

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

CRI 2009-004-11941

THE QUEEN

v

BIO TALAKATOA O'BRIEN

Hearing: 29 September 2009

Counsel: N Malarao for the Crown
D Niven for the Prisoner

Sentence: 29 September 2009

SENTENCE OF POTTER J

Solicitors: Crown Solicitor, P O Box 2213, Auckland 1140

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Introduction

[1] Bio O'Brien: You are before the Court today for sentencing on a charge of manslaughter to which you have pleaded guilty.

[2] It is necessary that I briefly summarise the background facts of this offending, although the full statement of facts which is the basis upon which you entered your guilty plea, has been read to the Court by Mr Malarao, counsel for the Crown.

Background facts

[3] At about 8 a.m. on Tuesday 7 April this year you were driving a black BMW motor car in a southerly direction along Carrington Road, Mt Albert. It was a busy time of the morning. The victim Mr Jasmatbhai Patel was driving a blue van in the same direction from his home in Te Atatu. There was a minor collision between your vehicle and Mr Patel's vehicle which caused a small dent of about 30 centimetres in the side of your vehicle. Both vehicles stopped, which caused some disruption to the flow of traffic.

[4] You approached the driver's door of the van and attempted to open it. Mr Patel was also trying to open the door when you grabbed it and opened it. Mr Patel was sitting in the driver's seat with his seat belt fastened. You leant into the van and took hold of Mr Patel and pulled him out. You pulled him out of the van on to Carrington Road. At this stage you were both standing on the roadway between the two vehicles.

[5] There was an altercation. Mr Patel tried to placate you because he could see that you were angry. He apologised for the damage to your vehicle. You grabbed Mr Patel's clothing and pulled him over to the side of your vehicle to show him the damage. He tried to pull away but you held on to him by his clothing and struck him a number of times about the face and the body with your hands. Holding on to Mr

Patel's shirt you pulled him towards you and then pushed him away causing him to rock back and forth. He put his hands up trying to defend himself but you continued to strike him as he tried to back away.

[6] Eventually you let go of him but you pushed him hard with both hands in the chest causing him to fall backwards. As he fell backwards he hit the base of his head on the kerb of the roadside and sustained a large and complex fracture to the base of his skull. An open wound also resulted. Mr Patel was unconscious and bleeding from the head wound and from his left ear.

[7] You tried to pick him up but he could not stand unassisted. You managed to move him to the grass verge where you laid him down. By this time members of the public had stopped to assist and Police and ambulance staff shortly arrived. Mr Patel was admitted to the intensive care unit at Auckland Hospital but died the following day from the injuries he sustained in the assault.

Victim impact statement

[8] We have heard read in Court today a victim impact statement by Mr Patel's son, George Patel. I have read the victim impact statements by his grandson and granddaughter. Mr Patel was a much loved father and grandfather. He was aged 78 at the time of his death. A hardworking man who had moved from India to New Zealand in 1977 to give his children better opportunities in life. He was loved and respected in the family and in the community. His death and the way he died have impacted significantly on those who are close to him.

Pre-sentence report

[9] I have been provided with a pre-sentence report for you, Mr O'Brien. You are Tuvaluan, aged 28 years. You came to New Zealand as a scholarship student in 2000. You have a wife and a daughter who I believe is turning three years old today. You have had good opportunities in life studying at Otago University and Unitec in Mt Albert. You express remorse for what has happened and you have provided a

letter to the Court in which you emphasise your sorrow and remorse. Your wife continues to support you and says that you are a good husband, father and family man. She confirms this in a letter she has addressed to the Court.

[10] You expressed the wish to meet with Mr Patel's family to apologise to them for what you have done and for the loss you have caused to them but they did not wish to accept your offer. You say you can understand that and that what you have done is in your words, "not worth forgiveness".

[11] The probation officer who prepared the pre-sentence report says you appeared to have insight into your offending behaviour. You agree absolutely that you have the capacity to resort to violence, which was a contributing factor in this offending. You have undertaken an anger management course while in custody and you say you are willing to continue to address your propensity for violence. You will need to do so, Mr O'Brien. The probation report assesses that your risk of using violence in future is high but can decrease if you continue to address your capacity to resort to violence. You say that you are highly motivated to address the causes of your offending behaviour.

Aggravating factors

[12] The Crown notes as aggravating factors of this offending that while it was the final push to Mr Patel that proved fatal, this was not a case of a single act of assault, because the push was preceded by you pulling Mr Patel out of the car and despite his attempts to placate you and apologise to you, you grabbed his clothing, pulled him around and struck him a number of times about the face and body with your hands. There were not significant signs of injury, beside the wounds to the head, but the force you used caused several buttons to be ripped from Mr Patel's clothing and there was an area of bruising on the left side of the chest which was consistent with being caused by a blow or blows. You continued to strike him while he tried to back away prior to the final, fatal push.

[13] The Crown accepts that this was not premeditated offending but notes there was a sustained assault before the final push which proved fatal.

[14] Mr Patel was aged 78 years as I have said, an elderly man of slight build. He was vulnerable given that you were then aged 27 and of strong build.

[15] The Crown points to the public nature of the offending. This offending took place in a public road during peak morning hour traffic and in view of a number of primary school children who were standing at a bus stop across the road.

[16] The Crown notes that you did try to assist Mr Patel once you had caused him to fall on to the kerb.

[17] You have five previous offences, Mr O'Brien, dating from 2001. I note offences of male assaults female and threatening to kill in 2001 for which you were sentenced to a period of community service. Those previous convictions are a cause for concern given your acknowledged propensity to resort to violence. But they are a number of years ago and relate to a single incident. For sentencing purposes I do not propose to treat them as an aggravating factor.

Mitigating factors

[18] In mitigation is your guilty plea which the Crown accepts should be treated as an early guilty plea. You are remorseful, which I accept. You made an offer to be involved in a restorative justice conference, which I treat as a factor confirming the sincerity of your remorse.

Submissions

[19] The Crown submits that an appropriate starting point for sentencing is in the range of four and a half to five years' imprisonment, taking into account the aggravating factors and the need for denunciation of your offending and deterrence in relation to road rage offending specifically and generally.

[20] Mr Niven on your behalf, submits that an appropriate starting point for sentencing is three to three and a half years' imprisonment and that you are entitled to a significant discount for the mitigating factors to which I have already referred.

Sentencing

[21] There is no tariff case for manslaughter. Each case will turn on its own particular facts and circumstances. It is inherent in the offence of manslaughter that you did not intend to kill your victim Mr Patel. But, Mr O'Brien, this was an appalling case of what may be described as "road rage". All of us who drive our motor vehicles, particularly in the city, know that from time to time there will be situations that frustrate us and sometimes accidents can occur when there is no breach of traffic regulations or even when appropriate care is taken. Your response to a minor collision and a minor scrape or dent to the side of your car was totally disproportionate. While you did not intend the fatal outcome that resulted, the assault you visited upon Mr Patel, quite unprovoked and quite unjustified, carried the risk of a serious outcome which unfortunately resulted.

[22] Relevant authorities, most of which have been referred to by both the Crown and the defence are: *R v Roker* CA 358/92 18 February 1993, *R v Savage* HC WANG T 982142 12 March 1999, Doogue J, *Lauaki v Police* HC AK CRI 2005-404-429 2 March 2006, Rodney Hansen J, *R v Schimanski* HC HAM CRI 2006-068-215 123 December 2006, Frater J, *R v Carmichael* HC TAU CRI 2007-070-2603 6 September 2007, *R v Esefo* HC AK CRI 2008-092-7925 24 October 2008 and very recently *R v Bryenton* HC AK CRI 2009-004-003080 7 April 2009.

[23] It has been accepted in a number of cases that for "one punch" cases a starting point in the range of three and a half to four years' imprisonment is appropriate. I see no reason to differentiate between a "one punch" case and a "one push" case: *R v Paku* HC HAM CRI 2005-019-6408 2 September 2006.

[24] However, this was more serious than those cases where a single blow or push has led to the death of the person assaulted. Here there was a sustained attack on Mr Patel which though not for any great duration, differentiates this case from those where a single act of assault has proved fatal. Further, I accept that the vulnerability of Mr Patel by reason of his age, the continuation of the assault in the face of his apology and attempt to back off from the assault and the complete absence of any

provocation from the victim are factors that should appropriately be reflected in the sentence imposed.

Sentence

[25] I take a starting point of four and a half years' imprisonment. To reflect the mitigating factors, the guilty plea and genuine remorse, I allow a discount of one-third or eighteen months. The final sentence is three years imprisonment.

[26] Please stand Mr O'Brien.

[27] The sentence imposed on you, Mr O'Brien, is three years' imprisonment.

[28] You may stand down.