

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

CRI 2007-019-010174

THE CROWN

v

MOANA WARREN HEREWINI

Hearing: 14 May 2009

Appearances: J N Foster for Crown
K Clews for Prisoner

Judgment: 14 May 2009

SENTENCING NOTES OF ANDREWS J

Solicitors:

Almao Douch, PO Box 19173, Hamilton 3244 *fax 07 839-3030*

Kit Clews, PO Box 19133, Hamilton 2001 *fax 07 838-2129*

Charges

[1] Mr Herewini, you appear for sentencing today having pleaded guilty to one charge of manslaughter, one charge of reckless driving causing injury, and one charge of driving with excess blood alcohol. I note that, that was your third such conviction.

[2] The maximum sentence that applies to the manslaughter charge is life imprisonment. For the reckless driving causing injury charge, the maximum is five years imprisonment, while there is a maximum sentence of two years imprisonment on the excess blood alcohol charge.

Relevant facts

[3] I have taken the summary of facts from the Police summary and the submissions by Ms Foster on behalf of the Crown. Mr Clews has raised certain matters in relation to the summary of facts. In most cases the matters that he has referred to are not relevant for sentencing purposes. As he said, he has raised them by way of explanation. I will comment on them as they arise.

[4] It is necessary to go back a bit in your driving history. You obtained a Class 1 learner licence by passing the theory test using the surname Karena in 2002, because at that time you were disqualified, as Mr Herewini, from holding or obtaining a drivers licence. In April 2003, you told Land Transport New Zealand that you were also known as Karena and Land Transport cancelled Mr Karena's licence.

[5] In June 2004 you legitimately acquired a Class 1 learner licence and that was for the first time.

[6] Class 1 learner drivers licence, as you will know very well, are restricted. A supervisor, who must be at least 20 years old and have held a full licence for at least two years, must sit in the front passenger seat whenever the learner is driving. Learner plates must be displayed.

[7] Between 17 November 2004 and 13 October 2006, the Police issued five infringement notices to you, for breaching learner licence conditions.

[8] We then come to Friday, 27 July 2007. That evening at about 7pm you drove your partner's car, with your family in it, in breach of your licence restrictions, from your home in Arapuni. You knew that the vehicle's registration and warrant of fitness were expired. You drove to a friend's house, in Rotorua Road, Cambridge to celebrate a birthday. In the course of the evening you drank alcohol and smoked two cannabis cigarettes. Shortly before midnight you left, driving your partner's vehicle, with your friend 16 year old Zion Heta in the passenger seat. Your partner had told you not to drive because of your drinking but you drove nonetheless.

[9] You drove to another address in Cambridge and picked up your best mate, 20 year old Kyle Douglas. As you left there, you revved the engine, dropped the clutch, and did a wheelie. The vehicle's left rear tyre clipped a solid concrete object as you drove away.

[10] From there you turned left into Racecourse Road, which is a rural sealed road marked with a broken white centre line, with a speed limit of 100 kilometres per hour. I accept that the speed limit was 100, not 80 kilometres per hour as stated in the Police summary.

[11] You accelerated along Racecourse Road. You deliberately drove with the two left wheels on the roadside verge with the right side wheels still on the road surface for up to 20 metres at a time, and you did this three times.

[12] Mr Heta told you to stop, you were going to crash, but you laughed.

[13] According to the Police summary, you then accelerated to 120-140 kilometres per hour. I note that you dispute the speed you were travelling at. In any event, both Mr Heta and Mr Douglas told you to slow down or stop they wanted to get out and walk. You refused to stop.

[14] Mr Heta warned you that you were approaching an intersection with State Highway 1, that of course is a busy road. Racecourse Road ends at the intersection with State Highway 1, Hooker Road begins at the other side of the intersection. It leaves State Highway 1 at a different angle, from the angle at which Racecourse Road enters the intersection.

[15] You ignored Mr Heta's warning and continued along Racecourse Road and through the intersection with State Highway 1. Again, you have said you were not going as fast as the Police summary states. The Police summary states that you were going at around 120 kilometres per hour. That is what Mr Heta said your speed was. Whether it was that speed or not, you should certainly have slowed right down for the intersection.

[16] You did not turn the car as it entered Hooker Road, so that the car left the roadway, travelled across a grass roadside area, through an 8-wire farm fence, across a paddock for approximately 100 metres, then crashed straight into a large tree. At some stage as it crossed the intersection or left the road, the car briefly left the ground. In fact it became airborne briefly.

[17] The impact caused serious injuries to Mr Heta and this led to the 'reckless driving causing injury' charge. He had a broken left leg, broken left arm, fractured pelvis and fractured lower jaw.

[18] The crash caused Kyle Douglas massive head injuries. He died four days later. This led to the 'manslaughter' charge.

[19] You extricated yourself from the vehicle and people came from a nearby house to help. When the Police came you told them that the vehicle had been driven by a hitch-hiking Black Power member who ran off after crashing.

[20] You were taken to Waikato hospital where your blood was tested for alcohol. This was approximately 3½ hours after the crash. You had 89 milligrams of alcohol per 100 millilitres of blood. It was estimated that at the time of the crash your level

would have been between 125 and 155 milligrams of alcohol per 100 millilitres of blood. The legal limit is 80 milligrams of alcohol per 100 millilitres of blood.

[21] The Police interviewed you on 10 August 2007. You admitted to driving after drinking alcohol and smoking cannabis. You confirmed that you drove the vehicle on a regular basis and you knew the registration and warrant were both expired. You also said the car had faulty breaks. You mentioned a grinding noise when you tried to apply the brakes.

Mr Williams' report

[22] Mr Clews provided the court with a copy of a report by an independent traffic analyst, Mr Williams. His analysis of the crash differs in some respects from the Crown summary, but his findings concur largely with those of the Police. Mr Williams agreed that for your car to come airborne when crossing State Highway 1 intersection, it would have been travelling at 80-85 kilometres per hour and between 80 and 100 kilometres per hour at Hooker Road. Mr Williams accepts that you were driving with excess blood alcohol, and that the effects of alcohol were possibly compounded by cannabis.

[23] Mr Williams questioned the severity of the brake problem, and noted that there were patches of fog around that night that may have impeded your vision. I have considered what Mr Williams has said, but the fact remains that you were driving with excess blood alcohol, you knew about a brake problem, and your friends in the car were concerned enough about your driving to want to be let out of the car. If there was fog around, then clearly you should have been driving according to the conditions. Patently, you were not.

Victim impact statements

[24] I have been provided with the victim impact statements from Kyle Douglas' family. I am sure that you have read them.

[25] Mrs Mere Rarere is Kyle Douglas' mother. She reports difficulty sleeping after his death and describes Kyle's desire to come home for his 21st birthday which would have been soon after his death. She finds it hard to cope and says she can hear Kyle calling out. She wishes that Kyle had died instantly. She hopes that you won't be able to do this to anyone else. She mentions that Kyle's younger sister, Victoria, was close to him, and is only now realising that he is isn't coming back.

[26] Hohepa Douglas is Kyle's father. He now works long hours to try to forget. Understandably he says, this is the wrong way round, parents should not bury their children. He says that Kyle's older brother, Joseph, said it should have been him who died, and is angry about that. Mr Douglas finds the silence unbearable and he expresses anger at what has happened.

[27] Melanie Douglas is Kyle's older sister. She finds it difficult to sleep, thinks about Kyle daily. She is seeing a doctor and receiving treatment for depression. She finds it hard to see the rest of her family suffering from Kyle's death.

[28] Kyle's younger sister, Victoria, expresses deep sadness at not being able to hug Kyle or see him again and says, "I can't enjoy life without Kyle ever again". She finds it very hard to cope with his absence.

Pre-sentence report

[29] I turn to consider the pre-sentence report, prepared by the Probation Officer. You are 27. You have a dysfunctional family. Your parents separated when you were a baby. Your mother moved to Australia, and you have not been in contact with her since. Your father is neglectful of you. You were placed in Child Youth and Family Services care. You later returned to live with your father but became rebellious, and your father evicted you.

[30] Until August 2008, you were in a relationship with your then partner, Ms Ratahi. You lived together in Arapuni with your four children. You worked as a farm irrigator for three years, until you were dismissed, and then worked as a hammer-hand for six months. After that, your partner became the sole income

earner and you looked after the children. You separated in August 2008. I am told that you have no contact with your children.

[31] You had a vehicle accident in 2007 which gave you a broken knee, which has not been treated. As a result of that you walk with a limp.

[32] You did not explain your offending to the Probation Officer but you admitted that you were so drunk that you could not recall the accident. Your drug and alcohol abuse was out of control at the time. You described yourself as being devastated because your best mate was killed and another good friend was badly hurt. Because of the stress and pain from the accident your alcohol abuse worsened. Although you told the Probation Officer that you have not overcome that abuse, you did express commitment to not drinking in the future.

[33] The Probation Officer describes your alcoholism as the catalyst for your past and present offending, and you admitted that. The Probation Officer perceived your motivation to address your offending as genuine.

[34] You were assessed as being at a high risk of reoffending. That risk is connected to your risk of resuming alcohol abuse. You have breached community based sentences. In 2005 you completed substance abuse counselling, but you failed to attend psychological counselling. You have completed some sentences of community work.

[35] The Probation Officer summed up your response to the sentences by saying that you have squandered opportunities for rehabilitation, and that you pay lip-service to counselling for your drinking and continued to reoffend.

Prior convictions

[36] You have many prior convictions. Eleven are driving-related, three are for driving with excess breath or blood alcohol, six are for breaching community work, failing to answer bail or attend court, or escaping Police custody. One, from 1997, is for wounding with intent. Others are for burglary, dishonesty or damaging property.

[37] Because of the nature of your offending, in sentencing you today your driving offences are very relevant. You drove while disqualified twice in 2000 and once in 2001. In 2003 your vehicle was confiscated. As I mentioned before you have three convictions for driving with excess breath or blood alcohol.

Sentencing process

[38] I come to the sentencing process. First, I am going to talk to you about the general law relating to sentencing and I will be talking to you about the principles and purposes of sentencing that are set out in the law that I have to apply. Then I have to decide what sentence is appropriate, taking those principles into account. A two-step process is involved.

[39] The first step is to establish what we refer to as the starting point. The starting point is what would be the sentence imposed for conviction on the most serious of the charges on which you have been convicted, if that conviction had been entered after a trial in court. In your case, that is the charge of manslaughter. We refer to that as the 'lead offence'.

[40] The second step is to take that starting point and decide what is the appropriate sentence for you, for your offending. I do this by considering whether there is anything about your offending that makes it more (or less) serious. These are referred to as aggravating (or mitigating) factors, and they would lead me to impose a sentence that is greater (or less) than the starting point.

[41] I also consider matters that relate to you personally, because these may also lead me to adjust your final sentence either upwards or downwards.

[42] In sentencing you I have to take into account what the law has set out as the purposes of sentencing. In particular, I have to hold you accountable – that means to make you responsible for your own offending. I have to consider deterrence of you, and others, and protection of the community. I also have to denounce your offending – this means to tell you in the plainest of words, that your offending is not acceptable

in New Zealand society. At the same time, the purpose of sentencing is to help you with rehabilitation back into the community.

[43] There are also some general principles of sentencing that must be considered. In your case I consider the gravity of your offending, including your own responsibility for it, the seriousness of your offending in comparison with other types of offences, and the general desirability of keeping consistency in appropriate sentencing levels.

[44] I must take into account the information provided to me about the effect of your offending on the victim.

[45] I am directed to impose the least restrictive outcome that is appropriate in the circumstances. It is desirable to keep offenders in the community if that is practicable with regard to the safety of the community. However, the court can impose a sentence of imprisonment in order to achieve the purposes of sentencing that are relevant to your case.

[46] In your case, I accept Ms Foster's submission on behalf of the Crown that no sentence other than imprisonment would be consistent with the principles and purposes of sentencing. In particular, the need for deterrence – that is, to deter you and others, to denounce your offending and the danger to the public that this type of offending poses, the devastating effect on the victim and the effect on the wider community. All of those factors mean that a sentence of imprisonment, and a substantial one, is inevitable.

Starting point

[47] I come to the starting point. As I said earlier, I set the starting point by reference to the 'lead', or most serious offence, in your case, the conviction for manslaughter.

[48] It is usual to refer to sentences imposed in other similar cases. The tragic fact is that the courts have on many occasions been required to sentence offenders for

motor manslaughter – that is, causing death by reckless or dangerous driving. Ms Foster referred me to a total of 11 sentencing decisions. Sadly, many of them were imposed in this court. Apart from two of the sentences, I do not propose to refer to them in detail, although they will be listed in the typed notes of this sentencing.¹ But in the cases referred to the starting points adopted were between eight and ten years imprisonment.

[49] There are two judgments of the Court of Appeal that are referred to as leading cases. The first is *R v Skerrett*². Skerrett drove his vehicle with five passengers and collided with a train at a level crossing. One passenger was killed as a result. There was evidence that Skerrett had accelerated as he approached the crossing, trying to beat the train. He pleaded guilty to one count of manslaughter.

[50] The Court of Appeal reviewed cases involving death by reckless, or dangerous, driving and commented that the sentences imposed in such cases could cover a wide range. Importantly for subsequent sentencings for these offences the court then set out aggravating and mitigating factors to be taken into account in sentencing.

[51] The aggravating factors were:

- Consumption of alcohol or drugs;
- Racing, competitive driving on the highway, grossly excessive speed, and showing off;
- Disregard by the driver of warnings from his passengers;
- Persistent and deliberate course of very bad driving;

¹ *R v Soti* HC HAM T 033266 4 November 2003, Fisher J; *R v Tairi* HC HAM T 033323 20 April 2004, Priestley J; *R v Douglas* HC HAM CRI 2004-079-946 13 July 2004, Laurenson J; *R v Time* (2004) 21 CRNZ 31 (Potter J); *R v Pori* HC AK CRI 2004-204-118 5 October 2004, John Hansen J; *R v Hēpi* HC HAM CRI 2005-019-2278 14 July 2005, Rodney Hansen J; *R v Peneha* HC WNN CRI 2006-078-872 1 August 2006, Gendall J; *R v Whiu* [2007] NZCA 591 (20 December 2007); *R v Drinnan* HC NEWP CRI 2008-021-838 4 March 2009, Harrison J

² *R v Skerrett* CA 236/86 9 December 1986

- Other offences committed at the same time and related offences such as driving while disqualified or without ever having had a licence;
- Previous convictions involving bad driving or offences involving the consumption of excessive liquor before driving;
- The incidence of death as a result of reckless driving;
- Behaviour at the time of the offence, e.g. failing to stop or trying at further risk to the victim to escape;
- Causing death in the course of reckless driving carried out in attempting to avoid detention or apprehension.

Those were the aggravating factors referred to by the court.

[52] Mitigating factors were:

- The fact that the driving was a one-off piece of driving; a momentary reckless error of judgment;
- The existence of a good driving record;
- A plea of guilty or genuine remorse; and
- Where the victim was either a close relative or close friend of the defendant and consequent emotional shock is likely to be great.

[53] A second leading case is *R v Grey*³. Mr Grey drove his car at excessive speed, failed to take a bend and collided with two school boys on bicycles, killing them. His car also hit a road sign (ripping the pole out of the ground), struck a stationary car and demolished a concrete block wall. It finally came to rest in the front yard of a house. Grey was charged with two counts of manslaughter and sentenced to eight and a half years imprisonment and disqualified from driving for 12 years.

³ *R v Grey* (1992) 8 CRNZ 523

[54] In that case the Court of Appeal stated that imprisonment was normal in cases of death or serious injury where the driver is under the influence of drink or drugs.

Features of offending

[55] Mr Herewini, as I said earlier, the law requires me to look at the aggravating and mitigating features of your offending, that is, the things that make it more or less serious. In your case, almost all of the aggravating features listed in the *Skerrett* decision apply. As to the offending itself, there are no mitigating features.

[56] The matters that are referred to in the *Skerrett* decision that are relevant to you will be considered in relation to your own personal matters. But in relation to your offending, it can only be regarded as serious. You drove drunk, fast and dangerously in a car that you knew had defective brakes. I accept Ms Foster's submission that the only thing that was going to make you stop that night was the crash that eventually did stop you, killed your friend and seriously injured your other friend.

[57] Ms Foster submitted that the starting point should be eight and a half or nine years imprisonment. Mr Clews submitted that a starting point of eight years imprisonment was appropriate.

[58] I have concluded that the appropriate course is to adopt a starting point of eight and a half years imprisonment, but that must be increased to nine years imprisonment to take account of additional aggravating features of your offending, that is the harm caused to the families of your victims, and the abuse of trust placed in you by those who were with you in the car, who it appears did not realise the extent of your intoxication and who tried to make you stop.

Personal factors

[59] I turn now to consider matters that relate to you, yourself. I have already referred to your previous convictions. They are relevant because they include convictions for dangerous driving, speeding, driving while disqualified, and driving with excess breath alcohol, and you have three convictions for that. I accept Ms Foster's submission that your driving on the night of the crash shows arrogance and a complete and blatant disregard for the law. Because of that, there must be a further increase to the starting point to nine and a half years imprisonment.

[60] I also take into account that fact that it was your best mate who was killed, and it was a good friend who was injured. Mr Clews referred to comments about this in the pre-sentence report. I accept what he says. What happened was a tragedy and you will have to live with the effects of that tragedy for the rest of your life. As noted in the *Skerrett* judgment, that is a factor I can take into account in sentencing you. The tragedy, however, was of your own making and sadly, your remorse will not bring Kyle back to life.

[61] I have also considered your guilty plea. It is accepted by the courts that a plea of guilty will entitle the prisoner to a reduction of sentence. How much that reduction is will depend entirely on when the guilty plea is entered. The earlier the plea, the greater the discount.

[62] In your case, your guilty plea did not come at an early stage. In fact, you failed to appear in court on the date your trial was first scheduled on 21 December 2008. You were apprehended a day or two after and appeared in court for a breach of bail. A new trial had to be scheduled and you entered your guilty pleas just one week before your trial was due to start in March 2009.

[63] Ms Foster submitted that in these circumstances you should receive minimal credit for your guilty pleas – that is, at most 10%. Mr Clews submitted that you should receive a discount for your remorse and your guilty pleas, taken together, of two and a half years.

[64] I cannot allow a discount of much more than 10% for your guilty pleas. I accept that by pleading guilty you have saved Mr Douglas' family the anguish and stress of a trial, you have made it unnecessary for Mr Heta to come and give evidence at a trial, and you have saved the state the cost of a trial. But your pleas came at a late stage, and that was after you had failed to appear at a scheduled trial. I do note however, from the Minute that I made after you appeared before me for your breach of bail, that it was noted at that time that the matter might be able to be resolved. From that I take it that there was some indication at that stage that a guilty plea would be made.

[65] I have concluded that the appropriate discount, to take account of the personal factors resulting from the crash – that is, your remorse and your appreciation of the fact that you caused the death of your best mate and injury to a good friend – is 12 months, and the appropriate discount for your guilty plea is a further 12 months.

[66] That leads me to an adjusted sentence of seven and a half years imprisonment.

Minimum period of imprisonment

[67] The Crown then seeks that I impose a minimum period of imprisonment, amounting to one half of the sentence.

[68] Under s 86 of the Sentencing Act 2002, I may impose a minimum period – that is, a requirement that you serve a minimum period of time before you may be considered for release on parole – for the purposes of:

- a) Holding you accounting for the harm done to your victims and the community;
- b) Denouncing the conduct in which you were involved;
- c) Deterring you and other persons from committing this kind of offence; and

d) Protecting the community from you.

[69] Thus, I must consider, as a separate exercise, whether your offending is so serious that if you were to serve only the normal minimum period before becoming eligible for parole (that is, one third of your sentence), that would not be enough to punish, deter and denounce your offending. There are two questions to consider: first, whether a minimum period of imprisonment should be imposed and secondly, if so, how long that period should be.

[70] Ms Foster submitted that a minimum period of imprisonment should be imposed because of your repeated history of offending involving driving under the influence of alcohol and driving while disqualified and in breach of your licence restrictions, together with the combination of aggravating features present in your case.

[71] I accept that submission. I am satisfied that the nature and circumstances of your offending are sufficiently serious that if you were to serve only one third of your sentence before being eligible for parole, that would not be sufficient to adequately punish, deter and denounce your offending. Accordingly, I am satisfied that it is appropriate to impose a minimum period of imprisonment.

[72] As to the length of that period I have concluded that it should be one half of your sentence that is, three years and nine months. I stress that that does not mean that you will be released after serving that period of time. It simply means that you will then be eligible to be considered for release. Your actual release will be a matter for the Parole Board.

[73] Ms Foster also submitted that I should impose a lengthy period of disqualification, to apply from when you are released from prison.

[74] Under ss 124 and 125 of the Sentencing Act, if a person is convicted of manslaughter, and the offence involved the use of the motor vehicle, the court may impose a period of disqualification for as long as the court thinks fit. I accept that it is appropriate that I impose a period of disqualification from driving.

[75] In the sentencing cases referred to in the Crown submissions, the disqualification periods ranged from three years, to an indefinite disqualification. I have concluded that the appropriate disqualification is for four years, to apply from the date of your release from prison.

[76] Would you please stand.

Sentence

[77] Mr Herewini, on the charge of manslaughter you are sentenced to seven a half years imprisonment.

[78] I direct that you serve a minimum period of imprisonment of one half of your sentence, that is, three years and nine months.

[79] On the charge of reckless driving causing injury you are sentenced to three years imprisonment.

[80] On the charge of driving with excess blood alcohol you are sentenced to six months imprisonment.

[81] All of the sentences are to be served concurrently. That means that your effective term of imprisonment will be seven a half years..

[82] In addition, you are disqualified from holding or obtaining a drivers licence for four years, starting from the date of your release from prison.

[83] Would you please stand down.