

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

**CRI-2015-029-310
[2016] NZHC 1687**

THE QUEEN

v

PAUL EDWARD HARRIS

Hearing: 22 July 2016

Counsel: BM O'Connor for Crown
AB Fairley and AM Harvey for defendant

Sentenced: 22 July 2016

SENTENCING NOTES OF FAIRE J

Solicitors: Crown Solicitor, Whangarei
Thomason Wilson, Whangarei

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Background

[1] Paul Edward Harris, you appear for sentence today having pleaded guilty to manslaughter,¹ for which the maximum sentence is life imprisonment.²

[2] The victim was Mr Joseph Rowland Keogh. You were originally charged with his murder, however, complications arose during trial and the Crown accepted a guilty plea to the charge of manslaughter.

[3] I am going to shortly summarise the facts, then I will explain the factors I must consider when I sentence you, and then I will pass sentence.

Facts

[4] I set out the agreed facts on which you pleaded guilty.

¹ Crimes Act 1961, s 171.

² Crimes Act 1961, s 177.

[5] You live on a farm about 10 minutes drive from Kaitaia. Mr Keogh lived on a nearby farm house with his partner and his four children.

[6] On Saturday 11 April 2015, two of Mr Keogh's sisters came to stay at Mr Keogh's family home. At that time they were aged 11 and 13. To entertain the children, Mr Keogh offered to take them possum shooting and they left the house in a four wheel drive vehicle when it got dark. Also with Mr Keogh and his sisters were two of Mr Keogh's children aged 10 and three.

[7] They took an air rifle belonging to one of Mr Keogh's sisters and a spotlight. They travelled around nearby roads, spotting, shooting and plucking possums for fur. At about 10 pm they were at the intersection of Fisher-Riley and Fairburn Roads when you approached the vehicle on a farm quad bike.

[8] You and Mr Keogh exchanged comments. You walked around to the front of the vehicle and then returned to the driver's door of the vehicle. You and Mr Keogh then started arguing, you were saying that you would call the police. Mr Keogh told you that it was only an air rifle that they were using and that he did not need a licence for it. Mr Keogh lifted the air rifle from where it was. There was a struggle during which the air rifle was pointed at you and punches were exchanged.

[9] During the struggle, you managed to pull Mr Keogh part way out the driver's door window. You then reached and took a knife from your quad bike and stabbed Mr Keogh in the chest. Mr Keogh then got out of the vehicle, stood up, and told you to leave. You got on your quad bike and drove at Mr Keogh who attempted to push you away. You then lost control of the quad bike and flipped it.

[10] Mr Keogh got back in his vehicle and attempted to drive away. The children in the vehicle were urging Mr Keogh to drive away but he only managed to drive a short distance before telling them that he could not see and falling unconscious.

[11] The children were afraid that you would come after them. Mr Keogh's 10 year old son got into the front of the vehicle, pushed Mr Keogh's feet away from

the peddles, sat on top of him and managed to drive the vehicle back home where they raised the alarm.

[12] Mr Keogh was rushed to hospital but died before he arrived.

Purposes and Principles of Sentencing

[13] In sentencing you today, I have to take into account a number of the sentencing purposes and principles which are set out in the Sentencing Act 2002. The relevant purposes which I have considered are:

- (a) holding you accountable for the harm you have caused;
- (b) promoting a sense of responsibility in you for, and an acknowledgement of that harm;
- (c) denouncing your conduct;
- (d) protecting the community from you;
- (e) assisting in your rehabilitation and reintegration.

[14] The relevant principles which I must take into account are the gravity of your offending including the seriousness of the offence and your level of culpability. I bear in mind that it is desirable to maintain levels of consistency amongst sentences and impose the least restrictive sentence that is appropriate having regard to the circumstances. I will take into account any particular circumstances that might make a sentence disproportionately severe in your case. I will also consider the other matters that are set out in s 8 of the Sentencing Act.

Victim impact statements

[15] We have heard today in Court the statements of Mr Keogh's family, these statements (and the others that I have received but were not read aloud) show the deeply traumatic effect that the loss of Mr Keogh has had on them.

[16] On Mr Keogh's partner behalf it was spoken about the effect of your offending on her family. Her children have lost their father in horrific circumstances, they are suffering psychological trauma. She is now a single mother and carries all the responsibility of the family without her partner and friend to share the burden. She says that her son has stepped up and into his father's role, a burden that he is far too young to deserve to carry.

[17] Mr Keogh's parents and grandmother have spoken about the incredible loss they are now facing. They have spoken about the trauma that you have inflicted on Mr Keogh's young children and sisters. They have spoken about the love that they had for Mr Keogh and say that what you did was completely unnecessary.

[18] We have also heard from one of Mr Keogh's sisters with assistance who was present when Mr Keogh was killed. Her statement is a moving statement. She is simultaneously dealing with the loss of her brother who she looked up to and the trauma of what she witnessed that night. This is something that no young person should ever have to go through, and I thank her and the rest of the Keogh's family for their statements. You truly have suffered a great loss. No words from me can ever fully explain and describe that loss. I just know what you have suffered.

Sentencing Approach

[19] I come now to consider what your sentence should be. I will follow the approach that has been established by the Court of Appeal.³ Briefly, what it involves is considering the circumstances and seriousness of your offending and setting what is called a 'starting point' with the assistance of guideline decisions or comparable cases. I then need to consider whether there are any aggravating or mitigating factors relevant to you which might reduce or increase that starting point.

Crown submissions

[20] The Crown submitted that the aggravating features of your offending are the use of a knife and the loss of life. The Crown does not accept that conduct of the victim is a mitigating factor in this case.

³ *R v Taueki* [2005] 3 NZLR 372 (CA); *R v Clifford* [2012] 1 NZLR 23 (CA).

[21] In terms of comparable cases, the Crown refers me to *R v Edwardson* (starting point seven years),⁴ *R v Herewini* (starting point seven years, three months),⁵ *R v Kapea* (starting point of eight years for the lead offender),⁶ *R v Ariki* (starting point of eight years),⁷ *R v Emery* (starting point five years, six months to six years),⁸ and *R v Raivaru* (starting point of seven years).⁹

[22] The Crown submits that in light of these authorities an appropriate starting point is around seven years imprisonment with a discount for previous good character and guilty plea, which is suggested to be around 10 to 15 per cent.

Defendant's submissions

[23] Mr Harris, your counsel Mr Fairley has accepted that the use of a weapon and the death of Mr Keogh are aggravating features of your offending but submits that your actions can be considered excessive self defence and that this should result in a substantial mitigation of the starting point.

[24] Mr Fairley seeks to distinguish the cases referred to by the Crown, with the exception of *R v Emery*. Mr Fairley also refers me to the cases of *R v Young*¹⁰ and *R v Beazley*.¹¹ He submits that an appropriate starting point is one between five years and five years, six months' imprisonment. He also submits that you are entitled to a significant discount for your guilty plea and previous good character.

Personal circumstances

[25] Mr Harris, I have been supplied with a pre-sentence report and a copy of your criminal history. You are 51 years old. You have been married for over 20 years and you have two teenage children. You understand that your offending has impacted heavily on your family, both emotionally and financially.

⁴ *R v Edwardson* HC Rotorua CRI-2006-069-1101, 27 April 2007.

⁵ *R v Herewini* HC Rotorua CRI-2006-063-3151, 5 October 2007.

⁶ *R v Kapea* HC Hamilton CRI-2009-019-10579, 22 February 2011.

⁷ *R v Ariki* [2015] NZHC 3240.

⁸ *R v Emery* HC Auckland CRI-2008-092-1285, 13 February 2009.

⁹ *R v Raivaru* HC Rotorua CRI-2004-077-1667, 5 August 2005.

¹⁰ *R v Young* [2012] NZHC 1460.

¹¹ *R v Beazley* [2016] NZHC 811.

[26] You have only two previous convictions which are for driving offences from 1989 and are not relevant to your current offending.

[27] The pre-sentence report paints a mixed picture about your understanding and acknowledgement of your offending. During the interview you were remorseful that a man died and you acknowledged that it was a tragedy, but you maintained that you acted in self defence and that you are not a violent man. The report writer was of the view that your remorse was more for your current situation than your actions.

Sentencing

Case law

[28] There is no tariff case which provides guidelines or ‘bands’ for sentencing in manslaughter cases. This is because the crime of manslaughter covers a broad range of circumstances with extreme variations in the level of culpability. However, the Court of Appeal set guidelines for sentencing in cases involving serious violent offending in the case of *R v Taueki*.¹² The principles set out in that case can also be applied to manslaughter cases involving serious violence. In the case of *R v Tai*, the Court of Appeal suggested that “a counsel of perfection” would be to consider the offending in light of the *Taueki* guidelines, making appropriate adjustments and to also assess culpability with reference to comparable manslaughter sentences.¹³ That is the approach I will adopt. I will first consider your offending as it fits within *Taueki* and then consider if any adjustments must be made in light of other comparable manslaughter cases.

[29] In *Taueki* the Court set out a number of factors which can be used to determine the seriousness of the offending.¹⁴

[30] Mr Harris, inherent in the charge of manslaughter is the fact that you took a life. This is the most serious aggravating factor. In your case the use of a weapon is also an aggravating factor. You took a knife from your quad which you used to stab Mr Keogh; the knife has never been recovered. A knife is an inherently dangerous

¹² *R v Taueki*, above n 3.

¹³ *R v Tai* [2010] NZCA 598 at [12].

¹⁴ At [31].

and deadly weapon. Any use of a knife in physical altercation must be condemned by the Court. I accept that you were not carrying the knife for use as a weapon but rather it was on your quad for use around the farm, and that your possession of the knife is not indicative of any premeditation. I must also take into account that you also attempted to drive at Mr Keogh with your quad after you had stabbed him. In this context, I consider that you attempted to use your quad as a weapon.

[31] One additional aggravating factor, which was not included in the *Taueki* factors but which has been considered in other cases of serious violence,¹⁵ and which I consider is very relevant and serious in this case is that you stabbed Mr Keogh in front of four children, in a somewhat isolated environment, when no other adults were present. This meant that not only did the children witness you stabbing Mr Keogh, but they were forced to take action to try and save Mr Keogh's life. Had it not been for the quick thinking, bravery, and driving ability of Mr Keogh's 11 year old son, Vince, they may not have been able to get home and raise the alarm. His action was truly exceptional in the circumstances.

[32] Your counsel has submitted that your offending should be considered excessive self defence or provocation, which are recognised as mitigating factors.¹⁶ Excessive self defence applies when a person has initially defended him or herself but then takes it too far, and goes beyond what is necessary. You have maintained that Mr Keogh was the aggressor who forced you to take action to defend yourself. I reject this argument. Any need to defend yourself was as a result of your actions in instigating the confrontation. In saying that, I do accept that Mr Keogh had an air rifle and that at some point during the struggle it was pointed at you, but this must be viewed in light of the circumstances as they arose. Indicative of this is that you pulled Mr Keogh partway out of his vehicle before you stabbed him and that after doing so, and when Mr Keogh told you to leave, you attempted to drive your quad at him.

[33] I consider that these aggravating factors place the offending in band two of *Taueki* which justifies a starting point in the range of between five and 10 years

¹⁵ *R v Fraser* HC Christchurch CRI-2009-061-244, 9 July 2009 at [29]; *R v Walsh* (2005) 21 CRNZ 946 (CA) at [38].

¹⁶ *R v Taueki*, above n 3, at [32].

imprisonment. However, I must also consider other cases which are comparable to set a starting point. Both counsel have provided me with a number of helpful cases and I thank them for their assistance.

[34] While none of these cases I have been referred to are completely analogous, this is to be expected in manslaughter cases. I consider that your offending warrants a starting point lower than *R v Ariki* and *R v Kapea* in which the Judges set starting points of eight years but higher than the starting point in *R v Beazley* which was six years. I consider that your culpability is most similar to that in *R v Edwardson* although I recognise that the setting is different.

[35] In that case, the defendant was a 16 year old who was attending a birthday party. On the street she saw the victim with some friends, one of whom the defendant had a history with. The defendant approached the victim's friend aggressively; the victim intervened indicating that the defendant would need to 'get through' her first. There was pushing and shoving between the two. The defendant then took out a small knife that she was carrying in her jacket pocket and stabbed the victim in the neck, nicking the jugular vein and severing the carotid artery. The defendant then ran away. In that case, Justice Stevens adopted a starting point of seven years imprisonment. In that case the Judge placed considerable weight on the fact that the defendant had been carrying a knife in a situation in which it was inappropriate to do so, but accepted that this did not equate to premeditation.

[36] The similarity, to the present case in my view, is that you instigated the confrontation which then became physical on both sides and resulted in you fatally wounding the victim with a single stab. Whilst *Edwardson* involved inappropriate carrying of a knife and a stab to the neck, your case involved the presence of young children and an additional weapon, which is the attempted use of the quad bike. However, the one factor which I consider reduces your culpability slightly below that in *Edwardson*, is that Mr Keogh did have an air rifle.

[37] Your counsel has submitted that the case of *R v Beazley* is comparable in which the Judge adopted a starting point of six years. In that case, the defendant had killed his son after his son had attacked him and there had been a struggle. This can

be distinguished from the current case; although the airgun was pointed at you during the struggle I do not accept that Mr Keogh was the instigator.

[38] Your counsel has also referred me to the case of *R v Emery* in which the Judge adopted a starting point between five years, six months and six years. The Judge considered that the case fell into the category of single stabs or single punches.¹⁷ While, in your case, Mr Keogh died of a single stab, this case could not properly fall within that category. There was an ongoing struggle during which you pulled Mr Keogh partway out of his vehicle and later attempted to drive at him with your quad. Accordingly, I do not consider that *R v Emery* is analogous to your case.

[39] In light of the bands set out in *Taueki* and the cases discussed, I consider that the circumstances of your offending justify a starting point of six years and nine months' imprisonment.

Adjusting the starting point

[40] Mr Fairley has submitted that you should be entitled to a discount for previous good character, which is accepted by the Crown. As I said earlier, you do have two previous convictions but they are driving convictions from 1989. One in particular, for driver or occupant not wearing a seatbelt, is particularly minor. Now you may remain seated. I have read the references provided by your friends, family members and members of the community. They say that you are an upstanding member of the community who regularly carries out acts of service. On this basis, I consider that the starting point should be reduced to six years, five months' imprisonment.

[41] You are entitled to a reduction for your guilty plea. You initially offered to plead guilty to manslaughter in the lead up to trial but at that time the Crown declined to accept your plea and the matter continued to trial on the charge of murder. Issues arose during trial and it was decided that a retrial would be needed. At that stage you again offered to plead guilty to manslaughter at which point the Crown accepted your plea. When determining the discount available for a guilty plea

¹⁷ At [38].

the Court must consider "... all the circumstances in which the plea is entered, including whether it is truly to be regarded as an early or late plea and the strength of the prosecution case."¹⁸

[42] I proceed on the basis that your plea was offered prior to trial but at a late stage. Mr Fairley has submitted that it is open to me to award you the maximum discount, which is 25 per cent. I disagree. The maximum discount is usually given where a defendant has pleaded guilty at the earliest opportunity or where the circumstances otherwise justify it. In this case, you offered to plead guilty at a late stage in the face of a relatively strong Crown case. You offered to plead guilty to manslaughter if the charge of murder was withdrawn. I consider that you are entitled to a guilty plea discount of no more than 10 per cent. That leads to a sentence of five years, nine months' imprisonment.

Minimum period of imprisonment

[43] The Crown has not requested that I impose a minimum period of imprisonment above the statutory minimum. While it would be open to me to impose one nonetheless, I do not consider that it is necessary in your case. It is my view that the sentence I am about to impose on you will be sufficient to denounce your conduct, deter you and others from committing similar offences, and to hold you accountable and to protect the community.

Orders

[44] Mr Harris would you please stand.

[45] For the manslaughter of Joseph Keogh I sentence you to a term of imprisonment of five years and nine months' imprisonment.

[46] You may stand down.

JA Faire J

¹⁸ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [74].