THIS JUDGMENT IS ANONYMISED CONSISTENT WITH THE ORDER FOR INTERIM NAME SUPPRESSION OF MR S AS SET OUT AT [19] IN [2024] NZHC 1020.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2022-092-4306
[2024] NZHC 1015

THE KING

v

S

Hearing: 30 April 2024

Appearances: C P Howard and K F R Karpik for Crown
M S Williams and A M H Cranstoun for Defendant

Sentence: 30 April 2024

SENTENCING NOTES OF O'GORMAN J

Solicitors/Counsel:
Kayes Fletcher Walker, Auckland
Public Defence Service, Manukau

Introduction

[1] Mr S, you are for sentence today, having been found guilty by a jury on two charges, namely that you murdered your eight-month-old daughter, F, and that you assaulted her on at least one other prior occasion.

[2] When a person is convicted of murder, they must be sentenced to life imprisonment unless a sentence of life imprisonment would be manifestly unjust.[1] If life imprisonment is imposed, a minimum period of imprisonment, or MPI, must then be set. An MPI is the time that must be served in prison before you are eligible to be considered for parole.

[3] The Crown submits that a sentence of life imprisonment is appropriate — there are no circumstances that would make that sentence manifestly unjust. The Crown also takes the position that an MPI of 17 years is triggered and appropriate in terms of s 104 of the Sentencing Act 2002.

[4] On your behalf, Mr Williams responsibly accepts that position.

[5] Before I address the sentencing aspects, it is necessary to summarise the circumstances of the offending.

Summary of offending

[6] The critical events for the murder conviction occurred between Friday 20 May 2022 and Monday 23 May 2022. At that time, you were 24 years old. You had been in a relationship with Ms P for several years and were living together. Your daughter F was almost nine months old. By your own account, you never bonded well with your daughter, and felt she had not warmed to you.

[7] On the evening of Friday 20 May 2022, you went into the bedroom where F was supposed to be sleeping. F looked up at you and started crying. She behaved like she was scared of you, and that reaction made you angry. So you decided she needed

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1 Sentencing Act 2002, s 102(1).

a hiding. You wanted to discipline her, and you thought that giving her a hiding would end your anger.

[8] Your assault of F on that Friday evening happened in a continuous act taking only a minute or two:

(a) First, as F was lying flat on the bed, you slapped her legs four times, then slapped her hand. You used an open palm for these strikes.

(b) You then lifted F into a sitting position so you could punch F several times in the stomach. You said you used seven out of 10 force for these closed-fist punches. Assessing your demonstration of this in the police interview, the blows would have been serious for an adult, let alone an eight-month-old baby. The last of these punches knocked F flat onto her back on the bed.

(c) You then lifted F back into a sitting position. This time you kept one hand behind her head while you punched her again in the stomach. It was this final punch that was likely the fatal blow.

[9] The medical evidence established that your punches ruptured F's bowel. Her internal organs were compressed up against her backbone, causing her bowel to perforate. Over time, this led to inflammation and infection (peritonitis), resulting in F's death three days later.

[10] F's mother, Ms P, was possibly having a shower when you committed the assault on the Friday night — she was unaware of it. Later that night, friends visited. You all discussed that F seemed unwell, but you did not tell anyone what you had done.

[11] Over the course of the weekend, you watched F's symptoms get worse. By Sunday at the latest, dark bruising on her stomach was visible and you had seen it. You still did nothing to get medical attention for F, nor did you tell Ms P what you had done.

[12] It was not until after 6.55 pm on Monday 23 May 2022 that you first admitted to Ms P that you had punched F in the stomach. Ms P and her friend took F to the Ōtara medical centre, arriving at around 9.17 pm on the Monday night. Soon after arrival, F became unresponsive. A doctor performed CPR, but it was too late. At around 9.45 pm the doctors determined that F had died.

[13] You were interviewed by police immediately afterwards but did not admit to any assaults. Over a week later, on 31 May 2022, you went to the police station voluntarily to make another statement. That interview was video recorded. At first, you only admitted to giving F a hiding by slapping F's legs four times and smacking her hand. It was not until much later in the interview, after you had been told about the forensic results, that you admitted the full scale of the blows that you inflicted on Friday 20 May 2022.

[14] The Crown did not suggest at trial that you actually intended to kill F;[2] rather it alleged a reckless murder done in a fit of rage.[3] You defended the murder charge by arguing you were guilty of manslaughter, but that it did not occur to you that F could die from the punches you inflicted. The jury who heard the case rejected that explanation and found you guilty of murder. Consistent with the jury's verdict, you simply must have known that there was a risk of death from hitting a young baby so violently, particularly in the vulnerable area of the abdomen.

[15] The jury also convicted you of a representative charge of assaulting F on at least one prior occasion, by slapping her. The medical evidence showed a pattern of injuries establishing other previous trauma (such as healing fractures), consistent with prior abuse, but these are possibly explained by a series of accidents. Whether or not you caused those other injuries, the assault that caused death was a severe escalation from your wrong attitude, despite warnings, that smacking is a valid form of discipline.

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2 Crimes Act 1961, s 167(a).
3 Section 167(b).

Pre-sentence report

[16] I now turn to the pre-sentence report. Mr S, you are now 26 years old. There is nothing remarkable about your personal background in the pre-sentence report. You arrived in New Zealand from Samoa in 2017 and had support from friends and other family members. At the time of your offending you used drugs regularly, particularly on weekends, but you had no criminal history. You admitted to daily alcohol use but you did not characterise your use of alcohol and drugs as problematic.

[17] Most significantly, you did not express any remorse or regret for your actions, other than feeling sorry for yourself and your family. The report writer identified that you appear to have an inflated sense of self-entitlement, with no proper boundary against using violence when reacting to situations that make you angry, or as a method of control.

Victim impact statement

[18] The victim impact statement, which I have read, reveals profound grief for the loss of a much-loved daughter. Of course nothing that I say can take away that enduring loss and pain. It also expresses remarkable forgiveness, and a hope that you would seek the same.

Purposes and principles of sentencing

[19] The Sentencing Act sets out various purposes of sentencing,[4] and the principles that the Court must take into account.[5]

[20] In sentencing you, I seek to hold you accountable for the immeasurable harm that you have caused by ending F's life, including the immense loss suffered by family and friends. The purposes of the sentence I impose today are to denounce your conduct, promote in you a sense of responsibility, deter you and others from committing similar offending, and protect the community from you.

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4 Sentencing Act, s 7.
5 Section 8.

[21] I am required to take into account the gravity of your offending, the general desirability of consistency with sentencings in similar cases, any victim impact statement, your personal circumstances and background, and I must impose the least restrictive outcome that is appropriate in the circumstances.

Framework for sentencing — s 102

[22] Section 102 of the Sentencing Act contains a presumption of life imprisonment in sentencing for murder unless the circumstances of the offence and the offender would render such a sentence manifestly unjust.[6] The presumption of a sentence of life imprisonment for murder recognises the sanctity accorded to human life in our society, and our community's abhorrence of the crime of murder.[7]

[23] A sentence of life imprisonment would mean that you must remain in prison throughout your life unless and until the Parole Board releases you into the community, on parole, at the end of the minimum non-parole period set by the Court. If you were to be granted parole and released into the community, you may only remain in the community so long as you comply with your parole conditions and do not reoffend. The sentence of life imprisonment would mean that you would always remain liable to be recalled to prison to complete your sentence.

[24] The Court may determine that a sentence of life imprisonment would be manifestly unjust, having regard to the circumstances of the offence and the offender. Those relevant circumstances may include that young persons aged 18 to 25 tend to have poor impulse control and difficulty in regulating emotions.[8] However, in *Kriel v R,* the Court of Appeal confirmed that the fact of youth alone cannot displace the presumption of life imprisonment.[9]

[25] You were 24 years old at the time of the offending, near the top of the "young person" range. Weighed against the seriousness of your offending, your youth does not displace the presumption and there are no other significant mitigating

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6 Section 102.
7 *R v Williams* [2005] 2 NZLR 506 (CA) at [57].
8 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [78], [86] and [177]; and *Frost v R* [2023] NZCA 294 at [99]–[100].
9 *Kriel v R* [2024] NZCA 45 at [102], referencing *Dickey*, above n 8, at [167].

circumstances. In other words, I do not consider that a sentence of life imprisonment would be manifestly unjust. That is the sentence that I impose.

Minimum term — ss 103 and 104

[26] If a sentence of life imprisonment is imposed, it is necessary to set a minimum non-parole period.[10] That is the minimum period of imprisonment, or MPI, you must serve before you are eligible for parole. Whether you are granted parole will be for the Parole Board to decide.

[27] The minimum term may not be less than 10 years, and must be the minimum period of imprisonment that the Court considers necessary to satisfy all or any of the following purposes:[11]

(a) holding you accountable for the harm done to F and the community by your offending;

(b) denouncing the conduct in which you were involved;

(c) deterring you or other persons from committing the same or a similar offence; and

(d) protecting the community from you.

[28] Section 104 of the Sentencing Act provides that the Court must impose an MPI of at least 17 years in specified circumstances unless it would be manifestly unjust to do so. The specified triggers list the most serious kinds of murder. The circumstances listed in s 104 include:

(a) if the deceased was particularly vulnerable because of her age, health, or because of any other factor;[12] and

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10 Sentencing Act, s 103(1)(a).
11 Section 103(2).
12 Section 104(1)(g).

(b) if the murder was committed with a high level of brutality, cruelty, depravity or callousness.[13]

[29] There is no doubt that s 104 is engaged. F was an eight-month-old baby in your care. She was particularly vulnerable. That factor on its own triggers s 104. I also consider that the murder was committed with a high degree of callous indifference,[14] also shown by your subsequent failure to obtain medical care for her.[15]

[30] If one or more of the s 104 factors are present, a two-step process must be followed:[16]

(a) First, I must consider the degree of culpability in this case compared with other similar cases, having regard to relevant aggravating and mitigating factors. If an MPI of 17 years or more is identified at this stage, then the MPI imposed must reflect that assessment.

(b) Second, if an MPI of less than 17 years is identified in the first stage, then the Court must consider whether imposing an MPI of 17 years would be manifestly unjust.[17] In that event the Court must set an MPI at a justified level.

[31] The aggravating factors in this case indicate a high degree of culpability, because of the callous indifference you showed by beating a vulnerable eight-month-old baby in the stomach, when she was dependant on you as her father and caregiver. The violent homicide of babies by those responsible for their care is of grave concern to the community.[18] In terms of mitigating factors, you were 24 years old and had no previous convictions, but these factors do not materially diminish your culpability. You had assaulted F before by slapping her, and you had been warned that was illegal and wrong. Now two years older, you have still not demonstrated any real insight or remorse for your actions.

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13 Section 104(1)(e).
14 *R v Gottermeyer* [2014] NZCA 205 at [79](a).
15 *R v Brown* [2023] NZHC 1267 at [28].
16 *R v Williams*, above n 7, at [52]–[54].
17 This is an easier threshold to meet than for s 102: see *R v Williams*, above n 7, at [57]–[68].
18 *Lackner v R* [2015] NZHC 690 at [17].

[32] A sentence of life imprisonment with a minimum period of 17 years' imprisonment for your offending is consistent with sentencing decisions in similar cases. I refer in particular to three cases by way of comparison:

(a) *R v Solomon*:[19] When Mr Solomon was 24 years old, he murdered his five-month-old daughter, while his partner was shopping and the baby was left in his care. Mr Solomon had used cannabis that morning. The baby died of blunt force trauma to the head and leg. Mr Solomon called 111 emergency services and performed CPR until the paramedics arrived. He said he was sorry for what happened, but he maintained the baby slipped from his hands when he was lifting her from the bath. The Court adopted an MPI of 17 years and was critical of Mr Solomon's irresponsible use of cannabis and giving a false account.[20] I consider your offending to have a similar level of culpability. In terms of the key differences, by 31 May 2022 you did provide an accurate account of the physical assault. On the other hand, following your violence towards F, you did not take immediate steps to get her medical assistance, unlike Mr Solomon. Overall, *Solomon* is quite a similar case, justifying a consistent sentencing approach.

(b) *R v Taylor*:[21] Mr Taylor was 23 years old when he was sentenced for murdering his partner's 15-month-old son. Mr Taylor snapped from frustration about being unable to settle the baby and was genuinely sorry for the death. A prior concussion might have been a factor contributing to his loss of control.[22] The Court concluded that, but for s 104, a period of at least 16 years would have been justified. Accordingly, a 17-year MPI was not manifestly unjust.[23] I consider your offending more culpable than Mr Taylor's, because of your lack of remorse and no other explanation for your lack of control.

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19 *R v Solomon* [2016] NZHC 1653.
20 At [49] and [66].
21 *R v Taylor* [2017] NZHC 1257.
22 At [19].
23 At [22]–[24].

(c) *R v Brown*:[24] When Mr Brown was 21 years old, he murdered a two-and-a-half year-old girl living in the same house, in circumstances where Mr Brown had assumed a level of responsibility approaching that of a parent or guardian. Mr Brown had tested positive for COVID-19 at the time and was isolating. Overcome with anger and frustration, Mr Brown struck the girl causing subdural haemorrhaging and spinal fractures. The pre-sentence report described Mr Brown's childhood trauma and a lack of positive role models. The Court adopted a nominal MPI of 15 years, taking into account the lesser self-control of a 21 year old, compounded by his COVID-19 status and deprived upbringing.[25] I consider your offending more culpable than Mr Brown's, because you were older, not suffering any medical issues, and not impacted by any identified deprivation factors.

[33] Taking into account these and other similar cases,[26] I consider that an MPI of 17 years would have been appropriate had s 104 not applied. Therefore the imposition of the statutory minimum of 17 years' imprisonment cannot be said to be manifestly unjust.

[34] The murder conviction eclipses your other conviction of assault for slapping in terms of significance. On its own, I consider that a sentence of three months' imprisonment would have been appropriate for the assault of an infant child by slapping,[27] but I do not apply any further uplift. The weight of that offending has already been taken into account in determining whether the 17-year MPI is manifestly unjust.

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24 *R v Brown*, above n 15.

25 At [46].

26 *R v Ellery* [2013] NZHC 2609; *R v Lackner*, above n 18; *R v MS* [2017] NZHC 2066; and *R v Wakefield* [2019] NZHC 1629.

27 Starting points of six months' imprisonment were adopted in *V v Police* [2015] NZHC 2284 at [16]; and *Kawhena v Police* [2014] NZHC 908 at [19]. Both involved an isolated assault on a child victim with a hand on the face and bottom. In both of these cases, an end sentence of home detention was imposed on appeal.

[35] For now, it is difficult to weigh your prospects of rehabilitation. In theory, as a relatively young person, those prospects should be reasonable, but that will require you to be more realistic and acknowledging the gravity of your wrongdoing.

[36] Mr S, would you please stand.

[37] For your crime of murdering F, I sentence you to life imprisonment. You are to serve 17 years as a minimum period of imprisonment.

[38] For the crime of assaulting F on another occasion by slapping her, I sentence you to three months' imprisonment.

[39] Both sentences are to be served concurrently.

[40] You may sit down Mr S. We will now continue addressing the question of suppression.

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O'Gorman J