ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF BABY H'S MOTHER AND ANY IDENTIFYING PARTICULARS OF BABY H PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2022-009-641
[2024] NZHC 1958

THE KING

v

MICHAEL JOHN TOPP

Hearing:	16 July 2024
Appearances:	D L Elsmore and C E Martyn for Crown P J Shamy KC, S A Saunderson-Warner and D M Kirby for Defendant
Sentencing:	16 July 2024

SENTENCE OF HINTON J

Solicitors / Counsel:
Ms D L Elsmore and Ms C E Martyn, Raymond Donnelly & Co, Office of the Crown Solicitor, Christchurch
Mr P J Shamy KC, Barrister, Christchurch
Ms S A Saunderson-Warner, Barrister, Dunedin
Mr D M Kirby, Barrister, Christchurch

[1] Mr Topp, you were found guilty at trial of the murder of your three-month-old daughter, Baby H. You were also found guilty of a representative charge of causing Baby H grievous bodily harm with intent to cause grievous bodily harm and one charge of causing Baby H grievous bodily harm with intent to cause injury. My task today is to sentence you for those crimes.

[2] First, I want to acknowledge the presence of Baby H's mother, Ms F, and other whānau and friends in the room today. Losing Baby H in these tragic circumstances is truly devastating. I commence my remarks this morning by extending the utmost sympathy of the Court to Ms F and Baby H's family, for their loss. I realise that nothing I can do today will come close to compensating for her death.

[3] Whenever a young child dies, and particularly in circumstances such as this, not only does the immediate family grieve, but the whole community grieves with them. There are too many deaths like this one. We all have a responsibility for those among us who are especially vulnerable and who need special care and protection. All children in the care and custody of adults should be entirely safe and secure. It is a tragedy that Baby H's life was taken from her by her own father, a person directly responsible for her care and protection.

[4] I turn to the sentencing now.

Facts

[5] First, I will set out the facts as I find them to be based on the evidence given at trial and the jury's verdicts. While I recognise that this will be painful for Ms F and the other victims here today, it is necessary for me to briefly record the circumstances of your offending Mr Topp.

[6] Baby H was born on 2 October 2021. During her life she was cared for mainly by Ms F. You would help occasionally with her care.

[7] On 30 December 2021 Ms F spent the night up looking after Baby H who was unsettled. The next morning, on 31 December 2021, she went to bed to get some rest.

During this time you took photos and videos of Baby H. You took a video at 11:20 am which showed Baby H smiling and alert.

[8] Sometime after 11:20 am, it seems you became frustrated with Baby H. Ms F heard Baby H cry for approximately five minutes and then settle again.

[9] At 12:18 pm you Google searched "what to do when baby choke". After waiting almost 10 minutes, you woke Ms F up. Baby H was limp and unresponsive. On Ms F's instruction you made a 111 call for an ambulance at 12:28 pm. By the time the ambulance arrived at 12:35 pm, Baby H was limp with decreased levels of consciousness. She was struggling to breathe.

[10] You told the ambulance officers that Baby H had choked on a bottle. You said she had been coughing and choking for five minutes during which time you were patting her back. You maintained this story until well after you were charged with her murder.

[11] Medical tests determined that Baby H's injuries were fatal. On 2 January 2022 she passed away in hospital.

[12] The postmortem revealed that Baby H's cause of death was complications of blunt force head trauma. Baby H had significant head injuries, including brain hemorrhages; bilateral ocular hemorrhages (that is, to the eyes); spinal injuries including an acute spinal cord hemorrhage; and multiple limb fractures. Baby H also had multiple bilateral rib fractures, but these were not ultimately the subject of a charge and I do not take them into account.

[13] The injuries were inflicted on a minimum of three occasions, including the fatal incident. All of these incidents were likely to be during the month of December 2021. Before you inflicted the fatal injuries there was at least one prior incident of force to the head consistent with blunt force trauma or shaking. The force required to cause

the bleeding in the eyes was described as "extremely high".[1] The head injuries were consistent with "very forceful"[2] or violent shaking.[3]

[14] In addition to the prior incident of shaking causing brain haemorrhaging, there was a prior incident causing a leg fracture. All of the limb injuries were likely caused by twisting or snapping.

[15] By the trial you had accepted that you caused the acute injuries (that is, those that killed Baby H). You admitted to fatally shaking Baby H and offered to plead guilty to manslaughter. You denied inflicting the older injuries.

[16] The jury by their verdicts accepted that you caused all of the injuries that were the subject of charges, but found you not guilty of a charge of causing one fracture to Baby H's left leg. The jury found you guilty of Baby H's murder. They accepted the Crown case that you intentionally applied force to Baby H, reckless as to whether death ensued.

Victim impact statements

[17] The victim impact statements make for terrible reading and it was worse still listening to Ms F reading hers out this morning.

[18] Ms F described how no sentence would ever heal the wounds your actions have caused. She spoke of how her entire world "blew up" following Baby H's death and how your actions have given her "a lifelong sentence of pain and pining for what should have been". Ms F has been unable to return to work. She has nightmares, terrors and flashbacks. Some days the pain you have caused was so bad she did not think she could go on. She has faced intense social media scrutiny and says she was blamed by some for your actions. You attempted to do the same during the trial in respect of the earlier charges. Ms F spoke about how she is trying to forgive herself for loving and supporting you. She says she will never be the woman she once was. Her life will never be the same.

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1 As described by one of the medical experts at trial – Dr Soh.
2 As described by defence counsel at sentencing.
3 As described by at least two medical experts at trial – Dr Garrett and Dr Christian.

[19] Ms F has also had to go through the trauma of giving evidence at the trial and now the trauma of the sentencing. I once again extend my deepest sympathy to her.

[20] I want to say to you, Ms F (and you and others can read this in my sentencing notes), from all of the evidence I heard and read during the trial – and I am including the evidence from all of the witnesses, the messages between you and Mr Topp, and the evidence of the medical people you took Baby H to in December when she was crying and unsettled – you were an excellent and devoted mother. You could not have known, or even suspected, what Mr Topp was doing to Baby H. Your friends and relations all thought Mr Topp was a normal loving father. Even the doctors you took Baby H to in December were totally unsuspecting: they thought she was suffering from normal baby injuries. The doctors did not pick up that Baby H had bone fractures and brain haemorrhages already. They thought she was suffering from normal baby concerns. These are injuries that are not visible, even when they kill.

[21] Looking back now, you are castigating yourself for her death, but you are not to do so. It was in no way your fault. You are every bit a victim along with Baby H.

[22] I have also read statements from Baby H's extended family and some of your [Ms F's] close friends. All described the harrowing experience of learning what had happened to Baby H and how they have struggled to cope with their grief. Baby H was a much-loved baby girl. The impact of her death has been profound on all those who knew her. Baby H's grandmother spoke of her heartbreak at not being able to see Baby H grow up and the pain she feels thinking about how she will never get to know Baby H. Baby H's great-grandmother said the pain and distress you have caused – Mr Topp – to Ms F and her family will never end.

Purposes and principles of sentencing

[23] In order to determine an appropriate sentence, I have to take into account the relevant purposes provided for in s 7 of the Sentencing Act 2002. This includes particularly the importance of holding you accountable for Baby H's death and denouncing you for it.

[24] I must also take into account the principles of sentencing, including the gravity of your offending and the seriousness of the type of offence, consistency with appropriate sentencing levels and similar offenders who have committed similar offences, and the effect on victims. I have also taken into account the need to impose the least restrictive outcome appropriate in the circumstances.

Sentencing approach

[25] The law requires that a person convicted of murder must be sentenced to life imprisonment unless the circumstances of the offending or the offender's personal circumstances make that manifestly unjust.[4] Your counsel, Mr Kirby, accepts, as I consider he inevitably must, that I must impose a sentence of life imprisonment in your case.

[26] Because of Baby H's age and vulnerability, both defence and the Crown agree that the law requires me to impose a minimum period of imprisonment of at least 17 years unless I find it is manifestly unjust to do so.[5] The question in your sentencing today therefore is whether I should impose a minimum period of 17 years or whether that would be manifestly unjust.

[27] There is a two-stage approach to that assessment.[6] The first is to consider the sentence the Court would impose if there was not the 17 year minimum requirement. The second stage is to consider whether to impose the 17 year period would be manifestly unjust.

Submissions

[28] I refer to the written submissions I have received from the Crown and defence and oral submissions.

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4 Sentencing Act 2002, s 102.
5 Section 104(1)(g).
6 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43.

Crown submissions

[29] The Crown submits I should impose a minimum period of imprisonment of 17 years. The Crown says that there are aggravating features of your offending and identifies four in particular.

(a) First, although the Crown accepts your offending was not premeditated, there were at least two additional assaults in the few weeks before the fatal assault. I proceed on the basis that injuries were inflicted on a total of three occasions.

(b) Second, the Crown says you abused the trust that is inherent in the role of a parent.

(c) Third, Baby H was only three months old. She was defenceless and totally vulnerable to any form of assault.

(d) And fourth, the extent of the loss. That is graphically set out in the victim impact statements.

[30] The Crown submits there are no mitigating features of your offending. Ms Elsmore says that you qualify for a 17 year minimum period not only because of Baby H's age and vulnerability, but also because your offending had a high level of brutality and callousness.

[31] The Crown says that a minimum period of imprisonment of 17 years is appropriate and is consistent with comparable cases.[7] I have recorded these cases in my written sentencing notes.

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[7] *R v Pickering* HC Auckland CRI-2008-055-1273, 30 July 2010; *R v Solomon* [2016] NZHC 1653; *R v Ellery* [2013] NZHC 2609; *Ngatai-Check v R* [2011] NZCA 543; *R v Sopo* [2024] NZHC 1015; *R v Izett* [2021] NZHC 70; *R v Wilson* [2023] NZHC 2640; *Sio v R* [2022] NZCA 337; *R v Barriball* [2022] NZHC 1555; *R v Clancy* [2021] NZHC 1021; *R v Sinclair* [2021] NZHC 569; and *R v Wakefield* [2019] NZHC 1629.

Defence submissions

[32] Mr Kirby submits that this case does not engage the section that imposes a 17 year minimum period of imprisonment for brutality or callousness. He says a 17 year minimum period would be manifestly unjust for three primary reasons:

(a) First, you did not intend to kill Baby H. This was, as I said earlier, a reckless murder and Mr Kirby says that is less culpable than an intentional murder.

(b) Second, Mr Kirby says your offending is mitigated by your personal circumstances at the time and surrounding the offending, including mental health issues, maladaptive coping mechanisms and sleep deprivation.

(c) And third, you are remorseful and would be unlikely to pose a significant risk of offending after spending 15 years in prison, not 17.

[33] Mr Kirby submits that a sentence of life imprisonment with a minimum period of 15 years would hold you accountable for the harm you have done to Baby H and the community,[8] denounce your conduct,[9] deter you and others[10] and protect the community.[11]

[34] He submits it is not only exceptional cases where a 17 year minimum period will be "manifestly unjust"[12] and relies on the statement of the Court of Appeal in *Filihia v R* that:[13]

> Issues such as the fleeting and reckless nature of the murderous intent by a caregiver under stress … are to be taken into account in deciding whether the 17 year period is manifestly unjust.

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8 Sentencing Act, s 103(2)(a).
9 Section 103(2)(b).
10 Section 103(2)(c).
11 Section 103(2)(d).
12 *R v Williams* [2005] 2 NZLR 506 at [59].
13 *Filihia v R* [2014] NZCA 401 at [116].

Notional MPI

[35] I first assess the notional minimum period of imprisonment. I will then address whether it is manifestly unjust to impose the 17 year period.

Aggravating factors

[36] I agree with the Crown as to the aggravating factors of your offending. It is significant that there were two incidents prior to the fatal one where you inflicted harm on Baby H.[14] You applied significant force to an infant baby who was so defenceless against you. You abused your position of trust. Baby H should have been safe in your care – she was the opposite. Your offending is not only a breach of Baby H's trust but that of Ms F. There is the extent of the loss and harm caused by your offending. Ms F's victim impact statement in particular was so eloquent and deeply moving in describing the loss and trauma suffered by her. There is also the profound effect on the wider family. Even more widely there is the loss to the community caused by the loss of a child in these circumstances.

[37] I do not agree with the Crown that your offending was at the level of brutality and callousness that engages s 104(1)(e). The offending was at a significant level of force, but it is not a case of brutality and callousness at the level required by s 104(1)(e).

Mitigating factors of the offending

[38] Against the aggravating factors, there are also mitigating factors of your offending.

[39] Much of the evidence at trial centred around your circumstances in December 2021. We heard – and I have heard today from Mr Kirby – that you were completely overwhelmed, stressed and burnt out. You were a full-time shift worker who would often be gone from home for 12 to 13 hours at a time. You had a long commute. After Baby H was born your two children from a previous relationship began to stay

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[14] I omitted to say that while agreeing this was an aggravating factor, I did not take it into account in setting the notional starting point, but rather applied an uplift of 12 months for the earlier offending – see [54].

overnight. This arrangement eventually progressed to 50/50 custody with their mother. Before this they had not regularly been in your care.

[40] You struggled to cope with the burdens of childcare. Ms F gave evidence that once your older children started staying the night you became more stressed and short tempered. You were frustrated with your children. Although you loved Baby H and appeared to be generally "quite doting on her", you would become frustrated if she was waking up a lot, not taking her bottle properly and wriggling. You were triggered by "normal or random" things Baby H would do and struggled settling her.

[41] You tried to use the gym to help manage your stress and frustration, but this only made things worse. Your shift work and gym routine led to you being unable to get into a good sleeping pattern. You felt burnt out. You were described by Ms F as having no energy from the start of December. In a text you sent Ms F on 1 December you said "im so angry at the moment". You also said "I started taking new pills so dunno whether that's heightened my mood of anger or frustration or if its sleep deprivation or work".

[42] You had suicidal thoughts and disclosed having panic attacks. Ms F was extremely supportive. On 8 December she went with you to the doctors. Ms F told the doctor that you were having outbursts and losing your patience.

[43] I accept, as Mr Kirby says, that I should take that background context to your offending into account, but I cannot give it much weight. All parents are stressed and frustrated at times and my assessment is that there was not a lot for you to be particularly stressed and frustrated about on the day you killed Baby H, other than no doubt being very tired. As I said, she looked perfectly happy and quiet in the video you took of her one hour before she went in the ambulance to hospital. Also, as a general rule, you were relieved of much of the stress of looking after Baby H because Ms F carried 95 per cent of that role.

Personal factors

[44] I must also take into account your personal circumstances. This includes not just your personal background, but matters in relation to your family, whānau, community and cultural background.[15]

[45] You are 37 years old Mr Topp. You were raised in Kaiapoi with your parents and a younger brother. You described a positive childhood to the probation report writer and you maintain a good relationship with your parents. As I noted earlier, you have two children from a previous relationship; these are an eight-year-old son and a seven-year-old daughter.

[46] You reported to the probation report writer that you have an alcohol addiction, which you struggled with for much of your teenage years. You are currently medicated for ADHD, which you were diagnosed with at a young age.

[47] Mr Kirby urged me to find that you are remorseful. In written submissions I was told that I would be able to form my own view of that from the 111 call and your police DVD interview.

[48] In the 111 call you sounded very distressed, and I am sure that that was genuine. But it was also part of the cover-up you were engaged in.

[49] In the police DVD interview you looked relatively calm – and this was while Baby H was still in hospital before she had died. You even tried to be charming, in my assessment, to the police officer in that interview. I did not see any sign of remorse or even any strong indications of distress in that video interview.

[50] In a letter provided to me for this sentencing you detail how you are disgraced and ashamed by your actions and you detail your remorse. However, that letter must be contrasted with the views of the report writer that you have a limited degree of insight into your offending and appear more concerned about your well-being than those who have been affected by your actions.

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15 Sentencing Act, s 8(i).

[51] My overall conclusion is I do not consider you are genuinely remorseful.

[52] Finally, on the subject of personal mitigating factors, you have minor previous convictions for entirely unrelated offending. The Crown does not suggest these are relevant and I disregard them.

Notional MPI

[53] Weighing all of this up, if I was sentencing you without the impact of the 17 year minimum period of imprisonment provision that I referred to earlier, I would consider a 15 year minimum period was an appropriate starting point. This is consistent with case law provided by the Crown[16] as well as the mitigating factors of your offending that I have just outlined. The level of violence you inflicted on Baby H was significant, but not as severe as other cases involving the murder of a young baby or infant where the victim was kicked,[17] thrown against a hard surface,[18] punched,[19] or subjected to prolonged abuse[20] or numerous violent blows with multiple instruments.[21] Your offending was reckless, not premeditated.

[54] Your convictions for causing grievous bodily harm and injuring mean I would need to uplift the notional starting point by 12 months.[22] This results in a total notional starting point of 16 years' imprisonment. This starting point reflects that Baby H was

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16 *R v Clancy*, above n 7: 15 year nominal MPI; *R v Wilson*, above n 7: 15 year nominal MPI; and *R v Brown*, above n 7, 15 year nominal MPI.

17 *Ngatai-Check v R*, above n 7: Mr Ngatai-Check delivered three blows including two "roundhouse style kicks" into the two-year-old son of his partner splitting his pancreas and dividing the splenic artery from the vein.

18 *R v Pickering*, above n 7: Ms Pickering banged the head of a three-year-old boy she was caring for on a hard surface. Section 104(1)(e) engaged.

19 *R v Sopo*, above n 7: Mr Sopo punched his eight-month-old daughter several times in the stomach causing her death. Section 104(1)(e) engaged.

20 *R v Barriball*, above n 7: Ms Barriball murdered a five-year-old in her care. Over a period of six months Ms Barriball physically assaulted and abused the victim, drowned him, burned him and restricted his food. This series of abuse culminated in Ms Barriball inflicting fatal blunt force injuries to the victim's head.

21 *R v Izett*, above n 7: Mr Izett murdered his two-year-old daughter. He inflicted up to 20 blows to the victim's head as well as injuries to her neck, torso, limbs and buttocks. Two different weapons were used to inflict the blows to the buttocks.

22 See, for example: *R v Wakefield*, above n 7: starting point nominal MPI of 15.5 years for one charge of murder and one prior incident of shaking (wounding with reckless disregard); and *R v Taylor* [2017] NZHC 1257: nominal MPI 16 years for one charge of murder and related assault charge on a child.

an extremely vulnerable victim; an innocent, defenceless, three-month-old baby who was dependent on you.

[55] Turning to mitigating factors personal to you, I do not consider there are any factors that really justify a discount. While you clearly struggle with your mental health, your mental health issues are not at the level where a discount would be justified. I have already considered the stress and frustration you were under at the time of your offending when setting the appropriate starting point. I have already found you are not genuinely remorseful.

[56] I accept that you acknowledged causing Baby H's death prior to your trial, but this was not a guilty plea to murder. You did not acknowledge causing the earlier incidents and in fact you attempted to lay the blame for those on Ms F.

[57] This leads me to a final notional minimum period of imprisonment of 16 years.

[58] Given that conclusion I have to consider whether the imposition of the 17 year minimum period, as required by s 104, would be manifestly unjust.

Manifestly unjust?

[59] Although each case turns on its own facts, it is helpful to compare the facts of your offending with comparable cases. I do so briefly.

[60] I consider your case similar to *R v Taylor*.[23] Mr Taylor murdered his 15 month old in circumstances where Mander J considered it likely that Mr Taylor "snapped from frustration at being unable to settle [the deceased], and that the violence inflicted was the result of [Mr Taylor's] sudden rage". The Judge considered it aggravating that Mr Taylor had first sought to exonerate himself by attempting to maintain the injuries were accidental and then by attempting to blame the mother. Mander J held that but for s 104 an MPI of 16 years would have been appropriate and, in the absence of any personal circumstances suggesting diminished responsibility, he concluded that the

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23 *R v Taylor*, above n 22.

statutory minimum period of imprisonment of 17 years was not manifestly unjust and should therefore apply.

[61] I accept there are some factual similarities between the circumstances of your offending and the cases Mr Kirby took me to of *R v Cooper* and *R v Wakefield* where minimum periods of imprisonment of 17 years were held to be manifestly unjust. But there are also fundamental differences between your offending and those cases. Unlike in *Cooper* your offending was not one off and the stresses on you were very different to those on the defendant in *Cooper* – when I say your offending, I mean your serious offending was not one-off.[24] Unlike in *Wakefield* you did not demonstrate immediate remorse, that being the major mitigating factor in that case.[25] Both cases also involved nominal minimum periods of imprisonment of much less than the 16 years in your case.[26]

[62] Taking into account the seriousness and circumstances of your offending, I am not satisfied that the difference between the 16 year nominal minimum period and 17 years is such that the imposition of a 17 year minimum period of imprisonment would be manifestly unjust. As has been said before, crimes involving the use of violence against young children are "regrettably all too common in our society. There can be no excuse for abusing a child. Your actions must be roundly denounced".[27]

[63] To conclude Mr Topp, your sentence will be life imprisonment and you will be subject to a minimum period of imprisonment of 17 years. If, after 17 years, the Parole Board concludes that you are safe to give parole to, then it will. If not, then it will not. If you are granted parole, you may remain in the community only for so long as you comply with your parole conditions and do not reoffend, otherwise you could be recalled to prison at any time to complete your life sentence.

Sentence

[64] Mr Topp, please stand.

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24 Compare *R v Cooper* [2017] NZHC 2498 at [33].
25 Compare *R v Wakefield*, above n 7.
26 14 years nine months' in *R v Wakefield*, above n 7; and 14 years six months' in *R v Cooper*, above n 24.
27 *R v Pickering*, above n 7, at [44].

[65] For the murder of Baby H, I sentence you to life imprisonment. You are to serve a minimum period of imprisonment of 17 years.

[66] For the crime of causing Baby H grievous bodily harm with intent to cause grievous bodily harm, I sentence you to two years' imprisonment.

[67] For the crime of causing grievous bodily harm with intent to cause injury. I sentence you to one year imprisonment.

[68] All sentences are to be served concurrently.

[69] You may stand down Mr Topp.

Hinton J