

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

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CRI-2021-063-2590
[2023] NZHC 520**

THE KING

v

MELODY MAMAENGA ROA NGAWHIKA

Date of hearing: 15 March 2023

Appearances: A J Gordon for the Crown
S I Mills for Ms Ngawhika

Date of sentence: 15 March 2023

SENTENCING NOTES OF JAGOSE J

Solicitors:
Gordon Pilditch, Rotorua
Lance Lawson, Rotorua

[1] Ms Ngawhika, as you know, on 29 November last year, a jury found you guilty of the manslaughter of your infant son, Elijah Abraham. You were convicted accordingly. I now am to sentence you on your conviction.

[2] In sentencing you, I must accept as proven all facts essential to your established guilt.¹ Because I was the trial judge, for sentencing, I also am entitled to make factual findings based on the evidence at trial, if consistent with the jury's verdicts, whether or not adverse to your interests. I am not bound to accept a version of facts most favourable to you.²

[3] I have read and listened to all that counsel have had to say, both for you and for the Crown. The Crown recommends a starting point of five years' imprisonment, discounted only in duration. Your counsel advocates for a starting point of four years' imprisonment. He additionally claims discounts in a range of 65–70 per cent leading to an end sentence of home detention.

[4] The lawyers' written submissions are detailed and lengthy. I have given them careful consideration. But I don't recite them, because sentencing is an intense exercise of my own judgement. I am not bound by the lawyers' views; I have to come to my own decision. To meet sentencing's multiple purposes,³ I must satisfy myself of the appropriate sentence for the gravity (or seriousness) of your offending, including your culpability (or responsibility) for it.

Your offending

[5] I need first to cover off the background to your offending, to let people know the conduct for which I am sentencing you.

[6] At some time in the night of 28 August 2021 into the following morning, you were trying to settle the teething and crying six-month-old Elijah. You were holding him against your body as you walked around inside your house, his face into your

¹ Sentencing Act 2002, s 24(1)(b).

² Section 24(1)(a); and *Edwardson v R* [2017] NZCA 618 at [105]–[107], citing *R v Connelly* [2008] NZCA 550 at [14] and *B (CA58/2016) v R* [2016] NZCA 432 at [76].

³ Sentencing Act, s 7: accountability, responsibility, victims' interests, reparation, denunciation, deterrence, community protection, rehabilitation and reintegration.

shoulder. The jury's verdict means it was satisfied beyond reasonable doubt you intentionally suffocated him. The verdict also means the jury was not satisfied beyond reasonable doubt you intended to cause Elijah significant bodily injury, or knew your actions were likely to cause his death or consciously ran the risk Elijah could die as a result of your actions. The jury rejected your infanticide defence, meaning they did not find it reasonably possible any disturbance in your mind was due to childbirth or entitled you then to be considered less than fully responsible for Elijah's death.

[7] You delayed dealing with Elijah's lifeless body for some hours. You contemplated disposing of it, but could not see that through. You avoided your brother's enquiries from hearing your distress, and excluded him and your daughter from your bedroom where Elijah lay. You called the children's father mid-morning to tell him you had killed Elijah. You said "my paranoia got the best of me". You then called police to say you had killed your son.

[8] You were then taken into custody on 29 August 2021, until you were granted electronically-monitored bail on 11 April 2022 at He Korowai Trust in Northland's Kaitaia, where you have remained ever since.

Victim impact statements

[9] I have victim impact statements from members of Elijah's family, including his father and grandparents. Elijah's death has been a source of understandable pain and suffering for them, particularly as Elijah appeared to be "a blessing of new beginnings and the drive for a better future", so says your whāngai mother. They blame themselves for not earlier intervening with you; they are hurt because you did not seek their help; and now they must guide your daughter to come to terms with her brother's death at your hands. I offer you all this Court's condolences.

Personal circumstances

[10] I turn to consider your personal circumstances. You were raising Elijah and his older sister in Rotorua. You had come here to put some distance between yourself and your former partner, the children's father, in Taranaki. You were 27 years old at the

time of Elijah's death. You established a good safe home for the children, and supported them well with the assistance of your younger brother who also lived there.

[11] That is obvious not only from his comments, and from the comments of medical experts at trial, but also from the comments of the investigating police officer, who observed the house was "really well equipped" and "really well stocked" and organised for the care of children. The photos of the home, including of a separate children's dining table and chairs carefully stacked away after use, reinforce the officer's observation. So too, sadly, does Elijah's post-mortem examination as "a well-developed, well-nourished infant male", uninjured but for three small external abrasions on his neck. The absence of internal injury illustrated he had not been strangled. And there was no indication of any exposure to drugs in his blood, despite your apparent cannabinoid self-medication, illustrating the care you took with him.

[12] The comfort and stability you sought to provide your children is in marked contrast to your own background. Before re-establishing yourself here in Rotorua, you had significant mental health issues since your own childhood, seemingly largely brought about by contact with your father. Your complaints of his sexual abuse led to your contact with mental health services from an early age. Your father suffered psychoses of a religious and self-aggrandising nature. He was forceful in requiring you to adopt his perspectives. Your mother's death in 2018 gave you the opportunity to escape his influence for your children's father in Taranaki. But that also descended into abuse from which you left, although you maintained contact with him by regularly travelling back there with the children.

[13] You had family support here in Rotorua. You felt happy, optimistic and supported. But in the weeks leading up to Elijah's death, expert evidence was you were suffering severe mental illness: a major depressive episode, including transitory psychotic elements of hallucinations and delusional paranoia. Together with other indicia of your disturbance — poor sleep, weight loss and mood changes — these were attributed to your father's attempts to resume contact with you and associated post-traumatic stress.

[14] At the time you killed Elijah, it is accepted you were experiencing a marked psychotic episode relating to demonology promoted by your father, in which you considered Elijah may be “not a child of God”, as born to you, a “jezebel” in your father’s depiction. You spoke of thinking about needing to have a sacrifice.

—*PAC report*

[15] For your sentencing, I have a very detailed 15-page pre-sentence report prepared by the Department of Corrections. The report-writer considers you do not fully recognise the impact of your offending on others, in particular, on Elijah’s father’s family, and therefore (given the nature of your offending) are of some risk of harm to others. But you are assessed as being at low risk of re-offending, particularly given the support now available to you.

[16] The report-writer observes your historically poor self-image, the foundation of your detrimental relationships, is undergoing change through your time with He Korowai Trust. You are fully engaged with its programmes, to the extent you have become a positive leader and role model to other residents. The report-writer notes your “long-term trauma and subsequent mental health issues ... are yet to be appropriately and fully addressed”, and recommends such be addressed “in conjunction with He Korowai Trust oversight” to maintain the Trust’s signature “wrap around service and support”. In the report-writer’s view, while recognising a custodial sentence may be required to hold you accountable, the least restrictive sentence in which you are able to be appropriately supported is home detention with post-detention conditions.

—*s27 report*

[17] You have asked me to hear from Jarrod Gilbert and his team on your background and its relevance to your offending and its sentencing. His 32-page report explains the economic deprivation, instability and parental neglect of your childhood put you at unenviable risk of endemic disadvantage, intensified by the sexual and violent nature of the abuse you suffered in family and gang-affiliated circumstances. He endorses the psychiatrists’ acceptance your severe mental illness springs from that background, further exacerbated by your cannabis use and possible brain injury. He

notes the apparent benefits you have obtained at He Korowai Trust in confidence, personal growth and remorse.

—*other reports*

[18] I have nothing directly from you. But He Korowai Trust’s deputy chief executive, Toddy Shepherd, explains your growth in its care on the path from distrustful isolation to remorseful engagement in acceptance of your responsibility for Elijah’s death. She says more time is needed for your rehabilitation to be completed. On my enquiry, your caseworker, Anahera Herbert (who has accompanied you throughout trial and now at sentencing), estimates that is for at least another 12 to 18 months. Ms Shepherd says you open up to those you trust, but remain very vulnerable and ashamed of what you did. I expect that explains the absence of any direct communication from you to me. I am aware He Korowai cannot keep a position open for you after imprisonment.

Approach to sentencing

[19] I now explain how I will go about sentencing.

[20] The usual sentencing method involves two stages. First, I decide a starting point for the type of offending for which you are convicted. That involves identifying the aggravating and mitigating features of your offending.⁴ Then I take into account all aggravating and mitigating factors personal to you, all to be calculated as a percentage of the starting point.⁵ Last, I stand back to assess the appropriateness of that sentence in your individual circumstances.⁶

[21] The range of conduct manslaughter sentencing must encompass means sentences may not easily be reconcilable. But “the more serious have attracted a starting point of ten years and above and most incorporate the aggravating feature of prior offending which establishes a pattern of abuse”.⁷ Where that pattern is absent,

⁴ *R v Taueki* [2005] 3 NZLR 372 (CA).

⁵ *Moses v R* [2020] NZCA 296, [2020] NZCA 296 at [46]–[47].

⁶ *Berkland v R* [2022] NZSC 143 at [22] citing *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38].

⁷ *Woodcock v R* [2010] NZCA 489 at [41].

and the death may “be properly characterised as an isolated event evidencing a momentary and uncharacteristic loss of control”, a lower starting point may be achieved.⁸ A number of cases at the low end of the range are “distinguishable on the basis that the offenders were suffering from varying degrees of mental impairment at the time of the offending”.⁹

[22] In the end, my sentence is to reflect this community’s repudiation of your crime, the sentence being “determined not on impulse or emotion but in terms of justice and deliberation”.¹⁰ I must have regard for the statutory purposes and principles of sentencing.¹¹ I must hold you accountable for your offending and for the harm you have caused.¹² Your sentence should be sufficient to denounce your conduct,¹³ to deter you and others from committing such offences,¹⁴ and to protect the community.¹⁵ I must consider the gravity and seriousness of your offending, and take into account its effect on the victims.¹⁶ The sentence must take into account the desirability of consistency in sentencing,¹⁷ and anything in your circumstances as would make an otherwise appropriate sentence “disproportionately severe” in your case.¹⁸ I must impose the least restrictive outcome appropriate in the circumstances.¹⁹

[23] These purposes and principles of sentencing have no ranking,²⁰ except:²¹

The dominant sentencing principle is to denounce and deter the gratuitous and extreme physical abuse of a baby by a parent or caregiver in a position of trust and responsibility.

Thus, in sentencing for violence against, or neglect of, a child, I must take into account as aggravating factors (if applicable) the child’s defencelessness; the serious nature of

⁸ At [41].

⁹ *Robinson v R* [2011] NZCA 479 at [12], referring to *R v Pene* [2010] NZCA 387; *R v Gordon* CA276/04, 16 November 2004; and *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411.

¹⁰ *R v Puru* [1984] 1 NZLR 248 (CA) at 249.

¹¹ Sentencing Act, ss 7 and 8.

¹² Sections 7(1)(a) and 103(2)(a).

¹³ Sections 7(1)(e) and 103(2)(b).

¹⁴ Sections 7(1)(f) and 103(2)(c).

¹⁵ Sections 7(1)(g) and 103(2)(d).

¹⁶ Section 8(a), (b) and (f).

¹⁷ Section 8(e).

¹⁸ Section 8(h).

¹⁹ Section 8(g).

²⁰ *Moses v R*, above n 5, at [4], citing *Hessell v R*, above n 6, at [37].

²¹ *Woodcock v R*, above n 8, at [42]. At [48], the Court of Appeal also refers to its judgment in *R v Leuta* [2002] 1 NZLR 215 at [80]. The whole of *Leuta*’s paragraphs [77]–[81] bear emphasis.

the harm caused; the magnitude of the breach of trust between victim and offender; threats to prevent the victim reporting; and deliberate concealment of the offending.²² As I say, to the extent applicable.

[24] My ultimate consideration is if “the sentence is a just one in all the circumstances”, having regard to “the circumstances of the offence and offender against the applicable sentence purposes, principles and factors”.²³

Starting point

[25] I begin with setting a starting point for your offending.

[26] Of the cases at “the low end” to which I previously referred, a case called *E* bears the closest comparison to your offending.²⁴ In that case, the mother left her 13-month son for the first time in an adult bath up to his chest in water for 15 minutes, during which time he drowned. Her dysfunctional background and major depressive disorder were factors in her one-off offending, while at the higher end of criminal negligence, explicable in part to keep the boy warm while attending on his sister. She also delayed making contact with family or emergency services until her husband’s return from work. A three-year starting point was substituted on appeal.

[27] In the other cases, *Gordon*’s four-year starting point followed the mother’s repeated violent shaking of her sixth baby, in respect of whom she suffered post-natal depression and rejected contact with him, being unable to cope as a wife and mother; *Pene*’s five to seven-year range for a starting point also related to the foster mother’s repeated hitting and shaking of the 13-month infant after a history of physical abuse.

[28] Elijah’s death was not the result of a pattern of abuse, but truly a one-off event. On the other hand, you did not negligently cause, but deliberately caused, Elijah’s death. I consider you bear greater culpability than the mother in *E*, but less than the mothers in *Gordon* and *Pene*. I therefore take a starting point of three years and six months’ imprisonment. That starting point is consistent also with other infant

²² Sentencing Act, s 9A.

²³ *Moses v R*, above n 5, at [49].

²⁴ At [21] above.

manslaughter sentences imposed by this Court in which causative mental impairment is not a factor.²⁵

Adjustment for personal factors

—aggravating factors

[29] Elijah's defencelessness and death, in serious breach of the relationship of trust that must exist between parents and children, have been taken into account in reaching my starting point.²⁶ It would be an error now, to uplift that starting point to account for them. There are no other applicable aggravating factors.

—mitigating factors

[30] Your culpability, however, is moderated by your mental illness,²⁷ which likely was causative of your offending.

[31] Although it is impossible to be definitive, it seems plain the psychosis you were experiencing at the time of Elijah's death fed into your treatment of him, either to achieve his death or to disregard the fatal consequences of your actions. Your psychosis unusually having cleared of its own volition and the rehabilitative steps you are taking at He Korowai Trust means I need not be concerned for any repetition of your offending. The pre-sentence report, as I said, confirms you are at low risk of reoffending. Comparably with the discount given in another infant-smothering case brought about by mental illness,²⁸ I will allow a 30 per cent discount on account of your mental health at the time of your offending.

[32] Separately from your mental illness, your dislocated and abusive personal history undoubtedly has contributed to your offending. Sentencing principle also is to allow a discount for credible personal background factors causing impaired choice and

²⁵ *R v Paea* [2016] NZHC 882 (repeated shaking of seven-week baby: starting point of three years and nine months' imprisonment); *R v Tukiwaho* [2012] NZHC 1193 (inadvertent smothering of two-month baby into shoulder: starting point of three years' imprisonment).

²⁶ *E (CA689/10) v R*, above n 9, at [53] and [67].

²⁷ At [68] and n 40.

²⁸ *R v Wright* [2001] 3 NZLR 22, (2001) 18 CRNZ 527 (CA), cited by *E (CA689/10) v R*, above n 9, at [72].

(therefore) diminished moral responsibility.²⁹ Your family's broken circumstances led you to the environment of your offending. Bringing up two children alone as well as you did, in deprived circumstances and with the reintroduction of your father's undesired attention, was a significant stress in itself to which Elijah's inability to settle only added. Your 'choice' to avoid offending very materially was impaired, quite apart from its motivating mental illness.

[33] Discounts of 15 per cent routinely are made under this head, with room for more in appropriate circumstances.³⁰ I am conscious the Court of Appeal, in approving a 20 per cent discount, specified "there can and should be only limited discounts for those who end up killing innocent children, whatever the difficulty of the offenders' personal situations".³¹ Given that limitation, and the prospect that some portion of a larger discount here may double-count part of your mental health discount, I only allow a 10 per cent discount for your background.

[34] Finally, I recognise your efforts to improve circumstances for your family, consistently with your lack of any criminal record, and developing expression of remorse for the impact of your offending, all justify some additional small discount. I include in that your confession to police. I will allow a 5 per cent discount under these heads.

[35] Taken together these are discounts of 45 per cent, reducing my starting point to a little over 23 months' imprisonment, which I will round up to 24 months.

End point

[36] As a short-term sentence,³² a two-year sentence is substitutable with a sentence of home detention.³³ In practice, the home detention sentence is half the length of the short-term sentence, to reflect its mandatory release date.³⁴ Home detention is a less

²⁹ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [161]–[162]; *Poi v R* [2020] NZCA 312 at [32]–[51]; and *Carr v R* [2020] NZCA 357 at [55].

³⁰ *Tipene v R* [2021] NZCA 565 at [22]–[23], citing *Carr v R*, above n 29, at [65]–[66].

³¹ *R v Pene*, above n 9, at [16].

³² Sentencing Act, s 15A.

³³ Section 80A.

³⁴ Parole Act 2002, s 86(1).

restrictive sentence than one of imprisonment,³⁵ and I am directed to impose the least restrictive sentence appropriate in the circumstances.

[37] A short-term sentence of imprisonment then would require adjustment to reflect pre-sentence custody.³⁶ You were in custody from 29 August 2021 to 11 April 2022, a period of 32 weeks. Thus your two-year or 104-week sentence would have 72 weeks left to serve. And your release date would be in 20 weeks' time, to reflect the 32 weeks you already have spent in custody. An alternative may be to sentence you to 36 weeks' home detention, being half the remaining short-term sentence. In either case, the 48 weeks you have spent on electronically-monitored bail also should be taken into account, typically by a credit of one-third to half your time on EM bail,³⁷ or a further 16–24 weeks.

[38] A derivative effective sentence now of only a few weeks' home detention would not come close to meeting sentencing's principles and purposes in your case. Given the rehabilitation you have obtained while on EM bail, I am not minded otherwise to give you credit for your time on it. At the same time, your time in custody requires to be acknowledged.

[39] I have considered if a sentence of intensive supervision might also or separately be imposed, analogously with two-year sentences for infanticide.³⁸ But I may not combine intensive supervision with home detention.³⁹ And there is resistance to non-custodial sentences for child manslaughter: "society's denunciation of the taking of the life of another makes a prison term appropriate".⁴⁰ In *E* (the case I consider most closely reflects your circumstances), the Court of Appeal would favourably have considered a derivative sentence of home detention (although the sentence itself expressly is not a custodial sentence).⁴¹ But it would not have accepted any less

³⁵ Sentencing Act, s 10A(2).

³⁶ *Longman v Police* [2017] NZHC 2928 at [8]–[9], citing *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223 at [24] and [26]; *Wharrie v R* [2019] NZHC 633 at [32].

³⁷ Sentencing Act, s 9(2)(h); *Paora v R* [2021] NZCA 559 at [53].

³⁸ *R v Wright*, above n 28, at [27]–[28].

³⁹ Sentencing Act, s 19(7).

⁴⁰ *R v Gordon*, above n 9, at [47].

⁴¹ Sentencing Act, s 80A(5).

restrictive community-based sentence because it found the trial judge was not wrong to have considered “a custodial sentence was the appropriate response”.⁴²

[40] Any concern for a formally custodial aspect to your sentence is addressed by the period you have already been detained in prison before being granted bail, thus acknowledging your time in custody by choosing home detention as the less restrictive sentence. Your return to prison in these circumstances now would be, in my assessment, disproportionately severe, removing you from He Korowai’s rehabilitation and support. I therefore will sentence you to 12 months’ home detention. I intend by that sentence you continue to make rehabilitative progress by engaging with He Korowai’s courses and interventions. I cannot make that a special condition of your sentence or post-detention, because special conditions require significant risk of your further offending,⁴³ and I do not think you present such risk.⁴⁴ But I expect a probation officer on assessment may consider you still need such rehabilitation and will approve its continuation, and for that purpose I commend such to the officer.⁴⁵

Sentence

[41] Ms Ngawhika, please stand. On your conviction for the manslaughter of your infant son, Elijah Abraham Ngawhika, I sentence you to 12 months’ home detention at He Korowai Trust in Northland’s Kaitaia on standard detention and post-detention conditions.⁴⁶ The sentence is to commence tomorrow, to give you time to return to that address from Court. You may sit down.

—Jagose J

⁴² *E (CA689/10) v R*, above n 9, at [106]–[107].

⁴³ Sentencing Act, ss 80D(2)(a) and 80P(1)(a).

⁴⁴ See [31] above.

⁴⁵ Section 80C(2)(g) and (3)(c)(iii).

⁴⁶ Sections 80C(2), 80N(2)(a) and 80O.