IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE

CRI-2019-083-001562
[2020] NZHC 1567

THE QUEEN

v

PETER ANTHONY LAURENCE ATKINSON

Hearing:	3 July 2020
Appearances:	M M Wilkinson-Smith and R N Benic for the Crown D Goodlet for the Defendant
Judgment:	6 July 2020

SENTENCING OF COOKE J

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[1] Mr Atkinson you have pleaded guilty following a sentence indication on one charge of manslaughter[1] and one charge of driving with excess breath alcohol.[2]

[2] In outlining the sentence that will be imposed on you I will first summarise the offending, outline the appropriate starting point for offending of this kind, explain any adjustments that may be made to that starting point given your personal circumstances and give a final sentence. As a sentencing indication has already been given this sentencing necessarily repeats much of what I had said earlier.

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1 Crimes Act 1961, ss 160(2)(a), 171 and 177, maximum penalty life imprisonment.
2 Land Transport Act 1998, s 56(1) and (4), maximum penalty two years' imprisonment, 12 months' disqualification or $6,000 fine.

Your offending

[3] On 9 November 2019 you were at the Basin Reserve in Whanganui and consumed an unknown quantity of alcohol. You drove with an associate to Castlecliff where you were involved in a physical altercation with an unknown person. Afterwards you were driven to a residential address in Castlecliff. You took a car from that address and drove it to a second residential address. After a family altercation at that address, you drove the car to Anzac Parade with a female in the front passenger seat. You drove the car at excessive speeds, weaving in and out of the incoming lane. The female passenger repeatedly requested that you pull over but you refused.

[4] At the intersection of Anzac Parade and Georgetti Road your car collided with the victim's motor scooter. The front right side of the car struck the victim, causing her to be thrown from the scooter. She was fatally injured and died at the scene.

[5] You failed to stop to check on her. You continued driving south. Your female passenger told you to pull over to check on the victim but you refused. You eventually stopped the car 1.3 kilometres away from the crash scene and ordered her to get out of the car. You left her on the side of the road and continued driving. You returned to the address in Castlecliff and parked the car, concealed from the road. You then used your t-shirt to try and clean up blood from the front of the car.

[6] You were later located at the address by police. Breath tests revealed your level of breath alcohol was over three times the legal limit.

The impact of the offending

[7] The victim was Jeanette Gibbs. Her youngest son Paul has provided a victim impact statement on behalf of the family. Paul has struggled with the thought of never seeing his mother again. The tragic loss has been especially difficult for Jeanette's husband of 45 years, Laurie Gibbs. Jeanette maintained a close and caring relationship with her three sons and her grandchildren. They too are devastated. Paul describes the aftermath of her death as shocking, traumatic and deeply sad.

[8] It is important that you understand that you not only took the life of a much loved person, but that by doing so you have caused deep distress within her family. That is something that you must carry with you for the rest of your life.

Personal circumstances

[9] You are now 42 years old. You are close with your mother and speak with her most days from prison but from a young age you and your twin brother Paul witnessed your father's violence towards her. Your mother left your father when you were six years old due to the violence. You have a limited education. While at intermediate you enjoyed playing in the school sports teams, but by college you "got in with the wrong crowd" and by age 14 you were regularly consuming alcohol, cannabis and cigarettes. That was the start of a lifelong relationship with alcohol abuse. You left school by the age of 18 and became a father at 19 years of age. The pre-sentence report records you have a history of poor relationship stability. You now have 11 children to five different women. Your history of alcohol abuse also means you have found it difficult to maintain stable employment.

[10] Your family and previous partners all say that at your core you are a good person who cares and can be helpful and generous, but when you are triggered by traumatic events you turn to drinking and become angry and violent. I will return to this aspect of your circumstances later but for now it is sufficient to note there is no doubt that alcohol abuse is associated with your offending. Over the last two decades you have amassed over 40 convictions, involving drink driving, child sex offending and family violence. 13 of those convictions are for driving related offences, including two charges for excess breath/blood alcohol, one charge of driving at dangerous speed and nine charges of driving while disqualified. You have served five sentences of imprisonment since 2005. The pre-sentence report assesses you at a high risk of reoffending.

Starting point

[11] The starting point for determining a sentence is assessed by looking at the offending itself, and without any assessment of you as the offender.

[12] The Crown has submitted that a starting point of seven years is appropriate for this offending. Your counsel suggests a starting point of six years, six months. There is no case specifying what starting point should be adjusted or provided for manslaughter as the charge can encompass a wide range of circumstances. In *Gacitua* the Court of Appeal provided a list of aggravating and mitigating circumstances in cases involving vehicular manslaughter.[3] That case concerned a charge of reckless driving causing death which carries a lower maximum period of imprisonment but the list of factors has been cited in a number of manslaughter decisions. I consider the following circumstances to be aggravating:

(a) *Consumption of alcohol*: Your breath alcohol gave a result of 849 micrograms per litre of breath — over three times the legal limit.

(b) *Greatly excessive speed/prolonged period of bad driving*: Immediately prior to the collision you were driving at excessive speeds and weaving in and out of the oncoming lane.

(c) *Disregard of warnings from fellow passengers*: Prior to the collision the female passenger repeatedly requested that you pull over.

(d) *Other offending*: The Crown says you were in breach of your restricted licence as you were carrying a passenger who did not have a full licence. You were also subject to a sentence imposed some seven months earlier that you be sentenced if called upon.

(e) *Irresponsible behaviour at the time of the offence*: You failed to stop after you hit the victim and ignored the repeated requests of the other passenger to stop and check on her. You deliberately concealed your parked car from the road and made an attempt to avoid detection by using your t-shirt to clean the blood off the car.

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3 *Gacitua v R* [2013] NZCA 234.

(f) *Previous convictions for motoring offences*: This is listed as an aggravating factor in *Gacitua* but it seems to me it should normally be dealt with as a separate uplift rather than in setting the starting point.

[13] In manslaughter cases where death results from reckless driving under the influence of alcohol, a starting point of between six and nine years' imprisonment is usually adopted.[4] In determining a starting point I have taken guidance from three decisions:

(a) *Ormsby v R:*[5] The 18 year old appellant was sentenced to four years, two months' imprisonment for one charge of manslaughter and one charge of driving with excess blood alcohol. He did not have a driving licence but drove with three passengers, with a blood alcohol reading of 117 mg per 100 ml of blood. He was driving at dangerously high speeds of up to 130 kilometres an hour across some distance and despite the protests of his passengers who were asking him to slow down. The appellant lost control and the car became airborne, flipping a number of times before coming to rest in a paddock. The car caught fire. One of the passengers died from the impact and the others suffered serious injury. The sentencing Judge identified the following aggravating factors: alcohol, excessive speed, repeated warnings from passengers, poor driving, aggressive driving and the fact that Mr Ormsby had been warned by police nine days earlier.[6] A starting point of six years, six months' imprisonment was adopted. That point was upheld on appeal.

(b) *R v McGrath:*[7] Mr McGrath pleaded guilty to charges of manslaughter, dangerous driving causing injury and driving with excess blood alcohol. After a day of drinking Mr McGrath took a car with two passengers, in breach of the conditions of his learners' licence. Mr McGrath was observed driving erratically and at high speed. He

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4 For example, see *R v Thomas* [2018] NZHC 819; *R v Pora* [2015] NZHC 1104; *R v Whiu* [2007] NZCA 591; *Ormsby v R* [2013] NZCA 578; *R v McGrath* [2014] NZHC 1583; *R v Mika* [2013] NZHC 2357; and *R v Murcott* [2014] NZHC 971.

5 *Ormsby v R*, above n 4.

6 *R v Ormsby* [2013] NZHC 1873.

7 *R v McGrath*, above n 4.

passed a Police patrol car which began pursuit. In response Mr McGrath speed up, reaching speeds of 142 kilometres an hour. He lost control of the car going around a curve. He crashed the car into a residential dwelling. The impact destroyed the front of the house. One passenger died and the other was seriously injured. It was found that Mr McGrath's blood alcohol level was over double the legal limit, at 130-160 mg per 100 ml of blood. He also had two previous convictions for driving with excess blood alcohol. The Judge adopted a starting point of seven years' imprisonment and uplifted by a further five months' to reflect his previous convictions for driving with excess breath alcohol.

(c) *R v Mika:*[8] Mr Mika pleaded guilty to one charge of manslaughter, one charge of driving without a licence and failing to stop. After a night of drinking and smoking cannabis Mr Mika drove a car with three other passengers. He was driving at speeds up to 100 kilometres per hour in a 50 kilometre zone and driving on the wrong side of the road. He ignored the other passengers' requests to stop. He hit an oncoming car and lost control, rolling the car. He left the vehicle and ran from the scene without checking on the condition of the other passengers. One of the passengers was killed and the other was seriously injured. The Judge took a starting point of eight years' imprisonment with an uplift of one year to reflect Mr Mika's previous 11 convictions for driving without a licence, and other convictions for careless and reckless driving.

[14] Given the comparable cases I consider a starting point of seven years' imprisonment appropriate in light of the aggravating factors arising in your case.

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8 *R v Mika*, above n 4.

Adjustments to the starting point

[15] The next stage in sentencing, having determined the appropriate starting point, is to assess whether circumstances that are personal to you mean the sentence should be increased, or decreased.

Uplift for previous convictions

[16] As I mentioned previously you have a substantial criminal history, particularly for driving offences. In my view an uplift to take into account your previous driving-related convictions would normally have been warranted. In other cases where dangerous driving has resulted in death and the driver has previous convictions an uplift in the range of six months to one year has been imposed.[9] Here an uplift of six to nine months may well have been appropriate.

[17] But you are subject to the three strikes regime. This is a stage two conviction under that regime. Under that regime the Court must order that you serve the full term of your sentence without any prospect of you being released on parole.[10] There is no discretion. In *Wipa v R* the Court of Appeal addressed whether there should be sentencing uplifts where there is a loss of parole.[11] It noted a separate uplift may not be necessary to achieve the sentencing purposes as prior history has already been taken into account to an extent given the implications of the second strike.[12]

[18] Section 8(h) of the Sentencing Act 2002 requires the Court to consider whether there are particular circumstances relating to the offender that would make the otherwise appropriate sentence disproportionately severe. Given the Court of Appeal's observations in *Wipa v R* I do not impose an uplift for previous offending that I would otherwise have given. The objectives of denunciation, accountability, deterrence and community protection are achieved by the elimination of the entitlement to be considered for parole. The loss of the right to be considered for parole will likely significantly increase the period of imprisonment that you serve.

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9 See for example *R v Mika*, above n 4 with a one year uplift; *R v Murcott*, above n 4 where an uplift of six months was given; and *R v Green* [2016] NZHC 513 where an uplift of 18 months' was given on a starting point of six years, six months.

10 Sentencing Act 2002, s 86C.

11 *Wipa v R* [2018] NZCA 219.

12 At [36].

Mitigating factors

Pre-sentence reports

[19] When imposing a sentence with a partly or wholly rehabilitative purpose I must take into account your personal, whanau, community and cultural background.[13] I have been provided with a cultural report from Ms Susan Anderson JP that addresses that background and how that may have contributed to your offending. As the Court of Appeal has recently noted, ingrained systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity require consideration at sentencing when shown to contribute causatively to the individual's offending.[14]

[20] Your mother is Te Atiawa. Due to the effect of colonisation and systemic deprivation on Māori communities you were raised largely without access to Māoritanga but made efforts to connect with your whakapapa and Māori identity later in life. You have connected with the Te Atiawa marae at Okato in the past and have expressed an interest in learning more. The report reveals a difficult upbringing, marked by family violence and alcohol abuse. You have experienced loss and tragedy in your life, with the passing of your twin brother, father and stillborn children. You sought refuge in alcohol and other drugs. This background is relevant to the extent that it affects your personal culpability. Considered by itself I do not accept that colonisation and systemic deprivation justifies a specific discount in your case. But it is relevant to assessing your overall personal circumstances which I will turn to shortly.

[21] A similar issue arises in relation to your alcoholism. Both the pre-sentence report from the Department of Corrections and the cultural report note that alcohol abuse and addiction as defining features of your life. You have said you are dependent on alcohol, it is always on your mind and then you say you are "only truly happy" when you are drinking. You have attended alcohol and drug counselling courses in prison and in the community through the District Health Board services. Your partner says after your latest release from prison you managed to abstain from alcohol during

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13 Section 8(i).

14 *Zhang v R* [2019] NZCA 507 at [159]. See also *Solicitor-General v Heta* [2018] NZHC, [2019] 2 NZLR 241 at [49].

your parole period ending in September 2019 but started drinking again as soon as your GPS anklet came off. Your drinking during this period no doubt led to you losing your employment. At your partner's insistence you self-referred to an alcohol and drug counsellor and agreed to weekly counselling sessions but five days later you committed the present offending, and you had been drinking heavily throughout the day of the offending.

[22] Under the Sentencing Act voluntary consumption of alcohol or drugs, other than for bona fide medical purposes, cannot be taken into account by way of mitigation.[15] The Court of Appeal in *Zhang v R* recently spoke of the relevance of addiction to the sentencing process and moral culpability of the offender.[16] Addicts may use their substance abuse as a coping mechanism for childhood trauma and in response to developmental difficulties.[17] Pro-social tendencies may be overwhelmed by dependence, calling into question the effectiveness of deterrence in much the same way as mental health issues do.[18] In addition, addiction engages the sentencing purpose of assisting an offender's rehabilitation and reintegration. But these comments are made in the context of methamphetamine addiction, although similar considerations can apply to alcoholism.[19]

[23] You have expressed a desire to get your alcohol issues under control by attending a residential rehabilitative programme and have self-referred to alcohol counselling services in the past. But the Court in *Zhang* also said that any discount for addiction should be based on persuasive evidence, as opposed to mere self-reporting, and the onus of proof lies on the defendant to establish the extent and effect of addiction.[20] In this case there is insufficient evidence to demonstrate our addiction was causative of the offending. So addiction by itself cannot justify a separate discount. But it is still relevant in the sense that it provides context for other potentially mitigating factors and gives insight into your offending.

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15 Sentencing Act 2002, s 9(3).
16 *Zhang v R*, above n 14.
17 At [145].
18 At [145].
19 See *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *Solicitor-General v Heta* [2018] NZHC 2453; and *Felise v R* [2020] NZCA 60.
20 At [148].

[24] The position is similar in relation to remorse. Tangible evidence of genuine remorse may justify a small discount in the range of five to eight per cent.[21] A difficulty in providing a discount for remorse is your actions immediately after the offending — your failure to stop and check on the victim and attempts to conceal the evidence.

[25] You did state in an interview with the pre-sentence report writer that you have no memory of the offending but acknowledged your actions have caused the victim's family hurt. You also made genuine attempts at restorative justice to own up to the actions and have reported a desire to "own up" to your actions and take responsibility. Restorative justice did not eventuate, however.

[26] I have stood back and considered the existence of cultural deprivation, alcoholism, and remorse collectively. As the Crown points out in its submissions, there is not really a strong link between systemic deprivation and the offending such to justify a separate discount. The Crown also submits there is little credit available to reflect diminished personal culpability due to your history of alcohol abuse because of your conviction history for similar alcohol-related offending. I have agreed that there should be no separate discount for alcoholism or cultural deprivation. The Crown acknowledge that some discount for remorse is possible, however.

[27] I consider some discount is warranted to collectively acknowledge remorse, your history of struggles with alcohol abuse, deprivation including because of your cultural background, and in recognition of rehabilitation potential.

[28] In the circumstances I consider a total discount for such factors of approximately 10 per cent is appropriate.

[29] You are also entitled to a full 25 per cent discount for the early entry of guilty plea.

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[21] See for example *McArthur v R* [2013] NZCA 600 at [13]–[14] and *Rowles v R* [2016] NZCA 208 at [18].

[30] Given the discounts just described I conclude that the end sentence should be four years eight months' imprisonment.

Disqualification

[31] The Crown submits a disqualification from driving for ten years from the date of sentencing is appropriate in light of your extensive history of driving-related offences. That amounts to a period of just over five years of disqualification following your release from prison.

[32] Section 124 of the Sentencing Act provides a court may order a period of disqualification from holding a driver licence where the commission of the offence was facilitated by the use of a motor vehicle.

[33] Recently in *Taiapa v R* the Court of Appeal discussed at some length the purpose and approach to imposing periods of disqualification following release from prison.[22] The Court emphasised the loss of a licence is a way of deterring the offender from similar offending and provides a means of protecting the community. But equally, the Court recognised that the inability to drive hinders the defendant's rehabilitation and reintegration and may offend the principle of imposing the least restrictive sentence appropriate in the circumstances.[23] In that case the Court of Appeal substituted a four year period of disqualification following release for one year's disqualification following release.

[34] The Crown has referred to a number of cases where long periods of disqualification were imposed for offenders with a significant history of driving convictions.[24] But in your case I question the value in a lengthy period of disqualification after release. Your criminal history shows that only rehabilitation will likely prevent re-offending. Previous sentences deterring your conduct have not been successful. The terrible consequences of your offending on this occasion may now lead you to take responsibility for your behaviour. Your future is in your hands. A

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22 *Taiapa v R* [2019] NZCA 524.

23 At [29], endorsing the comments of Dunningham J in *Mathias v New Zealand Police* [2016] NZHC 959.

24 *R v Thomas* [2018] NZHC 819; *Leaupepe v New Zealand Police* [2015] NZHC 1766; *R v Pora* [2015] NZHC 1104; and *R v Guest* [2013] NZHC 2432.

very long period of disqualification may hinder your reintegration following release from prison, in terms of obtaining employment or ability to attend rehabilitative courses or programmes. And the purposes of deterrence and denunciation are achieved by the imposition of the period of imprisonment without parole. If you fail, of course, the protection of the community may become a key consideration in any further issues before the Court.

[35] I consider a period of three year's disqualification following release from imprisonment is appropriate.

Sentence

[36] Mr Atkinson on the charge of manslaughter of Jeanette Gibbs, and the charge of driving with excess breath alcohol I sentence you to four years eight months' imprisonment, which given the three strikes regime is to be served without parole. I also impose three years' disqualification from driving following release from imprisonment.

[37] Please stand down.

Cooke J

Solicitors:
Wilkinson-Smith Lawyers, Whanganui for the Crown
D Goodlet, Whanganui for the Defendant