IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA305/2023
[2023] NZCA 462

BETWEEN	KAMERA JACOB TAMATI HARRIS Appellant
AND	THE KING Respondent

Hearing:	30 August 2023
Court:	Miller, Ellis and van Bohemen JJ
Counsel:	C S Cull KC for Appellant FRJ Sinclair for Respondent
Judgment:	21 September 2023 at 12.30 pm

JUDGMENT OF THE COURT

A The appeal against sentence is dismissed.

B The appeal against refusal of name suppression is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Kamera Harris appeals his sentence of five years and 10 months' imprisonment for the manslaughter of Michael Biggins,[1] and the refusal of permanent name suppression.[2]

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1 Crimes Act, ss 171, 160(2)(a) and 177.
2 *R v Harris* [2023] NZHC 1210 [sentencing notes] at [67] and [64].

The facts

[2] The facts as found by Campbell J at sentencing were not in dispute before us. We adopt his account, which is drawn from the agreed summary of facts:[3]

> *Background*
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> [9] On 26 September 2021, a friend of yours introduced you to Mr Biggins' wife. Your friend and Mrs Biggins had met some weeks before, when she offered him a ride to Kerikeri; she said she would drive him anytime he was going to Kerikeri. She quite clearly shared the same generosity of spirit as her husband. On the 26th of September, Mrs Biggins agreed to drive you and your friend to Kerikeri and took you to several locations before taking you back to [Ōkaihau].
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> [10] On 27 September 2021, you and another friend – your co-defendant – decided you wanted to steal a car and then go to see some friends in [Kaitaia]. The two of you planned to ask Mrs Biggins for a ride, push her out of the car and take it. You were 15 at the time. Your friend was 12.
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> [11] You selected a black-handled knife from the kitchen where you were, and said you were going to use the knife for the carjacking. Mr Mansfield KC tells me that you always carried a knife because you thought it made you seem more intimidating. He accepts that that does not diminish your responsibility for what happened.
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> [12] After selecting the knife, you and your friend then waited until it got dark. You went to Mrs Biggins' home at about 7.45 pm and asked Mrs Biggins if she would drive you to your aunt's house on Lake Road. Mrs Biggins declined as she had drunk a glass of wine. Mrs Biggins asked her husband, Mr Biggins, to give the two of you a ride. He agreed to do so. Shortly after, you and your friend left the house with Mr Biggins.
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> *The incident*
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> [13] At about 8.20 pm, residents on Imms Road heard a loud bang. Mr Biggins' car had collided with a tree on the side of the road, 200 metres from the intersection with Lake Road.
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> [14] Mr Biggins was found unresponsive inside the car, with his foot lodged on the accelerator. The front passenger door was open, and the engine was smoking.
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> [15] Mr Biggins was pulled from the car. The car caught fire.
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> [16] Mr Biggins sustained two stab wounds: a fatal 12cm wound in his left chest that had punctured his left lung and heart and fractured a rib, and a 3.8cm deep wound on his right forearm. Mr Biggins died at the scene.
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> [17] A black-handled knife with a blade 12.5cm in length was found near the vehicle. Your DNA was found on the handle of the knife.

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3 Sentencing notes, above n 2.

> [18] At around 3.00 am to 4.00 am you and your friend arrived back at your other friend's house where you informed him and another friend that you had stabbed Mr Biggins.

[3] We observe that in reaching these findings the Judge did not accept Mr Harris' claim, advanced through counsel, that the offending happened after Mr Biggins tried to disarm Mr Harris and a fight ensued.[4] The Judge was not asked to accept the account offered to the author of the pre-sentence report, to whom Mr Harris explained that instead of getting out of the car when asked to do so, Mr Biggins punched him in the face, seized the knife and stabbed him. Sentencing proceeded on the basis that Mr Harris did not intend to kill but assumed Mr Biggins would comply when threatened.

[4] Mr Harris was 15 years of age at the time of the offending. His friend was 12.

[5] The offending was characterised by several serious aggravating features: it involved the use of a weapon, it occurred in an attempt to steal Mr Biggins' car and it was premeditated.[5]

The sentencing analysis

[6] Campbell J noted the facts and the aggravating factors we have mentioned. He adopted a starting point of nine years' imprisonment, by reference to comparable cases.[6]

[7] The Judge allowed a discount of 15 per cent for youth and capacity for rehabilitation.[7] He noted that there was no suggestion that the offending was the result of susceptibility to negative influences or outside pressures.[8] He accepted that Mr Harris did not think it through, expecting that Mr Biggins would simply hand over the keys, but he did not accept that Mr Harris' actions were impulsive.[9]

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4 At [19].
5 At [25]–[27].
6 At [29]–[30]. The Judge noted that *R v SM* [2018] NZHC 3345; and *R v Edwardson* HC Rotorua CRI-2006-069-1101, 27 April 2007 were of particular assistance.
7 Sentencing notes, above n 2, at [37].
8 At [36].
9 At [27]–[28].

[8] A s 27 report was tendered. The Judge found that it did not identify a causal connection between systemic Māori deprivation and the offending; Mr Harris has a strong affiliation with his Ngāpuhi whānau, who live by te ao Māori values and provide him with strong support.[10]

[9] Nor did the Judge identify any connection between learning difficulties and the offending.[11] The author of the s 27 report referred to a list of disorders which she considered were linked to Mr Harris' offending — Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), Auditory Processing Disorder (APD) and Autism Spectrum Disorder (ASD) — but reports from psychologists did not support the author's suggestion that Mr Harris had been diagnosed with all of these disorders.[12] Further, they do not predispose a person to violence. It was difficult to see any connection between them and the offending.[13] He was not prepared to make any further allowance than he had already made for youth.[14]

[10] The Judge noted that Mr Harris was initially charged with murder and the offer of a guilty plea to a manslaughter charge was made on 7 November 2022.[15] The trial was scheduled for March 2023 but resolution had been delayed because of inquiries into fitness to stand trial. The plea was entered on 6 March 2023. The Judge was prepared to accept that the plea was entered at a relatively early stage.[16] He was not prepared to allow a full 25 per cent guilty plea discount, however, reasoning that the Crown case was overwhelming. He allowed 20 per cent.[17] He declined an additional discount for remorse, beyond that inherent in the guilty plea.[18]

Name suppression declined

[11] The Judge declined permanent name suppression, noting that there was nothing in the reports to suggest Mr Harris would suffer any particular hardship if his name

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10 At [40].
11 At [44].
12 At [42].
13 At [44].
14 At [47].
15 At [49].
16 At [51].
17 At [52].
18 At [53].

were published.[19] The argument for suppression rested entirely on Mr Harris' youth and the associated prospects of rehabilitation and reintegration. The mere risk to prospects of rehabilitation and reintegration, without more, could not amount to extreme hardship.[20] The Judge distinguished this Court's judgment in *DP v R* on the ground that the offender there had suffered a traumatic brain injury in his youth and there was serious concern that publication would cause extreme hardship.[21]

The appeal

[12] Ms Cull KC, for Mr Harris, submitted that the starting point adopted by the Judge was too high, arguing by reference to comparable cases that a starting point of seven to seven and a half years was appropriate. She contended that greater discounts ought to have been allowed; the guilty plea discount ought to have been 25 per cent, which is appropriate when a charge is amended from murder to manslaughter, and the discount of 15 per cent for youth and prospects of rehabilitation was too low. The psychological report and s 27 report contained information about Mr Harris which, although it might not provide a causal nexus for specific additional discounts, did justify a greater discount for youth and rehabilitative prospects in this case. She submitted that a discount in the order of 25 to 30 per cent would have been appropriate.

[13] With respect to name suppression, counsel submitted that publication would cause extreme hardship because of risk to his rehabilitation and reintegration which, on the material before the Court, has been proceeding well. She argued that the best interest of the child should be the primary consideration when considering name suppression. In oral argument she acknowledged that she could point to no specific hardship that results from publication, as opposed to the conviction and sentence of imprisonment.

The starting point

[14] Ms Cull did not take issue with the Judge's approach to the starting point. He fixed it by reference to comparable manslaughter sentencing and sentencing for

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19 At [62] and [64].
20 At [63]–[64].
21 At [64] citing *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306.

aggravated violence which does not cause death. Rather she argued that comparable cases called for a lower starting point, citing *R v SM*,[22] *R v Edwardson*,[23] *R v Pene*,[24] and *R v Hanara*.[25] She drew attention particularly to *Hanara*.

[15] For the Crown, Mr Sinclair argued that the starting point was squarely within range having regard to the serious aggravating features of the offending. He reminded us of the leading authority on what remains the approach to sentencing for manslaughter, *Tai v R*,[26] and drew attention again to *SM* and *Edwardson* as comparable cases.[27]

[16] We accept that starting points of as low as six years have been adopted for young defendants whose offending happened in a tense and fast-moving setting.[28] That was found to be the position in *Hanara*, where a rough sleeper was killed after he asked a group who had borrowed his torch to return it.[29] His request triggered a group attack. The sentencing Judge found that there was no real premeditation and the offending was impulsive.[30] This offending was much more serious. As Mr Sinclair submitted, it was calculated and connected to the commission of a separate crime against a person who presented as a convenient victim because he and his wife had been willing to help Mr Harris with transport.

[17] We are not persuaded that the starting point was too high. On the contrary, it was within range for an adult offender.

The guilty plea discount

[18] It was open to the Judge to fix the guilty plea discount having regard to the strength of the Crown case.[31] Timing of the plea is not the only relevant consideration.

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22 *R v SM*, above n 6.
23 *Edwardson*, above n 6.
24 *R v Pene* [2021] NZHC 3327.
25 *R v Hanara* [2023] NZHC 2057.
26 *Tai v R* [2010] NZCA 598.
27 *Hanara*, above n 25; and *R v SM*, above n 6.
28 See *R v SM*, above n 6, at [18]–[19].
29 *Hanara*, above n 25, at [2]–[9].
30 At [45].
31 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [74].

We are not persuaded that he erred by doing so. It has not been suggested that Mr Harris had a viable defence.

The discount for youth and rehabilitative prospects

[19] The neuropsychological report was prepared for sentencing at the request of defence counsel. The author, Amanda McFadden, is an experienced psychologist. There is no known family history of neurodevelopmental or learning disorders. Mr Harris was hyperactive and difficult to manage as a child and did not attend school full-time until he was six. He had symptoms of ADHD and ODD. He was sociable and did well at primary school with teacher aide support. But he struggled with the transition to college in year seven and was soon on daily report, with multiple stand-downs. He moved schools twice and ended his school career in 2021 without any qualifications. He reported that he began using cannabis in 2018.

[20] Following his arrest, Mr Harris was held at a youth justice facility, Te Maioha o Parekarangi, where his behaviour has improved. He does not present as dysregulated or overly impulsive but tends to be guarded and prone to disengage. He is viewed as a planner or thinker and conveys the impression that he is more intelligent and skilful than many other youths in residence. His Full-Scale IQ falls within the low-average range. He has achieved a number of NCEA unit standards. His reading age has been assessed as 12 to 13. Expert assessment has confirmed that he has age-appropriate logical thinking skills, but low verbal comprehension and signs of APD. He was diagnosed with that disorder in 2021. People affected by it can hear information but have difficulty storing and retrieving it in social or learning settings. He also has symptoms of ADHD but there is no evidence of ASD or Foetal Alcohol Spectrum Disorder.

[21] Ms McFadden could find little data to support a history of physical aggression. Rather, past behavioural difficulties appear to involve disruption, defiance or disrespect of others.

[22] These findings are a mixed blessing for Mr Harris when it comes to sentencing. On the one hand they point to potential for rehabilitation and help to explain limited

evidence of remorse. On the other, they suggest that his neuropsychological difficulties did not contribute in a substantial way to the offending.

[23] The s 27 report was written by Tara Oakley. Her report asserts that Mr Harris has multiple diagnoses (ADHD, ODD, APD and ASD), is highly susceptible to negative influences, and was intoxicated from cannabis at the time of the offending. She speaks positively of his whānau, describing them as a very close family who operate as a collective and raised Mr Harris with connection to his Māoritanga. But she says that he was surrounded by others who were culturally disenfranchised, citing the impact of colonisation on his iwi. She notes his exclusion from mainstream education at the age of 15 and cites the theory of intersectionality.

[24] Some of these propositions appear to be based on her interview with Mr Harris and are not borne out by the evidence, as the Judge noted.[32] We have noted a clear current diagnosis of APD and some symptoms of ADHD, and no history of violence. Others, such as the negative influence of others, were not evident in connection with the offending. There is no evidence that Mr Harris was affected by cannabis at the time of the offending and she does not suggest that he is addicted, though she finds him susceptible to addiction. As the Supreme Court stated in *Berkland v R*, s 27 reports for Māori offenders should focus on the offender's own community.[33] Wider historical dispossession and social disruption are relevant, but must manifest in a causal connection to the offending.[34] Mr Harris' own explanations for the offending suggest a possible connection to cultural disadvantage through a peer group in which stealing cars appears to be an acceptable activity.[35] However, there is no real evidence of it. It is also apparent that the cycle of deprivation has been weakened in Mr Harris' whānau.[36]

[25] In our view the principal mitigating factors for Mr Harris are his youth and immaturity, which mitigate culpability for the reasons recently affirmed in

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32 Sentencing notes, above n 2, at [43].
33 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [146].
34 At [125].
35 There are indications of this in the s 27 report.
36 *Berkland*, above n 33, at [110].

Dickey v R,[37] and his prospects of rehabilitation, which are good notwithstanding his psychological and social difficulties. He did not think through the likely consequences of his decision to steal the car. But as noted, the offending was not characterised by peer pressure or impulsivity, nor does there appear to be a clear causal connection to Mr Harris' neuropsychological difficulties.

[26] The sizing of the discount for youth and prospects of rehabilitation presents difficulties. Other sentencing objectives may prevail when the offending is especially serious.[38] That may reduce the discount available. A court may reach the same end result when comes to the final step in the sentencing analysis, when the court stands back and assesses the sentence against applicable sentencing purposes and principles as a matter of overall impression.[39] In *Dickey*, that resulted in adjustments at the final step. The end sentences were longer than those that would have resulted from simply tallying all available discounts.[40]

[27] But for the intrinsic seriousness and aggravating features of the offending, a discount of more than 15 per cent would be warranted to reflect Mr Harris' youth and immaturity, neuropsychological difficulties and prospects of rehabilitation. But we are not persuaded that Campbell J erred by fixing it at 15 per cent in the particular circumstances of this case. This was a premeditated attack on a couple who were chosen as victims because of their willingness to help Mr Harris and his friends. That feature of the offending has been especially difficult for Mr Biggins' family to come to terms with. They feel, understandably, that Mr Harris must be held accountable for it.

Overall assessment

[28] This was a difficult sentencing. It featured both extremely serious aggravating facts and strongly mitigating personal characteristics, principally the passing immaturity of youth.

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37 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [85]–[86] citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[55] and [77]–[91].
38 *Berkland*, above n 33, at [111].
39 *Dickey*, above n 37, at [175] citing *R v Williams* [2005] 2 NZLR 506 (CA) at [67].
40 *Dickey*, above n 37, at [175] and [210]–[211].

[29] Standing back, we consider the Judge did not err in his assessment. The end sentence of five years and 10 months' imprisonment was stern for an offender who was aged 15 at the time, but it was not manifestly excessive. We decline to interfere with it.

Name suppression

[30] Had Mr Harris been charged with an offence which allowed him to be dealt with in the Youth Court, he would have enjoyed automatic name suppression. That reflects a legislative assumption that publication of a youth offender's name may affect rehabilitation and reintegration. Youths may also lack the emotional maturity to deal with publication of their name in connection with offending.[41]

[31] However, a young person who is charged with murder or manslaughter must be dealt with in the High Court and the legislature has not provided for automatic suppression. On the contrary, the young person must satisfy the court that publication of their identity would cause them extreme hardship.[42] The legislation leaves no room for a presumption in favour of suppression. It calls for a case-specific inquiry in which the starting point is the open justice principle. The court must recognise the young person's right to have their need for rehabilitation and reintegration considered.[43] Somewhat contrary to the view taken by Campbell J, a court may quite readily be satisfied that hardship is extreme where publication is likely to change the course of a pro-social and perhaps promising future. But the extreme hardship must result from publication, as opposed to the conviction and sentence. Where the offending was serious it may be difficult to point to hardship that is specifically attributable to publication of the young person's name. That may be even more so when the initial publication will occur while the young person is serving a term of imprisonment.

[32] We accept that Mr Harris' offending will attract publicity having regard to its aggravating features and public concern about serious and reckless youth offending.

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41 *R v Q* [2014] NZHC 550 at [43].

42 *Robertson v Police* [2015] NZCA 7 at [48]–[49]. Mr Harris does not invoke any other of the grounds in s 200(2) of the Criminal Procedure Act 2011.

43 *DP v R*, above n 21, at [10]; and Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 40.1.

[33] But as Mr Sinclair noted, cases in which young offenders have been granted permanent suppression for serious offending usually involve applicants who are particularly vulnerable to publication for some reason. That explains *DP v R*, in which this Court identified a real risk that publication would cause the applicant harm while confined in a youth justice facility and noted a risk of self-harm and an absence of familial support on his eventual release.[44] It is much easier to point to adverse consequences of publication where the offender is being discharged without conviction, as in *R v Q*,[45] or is to serve a sentence whose purpose is primarily rehabilitative.

[34] We have noted that in this case Ms Cull acknowledged that Mr Harris cannot point to any such considerations. He has been convicted and sentenced to a term of imprisonment. He has good prospects of rehabilitation and has already made progress. He is about to become eligible for parole and we are prepared to assume that he is likely to be released before he must be moved to an adult prison in August 2024. So publication could occur about the same time as he returns to the community on release conditions. But there is nothing to show that publication will affect his rehabilitation or otherwise cause him hardship over and above that inherent in the sentence. In particular, there is no suggestion that he will not cope with the notoriety he may attract on publication of his name in connection with the killing of Mr Biggins.

[35] A court must also take account of the views of the victim when considering permanent suppression of an offender's name.[46] In this case victims strongly oppose it. Mr Biggin's widow Carolyn Biggins takes the view that the suppression of Mr Harris' name and publication of Mr Biggins' has been unfair, leading people to think Mr Biggins was in some way at fault, and Mr Harris should be named "as the person who took Michael's life". Another close relative feels that the application for suppression devalues Mr Biggins' life and shows that Mr Harris cares only that people should not know how bad a person he is.

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44 *DP v R*, above n 21, at [23]–[31].
45 *R v Q*, above n 41.
46 Criminal Procedure Act, s 200(6).

[36] For these reasons, which correspond generally to those of Campbell J, we are satisfied that Mr Harris cannot show that publication of his name would cause him extreme hardship.

Disposition

[37] The appeal against sentence and refusal of permanent name suppression is dismissed.

Solicitors:
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