IN THE COURT OF APPEAL OF NEW ZEALAND

CA410/2010
[2010] NZCA 598

BETWEEN	THE QUEEN Appellant
AND	ISAIAH JOHNSON RICHARD TAI Respondent

Hearing: 28 September 2010

Court: Chambers, Arnold and Harrison JJ

Counsel: D B Collins QC, Solicitor-General, and A C Walker for Appellant
P G Mabey QC and G Dixon for Respondent

Judgment: 8 December 2010 at 2 pm

JUDGMENT OF THE COURT

A **Leave to appeal is granted.**

B **The appeal is allowed. The sentence of two years ten months' imprisonment is quashed. In substitution therefor, the respondent is sentenced to four years six months' imprisonment.**

REASONS OF THE COURT

(Given by Chambers J)

Appeal against sentence for manslaughter

[1] Isaiah Tai, the respondent, pleaded guilty to the manslaughter of Hawea Vercoe, a 36 year old teacher. Potter J sentenced Mr Tai to two years

ten months' imprisonment.[1] The Solicitor-General seeks leave to appeal against this sentence on the basis that it was manifestly inadequate.

[2] The agreed facts were these.[2] On 21 November 2009 Mr Tai, a fit 21-year-old man, attended a kick-boxing competition in Whakatane with his friends. Following the competition, Mr Tai and his friends were drinking at the Quart Bar and then the Boiler Room nightclub. After the Boiler Room closed, Mr Tai and his friends returned to the Quart Bar at about 2 am. The victim, Mr Vercoe, was also socialising at the Quart Bar after attending a concert earlier in the evening.

[3] When the Quart Bar began closing, patrons moved on to the footpath outside. Whilst outside, Mr Vercoe spoke to a female friend. Mr Tai approached Mr Vercoe outside the Quart Bar and the two men exchanged words. Mr Vercoe and Mr Tai were previously unknown to each other and had not associated during the evening.

[4] Mr Tai then ran at Mr Vercoe and swung at him, punching Mr Vercoe in the head with a closed fist, very forcefully. This blow caused Mr Vercoe to fall face first to the ground. He hit his head hard on the concrete and lay unconscious on the ground. Mr Tai bent over Mr Vercoe. He then kicked him in the head with considerable force. Witnesses saw the violent nature of the kick and heard the sound that the impact of the kick made on Mr Vercoe's body. Mr Tai then walked away.

[5] Mr Vercoe was taken to hospital by ambulance, but died shortly after at 3 am. The post-mortem examination revealed that Mr Vercoe had died from a basal subarachnoid haemorrhage (bleeding on the under surface of the brain) which arose from a tear of the right vertebral artery at the top of the spine. The cause of death was either the initial blow or the fall to the ground.

[6] When spoken to by police Mr Tai denied hitting or kicking Mr Vercoe.

[7] The Court granted an extension of time, not opposed by defence counsel, for the Crown to file an indictment. This was to allow the Crown to obtain and properly examine security camera footage of the assault, so as to determine the exact events

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[1] *R v Tai* HC Rotorua CRI2009-087-2468, 2 June 2010 (sentence).

and the appropriate charge. Ultimately an indictment charging manslaughter was filed. Mr Tai pleaded guilty on arraignment at the first call on 28 April 2010.

Issue on the appeal

[8] There is only one issue on this appeal: was Potter J's starting point of four and a half years too low, with the consequence that her end sentence of two years ten months' imprisonment became manifestly inadequate?

[9] There is a further topic we shall touch upon briefly. Dr Collins QC, the Solicitor-General, advised us that relatives of Mr Vercoe wished to put before us what were effectively further victim impact statements. Victim impact statements from family members had been before Potter J. These new statements were intended to supplement the original statements. Perhaps also their intention was to express dismay at the apparent leniency of Potter J's sentence. We queried whether we had jurisdiction to receive these statements. In the end, the Solicitor-General decided not to press the point. We shall discuss the question of jurisdiction briefly at the conclusion of these reasons.

Was the starting point too low?

[10] Two considerations led Potter J to fix a starting point of four and a half years. The first was the starting point Priestley J had adopted in *R v Tuiletufuga*,[3] a decision Potter J considered "very similar factually".[4] Priestley J had held in that case that a starting point of not less than four years was justified.

[11] The second consideration was this Court's guideline judgment in *R v Taueki*.[5] *Taueki* sets guidelines for sentencing in cases where the offender has caused grievous bodily harm with intent to cause grievous bodily harm. (Such offending falls within s 188(1) of the Crimes Act 1961.) Judges have used *Taueki* to provide

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[2] This summary is taken from the agreed summary of facts before Potter J at sentencing.
[3] *R v Tuiletufuga* HC Auckland CRI-2005-092-13476, 17 February 2006.
[4] Sentence at [56].
[5] *R v Taueki* [2005] 3 NZLR 372 (CA).

guidance when sentencing for some manslaughter cases, there not being a guideline judgment for manslaughter sentencing. This Court has cautiously approved the use of *Taueki* in some manslaughter situations. In *R v Jamieson*,[6] this Court observed that *Taueki* would not always be relevant in manslaughter sentencing, given that manslaughter may involve only moderate or even minor personal culpability on the offender's part. But, in cases where the manslaughter involved serious violence, *Taueki* was relevant. This Court said in *Jamieson*:

> [34] The present case, however, involves serious violence where serious injury (if not death) was a foreseeable outcome. We think in cases of this nature the guideline judgment of *R v Taueki* is of considerable assistance in fixing the penalty for manslaughter. The matters which contribute to the seriousness, or mitigate the seriousness (or not), of grievous bodily harm offending as discussed in [31]-[33] of *Taueki* are also relevant to the assessment of culpability for manslaughter of the present kind.

[12] In those manslaughter cases where *Taueki* is relevant, the sentencing Judge effectively has a choice. He or she can assess the offender's culpability by reference to, among other things, comparable manslaughter sentencings. Another approach is to consider the matter in *Taueki* terms, making an appropriate adjustment for the fact that the consequence of the serious violence has been not just serious injury but death itself. A counsel of perfection perhaps would be to utilise both approaches, each providing a check on the other. In these reasons, we have tried to assess Mr Tai's offending on both bases. We begin with a *Taueki* analysis, because that was the approach Potter J took and the Solicitor-General does not in any way criticise the Judge for adopting that approach. The Solicitor-General's concern is focused on the application of *Taueki* to the facts of this case.

[13] The Judge considered the starting point should be just below the starting point in band 2.[7] The band 2 range is five to ten years. Because of the overlapping nature of the bands, for reasons explained in *Taueki*,[8] the effect of choosing four and a half years as the starting point was to place the offending in the middle of band 1, the range for which is three to six years.

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6 *R v Jamieson* [2009] NZCA 555.
7 Sentence at [61].
8 At [35].

[14] Dr Collins submitted that "the Judge erred in adopting a starting point for this manslaughter that was equivalent to a band 1 case under *Taueki*". This was, he said, a case where Mr Tai's culpability "should have been met by a starting point akin to the top of band 2". The culpability in this case was, he said, very high as a result of the particular combination of:

(a) an intent to cause really serious harm to the victim;

(b) the nature of the serious violence actually used; and

(c) the fact that death resulted.

[15] He went on to amplify these features. As to the first two, he emphasised the fact that the Judge had correctly found that an aggravating feature of the offending was Mr Tai's "intention to cause serious injury".[9] She went on: "Mr Tai must have appreciated that, given the nature of the violence inflicted, there was a real risk that the deceased would suffer serious harm." Mr Mabey QC, for Mr Tai, accepted that inference was available. The Judge also said:[10]

> Given the force of the blow to Mr Vercoe's head, the consequence of really serious injury must have been foreseeable by Mr Tai, even though death was not intended or foreseeable. When Mr Tai could see that the deceased was on the ground and absolutely defenceless, he aggravated an already fatal situation by applying a forceful kick to the head.

[16] Again, Mr Mabey accepted such an inference was open. This was a case where the offender had used serious violence with the intention of causing serious harm. This differentiates this case from the "single punch" manslaughter decisions; that is, those cases where A punches B, causing B to fall to the ground, B hits his head on the footpath, say, and unfortunately dies.

[17] As to the third feature, Dr Collins submitted that the fact of death was not just one further factor to be enumerated and put into the mix. It was not merely equivalent to a "very serious injury". Rather, where the intent was to cause serious harm and death results, the fact of death should dominate the sentencing exercise by

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9 Sentence at [35].
10 Sentence at [60].

having special weight attributed to it. He submitted that the Judge had erred in law by putting insufficient weight on the fact of death, given Mr Tai's intent when he attacked Mr Vercoe.[11]

[18] Taking into account these matters, Dr Collins submitted the case was firmly within band 2, with an uplift appropriate for the fact that death resulted.

[19] As to *Tuiletufuga*, on which the Judge had relied, Dr Collins submitted that the starting point in that case was too low. He submitted that a much more relevant decision was that of *R v Finn*,[12] where the facts were very similar to those in the present case, save that the victim lived, although with continuing nerve damage to his face. This Court held that the proper starting point was between five and six years. By virtue of the death in this case, Dr Collins suggested a starting point in the range of seven to nine years.

[20] Dr Collins also submitted that there was an inconsistency between sentences for s 188(1) offending and sentences for manslaughter. Some sentences would suggest that the offender was better off if the victim died. There is some merit in the Solicitor-General's submission. But this is not the occasion to try to evaluate such inconsistency thoroughly or to remedy it if our current impression of some inconsistency were found to be accurate. We have not signalled this appeal as a guideline judgment case. What we should emphasise, however, is that the correct approach to manslaughter sentencing remains that set out in *R v Leuta*.[13]

[21] We have set out the Solicitor-General's submissions at some length as we find the logic persuasive. With respect to the Judge, we consider her reliance on *Tuiletufuga* led her into error, as the starting point adopted by the sentencing Judge in that case was too low. The sentencing Judge in *Tuiletufuga* did not explain how he reached a starting point in band 1 of *Taueki*. This Court in *Taueki* had said that band 1 is "not an appropriate band for offences of extreme violence or violence which is actually life threatening",[14] still less, of course, for offences of violence

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[11] *R v Leuta* [2002] 1 NZLR 215 (CA) at [64].
[12] *R v Finn* [2007] NZCA 257.
[13] At [59]-[65].
[14] *Taueki* at [36].

where life was actually taken. Even if band 1 was somehow justified, there needed to be an uplift for the fact a death had occurred. Further, Mr Tuiletufuga's offending appears to have been slightly less serious than Mr Tai's.

[22] The present case was squarely a band 2 case in *Taueki* terms and the starting point should have reflected that. It involved two, arguably three, aggravating factors, the most serious injury (death), attacks to the head, and (arguably) a vulnerable victim, once he was lying defenceless on the ground.[15]

[23] We have checked our *Taueki*-based analysis against comparable manslaughter decisions which preceded *Taueki* or where the Court has since *Taueki* chosen not to draw a close *Taueki* analogy. Among those decisions are *R v Ruru*,[16] *R v Hetherington*,[17] and *R v Kengike*.[18] All of those involved greater culpability than the offending here, but not by much. They would tend to support a starting point here of at least seven years, which is at the bottom of the range Dr Collins suggests a *Taueki*-based approach would lead one to.

[24] Having considered all these materials, we think a starting point of seven to eight years could not have been challenged in this case. Since this is a Solicitor-General's appeal, however, we adopt our standard practice of increasing the starting point to the lowest appropriate sentence for the offending.[19] We fix that at seven years.

[25] Potter J allowed a three month discount for Mr Tai's involvement in a restorative justice meeting.[20] The Solicitor-General did not quarrel with that. The Judge then allowed a one-third discount (17 months) for an early guilty plea. That discount was entirely orthodox on the basis of the then controlling authority for guilty plea discounts, this Court's decision in *Hessell v R*.[21] At the time we heard this appeal, that remained the controlling authority. The Solicitor-General took no

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[15] *Taueki* at [31] and [38].
[16] *R v Ruru* CA371/01, 12 February 2002.
[17] *R v Hetherington* CA28/02, 20 June 2002.
[18] *R v Kengike* [2008] NZCA 32.
[19] *R v Urlich* [1981] 1 NZLR 310 (CA), *R v Hunter* [1985] 1 NZLR 115 (CA) and *R v Xie* [2007] 2 NZLR 240 (CA) at [31].
[20] Sentence at [64].
[21] *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298.

issue concerning the one-third discount. Since the hearing, however, the Supreme Court has reversed this Court's decision in *Hessell* and has ruled that discounts for guilty pleas need more flexible evaluation than our guideline had suggested.[22] More importantly for current purposes, the Supreme Court fixed the maximum discount for a guilty plea at 25 per cent.[23] A proper application the Supreme Court's criteria to the circumstances of this case would have yielded a smaller discount than the maximum 25 per cent.

[26] Notwithstanding that, we have decided that the only fair course here is to allow a one-third discount. Mr Tai pleaded guilty in accordance with the current appellate authority, which dictated he should get a one-third discount. That was still the law at the time of the hearing of this appeal. It would seem unfair to deprive him of the full discount simply because this decision has been reserved longer than we would have wished.

[27] Accordingly, from a starting point of seven years (84 months), we allow a three month discount for attendance at the restorative justice meeting and a further third (27 months) for an early guilty plea. The end result is a sentence of four years six months' imprisonment. We have stood back and evaluated that end result. We are satisfied that it is the lowest sentence that could reasonably be sanctioned in all the circumstances of this case.

[28] Accordingly, we allow the appeal. We quash the sentence of two years ten months' imprisonment and substitute for it a sentence of four years six months' imprisonment.

Statements from the relatives

[29] We doubt our jurisdiction to accept what are effectively fresh victim impact statements on an appeal. The Victims' Rights Act 2002 does not permit the filing of such statements on an appeal. Nor do our specific supplemental powers under s 389 of the Crimes Act appear to sanction the receipt of such statements. It is true that,

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22 *Hessell v R* [2010] NZSC 135.
23 At [75].

under para (a), we can "order the production of any document, exhibit, or other thing connected with the proceedings". Arguably, the statements in this case may be "documents" or "other things" connected with the proceedings, but, even if that were so, production may be ordered only where such production is "necessary for the determination of the case". That test is not met here.

[30] In light of that and in the face of Mr Mabey's strong opposition, we decided it would be inappropriate to consider these further statements. We wish to reassure Mr Vercoe's family that we have, however, read the original victim impact statements, as we do on every appeal against sentence. We are well aware of the tragic consequences Mr Vercoe's senseless death has had on his family, particularly his children, and friends. And we note particularly what Mr Vercoe's mother said:

> Ahakoa he iti, he Pounamu.[24]

Solicitors:
Crown Law Office, Wellington, for Appellant

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[24] Although his time here was short, it was precious.