IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CRI 2009 059 001541

REGINA

v

PAUL RICHARDS

Hearing: 8 February 2010

Appearances: J NP Young for Crown
W N Dawkins for Prisoner

Judgment: 8 February 2010

REMARKS ON SENTENCE OF CHISHOLM J

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[1] Paul Richards, you have pleaded guilty to the manslaughter of Mark Smith at Queenstown on 19 November 2009.

[2] Like so many sentencings for manslaughter, this is distressing in the extreme for all concerned. You and Mr Smith were waiting for taxis at Queenstown sometime after 11pm. You didn't know each other. You were grossly intoxicated and Mr Smith had also consumed alcohol. An argument developed. You punched Mr Smith with a closed fist. Then you pushed him against a taxi. According to the police summary, on which I must sentence, there was pushing and shoving and Mr Smith retreated on to the roadway. The police summary says that witnesses identified you as clearly the aggressor. You advanced on Mr Smith and hit him on the head with what has been described as a *"roundhouse"* blow. Unfortunately as a

result of that blow Mr Smith sustained a subarachnoid haemorrhage arising from a tear to his vertebral artery. He died within a short time.

[3] Dr Sage, an extremely experienced pathologist, reported that this type of mechanism is an extremely uncommon cause of death. He has only experienced six in his long career. Dr Sage said that it requires a substantial, but not massive, blunt force injury to cause that outcome.

[4] Mr Smith was aged 47 years. He was, from the information I have, considerably smaller than you. He had been with his wife for nearly 23 years. They have two boys, aged 20 and 10. I know that you have read the victim impact statements and, of course, the family have read some of them today. Those statements express the dreadful impact on a mother, wife, children and sisters. It is not at all surprising that their grief and anger is intense. A much loved member of their family has been cruelly taken away from them and I know that it doesn't need me to tell you that. It's probably not surprising that they seek the maximum available penalty that is permitted by law and they question the ability of the Court to deliver that, at least in their eyes. I can understand that, because nothing that I can say or do today can go any distance to compensating for the loss of a life. Lives are without value.

[5] But the night we are talking about was also a tragedy for your family. You are 34 years of age, Mr Richards. You were born in the United Kingdom, came to New Zealand in 2002 and were highly successful in the broking industry. You obtained New Zealand citizenship in September 2009. You have no previous convictions in either Britain or New Zealand. To the contrary, from all that I have read you have an exemplary background.

[6] You come from an extremely supportive family. Your parents have come to New Zealand to be with you during this sentencing process. At no small sacrifice, as I can understand from the information before me, they have lent you $50,000 so that this sum can be paid to the Smith family by way of reparation. I don't under estimate the sacrifice that your parents are making.

[7] During the short time that you have been in New Zealand you have impressed an extraordinarily wide range of people. I have read 43 references. In my years as a Judge I have never before read such an impressive array of references from such a wide sector of the community. Common themes come through: your genuine shock and devastation at the offending; their disbelief that you could have been involved in such offending; your intelligence and ability within your chosen field; your honesty and your integrity. Many describe you as a gentle giant. Given those references, Mr Richards, I am satisfied about two things. First, that this offending was totally out of character. Secondly, that your remorse is entirely genuine. Indeed, you are devastated.

[8] So how could this offending have occurred? Regrettably it is attributable to one thing: alcohol. From what I have read the consumption of alcohol to the gross level of intoxication that you were suffering was out of character: you can't remember what happened, and that would be consistent with the alcohol level that was recorded. The truth is that that alcoholic bash has devastated two families. I just wonder, Mr Smith, when the message will ever get through to the public at large, but particularly younger people, that too much alcohol often leads to mindless arrogance and aggression. If only those who are tempted to over indulge could see the misery that is being suffered at this moment.

[9] Sentencing for manslaughter is always an extremely difficult task for the sentencing Judge. There is no what lawyers describe as a tariff. I have been enormously assisted by the submissions, both written and oral, of counsel on both sides. Indeed, Mr Dawkins has not left a stone unturned.

[10] In broad terms the Crown suggests that I ought to adopt a starting point of between four and four and half years imprisonment and that the sentence that I should impose on you should be in the region of three years imprisonment. On your behalf Mr Dawkins suggested the starting point should be in the range of three to three and a half years and that, after mitigating factors are taken into account, I should arrive at a range of between 18 and 21 months imprisonment which would open the door to home detention (which is available when a sentence is two years or less). And, of course, Mr Dawkins recommends home detention.

[11] Numerous cases have been cited to me by both sides. Those cases are, of course, of assistance. But it is rare for any two situations involving manslaughter to be precisely the same and the truth is that there is no case precisely the same as yours.

[12] The aggravating factors that I need to take into account can be summarised in this way. First, it was an unprovoked assault involving two punches, the second punch being administered when Mr Smith was retreating. Secondly, and this is so often the case, this unfortunate death has caused total devastation for his family, as you have acknowledged. Thirdly, you were grossly intoxicated. And fourthly, although I do not place a great deal of weight on this, there was an element of vulnerability on Mr Smith's part.

[13] On the other side, the mitigating side, the factors that I need to take into account are these: first, your guilty plea (and it was at the first available opportunity); secondly, your previous good character; thirdly, your genuine remorse; fourthly, the offer of amends by way of reparation of $50,000. Can I pause here to say that, as Mr Dawkins said, money can never be adequate compensation, but in terms of the law it is something that I can, and must, take into account. Finally, there is the offer to attend a restorative justice meeting, again a factor that I need to take into account. But, as Mr Dawkins said, you full well appreciate that the Smith family cannot, at least at this stage, face the prospect of such a meeting. That is entirely understandable.

[14] Now I want to discuss the starting point. Mr Dawkins has argued very strongly that this is the akin to the *"one punch"* cases which have attracted a range of between three and four years, but Mr Dawkins says towards the lower end of that range. I have to sentence on the facts as they are presented to me, and I have to assess your culpability (or criminality) according to those events. The reality is that this was not a one punch case. There were two punches with a push against the taxi between those two. And, significantly. the fatal punch was administered when Mr Smith was retreating.

[15] I agree with Mr Young that a decision in *R v Roker* (CA358/92, 18 February 1993) offers some guidance. In that case a starting point of four years was upheld by the Court of Appeal.

[16] The next matter that Mr Dawkins emphasised was that the mechanism of death was extremely unusual. And he has referred to cases where that factor has been taken into account by the Judge. Most of those involve cases where someone has been punched, fallen to the ground and death has arisen as a result of a person's head striking the ground. As far as these events are concerned, Mr Richards, the reality is that it was the blow that caused death here, and Dr Sage has reported that it would usually require substantial force to cause death.

[17] Once I weigh all factors I arrive at a starting point of four years imprisonment. Then it is necessary to look at the mitigating factors and the reduction that should be made in that regard. I start with your personal circumstances.

[18] As I have already said, your previous character is exemplary. This is totally out of character. Your remorse is genuine, but there is strong overlap between any credit for remorse and the credit for a guilty plea. You have offered, and I am going to implement that offer, to pay $50,000 to Mr Smith's family. That entitles you to a substantial credit. There is a degree of overlap between the many mitigating factors that apply in your case and I am not going to attempt to allocate a specific discount for those particular factors except to repeat that the willingness to make amends by paying $50,000 entitles you to the largest proportion of the discount. Mr Dawkins suggested there should be a 25% discount. I agree.

[19] So from the starting point of four years I allow one year discount which brings me down to three years. You are entitled to a further one third discount by virtue of your guilty plea which brings the sentence down to two years.

[20] And now I arrive at the most difficult part of the sentencing: should you receive home detention? It has been recommended by the probation officer who has recorded, and I accept without question, that the chance of you re-offending is low.

That's probably an understatement. I don't think you will ever be before the Courts again.

[21] I need to take into account statutory considerations. I must impose the least restrictive outcome that is appropriate in the circumstances. I also need to take into account the desirability of keeping offenders in the community as far as practicable and consonant with the safety of the community. And, as Mr Dawkins emphasised, I must not impose a sentence of imprisonment unless I am satisfied that it is imposed for the purposes expressed in s16(2)(a), that those purposes cannot be achieved otther than by a sentence of imprisonment and no other sentence would be consistent with the principles in s8. I also take into account the observations of the Court of Appeal in *R v Iosefa* [2008] NZCA 45, although that case did not involve a charge of manslaughter.

[22] Mr Dawkins has argued very strongly on your behalf for home detention. He relies in particular on *R v Timu* (High Court, Auckland Registry, 2 September 2004, TO31152) and *R v Teima* (High Court, Napier Registry, 13 June 2003, T1/2002) in which leave to apply for home detention was granted and submitted that the many cases relied on by the Crown where leave to apply for home detention was refused can be distinguished. Care needs to be taken with pre-2007 amendment cases. But to the extent that in *Timu* and *Teima* can be taken into account (they being pre-2007), I note there was an element of provocation in both those cases, which can be contrasted with this case where the victim was actually backing away.

[23] As has been noted during the course of submissions, Hansen J considered the issue of home detention in *R v Efeso* (High Court, Auckland Registry, 24 October 2008, CRI 2008 092 0725), which was after the 2007 amendment. He made remarks, which are obiter, about whether home detention would have been granted if he had arrived at level where he had to consider it. His view was that the death of an innocent person as a result of street thuggery must normally be marked by a sentence of imprisonment. That was a slightly different case because the possibility of re-offending was high (which can be contrasted with this case where it is low) and the sentence arrived at by Hansen J was above the two years that I have arrived at. Nevertheless apart from the prospect of re-offending there are similarities between

your case and the decision in *Efiso*. Hansen J described the events there, which arose from an incident involving a parked vehicle, as *"street thuggery"*. In reality yours was not dissimilar, except that it was fuelled by alcohol.

[24] I have agonised whether or not I should grant home detention in this case. In the end I am afraid to say that I do not think that home detention could achieve the necessary element of deterrence. Notwithstanding the mitigating factors, and strong mitigating factors, that apply in your case and the payment of reparation, I have, albeit with some misgivings, arrived at the conclusion that a sentence of imprisonment is the least restrictive outcome. So Mr Richards you are sentenced to two years imprisonment and you are ordered to pay reparation of $50,000. The standard conditions will apply.

Solicitors: Crown Solicitor, Invercargill
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