NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF MS T OTHER THAN RELATIONSHIP TO MR BROWN AND VIS A VIS DECEASED AS "CAREGIVER" PROHIBITED UNTIL FURTHER ORDER OF THE COURT.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2021-092-8669
[2023] NZHC 1267

THE KING

V

TYSON BROWN

Hearing:	26 May 2023
Appearances:	L P Radich and T C T Riley for Crown L B Cordwell for Defendant
Sentence:	26 May 2023

SENTENCE OF JOHNSTONE J

Solicitors:
Kayes Fletcher Walker, Auckland

Preliminary

[1] Arapera Fia was a two and a half-year old girl. She should have been loved, and nurtured, by everyone who had the opportunity to be with her.

[2] Tyson Brown, it is my task to sentence you for the crime of murdering Arapera.

[3] I am going to take some time to let you and the other people here in Court know the reasons for the sentence I have chosen. I will ask you to stand up when it comes time for me to impose that sentence.

Offending

[4] First, I will describe your offending.

[5] By mid-2021 Arapera's [caregiver] rented a house for herself and Arapera in Weymouth.

[6] Mr Brown, you had known Ms T some years before. Contact was re-established. After initial reticence on your part about engaging in [the relationship], you commenced to spend more time with Ms T, staying nights occasionally in the Weymouth home.

[7] In mid-August 2021 New Zealand moved into full lockdown under Level 4 of the Covid-19 alert system. Auckland moved only to Alert Level 3 in early October 2021, and remained there for many weeks. You were still residing at your mother's home, but now staying frequently at the Weymouth house. Numerous people saw and heard you interacting with Arapera. For example, a neighbour heard you screaming and swearing at her, telling her to be quiet or else she would "get it". And Kiana Funaki and Jacob Hansen, a young couple who were staying in a sleep-out behind the main house, would occasionally hear yelling and banging from within the house, Arapera crying, and you, Mr Brown, yelling at her and telling her to "shut up". Ms Funaki and Mr Hansen recalled a particular episode in mid-October 2021 when they entered the main house to make some food and from the kitchen could hear you, yelling at Arapera as she cried in her bedroom.

[8] On the morning of 26 October 2021, Ms Funaki entered the main house from the sleep-out, to find Arapera in the living area on her own. Ms Funaki noticed and took photographs of bruising to Arapera's body in various places. Other photographs taken of Arapera during the period 25 October to 27 October 2021 appear to show other soft tissue injuries. I do not, however, find that it had to be you who caused those injuries. There is a real prospect of at least some of them being caused by Arapera falling from a small plastic slide on which it was Arapera's habit to play outside the house. And even if the injuries were inflicted by another individual, there is a possibility this individual was not you.

[9] On the other hand, I hold you responsible for taking a short video that Police recovered from your cell phone, despite it having been deleted, showing Arapera's head and shoulders from a distance of around half a metre as she gazes into the camera. She is clearly upset and scared. There is a tear in her eye. It is clear to me that in that moment you were cruelly attempting to impose some misguided form of discipline upon her. Your action in taking this video is consistent with other evidence of you assuming a level of responsibility for her approaching that of a parent or guardian, but choosing to exercise that responsibility cruelly; verbally abusing her and making unrealistic demands of her in matters such as making noise and toilet training.

[10] On Friday, 29 October 2021 you tested positive for Covid-19. While your preference was to undertake your mandatory isolation period at your mother's house, you were required to isolate at the Weymouth home. At midday on Sunday, 31 October 2021, the poor attitude and behaviour you displayed in response to your circumstances caused Ms T to complain to Ms Funaki during a text message conversation.

[11] By shortly after 2 pm, Mr Hansen and Ms Funaki had heard your raised voice from where they were in the sleep-out at the rear of the property. They were sufficiently concerned to attempt to check with Ms T, but she deflected their concerns. Ms T's phone records indicate that she was focused on acquiring food for the occupants of the home, and also that she took part in a 30-minute a phone conversation, apparently with a health authority representative, starting at 3.51 pm. During this phone-call, Mr Hansen texted Arapera's father, referring to you being angry at Arapera for crying and telling her to "shut up" and "stand up".

[12] Relying on the evidence of Mr Hansen and Ms Funaki, Ms T's telephone records, and the forensic and pathological evidence given at your trial, I infer it was during Ms T's phone-call, or shortly thereafter, that you spontaneously allowed your own circumstances and emotions to overcome your clear responsibility to Arapera. Using considerable force, you struck her, or you struck her against hard surfaces in her bedroom. There were at least three distinct and forceful impacts against her head, across multiple planes, causing Arapera to suffer widespread subdural haemorrhaging.

[13] Arapera was later found to have suffered bruising over much of her body, and compression fractures to her spine of a type most commonly seen in children her age if they have been plonked forcefully down on their bottom. Much of the bruising to Arapera's head will have been caused by the severe beating to which you subjected her. Despite the difficulties involved in scientific determination of the age of bone fractures, I am satisfied in particular by the evidence of Ms Funaki, who saw Arapera outside the home earlier in the day, that her spinal fractures were caused by you.

[14] Having finished her phone-call at 4.21 pm, Ms T continued to engage with her cell phone. She interacted with Ms Funaki on the topic of your poor behaviour and her desire to ensure you did not get any angrier. And she texted a commercial food delivery service and her own family over the prospect of obtaining further supplies. After 5 pm, Ms T arranged for Ms Funaki to enter the kitchen in the main house, to unpack and store food that had been delivered for her and Mr Hansen. At 5.21 pm, Ms T advised that for social distancing purposes she had retreated to Arapera's bedroom.

[15] Given the nature of Arapera's injuries, and the expert evidence to the effect they would have been immediately obvious, I infer that despite Ms T's evidence to the contrary this was the first occasion following her phone call and your assault on Arapera of Ms T checking on Arapera, at least in any meaningful way. Both Ms T, and you, Mr Brown, commenced a series of Google searches attempting to gain information about how Arapera might be woken up despite what by that stage would have been a state of deep unconsciousness.

[16] Your decision during this period not to advise Ms T of what had happened to Arapera was selfish, and a serious failing. From that time on, you have consistently attempted to resist being blamed for Arapera's injuries. The immediate consequence, conceivably informed to some extent by the presence of Covid-19 in the household, was that Ms T did not call emergency services for another two and a half hours. While Arapera's serious condition would have been obvious and should have meant an immediate call for help, your deceit of Arapera's [caregiver] alongside her own inattentiveness and poor decision-making meant that any remote prospect of saving the child's life was lost.

[17] Attending ambulance officers were able to detect faint traces of life. But Arapera was formally pronounced dead, soon after midnight, and shortly after she had been taken to hospital.

[18] You and Ms T were transferred to a managed isolation quarantine facility. Police intercepted your phone-calls with various other people, and also with Ms T following your joint release from that facility at the end of your isolation periods. In lengthy, apparently emotional, conversations with Ms T, you pretended that you were unaware of the fact that you had killed Arapera. Don't shake your head. It won't serve you. You strung her along, inviting her to believe you had done nothing wrong, while attempting to maintain your relationship with Ms T: manipulating her for the obvious purpose of trying to prevent her from telling investigators what she knew of your attitude and behaviour towards Arapera.

Sentencing for murder

[19] I turn to the law relating to sentencing for murder.

[20] An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.[1] Your lawyer, Mr Cordwell, responsibly accepts that a sentence of life imprisonment is required in your case.

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1 Sentencing Act 2002, s 102.

[21] When sentencing an offender convicted of murder to imprisonment for life, the Court must address the question of what minimum period of imprisonment (MPI) is needed to satisfy various sentencing purposes.[2] Of these, the sentencing purposes that are relevant in your case are those of holding you accountable for the harm done to Arapera, her family and the community, denouncing your conduct, and deterring other persons from committing similar offences.

[22] If the offending involved certain aggravating circumstances, which I will call "s 104 circumstances" because they are listed in s 104 of the Sentencing Act, the MPI is required to be at least 17 years unless that period would be manifestly unjust. The list of s 104 circumstances includes those where the deceased was particularly vulnerable because of her age. Clearly, Arapera was particularly vulnerable because of her age. Again, Mr Cordwell responsibly accepts that this means the presumption of a MPI of at least 17 years applies in your case.

[23] But the argument he advances for you is that a MPI of 17 years or more would be manifestly unjust because of various mitigating features personal to you. He refers in particular to your age, being 21 years old at the time of Arapera's death, your dysfunctional family background, and your lack of previous convictions beyond driving-related matters.

[24] The leading Court decision dealing with sentencing in line with s 104 suggests approaching the issue of what MPI to impose in two steps:

(a) First, the Court would consider the degree of culpability in the current case compared to the culpability involved in murders which do not feature s 104 circumstances, and it would settle on a nominal MPI which would be imposed in the absence of the s 104 presumption.

(b) Second, the Court would go on to consider the question whether to impose an MPI of at least 17 years would be manifestly unjust in light of the nominal MPI it had settled on.[3]

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2 Section 103.

3 *R v Williams* [2005] 2 NZLR 506 at [52]–[54].

Features of offending

[25] At this point I will refer to what I regard as important features of your offending, relevant to determination of the correct sentence.

[26] First, and as I have said, it is of course quite clear that Arapera was particularly vulnerable. And to the extent you were in a relationship with her [caregiver], living in a home occupied by just the three of you, and you had commenced domestic duties such as looking after Arapera when Ms T was occupied with other activities elsewhere in the house and had started to involve yourself with the way in which Arapera was being disciplined, you owed her a duty which approached that of the duty owed by a guardian. She had no choice about whether she would be subject to your standards of behaviour and decision-making. She, all of those who loved her, and the community at large, were entitled to expect more of you than you chose to offer.

[27] A further aspect of your offending is its devastating impact on Arapera's family. This morning, Arapera's father Malcolm Fia has read to everyone here in Court his description of the impact upon him of Arapera's loss. A further similar statement written by Vaofusi Faavaheikenila, Mr Fia's cousin, has been read on her behalf. I have also read and take into account the statement prepared jointly by the nannies, aunties and uncles of Arapera many of whom I recognise here in Court because they, just like Mr Fia, were present throughout your trial. The very thoughtful comments made in all of those statements about things such as what Arapera might have done and should have done had she been allowed to grow up, serve to confirm the seriousness of your offending.

[28] Next, I agree with Mr Radich for the Crown that your offending was committed with a high level of brutality and callousness, those aspects also qualifying along with her vulnerability as s 104 circumstances. While the exact mechanism by which Arapera suffered her injuries cannot fully be known, your attack upon her required at least three distinct forceful blows to her head. Given her age, your attack was highly brutal. The callousness involved in your offending draws similarly from her very young age, but also from the selfish and manipulative approach you took to defer her receipt of medical attention for the purpose of avoiding blame. There were in effect

two unacceptably poor decisions that you made as to how you would treat Arapera. Not only did you spontaneously erupt into violence which, while likely happening in my view relatively quickly, required at three least distinct efforts. Having completed that activity and taken what needed to be only a short period in which to reflect upon what you had done, you resolved that your own interests would take priority over Arapera's interests, when you decided to pretend that you did not know what was causing her clearly very severe medical condition.

[29] Against that, it is clear your initial decision to assault Arapera was spontaneous. Of course, her vulnerability to your actions meant that no particular planning was required, and your conduct in the days and weeks before Arapera's death showed that your general disposition towards Arapera was at times to treat her badly. But there is an extent to which your violent outburst was a product of the circumstances you happened to find yourself in at the time.

Features of offender

[30] That brings me to address your own circumstances, both in the moment and more generally.

[31] As I have noted, on 31 October 2021 you had Covid-19, you were isolating in a house that was not your first choice, you were looking after a two-and-a-half-year-old girl whose [caregiver] was occupied with seeking heath authority advice and obtaining food for those in the house, and perhaps most significantly for present purposes, you were 21 years old. The Courts have found that there are distinct differences between emerging or young adults aged 18 to 25 and their elders: neurological differences. Science has shown that the parts of the brain that control planning, consideration, impulsivity and judgement are the last parts of the brain to develop. Young people's brains are built to take more risks, or more accurately, are not yet built to take fewer risks.[4]

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4 *Dickey v R* [2023] NZCA 2 at [85], citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

[32] More generally, your family background has been highly unsettled. You were raised for your first 10 years or so by your mother, before going to live with a non-biological grandfather and uncle, and then to a further home. On occasion you saw violence directed towards your mother. But your relationship with her has been and remains poor. The pre-sentence report I have received from the Department of Corrections indicates, amongst other things, that factors related to your offending include the lasting effect of your childhood trauma, your lack of relationships with positive role models (even your grandfather was a significant drug user), the lifestyle you were living at the time of Arapera's death, and your relative youth and inexperience around relationships and caregiving. From what I have seen, I agree.

[33] Under s 27 of the Sentencing Act, you have requested that I should hear from Shelley Turner, a professional report writer. I have heard from Ms Turner in terms of s 27, by reading her helpful report. It emphasises the sense of dislocation you have felt as a consequence of your mother's lifestyle choices including the lack of attention she paid you and your half-siblings, the unsatisfactory nature of your stay with your grandfather who engaged heavily in drug use and the violence you witnessed. Ms Turner drew further attention to the environment of material deprivation in which you were raised, and your sense of cultural deprivation arising from a lack of engagement with your Māori heritage.

[34] Somewhat surprisingly, given your family circumstances, you did well at school achieving levels 1, 2 and 3 of NCEA. And having left school relatively early, you were able to find work in various roles. That said, cannabis use, along with experimental use of other drugs, became a feature of your lifestyle by your late teens or earlier. Indeed, you confirmed to Ms Turner your very substantial cannabis use in the period shortly before Arapera's death. You told her you were sick, not just physically but mentally.

[35] On the issue of remorse, your comment to Ms Turner that you would "want to say that [you are] sorry for [your] part in this" perhaps best captures your mindset. You appear to accept that your presence in the household may have contributed to Arapera being killed by someone else, implicitly Ms T. But you do not accept that in fact you killed Arapera yourself. You should.

Assessment

[36] Having described those features of your offending and the features relating to you, I can now apply the law to this case.

[37] At this point I need to turn back to the legal principles for the purpose of assessing the factors I have just mentioned. First, in light of the Court judgments I have referred to relating to the brain development of young people, I recognise that it is necessary for this Court sentencing a young person for murder to give careful consideration to whether a sentence of life imprisonment itself is manifestly unjust.[5] I have already mentioned your lawyer's concession that a sentence of life imprisonment should be imposed in this case. In my view, that concession was correct.

[38] Despite the youthful, perhaps unthinking, spontaneity with which you elected to assault Arapera, and the extenuating circumstances in which you made that decision, it is not in my view manifestly unjust that you should be sentenced in a way that will likely see you under state control for life. The multiple nature of your assault, its severity, your manipulative attempt that afternoon and over the following weeks to deflect blame, and the resulting need to hold you accountable for the harm you have done to Arapera, her family and the community, and indeed to denounce your conduct is too overwhelming for that. It is not unjust that you will be unable to move on from your conduct in respect of Arapera even after a very lengthy period in custody prior to your release into the community on parole. It is not unjust that even then you will be subject to being recalled if your behaviour in the community is not as required.

[39] Given that view, and the finding I have indicated that two of the s 104 circumstances are engaged, I turn as the lawyers have anticipated, to assess your culpability compared to that involved in murders which do not involve s 104 circumstances and therefore will regularly attract sentences of life imprisonment with MPIs as low as 10 years. For the Crown, Mr Radich suggests a nominal MPI of 17 years. For you, Mr Cordwell suggests a nominal MPI of 15 years.

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5 See *Dickey*, above n 4, at [177].

[40] To assist in making my assessment I have reviewed sentencing decisions involving comparable cases, including those that the lawyers for both the Crown and for you, Mr Brown, have referred to me. A summary of those cases will appear in the written form of my sentencing remarks.

[41] In *R v Taylor*,[6] Mr Taylor had caused a 15 month old child multiple subdural haemorrages and fractures to his jaw and shoulder blades. Mr Taylor was 23 years old. His offending was out of character, particularly given his unremarkable personal background and family support. On the night of the child's death, Mr Taylor at least raised the alarm and attempted to perform CPR but he sought to exonerate himself; firstly, by suggesting the injuries were accidental, and then by attempting to blame the child's mother. Justice Mander indicated that in the absence of the s 104 presumption, a MPI of 16 to 17 years would have been justified.

[42] In *R v Solomon*,[7] a 24 year old man who had been using cannabis murdered a five month old child, by causing substantial blunt force injuries to her head and leg. He phoned emergency services, but falsely claimed the child had fallen in the bath, her injuries occurring accidentally in the course of a rescue. Mr Solomon's breach of trust was particularly severe, the child being his daughter. Justice Davison imposed life imprisonment with a 17 year MPI.

[43] In *R v Ellery*,[8] a 21 year old Mr Ellery murdered a six month old child by removing her from her cot and slamming her headfirst to the ground. Initially, Mr Ellery suggested the child's uncle was responsible for her injuries, and other members of the family believed him. However, he eventually pleaded guilty and was able to call in aid a childhood and adolescence marked by emotional distance and detachment, and various vulnerable psychological traits. Justice Toogood elected to deduct two years from a MPI starting point of 17 years, to recognise Mr Ellery's upbringing and psychological traits, and a further 18 months for his guilty plea, sentencing Mr Ellery to life imprisonment with a 13½-year MPI.

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6 *R v Taylor* [2017] NZHC 1257.
7 *R v Solomon* [2016] NZHC 1653.
8 *R v Ellery* [2013] NZHC 2609.

[44] In *R v Wakefield*,[9] Mr Wakefield murdered his five month old stepson by shaking him a number of times. Justice Dobson selected a starting point for the MPI of 15.5 years. Further, Mr Wakefield was found to be remorseful. While he denied murdering the child by shaking, he admitted manslaughter. Justice Dobson, having reviewed a further range of cases which I have found helpful, noted that remorse and imposed life imprisonment with an MPI of 14 years, nine months. It does not appear Mr Wakefield was a young or emerging adult.

[45] The cases are not entirely reconcilable. And all of them were decided prior to the Court of Appeal issuing its reminder in the case of *Dickey* of the significance of youth in sentencing for murder.

[46] In my view, the appropriate nominal MPI is one of 15 years. It cannot be lower, because of Arapera's vulnerability to you and your breach of your duty of care, the devastating impact of her loss, your failure to seek help and your attempts to deflect blame, and inability to call in aid any real recognition of your wrongdoing, let alone a plea of guilty. But it cannot be higher, because in this case your 21-year-old, lesser level of self-control and under-developed ability to make mature decisions was compounded in my view by your Covid-19 status and your largely unsupported circumstances while in isolation in the house at Weymouth, and I further think was influenced by your undesirable upbringing and lack of proper parental role models.

[47] The next question is whether in light of that nominal 15-year MPI, the 17-year, presumptive MPI under s 104 of the Sentencing Act should be imposed. And the answer to that question depends on whether the 17-year MPI would involve manifest injustice. Of course, the practical difference between MPIs of these lengths should not be overstated. The overall sentence will be one of life imprisonment, and your release at the expiry of any MPI I impose will depend on what the Parole Board thinks of your risk to public safety at that time.

[48] For now, it is difficult to weigh your prospects of rehabilitation. In theory, as a young person those prospects should be relatively good, but you have not as yet acknowledged your offending. I expect that in time that acknowledgement will come.

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9 *R v Wakefield* [2019] NZHC 1629.

[49] On that basis, I consider a likely additional period of two years in custody, beyond the nominal MPI that would meet the relevant sentencing principles mentioned in s 103, to be sufficient to give rise to manifest injustice. In short, life imprisonment with at least 15 years in custody is enough.

[50] Mr Brown, please stand. For your crime of murdering Arapera Fia, I sentence you to life imprisonment. You are to serve a minimum period of imprisonment of 15 years.

[51] You may stand down.

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Johnstone J