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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2018-085-1440
[2019] NZHC 1629

THE QUEEN

v

WILLIAM MARTIN WAKEFIELD

Hearing:	12 July 2019
Counsel:	S C Carter and R M Kós for Crown S J Gill for defendant
Sentence:	12 July 2019

SENTENCING NOTES OF DOBSON J

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[1] Mr Wakefield, I now have to sentence you for the murder of your stepson, Lincoln. Lincoln died a year and a month ago today on 12 June 2018, a little short of five months old. You began a relationship with Lincoln's mother after you knew that she was pregnant and you set up house together on the basis that you would share the care of the child when it was born.

[2] After a period of maternity leave, Lincoln's mother went back to work four days a week, leaving you in sole charge while she was at work. You were able to work

from home and also spent substantial periods on computer screens as a "gamer". You tried to deal fondly with Lincoln, but his physical appearance reminded you of his biological father, and increasingly you resented that. In a lengthy recorded interview with a Police officer on the day Lincoln died, you changed your story as to how he had been hurt, eventually acknowledging that you had wanted to hurt him. On two separate occasions on 11 June 2018, you shook Lincoln a number of times. He became unresponsive, was hospitalised and operated on for internal injuries within his brain. He died early the next day. In pleading guilty to the manslaughter of Lincoln, you accepted that your shaking on 11 June 2018 was at least a substantial cause of his death.

[3] You denied that your killing of Lincoln was murder and put the Crown to the proof of the elements of that charge. Those elements required the Crown to prove that you did the act which caused Lincoln's death, which you did accept, as well as establishing that you appreciated that there was a real risk that inflicting the type of injury you did on him was likely to cause his death, and that you proceeded to inflict that type of injury being reckless as to whether it would kill him or not.

[4] The jury accepted that the Crown had made out that form of murderous intent. Their verdict was consistent with acknowledgements you gave in your Police interview that you did appreciate shaking a baby could cause its death, and that you did want to harm Lincoln when you shook him on that day. Those provided a proper basis for the jury to infer that you took the risk that you would kill him, knowing of that risk and being reckless as to whether death ensued.

[5] Sadly, 11 June 2018 was not the first occasion on which you had shaken Lincoln. During your Police interview, you acknowledged that you had done so on an earlier occasion and before your trial you pleaded guilty to a charge of wounding with reckless disregard in the period between 7 May and 4 June 2018, and I have also to sentence you for the conviction on that today.

[6] When your partner's parents looked after Lincoln for a day in the weekend before he died, they noticed a change in his appearance with his forehead appearing to be misshapen. Your partner's mother considered that on that occasion Lincoln was

not as strong or co-ordinated as she had observed him on previous occasions. They took photographs on that occasion which do tend to show, when compared with photographs taken earlier, the distended form of what was already a prominent forehead.

[7] When an autopsy was carried out, it showed that there were significant deposits of blood inside his skull and around the edges of his brain of two distinct types. Most recently, but before his death, there had been bleeding where the blood was characterised as acute, in that it had only recently escaped from blood vessels into the brain cavity. They also identified volumes of older blood, consistent with Lincoln having suffered a significant brain bleed on an earlier occasion. That finding, plus the indications of the altered appearance of his forehead, are consistent with him having suffered potentially significant harm as a result of your first shaking of him.

[8] Although there can be no precision as to the level of impact on Lincoln when you shook him, I accept as reasonable the Scottish medical expert's opinion that a relatively severe extent of shaking would be required to have caused the injuries that Lincoln suffered.

[9] In assessing the relative seriousness of this offending, the two most serious features for me are that this involved the worst form of breach of trust and how completely vulnerable Lincoln was. He was utterly defenceless and completely dependent on your basic humanity to treat him kindly and carefully. Left alone with you, defenceless and with no one to monitor your conduct, he was completely at your mercy.

[10] Also, there is the extent to which you were so reckless in shaking him as you must have done. I do not accept that you had any reason to ignore the risk of killing him because he may not have suffered obvious injuries after you shook him on the first occasion some weeks earlier. You acknowledged being aware of advertisements about the risk of serious injury or death to babies if they are shaken, and there was a pamphlet in your flat that spelt out those risks. I find that you appreciated the seriousness of the shaking because after you had done it, you initially lied to your then partner, you lied to the medical staff and to the Police.

[11] Baby killings by men who are not the biological fathers of their partners' children happen far too often in New Zealand. It is a real blight on the way we live and it should not happen in a caring society. In the last couple of days there have been news reports of yet another baby killing that appears to conform to this all too frequent pattern. That provoked public comment from the Children's Commissioner to the effect that children are a gift and a treasure, and when they are born they need adults to look after them and to prioritise the baby's interests. I entirely agree with that and deterring such dreadful conduct is a material consideration in sentencing.

[12] You have heard this morning from your now ex-partner, Lincoln's mother, reading her victim impact statement. The harm you have caused to her and her family is enormous, and I hope you accept that it is harm and a sense of loss that will never completely leave her. It has also caused real grief I acknowledge to her extended family.

[13] You will appreciate that it is mandatory for me to impose a sentence of life imprisonment for murder and the issue is the length of the minimum period of imprisonment (MPI), that is the length of time before you would be eligible to be considered for parole.

[14] At the bottom end of the range, the MPI must not be less than 10 years,[1] and above that, I am required to consider whether the circumstances of the offending warrant an MPI of 17 years or more. You will have heard counsel this morning referring to s 104, and that is the provision in the Sentencing Act 2002 which spells out the features of murders deemed to be so serious as to presumptively warrant an MPI of 17 years or more. The relevant one of those characteristics in this case is if the deceased was particularly vulnerable because of his age or health, or because of any other factor.[2] The Crown says that the MPI should be 17 years, relying on s 104, whereas Mr Gill argues that that would be manifestly unjust and that the appropriate MPI should be 13 years.

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1 Sentencing Act 2002, s 103(2).
2 Sentencing Act 2002, s 104(1)(g).

[15] Where a s 104 factor is present, the first step is to rank the degree of culpability in this offending relative to what is involved in a standard range of murders.[3] That ranking exercise can take into account the presence of any of the s 104 factors that Parliament has directed are to be treated as indications of particularly serious murder offending.

[16] As to the relative importance of the vulnerability of an infant as a murder victim, a number of Court of Appeal decisions have confirmed that murderous killing of infants can attract the 17 year MPI under s 104 just because of the victim's extreme vulnerability alone. There need be no other s 104 features. In a table that I will annex to the notes I will issue of this sentencing, I set out brief reviews of the circumstances of a number of those cases, with comments comparing the facts in each of them with your case.[4]

[17] There have been other cases where the vulnerability of an infant victim triggers s 104, but an MPI of 17 years was ultimately not warranted because of mitigating circumstances of the offending or the offender that required substantial reductions from that 17 year point. I will also include a second table with the notes of this sentencing that lists three such cases I have considered which resulted in end sentences of between 13.5 and 14.5 years as the MPI.[5]

[18] I am also mindful that you pleaded guilty to Lincoln's manslaughter and have been convicted of murder out of your own mouth in acknowledging the risk that shaking Lincoln as you did might cause his death. Your acknowledgement justified the jury's inference that you were reckless as to whether death ensued or not. That murderous form of recklessness distinguishes your offending from manslaughter, but some regard can be had to the very large gap that exists between sentences for manslaughter of infants and those for murder.

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3 *R v Williams* [2005] 2 NZLR 506 (CA) at [52].

4 Table 1: *R v Paul* CA496/05, 1 August 2006; *R v Little* [2007] NZCA 491; *Filihia v R* [2014] NZCA 401.

5 Table 2: *R v Ellory* [2013] NZHC 2609; *R v Lackner* [2016] NZCA 29; *R v MS* [2017] NZHC 2066; *R v Cooper* [2017] NZHC 2498.

[19] I am also appending to these notes a third table of cases where the factual circumstances of deaths of infants bore similarities to yours except that the Crown could not make out in those cases – or did not seek to make out – an awareness by the offender of the risk of causing death by shaking or dropping the baby, and the reckless assumption of that risk, which is why you are convicted of murder here.[6]

[20] The range of sentences in those cases lies between two years, and three years and 10 months', imprisonment. I am not persuaded that the cases provide an adequate explanation for the huge difference in sentences that are at least five times longer once the reckless form of murderous intent has been made out. However, as you will have heard me discuss with counsel this morning, in the end I cannot rely on that disparity to approach the MPI analysis here in any different way.

[21] Ranking your culpability against the range of circumstances in which so-called standard murders are committed, and giving substantial weight to the vulnerability of your victim and the fact that this was the second occasion on which you had harmed him by shaking, I would not rank its seriousness as sufficient to warrant an MPI of 17 years. In that initial analysis, I am treating the vulnerability of Lincoln as an aggravating factor in the general sense, without attributing to it the status Parliament has required in murder sentencings by including it as a feature of s 104. So in that first stage analysis I would settle on an MPI starting point of 15.5 years.

[22] As to the circumstances of you as the offender, you have minor previous convictions for entirely unrelated offending and I can disregard them. As Mr Gill has said this morning, this is the first time in your life you have done anything substantively wrong. I have the advantage of the assessment of you by Dr Barry-Walsh in August last year, which reports personality dysfunction contributed to by exposure to domestic violence when you were young, but he says no identifiable psychiatric illness.

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6 Table 3: *R v Pene* [2010] NZCA 387; *R v Paea* [2016] NZHC 822; *R v Wichman* [2016] NZHC 1663.

[23] Mr Gill has suggested this morning that the personality dysfunction recognised by the psychiatrist impaired the extent of your self-control and, although it cannot be a major factor, I recognise that as part of your personal make-up.

[24] There is also the Probation report prepared for this sentencing. Despite reporting psychological and physical abuse as a child, and being in a family where you observed the abuse of others, you consider that you had a good childhood. Your extended family remain supportive of you, they consider this offending to be quite out of character and their support is likely to be very important to you in your rehabilitation. You are the father of another child with whom you appear to have a positive relationship. You have been employed in IT roles and described to the Probation officer a passion for technology. And significantly you have no history of violence.

[25] You indicated your willingness to plead guilty to manslaughter promptly and, after discussions about the form of the charge, also pleaded guilty to the charge of wounding with reckless disregard. Having accepted liability to that extent, I can understand why you went to trial on the charge of murder, given your claim, which I am inclined to accept, that you did not intend to kill Lincoln. The admissions you made reduced the issues that needed to be traversed at trial, but obviously did not avoid the need for a trial and all the trauma that went with it for the wider circle of victims.

[26] The major mitigating factor in your case is your immediate and genuine remorse. Although you attempted to deflect responsibility for a matter of some hours, by the end of your lengthy Police interview later on the day when Lincoln died, you were tearfully sorry for the hurt you had caused your partner, and for unintentionally killing Lincoln. I take the terms of the Probation officer's report to also treat your deep remorse as genuine. I accept that it may not offer any consolation to your ex-partner and her extended family, despite your wish that they take your expressions of remorse and sorrow in the spirit you intend them.

[27] Ms Carter this morning has said that I cannot treat it as full remorse because that would require a guilty plea to murder. In a strictly legal sense, Ms Carter is correct in that, but as a candidate for sentencing I am not to see you in strictly legal terms. I

have to assess the personality aspects and cannot consider solely the legal status of the need for a guilty plea before remorse can be treated as complete.

[28] Having required the murder charge to go to trial, I would not be prepared to give you separate credit for pleading guilty to manslaughter, but in the circumstances of this case where it reduced the issues the Crown had to prove at trial, I see the guilty plea to manslaughter as adding weight to the credit you can be given for your genuine remorse.

[29] Putting s 104 to one side at this initial stage of the analysis, I would see the range of mitigating circumstances, being mostly remorse plus the impact of remorse in your acceptance of liability for manslaughter, as justifying a nine month reduction in the MPI. That would bring the MPI to 14 years and nine months.

[30] Now the second stage of the analysis, having identified an appropriate starting point without applying s 104, is to assess whether the presence of vulnerability as a s 104 factor, which presumptively requires an MPI of 17 years, would be a manifestly unjust outcome because of the difference between that level and what would have been an appropriate MPI in the absence of s 104.

[31] The presence of a s 104 factor means there has to be a significant reason for not applying what Parliament has directed to be the appropriate MPI. As the Court of Appeal observed in the case directing the process for murder sentencings where s 104 may arise:[7]

> [66] However, the specified minimum period may not be departed from lightly, as the Court is bound to give effect to the legislative policy of ensuring a 17-year minimum for the most serious murder cases. The reasons must withstand scrutiny. Marginal differences in personal circumstances or degrees of participation by co-offenders would not normally qualify. In *Parrish* at para [21] this Court indicated that the presence of mitigating factors under s 9(2) which related to the personal circumstances of an offender would rarely displace the presumption. Powerful mitigating circumstances bearing on the offence are more likely to do so.
>
> [67] We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified

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7 *R v Williams*, above n 3 (citations omitted).

> features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.

[32] In the end, yours is a case in which, if s 104 was not in force, I would have settled on an MPI of 14 years and nine months. That still reflects a very serious case of murder given the features I have identified of the vulnerability of your victim, the abuse of trust and the fact that this was not the first incident of violent shaking of him. The critical issue is whether, on the approach required of me by the Court of Appeal in *Williams*, I find that the difference between the appropriate MPI in the absence of s 104 and the 17 years as directed by that section would make it manifestly unjust to impose the MPI specified in s 104.

[33] My overall impression, Mr Wakefield, is that the gap between 14 years and nine months, and 17 years, is too great to be bridged by the requirement imposed on me under s 104. Of course, the tragic vulnerability of this infant makes it a very serious murder, but it is a factor that gets the MPI to a starting point of 15.5 years on the first analysis.

[34] I am satisfied that the ranking of relative seriousness of the murder and the combined impact of the mitigating circumstances are sufficient to make out the relatively difficult argument Mr Gill has advanced that it would be manifestly unjust to leave the MPI at 17 years. I will accordingly be imposing on you an MPI of 14 years and nine months.

[35] To Lincoln's extended family, and to others interested in the sentencing who are appalled at such killings and expect an even stronger deterrent signal, I say this. My finding that 17 years would be manifestly unjust does not mean that your hurt and anger and your broader concerns to deter such ghastly offending have not been heard. My responsibility on behalf of the community is to deal in a balanced way with all the pluses and minuses that I have reviewed. These include an interest in Mr Wakefield's rehabilitation. He will be in his mid to late 40s before he is eligible for consideration

by the Parole Board for release on parole and of course will be subject to the life sentence literally for the rest of his life. Where to leave the MPI at 17 years would be manifestly unjust, then that outcome has to be respected.

[36] Before imposing sentence Mr Wakefield, I am obliged to give you a first strike warning. You will be given a form of the warning in writing and sadly you have a lengthy period in prison to reflect on its impact, but I deliver it now orally in the following terms. Would you please stand.

[37] Given your conviction for murder, you are now subject to the three strikes law. I warn you about the consequences of another serious violence conviction. If you are convicted of any serious violent offences other than murder committed after this warning, and if a judge imposes a sentence of imprisonment, then you will serve that sentence without parole or early release.

[38] If you are convicted of murder that was committed after this warning, then you must be sentenced to life imprisonment. That would be served without parole unless it would be manifestly unjust. In that event, the judge would have to sentence you to a minimum term of imprisonment. The written notice you will receive will confirm the list of what are treated as serious violent offences.

[39] Mr Wakefield, I now sentence you on your murder conviction to life imprisonment and I impose a minimum period of imprisonment of 14 years and nine months. On the charge of wounding with reckless disregard, I sentence you to a concurrent term of three years' imprisonment. You may stand down.

Dobson J

Solicitors:
Crown Solicitor, Wellington
Steve Gill Law, Lower Hutt

Table 1

Appellate judgments in sentencings where vulnerability of infant victim a sufficient s 104 factor to warrant 17 year MPIs

***R v Paul* CA496/05, 1 August 2006**

The defendant was living with a woman and her two children, and was left in charge of three children in the partner's absence for an evening. The youngest of the three children, 14 months old, was sick and intermittently crying. The defendant punched the sick child in her stomach as she was lying on her bed with sufficient force to cause extensive internal injuries, extensive haemorrhaging and blood loss from which the infant died within a short period. The defendant lied about the cause of death until shortly before trial, when he pleaded to manslaughter but, after trial, was found guilty of murder under s 167(b) Crimes Act 1961. On sentencing, the Judge considered an MPI of 15 years would have been appropriate. However, vulnerability of the victim required the 17 year MPI under s 104 and defendant's remorse and personal circumstances not sufficient to displace the 17 year presumption. That approach was upheld on appeal.

Greater violence in the offending. Remorse delayed and other personal matters less relevant as mitigating circumstances.

***R v Little* [2007] NZCA 491**

The defendant was found guilty of murdering his six month old daughter whilst both having a bath. Evidence of pre-drowning injuries to the infant justified finding of intentional killing. Defendant suffering depression and was resisting his partner's (the victim's mother) initiatives for domestic separation. Sentencing judge would, but for s 104, have fixed a minimum period of 14 years. Court of Appeal upheld the vulnerability of the victim as a s 104(g) factor requiring a 17 year minimum that was not manifestly unjust.

Arguably, greater culpability in intentional killing. Previous good character treated as insufficient to depart from 17 year MPI.

***Filihia v R* [2014] NZCA 401**

The defendant had been found guilty at trial of the murder of a one year old child in her care. She had become angry in the course of bathing the child and most likely struck the child's head against a hard surface such as that of the bath, fracturing his skull. Sentencing judge concluded that s 104(1)(g) applied because the victim was particularly vulnerable, and found that the defendant's absence of relevant prior convictions and that the fatal injury was inflicted in a single incident of short duration were not sufficient to render an MPI of 17 years manifestly unjust. The judge accepted that the defendant did not intend to kill the child, and that there was no pre-meditation. However, the defendant had brutally attacked the head of the infant, lied to medical professionals and others about how the child received his injuries, and took steps to conceal her actions by false text messages. Although no previous convictions, there was evidence of repetitive hitting of numerous children. The Court of Appeal upheld the sentencing analysis and outcome.

Materially greater violence involved. No reference to remorse for her actions.

Table 2

Murder convictions where vulnerability of infant victim triggered s 104(1)(g), but circumstances rendered 17 year MPI manifestly unjust

***R v Ellory* [2013] NZHC 2609**

The defendant became angry when his partner's six month old daughter cried and threw her head-first onto the floor before smothering her with a cloth nappy until she stopped breathing. Vulnerability on account of age triggered s 104 starting point of 17 years but defendant's youth (21 at the time of offending), psychological impairments and remorse, plus guilty plea, would render 17 years manifestly unjust. MPI imposed of 13.5 years.

Greater level of violence, but potentially somewhat more compelling personal circumstances than exist here.

***R v Lackner* [2016] NZCA 29**

Defendant left to care for eight month old twins born to him and his partner. On the partner's return from work, she found the defendant holding the victim who was limp and had blood around his nose. Child could not be revived and a post-mortem revealed he had suffered severe head injuries. The defendant's explanation that he had slapped the child could not explain the extent of injuries identified. The defendant pleaded guilty to murder. Section 104 was engaged, however the guilty plea, remorse and understanding of the consequences of his actions rendered it manifestly unjust to impose 17 years as the MPI. MPI of 15 years imposed, and upheld on appeal.

Circumstances of offending approximately similar. Guilty plea entitling additional credit, but otherwise similar circumstances on whether 17 year MPI would be manifestly unjust.

***R v MS* [2017] NZHC 2066**

The defendant, recently arrived from India, shared accommodation with families and others. He was asked to care for the four month old baby of another of the occupants whilst she and the majority of other adults in the accommodation went out. After the baby had cried persistently, the defendant took him into a bedroom where injuries causing blunt force trauma to the baby's head occurred. The evidence was that the baby's head had hit a hard surface several times with considerable force and the baby died the same evening. The vulnerability of the victim triggered s 104 but the defendant's youth (19 at the time of offending) and impact of lengthy sentence away from his family in India meant a 17 year MPI would be manifestly unjust. MPI of 14.5 years.

Compelling mitigating circumstances arising in very different circumstances to the present.

***R v Cooper* [2017] NZHC 2498**

Defendant was convicted after trial of murdering her two year old grandson. She had assaulted him, throwing him around in her home. He died of serious brain injuries. The Judge accepted that s 104 applied because of the vulnerability of the victim. However, there were numerous mitigating circumstances. The defendant was looking after four high-needs children under the

age of five, with minimal support. At the end of a 17 year sentence, she would be 83 years old on release and for these, and other mitigating factors, the judge determined that a 17 year MPI would be manifestly unjust. Sentence imposed was MPI of 14.5 years.

The circumstances of the offending suggest a greater level of violence. Different but more or less equivalent weight to be given to mitigating circumstances that led to the finding that 17 year MPI would be manifestly unjust.

Table 3

Sentences for manslaughter convictions where parents/carers responsible for infant deaths

***R v Pene* [2010] NZCA 387**

The defendant hit a 13 month old foster son three or four times on the head and angrily shook him because he was crying. The assaults caused spinal cord concussion which compromised the infant's respiratory function, in turn causing brain damage leading to death. The High Court adopted a starting point in a range between five to seven years' imprisonment, but allowed discounts for a number of personal circumstances, producing an end sentence of two years and eight months' imprisonment. The Court of Appeal reduced this (giving credit for four months' home detention and community work completed) to a sentence of two years and three months' imprisonment.

***R v Paea* [2016] NZHC 822**

The defendant was an 18 year old mother left at home with a seven week old baby. The baby was crying and unsettled and she rocked him in her arms to a point where she was shaking him. She admitted being frustrated because the baby would not stop crying. The baby was taken to the hospital the following day but died later that day. The defendant pleaded guilty to manslaughter and a starting point of three years and nine months' imprisonment was adopted. Taking into account of lack of maturity, history of abuse and trauma, psychological dysfunction and the guilty plea, end sentence of 24 months' imprisonment imposed.

***R v Wichman* [2016] NZHC 1663**

The defendant and his girlfriend became the parents of twins born 15 weeks premature when the mother was just 16 and he slightly older. The defendant shook one of the twins out of frustration when she was crying and he was attempting to comfort her. The baby lost consciousness and the defendant called for help. The baby survived for some six months but died as a result of brain injury. The defendant pleaded guilty to manslaughter. The Judge adopted a starting point of five and a half years, with mitigating factors reducing the end sentence to three years and 10 months' imprisonment.