

**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE**

**CRI-2019-070-002783
[2020] NZHC 3312**

THE QUEEN

v

SHEVRON OLIVER ALFRED LINGMAN

Hearing: 15 December 2020

Appearances: Richard Jenson for the Crown
David Bates for the Defendant

Judgment: 15 December 2020

SENTENCING NOTES OF MOORE J

Introduction

[1] Shevron Oliver Alfred Lingman, at the age of 27 you appear for sentence having pleaded guilty to three charges:

- (a) ill-treatment/neglect of a child (representative) (x 2);¹ and
- (b) causing grievous bodily harm (“GBH”) with intent to cause GBH.²

The offending

[2] The facts will be well-known to you but because the law requires the sentencing process to be undertaken in open Court and in public, I must record them because they necessarily inform how the sentence I shall impose is formulated. The facts I shall recite are drawn from the summary of facts which you accept.

[3] The background is that you lived with your partner, Ms F, and your two children, S, who is now aged three-and-a-half and M, who is now aged two. The offending relates to the abuse of these children.

(i) *First ill-treatment/neglect (of S) between 12 August 2017 and 30 December 2018*

[4] During her first 16 months of life, S suffered a number of injuries which occurred whilst you had either sole care or joint care of her. You did not seek medical attention in relation to the injuries. These were:

- (a) bruising to her left eye and cheek, observed by the midwife when S was just three weeks old. You and Ms F were advised to take her to the doctor but you failed to do so and S was then taken into the care of Oranga Tamariki;
- (b) a torn frenulum, discovered when she was examined by doctors after she was put in Oranga Tamariki’s care;

¹ Section 195. Maximum penalty: 10 years’ imprisonment.

² Crimes Act 1961, s 188(1). Maximum penalty: 14 years’ imprisonment.

- (c) a black eye noticed by a neighbour. When the neighbour asked Ms F about it, she claimed that S had fallen off the bed and hit her face on a chest of drawers;
- (d) a collection of small bruises on her thigh, noticed by her day care teacher on 4 May 2018;
- (e) a burn or sore on her thigh, noticed by her day care teacher on 11 May 2018;
- (f) a bruise on her leg, noticed by her day care teacher in November 2018;
- (g) bruising on her leg, noticed by your half-sister in November 2018. When she asked Ms F about it, she said that you had smacked S because she had spread flour through the kitchen;
- (h) a bruise or mark around her eye, noticed by her day care teacher on 30 November 2018; and
- (i) a bruise noticed by Ms F after she returned home following M's birth. You told her it was caused by S falling down the stairs. No medical attention was sought. When M was admitted to hospital, S was uplifted by Oranga Tamariki and subjected to a medical examination. She was found to have a healing fracture to her right forearm, around a month old. It was suggested this may have been from the fall which occurred when Ms F was at birth care.

(ii) *Second ill-treatment/neglect (of M) between 5 December 2018 and 30 December 2018*

[5] After M was born, he was checked by midwives. In the first weeks of his life he suffered a torn frenulum. This is an unusual injury in a small baby and strongly linked to child abuse. You were aware of this injury and yet you did not seek medical treatment.

(iii) Causing GBH with intent to cause GBH (to M) on 29 December 2018

[6] You showered with M on the evening of 29 December 2018, when he was three-and-a-half weeks old. You inflicted a violent assault on him. This involved major rotational force with acceleration/deceleration of M's head by way of a violent shaking, slamming, throwing, striking or a combination of these mechanisms. You also violently or forcefully squeezed M's abdomen with sufficient force to fracture numerous ribs and cause other internal injuries.

[7] Following the assault, M was so unsettled that Ms F ended up sleeping with him. She noticed he was making some unusual body movements, including right arm and leg stiffness. He was also feeding less.

[8] The next morning you left for work. A friend of Ms F's visited her later in the morning. When she was holding M she noticed that he did not cry and seemed sleepy and dozy. She also noticed his left leg was shaking. The friend suggested to Ms F that she seek medical attention. They discussed going to hospital. The friend left.

[9] In the afternoon Ms F contacted "Healthline" and explained her concerns. She was advised to take M to hospital urgently. She took him to Tauranga Hospital from where M was flown to Auckland Starship. There he was examined. He was found to have many injuries:

- (a) a severe traumatic head injury, which if left untreated could have been fatal;
- (b) severe and permanent brain damage, a typical consequence of a head injury caused by child abuse, usually because the baby stops breathing for long enough to affect the blood supply to the brain causing brain damage;
- (c) numerous rib fractures, the number and distribution of which indicate they were caused by violent squeezing of M's chest;

- (d) traumatic pericardial effusion, a collection of fluid in the membranous sac which encases the heart. This was likely caused by squeezing the chest;
- (e) abdominal injuries, including a bruise on the right adrenal gland, fluid in the peritoneal cavity (most likely blood), altered liver function tests which returned to normal after seven days; and
- (f) blood loss. M required a transfusion due to blood loss caused by bleeding into his head, chest wall around the multiple rib fractures and into the abdomen.

[10] The extent of M's neuro-developmental disability will not become apparent until he is older, but he will require lifelong medical attention. In other words, he is permanently disabled.

[11] By way of explanation, you maintained the untenable position that M had swallowed water in the shower when you were showering with him.

Procedural background

[12] Your first Court appearance on these charges was 28 June 2019. You were initially remanded on bail. Your trial was scheduled to start on 24 August 2020. But, you absconded. A warrant for your arrest was issued and the trial date ultimately vacated. You were apprehended on 13 August 2020 and remanded in custody. A new trial date of 7 December 2020 was allocated.

[13] On 29 October 2020, you pleaded guilty to all three charges. Neither convictions nor a first strike warning was entered at that time.

Previous criminal history

[14] You have a long criminal history, but this is by far the most serious offending. You have 40 convictions, including common assault in 2017 and injuring with intent to injure in 2016. You also have several Youth Court notations. You have been

sentenced to imprisonment twice before. In 2013, you were sentenced to 14 months' imprisonment and in 2016, six months.

PAC report (dated 15 December 2020)

[15] The PAC report is deeply concerning. Despite your pleas of guilty you seem to maintain your innocence. In fact, so much so that having read it I had to get a message to Mr Bates to confirm you were, in fact, maintaining your guilty pleas. You put M's injuries down to accidental causes; swallowing water in the shower and the result of CPR. You put S's injuries down to a fall. After that you refused to engage with the report writer but seemed shocked when the list of M's injuries were read to you.

[16] The report writer says your focus during the interview was on the consequences to you; the risk these convictions would pose to you in prison. You blame others, including your half-sister, who is now S's caregiver. You have very little whānau support. You have a self-reported history of drug and alcohol abuse. Unsurprisingly you are assessed as posing a high risk of further offending because of your poor impulse control, cognitive distortions and limited ability to reflect on your own behaviours.

Section 27 report

[17] A s 27 report was prepared by Tara Oakley on 30 November 2020.

[18] As noted, you are 27 years old. You are Māori, and your iwi is Whakatōhea. Ms Oakley considered that you grew up disconnected from your marae, hapū, and iwi.

[19] The report discusses your upbringing. Your father was a patched member of the Mongrel Mob but had made significant changes in his life and met your mother through the Baptist Church. You said there was "only occasional" violence in your parents' relationship. Ms Oakley discusses how, when you were six years old, you woke up to find your father dead in the bed you were sharing. There were no other people in the house. You had to run to a local shop to summons help. You described this as a turning point saying that after this you started "hurting people" and getting

into trouble at school. Your mother died when you were 22. You describe your parents' relationship as "disconnected". You stated that after your father died, your mother was a welfare recipient and you were "poor as".

[20] You were diagnosed with ADHD at seven years' old. You took medication for it and received counselling. You were expelled from two high schools for fighting and stopped taking your medication because you were bullied for it. Around the age of 13, you started taking drugs, including methamphetamine. You stopped playing sport around 16 because your drug use took over. It was while "hanging out on the streets" that you became associated with the Mongrel Mob. You also spent about 12 months in a Youth Justice residence when you were 16 or 17 years for a firearms offence.

[21] After your mother died, you moved to Australia. You stayed with your brother, who gave you a good job. However, you again turned to drugs and were kicked out by your brother. You returned to New Zealand and resumed your relationship with Ms F.

[22] As you did with the pre-sentence report writer, you denied the offending. You claimed S got her injuries from falling off the couch and in respect of M, you said:

"I've been charged with GBH for giving [M] CPR. I was showering with my son and I didn't know that he was taking in all the water. He was floppy and I did CPR not knowing that I was supposed to use two fingers and did too much pressure and broke ribs. There are a few unexplained brain bleeds. I was on meth when that happened."

[23] You also turned it back on yourself when you talked about the effect all this has had on you. You said:

"Well and truly affected my mana. It's just destroyed me. I have lots of whakamā, lots of shame."

[24] You recognise that you need help for your methamphetamine addiction and you say you are keen to attend a residential drug and alcohol programme.

[25] Ms Oakley explains that research shows that increased adverse adolescent behavioural problems, aggression and delinquency following a parental death is a common pattern and bereavement in adolescence can lead to prolonged behavioural

problems. The report writer proposes that this has a causal nexus to your patterns of violence, crime and drug abuse. You had no modelling on how to be a good man and you were groomed through gang association.

Submissions

Defence submissions

[26] On your behalf, Mr Bates submits that the lead offence of GBH fits into the middle of band two of *R v Taueki*.³ He proposes a starting point of seven years' imprisonment is warranted, having regard to the following aggravating features:

- (a) the vulnerability of the victim;
- (b) the serious long term effects of the injuries; and
- (c) the magnitude of the breach of trust.

[27] As for the other two charges, he submits the starting point should be in the order of five years' to five-and-a-half years' imprisonment. He refers to the starting point in *M v R*.⁴

[28] Mr Bates acknowledges that the period of offending here is greater, but submits that the number and type of injuries were more extensive in *M v R*.

[29] To take into account totality, Mr Bates submits that the sentences should be applied concurrently.

[30] Mr Bates suggests that your previous violent convictions warrant an uplift. He submits that a 30 per cent discount should be given for the cultural factors outlined in the s 27 report and a 10 per cent discount should be given on account of your late guilty plea.

³ *R v Taueki* [2005] 3 NZLR 372 (CA).

⁴ *M v R* [2016] NZCA 53.

[31] He thus submits the appropriate end sentence is one of four years and three months' imprisonment.

Crown submissions

[32] Mr Jenson, for the Crown, submits that the aggravating factors in this case are the serious injury, the attack to the head, the vulnerability of the victim and the significant breach of trust. He also points to s 9A of the Sentencing Act 2002 ("the Sentencing Act").

[33] He submits the offending falls within band two of *Taueki* and has referred me to various cases all involving GBH of an infant, which he says are comparable. I will footnote them for completeness.⁵

[34] Mr Jenson submits of the cases he cites, *Strydom* is the most factually similar, given the very young age of the victim, the serious head injuries following a one-off incident and the injuries suffered on different parts of the body. Mr Jenson also notes that *R v Papanui* and *S v R* support a starting point of seven years for victims older than M and less extensive injuries. He thus submits a starting point in the range of six to seven years is appropriate.

[35] As for the second and third charges, Mr Jenson suggests that the starting point would be in the vicinity of four to five years' imprisonment. He submits that concurrent sentences for these charges is appropriate, but a one to two year uplift should be imposed on the lead offending to reflect totality. Accordingly, he says an overall starting point should be in the vicinity of seven to nine years' imprisonment.

[36] As to mitigating and aggravating factors personal to you, Mr Jenson accepts that an uplift is not necessary for previous convictions as your two violence convictions are of a more minor and different nature. He accepts the s 27 report reflects a background of drug use, deprivation and traumatic life events which may have contributed to your inability to deal appropriately with life's stressors. However, he submits that this must be viewed against the fact that you were unwilling to

⁵ *R v Wilson* [2004] 3 NZLR 60; *R v Papanui* HC Palmerston North CRI 2006 004 7944, 5 October 2007; *S v R* [2016] NZCA 367; *Strydom v R* [2018] NZHC 358.

acknowledge your offending and show remorse or divulge the context in which the GBH was committed. He notes it is unclear what caused you to act in the way you did so it is not known whether the offending can be linked to your background, or whether it was caused by drug use or another factor that would not normally mitigate offending. For this reason, he says the Court should act with care before allowing any discount for the factors discussed in the s 27 report. He agrees with Mr Bates that a 10 per cent discount is warranted considering you caused the trial to be aborted by absconding on bail in the face of a strong Crown case.

Discussion

Starting point – lead offence

[37] *Taueki* identifies the factors relevant to this form of offending. That case establishes three overlapping bands of starting points for imprisonment based on those factors.

[38] These include:

- (a) serious injury, including traumatic head injury, severe and permanent brain damage and injuries to ribs, chest and abdomen. For a newborn, these could have been fatal. The injuries also cannot have been caused by a single strike. Significantly they will likely cause debilitating developmental problems for M;
- (b) attack to the head;
- (c) the victim's vulnerability; this factor is present to the highest level, because M was just three weeks old; and
- (d) gross breach of trust; as the victim's father, you had a duty to care and provide for him.

[39] As suggested by Mr Jenson, I must also take into account the relevant factors in s 9A of the Sentencing Act, which specifically sets out the additional aggravating factors which apply where a child is a victim.

[40] The offending against M was a one-off incident. We have no context to understand how it happened. It is unclear whether you were acting out of frustration or stress, as often occurs in cases of this type. As M has been permanently brain damaged, I consider that the offence sits at the upper end of the cases advanced by the Crown. I will set a starting point of seven years' imprisonment for the lead charge.

Second and third offences

[41] To reflect the totality of the offending against both children, I must uplift the lead offence to account for the two ill-treatment/neglect charges.

[42] The summary of facts does not claim you caused the injuries listed. That may well have been the case, but I do not sentence you on that basis. The charges relate to your omission to obtain medical treatment for S and M's injuries while they were in your care. However, the charges under s 195 of the Crimes Act 1961 carry a high penalty to ensure that the Courts are properly equipped to respond to offending where children are assaulted or neglected and no medical treatment is obtained.⁶ Here, the injuries were non-accidental and occurred over a protracted period. Both children would have been in pain and it is simply not credible that you would not have noticed this. The relevant aggravating factors include:

- (a) the involvement of two victims;
- (b) extreme vulnerability;
- (c) a very high breach of trust; and

⁶ At [10] and [33]: "There are cases, of which this is one, where it is not possible to prove to the criminal standard who is responsible for a child's injuries. In such cases, the protective purpose [of s 195 of the Crimes Act] may be achieved by prosecuting those who are responsible for the child's care."

- (d) the consequences of their injuries which will undoubtedly be long term and may cause developmental and psychological issues.

[43] Taking into account the starting point which applies to similar offending,⁷ I will uplift the lead charge by two years for the second and third charge resulting in a global starting point of nine years.

Personal factors

Previous convictions

[44] You have two previous convictions for violence, but these did not occur in a domestic or family violence context and were more minor. I agree with Mr Jenson. I will not impose an uplift.

Personal, family, whānau, community, and cultural background

[45] I will grant you a discount for your background, as discussed in the s 27 and PAC reports.

[46] I am satisfied that the adversity and deprivation you experienced has a causal connection to your offending. I note particularly the trauma of witnessing your father's death as a child and the consequent lack of a paternal role model in your life. This has shaped the way you treated your own children. Your home life and schooling were extremely unstable, you were exposed to poverty, methamphetamine, crime and gangs from a young age.

[47] I do not agree that your inability to take responsibility or explain the offending counters the need for a discount, when that behaviour links back to the same factors identified in the s 27 report. However, the seriousness and violence of this offending does limit any discount available. In my view, a 15 per cent discount is appropriate.

⁷ *M v R*, above n 4: starting point of six years for two victims; *R v Otuszewski* [2019] NZHC 1895: starting point of six years for severe neglect where child died; *R v Rangi* [2017] NZDC 27937: starting point of three years and eight months where a baby suffered a head injury and did not receive treatment; *P v R* [2014] NZCA 211: starting point of three years, six months' imprisonment where child broke her leg and was not taken to hospital.

Guilty plea

[48] As suggested by both counsel, a 10 per cent discount is warranted for your late guilty plea.

Sentence calculation

[49] And so I now summarise those numbers. The resulting sentence calculation begins with the overall starting point of nine years or 108 months. From that I deduct 16 months (approximately 15 per cent) for personal mitigating factors and 11 months (approximately 10 per cent) for the guilty plea. The end sentence is 81 months or six years and nine months' imprisonment.

Result

[50] I enter convictions on all charges following your pleas of guilty.

[51] On the lead charge of causing GBH, I sentence you to six years and nine months' imprisonment.

[52] On each of the ill treatment/neglect charges, I sentence you to three years' imprisonment.

[53] These sentences are to be served concurrently.

First strike warning

[54] As I mentioned earlier, when you pleaded guilty you were not given a first strike warning. I am now required to give that warning.

[55] This being your first strike offence for a serious violent offence, I am now required to give you a warning under the so-called three strikes law.⁸

⁸ Sentencing Act 2002, s 86B.

[56] I must warn you of the consequences should you commit another serious violent offence. After I have given the warning, you will be handed a written notice outlining the consequences and listing the qualifying serious violence offences.

[57] If you are convicted of any serious violent offences other than murder committed after this warning and if a Judge imposes a sentence of imprisonment then you will serve that sentence without parole or early release (absent manifest injustice).⁹

[58] If you are convicted of murder committed after this warning, then you must be sentenced to life imprisonment.¹⁰ That will be served without parole unless it would be manifestly unjust. In that event the Judge must sentence you to a minimum term of imprisonment.

[59] Stand down.

Moore J

Solicitors:
Crown Solicitor, Tauranga
Mr Bates, Tauranga

⁹ Section 86C.

¹⁰ Section 86E.