IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE

CRI-2018-035-001070
[2019] NZHC 3326

THE QUEEN

v

NICHO CALEB FRATER

Hearing:	16 December 2019
Appearances:	C B Wilkinson-Smith and R N Benic for Crown N Levy QC and L C Ord for the Defendant
Judgment:	16 December 2019

JUDGMENT OF COOKE J

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[1] Mr Frater you appear to be sentenced after pleading guilty to one charge of manslaughter. Manslaughter carries a maximum sentence of life imprisonment.[1]

The offending

[2] The victim was eight-month-old Bella. The baby's mother, Kirsty, is your ex-partner. She had told you that you were Bella's father and you took on that role.

[3] At the time of the offending Kirsty and the baby lived at an address in Whanganui with you, your mother, and Kirsty's three other children. You had been living at the address for two weeks, and your mother had moved in with you one week

[1] Crimes Act 1961, ss 171 and 177.

prior. In the short period you were living at the address you had taken on the fathering role for Bella.

[4] On 7 November 2016 Kirsty left the house to take her older children to school. She left Bella at home with you and your mother. When Kirsty returned to the address, Bella was restless. Kirsty departed the address again at around 11.30 am to go to the central shopping district of Whanganui, leaving Bella in your care.

[5] At around midday you went into Bella's room. In a moment of frustration, you threw her to the ground. This was a single incident of short duration. The throw caused head injuries which resulted in Bella's death. Immediately she stopped breathing and went limp. You alerted your mother and called for help. At 12.05 pm you called 111. An ambulance attended and attempts were made to resuscitate Bella. She was taken to Whanganui hospital but pronounced dead at 1.10 pm.

[6] Bella suffered a subdural haemorrhage around the brain and spinal cord, retinal haemorrhage and scattering minor blunt force injuries. She sustained widespread hypoxic brain damage.

[7] You did not admit the offending after her death. Following a police investigation you were charged with Bella's murder in September 2018. You pleaded guilty to manslaughter on 25 October 2019.

The impact of the offending

[8] Bella's grandmother, Lisa, has prepared a victim impact statement on behalf of her family. She describes the unimaginable pain and grief Bella's family has suffered. She says the last three years have been damaging spiritually and emotionally, most significantly for Bella's mother but also for the other children who have received counselling from trauma and have suffered from difficulties in the aftermath of the offending. The family has been broken apart. She says she prays for justice to be served and says that now her granddaughter can rest and the family can begin to move on with their lives.

Personal circumstances

[9] You are 26 years old. You were born in New Plymouth and raised in Masterton. You are single with no dependents. You have little in the way of formal education and left school at age 16. You reported a close relationship with an aunt and receive support from your mother. You have no relationship with your father, who denies paternity.

[10] A letter from your aunt provided to the Court explains the family has a history of drug addiction and family violence, with your mother experiencing verbal and physical abuse at the hands of your grandmother and then an abusive partner. She explains you came to live with her a few times because your mother was unable to cope with raising three children and unable to show love or affection towards them. She describes you as a loner and naïve. She said you were shy and had difficulty expressing yourself and would often lash out at others. To her credit she continues to support you, visiting you in prison and writing you letters.

[11] Information from the Oranga Tamariki file confirms that you had a very difficult childhood. When you were 11 you were diagnosed with ADHD and ODD. Apart from periods of time where you lived with your aunt, you were placed in a Barnardos home at age 15 at which stage it was reported that you showed signs of psychological distress and suicidal ideation. Apart from the love shown to you by your aunt it seems to me that you have had a deprived upbringing.

[12] You are of Māori descent on your father's side. You say you have had little connection with your Māori heritage but recall completing a Tikanga Māori programme in prison and expressed a desire to further your knowledge.

[13] You have a history of drug abuse, reporting using methamphetamine and cannabis from the age of 18. At the time of the offending you reported using methamphetamine on a weekly basis and cannabis almost daily.

[14] You have 39 previous convictions. You have already served several sentences of imprisonment. The majority of your convictions are for family violence or dishonesty related offending, most seriously for assault with a weapon, threatening to

kill and male assaults female in 2016. You are the current respondent in a protection order naming your mother as the protected person.

[15] Your previous offending does not involve violence against children however. Your offending is usually associated with drug and alcohol abuse. You say you had not consumed drugs on the day of the offending but had used methamphetamine that week and was suffering from a come down. The pre-sentence report assesses you at a high risk of reoffending.

[16] You have accepted the summary of facts was an accurate reflection of your offending. The report writer recorded you had verbalised your remorse, but your true feelings were difficult to ascertain. You explained that you had been unable to settle the infant and had been frustrated and agitated with her irritability. You said your actions had been spur of the moment, and you had tried to block out the incident from your memory as you did not feel great about what you had done. You said you had written the child's mother a letter of apology. You said you wanted to use your time in prison by taking advantage of training and courses and use that education to become a better person in the future.

Starting point

[17] The appropriate approach to setting your sentence involves identifying a starting point in terms of the period of imprisonment. That starting point is based on the seriousness of the offending. When identifying the starting point I look at cases where similar offending has taken place and seek to identify where your case fits with other cases in terms of the seriousness of the offence. After I have identified that starting point I then make appropriate increases or decreases in light of your personal circumstances.

[18] In making these decisions I must apply the principles and purposes of the Sentencing Act 2002. Amongst the most relevant factors in your case are the need to hold you accountable for the offending, to identify your responsibility for it, to denounce your conduct and deter others from committing similar offences. But it is also important to assist your rehabilitation and reintegration into the community and I should impose the least restrictive outcome that is appropriate in the circumstances.

[19] There is no tariff case for manslaughter. Sentences range from conviction and discharge to life imprisonment, reflecting the wide variety of circumstances for this type of offending.

[20] Parliament amended the Sentencing Act in 2008 to emphasise its concern about cases involving violence against children. Section 9A provides the Court must take into account aggravating factors such as the defenceless state of the child and the scale of the breach of a relationship of trust when sentencing in a case involving violence against a child under 14 years. Successive courts have recognised s 9A as indicating Parliament's intent for tougher sentences for violent offending against children.[2]

[21] In *R v Leuta* the Court of Appeal indicated when declining to set a tariff decision for these cases that the best guidance was to be found in the starting point involved in similar cases, whilst noting that they were a guide and that such cases could not govern.[3] After reviewing a range of cases, in *R v Pene* the Court of Appeal later identified a range of five to seven years as arising from offending of this kind.[4] Cases involving the manslaughter of young children from a single violent incident have sometimes attracted higher starting points however, with the general range being between five to nine years.[5] Where there is particular cruelty or multiple acts of violence, a starting point of ten years and higher has been adopted.[6]

[22] I consider the offending in this case involved three key aggravating factors. First, the total vulnerability of the victim as an eight-month-old child. Second, the magnitude of the breach of trust. You were in the role of father since arriving at the address one month prior and were trusted with the solo care of the child on the day of the offending. Third, the level of violence and subsequent injury. Whilst this was an isolated incident, the child was thrown to the ground with sufficient force to cause serious brain damage.

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2 See for example *R v Mitchell* [2017] NZHC 1391; *R v Pene* [2010] NZCA 387.
3 *R v Leuta* [2002] 1 NZLR 215 at [59] and [81].
4 *R v Pene*, above n 2, at [11].
5 *R v Archer* [2019] NZHC 3146; *R v Ikamanu* [2013] NZCA 510; *R v Donnelly* [2011] NZCA 443; *Sami v R* [2019] NZCA 340; and *R v Kinraid* [2017] NZHC 233.
6 See *Woodcock v R* [2010] NZCA 489; *R v Leuta* [2002] 1 NZLR 215 (CA); and *R v Waterhouse* (2004) 20 CRNZ 897 (CA).

[23] On the other hand it is apparent that the act was impulsive. You sought the immediate help of your mother and emergency services. You did, however, then seek to conceal your offending. This had the unfortunate consequence of shifting suspicion for the death to the mother of the child when she was already in a position of unimaginable grief and suffering. The repercussions of you doing so are still felt to this day.

[24] I have considered other authorities which involve similar offending which are unfortunately all too common in New Zealand. Of the cases that have been referred to me I see *R v Mitchell* as the most comparable.[7] In that case a father of an 11 week old infant violently shook the baby in a moment of frustration causing brain injury and death. After reviewing the authorities the Court adopted a starting point of six years' imprisonment. Other cases that might be regarded as comparable, such as *R v Archer* have involved slighter higher starting points — in that case eight years six months.[8] In the circumstances of your case, given the nature of the offending, and the acts that you engaged in, I adopt a starting point of six years six months' imprisonment.

Adjustments to the starting point

[25] I first consider whether there should be any uplifts to the starting point because of factors personal to you as an offender.

[26] The Crown submits an uplift of three months to recognise your offending history is appropriate. Uplifts for previous offending recognise the greater risk of reoffending and the need for deterrence.[9] A cautious approach must be taken to ensure the offender is not subject to a further sentence for offending already punished.[10]

[27] You have a history of similar offending with 10 previous convictions for family violence offences. The present offending however, represents a significant escalation in seriousness and your previous offending has not involved violence against children. A two-month uplift is appropriate in the circumstances.

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7 *R v Mitchell*, above n 2.
8 *R v Archer*, above n 5.
9 *Reedy v Police* [2015] NZHC 1069 at [19], citing *O'Connor v R* [2014] NZCA 328 at [41]; *Tiplady-Koroheke v R* [2012] NZCA 477; and *Hodgkinson v R* [2012] NZCA 478.
10 *R v Casey* [1931] NZLR 594 (CA) at 597, cited in *Wipa v R* [2018] NZCA 219 at [25–[26].

[28] I must then consider whether there should be discounts to reflect your personal circumstances. There have been a number of factors that have been raised in that connection.

[29] First it is apparent that you have had psychological difficulties in your life, partly attributable to your background. Psychological issues that fall short of a definitive mental disorder may mitigate culpability and moral fault and reduce the sentence.[11] But courts are generally reluctant to offer a discount in the absence of evidence identifying the causal impact of the offender's mental health on the offending.[12] In this case I do not consider a discount to reflect mental health is available by itself. There is no evidence to suggest a connection between your difficulties and the offending, or that you were incapable of understanding the moral implications of your actions.

[30] Secondly discounts can be given for remorse. Where there is tangible evidence of genuine remorse, a discount in the range of five to eight per cent might be awarded.[13] Although the pre-sentence report writer noted difficulty in understanding your true feelings, that is not unsurprising given you have difficulty expressing yourself. The report does record that you accept the summary of facts as an accurate representation of what happened and that you do not "feel great" about what happened. Your counsel reports that you have communicated that you feel sorry for the baby's death. I have also been given a letter of apology that you have written to Kirsty and her children. I will provide that to Mr Wilkinson-Smith.

[31] Youth can also be a factor warranting a discount. You are 26 years old but were 23 at the time of the offending. That places you at the upper end of the range where a youth discount is available.[14]

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11 *E(CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411 at [68].
12 See *Nelson v R* [2014] NZCA 121; and *R v M* [2008] NZCA 148.
13 *McArthur v R* [2013] NZCA 600; and *Rowles v R* [2016] NZCA 208.
14 See *Martin v R* [2016] NZCA 213. See also *Rolleston v R* [2018] NZCA 611 at [28]; *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

[32] Finally discounts are possible as a consequence of social and cultural deprivation.[15] This can arise when such deprivation explains, but does not excuse somebody's offending.

[33] I have considered all the factors I have just mentioned — psychological difficulties, remorse, youth and deprivation — collectively. It seems to me that they need to be taken into account as factors that do reduce the level of your culpability. It seems to me that you struggle to fully understand and manage yourself, and that this terrible and tragic and impulsive action you took is partly influenced by those background factors. In those circumstances a total discount in the order of 10 per cent would be appropriate for all of those factors.

[34] In the circumstances the starting point of six years six months, uplifted to six years eight months because of your previous offending should be reduced to six years' imprisonment.

[35] There is then the need for a separate discount to represent your guilty plea. They can range as high as a 25 per cent discount in appropriate cases.

[36] You were first charged with murder in September 2018. Through counsel you offered to plead guilty to manslaughter in 2019. Consent of the Solicitor General to plead guilty to manslaughter was given on 21 October. Entry of the guilty plea was made on 25 October 2019.

[37] I consider a discount of less than 20 per cent and closer to 15 per cent is appropriate to reflect the guilty plea.[16] It would have been greater but for your delay in acknowledging your responsibility, and the implications this had for Bella's mother and the family although I accept that there were other factors in play in that regard. I reduce your sentence from six years to five years' imprisonment for the guilty plea.

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15 *Zhang v R* [2019] NZCA 507 at [158]–[162]; *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.

16 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

Minimum period of imprisonment

[38] There is a further issue to be addressed. Under s 86 of the Sentencing Act the Court is allowed to impose a minimum period of imprisonment in association with a sentence of imprisonment. That means that there is a period you must serve in prison without being eligible to be considered for parole. The circumstances where that is called for is when there is a particular need to hold an offender accountable, denounce his or her conduct, emphasise deterrence or to protect the community.

[39] Minimum periods of imprisonment have been imposed for offending of the kind you engaged in. Here the Crown seek such a period at 50 per cent of the sentence imposed. Your counsel suggests that no minimum term should be imposed.

[40] Having considered cases involving similar offending, it seems to me that such a minimum period of imprisonment should usually only be imposed when the consideration of the concepts of denunciation, accountability, deterrence and protection are not adequately addressed earlier in the sentencing exercise. Minimum periods of imprisonment should neither be routine, or arbitrarily imposed. There needs to be some particular reason why they are necessary.

[41] Here there is no need to impose such a reason for the protection of the community. It is unlikely that you will engage in offending against children of this kind. Whilst there is plainly a risk associated with domestic violence, you will now be serving a lengthy sentence and that risk can be properly addressed by the Parole Board in the normal way. As to the other factors of accountability, responsibility, deterrence and denunciation I have already addressed those in setting the sentence that I have imposed. I see no special need to effectively emphasise those factors again in the circumstances of your case in the form of a minimum period of imprisonment. When minimum periods of imprisonment have been imposed in other cases they have included cases where there has been particular cruelty or ongoing abuse of children. Here there was a one-off impulsive act, and whilst it has had terrible consequences. I have already adequately addressed those consequences in setting the sentence I have determined. I accordingly determine that there will be no minimum period of imprisonment.

[42] There are two final incidental matters. The pre-sentence report notes you have outstanding fines of $2,663.35 and suggests the Court remit those fines. Presumably you have no prospect of paying them. The Crown consents to that course and I duly make that order.[17] I also remit the $50 fine on this occasion. The pre-sentence report also notes that you are currently serving a sentence of intensive supervision which is due to end on 4 January 2020 and requests the Court cancel that at sentence pursuant to s 54(2) of the Sentencing Act. I see no reason why that should not occur and I duly do so.

Result

[43] Mr Frater, on the charge of manslaughter I sentence you to five years' imprisonment. Please stand down.

Cooke J

Solicitors:
Wilkinson Smith Lawyers, Whanganui for Crown
Ord Legal, Wellington for Defendant

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[17] There is a potential issue about this — see *R v Brown* [2009] NZCA 288 at [28]. Fines may be remitted under s 88(3)(h) of the Summary Proceedings Act 1957 if the s 88 procedure has been followed. That process involves the Registrar preparing a report for the Judge. On the other hand, in *R v Nathan* [2018] NZHC 3111 Palmer J remitted outstanding fines when imposing a sentence for an unrelated offence without a report. In doing so he relied on s 19(12) of the Crimes Act and s 88AE of the Summary Proceedings Act.