IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2021-092-8669
[2024] NZHC 332

THE KING

V

NIKITALOVE TE KOTIA

Hearing:	27 Februray 2024
Counsel:	L P Radich and B T Vaili for Crown E P Priest and P D Wilks for defendant
Sentence:	27 February 2024

SENTENCE OF JOHNSTONE J

Solicitors:
Kayes Fletcher Walker, Auckland

[1] Nikitalove Te Kotia, I will now sentence you for the manslaughter of your daughter, Arapera Fia. You may sit down. It's going to take me some time to let you and the other people here in Court know the reasons for the sentence I will impose.

Offending

[2] Arapera was born in September 2019, when you were 19 years old. You had been in a relationship with her father, Malcom Fia. And your relationship with Mr Fia continued for a while after Arapera's birth. But around the early part of 2021, it went downhill. Mr Fia moved out to live with your parents, and after a short while you moved with Arapera into a home on Gibbons Road in Weymouth, South Auckland.

[3] Around mid-2021, you were in contact with Tyson Brown, whom you had met some years before. Mr Brown started spending nights with you and Arapera in the main house at Gibbons Road. In mid-August 2021, New Zealand moved into full lockdown under Level 4 of the COVID-19 Alert System. Auckland moved only to Alert Level 3 in early October 2021, and remained there for many weeks.

[4] There were tensions in the home. A neighbour heard Mr Brown screaming and swearing at Arapera, telling her to be quiet or else she would "get it". And a young couple who were staying in the sleep-out behind the main house, Kiana Funaki and Jacob Hansen, would occasionally hear yelling and banging from within the house, Arapera crying, and Mr Brown yelling at her and telling her to "shut up".

[5] By late October 2021, Arapera was being hurt, unnecessarily. On 26 October 2021, Ms Funaki entered the main house from the sleep-out, to find Arapera in the living area on her own. Ms Funaki noticed and took photographs of bruising to Arapera's body in various places. Other photographs taken of Arapera during the period 25 October to 27 October 2021 appear to show other soft tissue injuries.

[6] A TikTok video taken on 30 October 2021 shows you energetically engaged with the camera recording the video, and Arapera standing passively in the background with visible facial bruising. Later on 30 October 2021, banging and yelling was heard

from inside the main house, with Mr Brown shouting "shut up, stop crying" and Arapera screaming and crying.

[7] There is a possibility that at least some of the injuries seen prior to 31 October 2021 were caused by Arapera falling from a small plastic slide on which it was her habit to play outside the house. But by the end of that month, it is clear that you were starting to overlook your responsibilities towards Arapera. You had isolated yourself from the support that your family may have offered, preferring to be independent. You had become inattentive to Arapera, and self-absorbed. And Arapera was being physically hurt: grabbed with force or struck, by what in a misguided way you may have thought of as imposing some kind of discipline. I think that most of this physical hurt was being caused by Mr Brown, rather than by you.

[8] In coming to this view, I have put aside what the Crown alleges in its draft summary of facts about what the night Ms Funaki and Mr Hansen say they came into the kitchen of the main house involved, when they heard Mr Brown interacting with Arapera and you making a comment about a "hiding". And also the allegations the Crown made about what you did when you took Arapera to a COVID-19 testing facility on 29 October 2021. You denied those aspects of the Crown's summary of facts, which otherwise you accepted when you entered your guilty plea. And although they were covered at Mr Brown's trial, especially when you gave evidence, you were then giving evidence as a witness. You were not taking part in that trial as a defendant, represented by your own counsel whom might have challenged that evidence, such as by asking some questions of their own.

[9] By 31 October 2021, Mr Brown had tested positive for COVID-19 and was isolating in the house. Arapera in particular, but also to some extent you, were in a difficult situation. During the morning of 31 October 2021, you exchanged text messages with Ms Funaki. Among other things, you told Ms Funaki that:

(a) you didn't want to be "stuck" at home with Mr Brown for two weeks;

(b) Mr Brown was stressed about the COVID-19 situation within the household and was agitated by Arapera's "naughty" behaviour;

(c) you and Mr Brown had been swearing at one another the previous day; and

(d) Mr Brown had been, to quote from one of your text messages, "throwing shit around".

[10] You asked Ms Funaki not to say anything to Mr Brown, as you did not want him to get "any more angry".

[11] By the afternoon of 31 October 2021, you knew enough about what Mr Brown had been doing to know that, if you left him and Arapera alone together in one part of the house while you were in another, there was a real prospect of him being violent towards her. But, during that afternoon, you answered a call from the COVID-19 Public Health Service. The call started at 3.51 pm on 31 October 2021, and it took half an hour. During the call, you left Arapera alone with Mr Brown in her room.

[12] In that half-hour period, Mr Brown inflicted severe head injuries upon Arapera that later proved fatal. From the sleep out, Mr Hansen heard banging noises coming from within the main house, and Mr Brown yelling at Arapera. Mr Brown was saying "get the fuck up", "stop crying", and "shut up". Mr Hansen could hear Arapera crying throughout.

[13] As a parent with care of a child under 18 years of age, you had a legal duty to take reasonable steps to protect Arapera from being injured. You were not present in the room when Arapera was killed. You did not know Mr Brown was going to murder Arapera. It might even be said that you were trying in some ways to look after Arapera, as well as yourself, by taking that call from the COVID Healthline and talking about how you were going to get food and otherwise work through your period of isolation with Mr Brown. But your failure to protect Arapera, from the violence Mr Brown inflicted upon her while you were on the phone, involved a major departure from the standard that was expected of you. That decision to take the COVID call and to keep talking for half an hour, leaving Arapera with Mr Brown, is ultimately the reason you are being sentenced for the crime of manslaughter.

[14] After you got off the phone, there was a delay of around an hour before you started to make a series of internet searches on your cell phone. The first search on your phone was "what happens if a baby's lip has ripped from the inside". Your searches went on to seek advice about babies with concussion and how best to wake them. You did not call for an ambulance until just after 8 pm.

[15] I infer from this sequence of events that you did not immediately know of, or even suspect, an assault as serious as that which had occurred, and that you did not check in on Arapera in any meaningful way, after you got off the phone, for that first hour. Here, I reject the Crown submission that your inaction during the fatal beating, while you were on the phone, could be considered cruel. In fact, the worst the summary of facts establishes is gross negligence, which after all is the reason your actions met the threshold for manslaughter.

[16] I also infer that even then Mr Brown misled you about what he had done, and that this, along with your inattentiveness, the presence of COVID-19 in the household, and your poor decision-making, meant that any remote prospect of saving Arapera's life was lost.

[17] Attending ambulance officers were able to detect faint traces of life. But Arapera was formally pronounced dead, soon after midnight, shortly after she had been taken to hospital. Because of the severity of her injuries, it is quite likely that Arapera would still have died, even if you had called for an ambulance as soon as you realised she had been hurt.

General matters

[18] In sentencing you, I must have regard to the purposes and principles of the Sentencing Act 2002, to the extent they are relevant. In your case, I consider the relevant purposes are those of:

(a) holding you accountable for the harm done to Arapera and to other members of her family;

(b) promoting in you a sense of responsibility for and acknowledgement of that harm;

(c) providing for the interests of those victims;

(d) denouncing your conduct (not the conduct of Mr Brown); and

(e) assisting in your rehabilitation.

[19] The relevant principles are those of:

(a) taking into account:

(i) the gravity of the offending in this case, including the degree of your individual culpability;

(ii) the general desirability of consistency with sentencing in other cases of similar culpability;

(iii) information about the effect on other family members; and

(iv) your personal, whānau and cultural background; and

(b) imposing the least restrictive outcome that is appropriate in the circumstances.

[20] I recognise the suffering of all of those family members that Arapera has left behind. I acknowledge the heartfelt statement read to me this morning by her father.

[21] In seeking to meet the purposes and principles of sentencing, I will select a starting point based on your actions and your decision-making on the day you committed this offence, and the terrible harm caused by those things. And I will make

adjustments to that starting point so that the final sentence reflects wider aspects of your circumstances as an individual.[1]

Starting point

[22] Sentencing for manslaughter, and in particular the selection of a starting point, is widely variable, because manslaughter is an offence that can be committed in many different ways, with differing levels of blameworthiness on the part of the offender.

Case comparison

[23] The Crown has referred me to two cases it suggests might assist.[2] It accepts that the one it says is most similar to yours,[3] where a starting point of eight to 10 years' imprisonment was indicated, is more serious. But even so, the starting point of seven years' imprisonment that the Crown has recommended to me for your offending seems to be based substantially upon that case.

[24] I can tell you now that I do not think the Crown's comparator cases offer any real assistance.

[25] In the case that the Crown says is most similar to yours,[4] the similarities are that a young mother saw bruising on her seven month old girl's body, around a month after they had started living with the young mother's new partner. But that was not the point at which the mother allowed the new partner to kill her girl. Instead, after seeing the bruising, the woman saw worse physical abuse of the girl, over a period of weeks, including her being punched in the face, a finger being put down her throat and thumbs into her eyes. In fact, the woman pleaded guilty to a separate charge relating to those weeks, of acting cruelly towards the girl. And then, in the final days of the girl's life, there was a period of three days when the partner's assaults became even more serious and frequent, and still the young woman did not protect her or seek medical treatment. The girl's cause of death, once it came, could not be traced to only

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1 *R v Taueki* [2005] 3 NZLR 372 (CA); and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46].
2 *R v Harris* HC Wellington CRI-2004-078-1816, 26 August 2005; and *R v Kuka* [2009] NZCA 572.
3 Referring to *Harris.*
4 Referring to *Harris.*

one episode. It was her multiple injuries, suffered over the previous eight weeks, that killed her.

[26] In the other case,[5] the young mother's conduct was so poor she was convicted of two manslaughters relating to the same person. This was because not only, like you, did she fail to prevent violence against her daughter, but once the daughter had been injured, that mother also failed to get medical treatment which probably would have saved her life.

[27] You may remember that, before you pleaded guilty, the Crown's manslaughter charge against you claimed that you committed the offence in both of these ways. When you indicated that you would plead guilty, the Crown dropped the allegation that you caused Arapera's death by failing to get her medical assistance after she had suffered injury, and I think that was for good reason. As I have said, it is quite likely that Arapera would have died even if you had called for an ambulance as soon as you realised she had been hurt.

[28] Because of these differences, I do not accept the Crown's suggested starting point of seven years' imprisonment. Your case is nothing like those cases, where higher, but not much higher, starting points were adopted.

[29] Your lawyer, Ms Priest, has referred me to other cases where children have been killed by their mothers, or in one case, by his grandmother.[6] The starting points selected in those cases range from three to five years' imprisonment. I think the culpability in your case compares more closely to these cases.

[30] In each of them, the women all failed to protect the children from dangerous circumstances, making poor decisions while affected either by drug use or mental ill health. Your case is a little different in that you were aware, for at least a few days, of the prospect of Mr Brown being violent to Arapera. The danger in those other cases cropped up only just before the child died. On the other hand, there was no third person in those other cases whose actions directly caused the child's death. The

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5 Referring to *Kuka.*

6 *R v Tukiwaho* [2012] NZHC 1193; *R v Peterson* HC Whangarei, CRI-2007-088-899, 20 December 2007; *R v Parangi* [2019] NZHC 996; and *E v R* [2011] NZCA 13, (2011) 25 CRNZ 411.

offenders in those cases were entirely to blame, not jointly to blame, like you. And the fact that you and Arapera were having to isolate with Mr Brown due to COVID-19, and therefore realistically you had a limited ability to remove her entirely from the danger he presented, is in my view very significant. The Crown submits that you becoming in effect "stuck" with Mr Brown was as much your fault as anyone's. But in light of your age, and your social and psychological background, which I will come to in the next part of this discussion, I do not intend to hold that against you. I mention here the research that Ms Priest referred me to about the issue of social entrapment.[7] It is not squarely on point, but it has some relevance.

Conclusion

[31] Bearing in mind that you choosing to leave Arapera with Mr Brown while you took and remained on that phone call had such serious, albeit unintended, consequences, and that I need to hold you accountable for that and to provide for the interests of Arapera's other family members, I select a starting point of four years' imprisonment.

Personal circumstances

[32] Turning to your more general circumstances as an individual, there are a range of reasons why I should make deductions from that starting point, and which together lead me to a sentence that is much less severe.

[33] Starting with the factors that the Crown has anticipated need recognition:

(a) I agree with the Crown submission that a 10 per cent deduction for the generally mitigating effect of the youth of an offender is appropriate. You were aged 21 at the time you allowed Mr Brown to kill Arapera. Young people are vulnerable to poor, age-related decision-making until they grow out of adolescence aged around 25. And their potential for rehabilitation following their offending is greater than that of full adults.

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7 Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" [2018] NZ L Rev 181 (2018) 181.

(b) And I will recognise the modest contribution you made to the resolution of your case by pleading guilty. I describe that contribution as modest, because having pleaded guilty you applied to vacate your guilty plea. Although you were unsuccessful, doing so set back this sentencing date by many months, delaying this case not just for you but for other members of Arapera's family. And the basis on which you made your application means I cannot give you any credit for acknowledging your wrongdoing. Without the application to vacate your guilty plea, your discount might have been up to around 15 per cent given it was entered only a few days before your trial. Because of your application, it must be considerably less. But it did at least mean the jury did not have to address your liability as well as that of Mr Brown. I will allow a five per cent discount.

[34] Next, I intend to recognise that following your guilty plea you gave evidence.

[35] Frequently, offenders who give evidence against their former co-defendants receive a sentencing credit for what is described as providing assistance to the authorities. But when you gave evidence, it is doubtful you had any intention of providing assistance. In fact, your evidence, suggesting that prior to your phone call from the COVID Healthline you were not aware Mr Brown was being violent towards Arapera, contradicted both the Crown's case at trial, and the guilty plea you had entered only a couple of weeks before.

[36] But that said, what did happen when you gave evidence, as the Crown when they called you as their witness will have anticipated, was you were exposed to cross-examination by Mr Brown's lawyer. And following Mr Brown's instructions his lawyer took you through a range of matters, including the intensely emotional conversations you had with Mr Brown after the event, which the police had secretly recorded, the lawyer suggesting to you that you knew Mr Brown was genuinely sorry but innocent, and that it was actually you who had killed Arapera. Now of course, the jury having watched your evidence rejected the idea it was you who killed Arapera. The jury found beyond reasonable doubt it was Mr Brown who was the killer. But the fact remains that in the course of this case, having formally admitted your role in your

child's death, such that you were no longer on trial, you have had to sit in a Court room, for a period of days, publicly re-living your child's death, and having your naivety and your blind loyalty to your child's manipulative killer exposed.

[37] Having observed you and your clear distress during that period, I consider your experience in Court as a Crown witness to have amounted to a form of punishment, undergone broadly in the interests of ensuring Mr Brown received a fair trial. In light of your decision to give evidence, and the distressing consequences for you of that decision, I take the view that I should moderate your sentence by 10 per cent.

[38] Further, I intend to recognise your wider personal situation, your family and cultural background. I have received reports on these matters and on other aspects from registered clinical psychologist Maria Purcell, from consultant forensic psychologist Sarah Bramhall, and from a sociologist, Tara Oakley.

[39] Dr Purcell's view is that in the weeks leading up to Arapera's death you met the diagnostic criteria for post-traumatic stress disorder, due to a range of traumatic events occurring during your upbringing and in your teenage life (including regular exposure to domestic violence involving others), and also the diagnostic criteria for a substance abuse disorder. Dr Purcell was unable to confirm whether your current view, that you did not know Mr Brown was being violent towards Arapera, was caused by you withholding information or by memory impairment associated with PTSD. In any event, the symptoms consistent with PTSD have unsurprisingly been exacerbated following Arapera's death. Dr Purcell reported your positive engagement with treatment sessions. Overall, she considered your risk of reoffending as low.

[40] Ms Bramhall's assessment is that your risk of violent reoffending is below average. She suggests that a sentence of imprisonment would have a particularly destabilising effect on your fragile mental state, and on your relationship with your daughter who is now around 14 months old. Ms Bramhall reports that you have worked closely with Oranga Tamariki and with your mother and other whānau to establish a close bond with this daughter, although you have been unable to live with her most of those 14 months while on bail and your visits have had to be supervised throughout.

[41] Ms Oakley reports that the operative or proximate factors contributing to your offending included a normalisation of violence in your background, relationship dysfunction and emotional abuse, and your own substance abuse. I accept and endorse that view. She has updated her report recently to include your account of the reasons behind your application to vacate your guilty plea, and to report you completing substantial courses in family violence prevention and parenting, and also engaging with your church. I have received certificates from those programmes and a character reference from your pastor. I trust that your work in rehabilitation will assist you in time to come to understand, and to take appropriate responsibility for, your role in Arapera's death.

[42] These various reports, and Ms Priest's submissions on your behalf, draw out a range of mitigating features that need to be recognised. They encompass causative factors deriving from your family and cultural background, your personal history (including your lack of previous convictions but also the state of your mental health), the distinctive impact of a sentence of imprisonment upon you,[8] and upon your 14-month old child,[9] your capacity for rehabilitation and your considerable steps taken so far towards rehabilitation. I take the view that in the round I should recognise them with a 25 per cent discount.

[43] Those discounts, amounting to a total of 50 per cent from my four-year starting point, lead to an outcome for the purpose of calculating what types of sentence are available such that I am required to consider whether you should be permitted to serve a sentence of home detention rather than imprisonment.

[44] In that regard, it is clear to me given the way in which your relationships with your mother, your father, your sister and others are being re-established, and your obligations to your child are being recognised by increasing contact under appropriate supervision, that a sentence of home detention is the correct way in which to meet the rehabilitative purpose of sentencing, and to impose the least restrictive available outcome.

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8 *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68]–[70].
9 *Philip v R* [2022] NZSC 149; [2022] 1 NZLR 571.

Sentence

[45] Ms Te Kotia, please stand.

[46] I sentence you for your crime of manslaughter to a sentence of 12 months' home detention, to be served at the address described in your bail bond, dated 18 January 2024, and otherwise upon the conditions specified in the Provision of Advice to Courts (PAC) report dated 24 November 2024.

[47] You may stand down.

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Johnstone J