IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CRI-2005-070-6292

THE QUEEN

v

MICHAEL JOHN CURRAN

Hearing: 1 February 2008
(Heard at ROTORUA)

Appearances: Mr G Hollister-Jones and Mrs H Wrigley for Crown
Mr P G Mabey QC and Mr Dixon for Prisoner

Judgment: 1 February 2008

SENTENCING REMARKS OF LANG J

Solicitors:
Crown Solicitor, Tauranga
Counsel:
Mr P G Mabey QC, Auckland

[1] Mr Curran, you appear for sentence today having been found guilty by a jury on a charge of murdering Aaliyah Morrissey. You defended that charge on the basis that you had no appreciation, when you struck Aaliyah on a number of occasions on 13 September, that you might kill her. The jury clearly rejected that and convicted you of murder. Both counsel agree that the only sentence that can appropriately be passed on you today is a sentence of life imprisonment and I impose that sentence accordingly.

[2] The real issue that I need to decide today is the minimum term of imprisonment that you should serve before the parole process can begin. Again, counsel are not that far apart regarding that issue but there is a difference between them, and I will need to address that issue specifically. Because that particular issue is informed by the facts, it is necessary for me to refer to the facts in a little detail.

[3] Before I do that I want to acknowledge here the presence in Court today of Aaliyah's parents, Mr and Mrs Morrissey. As I shall outline shortly they, of course, have survived this event and they are the people now who are principally affected by it. I acknowledge Mr Morrissey for the restrained way in which he made his remarks today before the addresses of counsel.

[4] I acknowledge also the assistance that I have received in this case from both counsel. Mr Mabey has not had an easy task in defending this matter and presenting submissions on sentencing. Mr Curran, you could not have been better served by your representation. I wish to acknowledge also the assistance I have received from the Crown. I consider that the Crown has presented its submissions in a fair, responsible and restrained way also. As a result, the task that I now have is made that much easier.

Factual background

[5] Aaliyah was a little over two-and-a-half years old at the date of her death. She lived with her parents in a suburban street in Tauranga. Down the street was a neighbour and family they came to know well. That family was Mr and Mrs Curran and their children. Not surprisingly, given the close ages of the children, they

formed a friendship and often played together. The two mothers also formed a friendship and clearly spent a lot of time in each others company. They no doubt shared the common problems of bringing up young children and all the stresses and strains that that can bring. Mr and Mrs Morrissey also got to know you, Mr Curran, as a result and, clearly, the two families – including you – socialised and saw a lot of each other.

[6] In about August 2005 Mr and Mrs Morrissey suffered difficulties in their relationship, precipitated it seems by the long hours that Mr Morrissey was working and financial pressures that were building in the family. This led Mr Morrissey to leave home for a while – as he put it to consider his position. During that period, Mr Curran, your contact with Mrs Morrissey continued and you in fact formed a relationship with her, notwithstanding that you were still living at home with your wife.

[7] This appears to have gone on for about a month and the real significance of it is that it led you to become a person in a position of trust so far as Mr and Mrs Morrissey were concerned, particularly Mrs Morrissey, because obviously she was the one who was seeing the most of you at that time. She clearly saw you as a person who had the necessary ability and responsibility to be entrusted from time to time with looking after her little daughter.

[8] During the trial I heard evidence about the days that led up to the incident that finally led to Aaliyah's death. In short, Aaliyah had not been well during the week preceding her death, although she was getting better. You were prepared to look after her. On the Friday evening before her death she was at your place with her mother and it seems that she fell asleep at the dinner table. It was then decided that, rather than wake her up and take her home, she would sleep the night at your place. She was then placed in a single bed in the children's bedroom.

[9] I interpolate to say that, at some stage around this point, another incident occurred that needs to be mentioned. This incident only came to light at a late stage when your wife elected, shortly before trial, to give a further statement to the police.

Although I accept that some issues may arise regarding your wife's credibility in relation to the statement, nevertheless I accept her evidence on this point.

[10] She said that at some stage around this time she heard what she considered to be a slapping noise from where she was in the lounge. She went into the kitchen and there she found you sitting at a table trying to make Aaliyah have something to eat or drink. She was not co-operating and you were slapping her repeatedly on the face. Your wife told you to stop and you did stop. Your wife also said that on at least one other occasion when Aaliyah had been in your care she had found you hitting Aaliyah on the bottom and again she had said to stop.

[11] Regretfully, Mr Curran, for everybody, your wife did not bring this particular episode to the attention of anybody at the time. Instead, she went along with your idea that you would tell everybody that the injuries that Aaliyah appears to have suffered as a result of this episode, namely, some puffiness or blackening of the eye and bruising to the face, had occurred as a result of a fall out of a top bunk in the children's bedroom.

[12] Although it does appear that on the Friday evening Aaliyah did fall out of the single bed, it is clear that the story that you concocted that she fell out of the top bunk onto some toys thereby injuring herself, was a fabrication designed to deflect possible guilt from you. I mention this fact, not because it has any direct bearing on Aaliyah's later death, but because it shows the way in which you approached your dealings with Aaliyah. I am satisfied on the evidence that I have heard that when you were looking after her, if things did not go the way you wanted them to go, you responded by hitting her in various ways. And that has relevance for what was to happen over the next few days.

[13] Aaliyah went home on the Saturday and you and your wife told Mr and Mrs Morrissey that she had hurt herself falling out of a bunk. You next saw her on the Tuesday when she came around in the morning. She was brought around early in the morning because Mr and Mrs Morrissey were going off to obtain some food and then to drop Mr Morrissey off at work.

[14] Mrs Morrissey and Aaliyah returned to your house after they had dropped Mr Morrissey off at work, bringing with them some food for you and your family. They ate the food with your family and then Mrs Morrissey and Aaliyah went home to have a shower. It seems that at this stage Aaliyah was also complaining of some soreness in her abdomen area. You will recall the evidence of relatives who called in that morning when Aaliyah said "Look, sore, sore, Nan" and Mrs Morrissey's foster mother and a companion saw a bruise on her abdomen. It was sufficiently sore for them to suggest to Mrs Morrissey that she take Aaliyah to see a doctor. I have to say, Mr Curran, that I have no way of knowing whether or not you struck Aaliyah in such a way as to create that bruise, but I have no doubt that you certainly had a hand in creating the bruises to her face and to her eye that were evident, albeit fading, on that day.

[15] Mrs Morrissey and Aaliyah then went back down the street to their house. Aaliyah was left in your care while your wife and Mrs Morrissey took the children to school. They were away for a short while, and when they returned you told them that the children, namely, your son and Aaliyah, had been crying because they wanted something to eat or drink. The ladies then chatted for a while and then went out again – this time to pay some bills.

[16] The timing of the trip to pay the bills was a subject of evidence at trial and does not need to be repeated here, but they had not been away a great deal of time before they received a telephone call from you to say that Aaliyah was not responding and that they should come home. They came home and found that your mother was also there. It now transpires that when things had begun to go wrong with Aaliyah, you had called your mother and she had come over and she had then suggested that you say to people that she was in the house when Aaliyah exhibited signs of being unwell.

[17] It was obvious to everybody in the room when Mrs Morrissey and your wife returned that Aaliyah was seriously ill. An ambulance was called and when the ambulance arrived the staff found that she had a Glaucoma Score of 3, which is the lowest possible score. Quite obviously she was in an extremely unwell state at that time.

[18] Despite valiant efforts by hospital staff after her admission to Tauranga Hospital and subsequent removal to the Starship Hospital, Aaliyah did not recover. Her condition deteriorated further and she ultimately died. You heard the evidence at the trial of the extent of her injuries as found by the ambulance staff, as noted by the paediatrician at the hospital, and also as subsequently noted during the post-mortem examination. She had a number of serious injuries, as well as a number of less serious injuries.

[19] Firstly, she had bruising to her face, some of which was fading, in particular to her left cheek. She also had serious bruising to both ears and the evidence of the paediatrician, and I think the pathologist also, was that the most likely cause of this kind of injury was that she was hit hard, either by slapping or punching or being boxed on the ears. She had bruising to her legs, although some of these bruises were fading and she had bruising to her chest.

[20] One of the most obvious forms of bruising, though, was the severe bruising that was present beginning at the line at the top of her nappy and spreading down through her pubic region. Mr Curran, you would have had an opportunity to see those photographs prior to and during the trial. That was a massive area of bruising and discoloration that extended from that nappy line right down to, and including, her pubic area. The pathologist and the paediatrician agreed that that kind of bruising could only have come from one or more significant blows to her abdomen. In addition, the CAT scan that was performed found that there was bleeding in the area of the small bowel or duodenum. On post-mortem examination it was found, indeed, that there had been injury to this innermost part of the body.

[21] The medical opinion was to the effect that there were likely to have been several blows, possibly of a shearing effect, to produce the nature of the bruising. In addition, the blows were sufficiently penetrating to have injured the organs that would ordinarily be in a protected part of the body. The pathologist thought that that was consistent with some form of stomping.

[22] Another significant injury that was readily visible to the naked eye was the severe bruising on Aaliyah's buttocks. Both of her buttocks were bruised all over.

The bruising was linear in nature and clearly was inflicted as a result of somebody hitting Aaliyah with extreme force on her buttocks with a hand. She also had bruising that went round onto her thigh. When Aaliyah was x-rayed, the medical staff also found a greenstick fracture of her left forearm.

[23] The most significant injury medically, though, was the injury to her head. When she was admitted to hospital medical staff found that she had an area of bogginess or softness on the rear of her head. This was not accompanied, however, by breaking of the skin or skull fracture. It was immediately apparent to the medical staff that she had suffered brain injury, and this was confirmed by the CAT scan. Put shortly, Mr Curran, she suffered severe brain swelling as a result of some violent decelerative force that was applied to her head. The medical evidence was to the effect that the nature of the force was similar to that which would be suffered by somebody who was involved in a motor vehicle accident that led to violent deceleration. The brain injury and associated swelling were ultimately the cause of Aaliyah's death.

[24] Another side effect of this particular injury was the damage that was done to Aaliyah's eyes. Both of Aaliyah's eyes had areas of retinal bleeding. The paediatrician said that in his view she would have been basically blind in one eye and that she would have had significantly impaired vision from the other as a result of the bleeding in her retinas.

[25] Mr Curran, I think that the true gravity of your offending is placed in context by the evidence of the pathologist and the paediatrician, both of whom had 15 to 20 years experience, when they said that in their practising careers they had never seen injuries such as those that you inflicted, particularly on Aaliyah's abdomen. That, Mr Curran, is a telling statement.

Victim impact statements

[26] I have had the benefit today, and earlier, of reading the victim impact statements that Mr and Mrs Morrissey have prepared. As I have said, they are the ones who are now left to carry the grief of what you have done. You, yourself, have

listened today to what Mr Morrissey has said as to how this event has profoundly affected himself and his wife. Not only will Aaliyah not have her own life, but they will be deprived of having a daughter that they can watch grow up and interact both with themselves and their other children. No sentence that this Court passes, Mr Curran, can start to repay that. You alone must live with that for the rest of your life.

[27] Mr and Mrs Morrissey take the view that somebody should lock the door of your cell and throw away the key. I suspect that others in the community will share similar thoughts. But that is not the way that the sentencing process operates, and it is important that the people who listened to the submissions today understand that the way in which our sentencing process operates is that the sentences that are imposed on offenders, even in the most serious of cases, are principled and transparent in nature. It is not open to the Court to react in a "knee-jerk" fashion, and to impose wildly long sentences in the certain knowledge that they will be reversed on appeal. It is important that I apply principles of law, because that is the only way in which, in the long term, our criminal justice can function properly.

Minimum term of imprisonment

[28] As I have said, the sentence that must be imposed upon you is one of life imprisonment, and I have already imposed that. The real issue, as I have said, is the minimum term of imprisonment that you should be required to serve before you are eligible for parole. Again, it is important for me to emphasise at the outset that the non-parole sentence that I am about to impose is not the finite sentence of imprisonment that you will serve. It is merely the period of time during which you, yourself, are not able to instigate the process by which you might eventually be released on parole. It is a matter entirely for the Parole Board as to whether, if ever, and when, you are released on parole.

[29] Normally when a person is sentenced to life imprisonment they must serve a sentence of ten years imprisonment or more. Under the law as it now stands, if a Court imposes a sentence of life imprisonment it must also direct the minimum term

that the offender must serve before being eligible for parole. Normally that must be a sentence of not less than ten years.

[30] In the present case, however, you are subject, in my view, to a section of the Sentencing Act 2002 that applies in special circumstances. Section 104 of the Sentencing Act requires a Court to impose a minimum term of imprisonment of not less than 17 years when one or more certain specified criteria are met. In this case, two of these criteria are met and both counsel agree that that is the case.

[31] The first of these is the very nature of the acts that you committed. You committed the most brutal of crimes, using the most brutal force. That alone qualifies you under s 104(e).

[32] Secondly, you committed that crime and used that force against a person who was particularly vulnerable. Aaliyah was vulnerable on two counts. Firstly, because she was just 2 ½ years of age. She had absolutely no means of protecting herself against a person carrying out the kind of actions that you did on that day. You are a very big man, Mr Curran. She was a very small girl. She had absolutely no way of withstanding the attack that you unleashed on her. And it is in that context that I really need to say something about what it is that you must have done, because you have never told anybody exactly what you did and that is a source of ongoing frustration for Mr and Mrs Morrissey. Even now they do not know what actually happened that morning when Mrs Morrissey was out paying bills.

[33] You, of course, initially denied any knowledge of what had happened when you were spoken to by the police. It wasn't until approximately a month later that you told the police that Aaliyah was crying and that you shook her in frustration when that occurred. You said that her head may have struck part of the furniture. That explanation really needs to be measured against the facts as we know them, and those facts, unfortunately, can only be gleaned from the evidence of Aaliyah's injuries and what other evidence we have.

[34] I suspect that the Crown was not too far off the mark when, in its closing address, it put to the jury a sequence of events that it suggested may well have

occurred. The Crown accepted, as do I, that your frustration is likely to have arisen as a result of the fact that Aaliyah would not stop crying. I say that for two reasons. First, that is what you told the police. Secondly, that is what had happened earlier in the morning when your wife and Mrs Morrissey had been out delivering the children to school. So it is likely that Aaliyah started crying and you could not stop her.

[35] I suspect it is also likely that the force that you unleashed on her elevated as it went on. You probably started by slapping her face. You may then have boxed her ears. You may then have got frustrated and punched or even stomped on her chest. Probably earlier you smacked her on the bottom a number of occasions to try to get her to stop. And then finally, I suspect, you jammed her head against the carpeted floor or against a padded piece of furniture with sufficient force to cause her the injuries that ultimately led to her death. I say that that was likely to be the last act because, as the Crown pointed out, the medical evidence was to the effect that Aaliyah would have lapsed rapidly into a coma as a result of the injuries that she suffered to her head and that is likely to have brought about what you wanted – silence. So it is against that background that I have no hesitation in saying that s 104 is engaged solely on the ground of the brutality that you showed when you struck Aaliyah in the way that you did and on the number of occasions that you did – some 30 bruises in all I think the doctor counted.

[36] Secondly, as I have said, Aaliyah was vulnerable. Firstly, because of her age and secondly, because she was placed in your case in the absence of her mother. She was vulnerable on both of those counts and that, too, is a factor that I can take into consideration in concluding that s 104(g) comes into play.

[37] The real issue, as both counsel acknowledge, becomes the point at which I should set the sentence. In this regard there is not much between counsel. The Crown say that a starting point of 20 to 22 years should be employed. Your counsel says that a sentence of 17 to 20 years should be imposed and not more.

[38] In assessing this factor, it is important that I have regard to decisions in other cases. Before I refer to some of those, it is necessary for me to point out that these are only of general assistance because in the end every case in this area turns on its

own facts. Each case will have unique features that are not present in other cases. In addition, in every case there is a range of available starting points. It must be remembered that this is not a science or an exercise in mathematics. There is no single sentence that is right or wrong. The sentence that is selected ultimately must come from a range.

[39] The two cases that I have found of the most assistance in this area, both curiously enough, go by the name of Williams. In the first, *R v Williams* CA 6/04 and 117/04 20 December 2004, the Court of Appeal considered an appeal by the Solicitor-General against a sentence imposed on an offender who had killed a girl of some six or seven years in age. That was the well-known case of Coral Burrows. In that case the offender had taken the deceased to school. She said, however, that she did not want to go to school and she would not get out of the car. The appellant became enraged at this, held her with his left hand and began punching her with his right hand. He reduced her to a state of unconsciousness in the back of the car. Rather than seek help at that stage, he then elected to drive off and find a remote location to hide her body. Whilst he was depositing her body in the bush, she gave a small groan. He then picked up a lump of wood and hit her hard on the back of the head, thereby ending her life. Later, he went back to the site and moved the body to a more remote location. He then went home and denied any knowledge of the girl's whereabouts, and even participated in the charade of pretending to hunt for her body.

[40] In those circumstances the Court of Appeal considered the starting point to be adopted. It viewed the matter afresh because it had adopted a different approach to that adopted by the sentencing Judge. The Court of Appeal said that the starting point for offending of that nature was a minimum term of 20 years imprisonment. It then took into account mitigating factors to reduce the minimum term of imprisonment to one of 17 years.

[41] In the second case, *R v Blair Williams* Miller J HC WLG CRI 2004-078-1816 24 February 2006, sentenced an offender who had killed a seven-month year old baby. The case superficially has some similarities to yours. The baby had a badly

broken arm and also suffered significant bruising about the eyes, face and chest. In addition, there was the factor that the child was only seven months of age.

[42] In those circumstances, Miller J felt that an appropriate minimum term of imprisonment was one of 17 years. Reading his sentencing remarks, however, I apprehend that he started a little bit above 17 years because at paras [20] to [22] of his sentencing remarks he refers to mitigating factors that he took into account before arriving at the final minimum term of imprisonment of 17 years. I therefore proceed on the basis that he felt that the offending warranted a starting point in the vicinity of 18 years imprisonment.

[43] Where then, Mr Curran, does your offending lie when set against the two cases to which I have referred? I think it is more serious than that in the latter case to which I have referred. Firstly, I consider that there is the aspect of the severe nature of the injuries to the abdomen, in particular, and also, the injuries to the buttocks and the head. Secondly, your offending has another added factor to which I shall refer shortly.

[44] I therefore proceed on the basis that your offending is more serious that that in the *Blair Williams* case. I consider, however, that it is a little less serious than that in the other *Williams* case. I consider that the steps that the offender took in that case to dispose of the body, and to actively and intentionally bring about the death of the child, put that case in a somewhat more serious category than yours. I bear in mind also that, as in the *Blair Williams* case, you were charged under s 167(b) of the Crimes Act 1961. This means that the Crown did not allege that you intended to kill Aaliyah. That is perhaps another point of difference with the second *Williams* case, where I infer that the offender was charged under s 167(a). I therefore take the Court of Appeal decision in *Williams* to involve a set of facts that were more serious on their face in relation to the death of the child than yours.

[45] Putting to one side other matters to which I am about to refer, I consider that the minimum term of imprisonment that would otherwise be warranted is one of not less than 18 ½ to 19 years imprisonment.

[46] There is, however, an added factor that I must take into account. In submissions before me, counsel have referred to it as your previous conviction, or the fact that you offended whilst on bail. I do not consider that either of those descriptions adequately conveys the nature of this particular factor, so I propose to explain it in a little more detail.

[47] At the time that you caused Aaliyah's death, you were on bail. You were bailed 24 hours a day to your home address in Tauranga. The charge that led to you being released on bail was, at that stage, a charge of murder. This charge had come about as a result of a series of events that occurred on 10 January 2005 at McLaren Falls in Tauranga. On that date you caused the death of Natasha Hayden, a person with whom you had been involved in another extramarital relationship. Again you had initially denied your involvement in this particular offending and you had actively misled the police in relation to it.

[48] You were initially remanded in custody on that charge and you sought, unsuccessfully on at least one occasion, to be granted bail on strict terms. This was obviously a serious matter, not only because of the nature of the charge, but because of the peculiar circumstances in which the earlier offence came to be committed. As became apparent at your trial on that matter, you caused Natasha Hayden's death by suffocating her. You claimed that that had occurred during a sexual act.

[49] Ultimately this Court was prepared to grant you bail. It did so on strict conditions, including a condition that you remain at your address 24 hours a day. In those circumstances it seems extraordinary, Mr Curran, that you could have become involved again just nine months later in causing the death of another female. The circumstances of the present offending were obviously greatly different. This time you killed a young child and not a mature woman but, nevertheless, you did that whilst you were at home, on bail, with a homicide charge pending. I consider that that is a factor that the Court has to take into account in setting the minimum term of imprisonment to be applied in your case. I consider that this aspect of your offending leads me to the conclusion that a minimum term of imprisonment of 21 years is appropriate.

Mitigating factors

[50] I now need to determine whether there are any matters of mitigation. By this I mean factors that would operate to reduce the starting point that I have selected. You cannot claim the benefit of a guilty plea because you defended the charge, as was your right. You cannot claim the benefit of a clean record either, because you have a number of previous convictions.

Personal background

[51] I have the benefit of a pre-sentence report that refers to the fact that you had a relatively uneventful upbringing. Overall the standard of your home life appears to have been good, although clearly there were some issues that caused you problems from time to time. You had difficulties at school and you were placed in a special needs class. Early on, however, you became involved in criminal offending and this led to you leaving school at a young age. Until recently you had not held down a regular job, although over the eight years prior to the offending in relation to Ms Hayden you had seasonal work operating an ice-cream truck.

[52] I have to say that one aspect that does come through from the pre-sentence report is that you appear to have a personality in which anger has been a feature in the past. In its written submissions the Crown referred to you as having some of the characteristics of a psychopath. I cannot make that observation, because I have no medical material available to me that would enable me to pass that judgment. But what is clear is that, as your parents noticed from an early age, you do have a problem with anger. They say that you never took it out on anyone else and that when you became angry you would go outside and hit something solid. Nevertheless, it seems to me that that is a real issue that you need to come to grips with, and that the Parole Board will obviously need to be satisfied about in the future.

[53] I note from the pre-sentence report that the principal psychologist of the Corrections Department has referred you for a psychological assessment in connection with your earlier conviction and I hope that that assessment would extend

to your present offending also. Quite clearly, Mr Curran, you have serious issues that you need to address before you can yourself feel safe to walk the streets again.

Protection of the public

[54] This leads really to another issue that counsel referred to during the course of the submissions, and that is the protection of the public. Counsel for the Crown properly pointed out that one of the objects and purposes of imposing a minimum term of imprisonment is the protection of the public. That is obviously a difficult matter to apply when you are talking about an offender who will not be released for some 20 odd years. Who can predict what will happen within that time? The best that I can do to give effect to the legislation is to satisfy myself that the sentence that I impose is adequate for the protection of the public. Having regard to the fact that you are serving an indeterminate sentence, namely life imprisonment, and that the starting point that I have adopted is one of 21 years, I am satisfied that the requirement that the public interest be protected so far as possible by the minimum term of imprisonment is satisfied in this case.

Totality

[55] The only area that gives me pause in relation to the issue of reducing your sentence lies in what counsel have described as totality principles. This means that when a Court is passing sentence in circumstances where an offender is already serving an earlier sentence, the Court must look at the earlier sentence and ensure that the later sentence that it imposes is not overly severe when viewed alongside the earlier sentence.

[56] In the present case there is nothing in the principle of totality that would cause me to alter the view that I have taken. I do not propose to reduce in any way the starting point that I have selected to reflect conventional totality principles. I consider that a starting point of 21 years is appropriate without reduction to take account of both your current offending, and also to take into consideration the sentence that you are already serving.

Time already served on prior conviction

[57] The sole exception to this is a matter that has been agreed upon between counsel. Prior to being released on bail you had already served six months of the sentence that was imposed upon you in relation to Natasha Hayden's death. I record that that was a sentence of nine years imprisonment with a minimum non-parole period of five years. Counsel agree that, in the event that no account is taken of it, you will lose the benefit of any time that you have served in relation to that particular offending. For that reason I propose to reduce the minimum term of imprisonment that you would otherwise serve by six months to reflect that fact.

Sentence

[58] You are sentenced to life imprisonment. You are ordered to serve a minimum term of 20 years six months imprisonment.

[59] Stand down.

Lang J