IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CRI-2017-016-1092
[2018] NZHC 2910

THE QUEEN

v

HENARE RAUKOKORE SWINTON

Hearing:	9 November 2018 (Heard at Rotorua)
Appearances:	A J Pollett for the Crown J P Temm for the defendant
Sentencing:	9 November 2018

SENTENCING NOTES OF JAGOSE J

Solicitors / Counsel:
A J Pollett, Pollett Legal Ltd, Office of the Crown Solicitor, Tauranga
J P Temm, Barrister, Rotorua

[1] Mr Swinton, you were found guilty by a jury of being an accessory after the fact of manslaughter. You now appear for sentencing. The maximum penalty for that charge is seven years' imprisonment.

[2] I have listened to what counsel have had to say, both for you and for the Crown. For you, Mr Temm argues you should be sentenced to 12 to 15 months' imprisonment. The Crown recommends a higher range: 21 to 24 months, and then perhaps with another six months on top to reflect your prior offending.

[3] However, I am not bound by counsels' recommendation. I must satisfy myself of the appropriate sentence for the gravity or the seriousness of your offending, and including your culpability or responsibility for it.

[4] Your co-offender, Jared Te Moana, was sentenced by Justice Downs earlier this year to 15 months' imprisonment.[1] A key consideration in sentencing is the principle of 'parity'; that is, making sure your sentence is consistent with his, given your respective levels of culpability. But he also pleaded guilty to his offending, which entitled him to a sizeable discount; you were found guilty by a jury, which does not.

Your offending

[5] As accessories, your and Mr Te Moana's offending took place in the wake of a killing. Downs J described that background to the offending:[2]

> On 26 November 2016, Mr Don Turei (junior) was killed by Mr Andre Taiapa. Mr Turei was driving a motorcycle; Mr Taiapa a van. Mr Taiapa ran Mr Turei down. Further detail is unnecessary, save the offending was gang-related. Mr Taiapa has pleaded guilty to manslaughter …

Mr Taiapa was sentenced to six years, four months' imprisonment, with a minimum period of imprisonment of three years, two months.[3]

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1 *R v Te Moana* [2018] NZHC 1480.
2 At [3].
3 *R v Taiapa* [2018] NZHC 1815.

[6] Downs J then went on to recount Mr Te Moana's offending, and you have already heard that here today. Downs J said:[4]

> You learnt what had happened. [This is him speaking to Mr Te Moana:] You and Mr Taiapa took the van elsewhere. You played a significant role in stripping it of its identifying features. At approximately 10 o'clock the same night, you and another drove the van to an isolated place on the banks of the Raukokore river. You and others set the van on fire to conceal any evidence or linkage to Mr Turei's death.

[7] Mr Swinton, it is common ground you also knew what had happened; and you were the other person that Downs J referred to, who drove out to the Raukokore river in the van where it was set on fire.

[8] However, Mr Temm submits your offending was substantially less serious than your co-offender's offending for two reasons. He says:

(a) it is acknowledged you were not present when the vehicle was earlier stripped of its identifying features; and he says

(b) there is no evidence you engaged in the actual conduct of setting fire to the van.

As Mr Temm would have it, your culpability extends only to driving the van, with your associates inside, to and from the Raukokore river. If that submission was sustainable, it might well justify the 12 to 15 months sentence starting point sought by your counsel.

[9] In my view, however, your offending differs little from Mr Te Moana's. Given the evidence at trial, I do not accept you were only a bystander to your associates burning the van. The jury is to be taken to have found you "actively suppressed evidence against Mr Taiapa, by assisting in relocating and burning the Honda Odyssey vehicle". As I noted to the jury – in answer to a question they put to me, whether assisting in relocating and burning were "two different activities" – that was "a continuous course of conduct". Both counsel concurred in that response.

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4 *R v Te* Moana, above n 1, at [4].

[10] Moreover, the earlier stripping of the vehicle really was just a precursor to the key event: relocating and burning the van on the riverbank. It was all part of the same overall attempt to render the van useless as evidence to police. To put that another way, if the van had not been stripped of its identifying features earlier, it is reasonable to infer you and your associates would have done so immediately before setting it alight. Your culpability is not materially reduced if you were not present during the van's actual stripping of its identifying features.

Starting point

[11] With that in mind, I turn to setting a starting point for your offending. Here I begin with Downs J's observation, with which I wholly agree:[5]

> Destroying evidence after someone's life has been criminally taken is itself a serious offence. It requires denunciation and deterrence, particularly when the offending is gang-related.

[12] Given your culpability is on a par with that of Mr Te Moana, I impose the same starting point of 21 months' imprisonment. That also is consistent with the cases referred to me by counsel.[6]

[13] An 18-month starting point was imposed for the two offenders in *R v Kahotea*, which similarly involved gang activity. A two-year old child had been killed in a gang shoot-out. The first offender initially hid the rifle under his bed, and later threw it down a bank; the primary assailants later retrieved it from the bank, and it was never recovered. The second offender moved the vehicle used in the shooting to another location, and assisted in driving the accused to an address in Northland to escape arrest.

[14] Your offending was more serious. Like the first offender, you were actively involved in suppressing evidence, but burning the van was significantly more destructive of material evidence than the gun's mere concealment. It also took time,

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5 *R v Te Moana*, above n 1, at [13].

6 *R v Kahotea* [2008] HC Wanganui, CRI-2008-083-704; *R v Haufano & Fa'aoa* [2014] NZHC 1201; *R v Granick* [2013] NZHC 2657.

effort, co-ordination, and the risk of detection to relocate the van to an isolated location on the East Coast. Your efforts reduced the vehicle to a burned-out shell.

[15] So while you did not help relocate the accused, like the second offender in *Kahotea* did, your actions nonetheless went further in impeding efforts to bring the primary offender to justice. The jury is also to be taken to have found your assistance, like that of the second offender in *Kahotea*, was "to enable Mr Taiapa to avoid arrest or conviction". And while that second offender also relocated the vehicle, she did not go on to destroy it. But you did, and that made a complete police investigation impossible. For instance, police have been unable to confirm who else was in the vehicle at the time of Mr Turei's killing.

Adjusting the starting point

[16] I now consider whether to adjust that starting point up or down in light of your personal circumstances.

[17] Mr Temm argues a discount for your personal circumstances is warranted given the observations of the pre-sentence report writer. Much of that report is a recitation of your statements to the report writer seeking to downplay your involvement in the offending; such remarks are not evidenced, and for the most part inconsistent with the trial evidence and the jury's verdict. The report writer also says you are "genuinely remorseful", although of what is unclear. I apprehend the expressed remorse is in relation to Mr Turei's death, which is acknowledged and commendable, but rather than for your subsequent actions. Any remorse for those obviously has arisen since conviction.

[18] You also say you are a reluctant president of the Mongrel Mob Aotearoa, and you are really wanting to put your gang involvement behind you to spend time with your family. That may be a more recent phenomenon than was evident at trial, when your apprehended status and conduct appeared to contribute to trial difficulties.

[19] More persuasive is the fact you became a certified fitter and welder after a four-year apprenticeship, and were employed in that capacity to the evident satisfaction of your employer before your current incarceration. I understand your former employer

to say that they would welcome you back. You previously held a role as supervisor in their enterprise. You say you want to move on with your life now you have this qualification, putting behind you what you refer to as the "stupid" offending of your past. Against that, I note your record shows a conviction for contravening a protection order as recently as 2017 (for which you received community work). But your only other conviction since you were released from your previous prison term in 2014 is for driving offending; stepping back and looking at your entire criminal history, there is some indication of your personal and socially constructive progress. I urge you to maintain that Mr Swinton.

[20] I am going to give you the benefit of the doubt and give you a global discount of ten percent for these personal factors. That roughly takes your sentence to 19 months' imprisonment.

[21] The other issue is whether to uplift for your previous history.

[22] You have 51 previous convictions, including terms of imprisonment or home detention imposed in 2002, 2004, 2008 and 2014. Those are mostly for burglary, theft or receiving. Then there are also numerous convictions for various kinds of assault, and also wilful damage.

[23] Criminal history does not, in and of itself, justify an uplift; I must be careful not to punish you twice for your previous offending.[7] The Crown focuses on your past convictions for wilful damage, alleging on that basis you possess a predilection to offend in some specific way. It seeks an uplift of six months. I do not consider there is a sufficient nexus between your present offending and your past convictions to warrant an uplift. Neither is an uplift required to vindicate the principle of deterrence.[8]

[24] Finally, Mr Swinton, as you did not plead guilty, you are not entitled to the additional discount Mr Te Moana received.

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7 *Reedy v New Zealand Police* [2015] NZHC 1069 at [19].
8 *R v Arthur* [2005] 3 NZLR 739, (2005) 21 CRNZ 453 (CA).

Result

[25] Mr Swinton, please stand. You are sentenced to serve 19 months' imprisonment on the charge of being an accessory after the fact of manslaughter.

[26] Please stand down.

ADDENDUM

[27] I impose the release conditions set out under option 1 numbered 1 to 8 of the pre-sentence report dated 31 October 2018.

—Jagose J