

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT PORIRUA**

**I TE KŌTI-Ā-ROHE
KI PORIRUA**

**CRI-2018-091-001305
[2018] NZDC 24062**

NEW ZEALAND POLICE
Prosecutor

v

GAVIN MAURICE HAWTHORN
Defendant

Hearing: 20 November 2018
Appearances: Sergeant P Macky for the Prosecutor
G Kahukore-Fitzgibbons for the Defendant
Judgment: 20 November 2018

NOTES OF JUDGE J A R JOHNSTON ON SENTENCING

[1] Gavin Hawthorne, you are 56 years old and you appear today for sentence having pleaded guilty to one charge of driving with excess breath alcohol, a third or subsequent offence, on 7 June this year. That charge carries with it a maximum penalty of up to two years' imprisonment and/or a fine of up to \$6000 and a mandatory minimum disqualification from holding or obtaining a driver's licence for more than one year.

[2] The issue for you, of course, is that you have a significant conviction history, some 62 previous convictions over the period 1979 to 2003 including 12 prior offences for offending, or convictions of this kind. Your past driving convictions have included

atrocious driving, resulting in the deaths of some four people as a consequence of two such instances, the most recent in 2003 where you were sentenced to 10 years' imprisonment for manslaughter. I note that you served almost all of that sentence and were released in 2013. Whilst you have already served punishments for those previous convictions, the fact of those convictions are an aggravating factor which the Court must take into account.

[3] The Court also needs to consider on sentencing for this charge, a number of factors that are contained in the Sentencing Act 2002. Those factors include the purposes of you being accountable for the harm that you have done to the community, promoting in you a sense of responsibility for that harm, and your acknowledgement of that harm.

[4] The Court also must look at denunciation of such conduct and deterrence, not only of you but also of others, from such offending. The protection of the community is also a relevant sentencing factor and the Court also needs, where possible, to assist in rehabilitation and re-integration.

[5] Relevant sentencing principles include the gravity of your offending and your degree of culpability. The Court must also be consistent with similar offences and look to impose the least restrictive outcome that is appropriate in the circumstances. The Court also can look at an offender's background and see whether there are any relevant personal or whānau circumstances which can be considered.

[6] As I said, the key aggravating factor here are your relevant previous convictions. In your favour is, of course, that a guilty plea has been entered to this charge at an early opportunity.

[7] I have had the benefit of receiving written submissions from the police which I have received this morning and from Ms Kahukore-Fitzgibbon on your behalf. Those submission refer to the relevant cases including the case of *Clotworthy* and the case of *Sampson*. Both submissions refer to starting points for this offending in the region of, for the defence, 15 months' imprisonment, and the police between 16 and 18 months imprisonment.

[8] Both the defence and the police also are of the view that you should receive discounts for your guilty plea for the full 25 percent as per the Hessel case, and Ms Kahukore-Fitzgibbon goes further and indicates that there should be some discount for your personal and/or family circumstances.

[9] I must say, Mr Hawthorn, when first looking at your situation, the temptation is to consider, in light of your history, sentencing you to a significant period of imprisonment. The maximum penalty, as I say, for this offence, however, is a maximum of two years imprisonment.

[10] The cases referred to also provide guidance to this Court in terms of the relevant factors that need to be taken into account at sentencing. Those factors as enunciated in both *Clotworthy* and *Sampson* include the level of the breath alcohol reading, in this instance 444 micrograms of alcohol per litre of breath, some 44 micrograms above the 400 limit.

[11] It is also relevant to note that the offending was detected by police operating at a check point. There were no concerns raised about the manner of your driving prior to you entering the checkpoint and undergoing breath alcohol procedures. Further, this is not a case where you were disqualified or otherwise prohibited from driving at the time of the offending. I note the police submission, however, that your licence has since been revoked.

[12] The most recent conviction for offending of this kind dates back to 2003 and I have referred to that already, but it is relevant to note that there was an infringement offence for drink-driving in 2017. That matter was not proceeded with as a charge as your breath alcohol level, although greater than 250 micrograms per litre of breath, was less than the 400 micrograms level which would see you brought before the Courts. That impacts on the gap of time between your previous offence and your now new offending.

[13] The most recent sentences that you have received for drink-driving, including for manslaughter and the cases involving you causing the deaths of others, have been sentences of imprisonment.

[14] The sentencing submissions, as I say, are similar, including from the police. The pre-sentence report that I have received recommends to the Court a sentence of home detention and community work. The home detention sentence recommendation is supported by the submissions that I have received from Ms Kahukore-Fitzgibbon and, as I understand the position, is recorded in the police submission as something that they would not be opposed to. Ms Kahukore-Fitzgibbon also submits that you have had numerous sentences of imprisonment in the past and essentially that has not worked for you.

[15] The proposed sentence recommended in the pre-sentence report of home detention, in her submission, will enable you to attend an alcohol rehabilitation programme and she reminds the Court that home detention is not a light sentence. You will be electronically monitored throughout the duration of that sentence and would not have access to a vehicle, according to her submission.

[16] Home detention is also a sentence that you have not previously received.

[17] The recommendation in the pre-sentence report also takes into account the contents of a comprehensive drug and alcohol report received from Mr John Duncan, dated 23 July.

[18] There is also s 38 CPMIPS Act report received from Dr Kennedy McLaughlin, which is also supportive of you receiving assistance for your alcohol abuse and offence-related thinking. In fact, Dr McLaughlin goes further and says that you require such treatment.

[19] Your case presents as a difficult one, Mr Hawthorn. As I say, your drink-driving history is appalling. You know that and you acknowledge that in the pre-sentence report and it is indeed one of the worst that I have seen. The starting point is clearly imprisonment and, looking at the cases referred to by counsel and the police, a starting point of 18 months' imprisonment is, in my view, warranted.

[20] In looking at the cases that I have referred to, that starting point takes into account your history and the factors applicable to you from both *Clotworthy* and *Sampson*. In particular, it takes into account the breath alcohol level for the present charge that is before the Court; the manner of driving on this occasion, which was innocuous, and your relevant conviction history.

[21] I also note the gap since your last offending, although that is smaller than the 2003 timeframe would suggest because of your time in custody and the infringement offence matter that I have referred to.

[22] There should also be a discount for your guilty plea and I also give you a discount for the personal and family circumstances submitted by your counsel, that I have referred to. The total discount, in my view, would amount, based on the authorities, to a total of six months, which would get to an end point sentence of 12 months' imprisonment.

[23] Because the police do not oppose home detention, because of the recommendation from the report received from Corrections and the submissions made by Ms Kahukore-Fitzgibbon and by the police, I am persuaded by the very slimmest of margins that it is appropriate for home detention to be applied in this case.

[24] I am satisfied, therefore, on the basis of the applicable cases and law that in these particular circumstances a short term of imprisonment would otherwise be appropriate; however, as per the recommendation from Corrections, you are a suitable candidate for a sentence of home detention. The purposes for which this sentence is being imposed cannot be achieved by any less restrictive sentence or combination of other sentences. The proposed residence is suitable; [the occupant], who addressed me earlier and is present today supporting you, consents, and you know that consent may be withdrawn at any time.

[25] You are convicted and sentenced to home detention, which is calculated at six months.

[26] The home detention residence is [address deleted].

[27] There will be the special conditions as set out in the pre-sentence report along with the standard conditions.

[28] I also impose the standard post-detention conditions until six months after the detention end date, and the special post-detention conditions until six months after the detention end date, also as set out in the pre-sentence report.

[29] I also sentence you to 180 hours of community work, and you are disqualified from holding or obtaining a driver's licence for two years. That starts now.

J A R Johnston
District Court Judge