EDITORIAL NOTE: SOME NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED

IN THE DISTRICT COURT
AT KAIKOHE

CRI-2017-027-000634
[2017] NZDC 16476

NEW ZEALAND POLICE
Prosecutor

v

HANUERE PAUL WITEHIRA
Defendant

Hearing:	26 July 2017
Appearances:	D Coleman for the Prosecutor H Taylor-Wi Neera for the Defendant
Judgment:	26 July 2017

NOTES OF JUDGE G L DAVIS ON SENTENCING

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[1] I have before me Hanuere Witehira. Mr Witehira is for sentence today, having pleaded guilty to one charge of wilfully ill-treating an animal, a brindle puppy, by hitting it with a blunt instrument and causing it to die. He is also for sentence on one charge of driving with excess breath alcohol on a third or subsequent occasion and one of driving whilst disqualified.

[2] In time order the sequence of events is as follows. On 4 May 2017 Mr Witehira was driving a motorbike on Hillcrest Road. He was stopped by a patrol car on an unrelated traffic offence. He admitted having a couple of drinks, breath testing procedures were carried out and his breath was found to contained 678 micrograms per litre of breath. At the time he was driving he was a disqualified driver, having

previously been disqualified in October of 1999 and not having his licence reinstated. He was granted bail in respect of those matters.

[3] Whilst on bail, at about noon on 8 July he was in Kaikohe. He was upset with the victim, his son, as the food that the victim wanted to have for lunch was not available. Mr Witehira's response was that he said, "I'm going to kill your dog." He then got a pein hammer from a toolbox in his bedroom, went to the background where Valley, a five month old cross bred brindle puppy was tied up. A pein hammer is described as being 40 centimetres in length and having a four centimetre wide face. Mr Witehira has hit Valley in the head eight times with the pein hammer. Valley was transported to Bay of Islands Veterinary Clinic where she was put down at about 1.15 pm. Valley sustained multiple fractures to the head, severe swelling to the brain, bruising to the eyes, a fractured tooth and she was bleeding heavily from the nose and mouth and as a result she was euthanised. He was spoken to by the police and Mr Witehira denied hitting the dog, saying it was already dead when he got home.

[4] Those are the facts that I have to proceed on today. As a preliminary matter in respect of the wilful ill-treating an animal charge, the charging document was laid in the Kaikohe District Court. The legislative reference was to Animal Welfare Act 1999. The reference to the section which gave rise to this charge was omitted from the charging document. Mr Witehira pleaded guilty to the charge of 18 July but without that legislative reference being inserted. I inquired of the police today what was the appropriate legislative reference. I was told s 28(1)(c) Animal Welfare Act was the appropriate legislative reference. I granted the police leave to amend the charge today and Ms Taylor very helpfully took further instructions from her client and confirmed that the guilty plea was to be maintained.

[5] The lead charge Mr Witehira in my view is the wilful ill-treatment of the dog charge. The Court, in coming to a sentence, has to arrive at a sentence that holds you accountable for what you have done in the first instance. It also must arrive at a sentence that denounces and deters this sort of behaviour, in other words, sends a message not only to you but to members of the public generally that this sort of cruelty will not be tolerated or condoned by the Court. It must also promote in you a sense of responsibility and acknowledgement for the harm that you have done, not only to the

dog, but to other members of the community. The Court must also arrive at a sentence that protects the community, both in respect of the cruelty charge, but also the drink-driving charges.

[6] I propose to deal with the sentencing in the following way. We will deal with the wilful ill-treatment of the animal charge in the first instance and then I will return to deal with the driving whilst disqualified and drink-driving charges after that. The Court of Appeal recently released a decision, *Erickson v Ministry for Primary Industries*[1]. That decision, while not a tariff decision as such, went through the history of the Animal Welfare Act and its predecessor legislation and set out some guidelines to assist Courts such as the District Court in Kaikohe with the approach to be taken to sentencing on these types of offences.

[7] The first point to be made Mr Witehira is that the Act itself states as its primary purpose as being an Act to reform the law relating to the welfare of animals and the prevention of their ill-treatment and in particular:

(a) To recognise that animals are sentient.

(b) To require owners of animals and persons in charge to attend properly to the welfare of those animals.

(c) To specify conduct that is not permissible in relation to any animal or class of animals.

(d) To provide for the development and issues of code of welfare and approval of codes of ethical conduct.

There are other matters referred to in the preamble to the Act that are not relevant for these sentencing purposes.

[8] The Court of Appeal described the Act as being, "The single most important piece of legislation relating to the protection of all kinds of animals under human

[1] *Erickson v Ministry for Primary Industries* [2017] NZCA 271

control." And then it went on to note the important difference between the charge bought under s 28 Animal Welfare Act and a charge bought under s 28A. This is the significance of why I raised with the police which section this charge is bought under because the charge under s 28 of the Act deals with the wilful ill-treatment of animals. Wilful is another word for deliberate ill-treatment of animals. A charge under s 28A deals with the reckless ill-treatment of animals.

[9] The importance of the sections and the difference in the intention is reflected in the penalties that Parliament has passed. The maximum penalty for a charge under s 28 Animal Welfare Act is five years' imprisonment and a $100,000 fine. The maximum penalty under s 28A is a three year term of imprisonment and a $50,000 fine.

[10] The Court of Appeal then went on to set out a framework for dealing with these charges and said, "The Court must analyse the offending by looking at three considerations." What it described as primary aggravating considerations, secondary aggravating considerations and thirdly, mitigating considerations. The primary aggravating considerations included factors such as:

(a) The causing of significant pain or distress and that requires an assessment as to how acute, how extensive and how extended the pain is and the distress.

(b) Whether there was extreme violence assessed by the nature of the actions taken, rather than their effect?

(c) Is whether there was any premeditation and planning to cause significant pain or distress, particularly of a sadistic nature, as opposed to impulsive or reactive behaviour?

(d) Was any repetitive offending, including the number of victim animals concerned?

(e) Was whether you took a leading role in the offending as opposed to being a follower or acting under the directions of another person?

[11] Secondary aggravating considerations include:

(a) The means of commission of the offending, such as the use of weapons, attacking the head or multiple offenders.

(b) Whether there was abuse of a position of trust, such as a managerial responsibility or something of that nature.

(c) The impact on third parties such as members of the public who witnessed the offending or its consequences.

It is against those guidelines that I need to consider the aggravating features.

[12] The mitigating features are described by the Court as being:

(a) Impulsive or reactive behaviour but not involving a sadistic intent.

(b) Experience suggests that often there is some form of mental disturbance, short of insanity.

It is whether or not those matters are present here.

[13] Undertaking that analysis Mr Witehira I note the following. This was an attack that involved eight blows to the head of the young puppy. There is no question that it caused significant pain and distress to the dog as evidenced by the summary of facts to which you have pleaded guilty and evidenced by the fractures, the multiple fractures to the head, the severe swelling to the brain, the bruising to the eyes, the fractured tooth and the blood that was discharging from the nose and mouth. Secondly, there was the extreme violence. That is again, gives rise or results from the blows that you have administered with the hammer to the head area of the dog. Thirdly, is the premeditation and the planning. I accept that this was at one level, probably a reaction by you to your son and the availability of food or perhaps unavailability of food as the

case may be. However, this requires you to go from the kitchen area to your room to get the hammer. It was then used because, in my view, it was some form of punishment directed towards your teenage son. That in my view renders this a primary aggravating feature.

[14] There is no question in respect of the fourth matter that you played the leading role in the offending. It cannot be said that you were a follower. It is your acts that caused the death of the puppy.

[15] In respect of the secondary aggravating features, again there were weapons involved, there were multiple attacks to the head. You were in a position of trust vis-à-vis your son and the dog. The impact on the third parties can only be described as one which resulted in members of the public alerting the police. It must in my view have been horrific for him to have witnessed or to be in the proximity of that.

[16] I now have a victim impact statement completed by [the victim]. He is really sad that his father killed the dog. He alerted the police. He feels that that has made the situation worse but he could not stand by and let you kill the dog. He has concerns about how your relationship will develop in the period ahead. He describes alcohol as being a factor in this offending and when you drink he describes you as being difficult to be around. He also said, for him, it was really tough to look after his dog knowing it was probably going to die when it had been hit by the hammer and was bleeding out of its face. As I suggested, it would have been traumatic and horrific for your young son.

[17] Mr Coleman has handed to the Court a case *Karekare v Police*[2] out of the Hamilton High Court. The facts surrounding that involved Mr Karekare arriving at an address after drinking. A kitten came to the door. He picked it up and threw it out the backdoor onto a concrete path in front of the complainant and her five year old daughter. The complainant screamed, "Stop". He picked the kitten up by the neck again and threw it onto the concrete path. The kitten stopped moving, the daughter began crying. He kicked in the head and put it in an incinerator and set it on fire. The end sentence of 18 months' imprisonment was imposed there. That of course would

[2] *Karekare v Police* HC Hamilton CRI-2011-419-000067, 3 November 2011

have acquired a higher starting point. That case, in my view though, was decided without the benefit of the Court of Appeal decision and without an analysis as to whether or how it fitted within the constructs that the Court of Appeal has recently provided.

[18] I take the view Mr Witehira that this offending that is worse than that in the *Karekare* case. That is because of the weapon involved; that is because of the sadistic element involving the punishment to your son, that is because of the nature of the injuries and the suffering that the dog would have endured. I take the view here that a stern response is needed by the Court to ensure that the appropriate message is sent to the public that this sort of behaviour cannot be tolerated. The starting point, in my view, of two years and six months' imprisonment is the appropriate starting point.

[19] I turn now to consider the drink-driving and the driving whilst disqualified charges. You have seven previous convictions for drink-driving. You have convictions in 1999, 1998, 1996, 1993, 1990, 1987 and 1982. The readings range from 565 micrograms of alcohol per litre of breath in 1990 to 1030 micrograms of alcohol per litre of breath in 1998. You have 11 previous convictions for driving whilst disqualified. Two in December 2016, one in 2002, one in 1999, two in 1997, one in 1995, one in 1991 and two in 1987.

[20] The concern here for the Court Mr Witehira is that alcohol appears to have played a factor in all of the offending. I accept that in terms of culpability there has been a significant period between your previous conviction in 1999 and the event in May 2017. The Court has often referred to a case *Clotworthy v Police*[3] in which the Court is required to consider 10 factors that go into considering what the appropriate starting point for any sentence involving recidivist drink-drivers should entail. The first of those factors is the level of the alcohol involved and I note here Mr Witehira the level was 678 micrograms of alcohol per litre of breath. It is a moderate reading. It is certainly not the highest reading that the Court will see today. Secondly, on the second factor is the length of time since your last conviction and I note there has been some 17 years or thereabouts. The third factor is whether there are two or more

[3] *Clotworthy v Police* (2003) 20 CRNZ 439 (HC)

convictions in close proximity to each other. I have touched on those. The fourth factor is what was the manner of the driving, was it dangerous, was it innocuous, were you driving whilst disqualified and that is certainly something, as I say, that counts against you in this instance.

[21] The next factor for the Court to consider is when the guilty pleas were entered and I have touched on that. The next factor is previous sentences and I note you have in the past served terms of imprisonment, although that has been some time ago. The next factor is whether you have a record for other offending. I note in that regard you have a significant history of failing to answer District Court bail, but by in large your offending largely relates to driving and drinking related offences.

[22] The next factor is whether there was any remorse or willingness on your part to confront your alcohol problems. There is nothing before me that assists in that regard and finally whether there is any mitigating or family circumstances contributing to the offending. There is nothing before me to assist in that regard.

[23] The other aspect here is that there was a Court of Appeal decisions *Hughes v R*[4] in which the Court of Appeal noted that notwithstanding the offences of drink-driving and driving whilst disqualified may have been committed on the same day, then they are to be viewed as two separate offences warranting cumulative terms of imprisonment.

[24] On a eighth drink-driving charge, it would be open to the Court, in my view, to look at a sentence of imprisonment that would be starting anywhere in the 12 to 16 month imprisonment range. However, I note the one factor that weighs heavily on the Court's mind here is that there has been a significant period between this conviction and your last. Recognising that factor, I will adopt a starting point of eight months' imprisonment.

[25] Secondly, on the driving whilst disqualified charge, the same cannot be said. This is now the third conviction inside of one year and it is the twelfth occasion you have come before the Court. The Court has indicated that in cases such as *Drinkwater*

[4] *Hughes v R* [2012] NZCA 388

v Police[5] the methodology is to look at the totality of the driving whilst disqualified charges but that of course has to be measured against the broader totality principle.

[26] There should be a starting point or an uplift to the eight month imprisonment by six months to take that driving whilst disqualified into account. That would leave an end sentence of 14 months' imprisonment of the driving charges, which would be served cumulatively on the 30 months' imprisonment in respect of the animal cruelty charge or a total of 44 months in jail.

[27] I then need to turn to factors personal to you that would warrant the sentence being increased or reduced as the case may be. In respect of the animal welfare charge, there is nothing in your history that would warrant the sentence being increased. Equally there is nothing, in my view, in your history for drink-driving and driving whilst disqualified that would warrant the sentence being increased. That is because it has effectively been built into the starting points that I have adopted in respect of each charge.

[28] As to matters that are personal to you. What I have before me to assist the Court in the sentencing process, is the pre-sentence report completed by the Probation Service. That report notes as follows: that in respect of the drink-driving charge your son had recently purchased a motorbike and got you to have a turn on the bike and that led to your arrest. You were resistant to the notion that your alcohol consumption was a problem. You said that you had drunk most of your life and you do not consider it to be a problem. You said you would prefer to be undertaking community work to doing a drug and alcohol treatment programme, although you would attend if required to do so. You did not wish to attend a residential rehabilitation programme.

[29] You have a previous history of breaching community-based sentences the Probation Service note. There was an address that was found to be technically suitable but your compliance says that an electronically monitored sentence in the Probation Service's view would not be appropriate. You are described as also being a cannabis user, although nothing turns on that as far as I can tell in respect of this offending. You have recently had a broken leg, which is not properly healed, which would render

[5] *Drinkwater v Police* [2013] NZHC 1036

some sentences arguably difficult for you to complete. The property, as I have said, is technically suitable but Probation Service do not consider you to be an appropriate person for a community-based sentence.

[30] I am of the view that the sentence should be reduced from 44 months' imprisonment by six months to take into account the factors personal to you, including the recent broken leg and the fact that a term of imprisonment, which in my view is inevitable today, will be difficult for you to serve, given what is referred to as gastrointestinal issues in the pre-sentence report.

[31] From the end sentence of 38 months in prison, I am of the view you are entitled to the maximum credit that I can give you for an entry of a guilty plea, which in turn would be nine months off the sentence. That would leave an end sentence of two years and five months in prison. When one steps back and looks at the totality of the offending, in my view, that is the appropriate sentence that should be imposed today Mr Witehira.

[32] In respect of the charges, I propose to deal with it in the following way. In respect of the wilful ill-treatment of animal charge, you will be convicted today and sentenced to two years' imprisonment. In respect of the driving with excess breath alcohol charge, you will be convicted today and sentenced to five months' imprisonment. That is to be served cumulatively, in other words, in addition to the two years that has been imposed in respect of the wilful ill-treatment of the animal. In respect of the driving whilst disqualified charge, you will be convicted today and sentenced to five months' imprisonment but that is to be served concurrently. In other words, at the same time as the excess breath alcohol charge.

[33] I also have to disqualify you from holding or obtaining a driver's licence. That will be for a period of one year and one day and that will begin today, 26 July 2017. When your finite disqualification ends on 27 July 2018, you will remain subject to the indefinite disqualification imposed by the Court of 1999 which means you will not be able to get your licence back until such time as you have

attended an assessment centre and the Director of Land Transport removes the disqualification.

[34] There will be an order for destruction of the hammer.

G L Davis
District Court Judge