

STATE OF TASMANIA v DAVID IAN CHARLES COLES
COMMENTS ON PASSING SENTENCE

7 MARCH 2024
PORTER AJ

David Coles, the defendant, has pleaded guilty to one count of manslaughter. On 3 January 2023 he unlawfully killed Nicholas Aaron Scott by shooting him once in the chest with a shotgun. The facts are as follows. From 30 June 2022, Mr Scott was on remand in custody in respect of drug trafficking charges. He had previously been on parole for offences of dishonesty. On a number of occasions in December 2022 while still on remand he was admitted to the Royal Hobart Hospital following acts of self-harm, including swallowing razor blades wrapped in plastic. On 29 December 2022 he was again taken to hospital after swallowing an object. On 2 January 2023 he managed to escape after requesting to use the toilet. He ultimately made his way to the home of a Ms Howlett, the mother of his young son. In an attempt to avoid police searching, in the early hours of the morning of 3 January 2023 Mr Scott, in company with Hayden Jetson went to the home of Brock Davey in Granton. Earlier that evening Shaun Barrow had been at Mr Davey's house and, at Mr Davey's request, had left the Granton house, driven to Moonah to pick up the defendant and returned with him. The defendant had in his possession a loaded double barrel shotgun, it having been prearranged that he would bring that with him. The State is not able to identify any apparent purpose in the defendant having this firearm. There is a suggestion Mr Davey was having difficulties with an unidentified male person and there was some concern this person might come armed to his home. When Mr Scott had arrived he was not aware that Mr Barrow had been there earlier but, of course, he was there when Mr Barrow and the defendant arrived with the firearm. Scott, Davey and Jetson were in Mr Davey's bedroom at the rear of the property. The deceased was sitting on a couch in the room, with Mr Jetson on the bed. The defendant, carrying the shotgun in a bag, went into the room and moved towards the couch. Mr Scott stood up and struck him to the head with a glass stubby, causing it to break. Mr Scott then went out the backdoor of the house with Mr Davey in pursuit. The defendant retrieved the shotgun from the bag and followed those two men out of the door. Mr Barrow also followed but remained at the back door. There were then three men outside; Davey, Scott and the defendant. A scuffle took place between Davey and Scott during which Scott had the broken end of the stubby in his hand and Davey received cuts to his face. The defendant was standing a few metres away from where this was going on, demanding that Barrow shine his phone torchlight in Scott's direction. Threats were exchanged between the defendant and Scott. There is an audio recording of what happened, captured by CCTV operating on a neighbour's property. It is best to set out some of what can be heard. At the beginning, Scott can be heard threatening to stab someone, presumably Davey, saying he has a knife in his hand and telling him to let go. The defendant says, "I will fucking shoot you, dog" and after being abused by Scott tells him to let him (Davey) go, calling him a "dog". He demands the torch be put on Scott saying he will shoot the pair of them. He repeats the request for light and the demand of Scott to "let him go" and says, "Don't worry about it Brock, I'll shoot the fucking dog" just before telling Davey to let Scott go; that he will shoot Scott. After the defendant tells Scott that he will die, Scott says he has a gun in his hand and that he will blow his (presumably the defendant's) head off. The defendant again threatens to shoot him at which point someone else says "Brock, let him go." The defendant again asks for the light and Scott says, "Come on, come on, you're gonna die cunt. You are gonna fucking die. You are going to die too cunt". The defendant asks what is he going to do about it. The deceased is then recorded as saying that he has a fucking hand gun and he was going to blow them both away. In the seconds before the defendant fires the shotgun the following can be heard. Defendant: "Let him go Brock, so I can just shoot the fucking dog." Scott: "Fucking just go, Brock's already a mess anyway [inaudible] and blow your head in you fucking goose...Don't fucking blow me away, you fucking goose."

It is of some significance that after the shot is fired, the defendant is heard to say "Fucking kill you next time scum" and "Do you want another one do you dog? Do you want another one? Of course, you fucking do, you fucking cunt". All of these events took place fairly quickly. The shot was fired less than a minute after the altercation between Davey and Scott had started. The defendant was standing a few metres from Scott at the time of firing the shot. At that precise point in time Davey was not being held by Scott or in contact with him. The shotgun pellets struck the deceased in the upper right chest perforating the chest wall, right lung, diaphragm and liver. The trajectory was downward and rearward. Scott died shortly after from acute blood loss either at the precise location in which he was shot or very close to it. Immediately afterwards the defendant took steps to get rid of the firearm and leave the property. About five minutes after the fatal shot he fired the weapon again and then threw it over the fence into an adjoining property. At about 1.40am the defendant left the property riding a motorbike that Mr Jetson had earlier used to transport himself and the deceased to the property. The defendant did not go back to his home until the afternoon of 3 January. Later that day he withdrew nearly \$10,000 in cash from his bank and remained at large for the next six days. On 9 January 2023 police spotted a vehicle that was linked to him. That was intercepted, the defendant was located and he was arrested for murder. When interviewed he said that he had known Brock Davey all his life, and he – the defendant – was one of his father's best mates. He said that Brock's father had asked him to keep an eye on him and to keep him off the drugs. He said he knew the deceased from gaol and that the last time he had spoken to him when in gaol. He denied being responsible for shooting the deceased and denied being at the address on that particular night. He said that he felt sorry for the deceased and for the family. The cause of death was determined to be a single gunshot wound to the chest. Ballistics investigations revealed that the defendant was about three or four metres away from the deceased at the time the firearm was discharged and at the time he was shot, the deceased had his arm raised. The expert opinion is that it is likely the defendant was pointing the gun downwards so that either the defendant was slightly elevated in position compared to the deceased, or the deceased was leaning forward at the time of discharge. No weapons apart from the broken bottle were found with the deceased. It was established that the deceased had high levels of methylamphetamine and cannabis in his system. The State accepts those drugs were consumed not long after the deceased arrived at Ms Howlett's home. The State asserts that the defendant went to the Granton property with a loaded firearm in anticipation that he may need to use it, but accepts there is no evidence to suggest that he was anticipating the deceased being present or an altercation with him. The plea of guilty to manslaughter was accepted by the State in substitution for the original charge of murder. This was on the basis that in the chaotic circumstances that followed being struck on the head with the bottle, the defendant did not appreciate that by intentionally shooting the deceased there was a real chance death would result. It is not disputed that at some point when the defendant was remonstrating with the deceased he was entitled to act in defence of Davey, but if there was a belief of the need to so act at the time of firing the weapon, such an act was far in excess of what was reasonable in the circumstances. In short, the State's position is that manslaughter is accepted in substitution for the original charge of murder on the basis the defendant committed an act intended to cause bodily harm "and/or the act is one known to be likely to cause death" although he had no intention to cause death, nor knowledge or appreciation that the act was likely to cause death. It is a culpable homicide not amounting to murder: see ss 156(2)(a), 157(1) and 159(1) of the Criminal Code.

I have a victim impact statement from Ms Howlett who was Mr Scott's partner for many years and who, as I have noted, is the mother of his son, Western, now four years old. It is prepared by her on his behalf. She speaks of the great bond the deceased had with his son in spite of the

short time they had together, and of the fun they had together playing. Ms Howlett is troubled by the future Western may have without a father figure. In particular the impact of the crime on the child has been a developing one. He has a fear of the telephone ringing. That was the means the deceased often used to speak to his son, and since his death Western will not speak to anybody on the phone. Because of events in her life, Ms Howlett suffers emotional detachment and although utterly devastated by Mr Scott's death she says she is not good at expressing herself talking to Western about it, and it means that she is not very good at knowing how to help him.

The defendant was 44 years old at the time; now 45. He has been in custody since his arrest on 9 January 2023. He has a very considerable recorded history of offending, predominately of dishonesty matters and drug offending. The record starts when he was 13 years old. Prominent other convictions in October 2014 for aggravated burglary, aggravated armed robbery and perverting the course of justice, which ultimately saw him imprisoned for five years and three months with a non-parole period of three years and three months. The first two of those crimes involved the robbery of a hotel in company of two others while armed with a firearm. I note the last sentence of imprisonment before this present crime was imposed on 3 March 2022. That was a period of 12 months imprisonment with three months suspended on conditions for three years. As to mitigation in penalty, I have the benefit of counsel's submissions and a very comprehensive report from Dr Michael Evenhuis, forensic psychiatrist, dated 14 August 2023. That was prepared for the State of Tasmania in relation to a claim for damages by the defendant relating to his time in care of the State as a ward and while in detention at Ashley Youth Detention Centre. The defendant's parents separated when he was young and he cannot recall them being together as a family. He spent his early childhood with his mother and sisters at Sorell but moved in with his father at Bridgewater when he was nine or ten years old. There was some physical abuse by his father. His offending seems to have started towards the end of his time at Sorell when he was associating with older pro criminal youths. His offending continued leading to him being taken into State care and ultimately periods of detention at Ashley. The report details his recounting of an appalling level of physical and sexual abuse of him and others, and active participation by staff in sexual abuse, often in exchange for favours, and the encouragement of sexual activity for personal gratification. He has had little remunerative work in his lifetime. Alcohol use started when he was still living with his mother, and the abuse of that substance continued unabated for a considerable period. He started smoking cannabis at about the age 13 but discarded that as he later did amphetamines, but developed an addiction to benzodiazepines which spiralled out of control. Ultimately he had addiction issues with heroin and morphine. Dr Evenhuis's summary describes an unemployed man who reports having spent the vast majority of his adult life in prison as a result of criminal activity driven by substance misuse. He says that there appears to have been a lack of stable attachment figures and parental supervision which contributed to conduct disorder, associations with older peers, early adoption of substance use and subsequent offending, unstable accommodation and eventual institutional care and detention. The doctor notes the emotional, sexual and physical abuse. The defendant continued to have access to illicit substances in juvenile detention and reports having primarily used opiates and benzodiazepines in order to experience positive moods and states and to block out traumatic memories. In the doctor's view, the long history of dishonesty is plainly related to his substance abuse. There are post-traumatic symptoms in the form of dreams and intrusive memories. He has chronic difficulties with low mood, social anxiety and problems within relationships and hypervigilance. Dr Evenhuis says there is evidence of personality dysfunction and that the defendant would meet the full criteria for anti-social personality disorder, opiate use disorder and partial criteria for borderline personality disorder. The defendant has been unable to

maintain relationships of any significance although he has been in a relationship with a woman that was intermittent over a time but has been relatively stable for the last few years, and they have a three year old daughter. She has two other children. I have a letter from her attesting to the defendant's good parenting skills and in which she speaks of the plans and hopes they have for the future. Generally, it appears in recent times he has had a more stable personal environment, and the frequency and seriousness of his offending has been diminishing.

In terms of the crime, I was told the following without dissent. The defendant's sole purpose of going to the Davey home was his concern for Brock Davey. He had been asked by Brock's father to watch out for him. Brock Davey was on bail with a curfew condition and accordingly it was known where he would be at any particular time and there were concerns about difficulties he was having with another person. These had escalated to the extent of his house being shot at about two days before this incident. That was the reason the shotgun was taken to the house; it was the defendant's intention just to leave it there. The defendant's recall is that he was hit from behind with the bottle with no interaction between the deceased and him before that happening. He is not aware as to what caused the deceased to act in that way, but it was put that this behaviour is consistent with a general level of paranoia on Mr Scott's part being an escapee and one would have recently ingested methamphetamine. The blow was a heavy one which disoriented the defendant and it took him a moment or so to gather himself before grabbing the shotgun. His recollection is that the altercation between the deceased and Davey started within the residence and moved outside, although nothing really turns on this. The defendant was still a little disoriented from having been struck over the head and was very concerned for Mr Davey throughout his altercation with the deceased. Scott was not only continuing to grapple with Davey but was making threats to him which included including threats to kill with mention made of the possession of a knife and gun. The defendant did not know that Scott was going to be at the Davey house when he returned. He did not plan for nor foresee any of the relevant events. It is common ground that the events involved the participants being in very heightened states, where things were moving quickly and with threats being made on both sides.

The taking of human life in circumstances of criminal liability is always, of course, a very serious matter. That said, the facts of manslaughter cases can vary greatly giving rise to a wide range of sentences, although imprisonment is almost inevitably the outcome. This case is one of manslaughter by intentional act. On the State's case, by the firing of the weapon, bodily harm was intended or, that act was commonly known to be likely to cause death. The State accepts that the defendant was in a situation where he did not know or appreciate there was a real chance of causing death. Of course, sentence is *not* to be imposed on the basis that the act was, in the circumstances, known to be likely to cause death. Were the facts to be so, there would be guilt of murder. But firing a shotgun at someone at close range, even given what was happening at the time, involved a high level of culpability. It is not in dispute that Mr Davey was not being held by, or in close contact with, Mr Scott at the time of the shot. I accept, as is obvious, that the defendant did not go to the house to confront Mr Scott and did not plan what happened. I take into account that the defendant was generally attempting to ensure Mr Davey was not harmed, that it was difficult for him to see what was going on in that respect, and that to an extent he was still somewhat disoriented from the blow to the head. That attack was unprovoked and without any obvious explanation. However, the use of the firearm is of itself significant and it is not the first time a firearm has featured in the defendant's offending. I must have regard to the fact that the defendant was prepared to grab the shotgun, take it outside with him, hold it while the altercation was taking place, to threaten its use and then to fire it at close

quarters. He then disposed of the firearm after firing it a second time for some reason, and then fled.

Mr Coles I have set out the facts, your personal circumstances and the considerations that I need to take into account. I need to balance the competing interests of the public in relation to attempting to deter others from risking life by the use of violence, particularly perhaps involving the use of firearms, and deterring you from further offending, as against your reasons for intervening in the situation, and your personal circumstances. Those circumstances include a disadvantaged and highly traumatic childhood and early adolescence. You are convicted of the crime. In all of the circumstances the appropriate sentence is one of eight years' imprisonment. That will commence on 9 May 2023. As I think there are some signs of your rehabilitation and other positive indications of a more settled life, I will make provision for parole, and I will make for provision for the maximum eligibility. I order that you not be eligible for parole until you have served four years of that sentence.