IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CRI-2009-441-000014

HEMI JAMES TAMATI
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 3 June 2009

Appearances: R D Stone for the Appellant
C R Walker for the Respondent

Judgment: 3 June 2009

(ORAL) JUDGMENT OF DUFFY J

Solicitors: Souness Stone P O Box 975 Hastings 4156 for the Appellant
Elvidge and Partners P O Box 609 Napier 4140 for the Respondent

[1] Hemi Tamati has appealed against a sentence of two years and eight months' imprisonment imposed on him in the District Court following his guilty plea to the offence of causing grievous bodily harm. He contends that he did not receive a sufficient discount for his youth.

[2] The appeal against sentence initially came before Miller J on 5 May 2009. On that occasion, Miller J noted:

> The major, if not only, question on this appeal, which was argued before me today, is whether Mr Tamati, who was aged 17 at the time of the offence, received a sufficient discount for youth, in addition to the full discount to which he was entitled for his early guilty plea.

[3] Miller J went on to recognise that although youth may:

> … not necessarily result in a discount in cases of serious violence … a significantly reduced sentence for rehabilitative purposes may be appropriate where a youth is or should be treated as a first offender and appears genuinely motivated to reform.

[4] The Judge thought that Mr Tamati might have good rehabilitative prospects, but he considered he had insufficient information before him to proceed to deal with the appeal on that basis. Therefore, he adjourned the appeal in order to obtain a psychological assessment of Mr Tamati.

[5] When the appeal was next called, it came on before me. By then, a psychological assessment had been completed. That assessment is moderately favourable to Mr Tamati. In summary, the registered psychologist described Mr Tamati as having predisposing factors to offending, including being:

> … a naïve, unwordly young man with concrete views, poor problem-solving ability and inexperience with complex emotional displays.

[6] Mr Tamati was also described as having:

> … a low level of empathy … His history also suggests he has had a limited range of socialisation, family acceptance of aggression and significant reliance on his father to 'sort out' problems.

[7] These are not positive factors. However, the psychologist also recognised that the factors precipitating the offence were Mr Tamati's:

> … emotional arousal and distress, poor impulse control, the presence of family in distress, and strong thoughts of helplessness and injustice.

[8] The psychologist considered that:

> … the primary factor perpetrating this type of violent behaviour in future will be the context of a situation: the more emotionally charged the situation and the more helpless he feels, the more impulsively and angrily he is likely to respond.

[9] Protective factors against re-offending were said to:

> … include his desire to remain with his partner and their child, his aversion to incarceration, and his view of himself as a well-mannered, humble and loving man.

[10] The psychologist also considered that there could be:

> … a maturational effect which may see the development of empathy, problem-solving and impulse control.

[11] In this regard, it was said that:

> Treatment options will need to target his low level of empathetic concern for others, learning how to manage emotional arousal, increasing his problem-solving ability and impulse control.

[12] The psychologist concluded that Mr Tamati remained at a medium risk of re-offending.

[13] The Crown has acknowledged that the report is more favourable to Mr Tamati than the pre-sentence report.

[14] The facts of the offending were that Mr Tamati came upon the scene of a motor vehicle accident at the Mangaroa Road (Hastings) intersection. One of the two drivers involved was a member of Mr Tamati's family. The family member, who was the driver of one of the cars, had attacked the driver of the other car, punching him about the head, dragging him out of his vehicle and throwing him on the ground. When Mr Tamati arrived on the scene, he is said to have walked up to the victim, and kicked him in the side of the head with such force that the victim was knocked unconscious.

[15] Mr Tamati was charged with causing grievous bodily harm, and sentenced in the District Court to two years and eight months' imprisonment. The District Court Judge adopted a starting point of four years' imprisonment, based on band 1 in *R v Taueki* [2005] 3 NZLR 372. The Judge then gave a one-third discount for Mr Tamati's age and guilty plea. This led to an end sentence of two years and eight months' imprisonment.

[16] Before me, it was accepted by both counsel that when the matter was first argued before Miller J, there was a concern that insufficient account had been taken of Mr Tamati's youth. His co-operation with the Police and early guilty plea would of itself entitle him to a discount of one-third. The question, therefore, was whether or not a higher discount should have been granted to cover his age.

[17] I have had the benefit of new material in the form of the psychological assessment, which Miller J ordered. This assessment shows Mr Tamati in a more favourable light than the pre-sentence report.

[18] The new material, coupled with the failure of the sentencing Judge to take into account Mr Tamati's youth, is sufficient to demonstrate that the sentencing in the District Court was inappropriate. Both counsel were of the view that it was open to this Court to proceed to sentence Mr Tamati afresh on that ground.

[19] The tariff for offences of serious violence is to be found in *R v Taueki*. I see no reason to depart from the choice of four years' imprisonment as a starting point. This is consistent with band 1 in *Taueki*. I consider that the four year starting point is sufficient in itself to encompass the nature of the offence, which involved a kick to the victim's head. If the kick was to any other part of the body, it would be unlikely to result in a wounding with intent to cause grievous bodily harm charge. It follows that there will be no uplift as a result of the injury being to the victim's head.

[20] I consider that there should be a discount of one-third for the early guilty plea. I consider that there should be a further 17 per cent discount to take into account Mr Tamati's youth (he was 17 years of age at the time of the offending and still is), and the fact that this was his first appearance in an adult Court. There have

been two earlier minor appearances in the Youth Court, which I do not consider to be relevant.

[21] The approach I am taking to Mr Tamati's sentence is influenced by the Court of Appeal's decision in *R v Thomas* CA138/05, 6 July 2005. In that judgment the Court of Appeal recognised the immaturity and youth of Mr Thomas as influential factors on his sentence. The Court of Appeal referred at [17] to the opinion of Kennedy J in the United States Supreme Court in *Roper v Simmons* 125 S Ct 1183 (2005), in which Kennedy J cited numerous examples of psychological and psychiatric studies that demonstrate that 16 to 17 year olds can frequently demonstrate a "lack of maturity and an undeveloped sense of responsibility". Later, at 1195, Kennedy J observed:

> The susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult.

[22] The Court of Appeal in *Thomas* took Kennedy J's comments into account in a case where there was some emotional vulnerability and trauma suffered by the appellant. In that case, it was the break up of his relationship with the complainant. Here, there was no relationship between Mr Tamati and the victim. But the circumstances of the offence would have involved some degree of emotional vulnerability and trauma for Mr Tamati. He came upon and attacked the victim not long after the victim was involved in a car accident, which included members of Mr Tamati's family. He saw his family members at a time when they had just received the injuries they suffered from the accident. The emotional trauma of that experience may well have been behind Mr Tamati's criminal conduct towards the victim. Given Mr Tamati's youth, his reaction to the situation before him can be distinguished from the type of irresponsible conduct that would carry the moral reprehensibility of similar actions when carried out by an adult; particularly an adult who had no connection with the other persons involved in the car accident.

[23] The outcome of the sentencing process I have followed is an overall discount of 50 per cent. This reduces the sentence to two years' imprisonment.

[24] It then becomes necessary to consider whether a sentence of imprisonment is necessary at all. As the Court of Appeal in *Thomas* has confirmed, s 16 of the Sentencing Act 2002 requires a sentencing Judge to be satisfied that the purposes of sentencing could not be achieved by a sentence other than imprisonment before it is appropriate to impose a sentence of imprisonment. At [11], the Court of Appeal said:

> Even if a community based sentence or a sentence of imprisonment could be justified, the community based sentence must be selected because of the way s 16(2)(b) is framed and the necessity for picking the least restrictive sentence: s 9(g).

[25] To similar effect, although dealing with another type offending, is the Court of Appeal's judgment in *R v Hill* [2008] 2 NZLR 381. Accordingly, I consider that it is not appropriate to conclude this appeal without some investigation of the possibility of imposing a sentence of home detention. I direct, therefore, that a home detention report be prepared. On its receipt, counsel will have the opportunity to provide further submissions in writing as to the appropriate sentence. In the meantime, the appeal is adjourned part heard before me.

Duffy J