IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA375/2019
[2020] NZCA 60

BETWEEN	MYRON ROBERT ALF FELISE Appellant
AND	THE QUEEN Respondent

Hearing:	24 February 2020
Court:	Miller, Dobson and Moore JJ
Counsel:	E P Priest for Appellant B Dickey and E J Smith for Respondent
Judgment:	16 March 2020 at 10.00 am

JUDGMENT OF THE COURT

A The application for extension of time to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Felise appeals the sentence of seven years imprisonment, with a minimum period of three years and six months imprisonment, imposed on him for the manslaughter of Eli Holtz.[1] He complains that the sentencing judge adopted a starting point that was too high, denied him a discount for his post-traumatic stress disorder

1 *R v Felise* [2019] NZHC 341.

(PTSD), and overlooked a causal link between the offending and his traumatic and deprived background.

The facts

[2] The summary of facts records that Mr Holtz, aged 18, was visiting Auckland from Whangarei with a friend on 27 January 2018. About 3.15am they were driving down Wellesley Street in Central Auckland, with Mr Holtz in the front passenger seat. Mr Felise was standing with a group of friends on the side of the road. As the car drove past Mr Holtz fired a single water pellet from a toy rifle at Mr Felise, hitting him on his lower back. This foolish act angered Mr Felise, understandably, but it did not injure him.

[3] The car stopped at the traffic lights at the intersection of Wellesley and Queen Streets. Seeing this, Mr Felise walked towards it, brushing aside an associate who tried to dissuade him. On reaching the passenger's side of the car, Mr Felise opened the door and punched Mr Holtz in the face, connecting at least once. He seized the water pellet gun and broke it on Mr Holtz, and punched him in the face repeatedly. Mr Holtz was trapped in the car and did not fight back. He lost consciousness during the attack, which did not stop until Mr Felise's associate pulled him away from the car. They left the driver to attend to Mr Holtz, who never regained consciousness and died in hospital after life support systems were removed.

[4] The incident was recorded on a street camera. The footage conveys not only the brutality of the attack but also an air of deliberation.

[5] Mr Felise was grossly intoxicated at the time. He admitted that he had consumed between 10 and 15 shots of spirits and at least 24 bottles of premixed ready to drink beverages, as well as several beers.

[6] A guilty plea was entered two weeks before the trial was to begin.

Personal circumstances

[7] Mr Felise was 31 years old at sentencing. He was raised in Otara in a tight-knit and supportive family in which he appeared to have a healthy and stable upbringing and developed a strong work ethic. He is married, with children, and enjoys strong support from friends and family.

[8] However, the environment in which he was raised included physical discipline. From the age of 13 he identified as a member of the Bloods Gang. He disclosed that he has taken part in over 40 incidents of serious violence in a gang context. He has also been a binge drinker from an early age.

[9] In 2010 Mr Felise, who was intoxicated, held up a liquor store with five accomplices. They committed the offence because they had run out of drink. A man was killed by one of the co-offenders and Mr Felise was convicted of aggravated robbery. On his release he ended his association with gangs and managed to go without alcohol for extended periods. He underwent treatment for substance abuse. However, the treatment was not ultimately successful. He resumed using alcohol in large quantities.

The sentencing

[10] After recounting the background, van Bohemen J correctly looked to *R v Taueki* for guidance.[2] He noted a number of aggravating factors of the offending: the violence, although not extreme, was gratuitous, it involved multiple punches to the head, and the blows continued after Mr Holtz lost consciousness. The injuries inflicted were very severe, ultimately resulting in death. Mr Holtz was vulnerable because he was restrained by a seatbelt and confined to the car. There were no mitigating circumstances of the offending. The Judge did not accept that there was any provocation. Having viewed the footage, he found it clear that Mr Felise never felt under threat and the attack was unwarranted and disproportionate to Mr Holtz's foolish prank. The Judge adopted a starting point in the middle of Band two in *Taueki*: eight

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2 *R v Taueki* [2005] 3 NZLR 372 (CA).

years imprisonment. The starting point was uplifted by 10 per cent for Mr Felise's history of violent offending.

[11] In mitigation, the Judge made a modest allowance of four months for remorse, which he accepted was genuine. That might have been greater had Mr Felise not delayed the entry of a guilty plea until just two weeks before trial, in the face of an extremely strong Crown case. The discount for the guilty plea was 10 per cent.

[12] Mr Felise sought a discount for severe alcohol disorder and post-traumatic stress disorder as a result of various factors including traumatic loss and his history of violent gang involvement. He contended that PTSD played a causal role in the offending, citing a psychological report which found that:

> In his heavily intoxicated state, with an impaired capacity for decision making, self-control, judgement and effective behavioural responding, it appears that Mr Felise experienced a PTSD exaggerated startle reflex in response to being shot, triggering an uncontrolled angry outburst response.

[13] The Judge did not accept that there was a causal connection between PTSD and the offending, finding it more likely that gross intoxication fuelled the attack on Mr Holtz. The Judge did make an allowance for restrictive bail and for family circumstances, resulting in an effective sentence of seven years imprisonment.

[14] The Judge imposed a 50 per cent minimum period of imprisonment because he found it necessary to hold Mr Felise accountable for the harm done, to denounce his conduct, and to deter him and protect the community. He remarked that Mr Felise had not learned from his experience the last time, referring to the conviction and sentence for aggravated robbery, and urged him to reform this time.

[15] We turn to the grounds of appeal.

Starting point

[16] Ms Priest submitted that the starting point of eight years was too high, suggesting that the Judge double-counted *Taueki* aggravating factors by referring

twice to violence done to Mr Holtz's head, and pointing to lower starting points for more serious violence in other cases.[3]

[17] We do not think the Judge double-counted aggravating factors, and we agree with his assessment of the seriousness of the offending. We have watched the CCTV footage. It conveys serious and measured violence, grossly disproportionate to Mr Holtz's prank. In our view the most comparable cases are *R v Tai*,[4] *R v Edmonds*,[5] and *Te Pana v R*.[6] It is true that lower starting points have been adopted in some of the authorities cited by counsel, but each is readily distinguished. By way of illustration, in *R v Harrington* the violence was similar but the defendant had attempted to perform CPR and he handed himself in to police a short time afterward. We are not persuaded that the starting point was too high.

Mental illness and the starting point

[18] Ms Priest submitted that Mr Felise's PTSD reduced his culpability, referring to the psychological report. She noted that Mr Felise scored in the highest ranges on several criteria for PTSD and his symptoms in the months prior to the sentencing were severe. His history of trauma included violent victimisation since childhood, his own use of violence, a vehicle accident at aged 14, witnessing a suicide, and recent family losses including a miscarriage. She cited the psychologist's opinion that Mr Felise may have experienced a "PTSD exaggerated startle reflex response".

[19] An allowance can be made for mental illness at the first stage of the sentencing analysis if it has a causal connection to the offending.[7] Van Bohemen J did not accept that it did, and we agree. The psychologist's report is speculative and overlooks the causal effect of intoxication when expressing an opinion about causation. As noted earlier, the camera footage conveys measured action rather than a reflex response, and it shows that Mr Felise had adequate opportunity to reflect on his actions. He brushed

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3 *R v Harrington* [2017] NZHC 170; *R v Edmonds* [2015] NZHC 3254; *R v Rangi* [2015] NZHC 1879; and *R v Evans-Whatarangi* HC Hamilton CRI-2008-068-609, 3 December 2009.
4 *R v Tai* [2010] NZCA 598.
5 *R v Edmonds*, above n 3.
6 *Te Pana v R* [2014] NZCA 55; and *R v Tepana* [2013] NZHC 1592.
7 *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68]–[70].

aside an associate who tried to stop him. He was under no threat when he attacked Mr Holtz.

Personal mitigating factors

[20] Ms Priest next argued that the Judge was wrong to deny Mr Felise a discount for mental illness as a personal mitigating factor under s 8(h) of the Sentencing Act 2002, and for his personal, cultural and familial background. She invited us to consider the psychological report as a s 27 report, and we have done so.

[21] As we understand it, counsel sought to identify a linkage between Mr Felise's personal, family and cultural background and his PTSD, so demonstrating that his background "related to the commission of the offence".[8] This argument attributes offending to a specific condition, PTSD, and so requires some evidence of a causal connection between them.[9] We observe that that may distinguish this case from others in which offenders plead their backgrounds in mitigation.[10]

[22] There may be more than one cause, and the weight attributed to each is a matter of fact and degree. In this case, as explained above, there is nothing in the record to show that PTSD contributed at all to the offending. On the facts, we agree with the Judge that gross intoxication was the likely trigger. The legislation precludes a discount for that, on the premise that the offender must take responsibility for the antecedent decision to drink.[11] The upshot is that Mr Felise cannot attribute the offence to anything other than his willed action.

[23] We record for completeness that the record does not identify a familial or cultural cause of the offending either. On the material before us, Mr Felise had a stable upbringing in a supportive family.

[24] In these circumstances, we prefer Ms Smith's submission for the Crown that the discounts given for personal factors were adequate in this case. A further discount

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8 Sentencing Act 2002, s 27.
9 As a mitigating fact, the onus is on the offender: Sentencing Act, s 24(2)(d).
10 See for example *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241; and *Arona v R* [2018] NZCA 427.
11 Sentencing Act, s 9(3).

might have been allowed for rehabilitative potential, but for reasons given below we would not disturb the modest allowance the Judge made for that. A discount might also have been given if the otherwise appropriate sentence would be disproportionately harsh, but that is not easily established and the evidence does not establish it here.[12]

Minimum period of imprisonment

[25] Ms Priest submitted that the minimum period of imprisonment was not warranted in this case. She emphasised that Mr Felise has severed his gang connections and submitted that he has prospects of rehabilitation once treated for PTSD.

[26] We accept Mr Felise would likely benefit from treatment for PTSD and further treatment for substance abuse. We have noted his strong family support, and we accept that he has potential for rehabilitation. We commend his decision to sever gang connections. Although he admitted to a long history of violence, he has only one past conviction for it.

[27] But we are not persuaded that the Judge was wrong to impose a minimum period of 50 per cent in this case. Mr Felise had fallen back into old patterns of behaviour only three years after being released from prison for a very serious violent offence in which he was fuelled by drink. He failed to absorb and apply the lessons of that experience and the treatment he received for substance abuse. These considerations supply the necessary additional need for accountability, denunciation and deterrence.

Decision

[28] Mr Felise filed his appeal four months out of time. His application for an extension of time to appeal is granted.

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[12] Sentencing Act, s 8(h). See *R v Verschaffelt* [2002] 3 NZLR 772 (CA) at [22]–[23]. See also *Candy v R* [2014] NZCA 288 at [12]; and *Nixon v R* [2016] NZCA 589 at [41]–[48].

[29] The appeal is dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent