IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CRI-2021-054-001840
[2022] NZDC 5429

WORKSAFE NEW ZEALAND
Prosecutor

v

NEW ZEALAND DEFENCE FORCE
Defendant

Hearing:	29 March 2022
Appearances:	A Simpson for the Prosecutor J Rooney and M Mercer for the Defendant
Judgment:	29 March 2022

NOTES OF JUDGE J KREBS ON SENTENCING

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[1] The New Zealand Defence Force, as defendant, faces a charge that as an employer in August 2020 it failed to take adequate steps to protect the safety of three soldiers in its employment.

[2] From time to time the New Zealand Defence Force is required to provide personnel in what is effectively a peacekeeping role to overseas countries, particularly in the South Pacific. That often occurs at very short notice. A recent example involves the deployment of soldiers to the Solomon Islands in December 2021.

[3] Because these situations arise suddenly there is seldom any opportunity to conduct training for specific deployments and specific conditions immediately before the requirement to travel, therefore regular training is required. The conditions which

soldiers might expect to face when they travel abroad in these roles are wide and varied, for that reason the training must also be wide and varied in its scope.

[4] As part of this training Operation Venom was conducted for six weeks in the middle of 2020. At its culmination it involved two nights of mock riot battle handling exercises at the Linton army facility. What that effectively did is pit a squad of soldiers playing the role of rioters against the trainees. This occurred at the urban training facility at Linton. This involved modified shipping containers set up to resemble an urban environment.

[5] 6 August was the second night of this mock battle training. Trainees were sent into this environment and faced mock rioters using a range of items, including water, flour and on this occasion Molotov cocktails. The first night had proceeded well, however on the second night there was a much larger group of mock rioters. As a result the event was less structured and there was a comparative lack of control.

[6] Although a risk management plan had been put in place before the incident, recognising the wide range of risks and difficulties, there were aspects of the plan which were not followed on this night. These included the fact that the trainees did not have or did not wear the full flame retardant personal protective equipment. Rules were broken, those being the rules as to engagement and how the mock rioters should behave.

[7] One or more of the rioters had access to fuel stored in one of the modified shipping containers. From their position on top of a shipping container they poured the fuel into the area where the trainees were. The fuel spread on the ground and doused a number of trainees.

[8] One of the rioters, as planned, threw a Molotov cocktail which was meant to break on a cinderblock surface and be immediately extinguished by a fire officer present. However, it skidded off the cinderblock, hit the wall of one of the modified containers, broke and immediately ignited. The fuel which had been poured from the top of the container also ignited as a result and then clothing worn by two of the soldiers, which had been doused in fuel that was poured from above, caught fire as well. One of the two soldiers instinctively ran and accidentally bumped into a third soldier. His fuel doused clothing also caught fire. Safety personnel were of course

present and extinguished the flaming clothing worn by the soldiers but not before they had suffered a range of burns, some of which were significant.

[9] The prosecution agency identifies four previous convictions for the defendant in 2007, 2013, 2014 and 2020. The most recent of those involves the death of a naval diver during training. In that case the Court found that the defendant failed to ensure that the divers were effectively supervised during training, there were insufficient supervisory staff present and there was a failure to ensure all present had diving competency certificates. A $525,000 starting point was fixed, including a five per cent uplift for previous matters. It is accepted, as it must be, that in this case it was a different branch of the New Zealand Defence Force but nevertheless the defendant is responsible for the safety if the personnel in each of its branches.

[10] I have received victim impact statements from the three soldiers who were injured significantly. Mr [redacted] who personally read his statement to the Court received burns to possibly as much as 20 per cent of his body, certainly 17 and a half per cent. He spent 19 days in hospital. He had three surgeries where skin grafts were applied to the burns on his upper arms, hands, the backs of one knee, to both sides of his face, ears and his nose. The grafts were applied to approximately 15 per cent of his body. There was scarring around legs and knees. He was unable to move or walk for most of that time that he was in hospital. Ongoing effects remain and there are still noticeable scars, some of which are causing him problems.

[11] His work with the army has had to change and he has spent much of the time since the accident in an administrative as opposed to an active role. His career progression has been impacted because of his inability to work in an active role. He has had ongoing psychological issues and I have received a report about those. He has suffered with ongoing depressive and PTSD related symptoms. Understandably he struggles with day-to-day things such as refuelling vehicles, the smell of the fuel causes an understandable reaction. Needless to say, from time to time, he relies on antidepressant medication to help him with his ongoing symptoms. He hopes to be off that medication shortly. In due course he is likely to need to leave employment with the army.

[12] Mr [redacted] suffered second degree and third degree burns to his left arm. These extended also around his shoulder to part of his back. He suffered burns to his head and to both of his ears. He suffered significant pain initially and that continues from time to time. He has struggled with the skin grafts which he has received and it seems that there were some issues with the grafts taking for a period of months. He is struggling to regain the strength that he needs to continue as a fit and healthy infantryman. He too has suffered from depression. As a result of the incident he has suffered nightmares, they have continued to affect his sleep. For a while, in order to help him sleep, he drank heavily to become intoxicated, although has been able to discontinue that unhealthy practice. The emotional stress has resulted in a breakdown of his relationship. He suffers from pyrophobia, he too becomes anxious with the smell of petrol and that engenders panic attacks. He wants to continue in the army but he too is not sure that he will be able to do so.

[13] Mr [redacted] was the least affected of the three. That is not to say he did not suffer injuries, however, he suffered superficial burns to his neck and wrist at the time. Perhaps in his case the ongoing harm is more psychological than physical. He describes feeling at the time a near-death experience and found that deeply traumatic. He relives the moment from time to time and has found himself suffering panic attacks unpredictably and he lashed out at a civilian neighbour as a result of what was, he acknowledges, a minor trigger. He has suffered from mood swings for a period of time. He describes himself, at the time of writing the report some months ago, as being 99 per cent recovered, however the occasional panic attacks remain and he is concerned that they may become a chronic pattern.

[14] I have received and have already acknowledged in court, and do so again, the lengthy and significantly helpful submissions on behalf of both the prosecutor and on behalf of the defendant. Both recognise that when considering sentence in this case the guideline decision I must follow is the case of *Stumpmaster v Worksafe New Zealand*.[1] The *Stumpmaster* decision sets out that I must adopt a four-step process:

[1] *Stumpmaster v Worksafe New Zealand* [2018] NZHC 2020.

(a) I must begin by assessing the amount of reparation that ought to be paid.

(b) I must fix the amount of the fine by reference to guideline bands and aggravating and mitigating factors.

(c) I must determine whether any cost orders are required.

(d) I must overall make an assessment of proportionality as to the monetary penalties by reference to the defendant's ability to meet such orders, in this case it is responsibility acknowledged that that issue does not arise.

[15] Counsel are agreed in their submissions that the following are appropriate:

(a) Reparation payments to the victims in addition to the support already provided in a tangible form by the defence force should be made totalling $100,000. They are broken down as between the three victims and are proportional to the degree of harm suffered by each of them.

(b) By reference to the authorities, of which a number are provided by counsel, it is accepted that a starting point for a fine is $600,000.

(c) The defence force acknowledges that Worksafe's costs of investigation in the sum of $3,645.28 ought to be paid and that order will of course be made.

[16] Issues arise here in two respects, first, the extent of uplift for previous convictions and, secondly, the amount of sentence reduction by way of discount for remorse, co-operation and future mitigation.

[17] I turn now to the sentence and the sentence structure. Having regard to the authorities and the principles in *Stumpmaster*, the suggested start point of $600,000 is appropriate. This matter sits on the medium to high cusp of culpability set out in that case. The defence force should have taken the following practical steps but did not:

(a) On the night of 6 August 2020 the defence force should have provided and required the wearing by trainees of appropriate flame retardant personal protection equipment. Although that was part of the safety

plan, that was altered by those in command of the incident on the night in question.

(b) The defence force should have provided appropriate training in the throwing of Molotov cocktails by the rioters, in this case the person who threw the Molotov cocktail which caused this incident had not previously thrown one. Adequate supervision ought to have been made.

(c) Members present were able to access cans of fuel and at least one was poured from the top of the container onto the ground and to the trainees. That ought not to have been allowed to happen.

(d) As well as supervision, the storage of fuel should have been more strictly controlled. The identified hazard was clear, the risks were clear. The risks were identified and included in the plan. The plan foresaw the risk of severe consequences without appropriate controls being taken.

[18] A significant number of the defence force personnel were put at risk by these breaches. It is not suggested by the defence force that the provision and following of these safety measures referred to would have been cost prohibitive at all. Having regard to all of those factors I am satisfied, as I have indicated, that the starting point for sentence is a fine of $600,000.

[19] I turn now to the uplift for previous convictions. Mr Rooney and Mr Mercer for the defence force argue that five per cent and no more is sufficient. The prosecution suggests an uplift of 10 per cent is appropriate having regard to previous convictions. More than five per cent ought to be imposed here given the recent convictions, however 10 per cent is too much. The uplift will be seven and a half per cent.

[20] There is no doubt that a discount for guilty plea of 25 per cent should be allowed. Admissions of culpability were immediate and from the outset it has been clear that the defendant would plead guilty.

[21] The discount for the balance of the mitigating factors is more complex and until today there was some disagreement between the parties. That disagreement has narrowed today. There is no doubt that the defendant has behaved in an exemplary fashion following the incident. All victims costs and out-of-pocket expenses have been met. Importantly, a full enquiry has been conducted. Meaningful consequences have been visited on those individuals responsibility for the incident through the Military justice system. The victims, or some of them, have expressed concern and frustration about the manner in which that system has moved. Some have expressed their concern that they did not feel that through that system justice has been properly done. Mr Rooney acknowledges on behalf of the defence force that more could perhaps be done to streamline and perfect that system. However, no system of justice can ever be perfect and it is clear that those individuals concerned have been both reprimanded and ordered to pay fines, some compensation, and in some cases individuals have lost seniority.

[22] Next there was an immediate moratorium placed on the use of incendiary devices during training. I am told that that moratorium remains to today while the defence force assess in very broad terms how it will appropriately train soldiers for real life combat. Improved directives and procedures are already in place. I repeat that the manner in which the defence force has acknowledged responsibility and proceeded meaningfully to ensure that the risks are better met in future has been exemplary. An offer for compensation in a significant sum has been made and I have referred to that already. Major-General Boswell attended today in person and I thank him for doing so.

[23] The prosecutor had originally submitted that discounts for co-operation of five per cent and for reparation of five per cent should be allowed. Today Ms Simpson has agreed that further discounts should be allowed.

[24] Counsel for the defendant, Mr Rooney, suggests that for remedial steps a discount of five per cent should also be allowed, together with a 10 per cent discount for remorse and that the reparation discount should be 10 per cent, not five per cent. I have indicated to him that I see here there being a risk of double counting in that regard.

[25] Turning then to sentence. From the aggravated starting point being $600,000 plus 7.5 per cent, or $45,000, I deduct the following:

(a) There will be a deduction of 25 per cent for guilty plea.

(b) A five per cent discount for co-operation.

(c) A 10 per cent discount to reflect remorse and the fact of reparation being paid.

(d) A five percent discount for remedial steps.

[26] The total discount will be 45 per cent. That as a percentage of the aggravated starting point is $290,000 with the result that the fine imposed today against the New Zealand Defence Force on this charge is $354,750.

[27] Reparation in the sum of $50,000 is to be paid to Mr [redacted].

[28] Reparation in the sum of $40,000 is to be paid to Mr [redacted].

[29] Reparation in the sum of $10,000 is to be paid to Mr [redacted].

[30] Investigation cost contribution is to be paid to Worksafe in the sum of $3,645.28.

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Judge J Krebs
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 01/04/2022