

**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE**

**CRI-2021-070-001645
[2021] NZHC 2666**

THE QUEEN

v

BENJAMIN MARK DODS

Hearing: 6 October 2021

Appearances: Benjamin Smith for the Crown
Thomas Harré and Xu Wang for the Defendant

Sentencing: 6 October 2021

SENTENCING REMARKS OF MOORE J

Introduction

[1] Mr Dodds, at the age of 30, you appear for sentence having pleaded guilty to three charges; manslaughter,¹ conspiring to deal the class A controlled drug DMT² and conspiring to deal the class B controlled drug MDMA otherwise known as ecstasy.³

[2] Before I go further, I wish to formally acknowledge the presence at this sentencing of the family and friends of Ui Phonphong because they represent a very important part of this process. I particularly refer to Mr Phonphong's wife, Minyi and his two daughters, as well as Mr Phonphong's father, mother and siblings.

[3] I am sorry that the present COVID travel restrictions mean that I am unable to be with you in person in the courtroom.

[4] However, despite the restrictions preventing that course, the process of sentencing remains a public one. The law requires that sentencing be undertaken in open Court. The essential public nature of sentencing requires me to discuss the relevant facts and other material which has been referred to me, despite the fact that much of what I shall say will be well known to most of you.

[5] I shall start by giving those present in Court something of a road map, so you are able to follow the process I shall be adopting.

[6] After those introductory comments, I shall start with a description of the facts which will cover not only what happened that evening in mid-January this year, but also the effect it has had on the family and friends of the man you killed, Mr Dods.

[7] I shall then calculate what is referred to as the starting point; that is what notional sentence should be imposed for all of your offending (that is both the manslaughter and the drug charges) before your personal circumstances are taken into account. In doing that I shall consider the caselaw as it relates to my assessment of

¹ Crimes Act 1961 ss 158, 160(2)(a) and 172. Maximum penalty life imprisonment.

² Misuse of Drugs Act 1975 s 6(2A)(a). Maximum penalty 14 years imprisonment.

³ Section 6(2A)(b). Maximum penalty 10 years imprisonment.

the aggravating and any mitigating aspects of your offending, and apply those to the facts of this case.

[8] Then I shall examine your personal circumstances. In your case, that will involve the extent to which those factors operate in mitigation by reducing the starting point.

[9] The end result of that process should lead to the final sentence which I shall double check, on a totality and culpability basis, to ensure what I have ended up with is appropriate in all the circumstances.

[10] So, first to the facts.

The facts

[11] The facts are contained in the Police's caption summary, which you accept.

[12] I shall start with the drug charges which are closely related in time to the facts of the manslaughter but appear otherwise unrelated.

[13] In January this year, you arranged for a dealer to supply you with DMT, which is a class A drug and MDMA (or ecstasy) which is a class B drug. The text messaging which supports these charges reveals that you ordered three grams of DMT and one gram of ecstasy. That was on the afternoon of Friday, 15 January 2021. That evening you went to work. You were employed as an engineer at a timber processing plant near Tokoroa. You finished your 12-hour shift early the following morning. You slept most of the next day before returning to work for the Saturday night shift.

[14] That finished early on the morning of Sunday, 17 January 2021. You then headed straight to Mt Maunganui where your former wife was living with your two children. You visited them between 9:30 am and 11:30 am. You then went to lunch with your parents and sister. You drank alcohol. You spoke of needing to have a sleep but instead met friends at another restaurant in Mt Maunganui where you consumed more alcohol. After that you went to a liquor store and bought a 10 box of RDT cans.

You went to a friend's apartment where you continued to drink. Again, you talked about not having any sleep.

[15] Later in the afternoon, you went to another friend's place for a barbeque. You drank more alcohol before returning to your friend's apartment where you continued drinking and also consumed methamphetamine. Those who were in your company described you as "loud, excited, erratic, disrespectful and drunk".

[16] The social part of the evening ended at 10:26 pm when, after an argument, you left the apartment in your utility. As you left the apartment you took a large swig from a bottle of rum.

[17] From that point, your movements are reasonably well-known because much of where you went and what you did was captured on CCTV. First you drove to the BP service station on Maunganui Road. En route you drove through a roundabout at speed without attempting to slow down or look for approaching vehicles. Your driving was sufficiently erratic to be noticed by those at the service station. You stopped there and attempted to involve them in conversation. They plainly thought you were behaving oddly and tried not to engage.

[18] Then you got back into your ute, drove around the forecourt, over a raised traffic island, and back out onto Maunganui Road, heading south. You drove at speed, changing lanes without indicating and overtaking other cars as you headed south in the direction of Papamoa.

[19] At about 10:48 pm, approximately 20 minutes after you first got into the vehicle, you got off the motorway. Then, about four minutes later, you were seen to get back onto the motorway, but this time onto a motorway exit ramp heading north in the southbound lanes. You were travelling in the wrong direction and against the flow of traffic. You were in the fast lane.

[20] One of the cars heading south directly towards you was driven by Mr Phonphong who was driving home to his wife and children in Papamoa. He had just finished his shift at a restaurant in Mt Maunganui.

[21] At about 10:53 pm, that is about 27 minutes after you first got into your car, you collided head on with Mr Phonphong's car. At the time, it is estimated you had been travelling at between 112 and 117 kilometres per hour in a 100 kilometres per hour speed zone. Immediately before impact, you managed to apply the brakes reducing your speed to an estimated to 105 to 110 kilometres per hour. Mr Phonphong had no chance to brake. He could never have expected there would be another car barrelling towards him on the one-way road he would have been well familiar with.

[22] The summary describes the forces generated by the impact as "massive". Your car was forced onto its nose and came to rest on the centre wire barrier. You survived. Mr Phonphong was not so lucky. The force of the collision ruptured his thoracic aorta and he died at the scene. His injuries are listed in the summary of facts. I do not propose to repeat them here other than to observe that they were multiple, including spinal, limb and pelvic factures as well as extensive internal injuries.

[23] You were not wearing a seat belt. You were injured. You were trapped inside your car and had to be cut out. You were taken to Tauranga Hospital where you remained until you were discharged about 10 days later.

[24] Your blood was tested a couple of hours after the collision. You had a blood alcohol reading which was twice the legal limit. Methamphetamine was detected at a level of 0.06 milligrams per litre. The summary records that recreational methamphetamine users typically return levels of between 0.01 to 1.9 milligrams. The anti-depressant medications, Amitriptyline and Nortriptyline were also present in your blood.

[25] In your car and wallet were five plastic snap-lock bags containing methamphetamine residue.

[26] Your car did not have a current warrant of fitness, having failed its inspection six weeks earlier for a faulty front drive-shaft universal joint, unbalanced brakes and faulty indicators. You had driven over 1,500 kms in that ute after it had failed, although, I accept, there is nothing in the summary which suggests that the condition of your car contributed to what happened.

[27] As I said you were injured. The summary says that you broke your ankles. You had lacerations to your face and scalp, and you broke your nose. You were diagnosed with a traumatic brain injury. You have said that you now have a “metal plate” in your skull. There is nothing before me on that other than what you have said to others. I do not know how or if this or your brain injury will affect you in the future. I shall return to this topic later.

[28] Unsurprisingly, you do not remember the crash. In fact, you claim that the last memory you have is leaving your friend’s apartment after the argument before waking up in Tauranga Hospital.

[29] You were unable to explain to the Police why you were driving in the wrong direction or where you were intending to go. You said that you did not think you had drunk much and when you were asked to explain the methamphetamine present in your blood, you said you did not use methamphetamine and were thus at a loss to explain it. You claimed the snap-lock bags were not yours.

[30] So those are the relevant facts. Next to the victims of your offending.

Victim impact statements

[31] I have received and read nine victim impact statements.

[32] They have been written by Mr Phonphong’s family and friends. They make harrowing reading because this is a very close-knit family. Minyi Phonphong describes meeting her husband and coming to New Zealand in 2005 to marry him. It is plain from what she has recorded that theirs was a very hard-working family but one which she described as “happy and blissful”. She describes how, on that Sunday night, she got the call that no wife should have to receive, and which would change her life forever. She described how that call and its aftermath has turned her world upside down and how she not only grieves for herself, but also for her two daughters.

[33] I have read daughters Amy’s and Magee’s victim impact statements. They cannot believe their father has gone. I have read the victim impact statements of Mr

Phonphong's parents and the devastating loss they feel, a loss shared by his siblings who are worried for their sister-in-law and nieces.

[34] I have read the victim impact statements of supportive family friends.

[35] The bottom line is that the harm you caused through your actions that night is a legacy they will each have to live with for the rest of their lives. The loss of an irreplaceable husband, father, son, brother and friend is something which will always be there for them. The hole in their lives has had, and will continue to have, devastating emotional consequences.

[36] I next turn to the law as it relates to sentencing.

Sentencing approach and principles

[37] Sentencing in this country is governed by the Sentencing Act 2002. It sets out the purposes and principles of sentencing.

[38] Mr Dods, in your case, I must hold you accountable for the harm you did, consider the interests of the Phonphong family, denounce your conduct and deter you and others from engaging in similar offending.

[39] I must also look at your prospects for rehabilitation and, by law, I must impose the least restrictive sentence appropriate in the circumstances.

[40] I turn now to calculate the starting point.

Starting point

[41] Everyone is agreed that the lead charge is manslaughter. There is no tariff case for vehicular manslaughter. However, this Court and the Court of Appeal have provided guidance in identifying the various aggravating and mitigating features on which culpability can be assessed.

[42] I record my gratitude to Mr Jenson, for the Crown and to your lawyer, Mr Harré, for setting out the case law so clearly and comprehensively in their submissions.

To a substantial extent, there is agreement. I will not discuss the case law in any detail, other than to footnote the principal authorities which the lawyers have referred me to in submissions.

[43] The aggravating and mitigating factors drawn from the cases and relevant to your circumstances are listed below. This is not a complete list of every factor the cases refer to. It contains just the ones which are engaged in your case. I am satisfied there are no mitigating factors relevant to your offending. The mitigating factors referred to in the caselaw, and upon which Mr Harré relies, are relevant to the second stage of the inquiry, that is your personal mitigating factors. I shall return to those shortly.

[44] From the cases I am satisfied the following aggravating factors apply in your case:

- (a) a prolonged, persistent and deliberate course of very bad driving;
- (b) the consumption of drugs (including prescription medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a “motorised pub crawl”;
- (c) aggressive driving (such as persistent or inappropriate attempts to overtake, or cutting in after overtaking); and
- (d) driving when knowingly deprived of adequate sleep or rest.

[45] I turn now to consider each of these four aggravating features.

Prolonged, persistent and deliberate course of very bad driving

[46] I am conscious that care should be taken to avoid double counting when considering this and other related driving features.

[47] On any analysis, your driving was appalling. You overtook vehicles without indicating. You drove at speed. You drove through intersections without looking out for oncoming traffic. You drove over a traffic island.

[48] However, undoubtedly, the most culpable aspect of your driving conduct was when you re-entered the highway using the exit ramp and, in the fast lane, sped north on the southbound carriageway. On any analysis, this was no accident in the true sense of that word. While the result was, most certainly, unintended, a very serious accident with fatal consequences was extremely likely, if not inevitable.

[49] The combined forces of the head on collision were, inevitably, massive and, for Mr Phonphong, fatal.

[50] This serious aggravating factor is present to a high degree.

Consumption of drugs and alcohol

[51] While you were driving, you had twice the legal level of alcohol in your blood as well as detectable quantities of methamphetamine within the recreational use range. Anti-depressants in the form of Amitriptyline and Nortriptyline were also detected. For the purposes of this sentencing, I assume these latter substances had been prescribed. I note that the Amitriptyline was used by you to assist with sleep. The presence of alcohol at twice the legal limit is a seriously aggravating factor in my view.

Aggressive driving

[52] To a considerable extent this has already been discussed under previous headings. As noted, there was aggressive and dangerous driving at roundabouts and in the BP forecourt.

[53] There was also excessive speed. However, I do not consider that excessive speed was, in itself, a significant contributing factor to what actually happened. It is better considered as an artefact of your persistent and very bad driving which I have already discussed. It is apparent from the summary that at various times during the half hour or so preceding the collision you were driving much faster than you should

have been. However, I agree with Mr Harré that while your speed immediately before impact, (that is, 112 kilometres per hour to 117 kilometres per hour) exceeds the posted speed limit, this feature does not naturally count as a discrete aggravating factor. As I said it is more appropriate to consider speed in this case in the context of your driving behaviour over the half hour or so before the crash.

Driving when knowingly deprived of adequate sleep or rest

[54] You had not slept after finishing your night shift early on the Sunday morning. Taking it most favourably from your point of view, it was 30 hours without sleep. You told several of those you interacted with during the day that you were tired and needed sleep. And yet despite that knowledge, instead of bunking down in your ute as you had told others you were going to do, you took a slug of rum, climbed into the driver's seat and drove off.

[55] This is a moderately aggravating factor in my assessment.

Other offences committed at the time of the offending

[56] The Crown also points to you driving a vehicle which did not have a current warrant of fitness. You say you had fixed the defects but after the accident, a number of problems were identified of sufficient seriousness to mean your ute would have been unwarrantable at the time of the collision. Furthermore, you had driven more than 1,500 kilometres since the ute failed its test.

[57] Despite Mr Jenson's submissions on this point, in my view, this factor does not call for discrete consideration as a standalone aggravating factor. Instead, rather like the fact you were not wearing a seatbelt, its relevance is more appropriately considered as a reflection of your cavalier attitude to driving and road safety that night.

[58] As for causing another's death, I agree with Mr Harré that this cannot be a discrete aggravating factor. Causing death is an element of the charge and is reflected in the 10 year maximum penalty.

[59] However, as I have already discussed, the consequences of Mr Phonphong's death and its effect on those close to him is a very relevant consideration and something I am required by law to take into account.

Starting point

Manslaughter

[60] Both the Crown⁴ and the defence⁵ have referred me to a number of cases which they submit are relevant to calculating the starting point.

[61] I have carefully considered those cases and their facts.

[62] To a considerable extent, it is a difficult and fraught exercise to attempt to make comparisons because no case is the same, an observation which is reflected in the fact that there is no tariff case.

[63] The Crown says that on the basis of the case law, the appropriate starting point for you is seven years' imprisonment. Mr Harré says that a starting point of five-and-a-half to six years is appropriate.

[64] Most of the cases the Crown has referred me to, share the added aggravating feature absent in your case, of either attempting to evade the Police or attempting to destroy or conceal evidence. Those cases mostly attracted starting points of seven years' imprisonment. As I said, those factors are not engaged here.

[65] However, the driving in your case, when viewed in its totality, is particularly aggravating. Driving north in the fast lane, head-first into southbound traffic at speed and under the influence of alcohol and drugs calls for a starting point of something more than six years but in my assessment less than seven years.. I am satisfied on the

⁴ *R v Atkinson* [2020] NZHC 1567; *R v McGrath* [2014] NZHC 1583; *Brook v R* [2010] NZCA 13; *R v Stewart* [2019] NZHC 1797 and *R v Mika* [2013] NZHC 2357.

⁵ *R v MacSwain* HC Auckland CRI-2004-292-91, 6 December 2004; *R v Makoare* [2020] NZHC 2289; *R v Price* [2020] NZHC 2995; *R v Tranter* [2020] NZHC 884; *Gacitua v R* [2013] NZCA 234; *R v Holdem* [2018] NZHC 1739; *R v Morgan* CRI-2005-057-675, 2 June 2006; *Baillie v R* [2021] NZHC 258 and *Ekeroma v R* [2021] NZCA 250.

case law referred to me that a starting point of six-and-a-half years' imprisonment is appropriate.

Uplift for drug offending

[66] Both Mr Jenson and Mr Harré agree there should be an uplift on the starting point to reflect the two drug charges. Mr Jenson submits that 12 months is appropriate. Mr Harré submits that six months is appropriate.

[67] I agree with Mr Harré that given the relatively small quantities involved and the fact that the purchase does not appear to have been completed, an uplift of six months' imprisonment is appropriate.

[68] I also accept that the circumstances suggest that the drug offending was not commercially driven and I also note that you have no prior convictions for drug offending.

[69] Adding the six months on, this brings the adjusted starting point to one of seven years' imprisonment.

[70] I turn next to consider your personal circumstances.

Personal circumstances

Aggravating factors

[71] There are no aggravating personal circumstances. You have been convicted of careless driving on two previous occasions and issued 10 infringement notices since 2007. Twice you have lost your licence for excess demerit points. The Crown refers to your traffic history but responsibly accepts that given its relatively historical nature, it does not call for a discrete uplift. The offending was also relatively minor in the scheme of things.

[72] However, I agree with the Crown that no discount for previous good character is available.

Mitigating factors

[73] Mr Harré refers to three mitigating factors, these being:

- (a) your timely guilty plea;
- (b) your genuine expressions of remorse; and
- (c) the injuries you suffered as a result of the collision.

[74] I shall deal with each of these in turn.

Guilty plea

[75] Mr Harré submits and the Crown accepts that you are entitled to the maximum discount of 25 per cent to reflect your early pleas of guilty. I agree.

Remorse

[76] Remorse may be a mitigating feature if it is genuine. I am satisfied that in your case, you are genuinely remorseful. You have written a letter to Mr Phonphong's grieving family. You have accepted full responsibility for your actions. You observe that you will live with the remorse and guilt of what you did that night for the rest of your life. You seek their forgiveness in time, recognising that you caused the death of an innocent man who was loved by his family and was a good friend to many.

[77] I also note that the authors of the document entitled, "Comprehensive report" dated 30 September 2021, record that you appeared genuinely remorseful and continued to grieve and reflect on the harm you caused. You express a desire to re-establish the relationship with your own children as a different man. The author of the pre-sentence report described you as appearing to be genuinely remorseful and being tearful at times during the interview.

[78] You also investigated whether the Phonphong family would consider engaging in restorative justice. Your sentencing was adjourned to explore that prospect. In the

end the family declined. In the circumstances that is entirely understandable. However, that you reached out in that way is a relevant factor which I do take into account.

[79] There were, however, some reservations to the PAC author's view on this issue of remorse. I agree that you do appear to have attempted to mitigate, to some degree, your culpability. For example, your denial of consuming methamphetamine claiming it may have been LSD, is puzzling in the circumstances. Furthermore, your apparent intimation that inadequate signage may have contributed to you getting onto the wrong side of the motorway smacks of minimisation.

[80] I would also add to that mix your denial that the snap-lock bags with methamphetamine residue, found in the ute and in your wallet were yours.

[81] However, against that are your early guilty pleas and the other factors I have mentioned. In the circumstances, I am satisfied you are entitled to some modest discount on account of remorse.

Other factors

[82] The "Comprehensive Report" refers to your troubled upbringing and how, particularly in recent times, you have gravitated towards substance abuse as a coping mechanism for the stressors in your life, particularly the separation from your wife and children. The report records a clear link between your social background, the choices you have recently made and your recent offending. Certainly, I accept the observations of the PAC report writer who assessed you as being at low risk of inflicting harm on others or of further offending.

[83] I also note the support that you have from those who have written in glowing and loving terms about you. That support and those connections will be needed when you are released from prison. I also acknowledge the successful completion of the rehabilitative programmes you have enrolled in.

[84] These are matters which, to a greater or lesser extent, deserve some recognition.

Injuries

[85] The case law also suggests that in some circumstances, depending on the degree of debilitation and prognosis, a discount for injuries suffered in the course of the offending may be appropriate.

[86] I have difficulty in assessing this in the context of your case because I have no independent evidence, other than your own self-reporting, as to the extent of your injuries or what your long term prognosis is. In other words, I cannot properly assess how disabling or permanent they are.

[87] The summary describes your injuries which, frankly, seem far from life-threatening. You were discharged from hospital later in the month. As I discussed earlier, you refer to a traumatic brain injury and having a metal plate in your head. Other than your reporting of the latter to others, there is no independent evidence of this. The medical report I have seen makes no reference to brain surgery. It does, however, refer to concussion and a traumatic brain injury, which is reported to have improved throughout your inpatient stay. As I have noted, there is no independent evidence before me on how these injuries and their sequelae are affecting your daily life or what your long-term prognosis is.

[88] Absent an independent expert opinion on this, I am not prepared to give a separate and discrete discount for this factor.

Summary

[89] In my view, it would be artificial to ascribe individual discounts for those personal mitigating factors which I have accepted are present in your case. The correct approach is to apply a global figure which in your case, I set at eight per cent.

[90] Taken in combination with the guilty plea discount, you are entitled to a 33 per cent or one third reduction from the seven year starting point. This comes to an end sentence of four years eight months.

[91] There are two further factors which require addressing at sentencing; disqualification from driving and reparation.

Disqualification

[92] The first is your driving disqualification. Following conviction for manslaughter, the Court may impose any period of disqualification it thinks fit. The Crown says that in light of the seriousness of your offending, a disqualification of at least two to three years is appropriate, with that disqualification to commence on the date of your release from prison.

[93] I agree that a period of disqualification is necessary, primarily to reflect the seriousness of your offending.

[94] In the circumstances, I am satisfied a three-year period of disqualification to meet that purpose is necessary, to commence from the date of your release.

Reparation

[95] A reparation order is also sought for the sum of \$10,167.99 which I understand to be the costs associated with the insurance cover and related costs borne by Mr Phonphong's insurance company.

[96] I asked counsel for further submissions on this point and, more particularly, your ability to meet such an award if it was ordered. The Crown has elected not to make further submissions on this point. Mr Harré filed submissions yesterday indicating that while you are willing to meet any order, it is simply impractical for you to do so and as I checked with Mr Harré this morning, that is a reflection and reference to your present and future circumstances, including the lengthy period of disqualification which may limit your ability to earn.

[97] There is no point. Indeed it would be futile to make an order which in all practical terms is impossible for you to meet and which effectively operates as an unnecessary burden. I have considered whether I should make an order in terms of the full sum sought or a fraction of that, or make orders for payments over time.

However, on reflection, I really feel in the circumstances that to do so would be an exercise in futility for the reasons I have discussed. Therefore, I will not make an order for reparation as sought.

[98] That completes the sentence calculation. Pausing there, I must ask myself whether, standing back and examining the sentence in its totality am I satisfied it properly reflects your culpability. I am satisfied it does.

Result

[99] Mr Dods, would you please stand because I am now going to pass sentence.

[100] On the charge of manslaughter, you are sentenced to four years and eight months' imprisonment.

[101] On each of the charges of conspiring to deal with controlled drugs, you are sentenced to six months' imprisonment, those sentences to be served concurrently with each other but cumulative on the manslaughter charge.

[102] Thus, the total sentence of imprisonment, accounting for the 33 per cent discount, is a final sentence of four years and eight months' imprisonment.

[103] You are disqualified from holding or obtaining a driver's licence for a period of three years, that period of disqualification to commence from the date of your release from prison.

[104] I make no reparation order.

[105] I am also required to give you a warning under the so-called three strikes law and I shall do that now.

[106] Before I stand you down, I wish to say a few words. I do not doubt that you now fully appreciate and understand the dreadful consequences of your incredibly selfish decision to get into your car, affected by alcohol and drugs and drive in the way that you did. The consequences to the Phonphong family have been catastrophic. A

loving and tight knit family has been torn apart by grief. I hope this knowledge will operate as an incentive to you to turn your life around and focus on your own two young children. They still have their father. You have the support mechanisms to help you in that. You will also have opportunities during your time in prison to improve yourself. Use those and come out the other end a different person who can make a real contribution to the betterment of our community.

[107] Stand down.

Moore J

Solicitors:
Crown Solicitor, Tauranga
Mr Harré, Mt Maunganui