

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

No. 00046 of 2012

THE QUEEN

Plaintiff

v

JUSTIN PATRICK PETER HILL

Defendant

JUDGE: ROBSON J
WHERE HELD: Melbourne
DATE OF HEARING: 31 July 2012
DATE OF SENTENCE: 20 August 2012
CASE MAY BE CITED AS: R v HILL
MEDIUM NEUTRAL CITATION: [2012] VSC 353

CRIMINAL LAW - Sentencing - Conviction of murder - Plea of guilty to defensive homicide - Matters in mitigation - *Verdins* enlivened

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr R Gibson	Office of Public Prosecutions
For the Defendant	Mr M Dempsey with Ms S Keating	Victoria Legal Aid

HIS HONOUR:

Introduction

1 Justin Patrick Peter Hill, you have been found guilty of the murder of Erin Burriss.

The offence

2 On 9 June 2011, Erin Burriss knocked loudly on the front door of 1 Jetty Road, Dromana, where your parents, Ron and Anne Hill, and cousin Gemma Kriening lived. Your parents and Gemma opened the door and saw Erin complaining loudly and accusing you of destroying her grandmother's wedding photo. Your father requested that Erin leave the premises and closed the door.

3 At that time, you were in the bungalow at the rear of the house where you lived. You heard the commotion, armed yourself with a very large knife, ran out and confronted Erin on Jetty Road outside the front door of your parents' home. Erin took a swing at you and you 'lost it'. You stabbed her several times in the left-hand side of her head. She raised her left arm to ward off the attack and yelled 'stop it, get off me', but you continued to attack her until she was dead. Erin suffered horrific injuries to her head.

4 After killing Erin, you walked back to your bungalow, changed your clothes and sat down at your computer to play a computer game.

5 Your father contacted emergency services. The police attended and took you into custody. You were subsequently interviewed and made a full admission to killing Erin. You were charged with murder.

6 At the trial, you pleaded not guilty to murder, but guilty to defensive homicide. The Crown did not accept that plea in satisfaction of the charge. Your defence was that you believed that it was necessary to do what you did in order to defend yourself or another person from death or really serious injury. By your plea of guilty to defensive homicide there was no issue at the trial that you caused Erin's death; that your actions which caused Erin's death were conscious, voluntary and deliberate; and that at the time you stabbed Erin in the head you intended to kill or cause her

really serious injury.

The jury's findings

- 7 In substance, the sole issue the jury had to decide was whether the prosecution proved beyond reasonable doubt that you did not believe that it was necessary to do what you did to defend yourself or another person from death or really serious injury. The jury's finding of guilty of murder carries with it the finding that they were satisfied beyond reasonable doubt that you did not believe that it was necessary to do what you did to defend yourself or another person from death or really serious injury.

Your circumstances and character

- 8 You were born in Victoria on 2 October 1974 and are currently 37 years of age. You were 36 when you killed Erin Burriss. Your childhood was free of neglect or violence, and although you appear to have had emotional difficulties from a very early age there were no significant behavioural issues during your school years. You left school in 1994 after attempting Year 11 for the third time.
- 9 You have struggled in almost every facet of your life, including your health – both mental and physical, your education, your social and friendship circles and your lack of intimate relationships. You have made some contribution to society through employment and in helping your parents around the house.
- 10 Your employment has been patchy. Although you were unemployed at the time of the offence, you have worked in a number of jobs during your adult life, including in retail, at a factory, on a farm, and in manual labour. You have found work stressful and difficult. At one stage in your past you were dismissed from a retail position for stealing.
- 11 Your social environment was a limited one. You lived at home, with your mother, father and niece, and had only a small circle of friends, including Erin. Your friendships, with Erin, Jason Webb and Heather Ludlow, were principally based on shared drug habits, although inevitably the relationships were more complicated

than this, and include confusion or ambivalence about your own sexuality and your relationships with both Erin and Jason.

12 When Erin was well you found her charming, funny, witty and great company. The evidence suggests you had unrequited feelings for Erin. Although you acknowledge the relationship was not a healthy one, you and Erin appear to have been emotionally co-dependent. Your psychologist Mr Derek Poupard formed the view that this relationship was causing you 'real stress', and your family noted that the relationship between you and Erin was emotionally volatile. A factor in the relationship between you and Erin was a sexual assault committed by you on Erin, and admitted by you. Although this has no bearing on the offence of murder, or on my sentence, it forms part of the context in which you were reluctant to inform the police of your claims that Erin was harassing you and your family for fear she would in turn report the assault.

13 Drug use has been a large part of your adult life. You have a long history of cannabis and heroin use, as well as occasional chemical substance abuse. While your drug use has undermined your mental health, and in fact the cessation of your heroin use just prior to the offence added to the deterioration of your mental state, you have never been violent, before this offence, when using either heroin, cannabis or any other drug.

14 Your medical history does not have the significance of your mental health history, but you were assaulted somewhere around 2005 and following that assault had your teeth removed. This caused you pain and I accept that your heroin use was in some ways a means of finding relief from that pain.

15 Despite a history of years of substance abuse, you do not have any convictions involving violence. You have only come to the court's attention twice before, for dishonesty offences. You were charged with burglary and possession of a house-breaking implement in 1993, for which you received a 12 month community based order, and convicted in 2012 of theft from a shop for which you were ordered to

complete 290 hours unpaid community work.

- 16 You are someone who struggles with impulsive behaviour and you have difficulties in managing everyday life, including relationships, finances and accommodation. A consultant forensic psychiatrist who assessed you after the offence, Dr Danny Sullivan, suggests that you appear to lack sufficient emotional maturity to manage the relationship you had with Erin. In addition, your psychiatric history, much of which relates to your substance abuse, indicates that you have a recurrent depressive disorder which is mild in severity with occasional deterioration in mental state, or alternatively a substance-induced mood disorder. You have also demonstrated signs of paranoia, linked to your cannabis use.
- 17 In the weeks leading up to the murder of Erin, your psychiatric care was in the hands of three people, Dr Richard Duff, your GP; Mr Poupard your psychologist, and Dr Robert Kruk, your psychiatrist. At this time your mood was fluctuating wildly and your mental state was deteriorating. Your dosage of Zyprexa, an antipsychotic medication you had been prescribed, was increased. You were concerned that Jason Webb was going to attack you and for this reason you procured a knife with which to defend yourself against him.
- 18 Your fear of Jason assaulting you arose out of you telling Erin of a sexual encounter that you had with Jason when you and Jason were both about fifteen. You had also had another sexual encounter with Jason in the recent past that you had not told Erin about. Erin informed you that she had taunted Jason about the sexual encounter and that Jason had told her that he was going to come down from Cobram where he lived to Melbourne and bash you. You thought that Jason must have mistakenly believed that you had told Erin about the recent sexual encounter. Jason denies these sexual encounters took place. In any event, I accept that you were genuinely concerned that Jason or friends of his were going to come down from Cobram, to bash you. This, however, goes no way to explaining why the attack on Erin was forthcoming.

19 The evidence of your doctors and Ms Alison Shand, the mental health nurse from the CAT team that attended you on 8 June 2011, is that by June 2011 you were anxious, worried, paranoid, and increasingly unstable. Although you were not considered psychotic by the mental health workers who attended you around this time, you did warrant increased mental health support.

Circumstances of the offence

20 It is important to view the offence in context. You contend that Erin's behaviour at the time of the offence was at its very worst and your ability to cope with that behaviour was at its lowest point. While I agree that your ability to cope with life's events was at a very low point, on balance I am not satisfied that Erin's behaviour was at this time at its very worst.

21 Your case, as presented to this Court, was that yours was a relationship of ongoing harassment by Erin of you and your family. You pointed to: instances of derogatory and abusive text messages you received from her; threats from her in relation to putting syringes in your parent's garden; numerous abusive phone calls from her; Erin stealing things from your parent's property; Erin being told multiple times that she was not welcome on your parent's property, a request which she continually ignored; and many verbal arguments between you and her. Your case was that Erin's behaviour was so bad that it forced Jason Webb to move to the country to get away from her. I am satisfied that Erin's behaviour was routinely bad and that the occasion of 9 June 2011 was, in reality, no worse than some of the other interactions that took place between the two of you. Neither your parents nor your niece gave evidence indicating that Erin's behaviour on that night was more troubling than what had occurred in the past. What is clear, and relevant to sentencing, is that your own ability to deal with Erin's behaviour was affected.

22 The immediate hours before the offence help to explain but not justify your actions. For the past eighteen days or so you had refrained from taking heroin. You were anxious and fearful of a physical attack from Jason or his friends. Your mental state was aggravated by your abstinence from heroin.

- 23 Around 6.00 pm, before her murder, Erin had come to your bungalow and invited you to go to her unit, that was some 150 metres away around the corner, to help her wash her dishes. In exchange she shared some cannabis with you. After washing the dishes in part, you then went back to your bungalow. At about 9.00 o'clock she returned to your bungalow complaining that you had not finished washing her dishes as agreed.
- 24 You returned to her unit to continue the washing up. You both began to argue. You smashed some cups and sauces on the floor of her unit. Erin hit you with a broom stick on your back. This assault left no marks on you. You broke the broom stick over her refrigerator. As you were leaving the unit, Erin attacked you with a log splitter hitting you on the shin and breaking the skin. As you walked up the road back to your bungalow, Erin followed you yelling abuse at you and threatening to come up to your parents house and hurt your mother and cousin.
- 25 You returned to you bungalow. But an hour or so later, Erin came to the front door of your parents' house and bashed on the front door with a small log splitter. You heard the commotion and quickly raced out from your bungalow to confront Erin on the road, and attacked her with a large knife you had armed yourself with to protect yourself from attack by Jason or his friends.
- 26 You say that you were 'in a big rage' and felt angry, but that your attack was not pre-meditated. I accept that your attack was not premeditated in the sense of being planned for some time. We do not know, however, what went through your mind that evening when you returned to your bungalow. I accept that you were in a heightened state of fear and anxiety as Dr Sullivan says. I accept that your fear and anxiety related to the attack you anticipated from Jason or his friends.
- 27 What has been established, however, is that you did not attack Erin out of a belief that it was necessary to do what you did to defend yourself or your family from death or really serious injury.
- 28 The exceptional violence of the attack, especially in circumstances where there was

no genuine threat from Erin which could have warranted such a response, is inexplicable. It is in fact difficult to contemplate any threat that would warrant the kind of injuries you inflicted on Erin. You did not know Erin was carrying a small log splitter when you attacked her. You knew that she had not effected entry to your parents' home as she was on the street when you attacked her. Your parents had not called out for assistance.

- 29 This was a particularly brutal and horrific killing. Erin was a young woman, only thirty years old when she was murdered. At the time of your attack, one of your neighbours heard a voice call out 'stop' or 'get off me' indicating that Erin was alive and aware of what was happening to her for at least a part of the attack. Erin suffered savage wounds, indicative of defensive injuries, including broken bones to her left arm and a deep wound to her left hand. Erin was trying to protect herself from the attack. I am satisfied beyond reasonable doubt of the aggravating factors mentioned above.

Sentence

- 30 The maximum prescribed sentence for murder is life imprisonment.¹ In deciding upon a sentence, I have had regard to current sentencing practices and also to the Sentencing Snapshot for murder prepared by the Sentencing Advisory Council, of May 2011. Mr Gibson of counsel, who appeared for the Crown, at the Court's request suggested a sentence range of 18 to 21 years for the head sentence, and 15 to 18 years for the non-parole period.² Your counsel submits that due to the nature and context of this case I should impose a sentence that has a significant disparity between the head sentence and the non-parole period.

Mitigating factors

- 31 You submit, on your plea, that there were a number of mitigating factors which I should take into consideration when deciding your sentence. I will now address

¹ Section 3 *Crimes Act 1958*.

² Transcript 694.

each of those factors.

Plea of guilty to defensive homicide

32 Your plea of guilty to the charge of defensive homicide did to some extent facilitate the course of justice, and indicated some acceptance of responsibility for the attack on Erin. Your plea was made early, in September 2011, and allowed for the trial to be run on very confined lines. This meant there was limited cross-examination needed and the duration of the trial was shortened.

33 You gave a frank and complete record of interview to the police. You tried to assist them in their inquiries as much as possible. The interview itself evidences your willingness to admit to your actions, asking as you did 'does that help you understand what happened', and containing as it does admissions that you killed Erin.

Remorse

34 The quality and level of the admissions made in your police interview indicate your remorse, as does your admission of guilt to defensive homicide, although this admission was not ultimately accepted by the jury. You also told your mother you were sorry for your actions, although it is not clear this referred to killing Erin rather than for causing trouble to your parents. I also note your submission that Erin was funny, witty and good company when well, is one which indicates your willingness to be honest in this proceeding, even if that honesty might damage your own defence.

35 Since being imprisoned you have undertaken courses in the areas of anger management; coping with change, grief and loss; and drugs and alcohol. This also indicates a level of understanding that your life choices and behaviour in relation to Erin was not appropriate or acceptable.

Motive

36 The Crown has urged me to make findings on the issue of motive. As such, and based on the evidence that has come before me, I am not satisfied beyond reasonable

doubt that the Crown made out that when killing Erin your motivation was to remove a pest or inconvenience from your life. I find that at the time of the killing your mental health was in sharp decline and this, coupled with your general inability to deal with life and specifically to deal with Erin's behaviour that evening, led you to, colloquially, 'lose it' and kill Erin on the spur of the moment in fit of anger. I reiterate that this was a grossly inappropriate and inexcusable act and provides absolutely no justification for what you did.

Time already served

37 It was agreed between the parties that on the date of the plea, 31 July 2012, but not including that day, 418 days of pre-sentence detention had been served by you.

*R v Verdins*³

38 You and the Crown agree that the principles of *Verdins* are enlivened in this matter. Put simply, *Verdins* extends the principle earlier outlined in the case of *R v Tsiaris*⁴ that an offender's mental illness may be a relevant consideration in the sentencing discretion. In *Verdins*, the Court of Appeal found that the principle espoused in *R v Tsiaras* was not limited to an offender who was suffering a 'serious psychiatric illness' but extended to an offender who had a 'mental disorder or abnormality'.⁵ In accordance with these authorities, your altered mental state must be taken into account in sentencing you.

39 Following this, when considering your sentence I take into account your mental health and the role it has played in your life and in the relevant offending. Although there is a difficulty in establishing a firm diagnosis in relation to your mental health, it is clear that it has had an impact on your behaviour. This in turn affects your culpability. You are not to be sentenced as someone who functions well in the world, because you clearly do not. For this reason general deterrence, as a

³ (Verdins) (2007) 16 VR 269.

⁴ [1996] 1 VR 398.

⁵ (2007) 16 VR 269, 271.

sentencing consideration, is also moderated somewhat by the state of your mental health.

Gravity of the offence

40 The crime you have been found guilty of is a most serious offence.

41 In *Romero v R* the Court of Appeal said:⁶

... the minimum sentence for murder must adequately reflect the community's paramount concern for the sanctity of human life and its abhorrence of deliberate acts which destroy life and have devastating consequences for those close to the deceased.

42 This murder was an extremely vicious and violent killing. Erin was stabbed multiple times in her head. She tried to defend herself, resulting in stab wounds to her arm. Although Erin had a small log splitter with her at the time you attacked, you were unaware of this and it played no role in your decision making. This was a frenzied and ferocious attack on another human being and was totally unjustified.

Victim Impact Statements

43 A relevant matter for my consideration is the impact of the offence on any victim of that offence.⁷ The statements of Barbara Burriss, aunt of Erin; Alison Kelly, cousin of Erin; Kerry Burriss, mother of Erin; Peter Burriss, father of Erin, and Heidi Conway, sister of Erin, were each read to the court. In addition, the court received written statements from Francis Lockett, aunt of Erin, and Kelly-jo Lockett, cousin of Erin.

44 Each of the victim impact statements speaks of the great loss that has been visited on Erin's family by her death, and the ongoing trauma and distress caused by the nature of that death. Erin's mother, Kerry, says that no mother should ever have to experience the loss of a child. She talks about feeling anger, disbelief, shock and frustration. She says she was not able to function when she first heard about what had happened to Erin, that she cried constantly and that she could not eat or sleep. She speaks of how distressing the funeral was, as was the task of having to pack up

⁶ [2011] VSCA 45.

⁷ Section 5(2)(daa) of the Act.

Erin's unit. Erin's death has had a lasting effect on her; she cannot watch news reports or television shows with any violence and feels stressed if she does see such programs. She was subjected to reliving Erin's death when her crime scene footage was accidentally used by a television station to illustrate another death. She avoids telling people what happened to Erin. She has had counselling and plans to have more when she is ready. She talks about the tremendous effect Erin's death had on her grandmother, Kerry's mother, who died last year, and of the ongoing tragic effect Erin's death has had on Erin's sister Heidi and her two children.

45 Erin's father, Peter Burriss, says that the news of Erin's death was devastating and the worst possible news a parent could receive. He says that he finds it hard to comprehend that he will never again spend time with Erin and that the first Christmas and birthday without her have been especially hard. He misses his phone chats with Erin and remembers that she always told him she loved him. He says that Erin never forgot a special occasion and would always visit a family member if they were in hospital. He recalls how emotional it was to empty out Erin's unit and how distressing it was to see her belongings being taken away in the back of a truck as if she had never existed. Peter says he often wakes at night thinking about Erin and that it has been very difficult because it was such a senseless crime. He says that his wife, Kerry, and daughter Heidi have been severely affected by Erin's death and their lives will never be the same again. He says that Erin had a favourite place by the creek at their farm and the family will make a special area for her ashes and a memorial.

46 Erin's sister, Heidi, says that life after Erin's death has been extremely hard. She feels overwhelmed with anxiety and depression and struggles to keep up with everyday life. She says that just after Erin died she often could not get out of bed even though she had two children under three and half and her health as been adversely affected. Her son's health has also been adversely impacted by the effect of Erin's death on the family. Heidi says she gets upset, frustrated and angry easily and very rarely laughs. She says that she constantly feels that she is a burden on her

family and friends. Her relationship with her husband has been affected due to her frustration and moods. She says she has no motivation and because of this her children suffer. She talks about feeling guilty when something good happens in her life as Erin will never be able to experience happiness again.

47 Erin's aunt, Barbara Burriss, talks of feeling distressed and inconsolable when told of Erin's death. She has had to take time off work and receive psychological counselling to deal with the ongoing distress. She thinks about Erin daily, and particularly about her premature death. She calls Erin a misguided, warm young girl with a kind heart who treated her with affection.

48 Erin's cousin, Alison, also describes being inconsolable after being told about Erin's death by her mother. She says she has had to take time off work as she was too distraught to attend, and that Erin's death has affected her life majorly. She has had counselling. Her mood swings after Erin's death saw her terminate a long-term relationship. Alison says her children have also suffered with her mood swings and she feels she is not being as supportive a parent as she should be. She describes visions and flashbacks in relation to Erin's death and says that she can't move past it.

49 Erin's aunt, Francis Lockett, writes that dealing with the death of Erin has been heartbreaking, devastating, and unbearably cruel and difficult. She writes that it is immensely painful to watch her sister and brother-in-law go through the ordeal of losing their youngest daughter. She writes that her mother, Erin's grandmother, was heartbroken by Erin's death, and after it happened Erin's grandmother's health and strength rapidly deteriorated as she had been very close to Erin and had spoken to her daily on the phone. She writes the Erin's death had a serious impact on the health of Erin's grandmother. Francis writes that Erin's death will always be a painful tragedy.

50 Erin's cousin, Kelly-jo Lockett, writes that the crime committed against Erin has had a devastating impact on Erin's family and that it is painful to see their suffering. She writes that it breaks her heart to see her cousin, Heidi, struggling and suffering

because of Erin's death. She says that the death has shown the family just how dark and terrifying people can be and that Peter, Kerry and Heidi have to live with this in their minds and hearts for the rest of their lives, which they do not deserve. Kelly-jo writes that she does not know how not to think about how her cousin suffered during the final moments of her life and that these thoughts prevent her from sleeping and wake her in the night. Kelly-jo also writes about the impact Erin's death had on Erin's, and Kelly-jo's, grandmother, who believed that Erin wanted to live a better life and that this was possible because Erin had time to make her life happier and healthier. Kelly-jo says Erin's murder has robbed Erin of that chance. Kelly-jo says that she believes that Erin's death was a torture for their grandmother and that although she was strong, she was not strong enough to endure the loss of Erin. Kelly-jo says that to harm Erin in this way was to harm her family

Observations

- 51 In sentencing I have had regard to all the matters referred to above, including the statutory matters I am required to consider.⁸
- 52 You have been found guilty of murder. Yours was a shockingly violent and unwarranted attack on another human being who must have been aware of what was happening to her as she was attacked, and who died in a suburban street far from her family who loved her. Erin's family have stated the way in which her terrible death has an ongoing effect on them all. Tragically, Erin, the person you murdered, was also your closest friend.
- 53 I take into account the mitigating circumstances in this matter. I accept that, under the principle in *Verdins*, issues of deterrence have less weight. I accept that your mental health affects your behaviour and your culpability. You fully cooperated with police and the affect of your plea of guilty to defensive homicide reduced the scope of the trial. You have no history of violence. You have not coped easily with life and had few friends. But in the end: you committed a foul and horrible murder.

⁸ Statutory considerations are set out in my sentencing remarks in *R v Lubik* [2011] VSC 137.

54 The sentence that I propose to impose: does not exceed that which can be justified as appropriate or proportionate to the gravity of your crime considered in the light of its objective circumstances; is just in all the circumstances; gives weight to your offer to plead guilty to defensive homicide; gives relevant weight to general and specific deterrence in light of *Verdins*; has regard to your rehabilitation and your personal circumstances; manifests the denunciation of the Court for the conduct you have engaged in; is no more severe than that which is necessary to achieve these purposes; and has proper regard to all other matters required of me in passing sentence upon you.

55 For these reasons:

- (a) I record a conviction of murder against you.
- (b) I order that you serve a term of imprisonment of 18 years and 6 months.
- (c) I fix a period during which you are not eligible to be released on parole of 15 years.
- (d) Pursuant to s 18(4) of the *Sentencing Act* 1991, I declare that the period of 439 days, as of and including today 20 August 2012, be reckoned as already served under the sentence I have ordered.
- (e) I cause and direct that the fact that I have made this declaration and its details be noted in the records of the Court.

56 I propose to publish these reasons. I will include as footnotes case citations and other references.

57 Remove the prisoner.