IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CRI-2009-087-2468

THE QUEEN

v

ISAIAH JOHNSON RICHARD TAI

Hearing: 2 June 2010

Counsel: G Hollister-Jones for the Crown
P G Mabey QC for the prisoner

Judgment: 2 June 2010

SENTENCE OF POTTER J

Solicitors: Crown Solicitor, P O Box 13063, Tauranga 3141

Copy to: P G Mabey QC, P O Box 13199, Tauranga 3141

Introduction

[1] Isaiah Tai: You appear before the Court today for sentence on a charge of manslaughter. You were initially charged with murder. You early indicated you would enter a plea of guilty to manslaughter. When the Crown presented an indictment for manslaughter you pleaded guilty on arraignment at the first callover following the presentation of the indictment. Manslaughter carries a maximum penalty of imprisonment for life.

Background facts

[2] On Friday 21 November last year you attended a kick-boxing competition with friends. At about 9.30 that night you headed into the centre of Whakatane and then went drinking at the Quart Bar and the Boiler Room nightclub. You returned to the Quart Bar when the Boiler Room closed at about 2 a.m.

[3] The deceased Hawea Vercoe was also at the Quart Bar.

[4] As the Bar began closing the patrons moved outside. Mr Vercoe spoke to a female patron. (According to Mr Tai it was he who spoke to the female patron and Mr Vercoe was critical of what he said). You approached him and there was a verbal exchange between you. You were previously unknown to each other and you had not been associating during the night.

[5] You then ran at the deceased and swung at him, punching him in the head with a closed fist very forcefully. He fell face first to the ground and hit his head hard on the concrete.

[6] You bent over his body while he lay unconscious on the ground and kicked him in the head with considerable force. The violent nature of that kick was seen by witnesses and heard by them as the kick impacted on the deceased.

[7] You then walked away. Other people moved the deceased into a recovery position, placed towels under his head and called emergency services. He was taken to hospital by ambulance but he died shortly afterwards at about 3 a.m.

[8] A post mortem of the deceased showed that he died from bleeding on the under surface of the brain (a subarachnoid haemorrhage) which was caused either by the punch to his head or the resulting impact when he fell to the ground. You initially denied to the Police that you hit or kicked the deceased.

Pre-sentence report

[9] I have received a pre-sentence report for sentencing purposes. It records that Mr Tai is aged 21 years. He left school at the age of 17 years after completing year 13 and gaining NCEA credits. He participated in a sports recreation course at Te Whare Wananga o Aotearoa but left after twelve months. He returned to Opotiki and completed an engineering course for eight months and then found permanent employment in an Opotiki kiwifruit orchard. He is proud of his Whakatohea ancestry but not fully involved in his Hapu.

[10] The report refers to Mr Tai's offending history. It is not of significance in relation to this sentencing.

[11] He reports that he is in good health. A fit young man of 21. A screening assessment was undertaken which showed that Mr Tai has a harmful pattern of alcohol abuse.

[12] Mr Tai accepted to the report writer that his inability to address his violence propensity contributed to his offending and said his reaction to strike the deceased, Mr Vercoe, was impulsive and he "did not want the man to die". He agreed he was unable to control his actions while under the influence of alcohol.

[13] Mr Tai's risk of re-offending is assessed at low but the report writer expresses the opinion that if he does not address his offending issues including his propensity for violence and his alcohol abuse, his risk of offending will be increased.

[14] Numerous references and letters have been provided for Mr Tai from peole who know him personally. I have read them all.

Restorative justice report

[15] A restorative justice meeting was held between Mr Tai and members of the deceased's family on 20 May 2010 at the Mana Social Services Trust. Members of Mr Tai's family were also present to support him.

[16] Section 8(j) of the Sentencing Act 2002 provides that the Court must take into account any outcomes of a restorative justice process that have occurred in relation to the particular case.

[17] The report dated 24 May 2010 does not express any opinion or comment as to the outcome of the restorative justice meeting but does include details of the exchanges between the parties and the acknowledgements made by Mr Tai. The facilitators conclude their report with the following observation:

> Whanau are to be acknowledged and commended for the way in which they conducted themselves during the meeting. Their integrity and humbleness under such trying circumstances was clearly visible throughout the conference. It was a privilege to have been involved in their process.

[18] The report notes that the meeting ended with a karakia.

[19] Mr Mabey QC, counsel for Mr Tai, has expanded on the restorative justice process in his submissions and in supplementary submissions dated 1 June 2010 which he presented to me in writing. In particular he referred to the expression of disappointment in the victim impact statement of Mrs Rosalind Vercoe (mother of the deceased), that while Mr Tai expressed his remorse for causing Mr Vercoe's death and apologised for the harm caused, he refused to acknowledge his subsequent actions after the initial punch which she said (and we heard her say this morning) threw doubt on the sincerity of his remorse and apology, because in her mind, it showed Mr Tai was not taking responsibility for his actions.

[20] Mr Mabey explained in submissions and has again referred to the matter in Court today, that Mr Tai's instructions to him from the outset were that he did not recall a kick to Mr Vercoe's head but he apparently acknowledged that he had attempted to kick him as he fell to the ground.

[21] The event was covered by closed circuit television. The CCTV tape was unclear. The tape had to be enhanced on two occasions and then a frame by frame analysis was carried out by an expert so that the true content of the CCTV footage could be accurately assessed. Mr Mabey explains that it was not possible to discuss this analysis with Mr Tai until after the restorative justice meeting, which he says was unfortunate. He explains that when Mr Tai saw the content of the expert analysis he readily accepted that what he recalled as an attempted kick, was in fact an actual kick.

[22] Mr Mabey was then instructed immediately by Mr Tai to confirm his acceptance of the summary of facts as it has been read today in Court. That summary includes a description of how Mr Tai kicked the deceased in the head with considerable force while he lay unconscious on the ground.

[23] As Mr Mabey explained, at the restorative justice meeting Mr Tai was maintaining his original position in reliance on his recollection of events, which proved to be mistaken.

[24] Mr Tai has confirmed through Mr Mabey, that his supporters said little or nothing at the restorative justice conference because he considered it appropriate that since it was he who caused the death of Mr Vercoe, he and only he should answer for his actions. He made clear his instructions to Mr Mabey that he hoped the deceased's family understood and accepted his apology and regret but that he "would not blame them" if they did not. He knows that they have lost a loved one and that he cannot bring him back.

[25] Mr Mabey reports on his discussion with one of the facilitators for the restorative justice meeting, Ms Heywood, who said that at the end of the meeting the

deceased's family exchanged hugs with Mr Tai and his family, including the children of the Vercoe family who were present.

Victim impact statements

[26] We have heard three moving victim impact statements read in Court today. I have received and carefully considered those statements and others that have been filed by the father of the deceased and individually by all of the children.

[27] The reality of the loss of a father is perhaps best expressed in the words of Mr Vercoe's eight year old son:

> Because of what you did I don't have a dad any more. He was fun. He laughed a lot. He made yummy porridge.

[28] His mother says how Mr Tai's actions have changed forever the lives of so many people. She speaks of "a stupid act of drunken bravado" which caused the death of their son.

[29] The victim impact statements attest to the indescribable loss and devastating affects for the family of Hawea Vercoe, of his unnecessary death. The shock and distress of Mr Vercoe's sudden, violent death have understandably been absolutely traumatic for those close to them and the wider community has lost a fine member.

Purposes and principles of sentencing

[30] The purposes and principles of sentencing set out in the Sentencing Act 2002 have helpfully been referred to me by counsel in their written submissions and I take them into account in sentencing. The sentence imposed must seek to hold the prisoner accountable for the harm he has done to the victim and to the community by the offending, to promote in him a sense of responsibility and acknowledgement for the harm done, to provide for the interests of the victims of the offending as far as that is possible in any sentence, to denounce and deter his conduct and to protect the community from him.

[31] It is also necessary for me to impose a sentence that is consistent, so far as that is possible, with sentences imposed in other similar cases. However, no two cases are ever exactly the same.

[32] I must take into account the need to provide for your rehabilitation, Mr Tai, and to impose a sentence that is the least restrictive outcome in the circumstances. In the circumstances of this case as your counsel Mr Mabey has acknowledged in Court, a sentence of imprisonment is inevitable. The requirement to impose the least restrictive outcome relates to the length of the sentence to be imposed.

[33] I am also required to have regard to the effect of this event on the wider victims of your offending. I have already referred to the devastating effects for Mr Vercoe's wider family.

Aggravating and mitigating features of the offending

[34] There are no mitigating features of the offending.

[35] Aggravating features include:

a) The use of actual violence. A severe punch to the head and a forceful kick to the deceased when he was on the ground and already unconscious.

b) The nature of the violence. It was unprovoked and gratuitous and included the callous kick to the head when the deceased was on the ground.

c) The violence was directed to the head of the deceased.

d) Intention to cause serious injury. 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.

e) Hawea Vercoe lost his life and his death has had a significant impact on his family, as I have already mentioned, and on the wider community because he was a person who held a number of respected positions in the community and was well liked and admired.

Aggravating and mitigating factors relating to the offender personally

[36] As I have noted the previous convictions of the prisoner are not an aggravating factor for sentencing which the Crown accepts.

[37] Mitigating factors include his guilty plea which the Crown accepts was at the earliest opportunity, Mr Tai's participation in the restorative justice meeting and his efforts at rehabilitation while on bail. These are evidenced by a letter from WAI Health & Social Services which is run under the auspices of the Waipareira Trust dated 12 April 2010. It expresses the opinion from the Addictions Counsellor, Mr John Winther that:

> Mr Tai is now in a very strong position to take control of his life. I therefore do not need to see him again.

But he offers the support of the service should Mr Tai wish to take advantage of it in future.

Crown's submissions

[38] The Crown submits that an appropriate starting point for sentence is five to six years imprisonment. Counsel for Mr Tai submits that a four year starting point is appropriate. Both counsel refer to the fact that there is no guideline decision for sentencing for manslaughter[1] which is because of the wide range of circumstances encompassed by the crime of manslaughter.

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[1] *R v Leuta* [2002] 1 NZLR 215 (CA).

[39] The Crown refers to *R v Rapira*[2] where the Court of Appeal stated that culpability is higher in cases where manslaughter results from intentional harm. The Court said that in such cases the sentence imposed must reflect the need for deterrence of intentional conduct which risks serious harm or death.

[40] The Crown refers to the recent judgment in *R v Jamieson*[3] where the Court said:[4]

> 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 in *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 in the assessment of culpability for manslaughter of the present kind.

[41] (The factual situation in *Jamieson* differed considerably from the present case but the authority is cited by the Crown for the statement by the Court of Appeal referred to).

[42] The Crown submits that applying the approach in *Taueki*[5] this case falls within the lower range of band 2 in which starting points are in the range of five to ten years, thus justifying, in the Crown's submission, a starting point for sentence in this case of five to six years imprisonment.

[43] The Crown identifies the aggravating factors which it submits place this offending in band 2 of *Taueki as:*

- The attack to the head.

- The resulting fatal injury.

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2 *R v Rapira* [2003] 3 NZLR 794 (CA).
3 *R v Jamieson* [2009] NZCA 555
4 At [34].
5 *R v Taueki* [2005] 3 NZLR 372.

- The forceful kick to the head of the vulnerable victim.

- That the prisoner's conduct was unprovoked and gratuitous.

[44] The Crown categorises the offending as more serious than the street attack example identified by the Court of Appeal in *Taueki* in relation to band 1, given the nature of the violence employed by Mr Tai and the fatal outcome.

[45] The Crown then refers to a number of cases where death has followed a single punch and in which starting points in the range of three and a half to four years imprisonment have been generally considered appropriate: *R v Carmichael*,[6] *R v Efeso*,[7] *R v Tuiletufuga*.[8]

[46] The Crown accepted that the offending in this case is very similar to that in *R v Tuiletufuga*, a case upon which the submissions for the prisoner, Mr Tai, place significant reliance. In that case fighting broke out between young men who were drinking, socialising and smoking cannabis in public. Mr Tuiletufuga approached the deceased from behind and punched him with a very heavy punch to the side of the head. The deceased fell to the ground hitting the back of his head on the concrete. It appeared he was unconscious prior to hitting the ground. While the deceased was on the ground Mr Tuiletufuga kicked him once in the back of the head. The pathological evidence was that this was not the fatal injury. The deceased died a short time later from head injuries. Priestley J considered that a starting point of not less than four years imprisonment was justified. He allowed a one-third discount for the prisoner's youth, good qualities, remorse and early guilty plea and imposed an end sentence of two years and eight months imprisonment.

[47] The Crown notes that *Tuiletufuga* predates *Jamieson* and that the various authorities referred to by Priestley J predated *Taueki*. The Crown submits that when a detailed application of *Taueki* is applied a higher starting point than that adopted in *Tuiletufuga* is justified.

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6 *R v Carmichael* HC Tauranga CRI-2007-070-2603 6 September 2007.
7 *R v Efeso* HC Auckland CRI-2008-092-7925 24 October 2008
8 *R v Tuiletufuga* HC Auckland CRI-2005-092-013476 17 February 2006.

[48] As to mitigating factors, the Crown acknowledges that the prisoner is entitled to credit for participation in the restorative justice meeting and his early guilty plea. The Crown accepts that the guilty plea was entered at the first reasonable opportunity and that the prisoner is entitled to a one-third reduction in accordance with *R v Hessell.*[9]

Submissions for the prisoner

[49] It is submitted for Mr Tai that a starting point of four years imprisonment is appropriate. Significant reliance is placed on *Tuiletufuga* which counsel describes as "strikingly similar" factually. Counsel referred to *R v Carmichael* (also referred to by the Crown), *R v Tutahi*[10] and *R v Cassidy*,[11] all being cases where death followed a single blow to the head, and all of which adopted a starting point before increase for relevant aggravating factors relating to the offender, of less than four years imprisonment.

[50] Counsel also referred to *R v Blance*,[12] where a starting point of four and a half years was adopted and an end sentence after allowance for mitigating factors of three and a half years was imposed. Mr Mabey contrasted that case as being more serious than this case because it involved multiple attackers, and punching and kicking over a period of about thirty seconds.

[51] Counsel submits that *Tuiletufuga*, being the most comparable sentencing authority is particularly relevant from the perspective of achieving consistency in sentencing as required by the Sentencing Act. He submits that in that case Priestley J did refer to *Taueki* criteria in assessing culpability to arrive at a starting point for sentence.

[52] Mr Mabey also referred to two 2007 High Court judgments which post date the judgment in *Taueki*. In *R v Matautia and Langi*[13] Lang J at [34] adopted the

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9 *R v Hessell* [2009] NZCA 450.
10 *R v Tutahi* HC Wellington T4724/01 26 April 2002.
11 *R v Cassidy*HC New Plymouth T2/03 10 July 2003.
12 *R v Blance* HC Napier T7/2201 3 May 2002.
13 *R v Matautia & Langi* HC Auckland CRI-2006-092-013486 29 November 2007.

analysis in *R v Hughes & Shortland*[14] where Keane J identified two distinguishable categories of deliberate street violence where weapons are not involved and where death results. The first category identified, being the more serious category, involves sustained episodes of serious violence often associated with robbery of the victim, as was the case in those two cases. In such cases a starting point of seven to nine years imprisonment will be appropriate.

[53] The second and less serious category of deliberate street violence resulting in death is where the assaults are more spontaneous, do not generally involve robbery and involve no more than one or two blows. Keane J identified that in such situations death may be neither intended nor foreseeable. In such cases a likely starting point will be around four years imprisonment: *R v Roker*[15] (which was one of the cases relied on in *Tuiletufuga*).

[54] Mr Mabey submits that considerable assistance can be taken from the assessment and review carried out by Keane J and followed by Lang J, the offending in this case falling clearly in the second and less serious category identified. He submits that *Jamieson* is not a guideline judgment and does not suggest that previous manslaughter sentences are too low. It simply approves, in his submission, the application of *Taueki* in providing assistance for sentencing Judges.

[55] Mr Mabey further submits that considered in terms of the *Taueki* bands, the five to six years starting point advanced by the Crown is excessive. He notes that the street attack example discussed by the Court of Appeal in *Taueki* in relation to band 1, attracts a starting point at the lower end of band 1, in the three to six year range. When there is a weapon involved or multiple attackers against a single victim then a starting point of around five years may be appropriate. He submits that on that basis, the starting point for Mr Tai's offending must be less than five years.

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14 *R v Hughes & Shortland* HC Whangarei CRI-2005-088-4349 11 May 2007.
15 *R v Roker* CA358/92 18 February 1993.

Starting point: Discussion

[56] This case is clearly very similar factually to *Tuiletufuga* where Priestley J said that a starting point of not less than four years was justified.

[57] The guidance of the Court of Appeal suggested in *Jamieson* is available from *Taueki* in sentencing for manslaughter is by reference to the matters contributing (or not contributing) to the seriousness of the offending as set out in [31] to [33]. These factors are also relevant, the Court said, in assessing culpability for manslaughter. In this case, the Crown identifies extreme violence which was unprovoked, serious injury relating in death and attacks to the head as relevant aggravating factors.

[58] The Court in *Jamieson* did say that by way of analogy, the *Taueki* bands of seriousness could be applied in manslaughter sentencing. However, it is axiomatic that the offences of causing grievous bodily harm and manslaughter do not equate. Death is an essential element of the offence of manslaughter. Degrees of bodily harm which may significantly impact on the sentence for grievous bodily harm, as referred to in *Taueki*, have no application in sentencing for manslaughter.

[59] The Court of Appeal emphasised in *Taueki* that the suggested bands and starting points should be used flexibly and that sentencing Judges will need to exercise judgment in assessing the gravity of each aggravating feature in order to establish a starting point which properly reflects the culpability inherent in the offending. The overlapping of the starting points in the bands, three to six years in band 1 and five to ten years in band 2, exemplifies the flexibility with which the assessment of culpability and hence the appropriate starting point, must be approached.

[60] Notwithstanding the two relevant aggravating features identified by the Crown, I do not consider the offending in this case can be assessed as if it were band 2 offending as the Crown seeks to do. There were no weapons used, the prisoner was a single attacker, not one of a group of attackers, and the attack was unpremeditated, indeed, impulsive. However, the attack was deliberate and unprovoked. 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.

[61] I consider a starting point just below the starting points in band 2 to be appropriate. Taking into account the numerous other relevant authorities referred to me by counsel, most of which I have referred to in my sentencing notes today, I take a starting point of four and a half years.

Discount for mitigating factors

[62] The prisoner participated positively in the restorative justice meeting held on 20 May 2010. The process was hampered and the outcome qualified by Mr Tai not having been able to reach the position where he accepted that he had kicked the head of the deceased after he fell to the ground. That now has been accepted by Mr Tai. He is entitled to a credit for what appear to have been some positive outcomes from the restorative justice meeting. I allow a discount of three months in that respect.

[63] The prisoner is also entitled to a discount of one-third for his early guilty plea, which the Crown accepts.

End sentence

[64] Thus I calculate the end sentence as follows:

a) Starting point four and a half years or 54 months imprisonment.

b) Allowance for involvement in the restorative justice meeting, three months.

c) Allowance for early guilty plea (one-third), seventeen months.

[65] The end sentence is therefore 34 months or two years and ten months imprisonment.

Minimum period of imprisonment (s 86(2))

[66] The Crown seeks a minimum period of imprisonment of fifty per cent of the end sentence which is opposed by counsel for Mr Tai. Section 86(2) of the Sentencing Act gives the Court a discretion to impose a minimum period of imprisonment if it is satisfied that the minimum period otherwise applying (one-third of the sentence) is insufficient for the following purposes:

a) Holding the offender accountable for the harm done to the victim and the community by the offending;

b) Denouncing the conduct in which the offender was involved;

c) Deterring the offender or others from committing the same or a similar offence;

d) Protecting the community from the offender.

[67] I consider accountability, denunciation and deterrence appropriately addressed by the sentence imposed. Given the assessment in the pre-sentence report that Mr Tai is of low risk of re-offending, provided he addresses and continues to address his violence and alcohol issues and given the steps he has taken while on bail to address those issues, I do not consider that a minimum period of imprisonment is required for the protection of the community. I trust Mr Tai that you will well understand that you will need to be conscientious and determined in continuing to address these issues that place you at risk of re-offending.

[68] However, I consider the Parole Board will be in a better position than this Court, to assess any risk factors at the point or points when Mr Tai becomes eligible for consideration for parole. He will need to be very mindful of this.

Result

[69] Please stand Mr Tai. The sentence imposed upon you Mr Tai, is two years ten months imprisonment.

[70] Your sentence of 100 hours community work imposed on 24 March 2009 is cancelled.

[71] I hope your counsel Mr Mabey is right that you will be a responsible and fine citizen in the future. This is your last opportunity.

[72] Thank you counsel. Thank you to all those present for being here today.