IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2006-092-11737

THE QUEEN

v

PRESTMAN VESIPUTA TAUIRA

Hearing: 19 June 2009

Appearances: K Glubb for Crown
R Earwaker and H Munro for Tauira

Judgment: 19 June 2009

SENTENCING REMARKS OF ALLAN J

Solicitors:
Crown Solicitor Auckland
R J Earwaker, r.earwaker@xtra.co.nz

[1] Mr Tauira you appear for sentence this morning, having pleaded guilty to a single count of manslaughter, which carries a maximum sentence of life imprisonment.

Facts

[2] On the evening of Friday 18 August 2006 you were with a group of friends at a house in Mangere. The group was socialising; liquor was involved and your own evidence is that over a period of several hours you drank a total of about 12 stubbies of beer.

[3] At about 9.30 pm, your group left the house and drove to what was understood to be a party at Nikau Road, Otahuhu. There were three cars. You drove your white Honda Stream car, in which there were three passengers. As you neared your destination you encountered, at the intersection of Nikau Road and Awa Street, a group of people who were clustered about a lamppost, drinking and listening to music. It is now known that they had gathered to commemorate the death of one of their associates who had been murdered at that location only a few weeks earlier. As your three vehicles drove past, words were exchanged between the two groups.

[4] You and your associates stayed at the Nikau Road destination for only a few minutes. When it was discovered that nothing of interest was occurring there, the three vehicles retraced their steps. As the first vehicle approached the group around the lamppost, a bottle was thrown at one of the cars. A passenger in that vehicle, Mr Hughes, got out of the vehicle and challenged the group at the roadside. A fight ensued between Mr Hughes and several of those in the opposing group.

[5] Yours was the second vehicle in the convoy. The fight broke out as you were driving past the area of the lamppost. You stopped your vehicle to enable three passengers to alight, in order to assist Mr Hughes. Thereafter, you drove a short distance up the street, carried out a U-turn, and stopped on the side of the road facing the fighting.

[6] By then weapons had been deployed. They included a bottle, a golf club and pieces of wood. Although there was a dispute at trial about the matter, I am satisfied you were not aware at that time that weapons had been used; but you became concerned that Mr Hughes was out-numbered and in danger of being overwhelmed. For that reason you decided to drive your vehicle towards the group, and accelerating from a stationary position, you approached those in the roadway. Your stated intention was to rescue Mr Hughes, or at least to facilitate his flight by distracting those gathered on the roadway.

[7] Regrettably, instead of stopping short of the group, you drove into them. In so doing your vehicle struck both Mr Hughes, who was thrown sideways, and the deceased Fafetai Lafolua. Although you say that you flicked your headlights at the group before approaching and revved your engine, it is plain on the evidence that those on the road were unaware of their jeopardy until after the impact had occurred.

[8] Mr Lafolua (Tai), was standing with his back to your vehicle. When struck he was thrown forward onto the roadway, and then became stuck underneath your vehicle as it passed over him. You did not stop, although Tai's associates shouted a warning that Tai had become trapped under the car. Your evidence is you did not hear the warnings. You were concerned about your own safety because Tai's associates smashed windows in your car and endeavoured to reach you through the open driver's window as you tried to drive off. Ultimately you were successful in doing so, although the performance of your car was much impeded by Tai's presence under the car. There were steering difficulties, arising from the fact that he was wedged under the front right side of your vehicle. You say that you did not know he was there, and attributed the impaired performance of your car to damage sustained by impact with the footpath, or some other object on the road.

[9] You drove your vehicle with Tai wedged underneath for some 2.4 km. During that time you collided with another vehicle at the intersection of Station and Saleyards Roads. Ultimately, having driven along Portage Road, and then into Great South Road, Tai's body became dislodged and you drove off.

[10] Your evidence is that you did not know he was there at any stage during the journey. Only on the following day when there was widespread publicity about the incident did you realise what may have occurred. Eventually your relations facilitated contact between you and the police.

[11] There is unchallenged medical evidence to the effect that Tai would have died, either instantly when his head made contact with the road, or within a matter of seconds thereafter. It seems clear that Tai would have been either dead or deeply unconscious throughout the whole of the time he was wedged under your car. That knowledge provides perhaps some small solace to those who were close to him.

Procedural history

[12] I need to mention the unusual procedural history of this case. You were apprehended by the police a day or so after the incident, and thereafter you were remanded in custody until your first trial for murder commenced on 19 November 2007. On that occasion, the jury was unable to agree. You were remanded on bail until your retrial, again for murder, which commenced on 13 October 2008. Again, the jury was unable to agree. I presided over both trials.

[13] The Crown applied to the Solicitor General for consent to proceed to a third trial. That consent was forthcoming, but upon the condition that the indictment charge manslaughter and not murder. Accordingly, on 18 March 2009 the Crown presented an indictment charging manslaughter. On 22 April 2009, you entered a guilty plea to that amended indictment.

[14] It is appropriate to record that, prior to your first trial and ever since, you have been willing to plead guilty to manslaughter. That fact is relevant to the weight to be attached for sentencing purposes to your guilty plea. I will return to that point shortly.

Personal circumstances and pre-sentence report

[15] You are 28 years of age, of Maori and Cook Island descent. You had the advantage of a good upbringing, being one of a large number of children. Your family remains supportive of you. You have been in a stable relationship with your partner for some eight years, although there was a period of difficulty which coincided with this offending, and which seems to have led to the drinking episode that preceded it. You have two young children. You attended college until early in your fifth form year, and left with no formal qualifications, but you have a stable and consistent work record. I draw the inference that you are a reliable employee.

[16] It is not necessary to discuss the detail of the temporary breakdown in your relationship with your partner. There seems to have been fault on both sides. For your part however, you drank heavily during this troubled period, and there were difficulties with anger control, both then and earlier in your relationship.

[17] The pre-sentence report indicates that you have undertaken both anger management and lifestyle programmes while on remand. A theme that does emerge from the report is your determination to renounce violence, to accept responsibility for your own actions, and in particular to acknowledge the gravity of this offending.

[18] This morning Mr Earwaker has handed a number of documents to the Court. Among them is a very substantial group which attest to your attendance at and satisfactory completion of a number of programmes while on remand in custody. They are generally anger management, lifestyle and alcohol related programmes. In addition, you have handed to the Court what amounts to a business plan for the setting up of a company which you intend to operate once you are back in the community. That is a most unusual document for a Judge sentencing for this sort of offence to see, and it attests to your determination to get your life completely back on track.

[19] You have expressed your remorse both to the pre-sentence writer, and indeed, when you gave evidence at the two trials. I accept that remorse is genuine. Just after the terrible events of August 2006, there was a family conference at which Tai's

family and yours gathered for a long period, at which a number of highly appropriate things were said. You were not there, because you were in custody.

[20] Today I have been shown a draft letter of apology you wrote in 2007, addressed to Tai's family. It has never been completed or sent because there are difficulties about communicating with the family of the deceased before a trial. But Mr Earwaker tells me this morning you do wish to complete it and have it presented in an appropriate fashion to Tai's family, and I commend that course. I accept your remorse is genuine and that will be reflected in the ultimate sentence I impose.

[21] You have just one earlier offence for burglary some years ago, which seems to predate the commencement of your current relationship. I do not regard that as relevant to today's proceedings.

Victim impact

[22] In Court today are a number of people, some I recognise from the two trials. Some are members of your family, some of Tai's family. The effects of this offending on Tai's family have been devastating and profound. They have, perhaps, been exacerbated by the two inconclusive trials, which have delayed closure for everyone. There are several victim impact statements, which include one each from two of Tai's children, Isaiah aged 10, and Lavana aged eight years. There are also statements from Tai's sister, Fofoa and his brother Alexander, his parents and two of his cousins, Christine and Robert. Christine's account in particular is detailed and harrowing. The picture of Tai that emerges is of a fun loving, outgoing young man with much of his life ahead of him. His three children have lost their father; his parents have lost a beloved son. The family group decided to move out of their home of 15 years, very near the scene of the incident, because they could not cope with living in proximity to the place where the incident occurred. Something of the heart has gone out of the family.

[23] I have carefully read all the victim impact statements and trust that today's proceedings will, in some small part, assist Tai's family as they face the future without him.

Sentencing principles

[24] Under our Sentencing Act I must take into account the need to hold you accountable for the harm done to Tai and to members of his family, as well as the community generally; to provide as far as I can for their interests; to denounce your conduct and to deter both you and other persons from committing offences of this type. I must do what I can to promote in you a sense of responsibility for, and an acknowledgement of the harm you have done, although I should mention that I am satisfied in this particular case that you well understand and appreciate the significance of what has occurred.

[25] I am required also to take into account the gravity of your offending, and the seriousness of the offence in comparison with like offending. There is a general principle which requires any sentence imposed upon you to be consistent with that imposed in like cases. Finally, I am required to facilitate your rehabilitation insofar as I am able to do so.

Starting point

[26] There is no tariff case for manslaughter generally, nor for motor manslaughter specifically. The leading cases on motor manslaughter are *R v Skerrett* CA236/86 9 December 1986, and *R v Grey* (1992) 8 CRNZ 523. In the latter case, after referring to *Skerrett,* the Court said that imprisonment is now regarded as the norm in cases of death or serious injury where the driver is under the influence of drink or drugs, and that in the worst cases sentences in the vicinity of ten years imprisonment have been regarded as appropriate.

[27] Comparable cases are useful in setting a starting point, but care must be taken, because no two cases are precisely the same. A sentencing Judge must carefully analyse the individual case, and then proceed with caution to compare it with others: *R v Edwards* [2005] 2 NZLR 709.

[28] Mr Glubb has helpfully analysed a number of Court of Appeal authorities. Mr Earwaker has also referred to a number of cases. In addition I have undertaken

my own research. None of the cases of which I am aware is quite like this. A case bearing some similarity to the present is perhaps *R v Johnson* HC WHA T31987 9 June 2004. There the young female offender had been to a party at which she became involved in a fight. Subsequently she deliberately drove into a crowd in a paddock, striking a total of 16 people of whom one was killed, four were seriously injured, and the remainder received moderate injuries. There, the Court adopted a starting point of ten years imprisonment, with a final sentence of seven years imprisonment.

[29] Mr Earwaker is, I think, correct to submit that that case was more serious than this, in that it involved a decision to drive deliberately into a crowd in order to avenge an earlier slight. Moreover, there was a significantly larger number of victims.

[30] Other cases to which counsel have referred involve facts that are quite different from the present case. Here, there was no history of life threatening driving before the incident but there was an element of deliberation about what you did. In summary, the facts of this case are a little unusual and I gain little assistance from cases in which the factual background is markedly different.

[31] Counsel accept that the case does not fall within the most serious category which call for starting points of ten years or more. Mr Glubb contends for a starting point between five and seven years. Mr Earwaker says the starting point ought to be between four and five years, so they are not far apart.

[32] In my view, a starting point of six and a half years imprisonment is appropriate. That takes into account certain aggravating features of the offending itself, a topic to which I now briefly turn.

Aggravating features of the offence

[33] Mr Glubb has identified several features which the Crown contends need to be taken into account as aggravating factors. The first is that of premeditation. Mr Glubb argues that you deliberately chose to drive your vehicle into the group,

knowing you were under the influence of alcohol. In other words, your actions demonstrated a resolve to get involved and to use your vehicle in the process.

[34] Mr Earwaker does not accept that this is an aggravating feature. He says that your primary intention was simply to scare the crowd into dispersing.

[35] I do not regard the level of premeditation as constituting a significant aggravating factor, but there is no doubt you did use your motor car as a weapon. I accept when you drove towards the group, your intention was not to hit anyone, but of course your guilty plea to manslaughter reflects the fact you were unable to control the car properly when under the influence of alcohol. As you readily accept, a motor car driven into a group of persons, even at relatively slow speed, can be, and of course was, lethal.

[36] Then there is the specific harm caused to Tai and to his family. It is impossible to lose sight of that most important consideration, but as Mr Earwaker submits, it is of course a factor necessarily inherent in any charge of manslaughter.

[37] Mr Glubb is right to focus upon Tai's vulnerability. He was plainly himself affected by alcohol, was a pedestrian on the roadway and was standing with his back to your approaching vehicle. You knew he was there; he did not know you were approaching.

[38] I do not regard your speed as aggravating. The evidence is that your likely speed was of the order of 15-42 kph at the time of impact, but I do regard as an aggravating circumstance the fact that you chose to drive your vehicle, having consumed a dozen stubbies of beer not long before. Plainly, you were in no condition to drive, and the ultimate tragedy undoubtedly stems, at least in part, from the fact that you were not in proper control of your vehicle by reason of your liquor intake.

[39] It is necessary to take into account also your post-impact conduct. On your own evidence you knew you had hit at least one person, yet you chose, because you feared for your own safety, to drive away from the scene rather than to stop and

ascertain whether anyone had been injured. I need not determine whether or not you heard what was being shouted out to you at the time. I am not satisfied you were aware that Tai was trapped under your vehicle when you drove away from the scene, and so do not regard that circumstance as an aggravating factor, but your failure to stop when you knew you had hit someone is a matter to be taken into account.

Mitigating features of the offence

[40] I accept this incident would not have occurred, but for the actions of Mr Hughes, and that your principal reason for driving towards this group was to facilitate his flight. Against that, it must be said that it is difficult to understand why you felt it was appropriate to use your vehicle at all. The evidence is that Mr Hughes had support from a number of others in your group, including the three who had earlier alighted from your car. The use of the vehicle was utterly inappropriate and quite disproportionate to any threat faced by you or your associates. I do not regard the circumstances in which it was deployed as constituting a mitigating feature. In particular, I do not regard Tai's role in the fight as somehow lessening your culpability.

Mitigating features of the offender

[41] Having considered features relevant to the offence itself, I now move to mitigating features relating to you. I accept there are no aggravating personal features.

[42] Having pleaded guilty, you are entitled to a discount from the appropriate starting point. Here counsel are at odds. Mr Glubb says that the discount ought to be relatively modest, because you pleaded not guilty to murder at the first two trials, and your guilty plea is now entered, in effect, as a recognition of the state of the evidence in those trials, and of the almost irresistible result of a third trial, as Mr Glubb puts it.

[43] Mr Earwaker disagrees. He submits there is no reason why you should not have the benefit of the ordinary 30-33% which an early guilty plea will normally attract: *R v Walker* CA435/08 6 March 2009. I agree with Mr Earwaker. You have indicated from the very outset that you would plead guilty to manslaughter. The Crown chose, as it was entitled to, not to accept that plea. Now that the Crown has presented an indictment charging manslaughter alone, you have pleaded guilty promptly.

[44] This is not a case in which the facts were in dispute. The issue was whether, on largely undisputed facts, the Crown could establish the ingredients of murder. In my view it would not be right to deprive you of the ordinary discount for an early guilty plea simply because the Crown chose to charge murder at your first two trials.

[45] I also accept Mr Earwaker's submission that, having regard to your evidence at the trials, your instructions to counsel and the contents of the pre-sentence report, it would be appropriate to make a further small allowance for remorse and the fact you have taken complete responsibility for what occurred. I accept Mr Earwaker's submission that you have shown a degree of insight into your offending, not always evident in cases of this type.

[46] Built into the allowance I propose to make for remorse, and it is a small one only, there will be a recognition of your previous good record. I note you enjoy the continuing support of your partner and your family. You are fortunate indeed to be in that position. No doubt their support will stand you in good stead in the future. Because you have that support I recognise you are unlikely to be before the Court for offences of this sort ever again.

Result

[47] In order to recognise your plea of guilty I allow a discount of two years imprisonment. There will be a further discount of three months in order to reflect your remorse and your previous good record.

Disqualification

[48] Sections 124 and 125 of the Sentencing Act enable the Court to impose a period of disqualification from holding or obtaining a driver's licence where a motor vehicle has been used in the facilitation of an offence. Mr Earwaker submits that, should the Court be minded to impose a period of disqualification it should not be as long as is often imposed where there is evidence of a persistent course of poor driving. Moreover, as he points out, you do not have any previous driving related convictions. I accept that submission. This case is different from those in which a sustained period of dangerous driving leading to a death is accompanied by a poor previous driving record.

[49] Further, Mr Earwaker notes that the terms of your bail between the first and second trials prohibited you from driving for almost a year. He submits that a lengthy period of disqualification would simply cause hardship to your family, and that you have demonstrated while on bail following the second trial, that you are capable of driving without incident.

[50] I am satisfied it is appropriate to impose a further period of disqualification, but having taken into account the period of disqualification already effectively served, I initially had in mind imposing a period of disqualification of nine months from the date of your release. However I propose to limit that to a period of six months, because I am impressed by the business plan documents Mr Earwaker submitted this morning, and I believe in some small way you are entitled to the Court's assistance in getting that sort of venture up and running. I am required to take into account your rehabilitation prospects. Accordingly, the period of disqualification will be six months from the date of release.

Sentence

[51] On the charge of manslaughter you are sentenced to a term of imprisonment of four years three months. You are also disqualified from holding or obtaining a driver's licence for a period of six months from the date of your release from prison.

C J Allan J