

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

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CRI-2022-009-7259
[2023] NZHC 2908**

THE KING

v

MARK NAGEL

Hearing: 17 October 2023
Appearances: M G McClenaghan for Crown
T Aickin for Defendant
Judgment: 17 October 2023

SENTENCING NOTES OF DUNNINGHAM J

Introduction

[1] Mr Nagel you have pleaded guilty to the charge of manslaughter and you are here today for sentence.

[2] As the lawyers have explained, I will first consider the starting point for sentence. I will do this having regard to the aggravating features of this offending and with regard to comparable, what we call, “single punch” manslaughter cases. I will then consider aggravating and mitigating features which are personal to you, and I will adjust the starting point to reach the final sentence.

[3] In doing all that, I have to have regard to the principles of the Sentencing Act. I have to hold you accountable for the harm you have done to the victim and the community by your offending. I have got to promote in you a sense of responsibility for, and acknowledgment of, that harm, and I have got to deter you, and others from committing the same or similar offence. However, I also have to, to the extent that is possible when sentencing you, assist you in your rehabilitation and reintegration. In setting the sentence, I must also do my best to impose a sentence that is consistent with the sentences that have been imposed on similar offenders committing similar offences in similar circumstances.

[4] However, before I start that process, I want to acknowledge the friends and family of the victim, Tony Kelly. In particular, I want to acknowledge those of you who have provided victim impact statements. While I will refer to Tony as the victim when I summarise what happened, that is not to detract from the rounded, complex and decent person that you all knew, and that you have described in your statements.

[5] First, I want to acknowledge Mr Kelly's children, in particular, Ryan's victim impact statement. It is quite poignant that Ryan is around the same age as you, Mr Nagel, but his life has taken a very different trajectory. He reflected to me on everything that has been taken from him by your actions. As he says, he will never be able to do the things a son should be able to do with their dad. To have a pint with him in the pub, to have him at his wedding, to see him hold his grandchildren, and to watch him to grow into the man he is trying hard to become. He is, quite rightly, proud to be his father's son.

[6] I have also read the victim impact statement of Judi Smitheram, Tony Kelly's partner. She did not want it to be read aloud in Court, but I can say it is a rich and detailed account of who Tony was, and the positive things he did with his life. He had dreams for his future and for the things that he would do with her. She told me of his love of music, of gardening, of being a home handyman, and of cherishing his Irish heritage. Through that victim impact statement, I have a picture of a man with a zest for life who gave to others and who laughed readily. Her loss is palpable through her victim impact statement.

[7] I also have the victim impact statement from Geraldine Clarke, who was Tony's former wife. She speaks of the immense personal difficulties Tony faced in his youth which he could not control, and it is her sadness that he has now died through actions that were beyond his control as well. She is angry too, to have taken away so many opportunities for Tony and his family and she has lost the opportunity to reconcile with him as a friend following the end of their marriage.

[8] Finally, there is the victim impact statement of Tony's two younger brothers, John and Phillip. They speak about making the heart wrenching decision to switch off Tony's life support after 10 days and the agony of having to say goodbye to their brother via video link 12,000 miles away. They are charitable enough to think, too, of your parents who are also victims in this matter. Your parents have to live with the knowledge that their son's actions caused the death of an innocent man. John and Phillip hope, too, that you have reflected on, and are deeply remorseful, for the pain your actions have caused both their family and yours.

[9] As the victim impact statements acknowledge, there is nothing that can be done to bring back Tony, and sadly nothing I can do in sentencing will change the finality of that outcome.

Summary of facts

[10] I now turn to provide a brief summary of the facts of the offending before turning to the sentencing exercise. There can be no real doubt about these facts as they were captured on multiple CCTV cameras.

[11] You first interacted with the victim at the Christchurch Bus Exchange at around 6.15 pm on 18 October 2022. You believed he was taking photographs of you and your friends, although there is no evidence to support that being so. The victim was asked to leave the Bus Exchange by security staff and he did so.

[12] You and several of your associates followed him out of the Bus Exchange and engaged with him outside Ballantynes Department Store. The victim realising he was being followed attempted to walk away from your group, but one of your associates continued to follow him. The victim then swung a punch at him, attempting to defend

himself. The associate re-approached the victim, adopted a fighting stance, and using his right leg, kicked the victim in the shin area. You then walked quickly through the rest of the group towards the victim who was standing side on to you. As soon as you got close to him, you kicked him once straight to the face with your right foot using a martial arts style kick.

[13] The victim immediately lost consciousness and fell straight to the ground where his head impacted on the footpath. You and the rest of the group all fled and ran back towards the Bus Exchange. Once you were on Colombo Street, you and the associate who initially kicked the victim slapped hands together in a congratulatory gesture. You then retreated to the Bus Exchange and departed on separate buses.

[14] Members of the public performed CPR on the victim until emergency services arrived. He was taken to hospital and placed in an induced coma. However, on 28 October 2022, when life support was withdrawn, he died.

Starting point

[15] The first issue I have to consider is the starting point. The Crown has referred me to the case *R v Ioata* which makes a distinction between single punch manslaughter cases where serious injury was not intended, and those where it is.¹ The first of these involves, for example, a punch to the victim in the chest, and who stumbles backwards, falls to the ground, strikes their head and dies, whereas the more serious category is where the defendant deliberately punches the victim, say, in the back of the head, with a single powerful punch that kills the victim. The Crown says this is more like the latter case, in that there was a single forceful kick to the head causing the victim to fall immediately to the ground and death occurred as a result of his head striking the ground.

[16] Where serious injury is intended, the principles in a case called *Taueki* can be applied and the Crown says the following aggravating features from that case are present.² First, while *Taueki* is a case about serious injury, here death was caused.

¹ *R v Ioata* [2012] NZHC 3389 at [21].

² *Taueki v R* [2005] 3 NZLR 372 (CA).

Second, the Crown says there was an element of premeditation as you and your group pursued the victim from the Bus Exchange to outside Ballantynes where the confrontation occurred. Third, there was an attack to the head which was sudden and powerful. Fourth, the victim was vulnerable in that he was not prepared for the attack and was unable to defend himself and break his fall. Finally, the Crown says your conduct after the attack was aggravating. It was clear to everyone that the victim hit the ground hard and, as Mr McClenaghan said, the noise of the impact can be heard on the videoclip. However, you did not go to assist the victim. Instead, you ran off and can be seen on the CCTV footage high fiving the associate who had kicked the victim.

[17] Mr McClenaghan says those are aggravating features that place your offending in a band that can attract five or more years imprisonment.³ He says a starting point of five to five and a half years is appropriate.

[18] Ms Aickin, does not accept that you intended serious injury to result from your actions. She says you have consistently told report writers that you did not intend serious harm and you did not appreciate the force of the kick you delivered, nor did you deliberately aim it at the victim's head. She refers me to three cases which she says are analogous,⁴ where a starting point of three to four years' imprisonment was taken.

Discussion

[19] So, as you have heard, there are no, what we call, tariff decisions for sentencing in manslaughter cases because there are such a wide range of circumstances in which death can occur from an unlawful act. There are two approaches; the first is to apply the sentencing bands in *R v Taueki* with an adjustment to acknowledge that the victim died. The second is to assess culpability by referring to comparable cases.⁵

³ *R v Taueki*, above n 1; and *R v Tai* [2010] NZCA 598.

⁴ *Palmer v R* [2016] NZCA 541; *R v Bryenton* HC Auckland CRI-2009-004-3080, 7 April 2009; and *R v Kokiri* [2019] NZHC 501.

⁵ *R v Tai*, above n 1, at [12]; and *Ioata v R* [2013] NZCA 235 at [27]–[28].

[20] I consider it is appropriate to make reference to the *Taueki* factors here. While Ms Aicken says you did not intend to cause serious injury, I think this case falls somewhere between the two scenarios. There was a deliberate forceful attack to the head.⁶ The CCTV footage of the attack shows you clearly prepared for the attack against Mr Kelly. You walked purposefully towards him, adopted a fighting stance, and launched your leg high into the air. Your foot directly connected with the victim's head when he was side on to you and he did not see it coming.

[21] I consider there was some premeditation here, although not significant. You say that you and your group pursued the victim to get him to delete any video he had taken. However, I accept what Mr McClenaghan says, that there is no indication that there was negotiation about that. Instead, the video suggests that you followed the victim with the intention of having it out with him. The fact that one of your number filmed the attack on camera also suggests this was not completely spontaneous.

[22] The aggravating factor of serious injury was clearly present because the victim ultimately died, although obviously that outcome was not intended.

[23] The aggravating feature in an attack to the head is clearly present. And as I have said, while you say you did not appreciate that the force of the kick you delivered, the video shows a very deliberate action aimed at the head and it is difficult to see that it was unintended. In my view, the force of the kick was the equivalent of a haymaker punch to the head and the victim fell straight to the pavement with no opportunity to break his fall.

[24] I also accept there were multiple attackers. While only one other associate attacked the victim apart from you, the fact you were accompanied by a large of number of young associates must inevitably have amplified the threat the victim felt he was facing. He could not outrun you and he was surrounded. The fact he was facing one attacker when you attacked him from the side meant he did not see your attack coming.

⁶ *R v Ioata*, above n 1, at [21].

[25] I also consider your conduct after the attack is an aggravating feature. You did not offer him any assistance, even though he was clearly lying on the ground motionless. Once you rounded the corner and caught up with the other associate who had attacked the victim, you slapped the palms of each other's hands. While your lawyer submits this was "dabbing", and simply a gesture of greeting, I do not accept that. It was clearly, in the context, a congratulatory gesture, between the two of you.

[26] Finally, though, I do not consider that victim vulnerability is a feature here, other than the fact he was confronted by a large group of young people. There was nothing inherently vulnerable about him in terms of age or disability.

[27] If a strict *Taueki* approach was taken, then I accept a starting point of five years' imprisonment would apply.

[28] But, I now consider analogous cases and, unfortunately, there is a large number of such cases. Some of the comparable cases include:

- (a) *Murray v R* — where there was an altercation between the victim and the defendant and his associates. There had been an argument and the defendant suddenly punched the victim with considerable force to the head causing him to fall straight backwards where his head hit the pavement and a five year starting point was adopted.
- (b) *R v Williams* — the defendant and the victim had been arguing. The victim went to leave and the defendant walked up to him, punched him in the side of the head which immediately knocked him unconscious. The defendant kicked the victim's leg while he was down and a five year starting point was adopted.
- (c) *R v Faletolu* — a kick to the head of the victim came from the defendant running and jumping from a vehicle into the fight and knocking the victim to the ground. I consider that was more serious because it is obvious that a more serious injury would result from a kick from that

position, rather than from a static position as you adopted, and that case had a starting point of five and a half years' imprisonment.

[29] I have also considered the cases your lawyer has referred me to. In *Bryenton*, a four year starting point was taken, where the attack was a spontaneous punch in response to a drink being knocked over, but that did not have the element of a group attack that is present here. In *Palmer v R*, there was a similar element of a group being involved and surrounding the victim and the victim did not see the single punch coming and a four year starting point was taken there.

[30] Having regard to all those, and the other cases, I propose a starting point of four years six months' imprisonment.

[31] I now have to consider aggravating or mitigating features relating to you. In that regard, I have been supplied with a great deal of material, including the pre-sentence report, the report from Dr Monasterio, a consultant psychologist, the prison counsellor's letter, and a letter from your parents.

[32] From this, I have learnt that you were born in South Africa and adopted by the Nagel family when a baby. You had a happy childhood and your family emigrated to New Zealand when you were around 10 years old. You had been positively engaged in Air Force training cadets and held down several part-time jobs which you worked well at, but your behaviour reportedly changed when you became involved with the wrong crowd at the Christchurch Bus Exchange after being introduced to them by a school friend. You then started to truant from school and became involved in filming young people associated with different gangs fighting and in selling some of the proceeds of crime for the gang members on their instructions. Your family were dismayed by your behaviour, and they tried their best to manage it by imposing curfews on you, but that caused tension at home.

[33] You clearly have potential. You achieved some credits at NCEA level 2, you have held down jobs. Your father's employer is also willing to employ you in the future. You have a partner who is supportive of you. Your parents have clearly done

their best by you and continue to support you. They want you to receive a sentence short of imprisonment, and say you are deeply remorseful for your offending.

[34] Dr Monasterio's report outlines your background and the fact you showed signs of ADHD from a young age which led to conflict with peers and a tendency towards acting aggressively. This improved with medication, but you have had difficulties with the effects of medication, and you are currently not taking it. You were identified with specific learning deficits which required remedial teaching and made you feel different from a young age. You struggled to form stable relationships and control yourself and it seems you dealt with problems with self-esteem by using your physical strength and engaging in fighting, and this gained you admiration from your peer group.

[35] Your lawyer submits that taking account of these background factors, your age, your remorse, your rehabilitative potential and your early guilty plea, you are entitled to significant discounts.

[36] The Crown submits it is appropriate that you receive a 20 per cent discount for your youth and the same for your guilty plea but is less positive about whether you are entitled to any other discounts.

Discussion

[37] Your guilty plea clearly warrants a discount, and the only issue is whether it is 20 or 25 per cent.

[38] Ms Aickin explains why there was a delay between your first appearance on 19 October 2022⁷ and the entry of the guilty plea on 12 May 2023. I accept that you entered your guilty plea at the first available opportunity following legal advice given in light of Dr Monasterio's opinion and I would allow a 25 per cent discount for guilty plea.

⁷ On a different charge.

[39] I also accept that you are entitled to a discount in recognition of your youth and lack of previous convictions and I would allow 20 per cent as both lawyers propose.

[40] What is more contentious is what other discounts should apply. I do not consider that Dr Monasterio's report makes a clear and direct connection with any mental health issues or intellectual disabilities and your offending behaviour. It also says it is unlikely the symptoms of ADHD significantly and directly contributed to your offending behaviour. The most he can say is that it is likely that the impact of your ADHD contributed to your propensity to use aggression and at times, violence, to deal with interpersonal confrontation and to gain social approval. At most, I am prepared to give a five per cent discount for this rather indirect link, between your personal background and your offending.

[41] Finally, your lawyer suggests there should be a discount for your remorse and rehabilitative prospects. The pre-sentence report writer says you are remorseful for your offending and you recognise there are many victims of your offending. Dr Monasterio reports that you are remorseful for your actions and for the distress you have caused the victim's family and your parents and the community. You have told him you want to stay out of trouble, study as many courses as you can, and do everything you can to get out as soon as possible. You say to him "everything has changed" for you. I truly hope that is correct.

[42] While I recognise a discount for remorse requires more than just a bare assertion of remorse,⁸ I consider that the information I have before me suggests you are remorseful. The prison counsellor suggests you are working on emotional regulation and gaining insight into what is causing your current beliefs and behaviours. Your parents also consider you have real rehabilitative potential, and they say you now want to help prevent others going on a path towards a similar situation.

[43] In light of the evidence that you have thought long and hard about your behaviour while in prison, I am prepared to give you a five per cent discount for

⁸ *Whitcombe v New Zealand Police* [2018] NZHC 1409 at [27].

remorse and rehabilitative potential. In total, that entitles you to discounts of 55 per cent from the starting point of four years six months.

[44] The end sentence is then, rounded down, two years' imprisonment. That means home detention is available and your lawyer says you should be granted leave to convert your sentence to home detention. Your parents support that and your counsellor says you will be able to continue counselling in the community.

[45] Because of the delay until sentencing you have now spent several months in prison. I understand you do not want to go back there. I accept therefore, your rehabilitation will be better served if you are able to serve the rest of your sentence on home detention.

[46] Mr Nagel, you have got choices. That is not something your victim has. You have taken that away from him. Your parents were right to be concerned about your behaviour and your associates. I hope you see that now. Use the choices you have, and the support you are being given, to do something worthwhile with your life.

[47] Mr Nagel would you please stand.

[48] On the charge of manslaughter, I sentence you to two years' imprisonment.

[49] I grant you leave to apply to this Court for a sentence of home detention.

[50] You may stand down.

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