

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CRI-2022-090-4196
[2024] NZHC 870**

THE KING

v

BRAYDEN ANDREW TOWLER

Hearing: 19 April 2024

Appearances: C P Paterson and K S Li for Crown
A D Couchman and K L Blackmore for Mr Towler

Date of sentence: 19 April 2024

SENTENCING NOTES OF JAGOSE J

[1] Mr Towler, as you know, on 20 March this year, a jury found you guilty of the manslaughter of Petunu Talitimu, by the unlawful act of dangerous driving causing death. You were convicted accordingly. I now am to sentence you on your conviction.

[2] In sentencing you, I must accept as proven all facts essential to your established guilt.¹ Because I was the trial judge, for sentencing, I also am entitled to make factual findings based on the evidence at trial, if consistent with the jury's verdicts, whether or not adverse to your interests. I am not bound to accept a version of facts most favourable to you.²

[3] I have read and listened to all counsel have had to say, both for you and for the Crown. The Crown recommends a starting point of five years' imprisonment. Your counsel, Adam Couchman, advocates for a starting point of four years and three months' imprisonment. He additionally claims discounts in a range of 40-45 per cent, leading to an end sentence of two years and four to six months' imprisonment. Both counsel propose a period of disqualification from driving after your release: six years says the Crown; 12 months says Mr Couchman.

[4] The lawyers' written submissions are detailed and lengthy. I have given them careful consideration. But I don't recite them, because sentencing is an intense exercise of my own judgement. I am not bound by the lawyers' views; I have to come to my own decision. To meet sentencing's multiple purposes,³ I must satisfy myself of the appropriate sentence for the gravity (or seriousness) of your offending, including your culpability (or responsibility) for it.

Your offending

[5] I need first to cover off the background to your offending, to let people know the conduct for which I am sentencing you.

¹ Sentencing Act 2002, s 24(1)(b).

² Section 24(1)(a); and *Edwardson v R* [2017] NZCA 618 at [105]–[107], citing *R v Connelly* [2008] NZCA 550 at [14] and *B (CA58/2016) v R* [2016] NZCA 432 at [76].

³ Sentencing Act, s 7: accountability, responsibility, victims' interests, reparation, denunciation, deterrence, community protection, rehabilitation and reintegration.

[6] Around midday on Wednesday, 23 November 2022, in traffic on streets surrounding a suburban shopping mall and other community facilities in Auckland's Glen Eden, an altercation occurred between you and Mr Talitimu from the Holden Commodore and Ford Territory in which you respectively were travelling.

[7] On Glenmall Place's one-lane roadway, edged on both sides by angled carparks serving the mall shops, the Ford initially was behind your Holden after you entered the roadway in front of the Ford. The Ford was driven by Mr Talitimu's partner, Ms Taateo. She perceived you had cut in front of her, "zooming ... out of nowhere". The Ford tailgated your car as you both drove in traffic up Glenmall Place.

[8] At the T-intersection exit into the bounding Glendale Road, with Mr Talitimu standing on the Ford's passenger-side running board and holding onto its roof with one hand, the Ford pulled up towards your driver's side as you travelled to the left of traffic stopped at the intersection. Mr Talitimu may have slapped the side of your car. At about the same time, the front passenger door of your car opened. The passenger appeared to be seeking to exit but the door closed again. While I cannot be certain about verbal and gestural exchanges between the occupants of the two cars, I apprehend you gave as good as you got.

[9] You then drove the Holden a short distance south-west down Glendale Road but almost immediately executed a forceful U-turn outside the Glen Eden RSA's carpark. You continued to accelerate in the direction from which you had come, crossing to the wrong side of the road around traffic ahead of you. One of those vehicles was the Ford, stopped in the middle of the road at the pedestrian crossing. Mr Talitimu stood to one side, on the pedestrian crossing, facing your car. You hit him there, only two seconds after completing the U-turn.

[10] Your speed was estimated to accelerate from some 30 km/h at completion of the U-turn to nearer 40 km/h close to impact. There is equivocal evidence if you momentarily braked before impact. Mr Talitimu was carried on the bonnet and windscreen of your car for some distance after impact. He fell to the side of the road as you swerved back to the correct side of the road after passing the blocking traffic. You did not stop but continued to drive away. Mr Talitimu died at the scene, of "head

injuries ... so catastrophic that [his] survivability was zero”, attributed by the pathologist to his body hitting the road.

[11] You had no acquaintance with Mr Talitimu prior to the events of the day. Crucially, the jury’s verdict means it reasonably doubted you intended to hit Mr Talitimu with your car. Given the jury’s verdict, it may also have doubted you returned to the intersection to engage with the Ford’s occupants. An alternative is you may have thought you were continuing to be pursued down Glendale Road and took evasive action.

[12] Regardless, the overall actions of your driving manoeuvre — in conducting a speedy U-turn in mid-weekday traffic in a retail shopping environment, accelerating to and on the wrong side of the road, and in the vicinity of both a pedestrian crossing and the intersection with Glenmall Place as well as oncoming traffic from West Coast Road, and passing pedestrians — objectively was dangerous. That danger crystallised here in your hitting Mr Talitimu, causing his death. The dangerousness was exacerbated by your following escape.

Victim impact statements

[13] I have, as you have heard, victim impact statements from Mr Talitimu’s parents and siblings. I offer you all this Court’s condolences. The statements set out in anguished detail the very considerable emotional and other personal impacts of your offending. None is surprising; all is awful. Given that, I am grateful for Ms Higgins’ forgiveness of you, her hope you also forgive Mr Talitimu and his partner for their part in the altercation and her wish you learn from this event to be a better person, which opportunity you took from Mr Talitimu. I urge you, Mr Towler, to understand and accept the perspectives explained to you by the family of Mr Talitimu.

Personal circumstances

[14] I turn to consider your personal circumstances.

[15] You were 27 years old when you killed Mr Talitimu. Over the preceding decade you had amassed more than 60 convictions for various dishonesty, driving, drug and

violence offending and breaches of sentence conditions. You have never held a valid New Zealand driver's licence and have been forbidden to drive without one now for over a decade. Only on the dishonesty offending had you previously been sentenced to short terms of imprisonment. But there also are multiple supervisory sentences, serving no obvious deterrent to your continuing nuisance offending.

—*PAC report*

[16] For your sentencing, I have a pre-sentence report recently prepared by the Department of Corrections in the report-writer's limited time with you. She accepts you are sincerely regretful and remorseful for causing Mr Talitimu's death, which was an outcome you had not anticipated at all. She records your advice of a difficult childhood, which you seek to avoid for your own son (presently in your mother's care). Your subsequent years relied on unstable income supported by theft and in negative peer associations. You said you would work towards addressing factors related to your offending, but she comprehends you have no real motivation for it as you do not recognise your need for rehabilitation, and she therefore puts you at high risk of re-offending with a very high risk of harm to others. But I also have evidence of your completion over the course of 2023 of a range of Corrections' rehabilitation programmes.

—*family representations*

[17] Your girlfriend, mother and grandmother each have provided supportive statements, broadly confirmatory of the report-writer's record of your background. They identify your remorse for causing Mr Talitimu's death, which they say has caused you to re-evaluate your responsibilities in life. They particularly emphasise your relationship with your seven-year-old son, on whose development your imprisonment already has exacted a significant toll.

[18] I also have read your own letter to Mr Talitimu's family, written shortly after you were found guilty of causing his death. As I have said, and as you have heard, Ms Higgins has granted the forgiveness you sought, recognising the deep remorse and regret you expressed to them and your preparedness to take responsibility and be accountable for Mr Talitimu's death.

Approach to sentencing

[19] I now explain how I will go about sentencing.

[20] The usual sentencing method involves two stages. First, I decide a starting point for the type of offending for which you are convicted. That involves identifying the aggravating and mitigating features of your offending.⁴ Then I take into account all aggravating and mitigating factors personal to you, all to be calculated as a percentage of the starting point.⁵ Last, I stand back to assess the appropriateness of that sentence in your individual circumstances.⁶

[21] In the end, my sentence is to reflect this community's repudiation of your crime, the sentence being "determined not on impulse or emotion but in terms of justice and deliberation".⁷ I must have regard for the statutory purposes and principles of sentencing.⁸ I must hold you accountable for your offending and for the harm you have caused,⁹ to promote your responsibility and accountability for that harm.¹⁰ I am to provide for victims' interests and any reparation for harm.¹¹ Your sentence should be sufficient to denounce your conduct,¹² to deter you and others from committing such offences,¹³ and to protect the community.¹⁴ I am to assist in your rehabilitation and reintegration in the community.¹⁵

[22] I must consider the gravity and seriousness of your offending, and take into account its effect on the victims.¹⁶ The sentence must take into account the desirability of consistency in sentencing,¹⁷ and anything in your circumstances as would make an

⁴ *R v Taueki* [2005] 3 NZLR 372 (CA).

⁵ *Moses v R* [2020] NZCA 296, [2020] NZCA 296 at [46]–[47].

⁶ *Berkland v R* [2022] NZSC 143 at [22] citing *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38].

⁷ *R v Puru* [1984] 1 NZLR 248 (CA) at 249.

⁸ Sentencing Act, ss 7 and 8.

⁹ Section 7(1)(a).

¹⁰ Section 7(1)(b).

¹¹ Section 7(1)(c) and (d).

¹² Section 7(1)(e).

¹³ Section 7(1)(f).

¹⁴ Section 7(1)(g).

¹⁵ Section 7(1)(h).

¹⁶ Section 8(a), (b) and (f).

¹⁷ Section 8(e).

otherwise appropriate sentence “disproportionately severe” in your case.¹⁸ I must impose the least restrictive outcome appropriate in the circumstances.¹⁹

[23] These purposes and principles of sentencing have no ranking,²⁰ except to recognise “a hardening of the courts’ attitude to this type of [motor manslaughter] offending”.²¹ My ultimate consideration is if “the sentence is a just one in all the circumstances”, having regard to “the circumstances of the offence and offender against the applicable sentence purposes, principles and factors”.²²

Starting point

[24] I begin with setting a starting point for your offending.

[25] The range of conduct manslaughter sentencing must encompass means sentences may not easily be reconcilable. The best guidance for sentence in manslaughter cases is to be found in earlier decisions in similar cases.²³ In general, starting points of 10 or more years’ imprisonment for serious manslaughter offending tend to incorporate aggravating features of relevant prior offending.²⁴ Where that pattern is absent, and the death may “be properly characterised as an isolated event evidencing a momentary and uncharacteristic loss of control”, a lower starting point may be achieved.²⁵

[26] Motor manslaughter — death caused by a motor vehicle — is no different.²⁶ As with manslaughter sentencing more generally, no guideline judgment exists.²⁷ Analogy with 10-year starting points recognises “death as resulting from a deliberate, grossly improper use of a potentially lethal object”.²⁸ Thus a nine-year starting point in a particular case was at the upper end of the range for driving there over an extended

¹⁸ Section 8(h).

¹⁹ Section 8(g).

²⁰ *Moses v R*, above n 5, at [4], citing *Hessell v R*, above n 6, at [37].

²¹ *R v Whiu* [2007] NZCA 591 at [20], citing *R v Grey* (1992) 8 CRNZ 523 (CA) at 525.

²² *Moses v R*, above n 5, at [49].

²³ *Jefferies-Smith v R* [2020] NZCA 315 at [13], citing *R v Tai* [2010] NZCA 598 at [12].

²⁴ *Woodcock v R* [2010] NZCA 489 at [41].

²⁵ At [41].

²⁶ *Anderson v R* [2010] NZCA 339 at [9].

²⁷ *R v Whiu*, above n 21, at [19], citing *R v Leuta* [2002] 1 NZLR 215 at [43]–[66].

²⁸ *R v Grey* CA122/92, 6 August 1992 at 526.

period in peak hour traffic in breach of many road rules with serious threat to other road users, ‘miraculously’ only resulting in a single death.²⁹

[27] But the directed nature of motor manslaughter, meaning the car generally is under the defendant’s control, also means analogy with lower manslaughter sentences as the result of a momentary loss of control is difficult to establish. From whatever that lower end may be for motor manslaughter, aggravating factors to take into account include highly culpable driving (such as aggressive driving), habitually driving below an acceptable standard (such as driving without ever having held a licence or while disqualified or forbidden) and irresponsible behaviour (such as throwing the victim from the bonnet of the car by swerving to escape, or failing to stop) at the time of the offence.³⁰

[28] For the purpose of guidance, I disregard cases of death arising from use of the car as a weapon.³¹ The jury’s verdict means that was not your case. I also disregard cases in which driving was impaired by the driver’s consumption of alcohol or drugs.³² That also was not your case.

[29] Instead I am guided by a number of other cases of death caused by reckless or dangerous driving, with starting points of four to five years’ imprisonment.³³ I do not accept your driving was significantly more dangerous than that in *S and G*, in which the offenders held the victim to their moving car.³⁴ In *Tawa*, it was accepted the driver bore no blame for anything that occurred up to the point the victim fell from the vehicle.³⁵ Here, you justifiably are to be held liable for your dangerous driving leading

²⁹ *R v Whiu*, above n 27, at [20]. Compare *R v Breakwell* [2019] NZHC 3338 (starting point of five years and six months’ imprisonment).

³⁰ *Gacitua v R* [2013] NZCA 234 at [25], citing *R v Cooksley* [2003] 3 All ER 40 (Crim App) at [15].

³¹ For example, *R v Niumagumagu* [2021] NZHC 3465; *R v Taiapa* [2018] NZHC 1815 (affirmed on appeal: *Taiapa v R* [2019] NZCA 524); and *R v Haufano* [2014] NZHC 1201.

³² For example, *R v Stevens* [2017] NZHC 727; *R v Green* [2016] NZHC 513; and *R v Tairā* HC Auckland, CRI-2006-092-11737, 19 June 2009 (*Tairā* also taking use of the car as a weapon as an aggravating factor).

³³ *R v S and G* [2024] NZHC 197; *R v Tawa* [2020] NZHC 95; *R v Purcell* HC Auckland CRI-2008-092-7177, 21 October 2010; and *R v Guild* HC Wellington CRI-2003-032-1649, 14 May 2004 (affirmed on appeal: *R v Guild* CA219/04, 11 October 2004).

³⁴ *R v S and G*, above n 33, at [27].

³⁵ *R v Tawa*, above n 33, at [4].

to Mr Talitimu’s death. The fact you were forbidden from driving at all appears a factor unique to your offending. I take *Purcell* as the most informative comparator, given:³⁶

... the risk that someone would not be able to get out of the way of his very aggressive driving. And the situation was one that he had brought upon himself.

[30] I therefore take a starting point in your case — aggravated by your highly culpable driving, habitual driving without a licence and while forbidden and irresponsible behaviour as I have described — of five years’ imprisonment.

Adjustment for personal factors

[31] I now turn to consider your personal circumstances.

—aggravating factors

[32] No one contends for any aggravating factor in your history as would justify any uplift on my starting point. I already have taken your forbidden driving into account in reaching my starting point and it would be double-counting to uplift that now to account for your relevant criminal history. The more orthodox alternative still would have been a 10 per cent uplift on a lower starting point of perhaps four years and six months, leading to much the same five years’ imprisonment.³⁷

—mitigating factors

[33] Nonetheless, it is accepted your criminal history is effective to exclude any discount for relative youth or for good character.

[34] You are entitled to a discount for your preparedness to plead guilty to a charge of manslaughter. I have read your counsel’s July 2023 correspondence with the Crown to that end, and the Crown’s August 2023 preference to proceed to trial on the murder charge. Your offer to plead guilty was vindicated by the jury’s verdict and therefore is to be recognised “in the normal manner”.³⁸ As not clearly arising at the first reasonable

³⁶ *R v Purcell*, above n 33, at [30].

³⁷ See *R v Whiu*, above n 21, at [21].

³⁸ *R v Jamieson* [2009] NZCA 555 at [44]. See also *R v Hessel* [2009] NZCA 450, [2010] 2 NZLR 298 at [41]–[42].

opportunity after initial disclosure,³⁹ but nonetheless well in advance of trial (albeit if of a strong Crown case for manslaughter), I will allow a 20 per cent discount.⁴⁰

[35] I recognise your fledgling steps towards rehabilitation in custody,⁴¹ and the significant impact of your custody on your seven-year-old son.⁴² But the former still is attenuated and your son was and remains in your mother's care, even while you plainly had a meaningful relationship with him. I will allow a 10 per cent discount for these.

[36] And I accept you properly and genuinely are remorseful for causing Mr Talitimu's death, a fact reinforced by Ms Higgins' gracious forgiveness of you. I will allow a 5 per cent discount on that account.

End point

[37] Taken together these are discounts of 35 per cent. That brings me to an end sentence of three years and three months' imprisonment. Standing back, and properly to reflect your offending was to take Mr Talitimu's life, I consider that just in all the circumstances.

Disqualification from driving

[38] Last, I am asked to disqualify you from driving for a period following your release from prison.⁴³ I am satisfied your commission of the offence was facilitated by use of a motor vehicle.⁴⁴ Given your conviction for manslaughter, I may fix any period of disqualification I think fit.⁴⁵ Again, there is no guideline for such disqualification,

³⁹ *R v Hessel*, above n 38, at [29].

⁴⁰ *Jefferies-Smith v R*, above n 23, at [44]–[46].

⁴¹ Sentencing Act, ss 7(h) and 8(i).

⁴² *R v Hayman* [2021] NZHC 642; *R v Theodore* [2018] NZHC 2364; NZLS CLE Justice Susan Thomas, Fiona Guy Kidd KC and Stacey Shortall "Impact of Parental Incarceration on Children" (New Zealand Law Society webinar, 2023); Annaliese Johnston "Sentencing the silent: children's rights and the dilemma of maternal imprisonment" [2014] NZPubIntLawJI 17.

⁴³ Sentencing Act, s 124(3).

⁴⁴ Section 124(2)(a).

⁴⁵ Section 125.

which instead is to be determined from sentencing principle.⁴⁶ This is for punitive and protective purposes.⁴⁷

[39] Given the importance of driving to independent travel in Auckland, I have considered if disqualification may incentivise you to further unlicensed driving. As any disqualification would arise on your release, I think it instead a useful discipline for your continued remorseful rehabilitation and reintegration. It is not ‘disproportionately severe’. I consider *Tawa* the most obvious (but less serious) comparable here, and reject *Haufano* on the same ground as previously,⁴⁸ to order a post-release period of 15 months’ disqualification from holding or obtaining a driver licence.

Sentence

[40] Mr Towler, please stand. On your conviction for the manslaughter of Petunu Talitimu, I sentence you to three years and three months’ imprisonment on standard detention and post-detention conditions.⁴⁹ You are disqualified from holding or obtaining a driver licence for a period of 15 months after your release from prison. You may stand down.

—Jagose J

⁴⁶ *Taiapa v R* [2019] NZCA 524 at [22]–[35].

⁴⁷ At [28]–[29], citing *Mathias v Police* [2016] NZHC 959 at [37]–[39].

⁴⁸ See [28] above at n 31.

⁴⁹ Sentencing Act, ss 80C(2), 80N(2)(a) and 80O.