IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2012-004-005298
[2012] NZHC 2366

THE QUEEN

v

EVANS JAMES MOTT

Appearances: A R Longdill for Crown
R M Mansfield and H C Stuart for Prisoner

Judgment: 13 September 2012

SENTENCING NOTES OF COURTNEY J

Solicitors: *Meredith Connell, P O Box 2213, Auckland 1140*
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[1] Evans James Mott, you appear for sentence today having pleaded guilty on the charge of assisting your wife, Rosemary Mott, to commit suicide.[1] Rosemary, or Rosie, as she was known and as your counsel has referred to her today in submissions and I too will refer to her like that, if that is alright with you. Rosie was 55 years old when she died, and afflicted by a most dreadful disease, primary progressive multiple sclerosis, or PPMS. She was in pain, and losing the ability to walk and take care of herself. She hated the indignity of her condition and made the decision to end her life. You provided a measure of assistance in that.

[2] You seek to have me discharge you without conviction.[2] The Crown opposes that. However, it accepts that the circumstances of the offending fall at the lower end of the spectrum in terms of your culpability and justify a non-custodial sentence.

[3] One of the objectives in sentencing in a case such as this includes an element of deterrence. This is not deterrence in terms of the individual because it is accepted in this case that there is no need for that, but the general deterrence that Parliament requires to ensure that others fully appreciate the effect of the law. There are a number of principles that a sentencing judge has to take into account in sentencing. Of particular relevance in this case is the gravity of the offence, the need for consistency in sentencing and the need to impose the least restrictive outcome in the circumstances. But before I can consider what the appropriate outcome, having regard to these principles, I need to record the events that led up to Rosie's death.

The offending

[4] Rosie had been suffering from PPMS for about four years before her death. This condition is an aggressive form of multiple sclerosis. Your lawyer's submissions have detailed the nature of the disease. Rosie's symptoms included tremors that made it increasingly difficult for her to feed or care for herself, difficulty walking, incontinence, and pain. She resolved to end her life. I am satisfied that she made this decision sometime in early to mid-2010. Rosie's niece has given an affidavit in which she describes conversations with Rosie about euthanasia in July

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[1] Section 179(b) Crimes Act 1961.
[2] Section 106 Sentencing Act 2002.

2010 with Rosie making it clear then that she was determined to end her life. Rosie contacted an organisation that advocates for the right to die. She talked about it to you. She talked about it to her daughter. She made a farewell video explaining her decision.

[5] Having read your affidavit and the other affidavits that have been filed in this case and seen the DVD that Rosie herself made I am satisfied that the decision was Rosie's own decision. I am satisfied that she researched the means by which her decision would be implemented and that she settled upon the use of nitrogen gas.

[6] Rosie acquired most of the equipment she needed herself. About three months before her death she bought a cylinder and had it filled with nitrogen. You obtained a flow meter and taped it to the regulator on the cylinder. You and Rosie discussed how the equipment would work. Then the cylinder was put in the wardrobe where Rosie could access it easily. On 28 December 2011 Rosie asked you to leave the house. You understood what she intended to do. When you returned Rosie was dead, having taken the steps that she planned.

Sentencing

[7] I have already referred to the principles that I must consider in sentencing. Because there are relatively few cases such as this, consistency is especially important. Counsel have referred me to the cases decided in New Zealand involving mercy killing and assisted suicide.[3] Mr Mansfield has also referred me to Australian cases involving assisted suicide.[4] These are closer factually to the present case but less helpful because of the different sentencing regime in Australia from New Zealand.

[8] The closest New Zealand case is that of *Davison*, in which the Judge took a starting point of 21 to 24 months imprisonment but ultimately imposed a sentence of

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[3] *R v Ruscoe* (1992) 8 CRNZ 68, 20 March 1992; *R v Crutchley* HC Hamilton CRI-2007-069-000083, 9 July 2008; *R v Davison* HC Dunedin CRI-2010-012-004876, 24 November 2011.
[4] *R v Maxwell* [2003] VSC 278 (Supreme Court of Victoria); *R v Mathers* [2011] NSWSC 339 (Supreme Court of New South Wales).

five months home detention, and the Crown submits that this is the appropriate course in your case.

[9] There were differences in *Davison*, however. In particular Mr Davison was directly involved in providing the morphine pills to his mother. It also seems unlikely that his mother could have effected the overdose herself. Although that case involved the death of a woman in the very last days of her life, which is not the position that Rosie was in, the assistance you provided was not as direct. I also accept that it was entirely Rosie's decision as to when that step was taken and I accept that Rosie would have found a way to end her own life even without your help. For these reasons I would regard your case as warranting a slightly lower starting point than 18 months imprisonment.

[10] But this case is not one in which a custodial sentence should be imposed, as the Crown accepts, and as I have already said, you counsel submits that no conviction should be entered at all.

Application for discharge without conviction

[11] A judge cannot discharge an offender without a conviction unless satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.[5] I must consider the gravity of the offence and then the consequences of a conviction and balance the two. A discharge is only possible if there is a real and appreciable risk that the consequences for you will be disproportionate to the gravity of the offence.[6]

[12] It is clear that both you and Rosie believed that the course she took should not be unlawful and that is a view shared by a large number of people in our community. However, the role of a sentencing judge is to sentence according to the law and the law recognises the sanctity of life. Parliament has signalled the gravity of this offence through the maximum penalty of 14 years imprisonment, reflecting the significance that it places on the sanctity of life. I must therefore start from the

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[5] Section 107 Sentencing Act 2002.
[6] *R v Hughes* [2008] NZCA 546; [2009] 3 NZLR 222; *Alshamsi v Police* HC Auckland CRI-2007-404-000062, 15 June 2007.

point that the offence you committed was a serious one under our law as it presently stands.

[13] However, the assistance you gave was, as I have described, limited. It was assistance in setting up the equipment that Rosie would use later at a time of her choosing. I am satisfied, as I say, that had you declined to assist, Rosie would nevertheless have succeeded in ending her life. She was plainly an intelligent and capable woman. She had managed alone for long stretches when you worked overseas including several months in late 2010 and early 2011, well after she had been diagnosed and was suffering from debilitating symtoms. Rosie was determined to implement the decision she had made and would have done so with or without your involvement.

[14] I also accept you took no part in the events of the day and that your absence from the house, while recognised by both you and Rosie as necessary, also caused you the grief of knowing that she died without you there.

[15] It is evident from these facts that, as the Crown accepts, your level of blameworthiness is low. The real question is whether the consequences of a conviction would be out of all proportion to the offending. This is a legal test, not a question for the Judge's discretion.

[16] Mr Mansfield has talked about two identifiable consequences for you. The first is the effect on you personally, particularly in terms of having to disclose a conviction to prospective employers. I accept that it is highly likely that you will have to disclose convictions to an employer in the future. You may or may not be given the opportunity to explain the exact circumstances of the offending and you may or may not be believed when you do. The second consequence is the effect on your ability to travel and work in the United States.

[17] The limitations on freedom to travel are generally approached with some caution by courts in the context of an application to discharge without conviction. It has been said by at least one judge that New Zealand courts should be slow to do something that might mislead foreign immigration authorities regarding criminal

offending.[7] But there have been cases in which a discharge has been granted, including for relatively serious offending, on the basis of the effect on the offender's prospective work.[8] So this is a matter that I take seriously for you.

[18] In your affidavit you have recorded your work history in detail. From your early days in your native England you have acquired many skills and a broad range of experience. You and Rosie were together for 24 years and lived overseas for much of that time. You only moved to New Zealand, where Rosie had grown up, in 1999.

[19] It is evident that you are hardworking, versatile and a skilled craftsman. You have experience welding, furniture making and construction. At a relatively early stage you obtained a qualification in composite construction and worked in the boat building industry in Australia. Many years later you returned to that work and for the last 12 years have worked as a boat builder in New Zealand, the United States and Europe. It is evident from the references you have provided that you are highly regarded and sought after in this industry and that this is the way you will continue to make your living.

[20] You have expressed concern about the effect of a conviction on your ability to work in the US. Most of your boat building work has been in Europe and there presently appears to be no shortage of such work there. Following Rosie's death you were offered a contract for boat building in Spain, a contract that was lost following your arrest. Since you hold a UK passport and are entitled to work in Europe a conviction would not affect this aspect of your career.

[21] The world economy is, however, uncertain. I accept that, given the nature of your work and your previous experience in the United States, and your references, including references relating to work you did in that country, you may be offered work there which you wish to take up. Indeed, Mr Mansfield has advised me that the contract you currently have on offer includes, if you want and are able to take it up, a portion of work in the US.

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[7] E.g. *Steventon v New Zealand Police* A108/01, 2 November 2001.
[8] E.g. *R v Hemard* HC Christchurch T30/03, 11 April 2003.

[22] There seems to be no disagreement between counsel that a conviction of this nature would have to be disclosed if you wanted to work in the US. There is real uncertainty about the effect it would have. Your lawyer has provided a letter from a US immigration attorney indicating that in her view this would be regarded as what is referred to as a "crime of moral turpitude" within the US regulations. The manual that is used by US immigration authorities does not identify this as a crime of moral turpitude but nor does it exclude it as one, and two lists are given. So this is a grey area and I think it is reasonably clear that this will cause some difficulty in immigration for work purposes.

[23] In considering the implications of this information I take into account your age and the need to support yourself through this sort of work. You are now 61. There is little of this kind of work in New Zealand and certainly not as well paid as it is overseas. You are currently unemployed and have had to remain in New Zealand for six months to resolve this prosecution when you would otherwise have been engaged in paid work overseas. You supported Rosie for all of the years that you lived in New Zealand, you working mainly overseas so she could stay at home and look after your son – a son that you both had – so that he could go to school here. The reality seems to be that you do not have much by way of a financial buffer and you do need to work. You probably have a limited number of good working years ahead of you, given your age (and without any reflection on any other aspect).

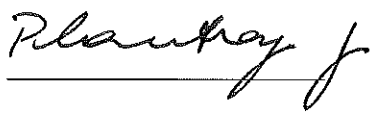
[24] So this brings me to the conclusion that in your particular case I think the consequences of a conviction would be out of all proportion to the gravity of the offending. I need then to consider whether I should exercise my discretion to grant a discharge without conviction. That is a decision to make taking into account all of the matters I have discussed and the factors identified in the Sentencing Act and the wider interests of the community.

[25] An order under s 106 for discharge is not restricted to any particular category of offending. This offence is serious but that fact does not preclude an order.

[26] There are strong mitigating factors in your favour, which the Crown acknowledges. At 61 years old you have no convictions of any kind. You acted out

of love and your motivation was to support your wife in a decision she made. You were open and fully co-operative with the Police. You entered a guilty plea early on. There is no appreciable risk of you re-offending. With considerable care, given that these cases come before the courts only rarely and each must be viewed through the lens of the need for consistency but looking at the particular circumstances, I have reached the conclusion that an order should be made discharging you without conviction.

[27] I emphasise that this decision represents the very particular circumstances of your case, which are at the lower end of the spectrum from any other case decided in this area.



P Courtney J