

STATE OF TASMANIA v JOSHUA GEORGE HECTOR CLARK

17 NOVEMBER 2022

COMMENTS ON PASSING SENTENCE

ESTCOURT J

The defendant Joshua George Hector Clark, aged 40, has been found guilty by a jury of the crime of manslaughter.

On 22 August 2015, the defendant was cutting firewood in the area of Mt Lloyd. He was with his then partner Sierra Lynd and her three small children.

After having cut some fallen trees and chopped the wood, the party drove off in the defendant's dual cab utility, leaving the cut firewood on the ground. I am satisfied beyond reasonable doubt that the defendant's purpose in doing so was to find a better quality of wood if he could.

After driving only 30 metres or so the defendant saw a green tree with a dead tree hung up in it, about 20 metres from the road. He parked the car in the middle of the road, told Ms Lynd and the children to stay in the car and took his chainsaw into the bush.

I am satisfied beyond reasonable doubt that his intention was to fall the green tree in order to bring the dead tree down and to then cut up the dead tree for firewood. I reject the defendant's explanation that the sole reason for felling the green tree was that, with the dead tree forked into it, and a cut already into it, it was a danger to others. If he had really thought that it was dangerous because it might fall across the road, then that would have alerted him to the need to remove his own vehicle to a safe distance.

I am satisfied beyond reasonable doubt that the defendant failed to follow his own safe practice of cutting a wedge out of the tree on the side of the tree that was facing the direction of the intended fall, before cutting a back cut on the other side of the tree. Had he done this, I am satisfied that he would have had some chance of controlling the fall of the tree, even though he overcut the back cut and left no "holding wood" between the cuts.

The defendant also failed to follow his own safe practice of parking his vehicle some 100 metres away from the tree to be felled. In fact, the tree was 32 metres tall and the nearest point of his vehicle from the base of the tree was only 22 metres.

In the circumstances, the defendant lost control of the direction of the fall of the tree and it fell across the utility and struck Ms Lynd's eldest child, seven year old Akira James Lynd Carroll, on the head. Akira died in hospital the following day from an un-survivable injury to his brain stem.

The defendant was immediately remorseful and the extent of his remorse was evident to me throughout the trial. As a result of the incident the defendant suffers from Post Traumatic Stress Disorder. A relevant sentencing consideration is that of trauma to the defendant and I take that into account. I also take into account the effect of imprisonment on the defendant's family in Victoria in respect of whom I have recently been provided with reports, which suggest

that the defendant's imprisonment will impact on them. This is not an exceptional case in that regard, however.

The defendant has no relevant prior convictions and I take that into account, although that is often the case in a case such as this. Equally, while the defendant comes from a background of trauma which left life-long scars, and was part of the reason that he became involved in wood hooking in the first place, his background and his personal circumstances do not bear in any relevant way on his offending.

The defendant spent three nights in custody and has been in custody since the conclusion of his trial on 9 September 2022.

There has been considerable delay in this matter coming to trial. Some seven years. I take the relevant parts of that delay into account.

The initial delay was in Tasmania Police preparing the file and presenting it to the Director of Public Prosecutions. The DPP responded within a week seeking further information. The file was returned but with not all of the information provided as the defendant had moved interstate. Police dubiously, in my view, assert that he was not locatable from 25 February 2016 until 20 July 2017, so they could not advance the matter because they could not contact the defendant. The file was not finally returned until 12 September 2018. The DPP was then able to have a complaint sworn and a warrant issued and that week the defendant was arrested on warrant and extradited from Victoria. The defendant had moved to Melbourne to be with his former partner and their daughter who suffered from cerebral palsy and has since died.

The defendant appeared before a Hobart court 20 September 2018 and he pleaded not guilty on 18 October 2018, and appeared in this Court in February 2019. It then took until 20 June 2019 for the defendant to decide to make no application for preliminary proceedings. Since then, the matter has been the victim of a COVID affected court list, notwithstanding that it has been given priority.

Thus it can be seen that delay on the part of Tasmania Police accounts for a period of some two years after the offence – during which time the defendant, not unreasonably understood that he would not be charged. I take those matters into account and I have moderated the defendant's sentence to make an allowance for that.

I have heard and read Victim Impact Statement's from Akira's mother and father and it is clear that the fact of, and the circumstances of, Akira's death have had devastating emotional and psychological effects on them and their family. Understandably so.

The defendant's practices were generally seen by others as safe and he was protective of anyone that he took out with him. However, whilst the negligence on the fateful day was outside the defendant's ordinary safety practices and thus an aberration, manslaughter is obviously a most serious crime.

From the perspective of the criminal law, the defendant is guilty of the crime of manslaughter because he was culpably negligent. His conduct fell so far short of what a reasonable person would have done that it is deserving of criminal punishment.

It is accepted that he did not foresee that death was a likely consequence of his act. However, that is not a mitigating factor on a manslaughter charge. If he had foreseen it, he would of been facing a murder charge.

As a former Chief Justice of this Court has pointed out, many competing considerations arise in a case such as this. If death had not resulted, the punishment would be less severe than will be the case. But, as it happened, he did cause death and he must accept responsibility for doing so. The sentence should reflect the sanctity of human life in general and the criminality involved in its unintended loss.

Having reviewed all sentences for manslaughter since 1989, I have concluded that no other sentence than substantial period of immediate imprisonment is appropriate.

The defendant is convicted of manslaughter and is sentenced to four years' and nine months' imprisonment, backdated to 6 September 2022. He is not to be eligible for parole until he has served half of that sentence.