IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2008-004-16873

QUEEN

v

ITUPA JULIE MIKAIO

Hearing: 27 November 2009

Counsel: D Marshall for the Crown
T Faleauto for the Prisoner

Sentencing: 27 November 2009

SENTENCING NOTES OF MILLER J

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[1] Mrs Mikaio, you appear today for sentence on three charges, all relating to grievous injury that you inflicted on your then three-year old son, Benjamin.

[2] The first charge, count 1, alleged injury with intent to injure, in the form of serious injuries inflicted on 27 June 2008. You pleaded guilty to that charge at the beginning of your trial.

[3] The second, count 3, was a charge of causing grievous bodily harm with intent to injure. It concerned severe head injuries inflicted on the morning of 30 June 2008. The jury convicted you of that charge at trial on 10 September 2009, but acquitted you of an alternative charge of causing grievous bodily harm with intent to cause such harm.

[4] The third, count 4, alleged that you failed without lawful excuse to provide necessaries of life, in the form of medical care for Benjamin following the injuries that you inflicted on 30 June. You were also found guilty of that charge at trial.

[5] Those dates span a weekend. At that time you were living with your husband and five children in a home at Avondale. The three oldest children were aged 12, 8 and 3, including Benjamin, and the youngest two were babies. You were also two months pregnant. Your husband worked long hours and looking after the five children was clearly your responsibility.

[6] Benjamin had only lived with you for a few months, because he had been raised until then by his grandparents in American Samoa. It seems that you had not bonded successfully with Benjamin, who had been raised by his grandparents and was used to life in Samoa. You found him a troublesome child, prone to climbing on bunk beds and the like. He was also a persistent bed wetter. You were in the habit of using physical discipline on him.

[7] On Friday 27 June you disciplined him with a hard-soled sandal for playing in the kitchen. For this trivial offence, you beat him about his bottom, back and legs, holding him by his left arm as you did so. You must have done so with great force and in a sustained way, for he suffered fractures to his pelvis, foot, right hand and wrist. You inflicted extensive bruising to his right and left lower legs, right hip and groin area, left elbow and also his lower back, and buttocks.

[8] On the morning of 30 June, your husband arose early and went to work, as was his custom. At about 8am the other children were getting ready for school. At that time you attacked Benjamin, apparently because he had once again wet the bed. You struck him on the head, and one of the two children described you chucking his head on the floor. The expert evidence is that this required great force, more than would typically result from a fall from some height. Benjamin collapsed.

[9] You wrapped him in blankets and placed him on the couch, where you prayed over him and checked him occasionally. After some time you noticed that he

had an extremely high temperature, and you removed his clothes and wrapped him with cold blankets.

[10] On the view I take of the evidence, Mrs Mikaio, you not only knew that he needed medical care but also refrained from seeking help because it would reveal what you had done to him. I accept however, that you did not know just how badly hurt he was.

[11] Eventually you did seek help, realising that Benjamin was getting worse. Sometime after 1pm you drove him to a property in Glen Innes, the home of Ms Fenunuti, a Samoan healer. She immediately saw that Benjamin was in trouble and instructed you to call an ambulance. Medical staff found him deeply unconscious and suffering seizures.

[12] Benjamin suffered extensive brain damage. Some of that damage is a result of pressure on the brain due to severe internal bleeding, a very dangerous phenomenon which would have been addressed had he undergone emergency surgery earlier. Based on the expert evidence about the impact of intracranial bleeding, I draw the inference that the brain damage would have been materially reduced had an ambulance been called without delay. As it was, Benjamin very nearly died.

[13] Contrary to counsel's submissions, Benjamin's prospects of living a normal life must be considered poor. Put another way, I agree with the Crown that he is at high risk of permanent disability. The jury heard evidence that although he had made pleasing progress, as at 23 June this year he needed a full time educational support worker at kindergarten, suffered impulsivity, puts inappropriate things in his mouth and was no longer toilet trained. He continued to see an occupational therapist, and wore a helmet to protect his head. A child in whom that sort of investment is being made by our health and education services is a child with very serious problems. The paediatrician who gave evidence at trial doubted whether he will be able to live independently as an adult. Further, I reject the suggestion that this may reflect pre-existing impulsivity and slowness. I accept there was evidence to that effect, but the evidence at trial is that the injury has caused the serious

consequences to which I refer. I observe that the recent victim impact statement from his grandmother, with whom he now lives, is consistent with that evidence. She considers that when he was in Samoa he was a bright boy, able to sit quietly and concentrate. But she states that when he left hospital he had to be taught to walk, talk, hold a spoon, and use the toilet. He cannot sit still or concentrate, and keeps misbehaving. He has to be watched all the time. He must still wear a skull cap when he goes outside. She feels that he will always need looking after.

Personal circumstances

[14] The presentence report records that you are aged 40 and the seventh of nine children in your family of origin. Your parents divorced when you were one, and your mother's new husband was very violent. He also abused you in other ways. You lived in American Samoa, and eventually moved to the USA, where you had five children with a husband whom you married there. The relationship was abusive and you left him in 2002 to return to Samoa, where you met your current husband. He is the father of your four youngest children. You followed him to New Zealand in 2005. Regrettably it appears that relationship too was violent for a time, although I am told that ceased on his commitment to the church of which you are members. I am told that the family has reconciled and he continues to support you. I acknowledge his presence in Court today.

[15] Two of your children now live with your brother in New Zealand, three live with their grandmother in Samoa, and the remaining four are in New Zealand. It is your understanding that Benjamin will return to live with family in Samoa.

[16] To the probation officer you accounted for the offences by saying you were two months pregnant with your youngest child and were feeling sick and dizzy, with a poor appetite. Benjamin would not listen when you told him things. You admitted hitting him on 27 June, but maintained that you did not inflict the head injuries.

[17] You present as remorseful, penitent, and contrite. There are no previous convictions, and you are assessed as having a very low risk of reoffending. You are a regular churchgoer. You have undertaken programmes in the community dealing

with parenting and anger management. No particular rehabilitative needs are identified, although you are described as emotionally fragile. I have read a letter that you've written to me today.

Sentencing principles

[18] I take the charge of causing grievous bodily harm with intent to injure as the lead offence. It is necessary to fix a starting point that takes into account the three convictions.

[19] There are a number of aggravating features. They are serious violence, the two discrete attacks, the prolonged nature of the violence on the first occasion, Benjamin's vulnerability, your failure to seek medical assistance when you knew it was needed, and the grievous harm that he has suffered.

[20] The Crown invites me to adopt a starting point of five and a half to six years before an uplift for the other offences. That is based on principles established by the Court of Appeal for sentencing under s 188(1) of the Crimes Act, after adjustment to recognise that your culpability is somewhat reduced.[1] That is so because you were convicted only of offences involving intent to injure, not intent to cause really serious harm.

[21] However, the Court of Appeal has also cautioned against mechanical application of that methodology to cases such as yours.[2] Rather, it is necessary to consider comparable cases. I have done that, and I will list the cases I have taken into account in my sentencing notes.[3] They show that although an attack on a small child is very serious, not least because of the potential for serious injury,[4] the starting points adopted in comparable cases fall into a range of about two to six years, with cases such as yours at the higher end of that range. That is so because it seems that

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[1] *R v Taueki* [2005] 3 NZLR 372
[2] *R v Brown* [2009] NZCA 288
[3] *R v Filo* [2007] NZCA 20, *R v Gatland* CA330/98 28 November 1998, *R v Wilson* [2004] 3 NZLR 606, *R v Te Waaka* HC AK CRI 2006-092-015178 7 April 2008, *R v Peauvale* HC AK TO22287 6 March 2003 also *Watene v The Police* HC WHA AP 11/03 26 May 2003
[4] I note in particular *R v Wilson* [2004] 3 NZLR 606 at [57]

in many of these cases the Court has accepted that a parent has simply lost control, so that the cases are not wholly comparable to those of very serious street violence.

[22] Relying on those cases Mr Faleauto urges me to adopt a starting point of not more than four years for all of the offences.

[23] Turning to this case, the offending was impulsive and you meant to punish, not to cause serious harm. It occurred in circumstances where I accept you were under stress from the pregnancy and your heavy childcare responsibilities. I accept that you did not realise how badly Benjamin had been hurt on the Friday. I also accept Mr Faleauto's submission that you didn't know the extent of his injuries on the Monday.

[24] But having regard to the repeated nature of the violence, the terrible consequences for Benjamin, his vulnerability and your wholly inexcusable failure to get help for him, a substantial starting point is needed. And I observe, by way of confirmation, that the neglect charge alone might attract three years.[5]

[25] I adopt a starting point of six years imprisonment for the totality of the offending.

Aggravating and mitigating factors

[26] There are no aggravating factors that I have not already considered. In mitigation, the first question is whether any allowance should be made for your guilty plea. Although you accepted responsibility for the Friday injuries at an early stage, the plea itself was very late. It did not avoid a trial, in which your two older daughters were required to give evidence. You were acquitted on count 2, and count 3 was added only at trial after I raised the question of an alternative charge with counsel. But you had refused the Crown's offer of the same charges made in a letter of 26 August 2009, and rather than focus on the question of intent to cause really serious harm, you sought to excuse yourself entirely at trial, on both counts on which

[5] *R v Hirchkop and Ash* CA506/05 6 July 2006

you were convicted, by advancing a fanciful theory of accidental injury. That required Mr Faleauto to confront the clear eyewitness accounts of your two daughters, which must have been distressing for them. In the circumstances, I will make an allowance for the guilty plea, but it will be limited to six months.

[27] I have accepted, Mrs Mikaio, that pregnancy and stress account for the very serious violence used, but all the indications are that vigorous physical discipline was the norm in your household. You won't be punished for that today. The point I am making is that it would be wrong to accept that your behaviour on these occasions was wholly out of character.

[28] I am prepared to make a further allowance for remorse, which I do accept is genuine, and your own background, but it must be limited having regard for your attempt to escape responsibility at trial.

[29] Contrary to Mr Faleauto's written submissions, your action in belatedly getting help for Benjamin is not a mitigating factor so far as the present charges are concerned. It merely explains why you have not been convicted of manslaughter.

Decision

[30] Your sentence on the lead charge, count 3 is five years imprisonment. On count 1 your sentence is two and a half years imprisonment, and on count 4 it is three years imprisonment. All of these sentences are concurrent. That means that your effective sentence is five years imprisonment. In the circumstances I will not impose a minimum period.

[31] Stand down.

Miller J

Solicitors:
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