FAMILY VIOLENCE, CULTURAL APPROPRIATENESS AND TRUE REMORSE: HOW SHOULD RESTORATIVE JUSTICE FACTOR IN SENTENCING CONSIDERATIONS?

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Citation: *The Queen v Poarau* [2016] NZHC 443

Parties: The Queen (Appellant(s)); Mr Poarau (Respondent)

Court: High Court of New Zealand; one judge sitting

Date: 15 March 2016

Judge: Brewer J

I. SUMMARY

This decision of the New Zealand High Court handed down on 15 March 2016 concerns the role of restorative justice in the context of domestic violence. In this case, Mr Poarau, an enraged father punched and kicked his teenage daughter and beat her with a spiked wooden plank. The attack left her battered, but she sustained no permanent injuries. Mr Poarau pled guilty to wounding with intent to cause her grievous bodily harm and assault with intent to injure. At trial in the District Court, Mr Poarau was sentenced to 9 months home detention, after taking into account a number of mitigating factors. The Crown appealed to the High Court of New Zealand on the basis that the sentence was manifestly inadequate and that the reductions for mitigating factors were disproportionate, duplicative and incorrect.

II. FACTS

The Poaraus are a Cook Islander family living in New Zealand. On the night of 9 April 2015, Mr Poarau discovered that his 18 year old daughter had been engaged in an intimate relationship with her uncle (Mr Poarau's brother). Mr Poarau and his daughter were living together at the time of the assault. He confronted his daughter at the backdoor steps of their house, before punching her, grabbing her by the hair and slapping her face several times. He then told her not to move, and retrieved a wooden plank with nails protruding from one end. He struck her head with the plank three times-before the plank broke in half. He continued to strike her head with the broken plank, resulting in a large gash and significant bleeding.

Following the assault, Mr Poarau instructed the victim to go to his bedroom, where she subsequently curled up in a ball on the floor. He then began to kick her in the head, and, when she tried to protect herself with her arms, he kicked her arms. Mr Poarau returned to the

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backyard to hose down his daughter and wash her blood away. After he had washed away his daughter's blood, Mr Poarau slapped her on the head and said that she was lucky that he had not retrieved a knife to stab her.

Following the assault, his daughter required hospital treatment for a large head wound requiring 5 stitches, a swollen lip, lacerations to her mouth and tongue and a sore neck. According to her victim impact statement, she suffered no permanent injuries and was "back to normal" within a week or two.

III. THE DISTRICT COURT JUDGMENT AND SENTENCING

On 7 October 2015, Mr Poarau was sentenced in the Rotorua District Court to nine months' home detention following a plea of guilty for wounding his daughter with intent to cause her grievous bodily harm and assaulting her with intent to injure. The charges carry maximum terms of imprisonment of 14 years imprisonment~~,~~ and 3 years respectively.

Judge Cooper of the District Court noted that while the victim's injuries did not carry any permanent effect, Mr Poarau had numerous prior convictions, some of which involved violent behaviour. The Judge granted EM bail to allow a restorative justice conference to proceed. Among other considerations, his Honour heard submissions from family members and the family's pastor about how the Cook Islands culture interpreted the seriousness of his daughter's relationship with her uncle. The Judge recorded that Mr Poarau apologised to his daughter and accepted full responsibility for his actions, and that his daughter had forgiven him. Notably, however, the pre-sentence report recommended a term of imprisonment and deemed home detention inappropriate in the circumstances of the case.

Aggravating factors were identified in accordance with the guideline judgment of *R v Taueki,* including: scale of the offending, use of a weapon, attacking the head, and the breach of trust in the familial relationship. As the injuries were only temporary and not significant, the Judge categorised the offending as a band one of *Taueki* and used the starting point of 3.5 years imprisonment. 6 months was added to account for Mr Poarau's previous convictions. Under s 8(i) of the Sentencing Act, 6 months were then removed due to the cultural context of the case. This Section provides that the Court "must take into account the offender's personal, family, whanau (extended family), community and cultural background in imposing a sentence…with a partly or wholly rehabilitative purpose". Another 6 months were removed due to the successful restorative justice outcome. The sentence was further reduced by one third to account for Mr Poarau's guilty plea and remorse. Another reduction of one month reflected the time spent by Mr Poarau on electronic bail. The final sentence was 1 year 11 months (within the threshold to be considered for home detention). The sentence handed down by the Judge was 9 months home detention, a decision said to have been made in light of the healing that occurred within the family. The Judge believed home detention would be more constructive than a term of imprisonment and took into account that Mr Poarau had already spent 4 months in custody on remand. The Crown appealed Mr Poarau's sentence, on the basis that it was manifestly inadequate and marred by too low a starting sentence and excessive discounts.

IV. LEGAL ISSUES

A. Was the sentencing of Mr Poarau adequate?

The High Court would not intervene in sentencing unless it could be characterised as manifestly inadequate and not properly justified by accepted sentencing principles. Determining if a sentence if manifestly inadequate is assessed in terms of the sentence given, as opposed to the processes by which the sentence is reached.

V. SUBMISSIONS

A. Crown Submissions to the High Court

The Crown submitted that the sentence starting point was disproportionately low, given the presence of several aggravating features in the *R v Taueki* [2005] 3 NZLR 372 guidelines. They submitted instead of a band one, the case was on the cusp of bands one and two, which meant that the minimum starting point for sentencing was 5 years' imprisonment.

The Crown submitted that the deductions applied for mitigating factors were excessive and duplicative, artificially reducing the sentence in order to get it within the home detention range.

B. Defendant's Submissions to the High Court

Mr Poarau's counsel submitted that the sentence starting point was within the range open to the Judge. However, in oral submissions, counsel accepted the Crown's submission that 5 year's imprisonment was the correct minimum starting point.

VI. DECISION

Appeal allowed.

A. The Starting Point

Judge Brewer focussed on the wounding with intent and did not propose any uplift for the assault charge, as the events prior to the assault charge form part of the overall context of the offending. Brewer J had particular regard to the following aggravating factors:

(a) Extreme violence: prolonged violence, continuing to beat his daughter inside the house in an ongoing course of conduct, planned conduct and hitting her with such force that the plank broke.
(b) Use of a weapon: the plank of wood with nails sticking out of it is a serious weapon that could cause significant injury, but its use seemed opportunistic.
(c) Attacking the head: Mr Poarau targeted his daughter's head on a number of occasions during the attack.
(d) Breach of trust/vulnerability of the victim: his daughter was 18 at the time of ~~the~~ offending and, as her father, he was clearly in a position of trust and power over her.

Brewer J noted that *R v Taueki* [2005] 3 NZLR 372 indicates that where aggravating factors are present, a higher starting point than the bottom end of band one (3-6 years) is required. The Judge in the District Court assessed the aggravating factors as just above the bottom of band one – 3.5 years.

Brewer J then explored *R v Taueki* [2005] 3 NZLR 372 further, looking to its guidance regarding domestic assaults – indicating a higher starting point for sentencing. Brewer J was of the view that these principles applied to the domestic context of this case.

Brewer J noted that band two of *R v Taueki* [2005] 3 NZLR 372 spans 5-10 years and related to serious offences with three or more aggravating factors with particularly grave features, such as a premeditated domestic assault involving permanent injury. While there was no premeditation in this case, the presence of more than three aggravating factors put it outside the lower end of band one and toward the end of band one or low to mid-end band two. Brewer J considered the Crown's submissions that a 5 year starting point based on comparable cases of *R v Williams* and *Rautahi v R* was acceptable. The appropriate starting point, given the aggravating factors, was 5 years imprisonment. Consequently, the 3.5 years starting point for sentencing was manifestly inadequate.

B. Adjustments to the Starting Point

A clear pattern of violence against women was present in Mr Poarau's prior offending, with 15 convictions for violence and 7 for breaching protection orders. Brewer J considered the original uplift of 6 months for prior offending was appropriate.

With respect to the discounts for mitigating factors, Brewer J noted that these are at the discretion of the sentencing Judge (although not unlimited discretion). Citing *R v Vailea* (Sentence, Unreported, Henry J, Supreme Court at Mackay, 14 October 2016). His Honour that a function of the criminal justice system is the exercise of mercy to an offender.

Brewer J then proceeded to considered each mitigating factor identified by the District Court Judge in turn:

1. Cultural Context of the Offending (Originally 6 month Discount)

Brewer J noted that it was not submitted that a violent response to discovering the relationship between his brother and daughter was culturally acceptable. To the contrary, the restorative justice conference report suggested that violence was culturally unacceptable in the circumstances. His Honour considered that the basis for the cultural discount was misplaced because Mr Poarau's response was unacceptable in both Cook Islands and New Zealand culture. The trial judge's analysis ~~is~~ deemed to be akin to a finding that the victim "provoked" Mr Poarau.

While the daughter-uncle relationship may have been culturally offensive, there was no suggestion that the extremely violent response of Mr Poarau was culturally appropriate or acceptable. Noting Mr Poarau's criminal history, Brewer J suggested that the violence was not

driven by cultural factors, but by Mr Poarau's issues with violence and anger management, particularly towards women.

His Honour considered that there was some force to the Crown's submission that allowing cultural factors to apply a sentencing discount in a domestic violence case would essentially be to say that a person's cultural background can excuse violence against women. A permissive approach could not be allowed, as everyone must comply with New Zealand laws, regardless of their norms or values and a cautious approach ought to have been applied when discounting sentences for cultural factors in relation to violent offences against women or vulnerable people.

2. Successful Restorative Justice Conference/Remorse (Originally 6 Month Discount)

The Crown submission was that reductions for engagement in successful restorative justice processes and an additional discount for remorse were excessive and duplicative, as remorse only developed out of the restorative justice processes. Mr Poarau's counsel submitted that the reductions were discrete, albeit interrelated issues. Brewer J concluded that it was not open for the Trial Judge to apply separate discounts for these factors.

Brewer J noted that s 10 of the Sentencing Act requires the Court to take into account restorative justice outcomes for sentencing purposes, including genuine apologies to the victim. In order to take these factors into account, Brewer J reviewed the information related to the restorative justice processes that Mr Poarau engaged in and the broader issues of remorse.

A Court-referred restorative justice conference was held on 5 September 2015. It was reported that Mr Poarau acknowledged his wrongdoing and apologised to his daughter via a letter. It was also noted that in Cook Islands culture, violence is unacceptable and needs to be rectified through the restoration of "turanga" to the victim and perpetrator. His daughter accepted the apology and forgave him.

One month later, on 5 October 2015, a probation officer interviewed Mr Poarau for the purpose of preparing a pre-sentence report. In this interview, Mr Poarau disputed the summary of facts, claiming he had been forced to plead guilty by his lawyer. The pre-sentence report assessed Mr Poarau as having little insight into his offending and dismissive as to the severity of the violence, along with prior convictions, and recommended imprisonment.

Brewer J considered that the previous cases could be read as applying separate discounts for successful restorative justice processes and the expression of remorse. *Adams on Criminal Law* indicates that engagement in restorative justice processes should be recognised by a reduction in sentence "as an indication of genuine remorse". His Honour noted that providing an additional discount for successful restorative justice processes was relatively unusual. Where an offender takes remedial action or offers amends as part of the process, a legitimate separate discount could be applied for this effort. However, Brewer J concluded that this does not reflect the present case.

Brewer J referred to the case of *R v Shirley* [2003] EWCA Crim 1976 where a 6 month discount was given for remorse and the positive outcome of the restorative justice conference. On

appeal, the Court of Appeal rejected the notion that the discount was inadequate, stating that restorative justice processes must be balanced with other sentencing principles, particularly in cases involving family violence.

It was noted that the restorative justice process created some reconciliation within the family and the expression of remorse via Mr Poarau's letter. The report and letter were the only evidence relied on as evidencing remorse. Brewer J found there to be no justification for a discount for participating in successful restorative justice processes in addition to a discount for remorse – Mr Poarau essentially received a double discount. That is restorative justice processes are appropriate to take into account when assessing whether Mr Poarau was genuinely remorseful for his offending. No additional discount could be justified.

The Trial Judge gave Mr Poarau the maximum one third (33%) discount for his guilty plea and remorse. Of this, 25% was for the guilty plea and 8% for remorse. Brewer J noted that Mr Poarau was fortunate in receiving the full remorse discount when taking into account his comments to the probation officer one month later, denying guilt. In particular, His Honour noted that the views Mr Poarau expressed to the probation officer demonstrated an alarming lack of insight into the seriousness of his offending and were consistent with his record of violence against women. However, as Brewer J notes that it is the Crown who appealed this case, generosity is preferable and the maximum remorse discount was not interfered with.

3. EM Bail Discount (Originally 1 Month Discount)

The Crown did not challenge this.

4. Guilty Plea Discount (Originally 25% Discount)

The Crown did not challenge this.

VII. LEGAL REASONS FOR SENTENCE REDUCTION

a. *R v Vailea* (Sentence, Unreported, Henry J, Supreme Court at Mackay, 14 October 2016) provides authority that a function of the criminal justice system is the exercise of mercy to an offender.
b. *R v Shirley* [2003] EWCA Crim 1976 indicates that restorative justice processes must be balanced with other sentencing principles, particular in cases involving family violence.
c. Section 10 of the *Sentencing Act 2002* (NZ) provides that the Court must take into account an 'offer, agreement, response, or measure to make amends' for the purposes of sentencing, which includes restorative justice outcomes.
d. EM bail and guilty plea discounts were not challenged by the Crown.

VIII. SUMMARY AND CONCLUSION

Brewer J undertook fresh sentencing, with the lowest starting point as 5 years' imprisonment. This was adjusted by adding 6 months to account for Mr Poarau's criminal history. A discount

of one third was considered appropriate as the maximum for Mr Poarau's guilty plea and remorse; a further one month reduction for the EM bail was applied. The final sentence given by Brewer J was 3 years 7 months' imprisonment. Therefore, Brewer J concluded that the original sentence imposed was manifestly inadequate.

IX. RESULT

The appeal was allowed and the original sentence imposed by the District Court of 9 months' home detention was quashed.

Credit was given to Mr Poarau for the 5 months already spent in home detention – Brewer J gave 7 months credit considering home detention is not onerous imprisonment. Brewer J noted Mr Poarau's counsel's submissions that it would be wrong to imprison him following home detention, however, Brewer J accepted the Crown's submission that the sentence was erroneous and must be corrected.

The final sentence was three years' imprisonment.

X. PERSONAL COMMENTS

As Brewer J concluded, the deduction for participation in restorative justice processes plus an additional discount for remorse constitutes double dipping. This is because both considerations are essentially aimed at a common factor.

One of the primary goals of restorative justice is to stimulate the offender's remorse for their actions or omissions. Accordingly, doubling down on the sentence reduction for both restorative justice participation and remorse is erroneous. One might even term it 'double dipping'.

I am in agreeance with Brewer J's view that the participation in restorative justice processes are a useful factor to take into account when assessing sentence discounts. However, it would be erroneous to give two discounts under two heads for the same outcome: remorse. The Trial judge's reasons might be interpreted as being an exercise in working backwards from an outcome. That is, reducing Mr Poarau's sentence to the requisite threshold for home detention.

This case highlights the inherent danger of a judge's conceptualising sentencing 'end goals' at the beginning of the sentencing process. Rather than beginning with the end in sight, sentencing considerations and subsequent reductions should be a set of logical steps that, when followed properly, end in a quantifiable bracket or outcome. While judicial reasoning is inevitably endowed with the colour of moral and social considerations, this cannot be allowed to run free of proper sentencing procedures. To do so would risk the overarching aim of consistency in judicial decision-making and weaken the rule of law. The words of Lewis Carroll are apropos to the desirable approach: "begin at the beginning and go on until you come to the end; then stop".

Brewer J was correct in increasing Mr Poarau's sentence in light of the available sentencing principles and a more considered view of the relevant mitigating factors. On one view, His Honour corrected the obvious errors of the Trial Judge, who worked backwards from an end

point to arbitrarily fit the sentencing category. Brewer J's sentence of Mr Poarau adequately reflects the severity of his crime, his criminal history and the cultural appropriateness of Mr Poarau's violent response to a distressing situation. This case provides guidance for how remorse and restorative justice overlap and should be considered alongside cultural appropriateness in sentencing.