

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

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

**CRI-2018-063-003591
[2021] NZHC 146**

THE QUEEN

V

SHANE CLAUDE ROBERTS

Hearing: 12 February 2021

Counsel: A Gordon for Crown
S Lance for defendant

Sentencing: 12 February 2021

SENTENCING NOTES OF KATZ J

Solicitors: Gordon Pilditch Solicitors, Office of the Crown Solicitor, Rotorua
Lance Lawson, Rotorua

Counsel: S Lance, City Chambers, Auckland

Mihi

Haere, haere, haere atu rā, e Karlos
Haere ki Hawaiki nui, Hawaiki roa, Hawaiki pāmamao
Ki te kainga tūturu mō tatou, mō te tāngata

Kei te ngau tōnu te mamae i te ngākau o te tāngata kua mahue i tēnei taha o te arai.
Nō reira, e moe, otiia atu.

Ka huri ki a tātou, tēna koutou katoa kua huihui i te ata nei
Ki te whānau o te hunga mate
Ka nui te mihi.
Ki a koe, e Te Ao
Kei te mihi ki a koutou ko tōu whānau
Nō reira, tēna koutou, tēna koutou, tēna koutou katoa

To the deceased, Karlos
Farewell
Travel on your final journey to great Hawaiki, long Hawaiki, and distant Hawaiki
The final resting place of us all
The pain of your departure gnaws at the heart of those that remain on this side of the veil
So farewell and rest peacefully

Turning to those present

To the whānau of the deceased, I greet you
I acknowledge Karlos and your whanau present
So I greet you once, twice, and three times.

Introduction

[1] Shane Roberts, you were convicted, following a jury trial, of the manslaughter of Karlos Stephens, an infant who was in your care. You appear today for sentence. The maximum penalty for manslaughter is life imprisonment.

What happened?

[2] Karlos was 10 months old at the time of his death. He was one of twins, born in January 2014 to a single mother who already had four sons. Although she loved her twin boys deeply, for personal reasons she struggled to provide a stable home for them. When they were about five months old you offered to care for them. You explained that you and your former partner, with whom you maintained a close

relationship, were experienced with twins, having raised twin girls of your own. I accept that you offered to look after the twins with the best of motives and out of a wish to help their mother.

[3] Karlos's mother accepted your offer and you took the twins into your care. Although you had significant involvement in their lives, it appears that much of the day to day care of the children fell to your former partner and your teenage daughters. Over the next few months the twins were cared for, and by all accounts treated very lovingly, by both you and your extended whānau. An Oranga Tamariki social worker gave evidence at trial of the strong bond you had with the boys. I accept that you genuinely loved them.

[4] In late November 2014, your former partner and daughters travelled to Christchurch to attend your daughter's graduation from a military course. You were left in sole charge of the twins for a week. It was arranged that you would stay at your former partner's house on Homedale Street, as that was the twins main home and you did not have electricity at your house on Alison Street. You invited the twins' mother to stay at your house on Alison Street while you were at Homedale Street, and told her that you would bring the twins to her for a visit so she could spend some time with them.

[5] On the afternoon of Saturday 29 November 2014, you took the twins to visit their mother at Alison Street. She noticed that Karlos was unwell and grizzly. She suggested that you take him to see a doctor. Your daughter made the same suggestion when you spoke to her later on the phone. You decided not to take him to a doctor, however. It was later discovered, after his death, that he was suffering from some type of flu-like virus, which presumably caused his irritability.

[6] In the early evening you took the twins back to Homedale Street, where they were in your sole care for the rest of the night. Presumably Karlos continued to be grizzly and unsettled.

[7] Based on the expert medical evidence, it was likely sometime in the early hours of Sunday morning that Karlos suffered his fatal injury. The jury found, beyond a

reasonable doubt, that you are the person who inflicted that injury. Although you continue to deny your offending, the evidence to support the jury's conclusion was overwhelming. The suggestion that the fatal injury could have been caused by Karlos's mother was understandably rejected by the jury.

[8] Karlos had no external injuries to his head or body, but he nevertheless suffered a severe brain injury. As a result of that he died from a subdural haemorrhage, or bleeding in his brain. The medical experts were in agreement at trial that the injury could not have been caused accidentally. It must have been the result of the application of severe and deliberate force. Only you know exactly what happened and what caused Karlos's fatal injury. The medical experts suggested that it could have been caused by violent shaking or a forceful impact with a hard surface, such as being thrown against a wall or onto a carpeted floor. Shaking was seen as a somewhat less likely scenario in a child of Karlos's age, as it is an injury mechanism more usually seen in younger children. Punches or kicks to the head were recognised as possible scenarios. However, given the lack of any external injuries, I proceed on the basis that the most likely scenario is that, in a moment of frustration, when dealing with a sick and irritable child in the early hours of the morning, you threw him with considerable force against the wall or onto the floor.

[9] A key issue I must determine is whether you realised at the time you assaulted Karlos, or shortly afterwards, that he was gravely ill, but you nevertheless deliberately delayed seeking medical attention for many hours. The medical experts were of the view that the severity of Karlos's condition would have become apparent immediately or very quickly. One of them said that the baby could even have been knocked out, and if not knocked out he would have likely shown some alteration of level of consciousness (for example, irritability, lethargy, altered cry, altered responsiveness, poor feeding, and vomiting). The complicating factor in your case is that you were already dealing with a quite sick child. Although there was evidence that Karlos had been vomiting, I do not know if that occurred before or after he suffered his injury. I cannot exclude the possibility that to the extent you saw some of the symptoms described by the medical experts, you may have believed they were associated with Karlos's existing illness. It was the middle of the night, you were no doubt tired, and it is possible that you did not immediately realise the seriousness of the situation.

[10] Other evidence also tends to support the inference that you may not have realised the seriousness of Karlos's condition until you awoke the next morning. In particular, your neighbour's evidence was that he saw you leave Homedale Street in your car in a mad rush at about 7.30 am. You did not stop to put either of the twins into their car seats, but just put them unrestrained into the car. Both the front and the back doors of your house were left wide open, as if someone had left in a great hurry. This evidence tends to suggest, in my view, that you did not realise Karlos was gravely ill in the early hours of the morning when he was first assaulted. Rather, it seems likely that his condition deteriorated during the night and it was only when you awoke in the morning that you realised that he was desperately ill and needed urgent medical attention. You then departed the property in a great hurry.

[11] Unfortunately, however, once you realised the gravity of the situation you did not call an ambulance or rush Karlos directly to hospital. Instead you concocted a scheme to try and distance yourself, and the Homedale Street property, from what had happened.

[12] You drove Karlos around to Alison Street and tried to persuade Karlos's mother to call an ambulance to that property, and to claim that Karlos had been in her care overnight and she had found him in that condition in the morning. You did not tell her, of course, that you had assaulted Karlos. Rather, you suggested his condition may have been due to the illness he had been suffering the previous day.

[13] Karlos's mother was not prepared to wait for an ambulance and insisted that you take Karlos immediately to hospital in your car. Sadly, although strenuous efforts were made to save him, Karlos was declared dead not long after his arrival at the hospital. You did not disclose to medical staff the cause of Karlos's condition. Further, when the police spoke to you that day you falsely stated or implied that Karlos had spent the night with his mother at Alison Street. You also persuaded Karlos's mother to back up that story. As a result, the police investigation was side-tracked for a lengthy period of time. Later that day, the police conducted a careful scene examination of the wrong address (Alison Street). A scene examination was never conducted at the Homedale Street property.

Starting point

[14] Mr Roberts, the first stage in the sentencing process is to set a starting point. I will then adjust that for any personal mitigating factors.

[15] There is no guideline decision for manslaughter sentencing. Instead, I am required to consider the aggravating and mitigating features of your offending and compare your case with similar cases to determine an appropriate sentence starting point.

[16] Karlos was a very young child, not yet a year old. He was entirely defenceless and particularly vulnerable at the time you fatally assaulted him.¹ You were his caregiver. He was totally dependent on you. The magnitude of the breach of the relationship of trust between you and Karlos was huge.²

[17] Although it is unclear exactly how you caused Karlos' injuries, it is clear from the expert evidence that the degree of violence you used against him must have been very significant.³ Children are generally fairly robust and the medical evidence was that the type of head injury Karlos received does not result from accidental falls, such as falling out of a high chair or down stairs. You must have thrown, hit or shaken him with considerable force.

[18] There was at least some delay in seeking medical attention. For the reasons I have set out previously, I cannot be sure that that delay was for a period of hours, as the Crown suggests. I therefore proceed on the basis that the delay was relatively short. In particular, rather than calling an ambulance you rushed Karlos, who was critically ill, around to the Alison Street property and tried to persuade his mother to call an ambulance to that property. This was a calculated ruse to try and distance yourself from what had happened to Karlos and prevent suspicion falling on you. Your efforts at concealment extended to failing to be honest to medical staff and lying to the police about the true cause of Karlos's condition, and persuading Karlos's mother to do the same. Given that Karlos had no external bruising or other injuries to alert

¹ Sentencing Act 2002, s 9A(2)(a); s 9(1)(g).

² Sentencing Act 2002, s 9A(2)(c); s 9(1)(f).

³ Sentencing Act 2002, s 9(1)(a).

medical staff to the possibility of a head injury, it was imperative that you put Karlos's needs ahead of your own self-interest and be honest with the medical team. You were not. In my view, this is a seriously aggravating factor.⁴

[19] Finally, I must have regard to the impact on the victim. A young life was tragically cut short as a result of your offending. Both his birth family and your own family lost a very much-loved child. The victim impact statements from Karlos's mother and his grandmother make extremely sad reading. You have deprived their family of a deeply loved son, grandson, brother and whānau member. They are also haunted by the fact that you have, to this day, not taken responsibility for hurting Karlos or told them the truth about what happened on the night of his death. We heard Karlos' grandmother read her powerful and moving victim impact statement in court this morning. Her grief is still clearly very deep, as is the grief of Karlos's mother. Karlos's mother's grief has been compounded by the fact that you have consistently tried to shift blame onto her by falsely suggesting that she may have caused Karlos's fatal injuries. This has caused her, and her whānau, considerable distress.

[20] Counsel have referred me to a number of child manslaughter cases that they say are similar in some respects to yours.⁵ Each case turns on its own facts, but it appears from those cases that the general range in sentence starting points for cases involving the manslaughter of young children from a single violent incident is between five and ten years imprisonment.⁶ Factors such as failure to seek medical attention and concealment of the offending are recognised as significant aggravating factors, often justifying starting points towards the higher end of that range. Sentence starting points above 10 years tend to be reserved for those cases involving multiple acts of violence.

[21] With reference to the case law, and the aggravating features I have referred to, including in particular the efforts you made to conceal your offending, it is my view that a starting point of eight years' imprisonment is appropriate.

⁴ Sentencing Act 2002, s 9A(2)(e).

⁵ *Sami v R* [2019] NZCA 340; *R v Archer* [2019] NZHC 3146; *R v L* [2020] NZHC 2911; *R v Kereopa* [2016] NZHC 1664; *R v Mitchell* [2017] NZHC 1391; and *R v Pene* [2010] NZCA 387.

⁶ *R v L* [2020] NZHC 2911 at [19].

Adjustments to the starting point

[22] I now turn to consider what adjustments need to be made to that starting point to reflect your personal circumstances.

[23] It is common ground between counsel that your previous convictions do not warrant an uplift to your sentence. I agree.

[24] On the other hand, no discount for remorse is appropriate. Your pre-sentence report notes that you maintain your innocence and still, despite the overwhelming evidence that was presented at trial, refuse to accept responsibility for Karlos's death.

[25] Your counsel submits that a discount should be afforded for the almost two years you have spent on electronically monitored bail ("EM Bail") prior to trial. I accept that a discount is appropriate for that, which I set at 10 months.

[26] When sentencing an offender, the Court is required to take into account their personal circumstances, including their personal, family, whānau, community, and cultural background.⁷ Your counsel has provided me with a very helpful and comprehensive s 27 report addressing these issues.

[27] Courts in both New Zealand and overseas have recognised that a person's background may reduce their moral culpability for the offending. Recently, in *Zhang v R*, the Court of Appeal observed that:⁸

[159] First, ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability. Where these constraints are shown to contribute causatively to offending... they will require consideration in sentencing.

(Footnote omitted.)

⁷ Sentencing Act 2002, s 8(i).

⁸ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; See also *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [40]–[50].

[28] I note that recognition of a causal linkage between matters relied on in a s 27 report and the offending does not require the court to be satisfied the matters are the proximate or immediate cause of the offending.⁹

[29] The fact that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.¹⁰ If an offender has diminished culpability as a result of their personal circumstances, this may in turn impact on the application of a number of the purposes and principles of sentencing.

[30] The cultural report you have provided is very comprehensive. It is 27 pages long and I have reviewed it carefully. I do not propose to go into detail about the contents of the report, much of which is very personal. I will, however, briefly refer to some of the key factors that the report writer identifies as being particularly significant.

[31] You spent your formative years in a dysfunctional, violent, home environment where abuse, anger, drinking and violence were normal. The violence you experienced growing up is described as unforgiving, raw and savage. At times you were knocked unconscious and have quite possibly suffered one or more traumatic brain injuries as a result.

[32] You are the oldest male child in your family and have 13 siblings. You had to leave school at the end of third form to go hunting in Te Urewera to help feed and support your whānau. Apart from a year spent at Maungapohatu marae as a teenager, which was a very positive experience for you, you lacked positive male role models in your life. The s 27 report writer describes you as having been surrounded by toxic and violent maleness in your formative years.

⁹ *Carr v R* [2020] NZCA 357 at [64].

¹⁰ *Poi v R* [2020] NZCA 312 at [26] citing *Bugmy v R* [2013] HCA 37, (2013) 249 CLR 571 at [40]; *R v Millwood* [2012] NSWCCA 2 at [69]: “I am not prepared to accept that an offender who has the start in life that the respondent had bears equal moral responsibility with one who has had what might be termed a “normal” or “advantaged” upbringing. Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions.”

[33] Later on, as an adult, you became involved with the Mongrel Mob for almost two decades, where you sought brotherhood, friendship and a new whānau. You have since left the Mongrel Mob. You say that you are trying to focus on being the best father and koro you can to your large extended whānau.

[34] The Crown submitted that there is no causative link between your background and the offending. Ms Gordon noted that you have ten children and no known history of violence against them. There is evidence that you are a loving parent to your own children. Further, you have very limited violence in your criminal history. Ms Gordon accordingly submitted that, despite your background, you have been able to overcome the challenges of your upbringing and that this offending cannot therefore be linked causatively to that.

[35] There may be some force in Ms Gordon's submission, but in my view it is overly simplistic. I accept that there is at least some causative link between your background of violence and deprivation and your offending, for the reasons I have previously outlined. In my view, a discount of 10 per cent is appropriate to reflect that factor.

Minimum period of imprisonment

[36] The last issue I turn to consider is whether I should impose a minimum period of imprisonment, as the Crown submits. Minimum periods of imprisonment may be imposed where the court is satisfied that the ordinary minimum period of imprisonment of one-third of the length of the sentence would not be sufficient to hold the offender accountable, denounce the offending, deter the offender or others, or protect the community.¹¹ Your case involves a one off assault on a young child, with fatal consequences. It appears to have occurred in a moment of frustration, when dealing with a sick and irritable child. There is no suggestion that Karlos was subjected to repeated violence. Community protection does not require the imposition of a minimum period of imprisonment in such circumstances. As for the factors of accountability, responsibility, deterrence and denunciation – in my view they are

¹¹ Sentencing Act 2002, s 86.

adequately reflected in your sentence already and do not require the imposition of a minimum period of imprisonment.

Sentence

[37] Mr Roberts, please stand. For the manslaughter of Karlos Stephens you are sentenced to six years and five months imprisonment. You may stand down.

Katz J