IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2017-009-007857
[2019] NZHC 1135

THE QUEEN

v

HAYDEN ANTHONY GRAY

Hearing: 23 May 2019

Appearances: D L Elsmore for the Crown
E C Bulger and J M Stringer for the Defendant

Judgment: 23 May 2019

SENTENCING NOTES OF OSBORNE J

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[1] Mr Gray, you were found guilty of two charges of causing grievous bodily harm with intent to cause grievous bodily harm and that followed a Judge-alone trial before me.[1]

[2] You appear today for sentence on those charges.

Facts

[3] The facts of your offending are fully dealt with in the judgment which I delivered on 1 May 2019.[2] It is against the background of those findings that I have to sentence you.

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1 Crimes Act 1961, ss 188(1) (maximum penalty 14 years' imprisonment).
2 *R v Gray* [2019] NZHC 941 (Reasons Judgment); [2019] NZHC 942 (Verdict).

[4] In summary, you inflicted grave injuries upon your infant son, Carter Hutton, who had been born to you and your fiancée, Megan Hutton, on 24 June 2017. The graver of those injuries occurred on 24 July 2017 when you inflicted on Carter very serious head injuries, including brain damage. You caused those injuries either by severely shaking him or violently throwing him against a soft object.

[5] Some 10 days earlier you had inflicted a large number of rib fractures and long bone fractures on Carter. In all he suffered 40 fractures of which at least 15 had occurred on that occasion, some 10 days earlier. The rib injuries were consistent with your having violently squeezed Carter's chest. You caused Carter's other fractures by violently shaking him or violently throwing him against a soft object.

[6] It was clear from the medical evidence that Carter would have been severely hurt by the fractures. There is evidence that he cried a lot around this time and, with the benefit of hindsight, that was consistent with the injuries we now know he suffered. It happens that the nature of the fractures was such that Carter would nevertheless have recovered from them.

[7] What he could not, and never did not recover from, were the injuries you inflicted on 24 July 2017. Again, there were some aspects of those injuries from which, although severe, he might have recovered. That includes the extensive haemorrhaging in his eyes. But his brain injuries which you caused that day meant that a large part of his brain died. He himself ultimately died a year and a day after you inflicted the injuries from complications arising from the injuries.

[8] The extent of his suffering, and the family's suffering, and I mean the broader family, through that period was not directly relevant to my judgment. But it was spoken to in Court by Ms Hutton and through the medical evidence called from the experts. As much as those close to him strove to give Carter a quality of life, the reality is that he had very little quality of life. He had lost the ability to do the fundamental things which normal brain function allows us to do automatically.

[9] His brain never grew after the injuries. To the contrary, the haemorrhaged area of his brain filled with fluid. His short life involved hospitalisations and operations.

His immune system was compromised. His gastric system was compromised. He could not feed other than by tubes or pump. Infections set in and were able to be dealt with for a time. When they no longer could be dealt with, without distressing him further, he was released from his final period in hospital and died in the palliative care of Ms Hutton, Dr Depree and others.

[10] I am turning now to consider particular matters relating to your offending.

Personal circumstances

[11] You are 32 years old and you were 30 years old at the time of the offending. This is your first appearance before the courts on any matter like the present.

Victim impact statements

[12] I have read and heard the victim impact statement read this morning by Ms Hutton. I acknowledge it. I have also read and acknowledge the statement of Carter's maternal grandmother, Valerie Hutton. The anger, grief and the sense of utter loss of which they have spoken is entirely understandable.

[13] In the written references provided by the closest members of your family, who are also victims of your offending, one can also sense their loss and their sadness, although their emotions are set in the context of their statements of support for you and, in some cases, their continuing disbelief that the harm you caused to Carter was other than accidental.

Approach to sentencing – overall approach

[14] In sentencing you today, I must have regard to the sentencing principles of denunciation and deterrence. I also recognise the need to hold you accountable.

Starting point

[15] As both counsel have acknowledged in their submissions, the Court of Appeal has provided guidelines in relation to offences of the type of which I have convicted you.[3]

[16] The Court of Appeal's judgment requires me to consider the combination of factors in this case in order to assess an appropriate sentencing band and then a starting point within that band. In assessing the aggravating features, I also have to take account of factors identified in s 9A of the Sentencing Act as Ms Bulger has referred to as the required considerations when there is violence against children in particular.

[17] The Crown has submitted that a band 3 placement is appropriate, and that indicates a starting point of nine to 14 years' imprisonment. The Crown submits that within that range something in the vicinity of 10 years' imprisonment is appropriate.

[18] For you, Ms Bulger accepts responsibly that a band 3 placement is appropriate. She submits that the starting point should be at the lower end of band 3, but concedes that a higher starting point will be open to me if I view Carter's death as an aggravating feature of your offending.

Matters contributing to the seriousness of this offending

[19] The four aggravating features which I find present are these:

First, extreme violence

The 24 July offence, in particular, involved extreme violence. As explained by Dr Christian:

> I think anybody who saw what happened to Carter would have recognised that this was terrible violence against an infant…

The injuries sustained through the earlier offence in large part must have resulted from your extreme squeezing of Carter's abdomen. The fact that your

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3 *R v Taueki* [2005] 3 NZLR 372.

violence on both occasions was unprovoked is also relevant to this assessment that the violence was extreme.[4]

Secondly, serious injury

Through the 24 July offence in particular, Carter suffered injuries which were potentially fatal and caused long term, permanent disability. The impact of his brain injuries in particular was debilitating and the complications which ensued ultimately resulted in his death.

Thirdly, Carter's vulnerability and defencelessness

There are no more vulnerable or defenceless victims than a baby in his first month of life.

Fourthly, the magnitude of your breach of a relationship of trust

I am required to take into account as an aggravating factor of your offending the magnitude of the breach of that relationship. Your huge breach of trust to Carter on 24 July 2017 is exacerbated by your silence following the earlier offending. At a time when Ms Hutton drew to the attention of the appropriate professionals what she viewed as concerning marks and crying, you remained silent as to the events that had occurred. At that point, the professionals needed to know the full medical history. But by your silence, you kept from them the very information which could have averted your later and much more devastating behaviour on 24 July. Your breach of trust is also heightened, as Ms Bulger noted in her written submissions, by the fact that your 24 July offending occurred when you were alone with Carter.

Other matters informing the seriousness of your offending

[20] Beyond those four factors which I have identified, there are other aspects of your conduct which provide context.

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4 *R v Taueki,* above n 3, at [31](a).

First, the nature of your loss of control

Your conduct on 24 July cannot be attributed to a momentary loss of control. The events associated with your first occasion of offending gave you the opportunity to address any difficulties you were experiencing appreciably before 24 July 2017.

Secondly, the seeking of help on 24 July 2017

I cannot determine the degree of impact your delay in calling 111 had on Carter, other than that it extended the period during which his brain was deprived of oxygen. The fact that you first called Ms Hutton and that it was only on her immediate demand that you called 111 caused a significant delay. I recognise though that in that period you would have been panicking.

Thirdly, suspicion caused to fall upon Ms Hutton

After 24 July 2017, you did not take responsibility for your conduct (beyond explaining it as accidental). You had been told the next day that medical evidence indicated that Carter's injuries had been intentionally inflicted. By your conduct, you caused suspicion to fall on Ms Hutton for some weeks. The consequence of that were that her rights of guardianship were temporarily lost and she was deprived of the opportunity that a mother has to bring her child home into unsupervised care.

Identification of a starting point sentence

[21] In coming to identify a starting point, I am required to make an overall assessment of the culpability of your offending, rather than to focus on the number of aggravating features. I assess your offending as very grave.

[22] There is some overlap between the aggravating features that I have identified, as for instance between the magnitude of your violence and the seriousness of the injuries which Carter sustained. Similarly there is an overlap between his vulnerability and the breach of trust. I recognise those overlaps. I also take into account the need

to avoid any doubling-up in my assessment of gravity by reason of your conviction of two offences.

[23] It is appropriate, having regard to the more severe nature of the 24 July offence, that I consider first the appropriate starting point for that offence.

[24] The range of starting points, as I have said, is between 9 and 14 years.

[25] In the circumstances I take a starting point of 11 and a half years' imprisonment.

[26] The earlier offending involved serious injuries but of a nature distinctly less serious than those you inflicted on 24 July. I consider the appropriate band for that earlier offending is band 2, a range of 5 to 10 years.

[27] In the circumstances, I take a starting point for the earlier offending of nine years' imprisonment.

Mitigating features of the offending

[28] As Ms Bulger has recognised there are no mitigating features of your offending.

Mitigating features of the offender

[29] I now turn to consider whether there are aggravating or mitigating circumstances relating to your particular personal circumstances which require that the actual sentence should be higher or lower than the starting point of 11 and a half years' imprisonment.

[30] Apart from one matter, there are no factors relating to your personal circumstances which can be considered as mitigating factors in this case.

[31] The one matter I will take into account in mitigation is that at 30 years of age you had no criminal history. You are a first offender. As the references provided by Ms Bulger indicate, you have consistently been a loving and responsible member of

your extended family and group of friends if we set this offending apart. You are not one who has resolved conflict through violence – you have been described as "walking away in order to calm situations".

[32] As a person who was 30 years old at the time of the offences, you are not entitled to any discount by reason of youth but I consider you entitled to some discount on account of this previous good character.

[33] Your pre-sentence report suggests that you have a genuine remorse. But the source of that conclusion appears to lie in the fact that you are upset at having caused Carter injuries, which you explain by having rolled onto Carter. You have not in fact demonstrated any remorse for the criminality of your conduct which occurred on at least two separate occasions. A discount for remorse would not be appropriate.

[34] I want to say this to you about your future rehabilitation. Your pre-sentence report indicates that your risk of re-offending is low. Your prospects of full rehabilitation may nevertheless be affected by your continuing refusal, and the apparent inability of those closest to you, to recognise that on at least two occasions you intentionally caused harm to Carter. The Probation Officer reports that you have said that "I feel I don't know myself". That suggests to me that with time you may come to acknowledge what you have done. Your prospects of a full and successful rehabilitation would then be the greater.

[35] From the starting point on each charge – that is nine years' imprisonment on the first charge and 11 and a half years' imprisonment on the second charge – I discount one year on account of your previous good character.

[36] As your offences were of a similar kind and were part of a connected series, your sentences should be served at the same time.[5]

[37] A sentence of 10 and a half years' imprisonment on the 24 July offence, as the lead offence, will reflect the totality of your offending.[6]

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5 Sentencing Act 2002, s 84(2).
6 Sentencing Act 2002, s 85(4)(a).

Conclusion

[38] I ask you to now please stand.

[39] Mr Gray, on the second charge, relating to 24 July 2017, you are sentenced to 10 and a half years' imprisonment.

[40] On the charge relating to the period between 24 June 2017 and 24 July 2017, you are sentenced to eight years' imprisonment, to be served concurrently.

Please stand down.

Osborne J

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