

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S ECR 2020 0011

DIRECTOR OF PUBLIC PROSECUTIONS

Crown

v

NING WANG

Accused

JUDGE: Incerti J
WHERE HELD: Melbourne
DATE OF HEARING: 15 December 2020
DATE OF SENTENCE: 23 December 2020
CASE MAY BE CITED AS: DPP v Wang (No 2)
MEDIUM NEUTRAL CITATION: [2020] VSC 884

CRIMINAL LAW - Sentence - Manslaughter - Intentionally cause serious injury - Found not guilty of murder but guilty of manslaughter - Early offer to plead guilty - Accused larger and stronger than victim - Moral culpability - Family setting of offending - Brutal assault on deceased - Age - Accused 68 years old at time of offending

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Ms K Churchill with Ms S Locke	Office of Public Prosecutions
For the Accused	Mr P Morrissey SC	Paul Vale Criminal Law

HER HONOUR:

1 Ning Wang, you were originally charged with the murder of your sister, Qin Wang. On 22 October 2020, you were acquitted of that count. You were, however, found guilty of the alternative crime of manslaughter by unlawful and dangerous act ('manslaughter'). The maximum penalty for the offence of manslaughter is 20 years imprisonment.¹

2 You were also charged with intentionally causing injury in relation to an assault on your nephew, Kuan Yang. You pleaded guilty to that charge. The maximum penalty for that offence is 10 years imprisonment.²

3 It is now my task to impose a sentence of this Court for these crimes.

4 I do not propose to set out in detail the events of the morning of 27 February 2019. They are summarised in the judgment I delivered when I found you guilty of manslaughter.³ It is sufficient for present purposes simply to note certain salient features.

5 The offending in this case was very serious. On the morning of Wednesday 27 February 2019, at approximately 7am, you and Qin argued, it escalated and you assaulted your sister at your home in Clayton South. Qin died shortly after the assault. Later that morning you placed Qin's body in the boot of your car and drove to the Burwood East home of another sister, where you assaulted your nephew, Kuan Yang, with a metal pole. You repeatedly told those present, including the police when they arrived, that you had killed your sister and that her body was in the boot of your car.

6 At the time of her death Qin was 57 years old. She had a son, Jianyao Xu, who is 32 years old. Qin lived in China and was visiting Australia to see her family, including her son and her elderly ill father, Shuhuai Wang.

7 You have five sisters and Qin was the youngest of them. Your relationship with your

¹ *Crimes Act 1958* (Vic) s 5.

² *Crimes Act 1958* (Vic) s 18.

³ *DPP v Wang* [2020] VSC 701.

sisters, including Qin, had deteriorated over the years. There were disputes about money and the care of your father. You were your father's primary carer from 7 December 2018 until the day of Qin's death. Your father required high-level full time care. He had dementia, renal cancer and other comorbidities. You provided assistance to your father for all his activities of daily living, including overnight care. You were experiencing fatigue and exhaustion in the days before and the morning of the incident. You were not coping with the demands placed upon you after your father came to live with you. Your coping ability was further impacted by an injury to your lower back in the weeks before the incident.

8 There was animosity and tension between you and Qin in the weeks prior to the incident. Your father was discharged from Box Hill Hospital the day before the incident and Qin stayed at your house overnight to help with your father's care. You had little sleep the night before the incident as you had to attend to your father's needs during the night. On the morning of the incident you and Qin conversed and subsequently argued. You spoke about the longstanding disputes and you told Qin that you had been treated unfairly. During the argument you became angry towards Qin. Your anger emerged in the context of your animosity towards Qin over the longstanding disputes, and more recently over your frustration based on your belief that she would not help you with your father's financial needs, in conjunction with her refusal to assist you so you could attend your uncle's birthday in Taiwan.

9 During the argument with Qin you assaulted her. Qin sustained numerous serious injuries to her upper body as a consequence of the assault, as well as multiple rib fractures. The upper body is known to be a vulnerable part of the body. The assault involved blows of at least moderate force, and in relation to the rib fractures potentially severe. You subjected Qin to a severe and repeated beating in which she sustained the injuries to her body.

10 The assault was not a lethal assault of itself and Qin's death followed most likely by reason of positional asphyxia.

- 11 There was no evidence of a weapon being used to inflict the injuries. The crime scene was contained suggesting a relatively confined assault. There was no fatal blow that killed Qin. No clean up or concealment occurred.
- 12 Your behaviour after the incident was difficult to explain, bordering on bizarre. Shortly after you assaulted Qin you wrote two notes and attended to your father's needs. The expression and language used in the notes is vague and amorphous and at times bizarre.
- 13 Even though there was no concealment of the body, you did drag your dead sister's body to the boot of your car and took her body to East Burwood. You did not call an ambulance or assist your sister after the assault. Further, you deliberately took Qin's body to her sister's home in what was a demonstration of what you had done to your family. You exposed your family to the killing of Qin. What occurred was a senseless and tragic crime and presents me with a difficult sentencing task.
- 14 In addition to the two handwritten notes you left at the Clayton South property in the morning of the incident, three months later, on 30 May 2019, a note you had written was found in your prison cell. Your note included the words: "I've killed one of blood suckers. Only one of many..."⁴
- 15 There were no victim impact statements provided to the Court. However, it goes without saying that your actions have caused pain and loss to your whole family and particularly Qin's family. The Court was informed that Qin's family have 'decided to be peaceful until Chinese New Year. Once Chinese New Year is finished they are holding a big family meeting where culturally every family member is required to attend. At that meeting, the crime will be discussed as well as the effect on each family member'.⁵ No sentence I impose will be able to undo your actions or the widespread suffering you have caused.
- 16 The submissions made at the plea hearing were largely not in dispute. The areas of

⁴ Trial Exhibit 29, Handwritten Note #3.

⁵ Prosecution's written submissions dated 8 December 2020 [21].

contention were primarily in relation to your moral culpability, the role of general deterrence and denunciation in this case, and the degree of remorse you have for your actions.

17 You were 68 years old when you killed Qin. You migrated to Australia from China in 1989 to study. You are now an Australian citizen. You have one daughter who lives in Hong Kong. You have worked all your adult life and at the time of your offending were retired. Despite the longstanding disputes with your siblings, including Qin, you have continued to be involved with your family and it appears that you have supported each other in different ways.

18 I have mentioned your devotion and sense of duty to your father. Your caring for your father was extraordinary and it had a great toll on you. You were suffering from exhaustion and despair in the weeks and days before the incident.

19 You have no criminal history. I have read the six character references provided to the Court written by friends who live in your neighbourhood.⁶ You are described as 'a kind and gentle man who has always helped people', 'a good person', 'a man who is grateful that Australia has given him an opportunity to live a better life', a 'truthful', 'reliable' and 'very hardworking' man, and a 'selfless' man.

20 You have spent your time in custody productively. You have completed a number of courses and endeavour to better yourself. You accept responsibility for your actions and say that you deserve to be in prison. You have not suggested that your age has made it more onerous for you to be in prison.

21 You are reconciled to imprisonment and do not say that you are especially burdened by it. Nonetheless, I accept your counsel Mr Morrissey SC's submission on your behalf that you are an older offender in the COVID-19 era and that imprisonment is onerous for you.

22 Your offending was inherently serious as you caused the death of another human

⁶ Plea Exhibit D2, Six References from Stephanie Ivankovich, Dennis Ivankovich, Cecelia Luen, Danika Balevska, Teresa Pareggi and Hy Hong Zhuang.

being. Factors which further aggravate the seriousness of your offending include that:

- You inflicted a severe and repeated beating in which Qin suffered numerous serious injuries.
- The assault was concentrated to the upper body which are areas of the body that are known to be vulnerable.
- Qin was small in stature and was an unsuspecting victim. You held a physical dominance over her and there is no suggestion that she posed a threat to you. When the assault was carried out you were standing in front of Qin, who was seated. The assault thereafter occurred at close range, and was therefore very personal and physical.
- You were Qin's older brother and she was entitled to feel safe and free from harm whilst a guest in your home and in the presence of her frail elderly father.
- Shortly after the assault you did not seek any help for Qin. Instead you attended to your father and wrote the two notes which in part set out instructions for the care of your father, but also contained confronting and objectively callous comments such as 'I have killed my sister Qin at 7 am to achieve my justice'.⁷
- Qin lay dead or dying for up to two hours before you dragged her body to the boot of the car and drove to your sister's home.
- Your conduct of driving to the East Burwood home of another sister was an effort to demonstrate what you had done to your family members. You deliberately and cruelly exposed family members to Qin's killing.
- In relation to the 'intentionally cause injury' charge, the use of a metal bar is an aggravated feature of the offending and it was perhaps sheer luck that Kuan Yang only sustained bruising.

23 In mitigation, I accept that:

- Your offending was not premeditated. It was a spontaneous burst of anger in the context of you being 68 years of age, exhausted and fatigued from caring for your father.
- You have a crime-free history. You have worked all your life and have established yourself in your community. The character references provided to

⁷ Trial Exhibit 7, Handwritten Note #1.

this Court speak glowingly of you as a person.

- You plead guilty to intentionally cause injury and offered to plead guilty to manslaughter at an early stage. You maintained that offer up to the door of the trial although it was not accepted by the Prosecution. At trial the offence of manslaughter was contested. Notwithstanding this fact, you are entitled to the utilitarian benefit of an early offer to plead guilty.⁸
- You have taken steps in prison to rehabilitate yourself. This augers well for your rehabilitation after you have completed your term of imprisonment and is relevant to the issue of specific deterrence.
- You disclosed that you had killed your sister within hours of the incident to your family members and the police. You have acted without any real contrition for your sister's death. You have accepted responsibility for your actions and are reconciled to imprisonment. The issue of remorse is not straightforward in your case. I agree that at best what can be said is that you have shown a measure of remorse but, as expressed by Mr Morrissey SC, falling short of full repentance. While the third note demonstrates you still harboured feelings of resentment and injustice against Qin even after the events that unfolded on 27 February 2019, I found that your actions after the assault did not necessarily show a lack of remorse. There was conduct such as your responses in the Record of Interview, where you acknowledged the death was a tragedy, that it was your fault and that it should never have happened.⁹ You did not attempt to excuse yourself and these sentiments are consistent with feelings of remorse.

24 In my opinion, your offending can be considered a mid-range example of manslaughter. I note that this assessment does not seek to minimise the significance of Qin's death, and the immense suffering your actions have caused. In reaching this conclusion I have had regard to the factors outlined above.

25 The Defence suggest that your moral culpability is reduced by the fact that you 'cracked' in a state of acute stress and exhaustion caused by the intolerable load of caring responsibilities placed on you. Particular emphasis was placed on the statement in your father's discharge summary from the Eastern Health Peter James Centre dated

⁸ *DPP v Pennisi* [2009] VSCA 322 applied in *DPP v Lai* [2015] VSC 346.

⁹ Trial Exhibit 28, Transcript of Record of Interview, 92-3.

6 December 2018, which expressly noted 'a high risk of carer stress'.

26 The Prosecution accept that you were under a lot of pressure in the lead up to Qin's death. However, the Prosecution submit that this pressure does not operate to reduce your moral culpability. In particular, the Prosecution emphasised that in the moment there were other actions open to you.

27 The fact that you snapped and assaulted Qin in anger whilst in a state of physical and mental exhaustion, means that your moral culpability is to some extent less than it would be if you had acted with premeditation or cold deliberation.

28 However, your sister was entitled to feel safe in your home. Your actions were a breach of the trust she placed in you as her brother. That your offending occurred in circumstances where you were experiencing fatigue and exhaustion and not coping with the demands placed upon you, can in no way justify the assault you inflicted on her. Accordingly, I do not find that your moral culpability is significantly reduced by reason of the exhaustion and fatigue you were experiencing and your sudden outburst of anger.

29 In determining your sentence I am required to take into account current sentencing practices. For any given offence, the range of factors relating to the circumstances of the offender vary significantly. It is never an easy task to identify the appropriate range of sentence. This is particularly so in cases involving the offence of manslaughter. However, it is important to have regard to the appropriate range of sentence, taking into account the nature of the offending and your circumstances.

30 I have been assisted by the summary of sentences in some other cases provided by the Prosecution.¹⁰ I have also had regard to sentences in some other cases.¹¹

31 Not surprisingly, none of the cases are substantially comparable to the present case.

¹⁰ *DPP v Ristevski* [2019] VSCA 287; *Freeburn v The Queen [No 2]* [2020] VSCA 156; *DPP v Rivett* [2020] VSC 563; *DPP v Bogart-Mott* [2017] VSC 262; *Astbury v The Queen [No 2]* [2020] VSCA 158.

¹¹ *Smith v The Queen* [2020] VSCA 159; *Vu v The Queen* [2020] VSCA 59; *Wan v The Queen* [2019] VSCA 81; *R v Boroviak* [2018] VSC 793.

However, a review as a whole has assisted me in determining the appropriate sentence range in this case.

32 Your offending involved the killing of another human being. By definition, this is a serious offence and general deterrence must be a primary sentencing consideration. The serious nature of your offending, and your degree of culpability, requires the Court to strongly denounce your conduct. As I have said, your offending was physically violent, closely personal and a very traumatic way for your victim to die.

33 The Prosecution submit that general deterrence and denunciation should play a particularly prominent role in your sentence, given your assault on Qin is a further instance of violence by a man to a women, within a domestic and family setting.

34 Your Counsel accepted that I should consider the domestic setting of your offending but submitted that your crime was not a gendered one in the sense that it was not motivated by male entitlement or control nor did it have a sexual aspect.

35 I accept that the appropriate way to proceed in this case is to work outwards from the facts, rather than seek to fit your offending into a pre-determined category.

36 However, as I have said, your assault on Qin was a betrayal of her trust in you as her brother. She was in a vulnerable position and was entitled to feel safe in your home. Your resort to violence was unacceptable.

37 General deterrence and denunciation are therefore important factors in this case.

38 Specific deterrence and the protection of the community are factors that must play a role in determining your appropriate sentence. It is important that the sentence be sufficient in order to ensure that you personally are deterred from any further wrongdoing. However, in that respect, as I have already indicated, I am satisfied that you have already taken positive steps towards your rehabilitation. Further, you were 68 years old at the time of the offence with no prior criminal history, and as such have good prospects of rehabilitation. There is less need for weight to be given to specific deterrence and the protection of the community in these circumstances.

39 You did not contend that imprisonment would be harder on you than any other person in their 70s. Nonetheless, your age is a relevant consideration as it means you are likely to spend a substantial portion of the remainder of your life in custody.¹² Furthermore, imprisonment is likely to be more burdensome on you than it would be on a young offender.¹³ This is particularly so given the objective dangers of the current COVID-19 pandemic and the fact that your age places you in a higher risk category.¹⁴ However, notwithstanding your age, just punishment, proportionality and general and specific deterrence remain primary sentencing principles, and I acknowledge that your old age cannot justify the imposition of an unacceptably inappropriate sentence.¹⁵

40 I also take into account, in particular, that you have expressed some remorse, though quite limited, that you offered to plead guilty at an early stage, that you have a crime-free history and that these offences are at variance with your otherwise good character.

41 Ning Wang please stand.

42 Taking those matters into account, I sentence you as follows. For the offence of manslaughter by unlawful and dangerous act, I sentence you to 10 years imprisonment. For the offence of intentionally cause injury, I sentence you to 12 months imprisonment. I order that 9 months of the intentionally cause injury charge be served concurrently with the manslaughter charge. The total effective sentence is 10 years and 3 months. I fix a minimum non-parole period of 6 years and 4 months.

43 Pursuant to s 18(4) of the *Sentencing Act 1991* (Vic), I declare that 666 days, including today's date, be reckoned as served under the sentence, and I shall cause that declaration to be noted in the records of the Court.

44 As I have already stated, I have taken into account, in your favour, the fact that you

¹² *R v RLP* (2009) 213 A Crim R 461, 474-6 ('*RLP*'); *DPP v Che Kien* (2000) 116 A Crim R 339, 342-3; *Austin v The Queen* (1996) 87 A Crim R 570.

¹³ *RLP* 474; *R v DD (No 2)* [2008] VSCA 15 [19].

¹⁴ *R v Madex* [2020] VSC 145 [51].

¹⁵ *RLP* 474-6; *R v Bazley* (1993) 65 A Crim R 154, 158.

offered to plead guilty to manslaughter at an early stage and that you pleaded guilty to intentionally cause injury. Section 6AAA of the *Sentencing Act* requires me to state the sentence, and the non-parole period, which I would have imposed but for your plea of guilty. But for your early offer to plead guilty to manslaughter and your plea of guilty to intentionally cause injury, I would have imposed a sentence of 12 years imprisonment and a minimum non-parole period of 8 years and 6 months.

CERTIFICATE

I certify that this and the 9 preceding pages are a true copy of the reasons for Sentence of Justice Incerti of the Supreme Court of Victoria delivered on 23 December 2020.

DATED this twenty third day of December 2020.

