IN THE HIGH COURT OF NEW ZEALAND
WHANGANUI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGANUI ROHE

CRI-2019-083-375
[2019] NZHC 1910

THE QUEEN

v

LORRAINE SMITH

Hearing: 7 August 2019

Appearances: M M Wilkinson-Smith for Crown
C P Brosnahan and L Scott for Defendant

Date: 7 August 2019

SENTENCING OF COOKE J

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[1] Lorraine Smith has pleaded guilty to one charge of murder of her granddaughter, Kalis, aged 13 years.[1] She appears for sentencing.

[2] Counsel for Ms Smith submits that in the circumstances it would be manifestly unjust to impose a sentence of life imprisonment, and a finite sentence in the realm of 10 to 12 years ought to be imposed.

[3] Counsel for the Crown seek a sentence of life imprisonment. The Crown submits that a minimum period of imprisonment of 17 years pursuant to s 104 may be manifestly unjust, and a lesser minimum period of imprisonment of 10 to 14 years is sought.

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[1] This offence constitutes Ms Smith's first strike under the three strikes regime and she was issued with a first strike warning by Simon France J when conviction was entered.

Factual background

[4] Ms Smith is 59 years old. This is her first offence. Kalis and her 16 year old brother lived with Ms Smith. Kalis had been raised by her since she was five months old.

[5] The facts of the offending itself are set out in the summary of facts. On Friday 15 March 2019 Ms Smith drove from her home address to pick up Kalis from a sporting event. They left the event together at 5 pm and returned to their home. Kalis's brother was also at home that day.

[6] At home, Kalis and Ms Smith began arguing in Kalis's bedroom. Kalis's brother could hear them arguing. He heard Kalis say "let go of me, stop pushing me down, I can't breathe I can't breathe" and Ms Smith replying "You want to die anyway don't you". He heard Ms Smith repeatedly telling Kalis to sit down. Kalis went into the lounge and sat on the couch with her head down. Ms Smith went and sat on another couch and watched television.

[7] Some time later, after dinner, another argument began, this time about Ms Smith wanting to confiscate Kalis's electronic devices. Kalis threatened to run away. Ms Smith told her to help her collect the washing from the clothes line outside. Ms Smith threatened to drag her outside if Kalis did not help her.

[8] After collecting the washing together the two continued to argue inside the house. Ms Smith then asked Kalis to go outside with her to help close the windows in the outdoor sleepout. As they walked outside, Ms Smith picked up a neck tie from the kitchen table. Kalis walked to the sleepout, closely followed by Ms Smith. Once inside, Ms Smith approached Kalis from behind and pulled the hood of the sweatshirt she was wearing over her face. She wrapped the neck tie around her neck and pulled it as tight as she could. Kalis struggled and fought back but she was unable to overpower her. Ms Smith continued pulling tightly on the tie until Kalis stopped breathing and then lay her body on the floor.

[9] Ms Smith went back into the house. She told Kalis's brother that she needed to go to the hospital, and she was taking Kalis with her. She phoned her son, Kalis's

father, and told him that she had done something and he needed to call the Police. Ms Smith then phoned 111 and told the operator that she had killed her granddaughter.

[10] Ms Smith then took an excessive amount of anti-depressant medication. She drove to the hospital and told staff what had happened.

[11] Kalis's father arrived at Ms Smith's address. He discovered Kalis on the floor in the sleepout. He started performing CPR on her, but it was too late. Police arrived as CPR was being performed.

[12] Ms Smith told Police everything that had happened. In explanation she said she had been arguing with Kalis that evening. She said they argued because of Kalis's attitude. She had had enough, she said, and wanted everything to stop. She said she had told Kalis to go to the sleepout because that is where she had decided to kill her, and that she had chosen that location because she did not want Kalis's brother to see it. She said she knew Kalis had stopped breathing because she had placed her finger under her nose to check for breathing. She said there was no excuse for what she did.

Victim impact statements

[13] Two statements have been provided to the court, one from Ms Smith's cousin, Ms Lorraine Mathie, and Ms Smith's sister, Ms Mere Titter. Both statements speak of a family who have suffered more than their fair share of tragedy, violence, drug addiction and mental disorders.

[14] The victim impact statements reveal the extent of suffering the family has undergone in the wake of this tragedy. The entire community is devastated. But both speak of Ms Smith's position in her family as the centre of support and guidance. They are adamant this incident was out of character for her and are finding her guilty plea difficult to comprehend.

Section 38 report and personal circumstances

[15] The psychiatric report provided to the Court details Ms Smith's personal circumstances and background. It sets out more detailed information which provides a better understanding of a case which would otherwise be difficult to comprehend.

[16] Ms Smith's life has been marked by hardship and difficult family circumstances. Difficulties in her first relationship lead to two suicide attempts before she fell pregnant at age 18. Her first son, A, had severe behavioural difficulties. Her second son Jordan was born with a congenital disorder some 12 years later. He has no functional vision, and has developmental delay and limited motor skills. He is unable to talk, or to feed himself and he is incontinent. He suffers from epilepsy and functions at the cognitive level of an 18 month to two year old child. Ms Smith has been his primary carer until he went into state care at the age of 21.

[17] In 1999, when Jordan was 10, he became very sick and nearly died. Ms Smith became overwhelmed and suffered a breakdown and considered smothering Jordan with a pillow. He was then placed in voluntary temporary foster care by Child Youth and Family for eight months. At that point Ms Smith sought counselling and started anti-depressant medication.

[18] Ms Smith's older son A, Kalis' father, displayed violent tendencies from his mid-teens. At this time, Ms Smith feared for Jordan's safety when A was around as he would sometimes carry a knife. A was eventually trespassed from home and went to live in the South Island.

[19] Ms Smith recalled that whenever she went to visit A he would assault his partner. That domestic violence was a matter of ongoing concern. All three of the children were ultimately taken away from A and his partner by Child Youth and Family Services and placed into Ms Smith's care — the youngest aged six weeks. The eldest child returned to her maternal grandmother after six months. At that time Ms Smith was still primary carer for then 13 year old Jordan. She received no support from the children's parents or other members of the extended family.

[20] A and his partner continued their relationship, and Kalis was their further child. After consultation with family, and Child Youth and Family Services, Kalis was also placed in Ms Smith's care.

[21] It was when Jordan was 21 that Ms Smith decided to place him in community care. She continued to visit him regularly and continued to parent her three grandchildren by herself.

[22] [REDACTED]

[23] Kalis was Ms Smith's youngest granddaughter. She had a happy childhood, but her relationship with Ms Smith became more fraught from age 11. Kalis suffered from suicidal tendencies and self-harm behaviours and was referred to Child and Adolescent Mental Health Services.

[24] A was released from prison in 2010 and Ms Smith agreed he could stay with her and the children temporarily. After a violent incident, a temporary protection order was made in respect of Ms Smith, Jordan and A's three children.

[25] Ms Smith has been treated for depression and situational anxiety for most of her life. All three of her grandchildren developed mental health problems, of varying type and degree, which has become more challenging for her to manage as they moved into adolescence. In the six months leading up to the offence, her mental health deteriorated, triggered by her grandson's situation and the loss of her own father. She became overwhelmed and suffered from what is described as "carer burnout" — severe emotional, physical and mental exhaustion. The report writer reports that she presented with symptoms of a moderately severe recurrent major depressive disorder. In interviews she presented as devastated and overcome with remorse for her actions.

[26] While the report writer considers she has a mental disorder, she does not require compulsory treatment within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992. The report writer suggests, however, that her circumstances involve mitigating circumstances. I accept this. Ms Smith has devoted her life to caring for her family, to the detriment of her own health and welfare. The

burden of doing so has taken a tremendous toll, and the pressures have mounted to the point that Ms Smith has taken the life of one of those she had committed her life to caring for.

Cultural report

[27] Counsel for Ms Smith have submitted a cultural report under ss 8(i) and 27 of the Sentencing Act 2002. Under s 8(i) of the Sentencing Act, the Court must take into account the offender's personal, family, whanau, community and cultural background in sentencing.

[28] The report writer expressed doubt that Ms Smith has had time to navigate her own culture as she was too busy navigating the system for the wellbeing of her tamariki and mokopuna.

[29] The report details interviews with several of Ms Smith's associates and family members. All describe Ms Smith as a devoted grandmother who "turned herself inside out" to try and get help for her grandchildren through social services and therapists. The report also details Ms Smith's history and childhood, describing similar events to the s 38 report. The report notes that Ms Smith has given so much of herself to her mokopuna that "all that was left was a shell".

Pre-sentence report

[30] The pre-sentence report outlines Ms Smith's background and personal circumstances. It records that Ms Smith had not been physically violent towards the victim prior to the offending and that she expressed a dislike for family violence and the impact such behaviour has on children. She has expressed a willingness to engage in any support offered to her whilst in prison and has started to attend counselling and an education assessment in order to undertake computer literacy courses while in prison.

Approach to sentencing for murder

[31] Under s 102 of the Sentencing Act, Ms Smith must be sentenced to life imprisonment unless a sentence of life imprisonment would be manifestly unjust. If

life imprisonment is imposed, the Court must order a minimum period of imprisonment of at least 10 years.[2] In certain circumstances, a minimum term of at least 17 years must be imposed where the case fulfils one or more of the criteria under s 104, unless such a minimum term would be manifestly unjust.

[32] The first key question for the Court is whether it would be manifestly unjust to impose a sentence of life imprisonment. Mr Brosnahan for Ms Smith submits that it would be, and argues that a finite sentence is appropriate. Ms Wilkinson-Smith for the Crown seeks a sentence of life imprisonment.

[33] The threshold to displace the presumption of life imprisonment is a high one and met only in exceptional cases.[3] Previous cases where that standard has been met have involved mercy killings,[4] cases where the defendant is suffering from post-traumatic stress disorder relating to family violence,[5] where the is a major psychotic illness,[6] or the defendant is very young.[7] The Court of Appeal in *R v Cunnard* has provided guidance by saying that:[8]

> [16] …Parliament has mandated that life imprisonment should be the standard sentencing response to a conviction for murder, reflecting society's recognition of the sanctity of human life and its condemnation of anybody who wrongfully takes another life. Life imprisonment is the ultimate penal sanction available, reinforcing the purposes of deterrence, denunciation, protection of society and accountability.
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> [17] However, Parliament has deliberately empowered High Court judges to impose a lesser sentence according to the all-encompassing criteria of manifest injustice. Its terms authorise a sentencing judge to take into account other relevant sentencing purposes, in particular aggravating and mitigating factors relating to the offence and offender. …

[34] Mr Brosnahan cites the following comparable cases where finite sentences were imposed:

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2 Section 103.
3 *R v Mayes* [2003] 1 NZLR 71 (CA); *R v Rapira* [2002] 3 NZLR 794 (CA); and *R v Smail* [2007] 1 NZLR 411 (CA).
4 *R v Law* (2002) 19 CRNZ 500 (HC).
5 *R v Wihongi* [2011] NZCA 592.
6 *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.
7 *R v Nelson* [2017] NZHC 3570.
8 *R v Cunnard* [2014] NZCA 138.

(a) *R v Rihia*:[9] The defendant stabbed her estranged husband. The relationship involved considerable alcohol abuse and violence. There had been 36 previous family violence incidents. Earlier that day, Child Youth and Family staff had removed their 7 year old daughter from the home. The two got into an argument over their daughter which escalated into a physical confrontation. While her husband lay on the couch, the defendant stabbed him once in the chest with a knife. She was assessed as suffering from post-traumatic stress disorder and had a borderline personality disorder, characterised by alcohol abuse, emotional dysregulation and outbursts of anger. The Judge decided that life imprisonment would be manifestly unjust and imposed a finite sentence of 10 years' imprisonment.

(b) *R v Wihongi*:[10] The defendant and the victim had been in a longstanding relationship. The relationship was plagued by violence and alcohol abuse. On the day of the murder, an argument between the two began which escalated into a physical altercation. He walked out of the house, and the defendant followed him, grabbed a knife as she did so. She stabbed him in the chest with the knife. The defendant had significant cognitive impairment resulting from an overdose when she was 13. Her ability to make judgements and to reason and plan was in the low to borderline range. She displayed residual, complex features of post-traumatic stress disorder, and anxiety and depression dating from earlier rapes and home invasion. She had an alcohol abuse disorder. The Judge found that her impaired mental health did play a part in causing the murder and that life imprisonment would be manifestly unjust. She was sentenced to eight years imprisonment. On appeal the Court of Appeal upheld the displacement of the presumption of life imprisonment but increased the term of imprisonment to 12 years' imprisonment.

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9 *R v Rihia* [2012] NZHC 2720.
10 *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775.

[35] Here I accept that Ms Smith was suffering from severe emotional, physical and mental exhaustion in the months leading up to the offending. Her mental health had continued to deteriorate and she presented with symptoms of a moderately severe recurrent major depressive disorder. The psychiatric report notes the offending was triggered by longstanding, cumulative stress from her role as primarily carer for a profoundly disabled son and three grandchildren who suffered from significant mental health difficulties. Ms Smith was previously prosocial in her attitudes and does not consume alcohol or use illicit drugs. She has no previous offences and the victim impact statements indicate this offending was completely out of character. Up until the offending she had appeared to be a committed grandmother who cared for her sons and grandchildren despite their significant difficulties. She was overcome with remorse in interviews and suffers from profound grief and guilt for the circumstances of her granddaughter's death. I consider the likelihood of her reoffending is low.

[36] There are countervailing considerations that I need to take into account. Ms Smith's mental health had not deteriorated to the extent that she was incapable of knowing that her actions were morally wrong. As the Crown points out in submissions, many people face difficult situations with family members. Those charged with responsibility for the care of others are accountable for their actions. The loss of a young life at the hands of the person entrusted to care for such a person is a matter of community concern. The victim here was particularly vulnerable, and there was an element of premeditation when Ms Smith told the victim to go to the sleepout because she planned to kill her there, away from her brother.

[37] As the Crown emphasises the presumption is only displaced in exceptional circumstances. The question is whether the circumstances are so exceptional here as to justify imposing a finite sentence of imprisonment.

[38] The current circumstances do not easily fit into any of the previous identified categories. I accept the Crown's submission that there are distinguishing features from the cases I have mentioned, particularly given the vulnerability of the victim. But many of the cases where life imprisonment has been treated as manifestly unjust nevertheless have some similarities, notwithstanding that each case is of its own kind. The features of many of those cases are that the defendants have been driven to

homicide when they have become psychologically overwhelmed by relentless adverse circumstances. The defendants have been broken down by the hopelessness of their situation. That is so in the present case, where a combination of factors have led Ms Smith to commit the offence. The ultimate question is whether those circumstances and the particular circumstances of the present case mean that the sentence of life imprisonment would be manifestly urgent.

[39] The Court of Appeal noted in *Wihongi*[11] that in circumstances of that case if there was no future risk of violent re-offending the Court would have seen the displacement of life imprisonment as relatively straightforward.[12] Here the circumstances leading up to the offending are different, but those circumstances are also compelling for the reasons I have explained. I also conclude there is little real risk of violent re-offending. I do not regard this case as straightforward because of the elements of premeditation and particularly given the vulnerability of the victim. But bearing in mind all of the circumstances it is my conclusion that a sentence of life imprisonment would be manifestly unjust.

Finite sentence starting point and discounts

[40] Having reached that decision the length of the finite term of imprisonment must be determined.

[41] I must first consider the appropriate starting point. Mr Brosnahan argues for a starting point from of 10 to 12 years. Ms Wilkinson-Smith suggests a starting point of 15 years. In assessing an appropriate starting point for a finite term of imprisonment, and then the discounts that should be applied, I have taken into account the following sentences imposed in cases where life imprisonment has been held to be manifestly unjust:

(a) In *R v Wihongi* the High Court had imposed a sentence of eight years' imprisonment. On appeal the Court of Appeal held that the sentencing principle of community protection was better

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11 *R v Wihongi*, above n 10.
12 At [89].

met by a longer finite sentence, and the Court increased the sentence to 12 years' imprisonment.[13]

(b) In *R v Rihia* after finding that a sentence of life imprisonment would be manifestly unjust given the violent relationship that the defendant had with the victim, a starting point of 12 years' imprisonment was adopted, with two years discount from that starting point given for the early guilty plea.[14]

(c) In *R v Cole* the Court found it manifestly unjust to impose life imprisonment in circumstances where the defendant, who had significant mental health issues, had shot and killed a son who had engaged in various instances of violence against him. The starting point was 14 years' imprisonment, and in light of the guilty plea and his personal circumstances the Court reached a final sentence of 12 years' imprisonment.[15]

[42] Taking these cases into account in light of all of the relevant sentencing factors, including the need for denunciation, deterrence and community protection emphasised by the Crown, I consider 14 years' imprisonment to be the appropriate starting point.

[43] Some discount is then appropriate to reflect remorse and Ms Smith's guilty plea at the earliest opportunity. It seems to me that an overall discount of two years is appropriate, leading to an ultimate end sentence of 12 years' imprisonment.

Minimum period of imprisonment

[44] As a finite sentence is to be imposed I must also determine whether a minimum period of imprisonment is appropriate. Under s 86, a court may impose a minimum period of imprisonment if it is satisfied that the period otherwise applicable under the Parole Act 2002 would be insufficient given the factors set out in the section.

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13 *R v Wihongi*, above n 10 at [98].
14 *R v Rihia*, above n 9.
15 *R v Cole* [2017] NZHC 517.

[45] Given that Ms Smith has no criminal record, and that the risk of re-offending appears low, it may be that any minimum period of imprisonment will be a matter of practical significance. Again I take into account the minimum period of imprisonment decisions in other cases where life imprisonment has been held to be manifestly unjust. In *R v Wihongi* the Court of Appeal concluded that an MPI greater than the one-third minimum was able to be imposed, but was satisfied there was no proper basis for doing so in that case.[16] In *R v Rihia* Justice Toogood decided that no minimum term of imprisonment was required.[17] In *R v Cole*, however, Justice Cull determined that a minimum term of imprisonment should be imposed, and that it should be six years.[18]

[46] In the present case I am satisfied that the setting of a minimum term of imprisonment greater than one-third is appropriate given the vulnerability of the victim, and the premeditation aspects of the offence. It is appropriate given the factors that make this case different from the cases where no MPI has been imposed, particularly the vulnerability of the victim which, as the Crown says, is a factor listed in s 104. That factor marks this case out in terms of the need for a minimum period. Whilst I have determined that the sentence of life imprisonment would be manifestly unjust, it is still necessary to recognise the seriousness of the offending in accordance with the factors relevant to the setting of a minimum term of imprisonment.

[47] In those circumstances I impose a minimum term of imprisonment of six years.

Conclusion

[48] Ms Smith will you please stand. You will have heard what I had to say. You have had an extremely difficult life, and have been required to carry a heavy burden. In the end the circumstances overwhelmed you, and you took the life of one of those you had committed to care for. I have accepted that in light of the circumstances that led to you committing this offence it would be manifestly unjust to sentence you to life imprisonment. But the seriousness of the offence you have committed must still be reflected in the term of imprisonment I impose, and my decision on the minimum period of imprisonment.

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16 *R v Wihongi*, above n 10, at [102].
17 *R v Rihia*, above n 9, at [34].
18 *R v Cole*, above n 15, at [83].

[49] I sentence you to a term of imprisonment of 12 years for the murder of Kalis Smith, and I impose a minimum term of imprisonment of six years under s 86 of the Sentencing Act 2002.

[50] Please stand down.

Cooke J