

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

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

**CRI-2017-004-012803
[2019] NZHC 1532**

THE QUEEN

v

FARSHAD BAHADORI-ESFAHANI

Hearing: 2 July 2019

Appearances: E Smith for the Crown
M Ryan for the Defendant

Sentencing: 2 July 2019

SENTENCING NOTES OF WOOLFORD J

Solicitors: Meredith Connell (Office of the Crown Solicitor), Auckland

Counsel: M Ryan, Auckland

[1] Mr Farshad Bahadori-Esfehani, you appear for sentence today having pleaded guilty to:

- (a) One charge of dangerous driving causing death;¹
- (b) One charge of causing death while driving with an excess breath alcohol proportion;²
- (c) One charge of failing to stop or ascertain injury or death after crash.³

[2] The Crown submits that a starting point of five years' imprisonment for the lead charge is appropriate, with an uplift of 18 months for the associated charges. Accordingly, the Crown submits that the appropriate starting point is in the vicinity of six years and six months' imprisonment with the following adjustments:

- (a) A guilty plea discount;
- (b) A discount for other personal mitigating factors.

[3] The end sentence put forward by the Crown is in the vicinity of five years and six months' imprisonment.

[4] Your counsel submits that a starting point of four years' imprisonment for the lead charge is appropriate, with a small uplift for aggravating factors and associated offending. Your counsel submits the following adjustments should apply:

- (a) A 25 per cent guilty plea discount;
- (b) A discount for youth, lack of prior convictions, remorse and engagement in restorative justice.

¹ Land Transport Act 1988, s 36AA. The maximum penalty is 10 years imprisonment or \$20,000 fine, and at least 12 months' disqualification from driving.

² Land Transport Act 1988, ss 61(1)(a) and 61(3AA). The maximum penalty is 10 years imprisonment or \$20,000 fine, and at least 12 months' disqualification from driving.

³ Land Transport Act 1988, s 36(1)(c). The maximum penalty is 5 years imprisonment or a \$20,000 fine, and at least 12 months' disqualification from driving.

[5] The end sentence put forward by your counsel is twelve months' home detention and 200 hours of community work.

Agreed summary of facts

[6] On 23 December 2017 at around 4.30 am, you were driving a black Mercedes-Benz motor vehicle after having consumed alcohol throughout the evening. There was a passenger in your vehicle. You drove the vehicle into Chancery Carpark on Bacons Lane. You collided with a pay station, causing minor damage. You were initially not permitted to enter the carpark. An altercation with security staff followed. Police were called. You drove your vehicle to the exit barrier and were permitted to leave the carpark. Police called for you to stop, but you did not.

[7] Leaving the carpark, you drove onto Kitchener Street, Waterloo Quadrant, and then Symonds Street. Police analysis has concluded your vehicle was travelling at an average speed of 87 kilometres per hour between Waterloo Quadrant and the crash scene. You drove through an amber light and three red lights on Symonds Street, although CCTV footage showed that your brake lights were activated as the vehicle approached intersections.

[8] At the intersection of Symonds Street and Alex Evans Drive, which you entered by driving through a red light, your vehicle collided with a car that had lawfully entered the intersection. Police analysis established that your vehicle was travelling between 61 and 74 kilometres per hour on impact.

[9] Your vehicle hit the other vehicle at the driver's door. The driver, Syed Abdul Raheem Fahad, died at the scene from severe blunt force trauma to the chest. His vehicle had been stationary with the brake on four seconds prior to impact, before moving into the intersection. It had accelerated to 32 kilometres per hour when it was struck and shunted approximately ten metres sideways. Both vehicles were severely damaged.

[10] You and your associate exited your vehicle. Your associate received bruising consistent with seatbelt abrasion. You said to members of the public, "Don't call the cops", "Can you call me a taxi?" and "I hope that guy has insurance". At no point did

you or your associate check Mr Syed's condition. You left the scene before emergency services arrived. You were located by a police helicopter on Newton Road.

[11] You were taken to the Auckland Police Station and had your breath alcohol tested. You blew 908 micrograms of alcohol per litre of breath (the legal limit to drive is 250 micrograms of alcohol per litre per breath).

[12] You were charged on 26 December 2017 with causing bodily injury (to your passenger), causing death with an excessive breath alcohol proportion and failing to stop and ascertain injury. The Crown, however, laid a charge of manslaughter on 1 May 2018 in advance of a case review hearing on 10 May 2018. The charge of manslaughter was, however, withdrawn on 2 May 2019 and substituted with a charge of dangerous driving causing death. The charge of causing bodily injury to your passenger was also withdrawn because only minor bruising was caused. You entered guilty pleas to the three remaining charges on 9 May 2019 in advance of a trial date of 13 May 2019.

Sentencing Approach

[13] The Sentencing Act 2002 sets out the purposes and principles of sentencing that must be considered by the Court. A starting point is based on the offending and adjusted to reflect aggravating or mitigating features personal to the offender.⁴

[14] There is no tariff case for reckless or dangerous driving causing death. A relevant list of aggravating and mitigating factors is set out *Gacitua v R*.⁵ The Court of Appeal recently stressed that sentencing is very fact specific and that a sentencing Judge should not simply tick off these factors, but use them as a guide.⁶

[15] Section 36AA of the Land Transport Act 1998 provides that the Court must order that the defendant be disqualified from holding or obtaining a driver's licence

⁴ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [73].

⁵ *Gacitua v R* [2013] NZCA 234 at [23], discussing the updated English test in *R v Cooksley* [2003] 3 All ER 40 (CA). The first version of this list in New Zealand was set out in *R v Skerrett* CA236/86, 9 December 1986.

⁶ *Pollard v R* [2018] NZCA 244 at [25].

for one year or more, unless there are special reasons relating to the offence under s 81.

Submissions

Crown Submissions

[16] The Crown submits that the primary aggravating feature in this case is the extent of the harm caused,⁷ although by definition, offences of this type always give rise to extremely serious harm.⁸ The Crown submits the aggravating features present in this case were:

- (a) Consumption of drugs or alcohol. The Crown notes that this factor forms the basis of the associated offending, so this should only count as an aggravating feature if the Court declines to give an uplift for the associated offending.
- (b) Prolonged, persistent and deliberate course of very bad driving.
- (c) Other offences committed at the same time.
- (d) Behaviour at the scene.
- (e) Causing death in the course of dangerous driving in an attempt to avoid detection or apprehension.

[17] The Crown is not aware of any mitigating factors relating to the offending.

[18] The Crown referred to the comments in *Gacitua* that a consequence of the 2011 amendments to serious charges under the Land Transport Act was “to permit the Court to impose sentences in cases which would not previously have been possible without a charge of manslaughter.”⁹ On this basis, the Court held that a starting point of five years for offending that involved five aggravating factors was not manifestly

⁷ Sentencing Act 2002, s 9(1)(d).

⁸ *Gacitua v R* [2013] NZCA 234 at [24].

⁹ At [22].

excessive.¹⁰ The Crown submits that the following authorities are useful in determining the appropriate starting point in this case. The Crown referred to *Richards v R*,¹¹ the *R v Lawson*,¹² and *Scott v R*.¹³

[19] By comparison to those cases, the Crown submits that the following aggravating features are present in this case:

- (a) You were driving in the course of attempting to avoid detection or apprehension, after failing to stop for police at the Chancery Carpark;
- (b) You were engaged in a prolonged, persistent and deliberate course of very bad driving by deliberately running through three red lights and travelling at an average speed of 87 kilometres per hour in a 50-kilometre zone;
- (c) You told members of the public at the scene not to call the police and showed a lack of care for Mr Syed, saying that he hoped he had insurance. You fled the scene before emergency services arrived.

[20] You had a breath alcohol level of 908 micrograms per litre of breath and did not check on the victim, but the Crown submits these factors should not be counted if they form the basis of an uplift for associated offending.

[21] The Crown submits that your driving was worse than *Scott*, less serious than *Lawson*, and slightly less serious than *Richards*. The prolonged bad driving was worse than *Scott*, according to the Crown, because of the combination of speed and running red lights, but less serious than the extreme speeds and dangerous manoeuvres in *Lawson*. The bad driving was on a similar level to *Richards*, according to the Crown.

[22] The Crown submits that a starting point of five years' imprisonment on the charge of dangerous driving causing death, is appropriate. The Crown further submits

¹⁰ At [44].

¹¹ *Richards v R* [2017] NZCA 232.

¹² *R v Lawson* [2017] NZHC 1051.

¹³ *Scott v R* [2014] NZHC 1598.

that 18 months imprisonment is an appropriate uplift for the associated offending. The starting point would have been higher if alcohol consumption was included as an aggravating factor. Further, the Crown submits that an uplift of 20 months is appropriate given the third charge of failing to stop or ascertain injury or death, which was on the serious end of that offending given the severe damage to both vehicles.

[23] Accordingly, the Crown submits that the appropriate starting point is in the vicinity of six years and a half year's imprisonment.

Adjusting the starting point

[24] The Crown acknowledges that you have no previous convictions. You were 20 years old at the time of the offending. The Crown submits, however, that a discount for youth should be limited because of the seriousness of the offending and the public interest in discouraging dangerous driving, especially the factors that lead young people to offend also cause concern about public safety.¹⁴ The Crown accepts that modest discounts may be available for personal mitigating factors and anticipates the defence will suggest additional factors.

[25] Pursuant to *Hessell v R*, the Crown considered your circumstances in which your guilty pleas were entered.¹⁵ The Crown accepts that the preparedness of the Crown to withdraw the manslaughter charge should be considered when assessing the timing of the guilty plea. However, the Crown submits that there was no suggestion that you were prepared to plead guilty on any basis until March 2019. The Crown suggests that a modest discount of 15 per cent is appropriate taking all factors in account.

Supplementary orders

[26] The Crown submits that under s 81 of the Land Transport Act 1998, you should be disqualified from holding or obtaining a driver's licence for perhaps five years, given the seriousness of the offending.

¹⁴ *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [84]; *Gacitua v R* [2013] NZCA 234 at [44].

¹⁵ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [74].

Defence Submissions

[27] Your counsel has emphasized that s 8(g) of the Sentencing Act 2002 requires the Court to impose the least restrictive outcome that is appropriate in the circumstances.

[28] Counsel submits that the *Gacitua* aggravating features that relate to this offending are:

- (a) Prolonged, persistent and deliberate course of very bad driving;
- (b) Behaviour at the scene;
- (c) Causing death in the course of dangerous driving in an attempt to avoid detection or apprehension.

[29] Counsel submits that the *Gacitua* aggravating factors that relate to the associated offending are:

- (a) Consumption of drugs or alcohol;
- (b) Other offences committed at the same time.

[30] Counsel referred to case law to indicate an appropriate starting point. In particular your counsel referred to the cases of *Roberts v New Zealand Police*¹⁶ and *McMillan v Police*¹⁷ and submitted that the three aggravating features in this case warrant a higher starting point than *McMillan* (which had one aggravating factor) and lower than *Gacitua* (which had five). Counsel submits that the closest case is *Roberts*, but the starting point in that case was considered high. Therefore, your counsel submits that a starting point of four years imprisonment is appropriate.

[31] Counsel submits that a 12-month uplift for the associated offending is appropriate in the circumstances. If the alcohol consumption and failure to ascertain

¹⁶ *Roberts v New Zealand Police* [2013] NZHC 2233.

¹⁷ *McMillan v Police* [2014] NZHC 150 at [49].

injury was considered aggravating factors in the lead offending, the circumstances would be similar to *Gacitua* with five aggravating factors. Therefore, counsel submits that an overall start point of five years' imprisonment is appropriate.

Adjusting the starting point

[32] Counsel agrees with the Crown that there is no aggravating factors personal to you in this case, but pointed to the following mitigating factors:

- (a) Your youth;
- (b) Your clean driving record and lack of any previous convictions;
- (c) You have shown genuine remorse. You have taken measures to stop your alcohol consumption and willingly participated in rehabilitative programmes. You demonstrated your remorse to the pre-sentence report writer, saying the victim "was an innocent man who didn't deserve that" and accepting responsibility. You accepted that your 'unhealthy drinking habits' contributed to the offending. The report writer assessed you as at a low risk of reoffending.

[33] Counsel submits that a discount of 12 months or 20 per cent is appropriate for these mitigating factors.

[34] Counsel further submits that your timing for entering a guilty plea was directly related to the Crown's willingness to withdraw the manslaughter charge. Counsel submits, therefore, that a 25 per cent discount was appropriate for your guilty plea.

[35] Further, counsel notes that although the pre-sentence report recommends a sentence of imprisonment, it also suggests a sentence of home detention is suitable. This would not be a common outcome for this type of offending, but counsel submits there are rare qualifying circumstances. Counsel submits an end sentence of 12 months home detention and 200 hours community work is appropriate.

Supplementary orders

[36] Counsel submits that a period of disqualification not exceeding four years is appropriate.¹⁸

Analysis

Setting the starting point

[37] The Court then has to set a starting point for this offending. Bearing in mind the submissions of both Crown and defence, it is my view that the relevant aggravating factors in this case are:

- (a) You were driving at greatly excessive speed, in the city centre;
- (b) You caused death in the course of dangerous driving in an attempt to avoid detection or apprehension. You did not stop after driving into the pay station at Chancery carpark and you did not stop for the police;
- (c) You were engaged in a prolonged, persistent and deliberate course of very bad driving. You failed to stop for a number of red lights and entered the intersection dangerously.

[38] I will not consider your alcohol consumption or the fact that you failed to check on the victim as aggravating factors for the lead charge. These two factors form the basis of your associated offending, which will be separately considered.

[39] This case can be compared to *McMillan v Police*, which attracted a three and a half year starting point.¹⁹ That case did not involve excessive speed, but the consequences were more severe, as one person was killed, a five-year-old child received a severe head injury and a seven-year-old child also received severe injuries.

[40] As well as the case law raised by the Crown and defence, other recent cases are useful for deciding on a fair starting point and, in that regard, I have given

¹⁸ As adopted in *Gacitua v R* [2013] NZCA 234 at [44].

¹⁹ *McMillan v Police* [2014] NZHC 150.

consideration to *R v Chaichumphon*,²⁰ *R v Griffiths*,²¹ *Police v Kearns*,²² and *Cao v Police*.²³

[41] In all the circumstances, I adopt a starting point of four and a half year's imprisonment on the lead charge.

Uplift for associated offending

[42] The charge of causing death while driving with an excess breath alcohol proportion is extremely serious, as your breath alcohol was 908 micrograms of alcohol per litre of breath. In that state you were immediately a danger to yourself, to your passenger, to pedestrians and obviously to the other drivers on the road. Your failure to stop or ascertain injury or death after the crash was also serious. You asked bystanders not to call the police and fled before emergency services could arrive.

[43] On this basis, I am of the view that an uplift of 12 months imprisonment on the starting point is appropriate. I therefore adopt an overall starting point of five and a half years' imprisonment.

Adjusting the starting point

[44] Both the Crown and defence counsel are agreed that there are no aggravating factors personal to you in this case.

Youth discount

[45] *Gacitua* referred to the aggravating and mitigating features set out in the English case of *Cooksley*.²⁴ An offender's age was only considered a mitigating factor where lack of driving experience had contributed to the commission of the offence.²⁵ It is obviously in the public interest to ensure that young people drive safely. Men below the age of 24 make up the majority of drivers affected by alcohol or drugs

²⁰ *R v Chaichumphon* [2018] NZDC 22948.

²¹ *R v Griffiths* [2018] NZHC 1104.

²² *Police v Kearns* [2017] NZDC 9319.

²³ *Cao v Police* [2015] NZHC 1793

²⁴ *Gacitua v R* [2013] NZCA 234 at [26], discussing the updated English test in *R v Cooksley* [2003] 3 All ER 40 (CA).

²⁵ *R v Cooksley* [2003] 3 All ER 40 (CA) at [15].

causing fatalities in New Zealand,²⁶ and drivers can obtain their restricted licence at 16 and a half years old. However, aside from a lack of driving experience, there are other reasons a person's youth affects their driving. There are neurological differences between young people and adults, which can make young people vulnerable to negative influences and more likely to act impulsively.²⁷ Further, it is easier for young people to be rehabilitated into their communities, and a prison sentence can have a more formative influence on their life.

[46] Other similar cases have awarded discounts for age:

- (a) In *R v Chaichumphon*, the driver was given a five-month deduction for his age (23) and personal background.²⁸
- (b) In *R v Griffiths*, the driver was given a 40 per cent discount for his age (18) and his psychological issues that inclined him to impulsive behaviour.²⁹ Toogood J said that the defendant's "behaviour in driving as recklessly as (he) did is a tragic hallmark of youth" and emphasized that young people have a greater capacity to be rehabilitated.³⁰

Remorse discount

[47] Remorse discounts have been discussed in *Hessell v R*.³¹

Remorse is not necessarily shown simply by pleading guilty. Sentencing judges are very much aware that remorse may well be no more than self pity of an accused for his or her predicament and will properly be sceptical about unsubstantiated claims that an offender is genuinely remorseful. But a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse. Where remorse is shown by the defendant in such a way, sentencing credit should properly be given from that for the plea.

[48] You have clearly shown genuine remorse. You have engaged in a restorative justice meeting with your mother, the victim's wife and a Mosque representative. You

²⁶ Ministry of Transport *Alcohol and Drugs Crash Facts* (2017) at 11.

²⁷ *Churchward v R* [2011] NZCA 531 at [77].

²⁸ *R v Chaichumphon* [2018] NZDC 22948 at [23].

²⁹ *R v Griffiths* [2018] NZHC 1104 at [30].

³⁰ At [27].

³¹ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64].

explained what happened, apologising, expressing your remorse and desire to improve your life, and agreeing to pay for the victim's car. The impact on his wife has, however, been devastating. You have, this morning, provided me with a handwritten letter in which you go into some detail about the level of remorse and the attitude that you now adopt, both to alcohol and fellow members of the community. I accept that your remorse is genuine.

Guilty plea discount

[49] The circumstances of the guilty plea have been discussed by both counsel. The plea can be considered early, as your willingness to enter the plea was affected by the change to the charges against you.

Lack of prior convictions

[50] The final mitigating factor is your lack of prior convictions and clean driving record. You are not a characteristically reckless driver.

[51] Overall, I consider that a discount of 33 per cent is appropriate considering your timely guilty plea, remorse, youth, lack of prior convictions and clear driving history. Accordingly, I sentence you to three years and eight months' imprisonment. At that level, the sentence does not make you eligible for home detention.

Supplementary orders

[52] Disqualification for four years is suitable considering the seriousness of the offence and so you are also disqualified from holding or obtaining a driver's licence for four years.

[53] Finally, in the restorative justice process you offered to pay \$12,000, being the cost of the victim's car. Accordingly, there will be an order in terms of s 32 of the Sentencing Act that you pay the sum of \$12,000 to Nishad Abedi within 28 days.

[54] You may stand down.

Woolford J