

**INTERIM ORDER SUPPRESSING NAMES, ADDRESSES, OCCUPATIONS
OR IDENTIFYING PARTICULARS OF DEFENDANTS AND CONNECTED
PERSONS UNDER S 286 CRIMINAL PROCEDURE ACT 2011.**

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

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

**CRI-2022-004-2642
[2024] NZHC 197**

THE KING

v

S and G

Hearing: 16 February 2024

Appearances: C Paterson and J Ah Koy for the Crown
K-A Kincade KC and A Shendi for S
P L Borich KC for G

Sentencing: 16 February 2024

SENTENCE OF GAULT J

Solicitors / Counsel:

Ms C Paterson and Ms J Ah Koy, Meredith Connell, Office of the Crown Solicitor, Auckland
Ms J-A Kincade KC and Ms A Shendi, Barristers, Auckland
Mr P L Borich KC, Barrister, Auckland
Ms H Croucher, Public Defence Service, Manukau

[1] Ms S and Mr G, you both appear for sentencing today following your jury trial in October.

[2] Ms S, shortly before trial you pleaded guilty to a charge of assault with intent to injure.¹ At the beginning of trial, you pleaded guilty to two further charges of assault with intent to injure and three charge of common assault.² You were found guilty by the jury of manslaughter by assault.³

[3] Mr G, at the beginning of trial you pleaded guilty to one charge of common assault. You were found guilty by the jury of manslaughter by dangerous driving and of failing to stop to ascertain injury.⁴

[4] I will begin by setting out the facts of your offending,⁵ before explaining the approach I am required to take in sentencing.

Facts

[5] Ms S, on Thursday 21 April 2022 at approximately 2:00 am, inside Saturdays bar in Britomart, you saw Ms Olson, called her names, poured your drink over her head, grabbed her drink and poured that over her head and then threw multiple punches at her body and kicked her leg before security intervened. This was the first assault with intent to injure.

[6] The following Saturday evening, you, Mr G and some friends spent time at your flat in Ponsonby before Mr G drove you and three friends into town in his Hilux Surf at about 12:30 am on Sunday 24 April 2022. You again went to Saturdays bar. Ms Olson was there again too. At around 2:00 am, you approached her from behind,

¹ Crimes Act 1961, s 193. The maximum penalty is three years' imprisonment.

² Crimes Act 1961, s 196. The maximum penalty is one year's imprisonment.

³ Crimes Act 1961, ss 171, 160(2)(a), 177 and 66. The maximum penalty is life imprisonment.

⁴ Land Transport Act 1988, ss 22(1), 36(1)(c) and 36(2). The maximum penalty is imprisonment for a term not exceeding five years or a fine not exceeding \$20,000; and the court must order disqualification from holding or obtaining a driver licence for 1 year or more.

⁵ I must sentence you on the basis of the proved facts implied in the jury's finding of guilt Sentencing Act 2002, s 24(1)(b), and *R v McCord* [2007] NZCA 312 at [22]. I may accept as proved any aggravating fact disclosed by the evidence at trial or agreed: s 24(1)(a). In this context, proved means proved beyond a reasonable doubt. Aggravating facts are those which justify a greater penalty than might otherwise be appropriate for the offence.

grabbed her hair and dragged her to the ground. You then ran away. This was the second assault with intent to injure.

[7] Mr G, at around 2:15 am, Mr Boyd and a friend were having a conversation outside Saturdays near Takutai Square. You approached them and joined the conversation, which began to get heated. You then punched Mr Boyd once in the face, which caused him to stumble backwards. This was common assault.

[8] Ms S, at that time you and two friends were sitting in Mr G's vehicle. Someone saw the altercation between Mr G and Mr Boyd, and you got out of the vehicle and walked towards them. The four of you were then standing on Roukai Lane talking. You became visibly aggressive towards Mr Boyd. You pushed him with two hands forcefully in the chest and neck area, causing him to fall backwards into a planter box. This was common assault. As Mr Boyd was sitting in the planter box, you lifted your right leg and front kicked him in the chest. This was another assault with intent to injure. As Mr Boyd attempted to get out of the planter box, you slapped him across the face with your right open palm. This was common assault. Mr Boyd got up from the planter box and attempted to walk backwards away from you. You followed him until security intervened.

[9] A few minutes later, after a conversation between Mr G and Mr Boyd on Takutai Square, Ms S and a friend returned to Mr G's vehicle, followed shortly afterwards by Mr G. Mr G, you were in the driver's seat and Ms S, you were sitting in the back right behind Mr G. Mr G drove down Galway Street and turned left onto Gore Street.

[10] At approximately 2:36 am, Mr Boyd was standing in the street talking to people in the car driven by Ms Olson's mother, who had arrived to take her and her friends home. Mr G, you stopped as you turned the corner and Mr Boyd walked over to your vehicle. You and Ms S both had the right-hand side windows down. Words were exchanged between you Mr G and Mr Boyd.

[11] Ms S, you then reached out of the right rear window and struck Mr Boyd in the head with your right hand. This was common assault.

[12] After he was hit, Mr Boyd said to Mr G “control your missus”. Mr G, you then leaned out of the driver’s window and grabbed Mr Boyd by the shirt, and drove off while holding onto Mr Boyd, causing him to stumble, turn and run alongside the vehicle. Ms S, you also reached out and grabbed onto Mr Boyd from behind. You both held onto Mr Boyd while Mr G proceeded to drive along Gore Street. Mr G turned sharply right and undercut the corner turning into Customs Street. At some point during the turn, Mr Boyd managed to jump onto the running board of the vehicle, holding onto the exterior. Mr G, you continued to drive at speed along Customs Street heading towards Queen Street. As your vehicle approached the next intersection at Commerce Street, Mr Boyd lost his footing and fell off the running board. As he fell, the back right wheel of the vehicle ran over Mr Boyd’s head and body. The fall and bump caused Mr Boyd to spin around and land close to the middle of the road.

[13] You both felt a bump. Mr G, you continued driving without stopping to check on Mr Boyd, who was lying in the road. You drove back to your flat. Ms S called 111 approximately seven minutes after Mr Boyd fell.

[14] Members of the public rushed to Mr Boyd and called an ambulance. Tragically, Mr Boyd died three days later as a result of his unsurvivable injuries.

Approach to sentencing

[15] In terms of my approach to sentencing,⁶ for each of you I will first set a starting point for your offending reflecting its nature and circumstances, having regard to aggravating and mitigating features. I will then adjust each starting point – up or down – to take into account any aggravating and mitigating factors personal to you so as to determine your end sentences.

[16] I must have regard to the purposes and principles of sentencing as set out in the Sentencing Act 2002.⁷ The relevant purposes of sentencing in your case include:

- (a) to hold you accountable for the harm you have done;

⁶ Following the two-stage approach set out by the Court of Appeal in *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46].

⁷ Sentencing Act 2002, ss 7 and 8.

- (b) to promote in you a sense of responsibility for, and acknowledgement of, that harm;
- (c) to denounce your conduct;
- (d) to deter you and other persons from committing the same or a similar offence;
- (e) to provide for the interests of the victims;
- (f) to protect the community; and
- (g) to assist in your rehabilitation and reintegration.

[17] The principles of particular relevance that I must consider are the gravity of your offending and the degree of culpability, the seriousness of the type of offence, the information received concerning the effect of your offending on Mr Boyd's family and Ms Olson, the desirability of consistency between sentences for similar offending, and the need to impose the least restrictive sentence that is appropriate in the circumstances.

Victim impact statements

[18] I have taken into account the victim impact statements of Connor Boyd's father and sisters, which were read aloud today. I have also read the victim impact statement from Connor's mum.

[19] Mr Boyd's father spoke of the infinite and indescribable pain he feels at having lost his son, only 18 years old, and the devastating impact of Connor's death and the impact that has had on his family. He feels lost without cause, and continues to struggle with the knowledge of how Connor died.

[20] Mr Boyd's mother described her immense love for her son, and the lifetime of pain, suffering and hurt she faces since his loss. Her mental health has suffered

significantly. She spoke of the profound loss her family has experienced, and how deeply she misses Connor.

[21] Mr Boyd's sister, Ashton, also spoke of the severe grief and trauma she lives with. She recalls the ordeal while Connor was in hospital, the pain of seeing him in the funeral home. She described how she struggles to accept his death. She also expressed how deeply she loved and misses her brother.

[22] Connor's sister, Tyler, describes the heartbreak of losing her brother, which never gets easier. She constantly wonders why he was the victim of this crime and cannot get used to his absence. She also speaks of her mental health. She says their lives will never be the same.

[23] I thank these family members for their courage, for giving me some more insight into Connor, and for sharing the continued impact of his loss. I acknowledge your immeasurable grief. I know that whatever sentences I impose today can in no way undo the harm done. I hope you too, Mr G and Ms S, also appreciate the profound and long-lasting pain you have caused by your offending.

[24] I have also read the statements provided by Abiel Biri, Tiaan Botha, Michelle Cardy, Elijah Tremain and Ella Olson. I acknowledge their grief and love for Connor too.

Manslaughter

[25] Before addressing your individual offending, I note that for both of you manslaughter is clearly the lead offence, though it is necessary to take into account all your offending. The maximum penalty for manslaughter is life imprisonment. There is no guideline judgment for manslaughter sentencing since the cases are highly fact-specific. In evaluating your culpability in the particular circumstances, I consider both your intended actions and the unintended consequences.⁸

⁸ *Turi v R* [2014] NZCA 254 at [11].

Mr G

Starting point

[26] Mr G, I address your position first. You were found guilty of manslaughter by dangerous driving and failing to stop to ascertain injury, and you pleaded guilty to an earlier common assault. Each charge relates to Mr Boyd. The Crown says that the less serious charges are properly taken into account as aggravating factors in the assessment of your culpability on the manslaughter charge, rather than by way of a separate uplift. Mr Borich KC accepts that approach, and I agree.

[27] I identify the following aggravating factors of your offending:

- (a) First, actual violence: in the lead-up to the dangerous driving you punched Mr Boyd in the face. That violence directed at Mr Boyd continued with your actions that ultimately caused Mr Boyd's death – you grabbed and held Mr Boyd as you drove off.
- (b) Secondly, deliberate dangerous driving: you deliberately held Mr Boyd as you drove. This caused him to stumble, turn and run alongside your vehicle. Even when you let go, you continued to drive, dangerously.
- (c) Thirdly, vulnerability of the victim: Mr Boyd was vulnerable when you pulled up on Gore street; he was alone standing next to your 4x4, outnumbered when you and Ms S grabbed him, unable to resist the force of your hold on him and the movement of the vehicle, and he had no safe option to escape the situation as the vehicle turned into Customs Street irrespective of exactly when you let go.
- (d) Finally, failure to stop: you continued to drive along Customs Street when Mr Boyd fell off the side of the vehicle and was lying in the road, without stopping to check on him.

[28] Ms Paterson, for the Crown, acknowledges that the events were a tragedy for Mr Boyd and were very unlikely foreseen with any degree of clarity, but she submits this should be characterised as the absence of an aggravating feature rather than a mitigating factor, and must be tempered by the earlier aggression towards Mr Boyd. I accept that assessment.

[29] I also accept Mr Borich's submissions that this case did not involve prolonged driving at high speed or aggravating factors often present such as alcohol or drugs. There had been "teen drama" earlier in the night and I accept that you may have reacted to what Mr Boyd said and what you thought was happening behind you when you grabbed him and drove off, and there was some evidence that he tried to punch you from the running board, but the jury did not accept this was a case of self-defence. I cannot rule out however that the jury may have concluded it was a case of excessive self-defence. But this needs to be seen in the context of your earlier actions in Gore Street and turning the corner.

[30] In relation to your failure to stop, I accept you did not have actual knowledge of the seriousness of the consequences of running over Mr Boyd, that the failure to stop did not contribute to his death, and that there were other people around, but these too are merely the absence of aggravating factors. Again, the jury did not accept this was self-defence despite the evidence of threats earlier in the night. As I have said, Ms S rang 111 seven minutes later.

[31] In relation to the earlier punch, I accept this was likely an excessive reaction to what Mr Boyd said and that you immediately assisted him up and apologised.

[32] The Crown submits that, by reference to other motor manslaughter cases,⁹ a starting point between six and six and a half years' imprisonment should be adopted for your overall offending. Mr Borich also refers to other motor manslaughter cases,¹⁰ and submits that a starting point of three to three and a half years' imprisonment is appropriate. With substantial discounts, he seeks an end sentence of home detention and community work.

⁹ *R v Ngamotu* [2018] NZHC 893: After an argument with the victim regarding ownership of a caravan, Mr Ngamotu got into his van and reversed it into the caravan. This caused the caravan to strike the victim, knocking her to the ground. Mr Ngamotu then continued to reverse, and ran over the victim with his van. The victim suffered numerous serious injuries and died during surgery. Hinton J adopted a starting point of six years' imprisonment, accepting that Mr Ngamotu's intention was to intimidate or frighten the victim rather than to hit her, but taking into account the aggravating factors of Mr Ngamotu's recklessness, and the fact that he knew at the time of the offending that the victim and her nephew were crouched beside the caravan in a vulnerable position, unable to see what Mr Ngamotu was doing or protect themselves. The Judge also took into account the fact that Mr Ngamotu immediately attempted to shift blame for his actions, and took no steps to assist the victim or call an ambulance after she was injured.

R v Green [2016] NZHC 513: The offender drove at speed towards the victim, in response to the victim kicking out at his car. Consequently, the offender struck the victim with his car, instantly causing his death. Whata J adopted a starting point of six years and six months' imprisonment, taking into account as aggravating factors that the offender had consumed several alcoholic drinks prior to driving, the grossly excessive speed at which he drove, his deliberately reckless driving, and the fact that the offender failed to stop and fled the scene. The Judge did not consider that the offending was premeditated.

R v Haufano [2014] NZHC 1201: After being assaulted by the victim, Mr Haufano chased the victim (who was on foot) in his vehicle, and ran over the victim (albeit not at speed). This caused the victim's death. The aggravating features of the offending identified by Wylie J included the fact that Mr Haufano used his motor vehicle as a weapon, the tragic consequences of the offending, the vulnerability of the victim given that he had his back to Mr Haufano and had been drinking, Mr Haufano's failure to stop, and Mr Haufano's attempts to escape police detention. The Judge adopted a starting point of six years' imprisonment.

R v Tawa [2020] NZHC 95: Mr Tawa left a property where he had been drinking with the victim. The victim pursued Mr Tawa, pulled open the driver's door of his car, stood on the front driver's sill of the car and assaulted Mr Tawa as he drove down the road. After the victim fell off the vehicle, Mr Tawa made a violent turn and ran over the victim's head, thereby causing his death. Lang J accepted that Mr Tawa's offending did not involve a prolonged or premeditated piece of bad driving, and that Mr Tawa was likely to have been motivated by a sense of panic in trying to escape the risk of physical injury inflicted by the victim. The Judge identified the fact that Mr Tawa caused his vehicle to travel over to the wrong side of the road when he must have known his brother was somewhere in the vicinity as an aggravating factor. A starting point of four years' imprisonment was adopted.

R v Stevens [2017] NZHC 727: While Mr Stevens was attempting to drive away from a property after arguing with the victim, the victim tried to stop him from leaving by grabbing the door handle of his car. A "tug of war" occurred while Mr Stevens continued to drive. Eventually, Mr Stevens let go, and the victim fell onto the road. Mr Stevens began to reverse; he then hit and ran over the victim, killing her. Mr Stevens left the scene without realising that the victim had been struck. Simon France J adopted a starting point of four years' imprisonment.

¹⁰ *R v Elliot* [2014] NZHC 214: Two offenders engaged in vehicle racing on a quiet road. A friend who was spectating the race unexpectedly crossed the road while the vehicles were travelling at speed. One of the offenders was unable to avoid striking the victim with his car, causing the victim to die almost immediately from his injuries. In setting a starting point of three years' imprisonment for each offender, Rodney Hansen J took into account as aggravating factors that the offenders were racing and driving at an excessive speed (at least 20 km/h above the speed limit), and the fact that the victim died.

[33] Given the aggravating factors identified and having regard to the other cases, I consider your culpability is more serious than in those other cases where the victim has pulled a vehicle door to stop a driver leaving but less serious than in the cases where the vehicle was used as a weapon or there was no suggestion of provocation. I set the starting point for your overall offending at four and a half years' imprisonment.

Personal aggravating and mitigating factors

[34] I turn to your personal circumstances Mr G. It is accepted there are no personal aggravating factors applying to you.

[35] As for mitigating factors, as the Crown accepts, you are entitled to discounts for your youth and previous good character.

Youth

[36] Mr Borich submits that a discount near the maximum is appropriate to account for your youth.

[37] Youth is a mitigating factor.¹¹ The courts have accepted that there are significant neurological differences between young people and adults.¹² The abilities to plan, consider, control impulses and make wise judgments are the last parts of the brain to develop, and it is acknowledged that young persons' brains are programmed to engage in higher levels of risk. Young people are more susceptible to negative influences and the environment in which they act could lead to inappropriate behaviour. It is accepted that long sentences can have a devastating impact on young people, that cognitive differences will also affect a young offender's perception of a term of imprisonment¹³ and that young people are more amenable to treatment and consequently have better prospects of rehabilitation than adult offenders.

R v Stevens [2017] NZHC 727: summarised at n 9 above.

R v Tawa [2020] NZHC 95: summarised at n 9 above.

R v Ngamotu [2018] NZHC 893: summarised at n 9 above.

¹¹ Sentencing Act 2002, s 9(2)(a).

¹² *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405, and *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

¹³ *Millar v R* [2019] NZCA 570 at [28].

[38] You were 18 at the time of your offending – Mr Borich submits you were a relatively immature 18-year-old. You are now 20. I accept that your conduct was impulsive, without the maturity needed to reflect on potential consequences. This is also reflected in Ms Visser’s observation in her psychological report. She said your personality assessment suggested you tend to portray yourself as being relatively free of common shortcomings. She also said based on your version of events there may have been an element of panic in your behaviour. The material I have seen also suggests a protective streak or sense of loyalty that likely contributed to some of your actions that night. This of course needs to be tempered by what I have said about the jury’s conclusion.

[39] I accept there is a clear link between your youth and bad decision making.

Previous good character

[40] You have no previous convictions. The reference material indicates your community involvement in surf lifesaving and sports. You have stable employment and good family support.

Remorse

[41] Mr Borich also seeks a discount for your remorse. There is inconsistency between the views of the report writers. The Department of Corrections probation officer’s pre-sentence report states that your remorse presented as superficial, you lacked insight into the severity of the offending and did not acknowledge any genuine emotions towards the victim and the victim’s family other than feeling sad. However, the psychologist, Ms Visser, considered that your remorse was genuine and deeply felt.

[42] I accept that the psychologist spent more time with you and that your general reserve may have inhibited the shorter process with the probation officer.

[43] I have also read your letters to Connor’s family and the letter you wrote to the Court. It acknowledges that you take full responsibility for your actions and the

consequences you have brought upon Connor and his family. You are more than open to rehabilitative programmes.

Rehabilitative prospects

[44] I accept that given your age, and the other material, you are more amenable to treatment and consequently have better prospects of rehabilitation than an adult offender. You are assessed as having a low risk of further offending.

Aggregate discount

[45] Taking your youth, previous good character and rehabilitative prospects together, and still keeping in mind the seriousness of the offending, I consider a discount of 35% is appropriate, plus a 5% discount for remorse.

Time spent on restrictive bail

[46] Mr Borich also submits that your sentence should be discounted to take into account the time you have spent on bail; specifically, almost one month on a 24-hour curfew, and approximately 22 months on a night-time curfew permitting travel to work. I allow a further credit of two months.

End sentence

[47] The aggregate discounts reduce your starting point of four and a half years' imprisonment down to an end sentence of two and a half years' imprisonment. Thus, the possibility of home detention does not arise.

[48] Mr G, please stand.

[49] On the manslaughter charge, you are sentenced to two and a half years' imprisonment.

[50] On the assault charge, you are sentenced to three months' imprisonment.

[51] On the failing to stop charge, you are sentenced to six months' imprisonment and disqualified from driving for two years from the date of your release.

[52] These sentences are to be served concurrently.

[53] Please stand down.

Ms S

Starting point

[54] Ms S, you were found guilty of manslaughter by assault, and you pleaded guilty to three charges of assault with intent to injure and three charge of common assault.

[55] With manslaughter as the lead charge, the Crown says in your case that the less serious charges relating to Mr Boyd are properly taken into account as aggravating factors in the assessment of your culpability on the manslaughter charge, but that your offending against Ms Olson should be dealt with by way of a separate uplift. Ms Kincade KC accepts there must be an uplift. I agree with that approach.

[56] In relation to the offending against Mr Boyd, I identify the following aggravating factors of your offending:

- (a) First, actual violence: before your actions in the vehicle, you pushed Mr Boyd in the chest and neck area, kicked him in the chest, and slapped him. Your pattern of violence directed at Mr Boyd continued with your conduct that ultimately caused his death – you reached out of the vehicle window, struck him in the head and then, most importantly, grabbed and held Mr Boyd's shirt as Mr G drove off.
- (b) Secondly, vulnerability of the victim: Mr Boyd was vulnerable during the assault because he was outnumbered by you and your friends, and did not demonstrate any physical aggression towards any of you. He was also vulnerable when Mr G pulled up on Gore street; he was alone

standing next to the 4x4, outnumbered by you and Mr G when you both grabbed him, he was unable to resist the force of your hold on him and the movement of the vehicle, and he had no safe option to escape the situation as the vehicle turned onto Customs Street irrespective of exactly when you let go, and accepting that you may well have screamed at him to do so.

[57] The Crown acknowledges that even though you were the main protagonist in terms of the violence directed at Mr Boyd over the earlier part of the night, you must be seen to have played a lesser role in the offending that led to Mr Boyd's death. You were not driving. However, as Ms Paterson submits, were it not for your animus towards Mr Boyd through the night, coupled with your assistance provided to Mr G in the vehicle, Mr Boyd's death would not have resulted. Also, self-defence was not suggested.

[58] The Crown refers to other manslaughter cases,¹⁴ but acknowledges this case is unique. Ms Paterson submits a starting point between three to three and a half years' imprisonment should be adopted.

¹⁴ *Mouat v R* [2017] NZCA 603: Mrs Mouat deliberately pushed her heavily intoxicated husband while trying to prevent him from re-entering their house, causing him to fall backwards off the porch and to strike his head on the concrete. He was taken to hospital but died 10 days later. A starting point of 22 months' imprisonment adopted in the Court below was upheld on appeal. While the Court of Appeal accepted that Ms Mouat's culpability was at the very low end of the scale for manslaughter offending, the Court rejected the claim that her offending was purely negligent; instead, the Court found that she had pushed her husband deliberately.

R v King HC Blenheim CRI 2009-009-17816, 9 February 2011: Mr King was the part-owner of a bar. He intervened in a confrontation between the victim and a member of his bar staff by putting his arm around the victim's neck area and pulling him away from the staff member. Mr King and another member of staff (Z) then lifted the victim off the ground to remove him from the bar. Z tripped and let go of the victim's legs while carrying him outside the bar, and Mr King also let go of the victim, causing him to hit the back of his head on the back of the concrete footpath. This injury caused his death. Taking into account various factors including that Mr King was not a protagonist, was entitled to assist his staff member and to remove the victim, had intended to remove the victim rather than harm him, and had essentially engaged in excessive defence of another and excessive defence of property (which is viewed as reducing the seriousness of violent offending), Mallon J determined that the appropriate starting point was between two to two and a half years' imprisonment.

R v Paku HC Hamilton CRI-2005-019-6408, 7 September 2006: Mr Paku and the victim were drinking at a nightclub and had a verbal altercation. Mr Paku confronted the victim again as they were leaving the nightclub and pushed him so hard that he fell to the ground, fractured his skull and suffered a tear to his brain. Venning J considered the push to be an act of aggression, and "not a lesser act of violence than a punch in all the circumstances." He adopted a starting point of three years' imprisonment.

R v Clarke HC Rotorua CRI-2009-270-73, 29 May 2009: Ms Whare was among four defendants charged with manslaughter. She had been drinking with a group of people including the victim.

[59] Ms Kincade also refers to other manslaughter cases.¹⁵ She submits that a starting point of two years and nine months' imprisonment is appropriate.

[60] Given the aggravating factors identified, and having regard to the other cases, for all your offending against Mr Boyd I set a starting point of three years' imprisonment.

Uplift for Ms S's offending against Ms Olson

[61] An uplift is needed for the two additional assaults with intent to injure against Ms Olson. The maximum penalty for assault with intent to injure is three years' imprisonment. The Crown seeks an uplift of 12 to 18 months' imprisonment, by reference to three comparable cases.¹⁶

[62] Ms Kincade submits that an uplift of six months' imprisonment is appropriate to reflect the additional charges, incorporating a 20 per cent discount for your guilty pleas. She also refers to other cases, including the guideline judgments for more serious violence.¹⁷

At one point during the evening, Ms Whare swore and kicked at the victim in response to being told to go away. Later in the evening, when one of her co-offenders suggested attacking the victim, Ms Whare repeatedly encouraged him to do so, and suggested taking the victim's EFTPOS card as she knew his PIN number. Her three co-offenders proceeded to undertake a prolonged attack on the victim, causing his death. At sentencing, Venning J acknowledged that Ms Whare had not participated in the physical assault, but had encouraged her co-offenders to attack the victim, and continued the encouragement on more than one occasion. A starting point of four years' imprisonment was adopted for Ms Whare, taking into account the following aggravating features: the extent of the loss (the death of the deceased), the violence inflicted on him, that the assault was an unprovoked attack by multiple offenders, and that the deceased was vulnerable because he was much older than the offenders and under the influence of alcohol.

¹⁵ *R v Tawa* [2020] NZHC 95 and *R v Stevens* [2017] NZHC 727, summarised at n 9 above; *Mouat v R* [2017] NZCA 603, *R v King* HC Blenheim CRI-2009-009-17816, 9 February 2011 and *R v Paku* HC Hamilton CRI-2005-019-6408, 7 September 2006, summarised at n 14 above.

¹⁶ *Tamihana v R* [2015] NZCA 169: a 12-month starting point was imposed for offending involving punching the victim's head and kicking him while he was on the ground.
Graham v Police [2014] NZHC 2112: an 18-month starting point was imposed for offending involving the defendant punching the victim with significant force, so that he sustained a large laceration and lost a number of teeth.

Moore v Police [2015] NZHC 616: here, the offender grabbed the victim's hair and punched her in the back of the head so that she fell to the ground. A 12-month starting point was imposed.

¹⁷ *Nuku v R* [2013] 2 NZLR 39, [2012] NZCA 584, *R v Taueki* [2005] NZLR 372 and *R v Harris* [2008] NZCA 528 (replaced by *Nuku*).

[63] It was not suggested these assaults involved aggravating features, albeit there was a pull to the hair. However, these assaults formed more than the backdrop to the lead offending.

[64] I consider the two assaults with intent to injure against Ms Olson would warrant a standalone starting point of one year's imprisonment. Allowing modest credit for your late guilty pleas,¹⁸ and particularly having regard to the totality of your offending, I consider an uplift of nine months' imprisonment is appropriate.

[65] Ms S, that increases your overall starting point to three years and nine months' imprisonment.

Personal aggravating and mitigating factors

[66] I turn to your personal circumstances. It is accepted there are no personal aggravating factors applying to you.

[67] As for mitigating factors, Ms Kincade seeks discounts of:

- (a) 25 to 30 per cent discount for your age, rehabilitation prospects, family support and charity work; and
- (b) 20 per cent for factors addressed in the psychological and pre-sentence reports.

[68] Ms Kincade ultimately seeks a sentence of home detention.

Youth

[69] As I have said, youth is a mitigating factor.¹⁹ I repeat that the Courts have accepted there are significant neurological differences between young people and adults.²⁰ The abilities to plan, consider, control impulses and make wise judgments

¹⁸ *Hessel v R* [2010] NZSC 135; [2011] 1 NZLR 607 at [74]. This discount would ordinarily be considered at the second stage under *Moses* but is addressed in relation to the uplift since the lead charge was defended.

¹⁹ Sentencing Act 2002, s 9(2)(a).

²⁰ *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 and *Churchward v R* [2011] NZCA 531, (2011)

are the last parts of the brain to develop, and it is acknowledged that young persons' brains are programmed to engage in higher levels of risk. Young people are more susceptible to negative influences and the environment in which they act could lead to inappropriate behaviour. It is accepted that long sentences can have a devastating impact on young people, that cognitive differences will also affect a young offender's perception of a term imprisonment²¹ and that young people are more amenable to treatment and consequently have better prospects of rehabilitation than adult offenders.

[70] You were 18 at the time of the offending. You are now 20. I accept that your conduct was also impulsive, albeit repeated. You made very bad choices with a lack of regard for the impact of your behaviour on others, which shows a lack of maturity. Youth is a significant factor here.

Previous good character

[71] You have no prior convictions. That is an indication of potential for rehabilitation.²² So is your business and charity work.

Remorse and psychological report

[72] The probation officer referred to your regret and remorse in relation to the events that contributed to Mr Boyd's death, and Dr Brindley also saw insight and remorse, but in the circumstances it is appropriate that no discrete discount is sought for remorse. Aspects of your accounts differed from the evidence at trial and focused on the impacts on you.²³ I acknowledge Dr Brindley's diagnoses of acute stress disorder and post-traumatic stress disorder. However, I doubt the nexus with your offending given the timing and other inconsistencies.

25 CRNZ 446.

²¹ *R v Millar* [2019] NZCA 570 at [28].

²² *R v Chankau* [2007] NZCA 587 at [27].

²³ As Ms Kincade submitted, I put no weight on Ms S's views recorded in the Te Whatu Ora notes.

[73] I have also considered Dr Brindley's updated comments via Ms Kincade.²⁴ They reinforce the appropriateness of a substantial discount for youth and your need for psychological therapies.

Rehabilitative prospects

[74] In relation to rehabilitative prospects, you have attended a Getting Start programme with Community Alcohol and Drug Services for a morning a week for four weeks. You are looking to undertake Shine's No Excuses programme, have had a preliminary assessment and been accepted onto the programme. These are good initiatives to address binge drinking and violence propensity, even though you appear not to accept that alcohol was a relevant factor in your offending. The psychologist, Dr Brindley, assessed your risk of future violence as low. You have good family support. I consider you have good rehabilitative prospects.

Aggregate discount

[75] Taking youth, previous good character, rehabilitative prospects and your psychological needs together, and keeping in mind the seriousness of the offending, I consider a total discount of 40% is appropriate.

Time spent on bail

[76] Ms Kincade notes that you have spent approximately 619 days on bail, with some variations, and submits that particularly at your young age this should be accounted for. Your bail terms have included a night-time curfew but have not been particularly restrictive, given the number of variations. A credit of one month is allowed.

End sentence

[77] The 40% discount reduces your starting point of three years and nine months' imprisonment down to an end sentence of two years and two months' imprisonment. The possibility of home detention therefore does not arise.

²⁴ This was accepted as Dr Brindley is incapacitated this week and it was necessary for her to update the Court.

[78] Ms S, please stand.

[79] On the manslaughter charge, you are sentenced to two years and two months' imprisonment.

[80] On the assault with intent to injure charges, you are sentenced to nine months' imprisonment.

[81] On the assault charges, you are sentenced to three months' imprisonment.

[82] These sentences are to be served concurrently.

[83] Please stand down.

Gault J