

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S ECR 2021 0325

DIRECTOR OF PUBLIC PROSECUTIONS

v

JUAN GONZALEZ

JUDGE: FOX J
WHERE HELD: Melbourne
DATE OF HEARING: 7 April 2022
DATE OF SENTENCE: 9 June 2022
CASE MAY BE CITED AS: DPP v Gonzalez
MEDIUM NEUTRAL CITATION: [2022] VSC 331

CRIMINAL LAW - Sentence - Murder - Deceased was ex-girlfriend of offender - Offender attended the deceased's home and shot her twice in the neck with a double-barrelled shotgun - Immediate confession to police - Early guilty plea - Offender aged 76 at time of offending - Old age - Ill-health - Offender had been diagnosed with terminal cancer at time of offending - Likely to die in prison - No prior convictions - Standard sentence offence - Sentenced to 24 years' imprisonment with a non-parole period of 17 years' imprisonment.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr D Glynn	Office of Public Prosecutions
For the Accused	Ms C Marcs	Anthony Isaacs

HER HONOUR:

1 Juan Gonzalez, you have pleaded guilty to the murder of Thanh Ngoc Truong. The crime of murder carries a maximum sentence of life imprisonment.

Background to the offending

2 Ms Truong was 48 years old at the time of her death. She had two adult children, both in their 20s, and lived in a unit at 2/36 Andrea Street, St Albans. Ms Truong had emigrated to Australia in 2011 and worked full-time. Shortly before her death, she married Lanh Duong. They were married on 7 April 2021.

3 The previous year, in April 2020, you had commenced a relationship with Ms Truong. During the relationship, you and Ms Truong remained living separately. You would attend her home to fix things around the house, and she would cook for you and visit your home on weekends. You were at times jealous and controlling of her, and the relationship ended in March or April 2021. Ms Truong's daughter recalls hearing you and her mother arguing and yelling. Ms Truong told her son that she ended the relationship because you tried to control her, and called her constantly. She told a friend and neighbour, Kim, that you became overprotective and controlling, and would insist on driving her places and follow her.

4 Towards the end of April 2021, you attended Kim's unit and told her that Ms Truong had ended the relationship, you knew she was seeing another man and you knew who it was. Kim recalls that after this, she would see you on occasion driving up and down the street. There were times Ms Truong would get home from work, and you would approach her in your car and tell her to go inside.

5 You told Kim's husband, Nghia, that you knew Ms Truong was seeing Lanh, and you knew he lived in Cairnlea and drove a Mazda CX7. You said you used your daughter's car to follow Ms Truong, so she would not know it was you. You also told Nghia that you had ended the relationship because Ms Truong had asked you to put your house in her name, so she would receive it when you die, and you would not agree to this. Nghia recalls that after the relationship ended, he saw you on

occasion walking up and down Ms Truong's driveway.

6 Shortly before Ms Truong and Lanh were married, you confronted Lanh near a grocery store in Sunshine North. You told him that you knew he was a good man, and showed him a photo of he (Lanh) and Ms Truong together in Ms Truong's car. You warned Lanh not to get too close, and not to marry Ms Truong.

7 At the time of the murder, you were 76 years old. In 2018, you had been diagnosed with retroperitoneal sarcoma, a rare type of cancer. You underwent surgery, and in October 2019, there was a recurrence of the disease, resulting in further surgery. A nomogram put your six year survival rate after this surgery at approximately 50%.

8 You were the holder of a Category A and B Longarm firearms' licence, and owned two shotguns and a bolt-action rifle. Your licence expired on 5 November 2020, and on 7 December 2020, you surrendered your firearms to the police, pending the renewal of your licence. The firearms were held at a gun dealership in St Albans called Gunco. On 22 February 2021, you received your renewed firearms' licence, and on 19 April 2021, you retrieved your three firearms from Gunco.

The offending

9 On the morning of 20 May 2021, Kim drove herself and Ms Truong to work.

10 At approximately 1:03pm, Ms Truong called you, and the call lasted for 25 seconds. At 1:04pm, you called Ms Truong, and the call lasted 12 seconds. This is the last known contact between you. There is no evidence as to what, if anything, was said during those calls.

11 Kim and Ms Truong arrived home from work at around 6:30pm and went inside their respective units. Ms Truong's daughter had gone for dinner in the city, so Ms Truong was alone.

12 At around 5:40pm, your drove to a friend's address, and placed some vegetables over her fence for her and her daughter. You then returned to your home, arriving at around 6:30pm. Once home, you collected your double-barrel shotgun and two

ammunition cartridges from your gun safe, and left your address. At approximately 6:38pm, you parked near Ms Truong's unit in Andrea Street, St Albans, and placed your shotgun somewhere near units 1 and 2. You then returned to your car, reversed out of the driveway, and parked nearby.

- 13 Two minutes later, you walked back to 36 Andrea Street and stood outside Ms Truong's unit. A neighbour was walking past and saw you standing there. You said 'hey' or similar to the neighbour, who kept walking. You remained standing outside Ms Truong's unit.
- 14 You then entered her unit through the unlocked front door. She was standing in the kitchen. You were armed with your shotgun. You shot Ms Truong in the neck at close range. She must have been facing you at this point, as the bullet passed through her neck from under her chin and exited the top of her head. This shot was fatal. Ms Truong fell to the kitchen floor. You then fired a second shot into her neck, with the bullet passing through her neck and exiting at the base of her skull. This second shot was fired at very close range, with the muzzle of your gun either in contact with, or very near, her neck. The first shot exploded Ms Truong's skull and destroyed her brain tissue. The second shot caused massive disintegration of Ms Truong's upper neck structures.
- 15 You left her lying dead on the kitchen floor and walked out, placing your gun near the letterboxes at the front of the unit complex. You then retrieved your car, reversed back, and went to collect your shotgun from near the letterboxes. You walked back to your car, carrying your gun close to your body. You placed the gun on the back seat and left. It was about 6:45pm.
- 16 About two minutes later, you rang your ex-wife, Blanca Gonzalez, and told her you had done something bad to your ex-girlfriend and intended to go to the police. You did not provide any further details. You returned home at around 7:00pm and returned the shotgun to the gun safe. You then left home on foot, and at around 7:02pm, called a female friend and told her you had done something bad. She met

you at a nearby shopping strip and you made comments about killing a lady.

17 Meanwhile, Ms Truong's daughter Linh had arrived home a few minutes before 7:00pm. She found her mother lying in the kitchen, and saw blood and brains on the floor. She called '000' and told the operator she thought her mother might have been murdered, as her head was separated from her neck. The operator arranged for a Vietnamese interpreter, and while this was being done, Linh went next door and told Kim and Nghia what she had found. Nghia accompanied Linh back to the unit and then contacted police. Linh then returned to her call with the '000' operator, who told her to commence CPR on her mother, which she did.

18 Police arrived at 7:17pm. Senior Constable McCran rapidly observed that Ms Truong was deceased, stopped Linh from performing CPR and ended the call with '000'. A crime scene was established.

19 At around 8:00pm, you attended the Keilor Downs Police Station and said you were there to hand yourself in, as you had killed your girlfriend. You said you had shot her in the head with a gun. You said she had been calling you from a private number and you were sick of the calls. You were arrested and given your caution and rights.

20 In the initial conversation with detectives, you confirmed you had shot Ms Truong twice. You said you felt 'guilty' but that she wanted to 'destroy' you. You said you had asked her not to call you anymore, and she wanted you to put your house in her name. You told her no, and she was upset. In a later record of interview, you said that Ms Truong used private numbers to contact you as a 'psychological ploy' and you were feeling 'crazy'.

Victim Impact

21 Three victim impact statements were tendered on the plea. Ms Truong's son and daughter both provided statements. They did not want them read aloud in open court, and I will not refer to those statements in any great detail. They are both traumatised and devastated by their mother's violent death.

22 A victim impact statement of Ms Truong's husband, Lanh Duong, was read aloud by the prosecutor. He lost his first wife, and now his second wife, Ms Truong, has been killed. He feels sad and alone, and really misses her. They were about to move in together, and he was looking forward to spending the rest of his life with her. She was everything to him. Since her death, he does not go out socially. He just wants to stay home and sleep so he can forget about his loss.

Personal circumstances

23 You are 77 years old and before the Court for the first time.

24 You were born in Argentina in 1945 and are the eldest of three siblings. You are still in contact with your sister, who remains living in Argentina. Your brother was killed in a motor vehicle accident at the age of 41. You were well-educated, and qualified as a mechanical engineer. I am told you worked in that capacity, and as a bus driver, and ran your own transport company for some years. You married your first wife in 1965 and had two daughters. You and your family moved to Australia in 1976, but your wife did not enjoy it here, and returned to Argentina with your daughters. You remained in Australia.

25 You worked as a mechanical engineer for Toyota and Ford, and began your own business, JCG Motors. This was quite successful, but after a motor vehicle accident left you with permanent injuries, you had to close the business at the age of 48. You began working casually as a handyman shortly thereafter.

26 You were prominent in the Latin American community, and were president of the Argentinian Social Club during the 1990s. You remarried around the age of 50, but separated after about 14 years, as your wife became disenchanted by your infidelity. You remain close friends and have one daughter together, Michelle, with whom you are also close. You have three grandchildren and five great-grandchildren.

27 A number of character references were tendered on your behalf, some from people who have known you for decades. They consistently describe you as cheerful, helpful, friendly and a gentleman. They find it unbelievable that you are charged

with murder and are totally shocked. One friend has spoken to you in prison. He says you struggle to explain why you did this, and you are upset and sorry for what you have done.

28 In 2021, your cancer recurred at a new site, and you underwent radiotherapy in September 2021. According to a letter dated 20 March 2022 from your Consultant Surgeon, Mr Gyorki, your prognosis is now slightly worse. Your life expectancy is likely to be approximately five years from the date of the letter, although the disease is unpredictable and a more rapid disease course could develop.

29 A report of Dr Walton was tendered on your behalf. As I indicated on the plea, it was of little assistance. Dr Walton saw you in July 2021. He did not have the police or prosecution summary, and seems to have accepted your explanation that Ms Truong 'harassed' you to breaking point. He was told nothing of your behaviour toward her. Dr Walton states you would attract a diagnosis of mixed anxiety/depressive disorder, which is not of marked severity. Dr Walton opines that this condition has been 'aggravated somewhat further' by you being incarcerated, and your mental state 'would not need to deteriorate very much further' before treatment options should be considered.

30 Your counsel, relying on your mixed anxiety/depressive disorder, argued *Verdins*¹ principle 5 has application, although conceded the weight afforded to the principle would be relatively modest. She submitted that a sentence of imprisonment will weigh more heavily on you than it would on a person in normal health. The prosecution did not concede *Verdins* has any application here, and even if applicable, submitted that it does not moderate general deterrence. They noted that Dr Walton described you as 'pleased to report that he is actively engaged in the prison industry', and that you had taken on a teaching role there.

31 In my view, on the material, *Verdins* has no real application here. There is no evidence that your anxiety/depressive disorder has deteriorated whilst in custody,

¹ *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102.

required treatment or made custody particularly difficult for you. According to your counsel, you continue to teach in the prison industry and appear to have been a model prisoner.

Plea of guilty, remorse, rehabilitation

32 You went and confessed your crime to police almost immediately. You participated in a record of interview and told police what you had done. You pleaded guilty at the earliest reasonable opportunity, and this entitles you to a meaningful sentencing discount.

33 Your plea of guilty has substantial utilitarian or practical value. It has saved the Court the time and expense of a trial, and also saved the Ms Truong's family and friends the ordeal of a trial. Although in reality, this matter could never have been anything except a guilty plea. Your guilty plea also shows a willingness by you to facilitate the course of justice, and shows that you have taken responsibility for your crime. Indeed, your conduct, from the moment you handed yourself in to police, evidences that willingness and sense of responsibility.

34 Additionally, an early guilty plea entered during the COVID-19 pandemic continues to attract an additional discount.² This holds true even where, as here, the matter was never going to be a trial. I also accept that conditions in custody continue to be more difficult and isolating, due to the COVID-19 pandemic and resulting restrictions. One of your friends, who provided a character reference, has been unable to visit you due to these restrictions.

35 Your counsel submitted that you were instantly remorseful, as evidenced by you handing yourself in to police and confessing to murder. Justice Health medical records describe you as feeling guilty, upset, sorry and disbelieving of what you have done. Your counsel also submitted that you had excellent prospects of rehabilitation, given your prior good character and remorse.

² *Worboyes v The Queen* [2021] VSCA169, [35]-[36].

36 In all the circumstances, I do accept you have shown remorse. I also accept that you have very good prospects of rehabilitation. For 76 years you lived a lawful, productive and blameless life. You raised children and helped others, and prior to this offending, were a man of good character. Assessing your prospects of rehabilitation is, in reality, something of an artificial exercise, given your age and illness. However, your prior good character and prospects of rehabilitation are both factors that weigh in your favour, and must be taken into account when sentencing.

Nature and circumstances of the offence

37 The standard sentence for murder is 25 years' imprisonment.³ The standard sentence is intended to represent the sentence for an offence 'in the middle range of seriousness', taking into account only the objective features of the offence. The standard sentence, like the maximum penalty, is one factor I must take into account.⁴ The seriousness of the offence must still be assessed in the conventional way, by considering both objective gravity and moral culpability.⁵ I am obliged to disregard sentencing practice which existed prior to the introduction of standard sentencing,⁶ although the principles found in those cases remain of relevance.⁷ When fixing a non-parole period, I must fix a period of at least 70% of the head sentence, unless it is in the 'interests of justice' not to do so.⁸

38 Your counsel submitted that whilst your relationship with Ms Truong had ended, you continued to help out around the house. She would also regularly call you. The only explanation offered by you is that you perceived her as harassing you, and attempting to unfairly acquire your property. Your counsel conceded that this offending was motivated by jealousy, and admitted there is evidence of what may be described as 'coercive control or stalking'. She also conceded there were a number of

³ *Crimes Act 1958*, s 3(2)(b). Pursuant to ss 3 and 5(2G) of the *Sentencing Act 1991*, murder is also a Category 1 offence and the Court must impose a term of imprisonment.

⁴ *Clarke (a pseudonym) v The Queen* [2022] VSCA 89, [27] (Priest and Walker JJA), citing *McPherson v The Queen* [2021] VSCA 53, [31] (Priest and T Forrest JJA).

⁵ *Brown v The Queen* (2019) 59 VR 462, 479 [55].

⁶ *Sentencing Act 1991*, s 5(2)(b).

⁷ *Brown v The Queen* (2019) 59 VR 462, 464 [4].

⁸ *Sentencing Act 1991*, s 11A(4)(b).

aggravating factors, including that Ms Truong was murdered in her own home; there was a degree of premeditation and planning; and you departed the scene, leaving Ms Truong's body to be found by others.

39 Your counsel submitted that your offending falls within the 'lower-range of murder offending'. She referred me to the decision of *McPhee v The Queen* ('*McPhee*').⁹ Your counsel acknowledged that *McPhee* was not a standard sentence case, however argued it is comparable, and that your offending falls to be assessed within the lower range of murder offending. In my view, the case is not relevantly comparable. The offender in that matter was at home with his partner, where they both lived. He lost control, picked up a kitchen knife and stabbed her while she lay on the couch. He then called '000' and tried unsuccessfully to revive her. There was no planning or premeditation, and the offending was spontaneous. Your counsel referred me to four other murder sentences, including one for a standard sentence offence.¹⁰ I found those decisions of some, but limited, assistance.

40 The prosecution submitted this is a brutal, premeditated and planned killing, committed in the context of family violence, where you refused to accept the breakdown of the relationship. They submitted there is no evidence of Ms Truong making demands of you, and even if she had, to suggest that led you to murder her is akin to victim-blaming. They submitted your offending does not fall within the lower range of seriousness for offences of this type, and general deterrence, denunciation and punishment are important sentencing considerations.

41 The prosecution provided a table of 27 murder sentences, imposed in cases where the standard sentencing regime applied. Of those, the prosecution relied on two in particular as relevantly similar, *R v Shaptafaj*¹¹ and *DPP v Kingdon*.¹² I have had regard to that table, including those two cases. In my view, the first of the cases is a

⁹ [2014] VSCA 156.

¹⁰ *Eustace v The Queen* [2021] VSCA 142; *DPP v Heddergott* [2021] VSC 793 (a standard sentence offence); *DPP v O'Neil* (2015) 47 VR 395; *R v Yasso* [2007] VSCA 306.

¹¹ [2022] VSC 71.

¹² [2021] VSC 858.

far more serious example of a double murder. The second is somewhat more comparable, although no two cases are identical.

42 The explanation you offer for your crime is difficult to accept. There is material that shows Ms Truong was calling you frequently from a private number, and you were also calling her, albeit less often. There are also some WhatsApp messages from you to her. On 9 May, you wish her Happy Mother's Day. On 11 May, you call her 'honey' and send her a photo of some land you are working on. There is nothing to suggest that you wanted her to leave you alone, or that you asked her to leave you alone. You have consistently said that she wanted you to put your property in her name, and you said as much to Nghia weeks before you murdered Ms Truong. This may be true, but in any event, it does not matter. Once you were in custody, the Justice Health notes from May 2021 record the following: 'admitted that he was angry and shot her in her home'. It is that simple, and that callous.

43 Ms Truong was entirely innocent and utterly defenceless in the face of your shotgun. This is not a case where you suddenly and spontaneously lost control. You travelled to her residence uninvited, and brutally killed her in her own home, a place where she should have been safe. She had ended your relationship, but you engaged in stalking behaviour, and your counsel admits you were jealous. There was a degree of premeditation or planning involved, including collecting your weapon and ammunition, and driving to her address. I accept there is no evidence of planning beyond what occurred in the 15 minutes or so before you shot Ms Truong. A double-barrelled shotgun is a serious weapon, and the placement of your first shot leaves no doubt that you intended to kill her. You had the presence of mind to conceal your weapon near her unit, both before and after the crime, doubtless to avoid having to walk down the street with a shotgun, which may have attracted adverse attention. You left her lying dead on her kitchen floor, to be found by friends or family. In my view, your moral culpability is very high.

44 Murder is, intrinsically, a very serious offence. This is a serious example of murder, for the reasons I have been through. It cannot reasonably be said to be in the 'lower-

range’.

Old age and ill health

- 45 Your counsel referred to your ‘multiple health issues’, being long-term asthma, ongoing and painful inguinal hernia, and terminal cancer. She argued prison would be more burdensome for you than a younger offender, due to both your age and poor health. She submitted you are likely to die in prison, and therefore any period of imprisonment will represent a larger proportion of your life expectancy. She argued your age, ill health and short life expectancy are exceptional and relevant circumstances, and should be given weight when sentencing.
- 46 The prosecution submitted you were aware of your ill health and life expectancy at the time you deliberately committed this offence, and those matters should not be given undue weight in the sentencing process.
- 47 Old age and ill-health are both relevant when determining sentence. It is important to separately consider those two factors,¹³ although in this case, the mitigatory impact of your age and cancer diagnosis overlap. I put to one side your long term asthma, which has no discernible relevance here. There is some evidence that you suffer abdominal pain resulting from an inguinal hernia. I accept your health problems will make imprisonment more burdensome for you. As your cancer progresses, your imprisonment will likely become increasingly difficult and onerous. This is mitigatory to some extent. However, as has been said in other cases, ill-health cannot be allowed to become a licence to commit crime, or escape punishment.¹⁴
- 48 An elderly offender may be less likely to pose a risk to the community. Given you were aged 76 at the time of this crime, this is not a situation where advanced age appears to be a barrier to committing this type of offence. Nor is this a case where you committed a crime as a younger man, and delay sees you sentenced many years

¹³ *R v Iles* [2009] VSCA 197, [31] (Redlich JA) (*Iles*’).

¹⁴ *Smith v The Queen* [2018] VSCA 208, [35], citing with approval *R v Smith* (1987) SASR 587, 589 (King CJ).

later, towards the end of your life.¹⁵ However, I do accept that you would be very elderly if you lived to see the end of your non-parole period. In those circumstances, protection of the community and specific deterrence are not relevant sentencing factors here.

49 You entered prison for the first time late in your life, and being incarcerated will be more onerous for you than for a younger man. The combination of your age and cancer diagnosis means you are highly likely, if not certain, to die in prison. Any period of imprisonment will therefore represent a large portion, or indeed the balance, of your life. It is no small matter, to spend your days in prison with the knowledge that you will probably die before you are eligible for release. In some circumstances, this may be a weighty consideration, but given the severity of your crime, I would not describe it as such here.¹⁶ It is certainly a relevant consideration, which operates to reduce the sentence I would have otherwise imposed. However, given the seriousness of your offending, I do not find that general deterrence or just punishment can be significantly moderated, simply because you are now 77 years old and in ill-health.¹⁷

50 The expectation that you will now die in custody is unavoidable, given you chose to commit murder at the age of 76, and in circumstances where you knew you had terminal cancer. You are an educated man, and you must have anticipated imprisonment beyond your life expectancy when you determined to kill Ms Truong. I note that one week after this crime, on 27 May 2021, you told a Justice Health worker that you believe you will die of your cancer in custody.

Other matters

51 In her written submissions, your counsel relied on your age and ill-health as key matters justifying a merciful sentence. She submitted it is in the interests of justice to fix a non-parole period of less than 70% because of a combination of factors, being

¹⁵ *R v AP* [2009] VSCA 249, [6] (Maxwell P and Buchanan JA).

¹⁶ *Iles*, [35]. But see also *Fichtner v The Queen* [2019] VSCA 297, [90] (Maxwell P and Kaye JA).

¹⁷ *R v Cumberbatch* (2004) VR 9, 14-15 [13].

your immediate confession, prior good character, ill health, age, positive work history and the absence of any need for specific deterrence. All those matters must be taken into account in your favour when determining sentence, and they mitigate the sentence I would have otherwise imposed. An element of mercy has always been regarded as 'running hand in hand with the sentencing discretion';¹⁸ however, I do not find this case calls for a particularly merciful or lenient sentence. I am also not satisfied, in all the circumstances, that it is in the interests of justice to fix a non-parole period of less than 70%. Your crime is too serious, and the matters in mitigation do not compel such a conclusion.

52 Ms Truong was 48 years old, with two young adult children, a new husband, and much of her life still to live. This is another example of a man killing a woman, in circumstances where the woman has ended an intimate relationship, because he has found some reason to feel aggrieved, or because he is jealous, or a combination of both. Murder in these circumstances is a crime which deserves significant punishment, regardless of when in an offender's life it is committed. It is necessary to publicly denounce your crime, and impose a sentence that gives due weight to general deterrence.

53 On the charge of murder, you are convicted and sentenced to 24 years' imprisonment. I fix a non-parole period of 17 years' imprisonment.

54 I declare you have served 385 days by way of pre-sentence detention, and such period is reckoned as time already served under this sentence.

55 I am obliged to declare, pursuant to s 6AAA, the sentence I would have imposed if you had not pleaded guilty. But for your plea of guilty, the sentence I would have imposed is 29 years' imprisonment and I would have fixed a non-parole period of 23 years' imprisonment.

56 I will make the ancillary orders sought by the prosecution.

¹⁸ *R v Miceli* [1998] 4 VR 588, 592 (Tadgell JA).