respondent

Hearing: 16 June 2022

Court: Courtney, Mander and Fitzgerald JJ

Counsel: J N Olsen for Appellant
B J Thompson for Respondent

Judgment: 16 November 2022 at 11.30 am

JUDGMENT OF THE COURT

A The appeal against sentence is allowed.

B The sentence of six years and three months' imprisonment is set aside and substituted with a sentence of five years and three months' imprisonment.

C The minimum period of imprisonment of three years is set aside and substituted with a minimum period of imprisonment of two years.

D The suppression order made by Muir J on 16 December 2021 is set aside.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Lani Paul died of a single stab wound inflicted by Dallas Hohua during an altercation at the end of an evening of drinking at Mr Hohua's home. Mr Hohua was charged with Mr Paul's murder. At trial he asserted self-defence. The jury returned a manslaughter verdict. Muir J imposed a sentence of six years and three months' imprisonment with a minimum period of imprisonment (MPI) of three years.

[2] Mr Hohua appeals his sentence on the ground that the sentence is manifestly excessive as a result of error by the Judge in:

(a) taking too high a starting point; and

(b) failing to give adequate weight to Mr Hohua's personal background.

The offending

[3] There were variations in the witnesses' accounts of events in the hours before Mr Paul's death. The following account is largely drawn from the Judge's sentencing notes; the Judge had noted that the account he recorded was based on a combination of the Crown summary of facts, with the Judge essentially agreed, and the Judge's own findings where required.

[4] Mr Hohua, who was 57 years old, and Mr Paul, then aged 29, were known to one another. At about 5 pm on 23 October 2020, Mr Paul, his partner and several of their associates went to Mr Hohua's address. Mr Hohua was not present but his partner, Ms Delamare was there, with the couple's young son and other whānau. Many of the group that arrived had been drinking. Mr Hohua arrived a short time later. He, too, had been drinking.

[5] At about 11 pm, after an argument began between Mr Paul and his partner, Mr Hohua and Ms Delamare decided to close the party down. What happened next was described by the Judge:[1]

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1 *R v Hohua* [2021] NZHC 1242 (footnote omitted).

> [5] … You told everyone to get off your property, including Mr Paul and his associate known as "Stretch".
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> [6] Mr Paul and his friends did not want to leave. You were determined that they do so and began pushing them out onto the driveway adjacent to the shed in which the party had occurred. A fight then broke out between you and Mr Paul during which you punched him in the face several times. You also took punches from Mr Paul resulting in swelling/bruising to your own face and a laceration.
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> [7] Throughout this period Ms Delamare vocally supported you and endeavoured to arm herself, including with a golf club which Mr Hohua removed from her.
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> [8] In due course, as a result of the intervention of others, you and Mr Paul disengaged.
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> [9] Mr Paul went out into the street, or the lane adjacent to your house, removed his shirt, and then walked back towards your property. You had at this stage gone around to the front of your house. You went inside for a short period before returning and taking up a position on the front law[n], brandishing a golf club. At about this point you were joined by your grandson who had retrieved a baseball bat from his car.
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> [10] Mr Paul then made an attempt to jump over a side fence into your property before returning to the street where you and Mr Paul yelled abuse at each other culminating in you leaving your front yard and advancing on him. As you did so, you discarded the golf club. But while inside the house I conclude, based on my assessment of all the facts, you had armed yourself with a knife.
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> [11] Mr Paul then retreated back up the street towards his own home. Stretch was with him. Either at that point or a little earlier they had removed a paling from the neighbour's fence. As you closed the gap on Mr Paul he grabbed the paling. Your grandson was doing his best to get you to disengage but you weren't listening. Mr Paul then swung the paling but your grandson blocked the blow. At that point you stabbed Mr Paul deeply in the mid chest.

[6] Having canvassed the facts of the offending the Judge made the following comments:[2]

> [14] These facts do not fit neatly within a standard legal construct because, although in one (I consider artificial) sense you may be considered to have stabbed Mr Paul in response to his intended assault of you, and accordingly acted self-defensively, that was in the context of you being the aggressor having jumped the fence and advanced on Mr Paul. A leading commentary, Simester and Brookbanks' *Principles of Criminal Law*, says that in such cases the determinative questions are likely to be whether:
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> > … [the defendant] has *foreseeably* and *wrongfully* created the circumstances in which he or she is endangered by [the victim], and

[2] Footnotes omitted.

> whether the danger is being posed by [the victim's] justified response to those wrongfully-created circumstances.

[15] The same authors state:

> Public policy, too, would seem to demand that an unjust aggressor not be entitled to plead self-defence. To not enforce such a limitation on the defence would imply that the state is willing to offer impunity to any unjust aggressor simply because his or her victim used force in self-defence.

The starting point

Selecting the starting point

[7] The Judge took an orthodox approach to the selecting the starting point — considering the aggravating and mitigating factors of the offending by reference to *R v Taueki* and then considering comparable cases.[3]

[8] The Judge identified three aggravating features — extreme violence, serious injury and the use of a weapon. As to the first, he rejected the submission made by Mr Munro, for Mr Hohua, that the use of the knife was not gratuitous:

> [23] … The jury's verdict necessarily implies that it rejected your claim of self-defence. Production and use of a knife was, at a minimum, a totally disproportionate response to the threat faced and in circumstances where the threat itself had defensive origins.
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> [24] I therefore consider the level of violence administered by you a significantly aggravating feature.

[9] As to the second, the Judge described the injury as "a mortal wound which resulted in proximate death".[4] He considered the seriousness of the injury to be a significantly aggravating feature.

[10] As to the third, the use of a weapon, the Judge said:

> [27] I am prepared to accept that when you armed yourself with a knife you did not do so with the intention of necessarily stabbing Mr Paul. Had the jury thought this was the case, a murder verdict may well have been appropriate. But you nevertheless introduced a lethal weapon into what was

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3 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372; *R v Tai* [2010] NZCA 598; *Ioata v R* [2013] NZCA 235; and *Everett v R* [2019] NZCA 68.

4 At [25].

> already a very volatile situation. Your use of that weapon is also a significant aggravating feature of the offending.
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> [28] Implicitly in what I have just said, I reject the Crown proposition that use of the knife was in any material sense premeditated. The fact you remained on the front lawn remonstrating with Mr Paul for a period after uplifting it, belies that proposition. My assessment is closer to that of Mr Munro. He suggests that your use of the knife was not premeditated but an impulsive act — that you did not brandish it but produced it in the heat of the moment.

[11] Mr Hohua's counsel had submitted that Mr Hohua's culpability was significantly reduced, first, as a result of Mr Paul's actions in refusing to leave the property, becoming aggressive and goading Mr Hohua into a fight; and, secondly, because Mr Hohua had been acting defensively throughout.

[12] The Judge accepted that some modest recognition of Mr Paul's provocative behaviour was appropriate:

> [31] … Had Mr Paul simply gone home after the initial altercation and removal from the property, this tragedy would have been avoided. Instead, he continued goading and taunting you into a fight. He would not leave you alone. He pressed all the wrong buttons by referring to your age, implicitly elevating his own superior physicality. He did so in front of your female partner who was egging you on and, despite the mature attempts of your grandson to de-escalate the situation, you rose to the bait. Mr Paul then attempted to jump the side fence back into your property. This was apparently the final straw; you then abandoned your defensive position and pursued him down the footpath. The fatal stabbing occurred shortly after. Some modest recognition of these provocations is appropriate. That said, the response was still disproportionate and extreme. …

[13] The Judge did not accept that Mr Hohua had been acting defensively so as to reduce his culpability. Mr Munro had argued that the jury must have accepted that Mr Hohua was acting in self-defence but had used unreasonable force, because if the Crown had proven that Mr Hohua was not acting in self-defence then the motive for stabbing Mr Paul would have been anger or retaliation and the verdict would necessarily have been one of murder. Rejecting that submission, the Judge said:[5]

> [33] … It is possible that the jury considered you were not acting in self-defence but nevertheless considered that you failed to appreciate, in the heat of the moment, that your action may well lead to Mr Paul's death. It would of course have been conscious of the standard of proof on the murder

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5 Footnote omitted, emphasis added.

> charge. It is not a necessary corollary of the jury's verdict that they thought you were acting in self-defence.
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> [34] However, in the context of this offending rarefied discussions about whether you acted self-defensively at all or whether you did so but in a way which was disproportionate, tend to the arcane and have little bearing on sentencing outcome. That is because whether the issue is analysed in the way I have previously quoted from *Principles of Criminal Law* or whether, as *Adams on Criminal Law* puts it, the actions of a nominally defensive aggressor "cannot be seen as reasonable", the same end point is ultimately reached — even though Mr Paul attempted to strike you or your grandson with a fence paling as you, the aggressor, advanced on him, this cannot be seen as mitigating your offending in any material sense. *As you pursued Mr Paul and as you saw him grab the paling to defend himself against your inevitable attack, you chose, against all of your grandson's pleading, to advance further, driven by aggression and frustration, your emotions fuelled by alcohol, knowing that you had by far the more lethal weapon at your disposal.*
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> [35] I do not therefore accept that purported self-defence or excessive self-defence reduces your culpability for Mr Paul's death.

[14] On the basis of there being three aggravating features — extreme violence, serious injury and the use of a weapon — the Judge placed the offending towards the upper end of band two.[6] He considered comparator cases involving single stab wounds causing death.[7] He concluded that:

> [44] … [i]n the final altercation between you and Mr Paul, you were the aggressor. You chose to pursue him knowing you had a knife in your possession. He was backing away from you as you approached. His swing of the paling was, I find, an attempt to forestall your advance and an attack on him.
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> [45] The cases therefore confirm me in my assessment that the starting point should be towards the upper end of band two. I adopt a starting point of eight years' imprisonment. From that however I deduct six months (or 6.25 per cent) on account of provocation. The result is an adjusted starting point of seven years, six months' imprisonment.

[15] The Judge imposed an uplift of three months to reflect Mr Hohua's previous convictions for violent offending.[8] From the adjusted starting point of seven years and nine months the Judge allowed discounts of 15 per cent for Mr Hohua's personal

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6 At [37].
7 *R v Olley* [2012] NZHC 40; *R v Kaihau* [2013] NZHC 3192; and *R v Scollay* [2014] NZHC 465.
8 At [46].

circumstances and five per cent for remorse.[9] This resulted in the end sentence of six years and three months' imprisonment.[10] The Judge imposed an MPI of three years.[11]

The starting point

[16] Mr Olsen, for Mr Hohua, submitted that the Judge erred in placing the offending in the upper part of band two. Although he accepted that band two would ordinarily have been appropriate, the mitigating factors — Mr Paul's own behaviour and the fact that Mr Hohua was acting defensively — ought to have brought the offending into band one, with a range of starting points between three and six years' imprisonment. Mr Thompson, for the Crown, did not accept this analysis. He supported the starting point taken by the Judge on the basis of the aggravating features identified by Muir J and by reference to comparable cases involving fatal stab wounds.

[17] We start by noting that we see some duplication in the Judge's identification of aggravating features. Given that death is reflected in the charge of manslaughter itself, the mortal nature of the wound was not an aggravating feature. However, the adjustment required in applying *Taueki* to cases of a fatal attack brought the offending within band two, though we consider that it is more appropriately placed in the middle of the band (subject to the issues regarding mitigating features of provocation and defensiveness that we come to later).

[18] Mr Olsen submitted that the Judge's factual finding that Mr Hohua was inevitably going to attack, was driven by aggression and knew he had a lethal weapon was inconsistent with the jury's verdict, particularly in light of the Judge's direction to the jury that "murderous intent does not require any premeditation or planning [and] can be unplanned, impulsive and instantly regretted". He argued that if the jury had found that Mr Hohua was acting aggressively (as the Judge viewed things) the verdict would have been murder. The manslaughter verdict necessarily meant that he was acting out of self-defence or defence of his grandson, albeit that the force used was unreasonable. In those circumstances the generally defensive nature of Mr Hohua's

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9 At [48]–[49].
10 At [50].
11 At [54].

actions, although not a defence to the charge, was properly viewed as a mitigatory feature of the offending.

[19] We do not see the Judge's assessment of the facts as inconsistent with the manslaughter verdict. Aggression is not incompatible with manslaughter. Even an intention to attack (indicated by the Judge's finding of inevitability of the attack) is not incompatible with manslaughter. We accept the submission made by Mr Thompson for the Crown that it was equally possible that the jury was simply unable to be satisfied beyond reasonable doubt that Mr Hohua had murderous intent. That did not exclude him acting out of anger, aggression or frustration.

[20] Reviewing the notes of evidence, we agree that, although the incident was fast moving, there was a distinct point when Mr Paul and his associate were no longer on Mr Hohua's property and were walking backwards, that Mr Hohua could have disengaged. It was Mr Hohua moving forward that led to Mr Paul swinging the fence paling and Mr Hohua responded by moving forward, with a knife. It is taking too narrow a view of the incident to focus only on the moment at which the fence paling was swung. That instant had to be viewed against the preceding moments in which Mr Hohua chose to advance. We therefore find that the Judge made no error in declining to accept that there was an element of self-defence by way of a mitigating feature in the offending.

[21] We also consider that the allowance for provocation of six months (equating to 6.25 per cent) was appropriate. While the conduct of the victim is a matter that may be taken into account this Court has previously said that an allowance on this account will, at best, give rise to a modest discount on the starting point.[12]

[22] On the basis that the offending sits within the middle of band two of *Taueki*, which has a range of starting points from five to 10 years, we turn to consider the comparable cases. We find that in "single stab" cases involving some level of discount for provocation starting points between six and seven and a half years are usual. Specifically, we find the following cases of assistance.

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12 *Wairau v R* [2015] NZCA 215 at [31].

[23] In *R v Herewini* the defendant had intervened to stop an assault on the deceased's partner. He was fended off. The deceased taunted him. The defendant went inside, got a knife and stabbed the deceased once, fatally. Allowing for a degree of provocation Stevens J took a starting point of seven years and three months' imprisonment.[13]

[24] In *R v Eastham*, following a fight in a bar between the defendant and the deceased, the defendant left and got into a vehicle.[14] The deceased approached the vehicle. The defendant got out, carrying a homemade knife. After more fighting the defendant ended up on the ground being punched in the head by the deceased. The defendant stabbed him once in the chest. Allowing for the victim's conduct, Ronald Young J took a starting point of seven years' imprisonment.

[25] In *R v Hepi*, an altercation between two groups associated with rival gangs led to the deceased and the defendant walking towards one another looking ready for a fight.[15] When they reached each other there was an exchange of punches before the defendant stabbed the deceased, who was unarmed. Andrews J found that the defendant had willingly engaged in the confrontation and stabbed him deliberately but, in the heat of the moment, did not realise that thrusting the knife at the deceased could lead to a fatal wound. She took a starting point of six years' imprisonment. This has similarities to the present case, although the stabbing occurred in the context of a broader confrontation.

[26] In *R v Skeen* the defendant and the deceased got into a fight at a party.[16] The deceased punched the defendant to the ground. The defendant either broke a bottle or picked up a broken bottle. He swung it at the deceased, cutting the jugular vein. Peters J placed the offending squarely within band two of *Taueki* and took a starting point of seven and a half years' imprisonment.

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13 *R v Herewini* HC Rotorua CRI 2006-063-3151, 5 October 2007.
14 *R v Eastham* [2013] NZHC 2792.
15 *R v Hepi* [2015] NZHC 1449.
16 *R v Skeen* [2016] NZHC 1904.

[27] Finally, in *R v Wirihana* the defendant had been drinking at his partner's house.[17] His partner's aunt took a dislike to him and left, returning with four men, including the deceased. Two of them rushed at the defendant. During the following fight the defendant was beaten, including being hit on the head with a shovel. The defendant went into the house and returned waving a knife, but he was outnumbered. The deceased then drove a vehicle at the defendant and his partner, pinning the defendant's partner's car against another vehicle. The defendant reached into the vehicle and stabbed the deceased in the neck. Edwards J accepted that there was provocation in the events leading up to the stabbing but that at the time of the stabbing there was no imminent threat. Citing the present case, Edwards J took a starting point of seven years.

[28] We were also referred to *R v Smith*, in which the deceased tried to goad the defendant into a fight because he thought the defendant had been spreading rumours about his ex-girlfriend.[18] The defendant walked away but later in the evening the deceased and his friends came looking for him to start a fight. The defendant found himself with his back to the bonnet of a parked car. When the deceased grabbed the defendant by his hoodie the defendant took a knife out of his jeans and stabbed the deceased three times in the back. Dunningham J accepted that there was a "limited amount of provocation" and of excessive self-defence but considered that his reaction was "prompted as much, if not more, by the goading … and [the defendant's] desire to get even … as it was by self defence."[19] A starting point of eight years was taken. Although this case has some comparable features, three stab wounds means it must be viewed as more serious.

[29] Other cases cited by Mr Thompson were "single stab" cases in which higher starting points were taken but where there was no element of provocation, so they cannot be viewed as truly comparable. Two were ones relied on by the Judge. In *R v Olley*, there had been an argument between the deceased and the defendant during which the deceased had pulled a knife on the defendant.[20] But a third party took the knife from the deceased without difficulty and put it on a bench. The defendant then

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17 *R v Wirihana* [2022] NZHC 863.
18 *R v Smith* [2014] NZHC 2091.
19 At [9]–[10].
20 *R v Olley* [2012] NZHC 40.

took up the knife and stabbed the deceased, who was seated and of much smaller build than him. Although the defendant had asserted a degree of provocative conduct by the deceased, Woodhouse J declined to recognise that conduct as having any significant weight, given that the fatal wound was inflicted after the deceased had been disarmed and was no longer any threat. A starting point of nine years was taken.

[30] In *R v Kaihau*, the defendant had been found hiding on private property and the defendant lunged at the deceased with a knife.[21] There was no question of provocation and the deceased was much older and smaller than the defendant. Dobson J took a starting point of eight years and nine months.

[31] In addition, we note *R v Scollay*, which the Judge also relied on.[22] The defendant had stabbed her partner when very distressed — described by Mander J as being a time of personal crises — as a result of stress and unhappiness in her marriage. However, the stabbing was premeditated, the deceased vulnerable because he was in bed and only partly awake, and there was no suggestion of provocation. The Judge took a starting point of eight years. We do not see these circumstances as comparable.

[32] Mr Olsen also referred to cases decided in the context of a domestic relationship in which lower starting points were taken. We do not find these comparable either. In *R v Patangata* the defendant stabbed her partner in the course of a fight.[23] The Judge concluded that the defendant had stabbed her partner because she was angry before the fight, her partner's violence during the fight scared her and exacerbated her anger, and because she was already disposed to using knives after she had been drinking. The defendant's partner's conduct in "kicking and briefly choking" the defendant was recognised in the starting point on the basis that the deceased had "used violence and it aggravated [the defendant's] state of mind."[24] An adjusted starting point of six years was taken. Self-evidently, those facts differ from the present because the stabbing occurred impulsively, during the fight itself.

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21 *R v Kaihau* [2013] NZHC 3192.
22 *R v Scollay* [2014] NZHC 465.
23 *R v Patangata* [2019] NZHC 744.
24 At [31].

[33] In *R v Rose* the defendant and the deceased were arguing and during the argument the deceased punched the defendant causing bruising and cuts.[25] After that assault the defendant texted an associate saying that if her partner touched her again she would stab him. However, the verbal argument continued. The defendant took out a pocketknife. The deceased laughed at her and began to get up. As he did so the defendant stabbed him in the upper back. The Judge took into account the assault on the defendant, and the threat by the deceased that she would die, and treated the text message as showing desperation, anger and fear rather than premeditation. He viewed the stabbing as a somewhat impulsive response. Moreover, the stab wound was to an area that was not obviously vulnerable. A starting point of three years and nine months was taken. Again, we see a significant difference between this case and an impulsive stabbing in the context of an ongoing argument between domestic partners where there has been previous actual and threatened violence, and where the stab wound was not to an obviously vulnerable part of the body.

[34] Mr Olsen also drew our attention to two other cases, *R v Rakete*[26] and *R v Kirk*.[27] However, neither involved stab wounds and the circumstances were markedly different to the present case.

[35] In our view the Judge's starting point of seven years and six months was slightly too high to reflect the circumstances of the offending, including Mr Paul's provocative conduct. We consider that seven years and three months would have properly reflected all the circumstances of the offending.

Discount for personal circumstances

[36] The Judge had before him the report of a clinical psychologist, Dr Loshni Rogers.[28] The report recorded Mr Hohua's 2014 diagnosis of

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25 *R v Rose* [2017] NZHC 1488.
26 *R v Rakete* [2013] NZHC 1230.
27 *R v Kirk* [2016] NZHC 1249.
28 In a minute dated 16 December 2021, Muir J made an order suppressing the contents of this report and reports provided by the Department of Corrections addressing matters personal to Mr Hohua. In this Court, Mr Hohua's counsel has advised that Mr Hohua does not wish to have this judgment redacted in accordance with that order. Counsel for both parties have confirmed that the suppression order may be set aside and we make an order accordingly.

post-traumatic stress disorder (PTSD) resulting from childhood physical and sexual abuse. That diagnosis had been made by an ACC Sensitive Claims therapist.

[37] Dr Rogers' report recorded the following information about Mr Hohua's childhood. He was the fifth youngest of 17 children. His father died when he was seven. His mother began a new relationship with a man who inflicted severe physical abuse on Mr Hohua. He recalls being knocked unconscious, hung upside down on a clothesline and locked in a wardrobe. Mr Hohua was both physically and sexually abused by his step-siblings, including being raped by his step-brother. Although he felt safe at school, the abuse at home made it difficult to succeed at school. Mr Hohua also suffered from deafness and wore hearing aids as a child. Mr Hohua moved to live with an adult brother when he started high school. This provided a better environment where he was not abused. He did not return home after that. He joined the Black Power gang when he was 19 which provided a sense of belonging and support.

[38] It is not clear from Dr Rogers' report what led to Mr Hohua seeking help from ACC. Dr Rogers refers to the ACC claim having been made in 2013 and Mr Hohua receiving counselling between 2013 and 2016. Dr Rogers drew on the ACC notes for information about Mr Hohua's diagnosis to inform her view.[29] Those notes recorded a diagnosis of DSM-V PTSD of chronic type. They recorded observations during engagement in therapy of Mr Hohua's emotional fragility and being easily aroused and overwhelmed by past sexual abuse.

[39] ACC assessor and psychologist, Mr Grove, concluded that an initial first defence, if Mr Hohua could not run, was to flash to a state of anger. Ms McGee noticed similar tendencies, describing Mr Hohua as displaying "classic PTSD symptoms" and living in "survival mode ("a fighter rather than a fleer")." Dr Rogers recorded Ms McGee observing Mr Hohua's tendency "to be easily triggered and to exhibit distorted thinking and poor problem solving within this context." His preference for isolation in order to keep safe was also emphasised, as well as his tendency to be a rescuer.

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[29] The ACC notes were provided by therapists Mr C Grove and Ms D McGee.

[40] Dr Rogers noted:

> … A prominent theme during the current assessment and during Mr Hohua's prior engagement with Sensitive Claims counselling suggested an entrenched internalised belief of being unsafe, and Mr Hohua's longstanding efforts to maintain a sense of safety and control over his environment.
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> …
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> It was considered by the writer and previous ACC assessor that Mr Hohua likely experienced significant developmental, neurobiological, and psychological impairment/damage that impacted his central nervous system. As such, it was considered likely that this hindered his ability to develop effective regulation skills for managing distress, including strong negative emotions.

[41] Dr Rogers' opinion was:

> … As a consequence of his abuse, he developed an entrenched distrust of others and perceptions of the world being unsafe. His abuse also left him with PTSD symptoms which he struggled to cope with. Combined with modelling of violence within the home, Mr Hohua became easily triggered and reactive, and likely perceived the need to protect himself. As such, he developed a propensity for violence in response to his triggers and feeling unsafe, and to resolve conflict. Mr Hohua did not appear to develop appropriate self-control and emotional regulation skills, and his violence was likely exacerbated by earlier substance abuse. In order to manage his distress and triggers, Mr Hohua used avoidance to cope. Within this context, he appeared determined to ensure that others understood they were not to visit him, and he maintained strong control over his environment to maintain his sense of safety.
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> …
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> Unfolding events on the evening of Mr Hohua's index offending when associates including the victim were at his home, likely caused him to be hypervigilant. This was likely influenced by the presence of his son, and underlying distrust of younger [B]lack [P]ower members. Thereafter, his sense of safety appeared further threatened by perceptions of his associates being under the influence of methamphetamine and becoming unruly. Mr Hohua also appeared to be significantly triggered when they refused to leave his home, and his emotions likely became heightened during altercations with the victim. Within this context, Mr Hohua's subsequent index offending was deemed likely related to his sensitivity to fears for his safety and increased reactivity within this context, given his PTSD symptoms and underdeveloped coping skills. Given his alcohol use through the evening, his reactivity was also likely exacerbated, and he engaged in poor decision (sic) when he offended against the victim.

[42] The Judge accepted that Mr Hohua's personal circumstances had a causative effect on the offending, which he recognised by a 15 per cent discount:

> [47] … Your upbringing, like so many that appear before the Court, was married (sic) by hardship and trauma. One consequence of that upbringing is that you are described by clinical psychologist, Dr Loshni Rogers, as having an "entrenched internalised belief of being unsafe". You need to maintain a sense of safety and control over your environment, have difficulties managing distress, have a quick temper and are "in constant survival mode". I consider these and other factors were directly relevant to your perception of the threat posed by Mr Paul and others on the night in question — in this way, they had a direct causative bearing on the decision-making that led to your offending.
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> [48] While your background in no way excuses what you did to Mr Paul, it does go some way towards explaining it, in turn impacting on your culpability. Some discount is therefore appropriate to reflect these factors albeit that in the case of very serious offending such as this there is an emphasis on proportionality. It is important not to lose sight of the fact that at the centre of this whole process is a young man, antisocial although some of his conduct was, whose life was cut short as a result of your actions. I consider that in all the circumstances a discount of 15 per cent is warranted for personal circumstances.

[43] The Judge also gave a further specific discount of five per cent for remorse.[30]

[44] Mr Olsen submitted that the Judge erred in tempering the discount for personal circumstances to reflect the proportionality of the process, given Mr Paul's death. He argued that in fixing a discount to recognise personal factors issues relating to the victim was not a relevant consideration. Mr Olsen submitted that a discount of 30 per cent was appropriate for the circumstances of this case because Mr Hohua's personal circumstances, specifically his PTSD, were integral to the actions on the evening.

[45] Mr Thompson, however, maintained that the discount provided was in line with the level of discount applied and recognised as appropriate in broadly similar situations. He cited particularly this Court's decisions in *Minogue v R*,[31] and *Kreegher v R*.[32] In *Minogue* and *Kreegher*, the discounts allowed were 15 and 10 per cent respectively. However, neither case is truly comparable. *Minogue* involved serious, sustained, sexual and violent offending against the defendant's ex-partner. The psychiatric evidence was that Mr Minogue did not suffer from any mental illness, intellectual impairment or cognitive disability. Rather, his history of persistent offending and major relationship difficulties suggested antisocial personality disorder

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30 At [49].
31 *Minogue v R* [2020] NZCA 515.
32 *Kreegher v R* [2021] NZCA 22.

complicated by methamphetamine use, neither of which were amenable to psychological or psychiatric intervention.[33] The 15 per cent discount recognised by this Court as appropriate did not reflect mental illness but, rather, Mr Minogue's seriously disadvantaged background which was regarded as being relevant to his culpability.

[46] *Kreegher* concerned serious violent offending (kidnapping, aggravated robbery, wounding with intent to cause grievous bodily harm and arson). Mr Kreegher had suffered a deprived and violent childhood and also claimed to have been sexually abused but had not addressed that issue. The sentencing judge had given a discount of six months for "gang affiliation, mental health and substance abuse … [which] are shaped by traumatic violent and abusive issues in your past".[34] This Court considered that those issues and, more generally, a life marred by social deprivation, likely influenced Mr Kreegher's decision-making on the night in question and bore on his relative culpability. A discount of 10 per cent was considered adequate to reflect those issues.[35]

[47] Both cases are markedly different to Mr Hohua's situation. Mr Hohua endured a violent, chaotic and abusive childhood that might well justify a discount in itself. But more than that, he emerged from that childhood psychologically damaged in a very distinct way. That damage has been recognised and is capable of clear definition. Mr Hohua has clearly tried to address the resultant effect on him by attending counselling.

[48] In *E (CA689/2010) v R* discounts of between 12 and 30 per cent were regarded as appropriate to recognise mental health issues that operated as a mitigating factor relevant to the offender's personal circumstances.[36] In *Orchard v R* the Court added, however, that this indication of range was not to be taken as confining the upper range discount where diminished responsibility by reason of mental health deficits

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33 *Minogue v R*, above n 31, at [36].
34 *R v Kreegher* [2019] NZDC 25842 at [24].
35 *Kreegher v R*, above n 32, at [47].
36 *E (CA689/2010) v R* [2011] NZCA 13, (2011) 24 CRNZ 411 at [68] and [70]. See also *Gotz v R* [2019] NZCA 99 at [20]..

substantially diminishes moral culpability and the need for deterrence, accountability and denunciation generally as sentencing concerns.[37]

[49] Mr Hohua's case is closer to *Orchard*, in that the defendant also suffered from PTSD following an accident. He was responsible for a serious assault — grievous bodily harm against his wife. Differing from the sentencing judge, who had given a "lesser" discount of 15 per cent because of the risk Mr Orchard's mental health issues posed to his family, this Court observed that where a mental health condition has contributed causally to the offending, and thereby mitigated that offending, the full measure of that mitigation ought to be allowed unless it can be said that the reduced discount is likely to make a difference in terms of safety.[38] The Court increased the discount to 20 per cent as being a proper reflection of the causative effect of Mr Orchard's mental health disability on the offending.[39]

[50] However, while comparable in the sense that Mr Orchard also suffered from PTSD, there are differences between that case and the present. Mr Orchard's illness was caused by an accident, rather than childhood trauma, and caused generalised symptoms such as anxiety, depression and emotional dysregulation. Importantly, the circumstances of the offending did not provoke the same specific triggers regarding personal safety as the circumstances in which Mr Hohua's offending occurred.

[51] The consequences of PTSD in the present case was that Mr Hohua's need to ensure his personal safety was seriously threatened by Mr Paul's refusal to leave and his aggressive goading of Mr Hohua to fight. Dissected clinically, it is possible to see that the opportunity existed for Mr Hohua to step back and disengage. But viewed through the lens of Mr Hohua's mental state it is clear that this would have been a very difficult thing for him to do. His instinctive response was to fight and that instinct reflected the disordering effect of PTSD. In our view the circumstances of this offending warranted a discount at a greater level than recognised by the Judge. We consider that a discount of 25 per cent would have been appropriate.

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37 *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [48].
38 At [51].
39 At [52].

[52] We have concluded that the appropriate starting point was seven years and three months' imprisonment. There was no challenge to the uplift of three months. The adjusted starting point should therefore have been seven years and six months. From that, a 30 per cent discount (25 per cent for personal circumstances and five per cent for remorse) results in an end sentence of five years and three months' imprisonment.

Minimum period of imprisonment

[53] The Judge imposed an MPI of three years on the basis that:[40]

> [53] … as your psychologist reports, you are a person quick to anger and a "fighter" by natural disposition. Not even the intervention and wise counsel of your grandson was sufficient to stop you re-engaging with Mr Paul. You did so knowing you had a knife. It was entirely foreseeable how this could all end up. There is a particular premium on accountability, deterrence and denunciation in this context.
>
> [54] I therefore impose a minimum period of imprisonment of three years (48 per cent). I note that given your extensive history of violence parole may not, even at that point, be a realistic option unless you use the available time in prison to address the root causes of such offending, many of which may lie in your early upbringing, and to seek the assistance available to chart a better course on release.

[54] Mr Olsen did not challenge the imposition of an MPI. He sought only an adjustment of the MPI in the event the sentence appeal otherwise succeeded.

[55] In cases where culpability is reduced as a result of a mental health condition it may be that the purpose of denunciation and holding the offender accountable will not be achieved through an MPI. However, community protection was a legitimate concern that warranted an MPI. In the circumstances however, we think that an MPI of two years was adequate for this purpose.

Result

[56] The appeal against sentence is allowed.

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[40] At [53].

[57] The sentence of six years and three months' imprisonment is set aside. A sentence of five years and three months' imprisonment is substituted.

[58] The MPI of three years is set aside and substituted with an MPI of two years.

[59] The suppression order made by Muir J on 16 December 2021 is set aside.

Solicitors:
Crown Law Office, Wellington for Respondent