NOTE: PUBLICATION OF PARTICULARS OF DEFENDANT'S HOME DETENTION ADDRESS PROHIBITED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-092-10594
[2019] NZHC 94

THE QUEEN

v

LIMA TERRY FELETI

Hearing:	7 February 2019
Appearances:	L Radich for Crown L O Smith for Defendant
Sentence:	7 February 2019

SENTENCING NOTES OF TOOGOOD J

Introduction

[1] Lima Feleti, you have pleaded guilty to the manslaughter of Hamuwera Holloway.[1] That was after you accepted a sentence indication which I provided on 19 November 2018.[2] You are to be sentenced on the basis of the agreed summary of facts, which you accept as true.

[2] Before I begin, I acknowledge the attendance of the two families who are deeply affected by the tragedy that has brought us together: Mr Feleti's aiga and Hamuwera Holloway's whānau. Those who were close to Mr Holloway are here in great numbers. Mr Feleti's family are also victims in a very real sense.

The facts

[3] The tragic circumstances that led to Mr Holloway's death are that, on Friday 7 September 2018, you were aged 18 years old and Mr Holloway was 19. You worked together as machine operators at Charta Packaging in East Tamaki.

[4] Shortly before 8.40 pm that evening, Mr Holloway and you were working together on a cardboard splitting machine. You were feeding cardboard through the machine, while Mr Holloway and another were stacking the cut product in preparation for the next stage in the process.

[5] At one point, you mis-fed cardboard through the machine, causing it to fall out and onto the ground. Annoyed, Mr Holloway picked it up and threw it at you. Although the cardboard missed you, an argument began and the two of you walked towards one another as if intending to fight. A co-worker separated you and told you it was not worth fighting at work as you might get fired. You both returned to the machine but, shortly after that, you picked up a metal machine tool and threw it at Mr Holloway who was standing not far away on the other side of the machine.

[6] The T-shaped tool was approximately 25 cm long and 14 cm wide, and weighed 364 grams. So it was not very big or heavy, but it hit Mr Holloway in the face and he

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1 Crimes Act 1961, ss 160 and 171; the maximum penalty is life imprisonment (s 177).
2 *R v Feleti* [2018] NZHC 2992.

fell to the ground, bleeding heavily. You panicked, apologised, and attempted to give him first aid. He was removed by staff, but died a short time later as a result of a penetrating injury to his left cheek, immediately below his left eye.

[7] Police attended the scene. You were upset and immediately expressed remorse. You explained you lost your temper and threw the tool at Mr Holloway's stomach. You said you did not know how it stabbed him in the eye.

Victim impact statements

[8] Several of Hamu's whānau – including his mother, Kathryn – have travelled from Melbourne to be here today. It is clear that Hamu's passing has left a void in all of your lives. That is a void that cannot be filled, regardless of what happens today.

E aroha nui atu ana, kia koutou i tēnei wā.

My thoughts and deep sympathies are with you.

[9] A great number of you have filed victim impact statements. I have read them all and I have taken them into account in considering the appropriate sentence in this case. Victims make an important contribution to the sentencing process where they wish to be engaged with it. Not only do they have a statutory or legal right to participate but the process is more robust by their doing so because the courts recognise that the principles of fairness and justice apply equally to victims as to offenders.

[10] Three statements have been read to the Court today. My words cannot truly reflect the sense of grief felt by those who have spoken, and the others whose lives were connected with Hamu. He was only 19 years old when he was killed. His whānau speak of a warm young man with a bright future ahead of him. His gentle and caring character was cherished by all around him. Memories have been shared of Hamu as a big young man with a big smile and a big heart: a gentle giant with a loving attitude to life.

[11] Not surprisingly, you are all still trying to come to terms with Hamu's passing. Some of you have spoken about your feelings of disbelief; your sense of numbness.

Others express your sorrow that Hamu will never see his 21st birthday or get married. All of you miss him and feel his absence from your lives keenly.

[12] I acknowledge the anger that many of you in this courtroom feel towards Mr Feleti. It is understandable, as was your unwillingness to engage in restorative justice. I am inclined to think that we invite victims to engage in restorative justice too early – particularly in cases where someone has died. It is all too raw, and that is evident this morning. I emphasise what I said earlier, that nothing that happens here today can truly account for Hamu's death or fill the gap that his passing has left in your lives. Your grief and your pain is obvious; it is clear that you are a very close family. I hope that, with each other, time will help the healing process for you.

[13] While recognition of the consequences of criminal offending for the victims is an important consideration for the Court, the primary focus of the sentencing principles is on the nature of the offending and the personal circumstances of the offender. Acknowledging that this is an emotional time for everyone in the courtroom, the Court must take a calm and unemotional approach, fairly applying the law to do justice to everyone affected. I trust that, however strongly any of you might feel about the sentence that is imposed, you will respect the dignity of the Court. That is most important.

[14] For those not familiar with our criminal justice system, the approach taken by courts to sentencing an offender may be confusing. I hope that I can help you to make sense of what is happening here by outlining the approach that I am required to take, explaining my reasoning as I go. I hope that will clarify the decision that I have reached and how I got there.

Approach to sentence

[15] Mr Feleti: in sentencing you, there are a number of purposes and principles which Parliament has said I must take into account.[3] I regard the requirement to denounce your conduct, to deter you and others from resorting to violence, and to hold you accountable for the harm done to Mr Holloway and his family as particularly

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3 Sentencing Act 2002, ss 7–8.

relevant. A young man died before his time, at the start of his adult life, in circumstances that were entirely avoidable and through conduct that is rightly regarded as unacceptable. On the other hand, Parliament has said also that the courts must bear in mind the purpose of assisting an offender's rehabilitation and reintegration and to take account of the need to impose the least restrictive outcome that is appropriate in the circumstances.

[16] Adopting the standard approach to sentencing,[4] I must first set an initial starting point based on the characteristics of the offending, including its gravity, which is informed by sentences given in similar cases and, in particular, by the observation of the Court of Appeal, whose judgments I am required to follow. Following that, I will consider whether any of your personal circumstances justify an adjustment to the starting point, either through aggravating factors such as a history of similar prior offending, or through mitigating factors such as your age and any remorse that you might have shown.

[17] Finally, I will give you a discount to reflect the fact that you have taken responsibility for your offending by pleading guilty.

[18] If all of this leads to a sentence of imprisonment that is two years or under I am then obliged to consider whether to convert your sentence to one of home detention.

Starting point

[19] The maximum penalty for manslaughter is life imprisonment.[5] Manslaughter covers a very wide range of circumstances which have led to a person's death; at times, these may come close to inadvertence; at others, they may fall just short of wilful murder.[6] For this reason, the appellate courts not provided guidelines but an analysis of comparable cases is always helpful to ensure consistency which is an important factor.[7]

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4 *R v Taueki* [2005] 3 NZLR 327 (CA); *Hessel v R* [2010] NZSC 135, [2011] 1 NZLR 607.
5 Crimes Act 1961, s 177.
6 *R v Wickliffe* [1987] 1 NZLR 55 (CA) at 62 citing *R v Cascoe* [1970] 2 All ER 833 (EWCA Crim) at 837-838.
7 *Murray v R* [2013] NZCA 177 at [27].

[20] Your counsel Mrs Smith and the Crown agree that this is the best approach to take. They also agree that it is best to compare your offending to cases involving "one-punch" manslaughter. That is because it involved a single act of violence that caused death. I have taken into account the cases to which counsel have referred in their submissions. It is true that these cases involving a punch do not involve the use of a weapon. I think characterising your offending as an attack with a weapon, however, is somewhat misleading; and I respect and am able to adopt Mr Radich's submission for the Crown that this was a deliberate act but one which might also be regarded as a freak accident; certainly the consequences were not intended by you.

[21] The tool you threw at Mr Holloway was evidently capable of killing him. But you did not use it with that purpose in mind. You did not go and get it from somewhere else. It just happened to be lying close at hand when you made the rash decision to pick it up and throw it at Mr Holloway in much the same manner as he did when he threw a piece of cardboard at you. I draw parallels with a case in which the offender struck a man in the head with a large wooden pepper grinder which was lying nearby.[8] The victim collapsed and suffered fatal injuries. A starting point of three years' imprisonment was adopted in that case.

[22] Striking the head of a victim makes the offence more serious. Although the tool struck Mr Holloway in the head, I accept that it has not been proved that that was where you aimed. You say that you were aiming at his stomach and, because I have not heard any evidence about that, I must accept what you say. Because of that, I do not think it can be said that Mr Holloway's death was foreseeable to any degree when you threw the tool at him. It was of course foreseeable that he would be harmed, but I do not think it can be said that you must have known that serious injury, let alone his death, was likely to result.

[23] I balance that against the time you had to calm down after the initial confrontation with Mr Holloway. The two of you had been separated by your co-workers and you had returned to your workstations. You could have and should have chosen to leave it there. But what you did was a gross overreaction to what was

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8 *R v Rakete* [2013] NZHC 1230

previously, by all appearances, a relatively minor dispute. It was a juvenile act but one which had disastrous consequences, which I understand you now appreciate.

[24] Overall, this is how I view your offending. It was not a considered attack. There was no plan and no premeditation. You made a rash and impetuous decision in the spur of the moment. That is not to say it was not extremely reckless and dangerous – the tragic result shows that. But it was also thoughtless and lacking any vicious intent or premeditation. You realised what you had done was wrong almost as soon as you did it. You immediately rushed to Mr Holloway's aid after he was struck by the tool and tried to help him.

[25] Taking into account the relevant cases referred to by counsel, I adopt the initial staring point I did in giving you a sentence indication. It reflects accurately, in my view, the reckless and impulsive nature of your offending and recognises that it resulted in someone's death.

[26] Assessing the seriousness of your offending itself and the tragic death of Mr Holloway, I adopt a starting point of three years' imprisonment.

Personal circumstances

[27] Although imprisonment is the usual starting point in considering a sentence for manslaughter, it is necessary to consider all relevant factors. It is in the community's interests to give an offender who is not perceived to present a risk of further violence – particularly one as young as you are – the best chance not to repeat the mistake.

[28] So I now shift my focus to you and your circumstances, Mr Feleti. That helps me to understand who you are and how you came to offend as you did, and it provides an indication of how you might behave in the future. In making that assessment, I have been assisted by counsel's submissions and by a pre-sentence report from a probation officer, and I have read the two letters of support provided by Mrs Smith.

[29] Mr Feleti, you are still only 18 years old. You identify as American Samoan and you are one of nine siblings. Despite having a strong bond with your family, you say you often feel like you "fly under the radar" amidst so many people you and have

not discussed your offending with them in any great depth. I suggest to you that you turn to your family now for help and guidance.

[30] You left school after year 12 and completed one year of a mechanical engineering course at the Manukau Institute of Technology. You subsequently gained employment and so left the course unfinished, but you say you intend to return and complete it one day.

[31] I have read a letter from Mr Samuel Nanai, a tutor at the Auckland University of Technology's UniPrep course. This is a five-week programme aimed at assisting students to make the transition from high school to university. You have been enrolled in UniPrep over the recent summer school semester. Mr Nanai reports that initially your participation in the programme was hesitant, but you have gradually warmed to the task and he is optimistic about your chances of completing the course.

[32] You remain strongly connected to your church, attending every Sunday and mowing its lawns once a week. You had previously been involved in the church's youth programme, but after your offending you were removed. This caused you to feel isolated and led, you think, to an imbalance in your wairua, your spirit.

[33] I am not sure if you have subsequently been able to resume attending the church's youth programme, but I have received a letter from the church's minister, Reverend Logopati Mataafa. He confirms that you have been attending church every Sunday and have become increasingly communicative in recent times. It is clear from the Reverend's letter that you enjoy the support of this tight-knit community, which is something that bodes well for your prospects of rehabilitation.

[34] The pre-sentence report writer assesses you as having a low risk of re-offending, but raises concerns about your ability to deal with and process conflict. In that regard, I note you have begun attending the Living Without Violence programme. I am told you have made good progress in this course, which is promising.

[35] It is also relevant that you offered to engage in restorative justice with Mr Holloway's whānau. You say you would have liked to explain to them yourself

how sorry you are for what you did, but you understand why they are not willing to engage in restorative justice.

Aggravating factors

[36] I now turn to adjust the initial starting point of three years' imprisonment to reflect various factors which I have discussed, and some others, that are personal to you.

[37] The first is a matter that the Crown says should result in an increase in your sentence. That is the fact that your current offending took place while you were on bail for another charge. That charge, relating to offending that took place on 10 March 2018, is yet to be determined so you have no prior history of criminal convictions.

[38] But part of your bail conditions for that alleged offending was not to use violence against any person and you broke that condition. An uplift is required for that, not to punish you for the earlier charge, but to reflect the fact that you disregarded the District Court's order.[9]

[39] I increase your sentence, therefore, by two months, leading to a provisional sentence of three years and two months.

Mitigating factors

Youth

[40] Young offenders regularly receive discounts in sentencing from those which might be appropriate for a fully adult offender. The Court of Appeal has commented that an offender's youth may be relevant to assessing their offending in three ways:[10]

(a) First, scientific research into adolescent brain development has shown that young people are more vulnerable to negative influences and peer-pressure; and their decision-making is also more impulsive.

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9 Sentencing Act 2002, s 9(1)(c); see also *Clunie v R* [2013] NZCA 110 at [22].
10 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

(b) Second, the effect of imprisonment is disproportionately harsh on young people. Adolescents in prison suffer from high rates of depression, self-harm, suicidal ideation or thoughts, and victimisation by other inmates.[11]

(c) Third, and more positively, young people have a greater capacity for rehabilitation. A young first offender like you should not be regarded as beyond help unless there is no escape from that conclusion, even if their offending is serious.[12]

[41] The front of the brain is the last to develop. That is the part that controls our ability to plan; consider or reflect; to control impulses and to make wise decisions.[13] This is particularly relevant to you, Mr Feleti. Your actions bear all the hallmarks of typical youth offending and the impulsiveness associated with adolescent brain development. It was rash moment of aggression that was completely uncalled for in the circumstances, but not deliberate in the sense of the consequences which flowed.

Remorse

[42] I may also take into account any remorse you have shown when considering your sentence.[14] If, on a robust evaluation of all the circumstances you have demonstrated remorse, credit should be given.[15] Where there is tangible evidence of remorse, a discount in the range of five to eight percent may be given, according to judgments of the Higher Courts.[16]

[43] In your case, I am satisfied that you have shown considerable remorse. I gauge that by considering that you attempted to help Mr Holloway in the immediately aftermath of your offending; you expressed remorse to the Police on that occasion. I also take into account your efforts with the Living Without Violence programme,

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11 At [85].
12 At [88].
13 At [80].
14 Sentencing Act 2002, s 9(2)(f).
15 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].
16 *McArthur v R* [2013] NZCA 600 at [13]-[14]; *Rowles v R* [2016] NZCA 208 at [18]; *Clark v R* [2013] NZCA 63; *Watene v R* [2014] NZCA 381; *Poi v R* [2015] NZCA 300 and *Kavenga v Police* [2015] NZHC 2599.

which show a genuine effort to address one of the root causes of your offending. you have accepted responsibility for your actions as reported in the pre-sentence report; and I accept what Mrs Smith says, that you now understand, having heard and read what the victims of your offending have said is the effect on them, that you truly understand the terrible consequences of that momentary rash and thoughtless act. And you offered to engage in restorative justice with Mr Holloway's whānau. That would not have been easy for you but I understand that you made that offer genuinely.

[44] The probation officer says thinking about Mr Holloway and his family makes you sad, and you seem to have a much better appreciation than you did a while ago about the serious consequences of your actions. To a certain extent, any discount I give you for remorse is tied up with a youth discount because both look to recognise your prospects of rehabilitation; that is, your chances of re-joining society in a productive way after you have served your sentence. For that reason, I will give you an combined discount for both youth and remorse rather than individual discounts. To the 20 per cent discount for your youth which I think is appropriate, I add five per cent for remorse beyond that inherent in your guilty plea. That would reduce your sentence to one of just over 28 months' imprisonment.

Curfew

[45] You were subject to a 24-hour curfew from 8 September 2018 to 24 October 2018. This was then varied to a curfew overnight between 7.00 pm and 7.00 am. You were therefore under a 24-hour curfew for just under seven weeks and your movements in the evenings were restricted after that.

[46] The Crown submits this was not unduly strict and you should not receive a discount for it; you could well have been remanded in custody given the seriousness of the charge against you. But any time spent in custody prior to sentencing is automatically deducted from a final sentence of imprisonment.[17] Time spent on restricted bail is not, hence the need to apply a discrete discount. That will often be appropriate to reflect a significant amount of time spent on 24-hour curfew.[18] I

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17 Parole Act 2002, s 90.
18 *Bennett v R* [2012] NZCA 173 at [25].

consider that a discount of one month is appropriate but by no means generous. Rounding down, therefore, I arrive at a provisional sentence of two years and three months' imprisonment.

Guilty plea

[47] As noted in your sentence indication, I intend to give you the full 25 percent discount for pleading guilty, which is mandated by the directions of the Supreme Court and the Court of Appeal.[19] That is to reflect, amongst other things, your acceptance of responsibility at an early stage; as well as the benefit to the victim's family, to witnesses and to the Court because a trial is no longer necessary.

Home detention

[48] All of this, applying those discounts, leads me to an end sentence of one year and eight months' imprisonment. When an end sentence is two years' imprisonment or less, a judge will consider whether to convert the sentence of imprisonment to one of home detention.[20] Home detention in such circumstances is by no means automatic, but it is a fundamental principle of sentencing that the Court must always impose the least restrictive outcome that is appropriate in the circumstances.[21] What the Court must do is make a considered and principled choice between the two forms of sentence – imprisonment and home detention – recognising that both service the principles of denunciation and deterrence, and then identify which of them better qualifies as the least restrictive sentence to impose taking into account all of the purposes of sentencing.[22]

[49] As you are no doubt aware, home detention is itself a serious punishment.[23] You have experienced it, in a sense, when you were on a 24-hour curfew which meant that you could not leave your home at all for just over six weeks. It carries with it in considerable measure the principles of denunciation and deterrence by imposing

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19 *Hessell v R.*
20 Sentencing Act 2002, s 15A.
21 Section 8(g).
22 *Fairbrother v R* [2013] NZCA 340 at [30].
23 *R v Iosefa* [2008] NZCA 453 at [41].

severe restrictions on an offender's freedom of movement, and is particularly harsh for a young man.

[50] In your case, Mr Feleti, the Crown acknowledges that nothing in the pre-sentence reports precludes the possibility of home detention. That is a responsible and, in my view, correct approach. You are seen as a suitable candidate and living at home with your parents and you siblings is also seen as appropriate. A number of factors demonstrate that you have strong prospects of rehabilitation. They are:

(a) Your age;

(b) The remorse you have shown, including your offer to participate in restorative justice;

(c) Your aspirations to achieve further qualifications and training, evident in the efforts you have already made in the *UniPrep* course at AUT and in your desire to resume studying at MIT;

(d) The ongoing support of your family and community, in particular your church. The Probation Service will be able to make arrangements for you to be permitted to attend church during your sentence, if that is appropriate;

(e) You have no previous convictions for violent offending;

(f) The pre-sentence report assessing your chances of re-offending as low; and importantly

(g) I take account of the efforts that you have made to address the root causes of your offending in the *Living Without Violence* programme.

[51] You have never been in jail and I have no doubt it is not the place for you. Sending you to prison would do you great harm and would do the community no good. I am satisfied that home detention is the right sentence in your case, notwithstanding that a young man died through your impulsive actions.

Sentence

[52] If I were to sentence you to a term of imprisonment of one year and eight months, which is what I have considered would be appropriate, you would be entitled to early release automatically after having served only half of that period; so ten months. Early release does not apply to home detention, the maximum period of which is 12 months. Taking that into account, I consider that a period of ten months' home detention is appropriate.

[53] I have considered whether I should add a period of community work to your sentence to further mark the need for denunciation, but I think your time is better devoted to attending educational and rehabilitation courses and, if appropriate, being given release to return to work.

[54] Mr Feleti, please would you please stand.

[55] I sentence you to 10 months' home detention.

[56] The sentence is to be served at [ ]. You are to travel directly to this address from the Court without delay and there await the arrival of a security officer to fit you with a home detention monitoring device. You are to reside at [ ] for the duration of your sentence. I direct that the address is not to be published.

[57] Further, I direct you to complete the *Living Without Violence* and *UniPrep* programmes you are undertaking. If arrangements can be made by the Probation Service, you shall attend those courses during your sentence. Otherwise, you must complete them after your release. You shall undertake and complete appropriate assessment, treatment or counselling as directed by and to the satisfaction of a Probation Officer, both during your sentence and upon your release.

[58] Please stand down.

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Toogood J