

THE QUEEN

v

AZEES MAHOMED  
TABBASUM MAHOMED

Charges: *Azees Mahomed:*  
Murder;  
Injuring with intent to cause grievous bodily harm (2);  
Failing to provide the necessaries of life

*Tabbasum Mahomed:*  
Failing to provide the necessaries of life

Plea: Not Guilty

Appearances: Philip Hamlin, Peter Dean and Pravina Singh for Crown  
Melinda Mason for Azees Mahomed  
Paul Borich for Tabbasum Mahomed

Sentenced: 15 December 2009

*Azees Mahomed:*  
Murder - Life imprisonment; minimum term of 17 years  
GBH - 5 years imprisonment (to be served concurrently)  
Necessaries of life - 5 years imprisonment (to be served concurrently)

*Tabbasum Mahomed:*  
4 years imprisonment

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**SENTENCING NOTES OF HARRISON J**

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**SOLICITORS**

Meredith Connell (Auckland) for Crown  
Christopher Wilkinson-Smith (Auckland) for A Mahomed  
Rice Craig (Papakura) for T Mahomed

## **Introduction**

[1] Mr Mahomed, you appear for sentence today having been found guilty by a jury following trial in this Court on 4 November 2009 on counts of murdering your 11 week old daughter, Tahani; twice previously injuring her with intent to cause grievous bodily harm; and failing to provide her with the necessaries of life.

[2] Your counsel, Ms Mason, accepts that I must sentence you, first, to a term of life imprisonment on the murder charge and, second, to a minimum term of non parole. The primary issue, and it is an important one, is the length of that minimum term. Should it be in the vicinity of 18-20 years, as Mr Hamlin submits for the Crown? Or should it be in the vicinity of 12 years, as your own counsel submits?

[3] In conducting this sentencing exercise the three convictions entered by the jury for the related offences are not to be overlooked. Each of the two charges of injuring Tahani with intent to cause her grievous bodily harm carries a maximum term of imprisonment of 14 years. The charge of failing to provide her with the necessaries of life carries a maximum prison term of seven years.

[4] Mrs Mahomed, you were found guilty jointly with your husband of failing to provide the necessaries of life to Tahani. I must say that a sentence of imprisonment is inevitable for you. The only question is its length.

[5] I will deal primarily with the facts. They will largely dictate the final sentences.

## **Facts**

[6] You were both born and raised in South Africa. You married there. Mr Mahomed is said to be around 31 years of age; Mrs Mahomed in her late 20s. You came to New Zealand in about 2006. You travelled on a student visa for Mrs Mahomed. She was to be enrolled in a computer business management course. She attended that course very briefly. The two of you soon turned your attention to the commercial enterprise of selling jewellery in local markets.

[7] You have a three year old daughter, Tasmia, who was born in South Africa. Your second daughter, Tahani, was born in New Zealand in October 2007. She lived, I regret to say, a brief and grossly abused life. We are here today because of the circumstances surrounding her death.

[8] At about 8 am on 28 December 2007 both of you arrived at Middlemore hospital with Tahani. You were then living in Otahuhu, about four kilometres from the hospital. It transpired that about two hours earlier Mrs Mahomed had made two distressed calls for medical assistance - one was to her general practitioner; the other was to a Healthline number. Mrs Mahomed essentially reported that Tahani had not been feeding for some hours. Both the recipients of those phone calls advised you to seek urgent medical assistance.

[9] By way of background, Mr Mahomed, you later told the police that you had been playing with Tahani at about 8 pm the previous evening. You said that you fed her. You told the police officer that, to use your words, "she just got frightened" and she "just wanted to go to sleep". You told the police officer that Tahani would not drink her mother's breast milk. You told him that she failed to wake for three successive feeds at about 11 pm, 3 am and 6 am. You told the police officer that when you took Tahani to hospital she was, to use your words and those of your wife, "fine". Both of you said she was breathing well and playing. You said the only reason for seeking medical attention was because of her refusal to feed.

[10] This account of Tahani's state could not have been further from the unchallenged medical truth. Her condition on admission to hospital that morning was quickly diagnosed as critical. In fact, she was suffering from a head injury which was by then unsurvivable. Medical staff quickly assessed her breathing as abnormal. It is of some importance, by reference to a submission made by Mr Borich this morning, that I record their evidence that she was posturing, or arching her back, and crossing her legs in a scissor-like movement. She was plainly in great distress. She was also blind by then.

[11] What you had attempted, Mr Mahomed, to downplay to the police officer as a little fright was plainly in fact the head injury that you had inflicted on her about

12 hours earlier. And what you described as Tahani's sleepiness was what one clinician called her comatose state as a result of the blow.

[12] Dr Montgomery at Middlemore hospital made an immediate decision to transfer Tahani to Starship hospital. He and his team had diagnosed her as suffering from widespread brain damage due to lack of oxygen and blood flow.

[13] On arrival at Starship, Tahani was examined by a paediatrician, Dr Silvana Campanella. She confirmed that the baby was suffering from severe injuries. In summary, in medical terms, those injuries included bleeding in the skull membrane lining, a skull fracture, extensive bilateral retinal haemorrhages and bilateral retinoschisis - that is, a detachment of the eye retina, the multilayered nerve layer lining the eye. Tests conducted by the end of the day showed that Tahani had no active brain movement. All of this, Mr Mahomed, was consistent with one thing. She had been struck with great force. It was described as blunt force trauma - that is, somebody using considerable force to bring her head into contact with an immovable object.

[14] Something more must be said about Tahani's condition. The medical staff immediately noticed her emaciated state. She was barely above her birth weight. She was malnourished and the victim of neglect. Neither of you could plead ignorance. As Mr Hamlin has pointed out, Tasmia was by comparison a well cared for and healthy child.

[15] It is also relevant to note that Tahani had been the earlier victim of violence at Mr Mahomed's hands. A severe breakage to her leg was found. It would most likely have been caused by a deliberate yanking or pulling movement. It would have led to what one clinician called excruciating or exquisite pain. It was never treated. The earlier head injury, also diagnosed that day, was healing as well. Mr Mahomed, the jury convicted you of two charges of injuring with intent to cause grievous bodily harm with relation to those two injuries.

[16] Each of you, as I have noted, was interviewed separately by police officers later on 28 December 2007. Each of you separately denied any knowledge of the

circumstances giving rise to Tahani's injuries, even though it was later common ground at trial that one, or possibly both of you, had inflicted those injuries. There was no other possible suspect. Each of you pretended that nothing adverse or bad had happened that night. Each of you emphasised that Tahani was in a good and happy condition when admitted to hospital. Each of you implied that it may have been the doctors who were responsible for Tahani's injuries. It was plain, as Mr Hamlin submitted to the jury, that you had used the intervening 12 hours or so to fabricate a self-serving story which you thought would exculpate one of you. But, as I have explained, that lie could never survive the undeniable evidence of Tahani's medical injuries.

[17] After discussing Tahani's situation with you, the medical authorities took her off a ventilator. She died on 1 January 2008. The post-mortem examination conducted by a perinatal pathologist, Dr Jane Zuccollo, the next day confirmed that the injuries identified on 28 December were the cause of Tahani's death.

[18] There is another incident with which you are jointly charged. Mr Borich has alluded to it today. Each of you has pleaded not guilty and will be subject to trial by a Judge alone. In summary, you left Tahani unattended in a motor vehicle in Otahuhu on a hot day just before Christmas 2007. She was there for a lengthy period. Members of the public observed her to be in distress. The car doors were locked and there was little ventilation. The police were called. Both of you were nearby with Tasmia, selling jewellery and pre-occupied with making money. Mr Mahomed was able to take Tahani away and make good his escape before the police arrived. Those facts were relevant at trial because they showed Mr Mahomed's attitude towards the care and safety of his infant daughter.

[19] The police obtained a warrant from this Court on 3 January 2008 to intercept communications between the two of you. Those intercepted communications included statements made by you, Mr Mahomed, which the Crown was able to rely on as admissions to prove its case at trial. As I have said before, it was common ground throughout the trial that the fatal blow could only have been administered by one or both of you. When asked by a police officer late on 28 December whether

Mrs Mahomed could have caused the injuries, Mr Mahomed advised that she was "very soft". He effectively ruled her out as a suspect.

[20] Only one inference was available from that statement. It was that, in the absence of a denial in evidence at trial, Mr Mahomed was responsible for killing Tahani. Nevertheless, at trial your counsel, Mr Mahomed, based your defence on a suggestion that the Crown had not excluded the reasonable possibility that Mrs Mahomed killed Tahani. He was entitled to raise that line of defence. He led evidence to support it. Your wife, in what her lawyer has described elsewhere as a passive approach, did not attempt to reject that suggestion. I was in no doubt that it was an extension of the lie the two of you had fabricated immediately after Tahani's death. The jury's verdict discloses that it was not well received in circumstances where you elected to remain silent, Mr Mahomed, but pursued this argument through your lawyer. It was a weak and cowardly strategy, and it failed.

[21] Mr Mahomed, with Mrs Mahomed's complicity, continues to deny any involvement in the offending. He denies any wrongdoing but he cannot offer any explanation for Tahani's injuries. I must sentence upon the finding of guilt by a conscientious and discerning jury. For what it is worth, I am satisfied that the finding had a sound evidential basis.

[22] Against that background, I will now deal with each individual offence.

## **Murder**

[23] The first and most serious charge is Mr Mahomed's conviction for murder. There is no issue on this point. You are sentenced now to a term of life imprisonment for Tahani's murder. I will deal with the question of a minimum term later.

### **Injuring with intent to cause grievous bodily harm**

[24] The next two convictions are for the charges of injuring with intent to cause grievous bodily harm. Given the sentence just imposed, sentencing on those charges is, in one sense, academic. But it will, of course, be directly relevant to the minimum term, as I shall explain.

[25] Each of these two offences was itself callous and cowardly, Mr Mahomed. I have outlined the circumstances. I need not repeat the pain and suffering Tahani would have undergone, particularly given the failure of you both to seek medical assistance for her. She was left to her own defenceless resources to heal.

[26] Each of these crimes merits a sentence of five years imprisonment. Those sentences are hereby imposed, to be served concurrently with the term of life imprisonment for murder.

### **Failing to provide the necessaries of life**

[27] The fourth count on which Mr Mahomed faces sentence, and the sole count on which Mrs Mahomed faces sentence, is of failing to provide Tahani with the necessaries of life in the 12 hours before her admission to hospital. That sentence primarily affects Mrs Mahomed. Again, there is an academic element to it for Mr Mahomed, given the term of life imprisonment just imposed. I will address these remarks primarily to Mrs Mahomed. They apply equally to Mr Mahomed.

[28] Mr Borich has made a number of compelling submissions on your behalf, Mrs Mahomed. He rightfully acknowledges, though, that the sentence will be determined by my factual findings. In the absence of an honest explanation from you, I have drawn a number of inferences. All of them are based on a careful review and knowledge of the evidence. They are as follows.

[29] First, Mrs Mahomed, given the close living circumstances of your family, I am in no doubt that you knew immediately or within a very short time that Mr Mahomed had inflicted the blow which killed Tahani. It defies belief that a

mother in those circumstances would have not known that her child was rendered comatose. Second, Mrs Mahomed, if there was any element of doubt about your immediate knowledge, it must have been dispelled by normal feeding time at 11 pm. You knew that Tahani could not be roused. Third, Mrs Mahomed, you knew that Tahani needed urgent medical assistance right from the start, but you failed to act. The reasons will never be known. Fourth, even after phoning for assistance at 6 am, you delayed taking Tahani to hospital for two hours while. I am satisfied, you fabricated your story. Fifth, despite Mr Borich's submissions to the contrary, the symptoms of Tahani's injury must have been plain. The physical signs, in the form of bruising, a swollen fontanel and closed eyes, coupled with her fitful state, would be immediately apparent to any observer, particularly a mother. Sixth, you lied to the police, Mrs Mahomed, about what happened. The purpose was to protect your husband, divorced of any consideration for your baby's fate.

[30] The clinicians were unanimous. Tahani's life might have been saved with early intervention, within what was called "the golden hour". Mr Borich carefully cross-examined two of them. He obtained admissions, properly made, that there was no guarantee of survival, of course. He is correct when he says that I cannot sentence you on the basis of a relationship between the failure to provide Tahani with the necessities of life - that is, to get urgent medical treatment - and her death. Whether or not she would have survived, with early intervention, will never be known. But I am satisfied, were it not for your inexcusable failure to obtain medical assistance, Tahani's life might have been saved. That is a relevant factor in the sentence to be imposed.

[31] Mr Borich says that the sentencing exercise must be confined to what he calls "the narrow window of culpability". He seeks to limit that to the 12 hour period after Tahani suffered her fatal injury. In my judgment Mrs Mahomed, that is a fine distinction and ultimately it carries no weight. What is more relevant is Mr Borich's submission that when sentencing you I must disregard two factors - one is that Tahani was suffering from malnourishment; the other relates to the episode in the car park just before Christmas. He is correct that they are subject to separate charges. You have yet to be tried. I accept Mr Borich's submission; they cannot aggravate the



sentence to be imposed today. But they are relevant as part of the background, and in my judgment they go a long way to explaining your failure to act.

[32] Having considered the facts carefully, Mrs Mahomed, I regret to say that I have concluded that this offending is near the worst end of the scale. It is inconceivable to me as a parent and a member of the community that a loving and responsible mother would leave a defenceless baby critically ill and unattended for many hours. Mr Borich says that you are remorseful. I have difficulty with that submission. I do not know what he is referring to.

[33] I observed you consistently during the trial. You showed no emotion whatsoever when listening to the distressing details of your daughter's death. That may have been a self-defensive mechanism. You may have been subject to wider pressures. You may have been depressed by your living circumstances. We will never know. Against that, Mrs Mahomed, we know that you are an intelligent woman. You had access to the wider Muslim community in Auckland. Evidence was given that you did not take the help from others that was offered to you.

[34] My discomfort is aggravated by the fact that, with one notable exception, this lack of emotion was a striking feature of the intercepted telephone and voice communications. Both of you were pre-occupied with devising strategies to protect each other from any criminal responsibility. Neither of you showed any interest in disclosing or discovering the truth about Tahani's death, something that might honour and give some meaning to her life.

[35] A tragic aspect of this case, Mr and Mrs Mahomed, is that the only people here in Court to honour your daughter are concerned members of the jury and the police officers who were responsible for the prosecution. I must acknowledge the commitment and professionalism of the policemen and of the medical staff.

[36] All of the lawyers have referred me to a number of other cases where sentences have been imposed by Judges following conviction of people for failing to provide the necessities of life. But, like most sentencing, it is a very fact specific exercise. The Crown submits that an end sentence of between two-and-a-half and

three years imprisonment is appropriate. That implies a starting point of four years with some allowance for your previous good character. Mr Borich, on the other hand, submits that a sentence of two years or less would be appropriate.

[37] I am guided by the principle that a sentence at or near the maximum should be imposed where the offending is of the most serious kind. The maximum penalty is seven years imprisonment. This offending is not far removed from the most severe of its kind. In my judgment a starting point of four-and-a-half years is appropriate.

[38] A small allowance for Mrs Mahomed's good character must be made. Also I bear in mind that serving a term of imprisonment, away from the support of your family and surviving daughter, will be difficult. You will be deported to South Africa on release. Whether you will be allowed to resume or recover custody of Tasmia will be for other authorities to determine. In the circumstances the ultimate sentence I impose on you, Mrs Mahomed, is four years imprisonment. You are remanded also to appear in this Court on 10 February 2010 for a callover on the other charges. Please stand down.

[39] Mr Mahomed, you are sentenced to a term of five years imprisonment on this charge, to be served concurrently with your sentence of life imprisonment.

### **Minimum Term**

[40] Mr Mahomed, I must now deal with the question of the length of your minimum term of non parole.

[41] It is unnecessary for me to jump through the statutory hoops discussed by the Court of Appeal in some of the leading cases: see *R v Williams* (2004) 21 CRNZ 352 at 363. I can go straight to the point. The question is whether the degree of your cruelty and callousness towards Tahani coupled with her vulnerability qualifies for the statutory minimum of 17 years imprisonment. A subsidiary question is whether, if it does qualify, a minimum term of 17 years would be manifestly unjust.

[42] It is appropriate to record that the Crown put the case against you on murder to the jury on two alternatives. One was that you intended to kill Tahani. The other was that you were reckless in meaning to cause her a bodily injury which was known to be likely to cause death. I agree with your counsel. The jury most likely convicted you on the alternative basis of recklessness.

[43] In my judgment the facts of this offending qualify for a minimum sentence of at least 17 years. It goes without saying that an 11 week old child is in the most vulnerable stage of her life. Not only could she not protect herself; she required the protection and care which the law entrusts to a parent. Nobody could have been more vulnerable than your daughter, Mr Mahomed. The blow which killed her was plainly deliberate and brutal. You fractured her skull diagonally, you caused her brain to bleed, bruise and swell, and you left her blind. Without immediate medical attention, she had no hope of survival. The detailed clinical evidence at trial confirms that the blow was of a callous and cruel nature.

[44] In the absence of an honest explanation from you, society will never know why, where or how you inflicted a blow of such severity on your baby daughter. As I have explained, both you and your wife refuse to tell the truth. Without an honest explanation, Mr Mahomed, I must draw certain conclusions, based on my knowledge of the facts.

[45] I agree with Mr Hamlin. A minimum sentence of 17 years is a starting point. There are aggravating features. They exist in the other offending which must lead to the adjustment upwards of that point. The jury's verdicts on the other charges must be recognised. The pattern emerging from the other major offending confirms the same cruelty and callousness towards Tahani. In many ways that offending would justify a substantial increase or uplift in the starting point. However, I am governed by the totality principle. In all the circumstances it is appropriate that the starting point should be increased to 19 years.

[46] Also relevant and factored into that adjusted starting point is my acceptance of a submission made by Mr Hamlin to the jury. He said that neither you nor your wife wanted Tahani. She was a nuisance. She was in the way of your new

commercial enterprise. It was chilling, Mr Mahomed, to listen to a conversation between you and your wife, intercepted within a month of her death, counting out, in a very optimistic way, large amounts of money with no hint of distress or remorse about your baby's death. In fact it was a striking aspect of the intercepted communications. Apart from one occasion when Mrs Mahomed broke down uncontrollably, both of you were both preoccupied with how best to avoid or divert the police inquiry into your daughter's murder.

[47] The lawyers have referred me to a number of other cases in this area. On at least two occasions recently the Court of Appeal has upheld a 17 year minimum period of imprisonment where the circumstances are similar. In one the accused man lost his temper and punched a 14 month old girl in the stomach. It was inflicted with such force that she died. The Judge there considered that 15 years was an appropriate period of minimum non parole. He later increased it to 17 years because of the child's vulnerability: *R v Little* CA496/05, 1 August 2006. The severity of the blow was comparable to this case. But, as I have said, there are the aggravating features which I have outlined. I repeat that they justify an increase in the statutory starting point for your minimum sentence from 17 to 19 years.

[48] Today Ms Mason maintains a submission that, even if a minimum term of 17 years or more is justified by the circumstances of the offending, it is still manifestly unjust. She submits that an allowance must be made for your low intellectual capacity. Two neuropsychologists have assessed your intellectual quotient as between 70 and 73. You are placed in the lowest 3-4% of your age. The specialists say that that condition affects your judgment, your common sense and your ability to cope. Ms Mason says that you should not be judged against the normal reaction of adults with an average intellect and normal coping mechanisms. As a result, she says, your moral culpability is lessened. I agree that I must take this factor into account: ss 8(h) and 9(2) Sentencing Act 2002.

[49] Also I must recognise any particular circumstances which mean that a sentence of imprisonment would be disproportionately severe for you. In this context there is, of course, your limited, but not too limited, grasp of English, your

status as a practising Muslim, and your isolation from your family and support mechanisms in South Africa.

[50] I acknowledge these factors but I have difficulty applying them here. The ultimate inquiry is whether your diminished mental capacity "materially contributed to the offending". I am aware of a number of decisions in the Court of Appeal where this issue has been raised: *R v Tuia* CA312/02 27 November 2002; *R v Whiu* [2007] NZCA 591; *R v Milford* [2008] NZCA 148. Ms Mason says that the evidence of the offending available from which I can draw inferences demonstrates a link between the crime and your mental incapacity. You understand that I have difficulty with that submission. You are well aware of your responsibilities as a parent; you know how to care for a child. Indeed at trial Mr Wilkinson-Smith led evidence for the purpose of showing that you were a good and loving father of Tasmia.

[51] I have considered Ms Mason's submission carefully. On balance I am prepared to accept that your intellectual incapacity may have had an effect. It may have limited your responses in coping with a difficult child. I will never know. I can only speculate. There are also other circumstances which I have referred to, such as your isolation, which are relevant.

[52] Taking all these factors into account, and giving the maximum allowance I am able, I reduce the starting point for your minimum term of non parole from 19 to 17 years imprisonment. I emphasise, though, that that is simply the minimum term before which you are eligible to apply for parole. Accordingly the minimum term imposed on the charge of murder is 17 years. You are also remanded to appear in this Court on 10 February 2010 for callover. Please stand down.

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Rhys Harrison J