

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA38/2024
[2024] NZCA 192

BETWEEN TEMA WIREMU RATANA
Appellant
AND THE KING
Respondent

Hearing: 13 May 2024
Court: Mallon, Lang and Moore JJ
Counsel: S R Lack for Appellant
T R Simpson for Respondent
Judgment: 29 May 2024 at 3 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Lang J)

[1] Mr Ratana pleaded guilty in the District Court to a charge of wounding with intention to cause grievous bodily harm.¹ The charge was laid after Mr Ratana inflicted two serious stab wounds on the victim of his offending. On 19 December 2023, Judge Hikaka sentenced Mr Ratana to seven years' imprisonment.²

¹ Crimes Act 1961, s 188(1).

² *R v Ratana* [2023] NZDC 28878 [sentencing notes].

[2] Mr Ratana appeals against sentence. He contends the Judge committed several errors in constructing the sentence and this resulted in the end sentence being manifestly excessive.

The facts

[3] The Judge sentenced Mr Ratana on the basis of an agreed summary of facts. This was supplemented by factual findings the Judge made following a disputed fact hearing that he conducted prior to sentencing.³

[4] Mr Ratana has an 18-year-old daughter from a previous relationship. The incident giving rise to the charge had its origins in disharmony that occurred in the relationship between Mr Ratana's daughter and the victim, her 19-year-old partner. Mr Ratana and his partner became aware of these issues on or about 20 November 2021 and they also came to believe that Mr Ratana's daughter had been assaulted by her partner. This led them to become involved in text message exchanges with Mr Ratana's daughter and her mother. Text messages that Mr Ratana's partner sent to the mother of Mr Ratana's daughter threatened to cause the victim extreme violence.

[5] At 1.40 pm on the afternoon of 21 November 2021, Mr Ratana and his partner drove to the address where the victim was living with his mother and younger brothers. Their three children were present with them in the vehicle. Mr Ratana's partner parked the vehicle across the driveway of the address and Mr Ratana walked up to the victim, who was mowing his lawns. Mr Ratana approached the victim from behind and then punched him in the face as he turned around.

[6] The victim immediately responded by pushing Mr Ratana to the ground and then punching him in the face and body as he attempted to get up. This resulted in Mr Ratana receiving a bleeding nose. Mr Ratana was eventually able to get away from the victim and returned to his vehicle. He told the victim that he would be back and was then driven away by his partner. The altercation caused Mr Ratana to leave his cellphone, sunglasses and an item of footwear at the victim's address.

³ *R v Ratana* [2023] NZDC 12718 [disputed facts hearing decision].

[7] Mr Ratana and his partner returned to the address approximately 30 minutes later. They both approached the victim's house and Mr Ratana's partner went up the steps to the front door. The victim's mother came to the door and Mr Ratana's partner asked for the items Mr Ratana had left at the address. The victim's mother told her Mr Ratana's daughter had been given the items but that she was not present at the address. The victim's mother also told Mr Ratana and his partner that they needed to leave. Mr Ratana, who was standing at the bottom of the steps, responded by saying "or what?"

[8] The victim then came to the front door and told Mr Ratana and his partner to leave. Mr Ratana's partner then went down the steps and stood beside Mr Ratana, who had his hands in his pockets. The victim then repeated that they both needed to leave. Mr Ratana responded again by saying "or what?"

[9] This caused the victim to walk down the steps, where he came face to face with Mr Ratana. At the bottom of the steps the victim drew his fist back to punch Mr Ratana in the face. As he did so, Mr Ratana pulled a knife from his pocket. Mr Ratana thrust the knife into the victim's abdomen, causing a horizontal stab wound. The victim then grabbed hold of Mr Ratana's wrist and punched him to the head. This caused Mr Ratana to stumble backwards, thereby freeing the knife from the victim's stomach. Mr Ratana then swung the knife at the victim again, causing a deep wound to his right index finger.

[10] The circumstances surrounding the second knife wound were the subject of the disputed facts hearing. The Judge determined that Mr Ratana had intentionally swung the knife towards the victim on a second occasion. The victim endeavoured to knock the knife from his grip and this caused the blade of the knife to strike his right index finger, causing a deep cut.

[11] The stab wound to the stomach caused the victim's internal organs to protrude from his body. When he lifted his shirt and saw the injury he screamed in pain and fright. Mr Ratana and his partner then retreated to their vehicle and drove away.

[12] The victim's family and neighbours provided first aid until emergency services arrived. The victim was taken to hospital in a critical condition and underwent emergency surgery. He had a perforated bowel that needed to be repaired and a horizontal laceration of approximately 20 centimetres to his abdomen that needed to be stapled. The victim also required stitching for the deep laceration that he suffered to his right index finger. The injuries required the victim to spend five nights in hospital, two of them in the intensive care unit.

The sentence

[13] The Judge accepted the Crown's submission that the offending contained several aggravating factors. The first was the intentional use of a lethal weapon on two occasions to cause very serious injury. There was an element of premeditation to the offending because Mr Ratana had taken the knife to the scene knowing there was likely to be a prospect of violence given the events that had occurred a short time earlier. He was also given several opportunities to leave the address and refused to do so.

[14] The Judge rejected a submission by Mr Lack, Mr Ratana's counsel, that the offending constituted excessive self-defence. He considered the aggravating features of the offending warranted a starting point of nine years imprisonment. The Judge then applied a discount of 10 per cent, or 11 months, to reflect the guilty plea entered two weeks prior to the trial. He applied a further discount of five per cent, or five months, to reflect remorse. He also reduced the sentence by seven months to reflect the fact that Mr Ratana had spent approximately 20 months subject to restrictive EM bail conditions. The Judge rounded these discounts up to two years to produce the end sentence of seven years imprisonment.

[15] The Crown sought the imposition of a minimum term of imprisonment but the Judge considered that Mr Ratana's rehabilitative prospects militated against this. He declined to impose a minimum term of imprisonment.

The appeal

[16] On Mr Ratana's behalf, Mr Lack submits that the Judge erred in declining to allow evidence to be given at the disputed facts hearing regarding the circumstances surrounding the infliction of the stab wound to the victim's abdomen. Mr Lack also contends the Judge was wrong to reject the submission for Mr Ratana that the offending constituted excessive self-defence. Further, Mr Lack submits that the Judge ought to have applied a discount of at least 20 per cent to reflect the guilty plea, as well as a reduction of at least 10 per cent to reflect other mitigating factors.

Did the Judge err in restricting the scope of the evidence to be given at the disputed facts hearing?

[17] The Judge directed that a disputed facts hearing was to be held to determine the correctness of the following paragraph in the summary of facts:

RATANA then swung the knife towards the victim a second time but the victim managed to throw his hand out to try knock the knife from his grip. As the victim did this the blade of the knife struck the victim's index finger, causing a deep cut to his finger.

[18] At the beginning of the hearing Mr Lack asked the Judge to widen the scope of the evidence to be given at the hearing. He sought to be permitted to cross-examine the victim and have Mr Ratana give evidence about the circumstances surrounding the infliction of the initial wound to the abdomen. The Judge declined to allow this to be done. He told Mr Lack that the issues he wished to explore in relation to the first stab wound could be done on another occasion. By this we infer the Judge was referring to the sentencing hearing.

[19] Mr Lack says it would have been a simple matter for the Judge to have allowed him to cross-examine the victim regarding the circumstances surrounding the infliction of the wound to the abdomen. He says Mr Ratana should also have been permitted to give evidence about that issue because this would have allowed him to explain that he stabbed the victim with the intention of defending himself from being punched in the face. Mr Lack says that the Judge's decision to limit the scope of the hearing effectively deprived Mr Ratana of the opportunity to explain his intention at the time he inflicted the wound to the victim's abdomen.

[20] We do not accept Mr Lack's submission on this point. The disputed facts hearing was arranged specifically for the purpose of enabling the Judge to determine whether the passage from the summary of facts that Mr Ratana disputed was correct. It was not an opportunity for Mr Ratana to broaden the area of dispute or to go beyond factors that were inherent in his plea.

[21] By entering the guilty plea Mr Ratana acknowledged that he wounded the victim in the abdomen with the intention of causing him grievous bodily harm. The fact that he did so to avoid being punched in the face by the victim was already apparent from the summary of facts. The summary of facts contained the following paragraph:

The victim walked down the steps towards RATANA who stood there waiting for him to approach. As the two came face to face the victim drew his fist back to throw a punch. As the victim drew his fist, RATANA pulled a knife from his pocket and thrust it into the abdomen of the victim pulling it horizontally across, opening up the victim's abdomen.

[22] As the Judge noted, Mr Lack remained free at sentencing to argue that the wounding constituted a pre-emptive strike by Mr Ratana to avoid being punched in the face by the victim. There would be no utility in broadening the scope of the disputed facts hearing to allow evidence from Mr Ratana as to the circumstances as he understood them to be at the time he pulled the knife. For reasons we discuss under the next heading, excessive self-defence required a broader assessment than as at the moment of pulling the knife.

[23] As to those broader circumstances, the Judge rightly allowed evidence on them at the disputed facts hearing because they were relevant to the competing accounts about how the second injury occurred. As to those broader circumstances, the appellant gave evidence and was cross examined about his intentions in returning to the property and why he had a knife. In essence he said he went to retrieve his property, he was not angry and the knife was to deter a second attack.

[24] In preferring the victim's account about the second injury the Judge said this about those broader circumstances:

[18] ... The defendant denied ever attempting to stab the victim a second time. Looking at the overall context of what occurred, his evidence is somewhat undermined by a number of the points he put forward to support his view of that altercation in that he did not swing, he was simply holding the knife and the victim grabbed the knife.

[19] When I referred to the overall context of the offending, that includes his hesitation about wanting to have a second confrontation, his purpose in taking the knife with him was to deter a second attack, to warn people off so that he would not be attacked.

[20] That simply did not ring true, even on his own version of events. He withdrew the knife from his pocket and stabbed it into the victim's stomach and pulled it across the stomach. Not only is that indicative of an additional level of violence and the intention to cause grievous bodily harm but it also very much undermines that he had the knife to warn people off and avoid being attacked a second time.

[21] Had that in fact been the reality of the situation, one would have expected him to present the knife earlier in the piece therefore to serve as a warning to others who might be inclined to attack him.

[25] It follows that we do not accept the Judge erred in restricting the scope of the evidence to be given at the disputed facts hearing. The hearing was correctly focussed on the relevant disputed facts.

Did the Judge err in concluding that the offending did not constitute excessive self-defence?

[26] The conduct of the victim may be a mitigating factor that reduces the starting point selected for a sentence.⁴ This permits the starting point for a sentence to be reduced to reflect the fact that the victim has contributed to the events that led to the offending. In cases of offending involving violence, the principle is most commonly applied where the offending is prompted by provocative conduct on the part of the victim or where the offender uses disproportionate force to repel an attack by the victim. The latter is sometimes known as excessive self-defence.

[27] In the present case Mr Lack submits that Mr Ratana's action in stabbing the victim was a direct, albeit disproportionate, response to the victim's conduct in

⁴ Sentencing Act 2002, s 9(2)(c).

drawing back his fist to punch Mr Ratana in the face. He contends the Judge should have reduced the starting point for the offending to reflect this fact.

[28] The Judge rejected this submission at sentencing for the following reasons:⁵

[43] I saw that there was a high level of premeditation. You were bested at the first encounter with the victim. ... You threatened that you would be back and you did return. ...

[44] I do not accept your explanation for having that knife with you. As I said at the disputed facts hearing and concluding the victim's account was more reliable and consistent than yours. Had you been armed with that knife with the intent to deter others, to warn them away from assaulting you because you were looking out for your damaged and recovering knee, you would have presented it earlier.

[45] Rather what happened was your continual refusal to leave the address and what the Crown describe as provocative "or what?" comments to the victim's mother and repeated to the victim himself. ...

[46] Your counsel referred to excessive self-defence in that he described the victim running down the stairs to punch you and you pulling out this knife and stabbing him. The victim is clear that he intended to punch you but the overall circumstances as presented in the evidence that I heard, the summary that you have pleaded guilty to and the nature of the injury itself, indicate that you had a clear intent to stab this person and to cause significant damage to him by inserting the knife into his abdomen and then drawing it across his abdomen to leave a 20-centimetre laceration. He thought there was something like a basketball sized protuberance under his shirt, which he lifted to see his innards hanging out. His little brother helped put them back in.

[47] That motion of drawing the knife across his belly indicated to me that you had the requisite intent which you have acknowledged, and that your explanation of having the knife there to protect yourself and that the stabbing was simply excessive self-defence, in my view is simply not available to you for the reasons I have stated.

[29] To the extent that some of this passage from the sentencing remarks suggest that the Judge rejected Mr Lack's submission on the basis that Mr Ratana had a clear intention to stab the victim and thereby cause him significant injury, that would not necessarily exclude self-defence. That is because the fact that a person intentionally inflicts injury on another does not generally determine whether the injury was inflicted in self-defence. Section 48 of the Crimes Act 1961 provides that everyone is justified in using, in defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use. This permits a person acting in self-defence

⁵ Sentencing notes, above n 2.

to inflict intentional injury where this is a proportionate and reasonable response to the circumstances as the person believes them to be.

[30] As we have already noted, the summary of facts permitted Mr Ratana to argue at sentencing that he stabbed the victim whilst acting in self-defence. It allowed him to argue that the stabbing represented a pre-emptive strike to neutralise the immediate threat that the victim posed to him. However, we consider this takes an unduly narrow approach to the circumstances as Mr Ratana believed them to be. The circumstances that led to Mr Ratana wounding the victim need to be viewed in light of the series of events that preceded it. These inform Mr Ratana's belief as to the circumstances he faced at the time he stabbed the victim.

[31] We consider the above passage from the Judge's sentencing remarks read in their full context correctly assessed that Mr Ratana was the aggressor in the confrontation that led to the knife wounds sustained by the victim. He did not go to the property a second time to retrieve his property and taking a knife to avoid a confrontation. He went there intending a violent confrontation. The way he manoeuvred the knife across the victim's stomach was consistent with this. We agree with the Judge's conclusion about this.

[32] Mr Ratana went to the victim's address on the first occasion for the express purpose of assaulting him. This is demonstrated by the fact that upon his arrival he walked up to the victim and attempted to punch him in the head whilst the victim was facing away from him. Having been bested by the victim in the ensuing altercation, Mr Ratana left the address after telling the victim he would be back.

[33] Mr Ratana then returned to the victim's address just 35 minutes later. By this stage he had armed himself with a knife. In deciding to return to the victim's address so soon after the initial altercation Mr Ratana must have appreciated that the victim would not react well to his return. He would also have known there was a high probability that the victim would respond in a violent way. The altercation that had occurred a short time earlier also meant Mr Ratana would have known that the victim was likely to overpower him unless he was armed. He therefore armed himself with the knife with the intention of using it to counter any violent act by the victim.

[34] We consider Mr Ratana's conduct after he returned to the victim's address was highly provocative. He refused to abide by requests by both the victim and his mother that he leave the address. He invited an adverse response in responding "or what?" when they asked him to leave the property. We consider Mr Ratana's response effectively amounted to a challenge to the victim to initiate a physical confrontation. This is exactly what happened. The victim walked down the steps and prepared to punch Mr Ratana in the face. Mr Ratana obviously anticipated what was about to occur because he was able to remove the knife from his pocket and stab the victim in the abdomen before he had time to land a blow. This demonstrates that Mr Ratana was ready to use the knife to respond to any form of physical attack by the victim.

[35] We consider the circumstances in the present case are broadly similar to those in *Saber v R*.⁶ In that case, there had been ongoing tension between the families of the victim and the appellant. There had been an earlier incident in which the appellant had threatened to kill the victim. On the day of the offending the victim had driven to a shopping centre near where he worked to do some banking. The appellant and an associate arrived by vehicle at or about the same time. As the victim got out of his vehicle, he saw the appellant and an associate walking towards him. The victim anticipated that the appellant and his associate were going to assault him. This was confirmed when he saw the appellant bring out what he believed to be a set of keys from his pocket.

[36] The victim pre-empted the anticipated assault by punching the appellant. The appellant responded by stabbing the victim on numerous occasions in the stomach with a knife. This caused several lacerations, the most serious of which was a six centimetre laceration from which the victim's intestines protruded. The stab wounds resulted in the victim spending six days in hospital and a further three months recovering at home. They also prevented the victim from pursuing a career as a professional body builder. This Court agreed with the sentencing Judge that the offending did not involve a case of excessive self-defence.⁷

⁶ *Saber v R* [2010] NZCA 603.

⁷ At [21].

[37] We take the same view in the present case. Mr Ratana effectively created the situation in which he found himself at the time he stabbed the victim. Having armed himself with a knife he taunted the victim and his mother when they told him to leave the property. He knew the victim was likely to respond in a violent way and this is what occurred. The only logical conclusion is that this is what Mr Ratana knew and intended would happen. Having provoked the victim into responding with a punch, Mr Ratana drew the knife out of his pocket and stabbed him in the abdomen.

[38] Mr Ratana therefore created a situation in which he always knew he would have the measure of the victim because he was armed with a knife. We do not consider this was a case involving excessive self-defence.

[39] However, even if the position was only viewed at the point where the victim came down the steps, we are satisfied the use of the knife as a means of self-defence was so excessive that it could not qualify as a mitigating factor.

[40] Mr Lack also contends the Judge was wrong to conclude that Mr Ratana purposefully swiped the blade of the knife across the victim's abdomen. He submits the level of injury to the victim's abdomen reflected the dynamic nature of the altercation.

[41] However, this submission overlooks the fact that the prosecutor gave Mr Ratana the opportunity to address this issue during the disputed facts hearing. During cross-examination the following exchange occurred:

Q. After putting that knife in [the victim's] abdomen, you slid that knife across didn't you?

A. Yes, I think so.

Q. Your intention to cause really serious harm to him?

A. It was mainly because of the impact of him coming forward which led it to go across.

Q. Well you didn't just stab at him did you, you put the knife in and you moved it across, disembowelling him?

A. Yes.

[42] We consider the Judge was entitled to conclude Mr Ratana had deliberately drawn the knife across the victim's abdomen given the answers that he gave to these questions.

Was the starting point too high?

[43] As he did at sentencing, Mr Lack submits that the offending in the present case is comparable to that in *Bowman v R*.⁸ That case has some similarities to the present because it involved two altercations between the appellant and the victim that occurred relatively close in time. The first incident occurred at and around a hotel where the appellant and the victim had been drinking. During this incident the appellant struck the victim in the head with a bottle. This caused a two-centimetre laceration to his face. A short time later the appellant returned to confront the victim. On this occasion he had taken a bottle to use as a weapon. During the ensuing altercation the appellant used a piece of glass from the bottle to cause a four-centimetre laceration to the victim's face.

[44] The appellant pleaded guilty to two charges of wounding with intent to cause grievous bodily harm. The Judge who sentenced the appellant in the District Court noted that the offending involved four aggravating factors. These were the serious injuries inflicted on the victim; the level of premeditation inherent in the offending; the fact that the offending involved the use of a weapon; and attacks to the victim's head. The Judge selected a starting point of four years and six months' imprisonment, which he reduced by six months to reflect the fact that the appellant committed the second offence whilst acting in self-defence. This Court upheld the adjusted starting point of four years' imprisonment.⁹

[45] We consider the present offending to be considerably more serious than that in *Bowman* for three reasons. First, the injuries in the present case were far more serious than that in *Bowman*. The injuries in the present case were life-threatening whereas those in *Bowman* were not. Secondly, we consider the offending in the present case to contain a greater element of premeditation than was present in *Bowman*. Thirdly,

⁸ *Bowman v R* [2010] NZCA 162.

⁹ At [18].

the appellant in *Bowman* inflicted the injuries using a less lethal weapon than the knife that Mr Ratana used in the present case.

[46] We consider *Saber* to be the most comparable case put before us to the present in terms of its factual similarity. The sentencing Judge in that case had selected a starting point of 10 years' imprisonment. This Court held that the starting point was too high and that the offending justified a starting point of eight and a half years' imprisonment.¹⁰

[47] The offending in *Saber* was arguably more serious to the extent that it involved the infliction of several stab wounds to the victim's abdomen, whereas the present case involved the infliction of just two wounds. However, the overall severity of the injuries and the effects on the victim in both cases are comparable. Both cases also involve a considerable degree of premeditation.

[48] In *Saber* this Court noted that the range within which the starting point fell to be selected was between eight and nine years' imprisonment.¹¹ It selected a starting point of eight and a half years' imprisonment, being midway in the range identified. Given the comparable nature of the offending in the present case we do not consider a starting point of nine years' imprisonment to be outside the available range.

Discount for guilty plea

[49] Mr Lack accepted that a greater discount for the guilty plea would only be available if we accepted his argument in relation to the issue of excessive self-defence. That argument having failed, we see no need to increase the discount for the guilty plea given that the plea was entered shortly before the trial.

Discounts for other mitigating factors

[50] Mr Lack accepts that the cultural report tendered under s 27 of the Sentencing Act 2002 did not establish that Mr Ratana suffered a severely deprived upbringing as is so often the case. He also accepts that Mr Ratana's criminal history is such that he

¹⁰ *Saber v R*, above n 6, at [24].

¹¹ At [24].

could not claim a credit for previous good character. However, Mr Lack submits that the material available to the Judge at sentencing showed that Mr Ratana had strong family support and positive rehabilitative prospects. The Judge acknowledged this when he declined to impose a minimum term of imprisonment.

[51] Mr Lack points out that whilst Mr Ratana was on bail he moved away from the area where the offending had occurred and obtained stable employment with an engineering firm. His employer spoke highly of him when the writer of the pre-sentence report contacted him. He said that Mr Ratana was a hard worker with a great attitude and that he would be prepared to take him on as an apprentice. The pre-sentence report also recorded that Mr Ratana has expressed interest in becoming involved in the beekeeping industry. Mr Lack submits that the Judge ought to have applied a discount of at least 10 per cent to reflect Mr Ratana's rehabilitative prospects in addition to the discount of six months he applied to reflect remorse.

[52] The Judge did not refer to Mr Ratana's rehabilitative prospects other than in relation to the imposition of a minimum term of imprisonment. Ordinarily they could be expected to attract a discount given the positive steps Mr Ratana appears to have taken whilst on bail. However, in the present case that issue needed to be considered in light of matters the Judge referred to when considering the issue of Mr Ratana's remorse.

[53] The Judge provided a discount of five months, or approximately five per cent, to reflect Mr Ratana's remorse.¹² He did so notwithstanding the following reservations that he held about the genuineness of that remorse:

[49] I have difficulty with the genuineness of your remorse as well. You pleaded guilty in April this year. The advice to court report was in September. You still had the same explanation for your offending which is not accepted. You breached your bail in July and the breach was a digital message directed toward the victim and making very clear that you maintained, through the message, an aggressive confrontational position to the victim. The way you described him and the way you referred to presenting yourself as innocent, not guilty.

¹² Sentencing notes, above n 2, at [53].

[54] The issues the Judge identified clearly limited the level of discount to be provided to reflect Mr Ratana's remorse. We also consider they largely negated the rehabilitative steps he had taken whilst on bail. The fact that Mr Ratana breached the terms of his bail by contacting the victim in an aggressive manner suggests that he has not yet come to terms with his offending and still considers himself to be in the right.

[55] We are therefore satisfied the Judge was not required to apply a discount to reflect the rehabilitative efforts Mr Ratana had made whilst on bail.

Result

[56] The appeal is dismissed.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent