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

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

**CRI-2020-063-598**
**[2021] NZHC 1709**

**THE QUEEN**

v

**WILLIAM JAMES SIO**

| | |
|---|---|
| Hearing: | 9 July 2021 |
| Appearances: | A Gordon for the Crown<br>F Wood for the Defendant |
| Sentencing: | 9 July 2021 |

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**SENTENCE OF GAULT J**

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Solicitors:
Ms A Gordon, Gordon Pilditch, Office of the Crown Solicitor, Rotorua (amanda.gordon@gordonpilditch.co.nz)
Mr F Wood, Tompkins Wake, Solicitors, Rotorua (fraser.wood@tompkinswake.co.nz)

[1] Mr Sio, you have pleaded guilty to one charge of murder,[1] three charges of ill-treatment of a child,[2] and one charge of assault on a child,[3] following a sentence indication I gave you on 29 April 2021.[4] I will annex this sentence indication to my sentencing remarks but it is necessary to repeat much of it given the public nature of this sentencing.

**Facts**

[2] I begin by setting out the facts of your offending.[5]

[3] Your son, Ferro-James, was born in 2014. You and his mother separated prior to him turning one. He was initially cared for by his mother. In 2017, you took full custody of him. Ferro-James was described as being a polite, friendly child who had a great nature.

[4] You and your de facto partner are the two defendants in this case. Your relationship began in 2018. It was volatile. You argued often. On occasions there was physical violence between you, becoming more frequent and more serious. You often separated for short periods. You were both responsible for the violence.

[5] From approximately the beginning of September 2018, you lived with your partner and Ferro-James at various locations in the Waikato and Bay of Plenty area. Ferro-James attended Kohanga Reo in Tauranga. His teachers observed bruising and pinch type marks to his ears, arms, back and shoulders. A Kohanga teacher raised concerns with you several times, advising you that Ferro-James said your partner was responsible. You would deny that. Following these conversations, the teacher observed that the marks would disappear for a time. The marks would subsequently reappear.

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1 Crimes Act 1961, s 172. Maximum penalty: life imprisonment.
2 Crimes Act 1961, s 195. Maximum penalty: 10 years' imprisonment.
3 Crimes Act 1961, s 194. Maximum penalty: 2 years' imprisonment.
4 *R v Sio* [2021] NZHC 943.
5 The agreed summary of facts was amended slightly between indication and sentencing. None of the amendments impacts on the overall sentence.

[6] You routinely had unrealistic expectations as to how your young son should behave and when behaviour fell short of your expectations, you would physically assault him, often for minor things, such as failing to eat all his dinner or to sit still. The assaults included being hit across the head, ears or mouth, kicked on the bottom or dragged out of the room by his arm. You would shut him in his bedroom, sometimes all day. You sometimes punished him by putting him in the corner of the room, facing the wall, with his hands in the air for up to 30 minutes at a time. At other times, Ferro-James would have to sit in the corner of the room and not move for hours. If he moved or complained, he would be physically assaulted and forced to remain there for an additional period.

[7] On occasions you would take Ferro-James with you to work, and he would sit in the car. You often left him with friends, sometimes for days at a time. They would not know where you had gone, what you were doing or when you would be coming back.

[8] You did not enrol Ferro-James into school when he turned five years old, so friends did so. You neither took him to school nor provided him with items needed. At times you were working out of town and therefore could not do so.

[9] On approximately 23 January 2020, you were staying with some friends in Rotorua. You were playing on a PlayStation console. Ferro-James asked you when you would be leaving and said that he was cold. You punched him in the chest and stomach area, sending him flying backwards into a hallway.

[10] The following day, you unexpectedly left your friends' place and arranged emergency housing in Rotorua for yourself and Ferro-James. Your partner mostly resided there too. The address had five separate bedrooms with communal facilities. The room you rented was small and cramped. You and your partner typically kept your room door and curtains closed. Ferro-James rarely left the room even though it was extremely hot at the time. He did not return to school. The other residents hardly saw him. The residents did hear daily fighting and constant arguing between you and your partner. They also heard yelling at Ferro-James and Ferro-James screaming in a frantic and distressed manner, and what sounded like him being assaulted and crying.

On one occasion they overheard you and your partner both yelling at Ferro-James "Shut up, what are you crying for? Want me to give you something to cry about?"

[11] On the morning of 5 or 6 February 2020 Ferro-James was observed walking back to the room from the toilet. He was hobbling, appearing to be favouring his left leg, and was walking on the toes of his left foot. You were pushing him along from behind.

[12] On 8 February, you were increasingly frustrated by your son's behaviour. At around 7:00 am he needed to go to the toilet, so you took him. He was already limping. You kept telling him to "move". Once back in the room, you made him stand facing the wall of the bedroom with his hands held straight out in front of him. If he fell towards the wall from exhaustion, placing his hand on the wall, you would hit or kick him. He was made to stand in this position for a total of up to seven hours throughout the day and evening.

[13] Between 10:00 and 11:00 am, you and Ferro-James again walked to the bathroom. You pushed him along while keeping his head down. By this time he had large dark bruising covering the left side of his face and bruises on his chin along his jawline. You made him have a shower, which caused him to cry out in pain and distress. The crying became muffled as though something was placed over his mouth. The shower was cleaned including wiping blood from the wall. A subsequent examination of the shower showed signs of blood.

[14] During the afternoon, you kicked Ferro-James violently multiple times while he could no longer stand up during "time out". One kick was of such force that he became short of breath and could no longer talk. His breathing became shallow. You told Police you attempted to perform CPR and he began to breathe again. You said you were tired and put Ferro-James to bed. You then fell asleep next to your partner. A few hours later, you woke up to find Ferro-James was cold and did not appear to be breathing. You tried to perform CPR and locate a defibrillator.

[15] You and your partner took Ferro-James to Rotorua Hospital. He lay in the rear seat alone. You parked some distance away from the emergency department and

walked slowly into the hospital, pausing a couple of times to have a conversation. You told staff you thought your son was already deceased. Hospital staff attempted to resuscitate him, but he was pronounced dead. He had multiple bruises and scratches, and blood was visible around his mouth. You told staff he had tripped over and "bites his own tongue" and makes it bleed.

[16] A post-mortem concluded Ferro-James died of multiple blunt force traumas from a sustained and severe beating. This resulted in extensive soft tissue injuries to his head, limbs and torso. These included a deep injury to the muscle of the right buttock and back of the thigh where the muscle had been torn. The soft tissue injuries caused extensive internal bleeding that was so significant it would at least have contributed to his death and could alone cause death. Ferro-James would have been in significant pain and have had trouble walking on his injured right side. There were also multiple blunt force impacts to the head, and Ferro-James had a punctured lung. Some injuries were consistent with older injuries and could have occurred days prior to his death.

[17] You told Police you had slapped your son on the backside and hands, and explained your "discipline" making him stand facing the wall with his arms outstretched for long periods. You also said: "I did what happened to him. I did all of it. I know I shouldna done it, know it's wrong. I can't control myself when I get to that bit."

**Approach to sentencing**

[18] It is accepted that you will be sentenced to life imprisonment for the lead charge of murder.[6] That is inevitable. Neither the Crown nor your counsel, Mr Wood, suggests there are any grounds on which life imprisonment would be manifestly unjust.[7] The main issue for me to determine is what minimum period of imprisonment (or MPI) you must serve before you are eligible for parole.

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6 Crimes Act 1961, s 172. It is also common ground that no further uplift is required in respect of other charges.

7 Sentencing Act 2002, s 102(1).

[19] It must be the minimum term that is necessary to satisfy the need to hold you accountable for the harm done to Ferro-James and the community, denounce your conduct, deter you and others from offending in similar ways, and to protect the community.[8]

[20] For murders with particularly aggravating features, the MPI must be at least 17 years unless that would be manifestly unjust.[9] As counsel agreed and as previously indicated to you, this applies in your case because Ferro-James was particularly vulnerable due to his age.[10] I note than an MPI may be higher than 17 years.[11]

[21] To determine whether a 17 year MPI would be manifestly unjust,[12] I must first identify what the MPI would have been if the 17 year benchmark did not apply. In doing so, I must consider the aggravating and mitigating factors of your offending and come to a starting point. I must also consider whether any of your personal circumstances justify an adjustment to that starting point. I must then compare the adjusted starting point to the 17 year statutory MPI, and determine whether to impose the 17 year MPI would be manifestly unjust.

**Starting point**

[22] As previously indicated to you, I consider the aggravating features of your offending are Ferro-James' vulnerability as a five year old child reliant on your care, your gross breach of trust since he was your son in your primary care, his defencelessness, the duration of the abuse over some 16 and a half months, the level of violence, brutality, cruelty and callousness in the final period including throughout 8 February 2020, his extensive injuries, your initial failure to seek medical assistance and concealment, and the impact of his death on others.

[23] I have read the victim impact statements that have been filed, and I acknowledge the pain and grief your actions have caused to Ferro-James' loved ones.

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8 Sentencing Act, s 103(2); and *R v Howse* [2003] 3 NZLR 767 (CA).
9 Section 102(1).
10 Section 104(1)(g).
11 *R v Baker* [2007] NZCA 277 at [23]; *Skilling v R* [2011] NZCA 462 at [7]; and *Momoisea v R* [2019] NZCA 528 at [19].
12 *R v Williams* [2005] 2 NZLR 506 (CA) at [52]–[54]. In *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43, the Court reframed this approach as a three-step methodology.

[24] I do not accept that your medical assistance in attempting to resuscitate Ferro-James carries any real weight as a mitigating factor.

[25] As previously indicated to you, having regard to the aggravating features of your offending, the cases cited by your counsel,[13] and the cases cited by the Crown,[14] I consider that a starting point of 18 to 18 and a half years' imprisonment is appropriate for the totality of your offending. From that range, I consider the appropriate starting point is 18 years and three months' imprisonment.

**Personal aggravating and mitigating factors**

[26] It is accepted that your previous convictions do not warrant an uplift to the starting point.[15]

[27] I now consider whether there are mitigating factors personal to you that justify an adjustment to the starting point.

[28] Mr Wood submits that your guilty plea, personal background outside your control, your remorse and the responsibility you took for your offending, and your prospects of rehabilitation, warrant reduction from the starting point. He submits that, but for the operation of s 104, an end sentence of 15 to 16 years' imprisonment would be appropriate, and therefore that imposing an MPI of 17 years would be manifestly unjust because it would not make adequate allowance for these factors.

[29] The Crown accepts that allowances could be made for your guilty plea and disadvantaged upbringing. However, Ms Gordon submits these factors do not create manifest injustice, such that the MPI of 17 years or more should be displaced. The Crown accepts the MPI should be reduced from 18 and a half years to take these factors into account, but submits that a final MPI of 17 years should be imposed.

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13 Of most relevance were *R v Ngatai-Check* HC Wanganui CRI-2009-083-3155, 23 February 2011; and *R v Ellery* [2013] NZHC 2609.

14 *R v Kapea* HC Auckland CRI-2007-092-16885, 25 November 2008; *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008; *R v Williams* HC Wellington CRI-2004-078-1816, 24 February 2006; *R v Paul* CA496/05, 1 August 2006; *R v Curtis* HC Rotorua CRI-2007-063-4149, 4 February 2009; and *Filihia v R* [2014] NZCA 401. See sentence indication for full case descriptions: *R v Sio* [2021] NZHC 943.

15 As his counsel submits, Mr Sio's criminal history is populated entirely by driving offences and a breach of community work.

[30] I address these factors in turn, beginning with your guilty plea.

*Guilty plea*

[31] You entered a guilty plea following my sentence indication on 29 April 2021. As Mr Wood acknowledges, a guilty plea alone is not sufficient to make the imposition of the 17 year MPI manifestly unjust. However, it is a factor that should be taken into account.[16]

[32] Having regard to other cases, Mr Wood accepts that your guilty plea was delayed, but submits you should still receive a discount of two years because the delay was for legitimate purposes – exploring legal options.[17] I accept that the delay was caused, at least in part, by change in counsel and delay in instructing a consultant psychiatrist. I consider a discount of at least 18 months and up to two years is appropriate for your guilty plea.

*Personal background*

[33] I now consider your personal background and upbringing. In addition to the report from consultant psychiatrist Dr Kumar that I received for your sentence indication, I have now received a s 27 cultural background report.[18] Those reports are detailed and helpful.

[34] They indicate you are of Samoan and Pākehā heritage. You do not feel any connection to your Samoan family and culture. While you were close to your mother, you do not remember your father and you have been told he was violent towards you and your mother when you were young. You report being told that you moved away because he threw you against the ground when you were a baby. He died when you

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16 *R v Williams* [2005] 2 NZLR 506 (CA) at [69]–[74].

17 Counsel referred to *Holl v R* [2015] NZCA 67 (offender acknowledged their involvement from the outset, but there was a delay in pleading guilty was due to the exploration of fitness to plead and the availability of psychiatric defences; full 2-year discount applied for these reasons, and in order to achieve parity with the discount applied to a co-offender); *R v Taani* [2019] NZHC 1746 (offender pleaded guilty to murder and attempted murder shortly before trial without any excuse for the delay; 18 month discount applied); and *Malik v R* [2015] NZCA 597 (delayed pleas to double murder charges entered following a mental competency assessment which was deemed malingering by the sentencing judge, as a charade of mental incompetence was pursued by the defendant in order to delay proceedings. An 18-month discount was still applied).

18 Prepared by Dr Jarrod Gilbert, Ben Elley and Phil Taylor.

were a teenager and you have not met the other family on that side. You and your half-sister were raised by your mother and a series of her partners. You have four more half siblings but have had minimal contact with them. You report verbal abuse from some of your mother's partners, and say you were regularly kicked in the buttocks by your uncle as a form of discipline. Physical punishment was normalised. The pre-sentence report, however, did not indicate you suffered physical abuse.

[35] You suffered socio-economic deprivation and instability during your childhood. Your mother was on a solo parent benefit and struggled to get by. You moved regularly with your mother and half-sister. At times you stayed with friends, in a caravan and at Housing New Zealand properties before finding a stable rental when you were about 12. You attended several primary schools and were stood down or expelled from most for misbehaviour. You quit school in Year 10 and began work for a bricklayer. You say you grew up around gangs and were affiliated with one but did not join any.

[36] You began smoking cannabis by 13 or 14 and soon became addicted. You began stealing in part as a means of paying for drugs. You believe you started using methamphetamine around 15 or 16, after you left school. You smoked cannabis daily, and when you had methamphetamine, you used about a point a day.

[37] When you took over full custody of Ferro-James in 2017, your mother was alive and you felt able to care for him with her support. However, she died about four years ago and this was traumatic for you. You say you subsequently began drinking heavily and attempted suicide. You were evicted from your mother's house and a series of properties. You had a falling out with your half-sister. You felt ill-equipped to raise a child.

[38] You say you have a problem controlling your anger; you hold it in and then it explodes. Dr Kumar said you presented with a tragic but complex background to which your own experience of childhood adversity, conduct disorder, extensive alcohol and drug use, lack of prosocial role modelling and opportunity to learn positive parenting skills have contributed. He considered you meet the criteria of antisocial personality disorder, and cannabis and methamphetamine use disorder. These

diagnoses are not considered mental illnesses. But intoxication and withdrawal from psychoactive drugs would have contributed to your lowered frustration tolerance and violent outbursts directed against Ferro-James. Your history of poor conduct disorder, poor coping, anger outbursts and antisocial personality structure would have predisposed you to being violent as an adult. The psychosocial factors had a profound effect on your personality and capacity to function as a father. Escalation in drug use, ongoing stressors and poor coping skills would have precipitated your extensive and repeated assaults on Ferro-James. Your ability to control your emotions and capacity to deal with stress would have been impaired because of cumulative effects of stress and effects of drugs. Similarly, Dr Kumar finally said, your ability to understand the nature and quality of your actions were at least partially impaired because of anger, frustration and effects of drugs.

[39] Since being imprisoned you have stopped taking drugs, including methamphetamine. You have begun exercising and eating better. You have completed six courses in prison focusing on self-control, managing anger and building relationships. You are now 25 years old. You say you are eager to engage in further courses, particularly in relation to anger management and drug addiction. You say your goal is to try to better yourself and turn your life around. When you are released from prison, you say you will "try and get a house and get set up". I acknowledge the efforts you have made towards rehabilitation and commend you for them.

[40] Mr Wood submits that your impoverished upbringing and physical abuse outside your control, untreated behavioural issues and drug abuse directly impact on your culpability. He submits that these factors warrant a further discount of 12 to 18 months, and support his overall submission that a 17 year MPI would be manifestly unjust, citing several cases.[19]

[41] Unfortunately, your lack of family support means your background circumstances are largely self-reported, but I accept you have suffered socio-economic

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[19] *R v Ransfield* [2020] NZHC 2487; *R v Ford* [2020] NZHC 2579; and *R v Ellery* [2013] NZHC 2609. In *Ford*, the Court concluded that a 17 year MPI would be unjust particularly in light of the defendant's personal circumstances, as his deprived upbringing, limited grasp of English and substance abuse likely had significant impacts on his emotional stability and decision-making abilities (albeit falling short of a recognisable psychiatric illness).

and cultural deprivation and instability. As the Crown accepts, I accept there is some causal connection between that and your offending. It also appears likely that some physical abuse was normalised even though you did not mention it to the pre-sentence report writer. But there is insufficient casual connection between that and the level of violence against Ferro-James. I accept Dr Kumar's diagnosis of antisocial personality disorder and cannabis and methamphetamine use disorder. But the Crown makes the point that the Court must not take into account by way of mitigation the fact that, at the time of the offending, an offender was affected by the voluntary use of alcohol or drugs.[20]

[42] The Court of Appeal has said that circumstances personal to an offender's background may bear on the setting of an appropriate sentence.[21] Their potential mitigating effect is not limited to particular types of offending. However, where a defendant is being sentenced for murder, particularly one with the aggravating features of this offending, the discretion available to the Court to reduce an otherwise appropriate sentence on account of such considerations will be more constrained. This is because the MPI must accurately reflect the seriousness of the offending and the need to give effect to the legislative policy mandated by the statutory MPI that is to be imposed for such murders. An offender's background of deprivation may carry less weight in the context of such a sentencing exercise.

[43] Considering your personal circumstances together with the aggravating features of your offending, I consider an additional discount of up to one year is appropriate.

*Remorse*

[44] The psychiatric and pre-sentence reports indicate a lack of insight into your offending or genuine remorse. The pre-sentence report writer said that, while you verbalised feelings of remorse, there were instances of blaming Ferro-James and attempting to justify your use of violence. Mr Wood does not seek a discrete discount for remorse but submits that the comments you made to the report writer should be

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20 Sentencing Act, s 9(3).
21 *R v Hohua* [2019] NZCA 533 at [44].

seen as merely acknowledgement of what happened and in light of your antisocial personality disorder diagnosis. That is accepted. But the pre-sentence report writer nevertheless indicates some lack of insight into your offending. In contrast, your letter to the Court says "sorry" and you express regret and shame, and take full responsibility for your actions, which I acknowledge.

*Summary*

[45] In summary, but for s 104, from a starting point of 18 years and three months' imprisonment, I would deduct up to three years. That is, up to a maximum of two years for your guilty plea and up to one year for your personal circumstances. But for s 104, the minimum term you would serve is at least 15 years and three months' imprisonment.

**Would a 17-year MPI be manifestly unjust?**

[46] Returning to s 104 and whether it would be manifestly unjust to impose the statutory minimum of 17 years' imprisonment, as the Court of Appeal has said, the statutory minimum of 17 years will not be departed from lightly; an offender's personal circumstances will only justify departure from the legislative policy in exceptional cases.[22] The Court of Appeal recently upheld a 17 year MPI in circumstances where at least 15 years would have been imposed under normal sentencing principles.[23] I do not consider that a sentence of at least 15 years and three months' imprisonment, which would be imposed under normal sentencing principles in this case, is so markedly different from the 17 year statutory MPI that it would be manifestly unjust to impose the statutory MPI. Nor do the circumstances warranting some personal discount otherwise make this a sufficiently exceptional case to result in the statutory MPI being manifestly unjust.

[47] A 17 year minimum period of imprisonment means that you will not become eligible for parole until you have served 17 years in prison. Whether you are released on parole at that time is a matter to be determined by the Parole Board.

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22 *R v Williams* [2005] 2 NZLR 506 (CA) at [66].
23 *Clarke v R* [2021] NZCA 151 at [40]–[41].

**Result**

[48] Mr Sio, please stand.

[49] On the charge of murder, I sentence you to life imprisonment. I impose a minimum period of imprisonment of 17 years.

[50] On the charges of ill-treatment of a child, I sentence you to concurrent terms of four years' imprisonment.

[51] On the charge of assault on a child, I sentence you to a concurrent term of one year's imprisonment.

[52] Please stand down.

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Gault J

**NOTE: PUBLICATION OF THE JUDGMENT AND OF THE REQUEST FOR A SENTENCING INDICATION IN ANY NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE IS PROHIBITED BY SECTION 63 OF THE CRIMINAL PROCEDURE ACT 2011 UNTIL THE DEFENDANT HAS BEEN SENTENCED OR THE CHARGE DISMISSED. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3865734.html**

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| | |
|---|---|
| Hearing: | 29 April 2021 |
| Appearances: | A Gordon for the Crown<br>F Wood for the Defendant |
| Sentence Indication: | 29 April 2021 |

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**SENTENCE INDICATION OF GAULT J**

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Solicitors:
Ms A Gordon, Gordon Pilditch, Office of the Crown Solicitor, Rotorua
Mr F Wood, Tompkins Wake, Solicitors, Hamilton

## Background

[1] Mr William Sio seeks a sentence indication in respect of one charge of murder,[24] three charges of ill-treatment of a child,[25] and one charge of assault on a child,[26] all relating to his five year old son.

## Facts of the offending

[2] These alleged facts are agreed for the purpose of this sentence indication.[27]

[3] The deceased was born in 2014. Mr Sio and the deceased's mother separated prior to the deceased turning one. He was initially cared for by his mother. In 2017, Mr Sio took full custody of him. The deceased (who I will continue to refer to as the deceased, although noting his name was Ferro-James) was described as being a polite, friendly child who had a great nature.

[4] Mr Sio and his de facto partner are the two defendants in this matter. Their relationship began in 2017. It was volatile. The pair argued often. On occasions there was physical violence between them, becoming more frequent and more serious, with the couple often separating for short periods. Both were responsible for the violence.

[5] From approximately the beginning of September 2018, Mr Sio lived with his partner and the deceased at various locations in the Waikato and Bay of Plenty area. The deceased attended Kohanga Reo in Tauranga. His teachers observed bruising and pinch type marks to his ears, arms, back and shoulders. A Kohanga teacher raised concerns with Mr Sio several times, advising him that the deceased said Mr Sio's partner was responsible. Mr Sio would deny that. Following these conversations, the teacher observed that the marks would disappear for a time. The marks would subsequently reappear.

[6] Mr Sio routinely had unrealistic expectations as to how his son should behave and when behaviour fell short of expectations he would physically assault his son,

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24 Crimes Act 1961, ss 160(2)(a), 167(b) and 172. Maximum penalty of life imprisonment.
25 Crimes Act 1961, s 195(1) and (2)(a). Maximum penalty of 10 years' imprisonment.
26 Crimes Act 1961, s 194(a). Maximum penalty of two years' imprisonment.
27 They are drawn from the Crown's amended statement of facts dated 15 April 2021.

often for minor things, such as failing to eat all his dinner or to sit still. The assaults included being hit across the head, ears or mouth, kicked on the bottom or dragged out of the room by his arm. Mr Sio would shut his son in his bedroom, sometimes all day. He sometimes punished his son by putting him in the corner of the room, facing the wall, with his hands in the air for up to 30 minutes at a time. At other times, his son would have to sit in the corner of the room and not move for hours. If his son moved or complained, he would be physically assaulted and forced to remain there for an additional period.

[7] On occasions Mr Sio would take his son with him to work, and his son would sit in the car. Mr Sio often left his son with friends, sometimes for days at a time. They would not know where he had gone, what he was doing or when he would be coming back.

[8] Mr Sio did not enrol his son into school when he turned five years old, so friends did so. Mr Sio neither took his son to school nor provided him with items needed.

[9] On approximately 23 January 2020, Mr Sio was staying with some friends in Rotorua. He was playing on a PlayStation console. The deceased asked Mr Sio when they would be leaving and said that he was cold. Mr Sio punched his son in the chest and stomach area, sending him flying backwards into a hallway.

[10] The following day, Mr Sio arranged emergency housing in Rotorua for himself and his son. His partner mostly resided there too. The address had five separate bedrooms with communal facilities. The room rented by Mr Sio was small and cramped. Mr Sio and his partner typically kept their room door and curtains closed. The deceased rarely left the bedroom even though it was extremely hot at that time. He did not return to school. The other residents hardly saw the deceased. The residents did hear daily fighting and constant arguing between Mr Sio and his partner. They also heard yelling at the deceased and the deceased screaming in a frantic and distressed manner, and what sounded like the deceased being assaulted and crying. On one occasion they overheard Mr Sio and his partner both yelling at the deceased "shut up, what are you crying for? Want me to give you something to cry about?"

[11] On the morning of 5 or 6 February 2020 the deceased was observed walking back to the room from the toilet. The deceased was hobbling, appearing to be favouring his left leg, and was walking on the toes of his left foot. Mr Sio was pushing him along from behind.

[12] On 8 February, Mr Sio was increasingly frustrated by his son's behaviour. At around 7 am the deceased needed to go to the toilet so Mr Sio took him. The deceased was already limping. Mr Sio kept telling him to "move". Once back in their room, Mr Sio made the deceased stand facing the wall of the bedroom with his hands held straight out in front of him. If the deceased fell towards the wall from exhaustion, placing his hand on the wall, Mr Sio would hit or kick him. The deceased was made to stand in this position for a total of up to seven hours throughout the day and evening.

[13] Between 10 and 11 am, Mr Sio and the deceased again walked to the bathroom. Mr Sio pushed him along while keeping his head down. By this time the deceased had large dark bruising covering the left side of his face and bruises on his chin along his jawline. Mr Sio made his son have a shower, which caused the deceased to cry out in pain and distress. The crying became muffled as though something was placed over his mouth. The shower was cleaned including wiping blood from the wall. A subsequent examination of the shower showed signs of blood.

[14] During the afternoon, Mr Sio kicked the deceased violently multiple times while the deceased could no longer stand up during "time out". One kick was of such force that the deceased became short of breath and could no longer talk. His breathing became shallow. Mr Sio told Police he attempted to perform CPR and the deceased began to breathe again. Mr Sio said he was tired and put his son to bed. He then fell asleep next to his partner. A few hours later, Mr Sio woke up to find his son was cold and did not appear to be breathing. He tried to perform CPR and locate a defibrillator.

[15] Mr Sio and his partner took the deceased to Rotorua Hospital. The deceased lay in the rear seat alone. They parked some distance away from the emergency department and walked slowly into the hospital, pausing a couple of times to have a conversation. Mr Sio told staff he thought his son was already deceased. Hospital staff attempted to resuscitate him but he was pronounced dead. He had multiple

bruises and scratches, and blood was visible around his mouth. Mr Sio told staff the deceased had tripped over and "bites his own tongue" and makes it bleed.

[16] A post-mortem concluded the deceased died of multiple blunt force traumas from a sustained and severe beating.

[17] Mr Sio told Police he had slapped his son on his backside and hands, and explained his "discipline" making his son stand facing the wall with his arms outstretched for long periods. He also said "I did what happened to him. I did all of it. I know I shouldna done it, know it's wrong. I can't control myself when I get to that bit."

**Approach to sentencing indications**

[18] A sentence indication is a statement by the Court that, if the defendant pleads guilty to the offence alleged in the charge at that time, the Court would or would not be likely to impose on the defendant a sentence of a particular type, within a specified range, or of a particular quantum.[28] It is intended to provide clarity and certainty about the "actual jeopardy" a person faces if they plead guilty.[29]

[19] A sentence indication is not the same as a sentencing. In particular, the Court does not have all the information that would be available at sentencing. Nevertheless, subject to that important limitation, to which I will return, the sentence indication can follow the same approach as a sentencing. In cases of murder, that is the approach prescribed by subpart 4 of the Sentencing Act 2002.

[20] I must have regard to the purposes and principles of sentencing as set out in the Sentencing Act 2002.[30] In serious violent offending such as this, the relevant purposes of sentencing include: to hold the offender accountable for harm done to the victim; to promote a sense of responsibility for that harm; denounce the conduct in which the offender was involved; and deter other persons from committing the same or a similar offence. I must also take into account the need for consistency between

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28 Criminal Procedure Act 2011, s 60.
29 *Taylor v R* [2013] NZCA 55 at [17].
30 Sections 7-8.

sentences for similar offending, the need to assist in the offender's rehabilitation and reintegration, and the need to impose the least restrictive sentence that is appropriate in the circumstances.

[21] I first set a starting point for the lead offence, the charge of murder.

**Murder**

[22] Everyone one who commits murder is liable to imprisonment for life.[31] That is, however, subject to s 102 of the Sentencing Act 2002 (the "Act"). Section 102 provides that an offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust. Here, there is no suggestion that a sentence of imprisonment for life would be manifestly unjust. That is accepted.

[23] If a person is sentenced to life imprisonment, the Court must impose a minimum period of imprisonment of no less than 10 years.[32] If, however, the murder involved an aggravating factor contained in s 104, then the Court must impose a minimum period of imprisonment of at least 17 years unless it would be manifestly unjust to do so.[33]

[24] In *R v Williams*, the Court of Appeal set out a two-step approach to the application of s 104:[34]

(a) First, the Court should consider the degree of culpability in the present case in relation to that involved in the standard range of murders. In doing so, the Court will take into account in the normal way the pertinent aggravating factors set out in s 104 to the extent they were present, any other applicable aggravating factors, and all those in mitigation. The sentencing judge should then decide what minimum

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31 Crimes Act 1961, s 172.
32 Sentencing Act 2002, s 103. I note there is an exception where s 86E(1) of the Act applies.
33 Section 104(1).
34 *R v Williams* [2005] 2 NZLR 506 (CA) at [52]-[54].

term of imprisonment was justified in all the circumstances of the case, including those of the offender.

(b) Where the first step indicates that the appropriate minimum period of imprisonment is 17 years or more, the minimum term must reflect that assessment. In cases where the first step points to a lesser minimum term being justified, the Court would go on to the second step and consider whether to impose a minimum term of 17 years' imprisonment would be manifestly unjust. If it is, the minimum term must be reassessed to what the Court considers to be justified.

[25] In *Davis v R*,[35] the Court of Appeal reframed this approach as a three-step methodology:

> [25] … when s 104 is invoked the sentencer must decide (a) what notional MPI would apply under s 103 and (b) whether a s 104 category applies. If s 104 applies but the notional MPI would be less than 17 years the judge must (c) address manifest injustice. We add that the first two steps need not be followed in that order. The sequence chosen may depend on the category and the circumstances. Some s 104 categories apply unambiguously — double murder, for example — while others, of which s 104(1)(e) is the leading example, require judgements of quality and degree.

[26] I apply that three-step methodology.

*Step one – what notional minimum period of imprisonment applies under s 103?*

[27] As both counsel accepted, the minimum period of imprisonment should be assessed with reference to the totality of the offending, not just the conduct that was causative of death. That would include the conduct constituting the charge of ill-treatment of a child.[36] Where the most serious offence is murder, the only way in which the offending other than the murder can be reflected in the sentence is in fixing the minimum period of imprisonment.[37] Accordingly, the entirety of the conduct

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35 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 (CA).

36 *R v Kapea* HC Auckland CRI-2007-092-16885, 25 November 2008 at [19], where John Hansen J said that "[w]hat must be looked at in setting the minimum term is the overall behaviour, not just the specific acts that led to the death of [the deceased]".

37 *Pukeroa v R* [2013] NZCA 305 at [40].

detailed in the summary of facts is to be taken into account in indicating the minimum period of imprisonment.

[28] Ms Gordon, for the Crown, submitted that the appropriate starting point for the minimum period of imprisonment would be in the range of 18 to 19 years. She submitted the aggravating features of the offending justifying this starting point were:

(a) The vulnerability of the deceased as a five year old child reliant on the care of Mr Sio;[38]

(b) The gross breach of trust associated with the deceased being Mr Sio's son who was in his primary care;[39]

(c) The defencelessness of the victim;

(d) The extent (duration) of the abuse, which was ongoing for a period of some 16 and a half months with escalating severity, including all of 8 February, only ceasing when the deceased was killed;

(e) The extent or level of the violence, brutality, cruelty and callousness in the months preceding and particularly throughout 8 February, the extensive injuries caused, and the failure to seek medical assistance.[40] She submits it cannot be categorised as excessive discipline.

(f) The concealment of the offending from authorities by telling hospital staff that the deceased had suffered the injuries from tripping over – although not a significant factor;[41] and

(g) The victim impact associated with the death of the child. I have read the victim impact statements that have been filed.

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38 Sentencing Act 2002, ss 9(1)(g), 9A(2) and 104(1)(g).
39 Sections 9(1)(f) and 9A(2)(c).
40 Sections 9(1)(a), (1)(e) and 104(1)(e).
41 Section 9A(2)(e).

[29] Mr Wood, for Mr Sio, submits defencelessness is incorporated within vulnerability, which Ms Gordon accepts albeit noting the authorities refer to it as a separate factor. I accept Mr Wood's submission that the summary of facts does not indicate that the earlier abuse over the 16 and a half months was at the level of violence akin to that in the final period. Otherwise, I agree with Ms Gordon's assessment of the aggravating factors.

[30] Mr Wood submits that Mr Sio's medical assistance is a limited mitigating factor, but I do not accept this is of any real weight in the circumstances.

[31] Ms Gordon referred to several cases which were considered similar to the present case (which I will footnote).[42]

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[42] (a) In *R v Kapea* HC Auckland CRI-2007-092-16885, 5 February 2008, the defendant was the babysitter of a baby cousin for approximately one month. Over that time, various injuries were inflicted upon the baby which the defendant explained as accidental. They were, however, admitted to be the result of abuse. Eventually, the defendant hit the deceased several times on the head with significant force, covered her mouth and nose to stop her crying, and threw her against a wall, causing injuries that resulted in death. Given the extent of the period of cruelty and the nature of the violence inflicted, John Hansen J imposed a starting point of 18 and a half years. This was reduced to 17 years' imprisonment to account for the defendant's full confession at an early stage and guilty plea.

(b) In *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008, the defendant was a trusted friend and neighbour of the deceased child's mother, during a period where the deceased child's parents were having relationship issues. The deceased child was two and a half years old and occasionally in the care of the defendant. One night when the deceased was in the care of the defendant at his home, his wife saw him slap the child repeatedly in the face. Over a period of about five days, the defendant abused the deceased when she was in his care, eventually causing the child's death. There were numerous injuries to the child, with the pathologist and paediatrician commenting that they had never seen injuries such as those inflicted by the defendant. For this, Lang J considered a starting point of around 18 and a half to 19 years' imprisonment was appropriate.

(c) In *R v Williams* HC Wellington CRI-2004-078-1816, 24 February 2006, the defendant was the partner of the deceased seven month old child's mother. The deceased was first taken to a doctor with bruising on 14 October 2004. During November, several witnesses recognised bruising to the child's head and face until eventually, on 27 November 2004, the defendant found the child dead. The pathologist found that it was likely that the deceased's body simply shut down under the accumulation of injuries inflicted by the defendant. Miller J concluded that the appropriate minimum period of imprisonment was 17 years.

(d) In *R v Paul* CA496/05, 1 August 2006, the defendant was living with his partner and was left in charge of three children for an evening in his partner's absence. The defendant became frustrated with the youngest child, who was 14 months old, crying. He punched the child in her stomach when she was lying on her bed. The impact of the blow forced the deceased's internal organs against her spine, completely rupturing her bowel and tearing her mesentery artery, causing extensive haemorrhage and blood loss from which she died within a short period. On appeal, the Court of Appeal upheld Gendall J's imposition of a 15 year starting point for the minimum period of imprisonment.

[32] Mr Wood submits that a notional MPI of 16 to 17 years is the appropriate starting point, referring to several further cases.[43]

[33] Previous decisions can only be of general assistance – each case turns on its own facts.[44] But having regard to the other cases, I consider that in the circumstances of this case as I have outlined, a starting point of around 18 to 18 and a half years' imprisonment is appropriate.

*Step two – do any of the s 104 factors apply?*

[34] Counsel agree that s 104 is engaged. I agree that the deceased was particularly vulnerable because of his age so that s 104(1)(g) applies.[45] It is therefore unnecessary to decide whether s 104(1)(e) also applies (that is, the murder was committed with a high level of brutality, cruelty, depravity, or callousness) but I note the similar aggravating feature identified above.

*Step three – would the minimum period of imprisonment be manifestly unjust?*

[35] Step three only arises if s 104 applies but the notional MPI would be less than 17 years. The question then is whether the imposition of at least a 17 year minimum term of imprisonment would be manifestly unjust. I note an MPI may be higher than 17 years.

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(e) In *R v Curtis* HC Rotorua CRI-2007-063-4149, 4 February 2009, two defendants who were convicted of murder severely abused a three year old child, who was in their care, for a period of two months. This included spinning her on a clothesline until she fell, performing "wrestling moves" on her and placing her in a clothes dryer and turning it on. The occasion that caused the death of the child involved those two defendants kicking the deceased. The deceased lost consciousness during this process and subsequently died. Potter J considered the appropriate starting point was a minimum period of imprisonment of 18 years.

(f) In *Filiha v R* [2014] NZCA 401, the defendant killed a one year old child by striking the child's head against a hard flat surface. The child was the grandchild of her neighbours, and she had been entrusted to look after it through an informal adoption. On appeal, the Court of Appeal upheld the sentence, including the 17 year minimum period of imprisonment. While the "fleeting and reckless nature of the murderous intent by a caregiver under stress" involved a lack of premeditation and intent to kill, the 17 year minimum term of imprisonment was not manifestly unjust.

43 Of most relevance, he cited *R v Ngatai-Check* HC Wanganui CRI-2009-083-3155, 23 February 2011; and *R v Ellery* [2013] NZHC 2609

44 *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008 at [38].

45 *Graham v R* [2011] NZCA 131 at [13].

[36] In *R v Williams*, the Court of Appeal said:[46]

> We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.

[37] As Mr Wood acknowledges, a guilty plea is not, of itself, sufficient to make the imposition of the 17 year MPI manifestly unjust.[47] Where s 104(1) is engaged, Mr Wood acknowledges it would be unusual for the Court to give a sentence indication as it will not have all relevant material before it to determine manifest injustice. But he submits that the psychological report prepared by Dr Shailesh Kumar, an experienced Specialist Forensic Psychiatrist,[48] in combination with a guilty plea, a pre-sentence report and a s 27 cultural report (yet to be obtained) which are expected to elaborate on the issues identified in the psychological report, would be sufficient to justify the imposition of an MPI of less than 17 years. That is, that an MPI of 17 years would be manifestly unjust. He submits that an appropriate end sentence would be an MPI in the realm of 15 years. The Crown is supportive of a sentence indication being given, but submits there would be no manifest injustice to an MPI of 17 years.

[38] There are several cases where the presumptive minimum term of 17 years' imprisonment for the murder of a young child has been found to be manifestly unjust notwithstanding that the deceased's age constituted an aggravating factor under s 104(1)(g).[49] For example, in *Lackner v R*, the imposition of a 17 year minimum

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46 *R v Williams* [2005] 2 NZLR 506 (CA) at [67].

47 *R v Williams* [2005] 2 NZLR 506 (CA) at [69]-[74].

48 Dr Kumar's report was drafted following two interviews with Mr Sio and with access to written information, including the summary of facts, Mr Sio's medical records and his criminal history. The report details Mr Sio's background history; relationship history; medical history; family history; cultural history; alcohol and drug use history; forensic history; psychiatric history; the background to the alleged index offending; a review of the evidence; a mental state examination; and offers a professional opinion on the linkage between these matters and the offending.

49 See for example *R v Ellery* [2013] NZHC 2609 at [31] where it was manifestly unjust to impose a 17 year minimum period of imprisonment for the killing of the defendant's partner's baby due to the defendant's youth, psychological issues and remorse. See also *R v Wakefield* [2019] NZHC 1629 where it was manifestly unjust to impose a 17 year minimum period of imprisonment for the killing of the defendant's five month old stepson because of the defendant's personality dysfunction (being exposed to domestic violence as a child), willingness to make admissions and plead guilty to manslaughter (being a borderline case between that and murder) and remorse.

period of imprisonment was manifestly unjust where the defendant had lashed out and slapped the deceased baby, and subsequently expressed remorse and pleaded guilty.[50]

[39] So I return to the important limitation on sentencing indications that has particular application in cases such as this involving defendants charged with murder. I consider that where s 104(1) is engaged, it is inappropriate to give a sentence indication in relation to the issue of manifest injustice unless the Court has sufficient material relating to the defendant's personal circumstances. That is because in determining manifest injustice, the sentencing Judge is required to consider not only the circumstances of the offending but also the circumstances of the offender. On a sentence indication, the material available for considering the circumstances of the offender is ordinarily limited. That is the case here. There is no pre-sentence report, which can only be ordered after conviction. Such reports may well contain matters about the offender that can be mitigating factors. It follows that they can lend support to the proposition that a 17 year minimum term of imprisonment would be manifestly unjust.

[40] The most I can say at this stage is that based on the psychological report – and assuming other material available at sentencing is consistent – it is possible that a further discount for personal circumstances will be available. The report indicates Mr Sio is a 24 (now 25) year old Samoan Pakeha with a disadvantaged personal background, that is elements of cultural and economic deprivation in his upbringing. Mr Sio said he was subject to physical abuse as a child – kicked in the buttocks. The report also indicates drug use, including at the time of the offending. As Ms Gordon notes, s 9(3) provides that the Court must not take into account by way of mitigation the fact that the offender was affected by the voluntary use of alcohol or drugs. The report also indicates a lack of genuine remorse or insight by Mr Sio into his offending.

[41] Dr Kumar is of the opinion that Mr Sio does not present with any features suggestive of a serious mental illness. He does, however, fulfil the criteria for diagnoses of antisocial personality disorder and cannabis and methamphetamine use

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50 *Lackner v R* [2016] NZCA 29.

disorder. These diagnoses are not considered mental illnesses. Mr Sio does not suffer from a form of mental disorder that would affect his perception, decision making or ability to control his emotions. But intoxication and withdrawal from psychoactive drugs would contribute to Mr Sio's lowered frustration and anger outbursts, resulting in violent behaviour towards the deceased. Mr Sio's history of poor conduct disorder, poor coping, anger outbursts and antisocial personality structure would have predisposed him to violent behaviour as an adult. Escalation in drug use, ongoing stressors and poor coping skills would have precipitated the extensive and repeated assaults. Mr Sio's stress and drug impairment would have inhibited his ability to understand the nature and quality of his actions, perpetuating the violence against the deceased.

[42] Even so, having regard to that psychological report, at this stage, I cannot say a discount for personal mitigating circumstances will be available, or what it would be.

**Other matters**

[43] Ms Gordon acknowledges that her proposed starting point MPI reflects all the offending and no further uplift is required in respect of other charges.

[44] It is also common ground that there would be no uplift for Mr Sio's previous convictions.

[45] In relation to the guilty plea discount, the Crown acknowledges that a discount to the end sentence would apply if Mr Sio accepts the sentence indication. Mr Wood submitted this should be in the vicinity of 20 per cent whereas Ms Gordon submits a more modest discount given the plea would be entered quite late as the trial is set down for 14 June 2021. In the s 104 context,[51] discounts are more narrowly confined and tend not to be expressed in percentage terms. Ms Gordon refers to discounts in the order of one to two years. In relation to the guilty plea, I do not express the discount in percentage terms but note that it would not be entered at the earliest available opportunity but nevertheless a discount would still be appropriate.

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[51] Compare *Moses v R* [2020] NZCA 296.

**Conclusion**

[46] Finally, I note that the Crown acknowledges that discounts might reduce the MPI to 17 years.

[47] In this sentence indication, I cannot go further than indicating that the appropriate starting point for the MPI is around 18 to 18 and a half years' imprisonment; that s 104 is engaged; and that discounts may be available which make it possible that imposing an MPI of 17 years would be manifestly unjust.

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Gault J