

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

CRI-2007-063-002028

THE QUEEN

v

KAREN ALICE ROBINSON

Hearing: 27 November 2009
(Heard at New Plymouth)

Appearances: G Hollister-Jones for the Crown
J N Briscoe for the prisoner

Judgment: 27 November 2009

SENTENCING REMARKS OF STEVENS J

Solicitors/Counsel:
Crown Solicitor, PO Box 13063 Tauranga 3141
J N Briscoe, Davys Burton, PO Box 248, Rotorua 3040

Introduction

[1] Karen Alice Robinson, you appear for sentencing today having been found guilty by a jury on one charge of manslaughter under s 171 of the Crimes Act 1961. The maximum penalty for that offence is life imprisonment. Let me say at the outset that what you did here breached the trust that every child is entitled to expect of those in the position of a parent. The victim, Melissa Sale, should have been given protection, safety and security and you let her down on all counts.

[2] For the purposes of your sentencing, I have been assisted by written and oral submissions from the Crown and from your counsel Mr Briscoe; a pre-sentence report; a psychiatric report from Dr Dean, to which I will refer later; a victim impact statement from Mr Sale; and 16 letters of reference and testimonial from friends of yours.

[3] I would like to refer briefly to the victim impact statement from Mr Sale and state that it is extremely fair and balanced and I hope that you have read it. I am only going to refer to one passage in it because it is particularly relevant in your case. This is what Mr Sale said:

To this day I do still not really know how or why Melissa received such serious injuries. These have never been truthfully explained by the Accused in my view, and this only makes it worse for me not knowing exactly how Melissa's final few hours of meaningful life unfolded. It would certainly help if I knew what had really happened on the day in question.

[4] Those words are particularly apt bearing in mind the video clip of Melissa which showed her condition as a normal, happy child at 2.15pm on the afternoon in question.

Factual background

[5] Melissa Sale was aged 14 months at the time of her death in January 2006. She was the youngest of five children of Mr and Mrs Sale. They agreed to the children being placed in care, for what was to be a temporary placement. You and your husband had been approved as foster parents in September 2002. Between that

date and November 2005 you had a number of placements from the Open Home Foundation, the last of whom was Melissa and her sister Lila. You lived with your husband and five of your own children at State Highway 2, Paengaroa, a farm property where you and your husband were involved as sharemilkers and managers.

[6] Melissa and Lila came to you on 29 November 2009, having previously stayed for one night on 18 November 2009. Melissa slept in a cot set up in one of the children's bedrooms. Lila also slept there. During the day, Melissa slept in a portacot set up in your own bedroom.

[7] Prior to Melissa staying with you, she had been examined by her local general practitioner in Tauranga, where she received a full medical examination and check-up. No injuries of any significance were noted and she was found to be in good health. On 6 December 2005, she was again examined after complaining of a tummy bug. She was given an external examination and no injuries of any type were noted.

[8] On 4 January 2006, Melissa was at your farm with her sister, your five children and yourself. Your husband had left the house to do some maintenance work in the milk shed some distance from the residential property.

[9] At about 5.10pm you telephoned the St John's ambulance informing the officer that a 14 month old girl had banged her head when falling over and that she was non-responsive. You stated that the fall had occurred approximately five minutes earlier.

[10] The ambulance arrived at your address at approximately 5.30pm. You were outside holding Melissa who was motionless. Upon examination in the ambulance, swelling and soft spots were detected on her head, her pupils were dilated and her jaw was locked preventing air access. Her coma score was three, indicating that she was very, very sick. You informed the ambulance staff that Melissa had fallen from a portacot – a change from your earlier story – you heard a bang and then according to you Melissa stumbled. You said Melissa appeared fine for a few minutes before collapsing.

[11] At Tauranga hospital a CT and neck scan identified a right-sided subdural haemorrhage. Melissa was later transported to Starship hospital in Auckland where she underwent neurosurgery. She showed no sign of significant brain function while at the Paediatric Care Unit at Starship. On 8 January 2006, the decision was made to remove her from the ventilator.

[12] An autopsy concluded that Melissa died as a result of a sudden acute right-sided subdural haemorrhage to the brain. There was also right retinal haemorrhaging and damage to the brain stem. As referred to in submissions, there was evidence of an earlier brain stem injury and subdural bleeding. Such injuries had occurred as recently as one week prior to the fatal injury, but could not be accurately dated.

[13] Medical investigations concluded that the injuries to Melissa would have required considerable force. The nature of the injuries received, and the force required for those injuries, was not consistent with an accidental fall from a portacot. The injuries that resulted in Melissa's death were determined to be consistent with non-accidental cause indicating trauma and the likelihood that she had been violently shaken. The injuries combined to rule out the possibility of an accidental injury by falling and the jury rightly rejected the claim of a fall from a portacot.

[14] The Crown has helpfully summarised the injuries that Melissa suffered as follows:

- Earlier brain injury, evidence of bleeding into the subdural space, considered to be mild and four to ten days prior to the fatal trauma;
- Major brain injury was a large, right-sided subdural haemorrhage caused by a torn bridging vein;
- Injured nerve fibres in spinal cord caused by a whiplash mechanism;
- Widespread retinal haemorrhages in right eye, extending out to the periphery;
- Patterned abrasion to left forehead;

- Large area of bruising on the area of the scalp overlying the patterned abrasion on left forehead;
- Patterned abrasion to the right side of forehead;
- Patterned abrasion to left cheek (21 x 25mm) described as an impact injury;
- Bruises to both earlobes;
- Pinpoint bruising on front of and below left ear;
- Vertical abrasion on nose; and
- Linear abrasion to left chest, 3cm below the left nipple and an older one on the right side.

Personal circumstances

[15] You are 38 years of age and of New Zealand European descent. You have five children of your own. You worked as a foster parent, as well as assisting on the farm. During the three years of working as a foster parent, you had 18 children through your care. You had a motorbike accident in 2006 resulting in a leg being amputated. You were raised by your mother from the age of four years. In recent times you have had little to do with your father. You also have a brother, sister and four other half siblings, with whom you have a good relationship. You state that your family are not supporting you.

[16] You also state that in the year leading up to the offending, you were experiencing some problems with your husband. You expressed resentment towards your husband and your children as you had been unable to follow your chosen career path as a result of your husband's reluctance to support you and your role as a mother and foster parent. You have recently attempted to commit suicide probably, according to those who have been examining you, because of relationship issues and stress related difficulties. You have ongoing mental health issues.

[17] You continue to deny the offending. Both your husband and your friend Ms James have described changes in your personality. Your husband says that approximately six years ago your focus shifted away from your family to your own goals. Ms James refers to possible paranoia and taking things to the extreme.

[18] You have no previous convictions.

Psychiatric report

[19] Dr Dean prepared a psychiatric report for the purposes of assisting the Court with the length of your sentence and any appropriate conditions. Dr Dean referred to your admission to psychiatric hospitals on three occasions, all subsequent to the current offending. It seems that the motorbike accident in 2006 may have been related to your suicidal thinking and psychiatric problems. You have been diagnosed with personality dysfunction and adjustment problems, rather than a major depressive illness. Dr Dean stated that you appear to have some symptoms of post-traumatic stress disorder relating to your arrest and the motorbike accident.

[20] Dr Dean said that, if a sentence of imprisonment is imposed, then it would be important that you be adequately assessed in the prison environment. The prison authorities will need to provide a period of close observation to reduce any risk of successful suicide. You will require support from the Regional Forensic Psychiatric Service in the prison setting and appropriate arrangements can be made should your mental health condition deteriorate.

[21] I found Dr Dean's report extremely helpful and I am grateful to him for the assistance which he provided.

Crown submissions

[22] The Crown submitted that a custodial sentence is warranted with a starting point in the range of seven years' imprisonment. The Crown referred to various aggravating features, including the application of considerable force to the head of

the victim and the other injuries which have already been referred to, the loss of a young child in respect of whom you were in a position of trust as a caregiver, that the victim was particularly vulnerable, that there was a 15 minute delay before you sought emergency medical assistance for the victim and that between the first and second 111 calls you developed a false explanation that the victim had fallen out of the portacot.

[23] The Crown accepts that your previous good character is a mitigating factor.

[24] The Crown referred to the case of *R v Leuta* [2002] 1 NZLR 215 where the Court was dealing with more serious offending, but found a ten year starting point appropriate. The Crown also referred to *R v Waterhouse* (2004) 20 CRNZ 897 and *R v Iorangi* CA533/99 30 March 2000, but submitted that *Iorangi* was of limited assistance because it was before the case of *Leuta*. Thus it was submitted that the amount of violence involved was less extensive than *Leuta* and *Waterhouse* and as Mr Hollister-Jones submitted orally, the offending was in the mid-range of culpability.

[25] The Crown also referred to the case of *R v Broadhurst* [2008] NZCA 454 but accepted that there were some factual differences between that case where the violence categorised as extreme and the present. I agree that there are some differences.

Defence submissions

[26] Your counsel, Mr Briscoe, filed helpful written submissions referring to the difficulties in knowing how much actual force was used in this case. In fact, the Court is left in a position of having to work with the medical evidence that was heard at the trial. Mr Briscoe referred to your feelings of remorse and the fact that you deeply regret the death of a child in your care. He referred to the various attempts at suicide as demonstrating a degree of remorse and certainly the huge impact that the death had had on you and your family. He referred to the point about a possible “violent slamming” and I indicated in argument that I accepted that was the way in which the case was originally put at trial. But that of course the Court must look at

the evidence and in particular the forensic evidence and the injuries that were actually caused.

[27] Mr Briscoe sought to mitigate the short delay between the time of the injuries and when medical assistance was sought. He referred to normal human reaction of shock and lack of appreciation of the serious nature of the injuries concerned.

[28] Mr Briscoe referred to the 16 references from friends, family and supporters and spoke about your previous good record and your reputation in the community as evidenced from the statements.

[29] Mr Briscoe's submissions also sought to distinguish the cases of *Leuta*, *Waterhouse* and *Broadhurst*. But he accepted that at the end of the day it was for the Court to make a determination as to the degree of violence in the present case compared with the violence in those cases, as well as the degree of force used.

[30] Helpfully, Mr Briscoe referred to several decisions including *R v Auva* HC AK S166/92 1 December 1992, a decision of Hammond J in which he set out six factors that are relevant to the factual determinations which I must make. Indeed, I confirm that I have taken each of those into account. What I do not apply are the observations comparing a case such as the present with a manslaughter sentence involving a fight outside a pub or some similar event. To do so would be entirely inconsistent with the recent authorities and the decision of *Leuta* in particular.

[31] Mr Briscoe also referred to the cases of *R v Gordon* CA276/04 16 December 2004; *R v Kershaw* HC PMN CRI-2003-054-2237 29 October 2003 and *R v Sperry* CA196/90 CA191/90 3 October 1990, all of which I have considered carefully.

[32] In summary, Mr Briscoe, by way of mitigation, emphasised your clean record and reputation in the community, the remorse that you have shown, the fact that this was a one-off incident, the other features of your personal circumstances and the fact that you are unlikely to re-offend.

Relevant purposes and principles of sentencing

[33] Under the Sentencing Act 2002 I am required to keep in mind a number of purposes and principles. Under s 7, I need to hold you accountable to the harm done to the victim and community; the need to promote in you a sense of responsibility for and acknowledgement of that harm; the need to provide for the interests of the victim, who paid the ultimate penalty; the need to denounce your conduct; the need to deter you and others like you from committing the same or a similar offence; and the need to protect the community. But, there is also the importance of assisting in your rehabilitation and reintegration.

[34] Then there are the principles of sentencing under s 8, including assessing the gravity of the offending and the degree of culpability. I have looked at the seriousness of this type of offence and consider the general desirability of consistency in the approach to sentencing levels with cases of a similar nature. The particular circumstances relating to you as the offender are to be taken into account and that would mean an ordinarily appropriate sentence would be disproportionately severe, as well as the need to impose the least restrictive outcome that is appropriate to your circumstances.

Features of the offending

[35] The Court of Appeal in *R v Taueki* [2005] 3 NZLR 372 sets out the orthodox approach to sentencing so that I must first set a starting point based on the features of the offending and adjust that according to any mitigating and aggravating features.

[36] In terms of aggravating factors, there is the level of actual violence involved here; the loss damage and harm resulting from your offence; the fact that you abused a position of trust in relation to the victim and the fact that the victim was particularly vulnerable because of her age. There is also the very tender age of Melissa in this case to which I have regard, and in particular the fact that she had come to you for safekeeping.

[37] In terms of the offending, there are no applicable mitigating factors.

[38] In terms of you as the offender, there are no applicable aggravating factors. But there are a number of mitigating factors – your previous good record and reputation in the community, some limited remorse and your mental health issues. I have noted the general presumption against imprisonment.

[39] With manslaughter there is no tariff case. Every case must be assessed on its own particular facts. I note in *Leuta* what the Court of Appeal said at [80]:

Of course child homicides often occur in complex relational and domestic situations. They bear upon the offender frequently to evoke sympathy and mitigate the offending. They are to be taken into account for sentencing. But they should not cloud the essential fact that the violent, cruel and brutal treatment of a defenceless and vulnerable child, to whom there are duties of trust and responsibility, constitutes conduct of grave criminality and, where death ensues, the sentencing task is in respect of a very serious crime.

[40] I have already mentioned the various cases that have been referred to me and I do not need to repeat them.

Discussion

[41] There are a number of aggravating features that I must take into account, including the nature of the violence involved. It was considerable as demonstrated by the extent of the injuries caused that I have already referred to and summarised earlier. I discount the earlier brain injury for the reasons already indicated.

[42] I accept that this offending was in the nature of a one-off incident, albeit involving considerable violence. But it was violence on a vulnerable child in your safekeeping. It involved a breach of trust and that breach was significant, given that Melissa had been sent to you specifically to keep her safe. You were the foster parent, she was there under your care and protection, you breached that and she was defenceless in the face of that.

[43] I take into account to a limited extent the delay in getting help. It was not as serious as in some other cases and I appreciate that it may have taken a short time for it to dawn on you just how serious the situation was.

[44] The closest case is probably *Broadhurst*. But I accept the Crown assessment that this case is less serious than *Broadhurst*. In your case, I take a starting point of seven and a half years' imprisonment as being appropriate having regard to all of the aggravating features of the offending.

[45] You are entitled to a discount for your previous good character and your reputation in the community. I have also taken into account all of the references that were provided to me and those mentioned in court today. I consider that a discount of six months' imprisonment is appropriate for that purpose.

[46] You are also entitled to a discount to take into account the limited remorse that you have shown and your recent mental health issues. I consider that a further discount of six months' imprisonment is appropriate, but indicate that is generous.

[47] That brings the final sentence to one of imprisonment of six years and six months.

[48] I draw the attention of the prison authorities to the report prepared by Dr Dean and request that particular care be taken when you are received at the prison office upon leaving this court.

[49] You may stand down.

Stevens J