IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

I TE KŌTI MATUA O AOTEAROA
TŪRANGANUI-A-KIWA ROHE

CRI-2020-016-1659
[2020] NZHC 3145

THE QUEEN

v

MERI HOANA GRACE

Hearing:	27 November 2020
Counsel:	C R Walker for Crown D D Rishworth for defendant
Sentence:	27 November 2020

SENTENCING NOTES OF DOBSON J

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[1] Ms Grace, I have to sentence you this afternoon on convictions for driving with excess blood alcohol causing death, driving with excess blood alcohol causing injury and driving while disqualified. The events in question caused the death of your four year old son, Tipene. There is quite a wide gap between the sentence urged on me by the Crown and that submitted as adequate by Mr Rishworth. Uppermost in my mind in assessing the matter is that whatever sentence I impose will be less weighty than the burden of knowing you caused the death of Tipene.

Facts of the offending

[2] In March this year, you were living in Ruatoria with Tipene. On 5 March 2020, you picked him up from school at around 2.30 pm, purchased liquor from a local store and had a drinking session with members of your whānau. That evening, you decided

to drive to Gisborne to visit your previous partner. You took with you your aunt, Ms Aupouri, one of those with whom you had been drinking. The trip from Ruatoria to Gisborne is approximately 130 kilometres.

[3] You placed little Tipene in the back seat in a half booster seat, but without restraining him with a seatbelt. Neither you nor your aunt wore seatbelts in the front seat because they had been chewed by your dog.

[4] You set off from Ruatoria at about 8.15 pm and by about 10.00 pm were in the Whangara area on State Highway 35, about 20 or 30 minutes short of Gisborne.

[5] The reconstruction by the Police serious crash unit of what happened suggests that you fell asleep at the wheel, with your car veering off the road at a relatively gentle angle and with no indication that you braked or attempted to steer the car back onto the road. The car hit a grassed culvert, was launched into the air and tumbled across a grassy bank. All three occupants were, at some point, thrown out of the vehicle. Sadly, the vehicle landed on top of Tipene who died at the scene. Your aunt received a broken ankle and four broken ribs, but she describes these in her victim impact statement as "nothing too serious".

[6] The car had not had a current warrant of fitness for some time and you were driving without a current licence, having been disqualified from driving for driving with excess breath alcohol in October 2019.

[7] Two victim impact statements have been filed with the Court. One from your aunt who was in the car with you, and one from your ex-partner who was Tipene's father. He reports missing Tipene terribly and he is angry because of that. However, neither of them wish to see you suffer any more than is necessary by way of punishment, and your ex-partner in particular hopes you get a sentence that gives you the best chance of an improved future.

[8] The more serious charges were laid under s 61(1)(b) of the Land Transport Act 1998 and they carry maximum penalties of 10 years' imprisonment where death has ensued and five years' imprisonment where injury has ensued.

The starting point

[9] I have to deal first with the relative seriousness of the offending. The Crown has related it to cases it suggests are comparable to propose a starting point of five years' imprisonment.

[10] On your behalf, Mr Rishworth disputes that the cases the Crown relies on are comparable, and he has put other cases to me which support his submission that the starting point of three years' imprisonment would be appropriate, before considering personal factors that might entitle you to a reduction from that starting point.

[11] I will attach an appendix to the notes of this sentencing with brief summaries of the cases that I have considered to be most useful comparisons to the circumstances of your offending. I have been mindful that the Court of Appeal has cautioned against trying to find a case where the relative seriousness is exactly the same, given that so much depends on the particular circumstances in each case of offending.[1] Nonetheless, in that case the Court of Appeal provides guidance as to the approach and the factors that we have to take into account in ranking the seriousness.

[12] I cannot accept all the aspects Mr Rishworth has urged on me to reduce the relative seriousness of the offending. This was appalling risk-taking, not entirely I suspect influenced by the level of alcohol you had consumed, and such conduct has to be, and is by the Court, denounced and deterred. So that is an influence on the starting point I have to set.

[13] In the end, I have set a starting point of four years' imprisonment. That is reached, giving relatively modest weight to your recent conviction for excess breath alcohol. In other cases, such a demonstration that a first sentencing like that has not taught you the lesson would actually add considerable weight to the starting point. I have not done so because I treat your willingness to re-offend as symptomatic of the poor frame of mind and poor state that your life was in at the time.

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1 *Gacitua v R* [2013] NZCA 234 at [22].

[14] You will have heard my debate with Mr Walker as to the point at which I take into account the tragic consequence of the death of Tipene, and although my analysis has done it both ways, I am persuaded that I should follow the Crown's suggestion as to how I take into account the other horrible punishment that has been imposed on you by Tipene's death. So I come to that at the second stage and the starting point of four years' imprisonment does not include any concession that you have suffered that other punishment.

Personal circumstances

[15] I have had the advantage of a thorough pre-sentence report for which I am grateful, a cultural report from Patricia White provided under s 27 of the Sentencing Act 2002, together with reports from a social worker and a mentor working with your iwi in Ruatoria. As Mr Rishworth has submitted, I accept that in terms of the s 27 report, the causal connection between the causes of strife in your life and this offending is made out so it is valid to have regard to its content.

[16] You have had, Ms Grace, a number of significant setbacks in your life, and it is to your credit that you do not blame them for your offending. The death of your sister who you were close to and who died in 2002 aged 16 in a crash impacted your mental well-being badly. You have been in an extremely violent domestic relationship that has caused numerous material physical injuries and, I discern, longer-lasting mental health damage in terms of low mood and low self-esteem. The combination of pressures in your life have meant that there have been times when you have been less than conscientious with the insulin treatment for a diabetic condition, and I understand that has caused at least one hospitalisation.

[17] I sense that the deep shame apparent from the reports from causing Tipene's death is made even worse by the fact that your trip to Gisborne on the night in question was for an attempt to once again see the highly abusive partner who had caused so much grief for you over a period of years.

[18] The cultural report and other letters about your condition refer to the concept of whakamā, being something more than a deep sense of shame and extending to

embarrassment for your whānau and uncertainty about your place within your whānau.[2]

[19] Despite these setbacks and the pressure on your mental well-being, you are also reported as being positive about your future, and keen to make progress in lessening your dependence on alcohol and getting a worthwhile job for yourself. You also enjoy very strong support from pro-social whānau and that is an important factor in assessing your personal circumstances. I am satisfied that yours is a personal predicament that justifies a compassionate sentencing approach, to the extent that is possible.

[20] I consider your remorse for the death of your son and the on-going grief, which is as difficult a punishment as any the Court could impose, justifies its own reduction of 20 per cent from the starting point. In addition, I consider your prospects of rehabilitation in light of the adversity you have suffered, quite apart from this car accident, justify a further 10 per cent reduction.

[21] You entered guilty pleas on the charges at the first possible opportunity and the Crown agrees with Mr Rishworth that that justifies a separate discount of 25 per cent.

[22] Applying the new sentencing approach as set out in *Moses v R*,[3] I therefore get to total discounts of 55 per cent from the starting point. Now, I don't expect you to know but that is a very substantial extent of discount compared to the way sentences are often structured, and I have had to reflect on that. But it is not unprecedented and I am satisfied it is justified in your case.

Home detention as the appropriate substitute

[23] So, the starting point of four years or 48 months, less 55 per cent discount for the mitigating factors I have analysed, leaves an end sentence of what would be a little bit more than 21 months' imprisonment. Once the end sentence is under two years,

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2 See *Henare v R* [2020] NZCA 188 at [26], where the Court of Appeal observed that "in an appropriate future case, the courts may be able to explore the possibility of treating whakamā as a unique mitigating factor when sentencing a Māori defendant".

3 *Moses v R* [2020] NZCA 296 at [46].

Mr Rishworth urges that I should substitute that short term of imprisonment with a sentence of home detention. The Crown opposes that course and on principled bases. First, because the Crown has submitted the end sentence ought to be more than two years in any event, which is the upper limit at which substitution with a sentence of home detention can occur. Secondly, that even if the end sentence is less than two years, substituting it with home detention would, on the Crown view, send an inadequate signal for deterrence and denunciation purposes, given the relative seriousness of the driving conduct involved.

[24] I am satisfied that a relatively lengthy period of home detention can indeed be sufficient in terms of deterrence and denunciation to mark the seriousness of this conduct, once the very substantial mitigating circumstances of you as the offender are taken into account. As I have said, your predicament cries out for a compassionate response with a view to making as much as possible of the prospects for rehabilitation.

[25] I note that the pre-sentence report even recommends intensive supervision as your sentence, essentially because it would free you of the restrictions imposed by a 24/7 curfew at one address, making it easier for you to undertake rehabilitative initiatives. That would be two steps down the hierarchy of relative seriousness of sentences, and I do not consider it would meet the purposes and principles of the Sentencing Act.

[26] I did have reservations about the effectiveness of your serving a sentence of home detention in Ruatoria. The proposed address in Ruatoria is one where you would reside alone and in a community of that type, without the ability to drive, the sentence of home detention is likely to impose quite substantial pressures of its own. For those who think home detention is an easy sentence, the Court has lots of sad cases where people have been unable to complete sentences of home detention because the discipline required is greater than they appreciated. I am grateful to the Probation Service representative in Court today who has assured me that the sentence can be adequately monitored and it reinforces my view that it becomes the appropriate one.

[27] The positive aspect of being in Ruatoria is that you would be relatively close to your parents who are caring for your older child, and who I understand to be willing

and able to provide support for you. In addition, one of those mentoring you who have provided a letter of support, Ms Dewes, is based in Ruatoria and appears to be available to continue mentoring you.

[28] I am therefore satisfied that what would otherwise be a sentence of 21 months' imprisonment is to be substituted with one of 10 months' home detention. The conditions on which that is to be served are those that were proposed by the Probation officer who prepared the suitability assessment, namely that you are:

(a) to travel directly from the court to the nominated address in Ruatoria and await the arrival of a field officer;

(b) to remain at that address 24 hours a day, seven days a week unless issued an approved absence from your Probation officer;

(c) to reside at that address and not change address without the approval of your Probation officer;

(d) to attend an assessment for a departmental programme and, if the assessment confirms, undertake and complete a departmental programme to the satisfaction of your Probation officer;

(e) to undertake an assessment for and complete an alcohol and drug programme;

(f) to undertake trauma counselling to the satisfaction of your Probation officer.

[29] These conditions are to remain in force for six months after completion of the sentence of home detention.

[30] You will have heard my dialogue about disqualification. I consider that you must have a period of disqualification. I will make it for a period of 12 months from today. I appreciate that that will make the sentence of home detention harder but that

is evening the scales in terms of what is required to reflect the seriousness of your driving conduct.

[31] This is, Ms Grace, a lenient sentence for the very serious driving offending to which you have pleaded guilty. It is to give you a chance and I urge you to take it. So that is the sentence I impose on the two charges under s 61 of the Land Transport Act. On the driving whilst disqualified, I convict and discharge you. I prohibit you from obtaining or holding a driver licence for a period of 12 months from today's date.[4]

Dobson J

Solicitors:
Crown Solicitor, Gisborne
Rishworth, Wall & Mathieson, Gisborne

[4] Section 61(3AA)(b) of the Land Transport Act 1998 dictates that if a person is convicted of an offence under subs (1) or (2) of s 60 that causes the death of a person (as in this case), the Court must order the person to be disqualified from holding or obtaining a driver licence for one year or more.

Appendix of potentially comparable cases on starting point

Skipper v R [2017] NZCA 399

The appellant was charged under s 61(2)(b) of the Land Transport Act (causing death or bodily injury while in charge of a motor vehicle while blood contained evidence of the use of a Class A drug, specifically a low level of methamphetamine) after she lost control of her car and it left the road. Her two-year-old daughter, who had been buckled into a child seat but had undone the buckle during the journey, was killed. The appellant and her 11-year old daughter were not injured. She was an unlicensed driver and two years earlier had been prohibited from driving. The Court of Appeal held that the sentence of three years in this case was excessive; instead a starting point of two years was appropriate to reflect the appellant's moderate culpability on the one hand and the grave consequence (death of a child) on the other.[5] The Court considered that the appellant ought to have been granted a 30 per cent discount for her genuine remorse, loss of her child and lack of previous driving offences,[6] leading to a final sentence of 17 months' imprisonment, commuted to home detention.[7]

McCullough v Police [2013] NZHC 279

The appellant was charged under s 62(1)(a) of the Land Transport Act; causing death and injury while under the influence of alcohol to such an extent that she was incapable of having proper control of the vehicle. After consuming alcohol at a party, the appellant drove home (with her vehicle being unregistered, unwarranted and in breach of her restricted licence) with three passengers, and lost control while driving at 100 kilometres an hour, killing one passenger and injuring another.[8] The sentencing Judge identified the aggravating factors as the blood alcohol reading (twice the legal limit – 160 milligrams of alcohol per 100 millilitres of blood), breach of licence conditions, the vehicle being unwarranted and unregistered and the consequences of the driving.[9] The mitigating factors were identified as this being an isolated incident, the driver's otherwise unblemished record, her remorse, and her closeness to the deceased.[10] A starting point of three and a half years' imprisonment was adopted, reduced to an end sentence of two years due to discounts for youth, remorse and guilty pleas. This was upheld on appeal, with Brewer J finding that the sentencing Judge did not err in deciding against home detention.[11]

Edmonds v R [2020] NZHC 662

The appellant pleaded guilty to a charge of driving a motor vehicle causing death while under the influence of alcohol to such an extent as to be incapable of having proper control of her vehicle, and was sentenced to one year and nine months' imprisonment

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5 At [32].
6 At [34].
7 At [35]–[36].
8 At [3].
9 At [15].
10 At [16].
11 At [28] and [34].

by the sentencing Judge in the District Court. The appellant had consumed alcohol at a rugby club and left with her friend at night. Upon approaching a right-hand bend with an advised speed limit of 65 kilometres per hour, her car went towards the left-hand side of the road and onto the gravel shoulder. She attempted to regain control of the car by steering sharply to the right, causing the car to cross both lanes of the road and down a bank, rolling and killing the passenger. The appellant was found to be almost five times over the legal limit at the time (approximately 245 milligrams of alcohol per 100 millilitres of blood) and had several previous driving offences, including a past disqualification (although these were not relevantly recent).[12] On appeal, Brewer J found that the sentencing Judge did not err in the sentence imposed, noting that although the starting point of three and a half years was "somewhat high", the discount of one year and 11 months (five months for remorse, three months for health difficulties, three months for insight into offending), a 25 per cent for guilty plea and a final sentence of one year nine months was appropriate and that there was no error in not commuting the sentence of imprisonment for home detention.[13]

***Leaupepe v R* [2016] NZCA 228**

The appellant was charged with driving with excess blood alcohol causing the death of his passenger when he lost control of his vehicle when rounding a corner near Bulls, causing the car to hit a fence. His passenger died at the scene.[14] His blood alcohol reading was 126 milligrams of alcohol per 100 millilitres of blood, his vehicle was travelling between 136 and 164 kilometres per hour in a 100 kilometre per hour zone, and he had two previous convictions for driving with excess blood alcohol. These were all considered aggravating factors.[15] In the District Court, the sentencing Judge had adopted a starting point of three years' imprisonment, reduced to two years for an early guilty plea, remorse and participation in restorative justice.[16] This was upheld in the High Court and Court of Appeal.

***Tugu v Police* [2020] NZHC 452**

The appellant (a seasonal employee from Vanuatu working at an orchard) pleaded guilty to two charges of drink driving causing death, and was sentenced in the District Court to one year and 10 months' imprisonment. In the early hours of the morning, the appellant was driving his friends home after a night of drinking (the appellant's blood alcohol level was 141 milligrams per 100 millilitres). None of the passengers were wearing seatbelts. During the drive, an argument broke out between the appellant and one of the passengers in the back, causing him to lose control of the vehicle, veering off the road and into a garage, killing both passengers in the back seats.[17] The District Court Judge imposed a starting point of three and a half years' imprisonment based on the high level of alcohol consumed and the fact that the appellant left the scene after the crash.[18] This was reduced by 12 months due to significant remorse,

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12 At [5]–[6].
13 At [8]–[9] and [15].
14 At [3].
15 At [5].
16 At [5].
17 At [2].
18 At [7].

prior good character and a customary restorative justice ceremony known as "holo" with the families of the victims, in addition to a 25 per cent discount for a guilty plea.[19] The key factor influencing the sentencing Judge to decline a sentence of home detention was that it would result in the appellant's immediate deportation to Vanuatu, which would defeat the purpose of the sentence.[20] This was overturned on appeal, with Duffy J finding that there were "powerful factors" suggesting in favour of home detention, including the lack of prior convictions, the good character of the appellant, prison being disproportionately severe for the appellant as a foreign national, and his significant level of remorse.[21]

***Williams v Police* [2014] NZHC 2666**

The appellant was charged with causing death while in charge of a motor vehicle with an excess blood alcohol level and was sentenced to 18 months' imprisonment. The appellant had been drinking during the evening and met a young woman who lived near to him. He offered her a ride home, contrary to the terms of his learner's licence. As the pair were driving home, the appellant was momentarily distracted while speaking to his passenger and veered onto the verge while approaching a moderate bend in the road. He over-corrected the steering with the result that the vehicle crossed the road, crashed through a wire fence and rolled down a bank. The passenger was thrown from the vehicle and killed. The appellant was found to have a blood alcohol level of 110 milligrams of alcohol per 100 millilitres of blood (although there is a "zero tolerance" rule for drivers on a learner's licence). The sentencing Judge applied a starting point of two years and nine months (which the High Court Judge on appeal accepted as being "perhaps stern") based on the starting point that had been set in *McMillan v Police*, making it slightly lower due to the lower blood alcohol level.[22] The starting point was reduced by six months (or 20 per cent) for the appellant's "deep and genuine remorse" and restorative justice processes, a further discount of three months for the appellant's good character and lack of previous convictions, and 25 per cent for an early guilty plea, leading to an end sentence of 18 months' imprisonment.[23] On appeal, MacKenzie J found that the sentencing Judge erred in not imposing home detention: although deterrence and denunciation were important, the Court should also impose the least restrictive outcome that is appropriate in the circumstances, and a sentence of imprisonment could cause the appellant to enter a perpetual cycle within the judicial system, justifying home detention.[24]

***R v Tawa* [2019] NZHC 95**

The appellant was found guilty of the manslaughter of his brother in a driving incident. The appellant had been drinking with his brother and his friends at a residential address until he decided to leave in his car after his brother and others began consuming methamphetamine. The appellant's brother had begun to abuse the appellant, and attacked the appellant as he left the address, hanging on to the bumper of the car while

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19 At [8].
20 At [10].
21 At [24].
22 At [8].
23 At [8].
24 At [16].

the appellant drove away. He fell off when the appellant reached a "T" intersection, with the appellant turning around at that intersection and down the side of the road from which he came, running over his brother and killing him.[25] Lang J adopted a starting point of four years, noting that he could not be satisfied beyond reasonable doubt that the defendant knew that he had struck his brother.[26] In terms of mitigating factors, a 20 per cent discount was granted for the defendant's previous good character, youth, and likelihood of rehabilitation.[27] A five per cent discount was given for remorse, and 15 per cent for a guilty plea.[28] This led to an end sentence of two years' imprisonment. The Judge commuted the sentence to one of home detention. He observed :[29]

> On this issue the answer is obvious. It would be pointless to send you to prison and, as the pre-sentence report points out, to thereby expose you to sinister criminal influences. Rather, you need to be returned to the support of your whanau so they can assist you to come to terms with what you have done. You can also assist them to atone for what you have done through the appropriate expressions of remorse and by providing assistance to others in the same way that you have assisted them in the past. I consider a sentence of home detention to not only be the least restrictive outcome, but also the outcome that will best promote the prospect of rehabilitation so you can remain a valuable member of our community.

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25 At [4]–[6].
26 At [19]; [22].
27 At [26].
28 At [27]; [29].
29 At [30].