

[1] [M], you appear for sentence today having pleaded guilty to assaulting Stephen Dudley with intent to injure him. Although the maximum penalty for that offence is three years' imprisonment, I will not be sentencing you to either imprisonment or home detention. The issue for me today is whether I sentence you to a non-custodial sentence, or discharge you without conviction. I have decided to discharge you without conviction. Now I have told you that, I want you to listen carefully to what I now have to say about how I have arrived at that decision because it has some important messages for you.

Summary of facts

[2] First, the detail of the offending for which you are sentenced. Your younger brother and the victim, Stephen Dudley, were members of the same rugby team at an Auckland secondary school. At the time of the offending they were friends and were both 15 years of age. You were also a student of that school, but you were two years older. At the time of the offending you were 17.

[3] On the day of the assault, the rugby team had come together for a pre-season practice. Before training your brother and Stephen had an argument and almost came to blows, but they were stopped by other teammates.

[4] After practice, Stephen was leaving the ground when someone from the team called him back. Your brother met Stephen at the centre of the field. There seems to have been peer pressure for a fight, with people calling out for a fight and using their cellphones to record events.

[5] You arrived at the playing fields to pick your brother up at that moment. You saw the brewing fight. You ran to the centre of the field and involved yourself in events.

[6] You approached Stephen from the side and struck him once on the neck with a swinging right arm. Stephen did not see this blow coming and hunched over defensively. He did not throw a punch. You and your brother then delivered several punches to Stephen's torso. Stephen collapsed and at that point you and your brother left the scene. Attempts were made to revive Stephen but he later died in hospital. Unbeknownst to you or to anyone at the time, Stephen had an undiagnosed heart condition which made him vulnerable to problems with his heart's rhythm in situations of traumatic stress. Because of that condition, it is impossible for anyone to say what actually caused Stephen's death. However, we can at least say that if the fight had not taken place, Stephen might be alive today.

[7] Your brother has been sentenced for his part in the assault on

Stephen and he was discharged without conviction.

Stephen's death

[8] You have pleaded guilty to assault with intent to injure. You had earlier faced a count of manslaughter. However, when Stephen's underlying heart condition came to light the Crown came to the conclusion that it could not safely be determined as a matter of fact that your actions caused Stephen's death. As a result, the Crown amended the charge brought against you to assault with intent to injure.

[9] For this reason, the fact that Stephen died after the fight is not to be weighed by me in determining the sentence I impose. Both your counsel and the Crown are agreed that this is the approach that I must take.

Victim impact statements

[10] I acknowledge that Stephen's family were previously present in Court today and in determining your sentence I have taken into account, to the extent that I may, the statements made by Stephen's family. I say to the extent that I may because those statements naturally focused upon Stephen's death. I listened to both of Stephen's parents, Brent and Mona, and I also listened to Talita, his sister, who spoke on behalf of Stephen's siblings.

[11] Mr Dudley has characterised your actions as cowardly and brutal. Mrs Dudley tells of her and her family's profound sense of loss at losing Stephen, who she described as a role model to his family, friends and community. It is clear from Stephen's family's description of him that he was a loving, loved and lovely young man.

Your personal circumstances

[12] I have read the pre-sentence report prepared in respect of you. Although it is a brief document, it does tell me a little about you. You are 18 years old, but you were 17 at the time of your offending. You were in your final year of school, year 13.

[13] You are the eldest son in a family of five children and your family is present in Court today to support you. You have had a strict but loving upbringing. You are currently enrolled in tertiary education and are actively involved in sport at representative level. You have no previous convictions. You are assessed as being at a low risk of re-offending.

[14] Your counsel has provided me with information about your schooling. You were an average student, but you had real ability in

some subjects, particularly mathematics. There is no history in your school record of you having ever previously resorted to violence. You have no disciplinary record.

[15] I also have available to me a report prepared by Dr Suzanne Blackwell who met with you over a course of several months. She is a clinical psychologist. Dr Blackwell has described you as a somewhat sheltered but otherwise normal 18 year old, who has grown up a lot in the last 12 months. She says that prior to these events your life consisted of school, sport, church and family and that you were perhaps an immature 17 year old because of your sheltered upbringing. She describes your acknowledgment of the effect of your offending on Stephen's family and how you have spoken to members of your church about these events and the lessons you have learnt from them. She assesses your remorse for your actions as "most sincere".

[16] I have read the testimonials provided in respect of you, from people who have had contact with you at school, at university and through sport. You are regarded as a hardworking, decent young man.

[17] I have also read the affidavit you have provided for this sentencing. You say that you feel like Stephen is dead because of you. You are sorry for the pain you have caused Stephen's family. You have wanted to meet with them, but understand they do not wish to meet with you.

[18] You describe why you acted as you did on that day. You saw the start of a fight involving your little brother, someone it was your role in the family to protect. You were worried about your brother because he did not know how to fight. You were scared he could get hurt, and you wanted to defend him. You said that when you hit Stephen he fell to the ground. You thought you had knocked him out. Because you were scared, you told your brother to grab his stuff and you both left.

Counsels' submissions

Submissions for the defence

[19] Your counsel applies for a discharge without conviction on the grounds that the consequences of conviction would be out of proportion to the gravity of the offending. He submits that your presence in this Court, as with your brother, is a result of the sad circumstances that surrounded Stephen's death and his underlying heart condition. In ordinary circumstances had Stephen not died, the fight almost certainly would never have come to the attention of the police and would have been dealt with by your school.

[20] He characterises your actions as those of an impulsive and protective older brother looking out for his sibling, and overreacting in doing so. Your counsel has submitted that your youth is highly relevant to your culpability, given the limited ability of teenage boys to assess circumstances in a rational manner, especially in situations of stress. He submits that for these reasons your offending should be assessed as of low to moderate seriousness.

[21] As to the consequences of a conviction, your counsel has submitted that you have already faced significant consequences for your actions. You were excluded from your school. You lost the supportive environment that you were once an integral part of. You could not complete NCEA level three. Your counsel has also emphasised the responsibility you feel for Stephen's death. He stresses the negative and ongoing impact on a young person of a criminal conviction. For these reasons he submits that the consequences of the conviction would be out of proportion to the gravity of the offending.

Submissions for the Crown

[22] The Crown submits that your role is more culpable than that of your brother. It identifies the following as aggravating factors of your offending:

- your attack on Stephen was unprovoked and unexpected;
- you were older and larger than Stephen;
- you were the person who resorted to the use of violence first;
- and you then joined in on attacking Stephen with your brother.

[23] The Crown says your actions are moderate violent offending at the least. It submits that a starting point for offending of this sort could legitimately be several months' imprisonment. The Crown accepts that you are entitled to reductions in sentence for your previous good character, youth and guilty plea. It has suggested that a sentence of 80–100 hours' community work may be appropriate given the harm your offending has caused to the greater community.

[24] The Crown opposes the application for discharge without conviction. It submits that a discharge would fail to reflect adequately the purposes and principles relevant to sentencing you in this case. It considers that a greater deterrent, both specifically to you and more generally to others of your age bracket, is needed. It submits that there is nothing to suggest that you will have to bear any special consequences of conviction that would make the effects of your conviction disproportionate to the gravity of your offending.

Sentencing considerations

[25] The Sentencing Act 2002 describes the purposes for which the court may sentence an offender, and principles that the court must take into account in conducting that sentencing exercise. I have to consider the gravity of your offending and your culpability for it. I must take into account the impact of your offending on the victim. In sentencing you I must hold you accountable for your offending. Relevant also in this case is the need to denounce your conduct and to deter you and others from similar offending in future. It is important also to provide for your rehabilitation. The latter being particularly important in light of your youth.

[26] As to the gravity of your offending. I accept the aggravating features identified by the Crown. You initiated the violence. Moreover the blow you initially struck was to Stephen's neck, a vulnerable part of the body. Stephen did not see the blow coming. You pushed your way into a scuffle that was between people of a different age group to you. I also acknowledge that the seriousness of the offending is aggravated by the fact that both you and your brother assaulted Stephen.

[27] However, I do not accept the Crown's submission that your actions can be described as moderate violent offending "at least". In so saying, I repeat that I do not take into account the fact that Stephen died after the fight. There is no suggestion that any of the blows struck caused injury in and of themselves. Assessed in that light these were punches thrown in the context of a schoolyard fight. If Stephen had not died because of his undiagnosed heart condition there would be nothing to distinguish this from numerous school yard fights. You were all schoolboys, even if you were the oldest.

[28] I also take into account that however foolish and unjustified your actions, they were taken in defence of your brother. This is relevant not because it justifies what you did, because it does not. But it satisfies me that you were not maliciously involving yourself in these events. I also accept your counsel's submission that you acted reactively. There was no pre-meditation.

[29] I regard your age as very relevant in assessing your culpability. Youth is a relevant factor in sentencing. As I have said, it is relevant because of the particular interest society has in ensuring that young offenders can be rehabilitated to be contributing members of society. But it is also relevant because the law recognises that young people may in some circumstances be less culpable for their offending. This is because young people are less able than adults to make good choices as to their actions and to control impulses. In her report, Dr Blackwell says something of the reasons for this. Adolescents, especially boys, do not reach full development of their brain functioning until their early to

mid-20s. The part of the brain which governs planning, appreciation of consequences and impulse control, is not fully developed for many boys prior to the age of 19. When this fact is combined with the higher levels of testosterone in young men, it often if not frequently produces flawed decision making.

[30] In determining the appropriate sentencing response to your offending, I also take into account your previous good character. You have no previous history of interaction with the criminal justice system. Moreover the material I have before me shows me that prior to these events you were not a person who would resort to violence.

[31] It is also relevant to take into account your remorsefulness. Dr Blackwell has expressed her view that your remorse is genuine and I share that opinion. Indeed, the Crown also accepts that you are remorseful. You have expressed your remorse in your affidavit. You have offered to engage in a restorative justice process. You pleaded guilty as soon as the charge against you was amended.

[32] Finally I take into account that it is unlikely that you will reoffend.

[33] For these reasons, I agree with Crown counsel and your counsel that a custodial sentence is inappropriate in your case. The question becomes whether you should be granted a discharge without conviction, or whether the purposes of sentencing of deterrence and denunciation demand a more punitive non-custodial sentence.

Discharge without conviction

Introduction

[34] My power to discharge you without conviction is derived from s 106 of the Sentencing Act 2002. I may only do so if I am satisfied that the direct and indirect consequences of a conviction will be out of all proportion to the gravity of the offence. The approach I have to take in assessing this issue is first to identify the gravity of the offending by reference to what you did; assess the direct and indirect consequences of a conviction on you; and determine whether those consequences would be out of proportion to the gravity of the offending. This assessment of the consequences and proportionality may include your youth as a factor.

Analysis

[35] Your actions are worthy of condemnation. An assault of this kind, though regrettably common in our schools, is unacceptable. I have

discussed the gravity of your offending and your culpability for it. You are not to be sentenced on the basis that your actions caused a death. Your offending was at the low to moderate range of seriousness for an assault of this type.

[36] The Crown submits that the gravity of your offending is of such a high level that a discharge without conviction should not be granted because a greater deterrent both to you and to the community at large is required. I do not accept that submission because of my assessment of the gravity of your offending and because you are assessed as unlikely to reoffend. I bear in mind that you are not here today to be called to account for the death of Stephen, but rather for your assault on him.

[37] I also weigh that you have already faced consequences for your offending. These are consequences that for a young person are significant. For several months you were charged with manslaughter, and had to deal with the stress of that. You were unable to complete secondary school, and you missed your chance to complete your NCEA examinations. You were socially isolated from your school peers. You have lived and will live your life in the knowledge of your role in the events that ended with Stephen's death and I am satisfied that you do feel the weight of that.

[38] What of the consequences of a conviction for you? Again I do not accept the Crown's submission that there is no particular consequence identified for you that will inevitably result from the entering of a conviction. I consider that there is a real and appreciable risk that your transition into adulthood, given your current prospects and educational ambitions, will be significantly prejudiced should a conviction for violence be entered against you. The fact of a criminal conviction can significantly damage a young person's employment and educational opportunities and have an exaggerated impact upon their development. Such convictions can have a disproportionate impact on the ability of a young person to gain meaningful employment and to play a worthwhile role in society.

[39] Are these consequences out of proportion to what I have characterised as the low to moderate gravity of your offending? I consider that they are. Therefore, [M], you are discharged without conviction in respect of the charge of assault with intent to injure.

[40] But I wish to make a final remark. Nothing in these sentencing notes should be taken as an endorsement of your actions. Fights amongst school children may be common, but that does not mean that we should tolerate them as a society. Every act of violence carries with

it the risk of unexpected, even grave harm. All too often the Courts deal with the consequences of a single blow causing serious injury and even death. It may well be that schools should provide education as to the risks of fighting. This is especially so in a climate where so much violence, severe violence even, is portrayed in the media in drama programmes and even in sports on a daily basis. I hope that these events and other recent incidents are the necessary spur to action for that.