ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF DEFENDANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF VICTIMS PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2020-085-001531
[2020] NZHC 2911

THE QUEEN

v

L

Hearing: 5 November 2020

Appearances: S C Carter for the Crown
E Hall and R O'Hagan for the Defendant

Indication date: 5 November 2020

SENTENCING OF COOKE J

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[1] L you have pleaded guilty to one charge of manslaughter,[1] five charges of male assaults female,[2] and one charge of assault on a child.[3] These guilty pleas follow on from a sentencing indication I earlier gave you.

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1 Crimes Act 1961, ss 160(2)(a), 171 and 177, maximum penalty life imprisonment.
2 Section 194(b), maximum penalty two years' imprisonment.
3 Section 194(a), maximum penalty two years' imprisonment.

The offending

[2] The victim of the main offending was your baby daughter, A. A was born on 23 July 2018. She was just over three months' old at the time of her death. A was raised in a home in Porirua with her mother, yourself, and her two-year-old sibling.

[3] On Monday 12 November 2018 you and A's mother were at home with A. She was crying more than usual that day and you both took her to the hospital for examination. A doctor did a full body examination but found nothing abnormal was found and the suspected the cause of her discomfort was reflux.

[4] The following day A was in the care of yourself and A's mother in the sleepout of the family home. In the afternoon A's mother wanted to rest in the main part of the house, and you took over as primary caregiver. About an hour later A's mother heard A crying and returned to the sleepout. You were holding A and appeared to be angry with her. She asked if everything was okay but you told her to go back inside the house. When she was leaving she heard A make a loud scream as if A was in pain. She ran back to the sleepout but you told her to go back into the house. Scared of confronting you, A's mother returned to the house.

[5] It was around this time that you caused A to suffer a serious head injury, either by violent shaking, throwing, striking her or some combination of those things. The trauma was such that it would have resulted in immediate or near-immediate onset of symptoms. The infant suffered retinal haemorrhages to both eyes. Expert medical evidence indicates she would have stopped breathing immediately after the injury was inflicted and remained comatose until death.

[6] After inflicting the injury you left A in the sleepout and went to an associate's house. You returned to the address shortly after 5 pm. A's mother had been asleep in the main house. You told her that you had fed A a short time prior. She did not check on A, thinking she was asleep after having been fed. At around 7.30 pm you brought A into the main house and said there was something wrong with her. An ambulance was called but A had died, despite efforts to resuscitate her.

[7] Medical examinations after her death revealed A suffered brain bleeding and internal bleeding of the spine. She also had multiple historical injuries, including fractures to her ribs, fractures to her collarbone, shoulder bone, finger and trauma to her elbow.

[8] In explanation you denied causing any injury to A and could not explain her injuries.

[9] The other charges arise from a series of incidents in 2017 and 2018 when you struck A's mother and your young daughter:

(a) On 25 February 2017 an argument ensued while you and A's mother were in a car together. Your elder daughter was one month old at the time. A's mother told you that she was going to leave you. You turned back towards her and asked her to give you your daughter. You then swung your arm and fist at her, striking her on the cheek as she held the baby.

(b) Sometime between April and June 2017 you returned home after you had been out drinking. A's mother was at home in your bedroom asleep with your daughter. When you returned home, an argument ensued. You grabbed A's mother by the shoulder and shoved her backwards, causing her to bang her head on the bedroom wall.

(c) Sometime between April and June 2017 you and A's mother were at your home together. An argument developed about your cannabis use and care of your daughter. There was some pushing and shoving and you pushed her backwards, causing her to strike the kitchen bench and fall to the floor.

(d) In January 2018 you and A's mother were at home and started arguing. She placed your one year old daughter on the bed while she continued to argue with you. The argument escalated and she struck you in the face. Fearful of retaliation, she grabbed your daughter off the bed as

she thought you would not strike her if she was holding the child. You went to punch her in the face but missed and struck the child in the head. Your daughter suffered bruising to her head.

(e) Between May and June 2018, when A's mother was six to seven months' pregnant, she struck you after an argument and told you to stay away from her. You became angry at her and yelled at her, before punching her twice on the arm. You apologised but soon became angry again, with both parties pushing and shoving each other. You then hit her before walking off and hitting the walls.

(f) Between May and June 2018 you and A's mother were in a bedroom at your home. After an argument you started pushing and shoving each other. You grabbed her by her shirt collar and struck her on the side of her face.

[10] I have considered the victim impact statement from A's mother. She has explained the difficulties everyone faced within the home, and the isolation that both she and you faced in your lives growing up in New Zealand. She has expressed her own pain. She has also described the impact on A's sister, and outlined the adverse effects of the initial investigations and the reaction of the community. I again thank her for her direct and honest explanations. She asks that A receive justice, but also that you be able to find the opportunity to heal yourself.

[11] In determining the appropriate sentence I begin by assessing the starting point for offending of this kind. I will then decide whether there is any uplift from that starting point, including for your other offending. There is then the question of discounts from that starting point, including because of a guilty plea. Finally I will address the question of a minimum period of imprisonment.

First step: The starting point

[12] There is no tariff case for manslaughter. Sentences range from conviction and discharge to life imprisonment, reflecting the wide variety of circumstances for this type of offending.

[13] Parliament amended the Sentencing Act in 2008 to emphasise its concern about cases involving violence against children. Section 9A provides the Court must take into account aggravating factors such as the defenceless state of the child and the scale of the breach of a relationship of trust when sentencing in a case involving violence against a child under 14 years. Successive courts have recognised s 9A as indicating Parliament's intent for tougher sentences for violent offending against children.[4]

[14] Counsel agree the offending in this case involves three main aggravating factors:

(a) Vulnerability: The total vulnerability of the victim as a three month old infant.

(b) Breach of trust: You were A's father and should have cared for her and protected her. At the time of the offending her mother had entrusted A with you, leaving her alone with you in the sleepout so she could rest in the main house.

(c) Level of violence and subsequent injury: The post mortem revealed the cause of death as traumatic injury from violent shaking, throwing, slamming, striking, or some combination of those.

[15] The Crown submit that it can also be inferred from the cause of death the assault involved an attack to the head. Ms Hall submits that in a child as young as A it is not possible to say the kind of injury necessitated targeting to the head.

[16] The basis for sentencing is the summary of facts. The summary here is not conclusive as to whether there was an attack to the head but does say A suffered a traumatic head injury which is typical of abuse head trauma. I do not proceed on the basis that there was an attack to the head. But even if it was not an attack to the head, it must have involved significant violence.

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4 See for example *R v Mitchell* [2017] NZHC 1391; *R v Pene* [2010] NZCA 387.

[17] I agree with the Crown that the delay in seeking medical attention is an aggravating factor. You did not immediately alert emergency services or even others in the household. After causing the head trauma you left A alone in the sleep-out and went to a friend's house. You did not return to the property until later in the evening, and told her mother the child had just been fed, thereby ensuring the child would not be discovered for some time. You did not inform others in the household until several hours after returning home.

[18] Ms Hall argues that you may not have known the baby was seriously injured before alerting others. I do not accept that — the summary of facts records the trauma was such that it would have resulted in immediate or near-immediate onset of symptoms. Ms Hall also points out that you assisted in attempting to resuscitate the child when emergency services arrived. I consider that any such assistance does little in mitigation given your delay in alerting others to A's condition.

[19] In *R v Leuta* the Court of Appeal indicated when declining to set a tariff decision for these cases that the best guidance was to be found in the starting point involved in similar cases, whilst noting that they were a guide and that such cases could not govern.[5] Cases involving the manslaughter of young children from a single violent incident have attracted a general range of between five to nine years.[6] When there is particular cruelty or multiple acts of violence, a starting point of ten years and higher has also been adopted.[7]

[20] Counsel have each referred to a number of cases. Some of the cases referred to involve a lesser degree of culpability than the present case as the assault involved a lesser degree of violence[8] or where the offender immediately sought medical attention afterwards.[9]

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5 *R v Archer* [2019] NZHC 3146; *R v Ikamanu* [2013] NZCA 510; *R v Donnelly* [2011] NZCA 443; *Sami v R* [2019] NZCA 340; and *R v Kinraid* [2017] NZHC 233; *R v Leuta* [2002] 1 NZLR 215 (CA), at [59] and [81].

6 *R v Pene*, above n 4; *R v Archer*, above n 5; *R v Ikamanu*, above n 5; *R v Donnelly*, above n 5; *Sami v R*, above n 5; and *R v Kinraid*, above n 5.

7 See *Woodcock v R* [2010] NZCA 489; *R v Leuta*, above n 5; and *R v Waterhouse* (2004) 20 CRNZ 897 (CA).

8 *R v Kinraid*, above n 5.

9 *R v Frater* [2019] NZHC 3326; *R v Mitchell* [2017] NZHC 1391.

[21] I consider the following three cases are most relevant in addressing the potential range:

(a) *Sami v R*:[10] The offender was employed by the one-year-old victim's mother as caregiver. The child was assaulted causing two separate skull fractures and bruising to the face. The offender carried the child outside and a neighbour drove them to the hospital. She initially claimed the child had fell off the couch but the sentencing Judge found the injury was caused by gripping the infant's face and hitting the head onto a hard surface. The sentencing Judge adopted a starting point of seven years' imprisonment. On appeal the Court noted the "extraordinary" recklessness involved in the offending and concluded "in what was a case very close to murder we consider seven years is by no means excessive".

(b) *R v Archer*:[11] The victim was a two-year old child. She was left in the offender's care while the mother went to the shop. The offender's initial explanation was that he had been swinging the victim around and she had slipped from his grip and struck a wall. The jury found that the offender had deliberately caused the victim's head to be struck in a single act of violence. The victim fell unconscious immediately after being struck. The offender tried to revive her and called her mother. When the mother returned home, assistance was sought from neighbours. Ambulance services were called and unsuccessfully attempted to revive the child. The Judge considered three aggravating factors present: a strike to the head, the vulnerability of the child and extreme violence. In mitigation was that the offender took immediate steps to resuscitate her and sought help. The Judge set a starting point of eight years, six months.

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10 *Sami v R*, above n 5.
11 *R v Archer*, above n 5.

(c) *R v Kereopa*:[12] The offender was in a relationship with the six-month-old victim's mother and was living with them at the time. The mother had left the baby in the offender's care for the afternoon. The exact cause of death and offending was unclear but the sentencing Judge inferred that the offender was attempting to care for the child and picked her up to try and settle her and caused her to suffer severe blunt force trauma to the right side of her head. The offender failed to call for medical help even after the child vomited after sustaining the injury and did not alert the mother, leading to further delays in treatment for around an hour. The sentencing Judge considered the combination of aggravating factors was particularly grave and taking s 9A into account, determined a starting point was 10 years' imprisonment.

[22] The offending here has similarities with aspects of each of those cases. This offending is, however, more serious than *Sami* and *Archer* because of the failure to take any action once A had been seriously hurt. This was a period of time where any attempts to save her life were lost, even if they may have been futile. The offending was more similar to *Kereopa* in that respect.

[23] Bearing in mind all the circumstances, in my view nine years' imprisonment is the appropriate starting point.

Second step: Uplifts

[24] The second step is to consider uplifts. I consider an uplift of 12–18 months' imprisonment sought by the Crown for the remaining assault charges is not appropriate. I bear in mind the recent comments of the Court of Appeal emphasising the seriousness of violence in the home.[13] But the starting point here already involves a significant period of imprisonment, and there were no serious injuries caused from the additional assaults. Although the child victim was particularly vulnerable, I accept that you did not intend to strike her. The total period of imprisonment needs to be the key consideration. I adopt an uplift of 10 months for the other offending.

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12 *R v Kereopa* [2016] NZHC 1664.
13 *Solicitor-General v Hutchison* [2018] NZCA 162, [2018] 1 NZLR 420 at [27].

[25] Ms Hall has submitted a discount of four months is appropriate for totality. I accept that nine years 10 months' imprisonment involves a significant starting point. But it is necessary to recognise the separate offending against A's mother and your other child, and any further discount for totality would undermine the need to do so. I have already limited the uplift for this further offending given the overall sentence. A further discount for totality is not required.

Third step: Discounts for personal factors

[26] I have now received information that is relevant to assessing whether there should be discount for personal factors, including a drug and alcohol assessment report and a cultural report under s 27 of the Sentencing Act.

Youth/rehabilitation potential and prior good character

[27] You are 24 years old and were 22 at the time of the offending. A discount for youth recognises the existence of age-related neurological difficulties between young people and adults,[14] and the greater potential for rehabilitation.[15] It also recognises the crushing nature of a long sentence that may have a disproportionate effect on a young person.[16] I note that you have recently participated in a youth section at Rimutaka Prison. While you are not so young as to justify a significant discount for youth you may have a greater capacity for rehabilitation given your limited prior criminal history. You have no prior record of violent offences, with just three prior convictions for driving-related offences.

[28] I consider a 10 per cent discount is appropriate to recognise those factors.

Addiction and rehabilitation

[29] The drug and alcohol report from Mr John Duncan reports that you have a long history of drug and alcohol abuse. You started using cannabis aged 11, by age 16 using cannabis and alcohol regularly and by 18 started using methamphetamine. You are

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14 See *Rolleston v R* [2018] NZCA 611 at [28].
15 See *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].
16 See *R v Chankau* [2007] NZCA 587 at [26]; and *R v Slade* [2005] 2 NZLR 526, (2005) 21 CRNZ 600 (CA) at [43].

assessed as meeting the criteria for a severe cannabis use disorder, severe alcohol use disorder and severe stimulant use disorder, although you are now in a sustained remission.

[30] Evidence of addiction can be relevant to the assessment of culpability, and the associated sentencing principles of rehabilitation and reintegration.[17] There is no suggestion that you were under the influence of drugs at the time of the offending and neither does the report writer suggest that your consumption is an offending related factor.

[31] Ms Hall has suggested a 10 per cent discount is appropriate to recognise drug and alcohol factors. But it seems to me that they do not warrant a separate discount. They may be relevant in assessing the wider social and cultural factors, and I have also provided a level of discount for your relative youth and limited prior criminal history. I do not believe a separate discount for this factor is appropriate.

Cultural factors

[32] When imposing a sentence with a partly or wholly rehabilitative purpose the Court must take into account your personal, whanau, community and cultural background.[18] Ingrained systemic poverty resulting from a loss of land, language, culture, rangatiratanga, mana and dignity require consideration at sentencing when showing to contribute causatively to offending.[19]

[33] You are Samoan. Your parents immigrated in the 1980s and you were born here, although your family moved to Australia in the 1990s. You report a very troubled background with your father abusing alcohol and being violent, including violence towards you. You report having been abused as a child by another relative and feeling powerless and experiencing deep shame as a consequence. Notwithstanding the troubled background you attended school and played 1st XV rugby. But after leaving school external events — an injury preventing you playing rugby, your mother's

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17 *Zhang v R* [2019] NZCA 507.
18 *Zhang v R* [2019] NZCA 507.
19 At [159].

stroke, your partner returning to Samoa — meant you suffered from depression, and used methamphetamine more regularly.

[34] I accept that the background described in the report indicates a systemic form of cultural and social deprivation in common with many other families that have immigrated from the Pacific. I infer the linkages between the systemic deprivation and your offending. It is difficult to imagine why you would have done such a terrible thing to your own baby without this having been a consequence of the previous fundamental problems described in the reports.

[35] This is a critical point in your life. You will know that you are going to serve a significant prison sentence. It is now in your hands whether, notwithstanding your background and the terrible thing that you have done you can find a way to address these difficult issues, and become a better person.

[36] In light of these background circumstances it seems to me that a further 15 per cent discount for systemic social and cultural deprivation is appropriate.

Remorse

[37] Where there is tangible evidence of genuine remorse a discount of around five to eight per cent may be appropriate.[20]

[38] The Samoan restorative process is "ifolga" — the practice of seeking forgiveness and rendering a formal apology initiated by the offending party. You have undertaken a restorative justice conference with your parents and A's mother. You explained your offending, apologised and expressed remorse and your wish to have a new start so that your family be proud of you. All of the pre-sentence reports have observed that you have insight into your offending and have expressed remorse and motivation to address the underlying issues. You have said that you are supposed to protect your family but failed as a partner, father and son. You have yourself said you now owe it to your family to be a better person, and to leave prison as a better man.

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[20] See *McArthur v R* [2013] NZCA 600 at [13]–[14] and *Rowles v R* [2016] NZCA 208 at [18].

[39] I consider a discount of a further five per cent is justified to recognise the sincerity of these expressions of remorse, and to further recognise your commitment to restorative processes and your motivation to rehabilitate. It is provided to encourage you down this path, which is really the only path for you for a better life.

[40] In determining these discounts I have been careful to keep the total discount in mind, particularly when the relevant categories overlap. The Crown suggested a total overall discount of 25–30 per cent for factors other than the guilty plea. Ms Hall suggested 60 per cent. My assessment involves a discount of 30 per cent. You are also entitled to a discount of approximately 25 per cent for your guilty plea. That means there is a total discount of 55 per cent from the uplifted starting point.

Minimum period of imprisonment (MPI)

[41] Under s 86 of the Sentencing Act the Court is allowed to impose a minimum period of imprisonment in association with a sentence of imprisonment, which means there is a period that must be served without you being eligible to be considered for parole. The circumstances where that is called for are when there is a particular need to hold the offender accountable, denounce his conduct, emphasise deterrence or protect the community. The Crown has sought such a minimum period of imprisonment here.

[42] Having considered cases involving similar offending in my view a minimum period of imprisonment should usually only be imposed when the consideration of the concepts of denunciation, accountability, deterrence, and protection are not already adequately addressed in the sentencing exercise. Minimum periods of imprisonment should neither be routine, or arbitrarily imposed. There needs to be some particular reason why they are necessary.[21]

[43] In my view the factors of accountability, responsibility, deterrence and denunciation have already been addressed in the proposed sentence. When they have been imposed in other cases there has usually been some particular cruel or ongoing

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[21] *R v Frater*, above n 9, at [40].

abuse of children. The summary of facts does not record that as arising here. I accordingly determine there will be no minimum period of imprisonment.

Result

[44] The ultimate sentence to be imposed involves a starting point of nine years, uplifted by 10 months for your other offending, and then discounted by: 10 per cent for your youth, rehabilitation potential and good character; 15 per cent for cultural factors; 5 per cent for remorse and approximately 25 per cent for your guilty plea — being a total discount of approximately 55 per cent. That takes your final sentence down to four years and five months' imprisonment.

[45] L will you please stand. On the charge of manslaughter I sentence you to four years and five months' imprisonment. On the five charges of male assaults female, and one charge of assault on a child I sentence you to six months' imprisonment on each of those charges to be served concurrently, meaning that your total sentence of imprisonment will remain at four years and five months. I do not impose any minimum period of imprisonment. Please stand down.

Cooke J

Solicitors:
Crown Law, Wellington for the Crown
E Hall for the Defendant