IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CRI-2017-069-000543
[2018] NZHC 2690

THE QUEEN

v

DONOVAN MICHAEL DUFF

Hearing:	18 October 2018
Counsel:	AJ Gordon and CHR Harvey for Crown MM Dorset and RE Webby for Defendant
Judgment:	18 October 2018

SENTENCING REMARKS OF DOWNS J

Solicitors/Counsel:
Crown Solicitor, Rotorua.
MM Dorset, Rotorua.
RE Webby, Tauranga.

Introduction

[1] Mr Duff, after a jury trial before me, you were found guilty of your daughter's murder. Maija was only nine months old when you killed her. It is common ground you will be sentenced to life imprisonment. The only issue today is the period you must serve before you are eligible for parole. The law calls this a minimum period.

[2] Before going on, I acknowledge the presence of whanau—and their tremendous loss. Plainly, Maija was a much-loved child.

Facts

[3] Maija was born on 14 June 2015.

[4] On the evening of Friday, 11 March 2016, she was returned to your care. She had been with others for the day. She was well. Maija's mother, your partner, was elsewhere this night. You and Maija were home alone.

[5] Overnight, you inflicted fatal injuries to Maija's head. Your precise mechanism of force remains unclear. Only you know exactly what you did. However, expert evidence at trial established Maija suffered at least three instances of blunt force trauma to her head. The experts agreed "significant" force was required. One likened Maija's injuries to those caused in road traffic accidents; another likened the force to a kick to the head by a horse.

[6] These episodes of trauma caused what were described as "devastating" injuries to Maija's skull, and associated bleeding around her brain and base of the brain. The injuries would have caused either immediate or near-immediate unconsciousness. An expert of international standing said Maija would have been very unlikely to survive even if a neurosurgeon had been standing by ready to operate.

[7] The precise timing of the injuries is unclear. However, what is clear; you did not raise the alarm immediately. You did not call an ambulance. You waited until after 5.30 am before leaving to get help. The experts said Maija's condition would have

been obvious. You did nothing. So, while prompt medical attention would not have saved Maija's life, you did not even try.

[8] You defended the case on the basis you did nothing to hurt your daughter, and her injuries might have been the product of accident. For example, falling from the bed. The experts firmly rejected accident as a reasonable possibility. Ms Dorset defended you with vigour and care, but in truth, you had no defence.

Victim impact

[9] I have received two victim impact statements: one from Maija's grandmother; the second from her grandfather. Unsurprisingly, they describe Maija's death as the worst thing that could happen to any grandparent. They describe a hole in the family that can never be mended.

[10] Both refer to the shock of learning their granddaughter had not died from natural causes. They describe this discovery as "heartbreaking and soul destroying".

[11] I have not received a victim impact statement from Maija's mother. I assume she too has suffered profound trauma. No parent should have to bury their child.

Aggravating features in relation to the offence

[12] The prosecution contends your offending exhibits several aggravating features. I agree.

[13] First, you applied at least three instances of significant force to Maija's head. Everyone knows a person's head is vulnerable to serious harm. Second, Maija ought to have been able to look to you for care and protection. Your actions constitute the ultimate betrayal of her trust.[1] Third, because of her age, Maija was vulnerable. Indeed, she was utterly defenceless.[2] Fourth, even though prompt medical attention would not have made a difference, I consider it aggravating you did nothing. This aspect reflects on your culpability, not causation.

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1 Sentencing Act 2002, s 9(1)(f) and s 9A.
2 Section 9(1)(g) and s 9A.

An especially bad murder

[14] The prosecution contends your murder of Maija falls within the especially bad murder provision because she was particularly vulnerable because of her age.[3] Defendants caught by this provision must receive a minimum period of at least 17 years unless that would be manifestly unjust. Ms Dorset accepts you are caught by the provision in the way identified, but contends a minimum period of 17 years would be manifestly unjust.

[15] To address this submission, I have considered like cases to identify what the minimum period would be but for the 17-year benchmark.[4] Conceptual difficulties arise because all like cases are caught—and informed by—the 17-year benchmark. That said, I am satisfied the circumstances of your offending would warrant a minimum period of at less 15 years irrespective of the especially bad murder provision.[5]

[16] Ms Dorset contends your offending is distinguishable from similar cases because many involve earlier physical abuse of the victim, whereas you had not previously harmed Maija. I pause at this juncture to acknowledge you loved her. Before this incident, you appear to have been a good father to her. Witnesses spoke of your obvious affection for her. I do not doubt this testimony.

[17] There was some evidence Maija sustained older injuries. I put this aside because there was no evidence the earlier injuries were caused by physical abuse—or you.[6]

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3 Sentencing Act, s 104(1)(g).

4 *R v Williams* [2005] 2 NZLR 506 (CA) at [52] and *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [41]–[42].

5 *R v Hemana* [2012] NZHC 376 at [46]; *R v Lackner* [2015] NZHC 690 at [18] and *R v Taylor* [2017] NZHC 1257 at [22].

6 *R v Duff*, summing up at [72]–[75].

[18] I return to Ms Dorset's submission, and the sad roll-call of cases in this area.[7] Notably, several involve single episodes of violence resulting in death.[8] In each, the especially bad murder provision was engaged. So too here. Again, you murdered a defenceless infant through application of significant force to her head. That you had been a caring father previously does not detract from the enormity of what you did.

Personal factors and manifest injustice

[19] Ms Dorset also contends your personal circumstances reveal as manifestly unjust a minimum period of 17 years. You refused to engage with the probation service. Consequently, Ms Dorset highlights your background through an extensive cultural report.[9] I make four general observations on this topic.

[20] First, an offender's background is relevant at sentencing. The law takes a broad view of what comprises such background. It includes not just the offender's personal background, but matters in relation to her or his family, whanau, community and cultural background.[10]

[21] Second, an offender's background may arguably extend to what is described as systemic disadvantage, meaning longstanding deprivations that affect—and afflict—some groups, at least when that background may relate to the commission of the offence.[11]

[22] Third, an offender's ethnicity cannot justify a sentencing discount. So, the mere fact an offender is Māori, is not a basis for a lesser sentence or different treatment.[12]

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7 *R v Harrison-Taylor* HC Auckland CRI-2004-092-1510, 12 September 2005; *R v Williams* HC Wellington, CRI-2004-078-1816, 24 February 2006; *R v Paul* CA496/05, 1 August 2006; *R v Hemana*, above n 5; *R v Loffley* [2013] NZHC 201; *R v Ellery* [2013] NZHC 2609; *R v Filihia* [2013] NZHC 2833; *R v Lackner*, above n 5; *R v Solomon* [2016] NZHC 1653; *R v Taylor*, above n 5; and *R v MS* [2017] NZHC 2066.

8 *R v Filihia* [2013] NZHC 2833, upheld in [2014] NZCA 401; *R v Lackner*, above n 5; *R v MS* above n 7; and *R v Paul*, above n 7.

9 Sentencing Act 2002, s 27.

10 Section 8(i).

11 See Sentencing Act 2002, s 27(1)(b); *Solicitor-General v Heta* [2018] NZHC 2453 and the cases cited therein.

12 *Mika v R* [2013] NZCA 648 at [12].

[23] Fourth, the factors to which I have been referring are likely to have only a modest effect on sentence when the offending involves serious violence or serious sexual offending. Indeed, such factors may have little application, if any.[13] Frequently, other sentencing principles will prevail, especially denunciation and community protection. Equally importantly, the law does not accept some groups may use violence—but not others.[14] No other approach is conceivable.

[24] The cultural report was helpful, but did exhibit some advocacy. As to your personal circumstances, they are these. You are 42, and Ngati Tuwharetoa. You were raised by your grandparents because of your mother's drinking. They gave you what is described as a "stable" upbringing. But, you were influenced by gangs. You would also smoke cannabis and drink alcohol with your mother.

[25] You acknowledge mixing with the wrong crowd. In your own words, you got into "mischief". You have been imprisoned repeatedly. More about that in a moment. You became a patched member of the Mongrel Mob. You also became a regular user of methamphetamine.[15] Regrettably, your story is a familiar one. It includes the administration of serious violence to others.

[26] In 2016, you used a firearm against a law enforcement officer. In 2012, you mistreated a patient under the Mental Health Act. In 2007, you wounded your former partner with intent to cause her grievous bodily harm.[16] This offence was brutal. You attacked your partner with a hammer. You repeatedly hit her with it. You broke her pelvis.[17] All this you know. You received a term of imprisonment of five and a half years. In 2007, you also injured someone with intent to injure. You have also committed aggravated robberies and two assaults with intent. A host of other offences round out your extensive criminal record.

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13 *Keil v R* [2017] NZCA 563 at [58]; *Solicitor-General v Heta*, above n 11, at [57]; and *R v Misitea* [1987] 2 NZLR 257 (CA).

14 *Keil v R*, above n 13, at [58].

15 Methamphetamine was found in Maija's system following her post-mortem examination. Maija's mother smoked methamphetamine too.

16 Mr Duff has four children to his former partner, but she has exclusive custody. And, a protection order remains in force.

17 See Section 27 Cultural Report, p 28.

[27] I am satisfied nothing in the cultural report, either alone or with any other factor, would make a 17-year minimum period manifestly unjust. The Court of Appeal has held personal circumstances of an offender will rarely displace the presumptive 17-year term.[18] Nothing about your personal circumstances stands out in this context. True, you have suffered disadvantage. However, you also appear to have shied away from the stable background offered by your grandparents.

[28] In any event, your background cannot explain or detract from the gravity of what you did. I refer to my earlier observations about the impact of an offender's background in this area.[19]

[29] The obvious should also be stated, and clearly: too many children in this country die because of violence within the home. I note also *missing* features that might otherwise have been material. You did not plead guilty. Contrary to Ms Dorset's submission, you are not remorseful—as against distressed Maija is dead. You acknowledge no wrongdoing. You now refuse to even discuss the offending. You continue to assert you do not know what happened.

[30] In summary, yours is an obvious case for the application of the especially bad murder provision.

[31] This leaves one matter. The prosecution contends the 17-year minimum period should be increased because of your convictions for violence. I would have increased this period by six months. I do not do so because of the disadvantages in your upbringing as described in the cultural report. It is likely these affected your path. But, this observation would be incomplete without also noting the very many bad choices you have made along the way.

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18 *Williams* at [66]–[67].
19 See [19]–[23].

[32] Mr Duff please stand. For murdering your daughter, I sentence you to imprisonment for life. You must serve at least 17 years.

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Downs J