

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2021-004-4422
[2022] NZHC 753**

THE QUEEN

v

**DANIEL HAVILI
Defendant**

Hearing: 12 April 2022

Appearances: CP Paterson and HC Smaill for the Crown
L Freyer and CG Wright for the Defendant

Sentenced: 12 April 2022

SENTENCING NOTES OF FITZGERALD J

Solicitors: Meredith Connell, Auckland
Public Defence Service, Auckland

Introduction

[1] Mr Havili, you appear for sentencing today for your role in the assault of two men, Ika (James) Vake and his brother Liufau Vake in May last year. To avoid confusion, I will refer to James and Liufau this morning by their first names, and I certainly mean no disrespect in doing so. Tragically, Liufau died as a result of the injuries he sustained. Mr Havili, you are therefore to be sentenced today having pleaded guilty to one charge of manslaughter¹ and one representative charge of assault with intent to injure.²

[2] Before I go any further, I would like to acknowledge James, Liufau's wife and daughter, and the broader Vake family. In an instant nearly a year ago, your lives were changed forever and you lost a husband, father, son and brother. I have read the victim impact statements that have been provided to me, and listened to that read here in Court this morning. I know that the sentence I impose today will not in any way compensate you for your loss. Indeed, nothing I say or do this morning can do that. But I hope that today's sentencing brings you a step closer to closure, at least in terms of the court process, and I extend the Court's deepest sympathy to you.

[3] I would also like to acknowledge your family, Mr Havili, especially your wife. You too are a husband, father, son and brother.

Facts

[4] I will begin by summarising the facts of your offending which are set out in a summary of facts which is agreed by both you and the Crown. As part of that summary of facts, I have been provided with CCTV footage which captures the events as they occurred. I have watched that footage closely, and many times now. The facts of your offending will be well known to you and the lawyers here in Court, but sentencing is a public process and it is important that the public is aware of what the Crown and you agree happened, and therefore the basis upon which I am sentencing you today. I am going to recount the circumstances of the offending in some detail, as the whole context of the fight is relevant to your sentencing.

¹ Crimes Act 1961, ss 160(2)(a), 171 and 177. Maximum penalty life imprisonment.

² Crimes Act 1961, s 193. Maximum penalty three years' imprisonment.

[5] In the early hours of the morning of Sunday 16 May 2021, at around 2.50 am, you left a bar on Symonds Street in central Auckland, together with three associates, one being Mr Folau who has already been sentenced. Your group then encountered James and Liufau who were also on Symonds Street at the time. All of you had consumed alcohol earlier in the evening.

[6] At about 2.51 am, a fight started between James, Liufau and one member of your group. It is not clear from the agreed summary of facts or the CCTV footage how or why that fight started. The footage shows the three men almost tumbling into a heap onto the side of the road. You and the other three in your group were following a little behind and caught up to the melee.

[7] At this point, Mr Folau grabbed hold of James. You, Mr Havili, grabbed hold of Liufau and held him back from James and Mr Folau. You were by this time standing a little distance away from James and Mr Folau, just off the kerb of the road in between two parked cars. Another member of your group approached you, and you took steps to keep Liufau and that person separated, pushing your friend away. In the meantime, Mr Folau had chased after James, who ended up pressed against the alcove of a barber shop doorway. Mr Folau then punched James and was then pushed by another in your group, ending up falling inwards into the barber shop when the lock on the door broke. All of this time, you were still standing some distance away, holding Liufau, though neither of you were fighting or doing anything similar at that time.

[8] At this point, Mr Folau took off his shirt and ran towards where you were standing. As Mr Folau advanced, you turned to put yourself between Mr Folau and Liufau, and put your arm out briefly to hold Mr Folau away. However, Mr Folau moved around you and punched Liufau three times in the head, while you continued to hold him. Mr Folau then ran back to the footpath, and you were still holding Liufau back, but there was still no particular aggression between you and him at that time.

[9] At this point, one of your group approached James while he was still on the floor of the barber shop, and punched him again.

[10] After this, James collected his scattered belongings and began heading south along Symonds Street. At this point, one of your group walked over to you and Liufau, and seeing him approaching, you pushed Liufau further out into the street, clearly trying to push him away from your associate who was trying to get to him. At one point, when both you and Liufau were in the middle of the road, you turned around and away from Liufau, and grabbed hold of your associate and pushed him away. At this point, Liufau started walking back towards the pavement and Mr Havili, you then put yourself between Liufau and another member of your group, briefly holding them apart as words appeared to be exchanged between them. Everything seemed to settle down at that point, and Liufau and your associate actually walked back to the footpath quite calmly together.

[11] In the meantime, however, one of your associates had followed James as he was walking further south down on Symonds Street and punched him again, and he ran out onto the road to get away. Liufau caught up with James on the road, and began pushing him north along Symonds Street to get him away from where you and your associates were standing.

[12] These things might have ended, but one of your group ran after the brothers and essentially “shepherded” them off the road to the side of a parked car. That member of your group and James then began talking, and Liufau put himself in between them to separate them. Your associate then walked away from the brothers, back towards you, and then for some reason, turned around and returned to the brothers, when words were again exchanged.

[13] You followed your associate at this time, but were standing a little bit to one side, clearly listening to what was being said. Your associate again turned to walk away, and at the same time James turned to walk in the opposite direction, and said something out loud as he did so. Almost immediately your associate turned back and walked towards James, Liufau again intervening between the two. You were standing about a metre away. Words were then exchanged between Liufau and your associate, and your associate then “cuffed” Liufau once across his face. Almost immediately, you stepped forward, and while Liufau was standing with his arms at his side, moving slightly backwards, you swung your left fist in a hook which connected squarely with

the right side of Liufau's face. Despite him facing you, he had no opportunity to avoid the punch, which caused him to fall backwards into the road, with the back of his head heavily hitting the asphalt surface. It is these events which give rise to the manslaughter charge.

[14] James, who had been walking away, saw his brother lying on the road and took a few steps towards him, but you confronted him and punched him twice in the head, causing him to fall to the ground, onto his back with his feet in the air. You grabbed him by his feet and dragged him along the ground for a short distance. He got to his feet and grabbed you by your legs, and pushed you both into the side of a nearby car. While James was still hanging onto one of your legs, you punched him and kneed him in the head. These events give rise to the assault with intent to injure charge. You were then pushed away by one of your group and walked around Liufau, who was still lying on the road, and back south down Symonds Street. You did not stop to assist Liufau, but were aware that others were trying to assist him at that time.

[15] The medical evidence shows that the impact of Liufau's head hitting the road caused a fracture, amongst other injuries, to the back of his head. His brain began to bleed, resulting in unsurvivable brain damage. He remained on life support in hospital for nine days, but tragically, he passed away on 25 May 2021.

[16] It is worth noting three points before going further:

- (a) First, it is apparent from the summary and the CCTV footage that up until you punched Liufau and then assaulted James, you had perhaps been the least of your group to be involved in the fighting, and indeed had taken steps at various points to keep people apart.
- (b) Second, while your punch of Liufau was obviously forceful enough to cause him to fall backwards onto the road, there is nothing in the summary of facts or the CCTV footage to suggest that your punch was *unusually* forceful, or that it itself caused any separate injuries to Liufau's face or head. I mention this now as it is relevant to the approach to be taken to sentencing, which I will discuss shortly.

- (c) Third, there is no suggestion made on your behalf of any kind of provocation by Liufau which led to the punch. And nor could there be. While there were clearly words being had between Liufau and one of your associates, you were not advanced on at any time by Liufau, either at or around the time you punched him.

[17] Mr Havili, I will now briefly explain how I will determine your sentence today.

Legal context

[18] Key purposes in sentencing for offending like yours are to hold you accountable for and to denounce your conduct,³ to deter you and others from such offending,⁴ and to provide for the interests of the victims of your offending.⁵ I must also take into account the gravity of your offending,⁶ the desirability of consistency with co-offenders,⁷ and I must impose the least restrictive outcome that is appropriate in the circumstances.⁸

[19] In arriving at what I consider to be the appropriate sentence, I must first consider what the Crown and your lawyers refer to as the “starting point”, or the number of years imprisonment that properly reflects the circumstances of your offending. I will then consider your personal circumstances, and whether that starting point should be adjusted upwards or downwards as a result. I will also take into account your guilty pleas at this point of my sentencing.

Sentence

Starting point

[20] Mr Havili, it goes without saying that your offending is serious, given the manslaughter charge. Your actions led to the death of another. But to be clear to others observing this sentencing, the charge of manslaughter, unlike a charge of murder,

³ Sentencing Act 2002, s 7(a) and (e).

⁴ Section 7(f).

⁵ Section 7(c).

⁶ Section 8(a).

⁷ Section 8(e).

⁸ Section 8(g).

reflects that the Crown accepts that there is no evidence to suggest you intended to cause Liufau's death.

[21] There is no guideline judgment for manslaughter sentences, because manslaughter covers a wide range of circumstances which have led to a person's death.⁹ For this reason, sentencing for manslaughter is generally assessed by way of comparison with similar cases, or with reference to a guideline judgment of the Court of Appeal for sentencing serious violence offending, called *Taueki*.¹⁰ In some cases, both approaches may be used in combination.¹¹ However, the *Taueki* guidelines will not always be relevant to manslaughter cases and should be applied cautiously.¹² They will be most relevant when the offending involves an offender actually intending to cause, and causing, "serious violence".¹³

[22] The lawyers have referred me to a number of cases which might generally be described as "one punch" manslaughter cases. Based on the cases the Crown has referred to, the Crown suggests a starting point of **four years' imprisonment**.¹⁴ Your lawyers say that single punch manslaughter has generally attracted starting points of three to four years' imprisonment.¹⁵ On this basis, they suggest a starting point of **three years and nine months' imprisonment**. As will be appreciated, there is not a lot of difference between the two suggested starting points, only three months.

[23] The appropriate starting point needs to reflect the aggravating and mitigating factors of your offending. In terms of aggravating factors, there are in my view four.¹⁶ First, the extent of the violence. The Crown submits that there was a moderate degree of violence involved, and I accept that characterisation. It was also gratuitous, given

⁹ *R v Edwards* [2005] 2 NZLR 709 (CA) at [14].

¹⁰ With an adjustment for the fact the offending has resulted in death. See *Everett v R* [2019] NZCA 68; *Ioata v R* [2013] NZCA 235 at [25] and [28]; and *R v Tai* [2010] NZCA 598 at [12].

¹¹ *Everett v R*, above n 10, at [27]; *Ioata v R*, above n 10, at [25] and [28]; and *R v Tai*, above n 10 at [12].

¹² *Everett v R*, above n 10, at [26].

¹³ *R v Tai*, above n 10, at [11], citing *R v Jamieson* [2009] NZCA 555 at [34]; and see *Turi v R* [2014] NZCA 254 at [17]–[18].

¹⁴ *Blackler v R* [2019] NZCA 232; *R v Felise* [2019] NZHC 341; *Murray v R* [2013] NZCA 177; *Palmer v R* [2016] NZHC 1962; *R v Larson* [2020] NZHC 237; and *R v Tai*, above n 10.

¹⁵ The Court of Appeal made this observation in *Murray v R*, above n 14, at [21]. Counsel for Mr Havili also refer to the following cases: *R v Nepia* [2019] NZHC 1932; *R v Kokiri* [2019] NZHC 501; *R v Unasa* [2020] NZHC 3139; and *Palmer v R*, above n 14.

¹⁶ Sentencing Act, s 9.

you yourself were not threatened by Liufau. Second, the seriousness of the injury; Liufau suffered fatal head and brain injuries from the fall which resulted from your punch. Third, the offending involved an attack to the head. Fourth, you acted together with an associate in inflicting violence on Liufau, though I temper this somewhat by the broader context I have described earlier, namely that up until that point, you had taken a lesser role in the fighting, and had tried to stop it at times. I note that in some cases, failure to provide assistance to the victim has been treated as an aggravating factor; however, I do not do so here, because other people went to help Liufau and you were aware of this, and your assistance might well have aggravated the situation further had you tried to offer it.

[24] There are no mitigating features of your offending. Your lawyers rightly do not suggest there was any provocation. The fact that you were drunk is no excuse.¹⁷ Sadly, most “one punch” manslaughter cases involve young men out late at night, drinking.

[25] Against this backdrop, I have read all the cases to which I have been referred, and a few others. I do not consider this is a case where I should sentence you by direct reference to the *Taueki* guidelines. While your punch was forceful enough to make Liufau fall backwards, as noted, I accept the Crown’s categorisation of the violence involved as moderate. I do not consider it involved the *serious* degree of violence or force that typically warrants sentencing by reference to *Taueki*. That approach usually involves unusually forceful punches where serious violence was both intended and occurred.¹⁸ Often the punch itself, rather than a resulting fall onto a hard surface, will have caused serious injuries, and possibly the fatal injuries. Or there may be other aggravating factors, like a series of punches to the head, or kicking to the head also. Applying the *Taueki* guidelines would result in a starting point that is considerably higher than even the Crown is suggesting. I will therefore assess the starting point for your offending predominantly by comparing the circumstances of your offending to other similar cases.

¹⁷ Sentencing Act, s 9(3).

¹⁸ Such as in *R v Tai*, above n 10; *Murray v R*, above n 14; *Ioata v R*, above n 10; and *R v Felise*, above n 14.

[26] I consider your offending to be less serious than in the cases called *Tai*, *Ioata*, *Felise* and *Blackler*, in which starting points of five to seven years' imprisonment were adopted. Your lawyer has referred me to a case called *Kokiri*, in which a starting point of three years nine months was adopted, and in which there was provocation by the victim. I consider that case to be quite different though, as there was not a broader, ongoing fight like in this case, and the approach likely reflected the offender's young age (being only 17 years old). I also consider your offending to be a little more serious than in the case of *Nepia*, in which the Court adopted a starting point of three years, six months' imprisonment, which did not involve offending in conjunction with associates.

[27] I consider your offending to be most comparable to cases called *Murray* (in which a starting point of five years was adopted) and *Palmer* (in which a starting point of four years was adopted), which also involved a single punch to the head which caused the victim to fall backwards and strike their head on a hard surface. In *Murray*, the punch also occurred in the context of an altercation involving associates. However, I consider the offending in *Murray* to be more serious than this, as the punch was described as an "unusually forceful blow", and which itself caused very significant injuries to the victim's face. Taking into account all of the cases I have read, I agree with the Crown that a starting point of **four years' imprisonment** is appropriate.

Uplift for additional offending

[28] The Crown says that an uplift of 16 to 18 months' imprisonment would be appropriate for the assault with intent to injure charge, relating to your assault on James. The Crown says that your culpability for your offending on James is similar to that of Mr Folau who has already been sentenced, the sentencing Judge adopting a starting point of 18 months. Your lawyer says that the uplift should be no more than six months, taking into account totality.

[29] I adopt the Crown's uplift of 16 months imprisonment for the assault on James. The assault is indeed similar to that by Mr Folau, and parity with co-offenders is important.

[30] However I also need to assess whether the resulting starting point of five years and four months' imprisonment ought to be reduced for totality. A totality adjustment is not automatic.¹⁹ Standing back, I consider there ought to be an adjustment for totality, but a relatively modest one. Your assault on James was gratuitous. It occurred when you were already clearly "fired up" having just punched Liufau. There is no suggestion in the summary of facts or the CCTV footage that you were in any danger from James. I accordingly make an adjustment for totality of four months, bringing the adjusted starting point to **five years' imprisonment**.

Personal circumstances

[31] I turn now to whether there should be any increase or decrease to this to reflect matters personal to you, Mr Havili.

[32] You have some prior convictions for assault, but these occurred some time ago now. The Crown does not suggest an uplift for these matters. Your most recent conviction, other than for the present offending, was in 2013, so some eight years prior to your current offending. I do not know the detailed facts of those assaults but from the sentences imposed (the most serious being nine months' supervision, together with community work), it seems they were not particularly serious. Given this and that they occurred more than eight years ago, I do not propose an uplift for the previous convictions.

[33] Turning to mitigating personal factors, your lawyers seek a global discount of at least 20 percent to recognise your deprived upbringing, rehabilitative prospects and remorse.

[34] I turn first to consider your upbringing, which is set out in a cultural report prepared on your behalf, which is detailed and helpful. The key points arising from that report are that:

- (a) You are now 30 years old and proudly identify as Tongan.

¹⁹ *Ashcroft v R* [2014] NZCA 551 at [32].

- (b) Your parents were deported from New Zealand as overstayers when you were aged one. This was a source of deep shame for your family. You suffered very significant deprivation, material hardship and housing instability in Tonga, and again when you returned to New Zealand aged 15 with your siblings. You spent three years separated from your parents.
- (c) You grew up with a culture of violence in the home. You suffered physical and emotional abuse, and witnessed such abuse being meted out to others in your family. You felt a lot of fear and anger about this. You also suffered a near-fatal attack from a neighbour when you were a teenager and were hospitalised for six months as a result.
- (d) You were bullied at school. You experienced shame for not being able to speak English, as well as low self-esteem and depression. You left school without any qualifications.
- (e) You started drinking alcohol at 15. You describe a rapid escalation of violence and drinking during your mid-20s. You exhibit symptoms of dependence on alcohol. You have given up alcohol at times, but had relapsed to drinking four months prior to your offending.

[35] Similar points are made in the Department of Corrections “Provision of Advice to Court”, or “PAC”, Report prepared for the Court in advance of sentencing. The report writer refers to problematic alcohol use, a propensity for violence and peer influence as directly contributing to your offending, but also that childhood trauma, leading to anger management issues, is also an underlying cause.

[36] I accept that there is a causal link between the deprivation and violence that characterised your upbringing, and your offending.²⁰ In my view, a discount of 15 percent is appropriate to recognise these factors.

²⁰ *Carr v R* [2020] NZCA 357 at [65].

[37] Turning now to your rehabilitative prospects, what is clear from the materials I have read, Mr Havili, is that you do have an anger management problem, which is seriously aggravated by alcohol. Since the offending you have attended counselling for alcohol abuse through the Community Alcohol and Drug Services, and have also completed a 20 week “Man Alive” anti-violence programme. You have been abstinent from alcohol since May last year.

[38] Mr Havili, your rehabilitation will very largely depend on you not drinking. It is as simple as that. It also seems clear that you will need targeted counselling to address some of the more deep-seated issues that arise from your childhood. But I accept that you are genuinely motivated to rehabilitate, and you have good support around you to help you to do so, both from your wife, who has been your partner since you were much younger, your siblings and your church.

[39] I have also received and read letters in support from your friends and family. The general theme is that you are a caring man who helps and supports others, and takes good care of his immediate family. There have clearly been two sides to you Mr Havili, the caring, helpful man described in these letters, and the angry, drunk and violent man which led to your offending. Again, stopping drinking will be key to ensuring that going forward, the community sees only the first version of you, and not the second.

[40] I also accept that you are genuinely remorseful. You have written a letter to the Vake family, in which you express your apologies and deep regret, and take full responsibility for your actions. You were willing to engage in restorative justice, but that was ultimately not recommended by the service provider. Similar sentiments of your remorse are echoed in the PAC report and the cultural report.

[41] I consider a further discount of five percent is appropriate to reflect *both* your rehabilitative prospects and remorse.

[42] I turn now to consider your guilty pleas. The Crown accepts that a full discount of 25 percent is appropriate.²¹ You confirmed to the Court your intention to plead

²¹ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].

guilty at a very early opportunity; however entering that plea, and then this sentencing, both of which needed to take place in person, were then delayed for some time due to COVID-19 restrictions. I agree with the Crown that the full discount of 25 percent is available.

[43] Applying these discounts to the starting point of five years' imprisonment leads to an end sentence of **two years and nine months'** imprisonment.

Sentence

[44] Mr Havili, would you please now stand.

[45] Mr Havili, I sentence you on the charge of manslaughter to two years, nine months' imprisonment. I sentence you on the charge of assault with intent to injure to 16 months' imprisonment. Both sentences are to be served concurrently, so your overall sentence is one of **two years and nine months' imprisonment.**

[46] Please stand down.

Fitzgerald J