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

**CRI 2006-057-001845**

**THE QUEEN**

v

**WARICK IAN BROADHURST**

Hearing: 24 April 2008

Appearances: P K Hamlin & K E Latimer for Crown
P Borich & C H Bennett for Accused

Judgment: 24 April 2008

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**SENTENCE OF WINKELMANN J**

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Crown Solicitor, Auckland
Rice Craig, Papakura

[1] Warwick Broadhurst, you appear for sentence having been found guilty by a jury following trial on one count of manslaughter. The relevant facts are these. On the evening of 15 March 2006 you had sole care of your de facto partner Molly's daughter, Arwen Fletcher, who was then just over two years old. You were also caring for your own child who you had with Molly, a baby girl, Jessica Broadhurst. Shortly after 8.00 pm on that day you presented at the Waiuku Medical Centre with Arwen. She was floppy and not breathing. The doctors commenced mouth to mouth resuscitation. Breathing was re-established and Arwen was transferred to Middlemore Hospital and then ultimately to Starship Hospital. She died on the morning of 17 March 2006. She had been taken off a ventilator, having met the criteria for brain death.

[2] On post-mortem it was established that Arwen had an extremely extensive skull fracture. It was 28 centimetres long, extending from the occiput at the back of the head to the frontal bone. There was bruising on the tissues above the bone of the skull in an area of 8 centimetres by 4 centimetres wide. That is a considerable area on the head of a two year old. There were brain injuries, including injuries to Arwen's upper brain stem and spinal chord.

[3] On post-mortem, the neuropathologist, Dr Liz Synek, also detected an aged brain injury in the frontal lobe. Dr Synek said that it was at least two to three weeks old and could be no more than three months old.

[4] The consultant paediatric ophthalmologist who gave evidence, Dr Justin Mora, described haemorrhaging in all layers of Arwen's retinas, consistent with her having been violently shaken. The haemorrhaging was extensive and went out to the periphery of the retinas. There was also macular schesis, which is a splitting of the layers of the retina. That is a blinding injury. Dr Mora's evidence was that if Arwen had survived her injuries she would have been blind.

[5] There is no eyewitness account of how Arwen was injured. Your account was that after she had a shower you lifted her out of the bath. She slipped and fell from less than her own height and knocked her head on the frame of the door. She

got up, moved into the hallway then collapsed, again knocking her head. That account was rejected by the jury.

[6] The evidence of Dr Denmark was that a very substantial impact on a hard surface was the most likely cause of the skull fracture and could also have possibly caused neck injuries. However, Dr Patrick Kelly considered that the brain stem injuries combined with the retinal eye damage were most likely to have been caused by shaking. His opinion was that Arwen had been violently shaken and slammed against a hard surface.

[7] I am satisfied, having considered the evidence of Doctors Mora, Kelly, Synek and Denmark that the injuries to Arwen were caused by her having been violently shaken and slammed with great force down on to a hard surface, most likely covered with a padding such as a carpeted floor. I say covered with padding because Dr Denmark's evidence was that the absence of any break in the skin on Arwen's scalp suggested that there was some sort of covering on the hard surface she was slammed into. I am satisfied that the force involved was extreme. It caused injuries to her skull, brain stem, spinal chord and eyes, which the doctors who gave evidence characterised as severe.

[8] I have a pre-sentence report in respect of you. That tells me that you are 20 years old. You have had a good upbringing and enjoy good relationships with your family. Family members interviewed by the probation officer describe you as kind, helpful and never violent. You have a very patchy employment history which consists of short term labouring jobs and you have not had significant employment since 2006. You left school when you were only in the 4th form because you preferred to work.

[9] The probation officer considers that your risk of reoffending is low, although I must say it is not clear how he has arrived at that assessment since there is no basis on the information in the report for him to assess the cause of the offending. However, for the purposes of this sentencing, I accept that assessment. The probation officer reports that your motivation and readiness to change is difficult to assess because you have pleaded not guilty to the offence.

[10] I have information that you have offended on a previous occasion. You were convicted of using a document for pecuniary advantage. It is a different kind of offence to the present. Since the present offending, you have also been convicted of further minor offending.

[11] I have had some victim impact statements prepared by Arwen's maternal grandparents placed before me. They speak of the deep loss that they feel, both in respect of Arwen and also in respect of their relationship with Molly. Because Molly has decided to stand by you, she has become estranged from her family.

[12] I also have a victim impact statement from Pare Phillipson, who is Molly's aunt and is also currently caring for the two children that you have with Molly. She says in her victim impact statement of Arwen, that she feels that Arwen is not here and that no-one cares. I do not have a victim impact statement from Arwen's mother. The Crown cannot tell me why that is not available, but apparently Arwen's mother did not want to provide a victim statement. She has however provided a letter in support of you.

[13] I have numerous letters of support in relation to you from, amongst others, Molly, your mother and father, your cousin Stephanie Haines, your step-sister Patricia Parker, your friend Andrew Tutuki, your 10 year old brother Ricky Haines and other friends of yours and family friends. These people describe you as kind, trustworthy, non-violent and a good father. Several of the friends and family speak highly of your ability to interact with children and say that they would trust you to look after their own children.

[14] The Crown has made careful submissions to me today and in writing. It submits that a starting point of 10-11 years imprisonment is appropriate. The Crown characterises this as a particularly serious case and says therefore that a penalty near the maximum is appropriate. It points to the seriousness of the injuries and the violence of the actions that you would have had to have undertaken to inflict those injuries.

[15] As to the aggravating features of the offending the Crown points to the trust reposed in you when you were given the responsibility of caring for Arwen. You were her de facto father and you had sole care of her on the night that she suffered the ultimately fatal injuries. The Crown points to the severity of the injuries, the nature and type of injuries and the number of injuries. It points to Arwen's age, just over two. The Crown also submits that it is a significant aggravating feature of this offending that Arwen suffered previous head injuries as a result, the Crown says it can be inferred, of abuse by you. It also emphasises there is no remorse or acknowledgement of the offending by you. The Crown is prepared to concede one mitigating factor which is your age, but submits that even that can have little weight.

[16] As for the defence submissions, your counsel has spoken well for you today. Mr Borich submits that an appropriate starting point in sentencing you is six and half to seven years imprisonment and that that is in line with *R v Iorangi* CA533/99 30 March 2000, which he says, like your case, involved a one-off loss of control with no evidence of calculation or significant prior mistreatment. Mr Borich argues that Arwen's earlier injuries cannot be attributed to you beyond reasonable doubt and therefore they cannot aggravate the offending. In mitigation, Mr Borich points to the pre-sentence report writer's assessment of you as being at low risk of reoffending. He also draws my attention to your age, your efforts to obtain medical assistance for Arwen and the domestic circumstances highlighting your parental inadequacies. Finally, your counsel asks me to give you credit for your good character as attested to by a number of character references. In relation to this last point he says effectively that what the jury has found you did to Arwen was out of character for you.

[17] In sentencing you I consider that particularly important considerations are the need to deter you and others from similar such conduct in future and also to hold you accountable for the conduct that you have engaged in. The nature of your offending is regarded by our society as amongst the most culpable. You had care of a small, vulnerable infant. You were in a position of trust; she looked to you for care and nurturing. Instead, you subjected her to extreme violence. You could have been in no doubt that the acts that you undertook of violently shaking her and striking her forcefully against a hard surface could well cause her harm. However I acknowledge

that following the jury's verdict I am to sentence you on the basis that you did not foresee a risk of death.

[18] In *R v Leuta* [2002] 1 NZLR 215 the Court of Appeal observed at [77]:

> Violence inflicted upon a child is worse than that directed at another adult. Defencelessness and vulnerability are significant features, as is abuse of a position of power and responsibility. The fragility of young children, particularly infants, is frequently referred to, and too often overlooked. The lethal consequences of shaking and striking babies is often enough publicised. There can be little reduction in criminality these days for a claim that the danger was not realised.

[19] In sentencing you I take into account as an aggravating factor that Arwen was a young child and she was therefore a vulnerable victim. It is also an aggravating factor that you had parenting responsibilities for her when you hurt her. I also accept that the nature of the injuries is a matter that aggravates the criminality and culpability of the offending. Striking a child's head against a surface and shaking a child is something likely to cause severe harm. I have assessed the force used by you to be extreme. This assessment can easily be arrived from the nature of the skull fracture and the damage to Arwen's eyes. The acts that you subjected Arwen to could never have been justified as acts of parental discipline. It was not a case where discipline got out of hand.

[20] I do not consider that it is an aggravating factor that you have not acknowledged your offending or expressed remorse. That is rather the absence of a mitigating factor.

[21] Your counsel characterises your offending as a one-off loss of control. The Crown in contrast depicts it as the final violent act in a series of assaults upon Arwen. That is an issue between the parties and it is something that I have to form a view on. If I am to take into account as an aggravating factor that you had previously assaulted Arwen, then I must be satisfied of that beyond reasonable doubt. In reaching a view about that I can take into account the evidence that was produced before the jury. At trial the jury heard evidence of a number of suspected or actual injuries to Arwen. Two child care workers, Ms Smithson and Ms Galbraith, who had cared for Arwen gave evidence that on 7 and 14 March 2005

they observed what they believed to be bruising on her back. However, there was other evidence at trial from Ms Fletcher that these were in fact birthmarks on Arwen. This evidence was confirmed by Dr Kelly. He said that when he examined Arwen he observed dark birthmarks on her back. The Crown concedes that I can put that matter from my consideration.

[22] However, on 4 April 2005 Ms Smithson observed deep, graze like marks to the inner and back of Arwen's upper thighs below her buttocks. There was no evidence as to a possible explanation for that.

[23] On 27 June 2005 bruising was observed to Arwen's right eye and right side of her forehead. Ms Fletcher gave evidence that that occurred when you had sole care of Arwen and that you told Ms Fletcher that Arwen had climbed up and then fallen down off the television cabinet.

[24] There was also evidence that on autopsy an aged injury to Arwen's brain was detected in the frontal lobe and as I noted before, Dr Synek's evidence was that that was not less than two weeks old and not more than three months old. It could not then relate to the June 2005 injury. The Crown's case is that the aged brain injury and the preceding two injuries were inflicted by you. In relation to the aged brain injury, the Crown argues that I can safely infer that it was inflicted on Arwen about 20 February 2006, again when Arwen was in your sole care. There is evidence in relation to an incident in February. Molly Fletcher gave evidence that on the 20 February 2006 she was leaving the house to go to the shops and that Arwen ran along the verandah toward her. As Ms Fletcher was walking down the stairs she heard a cry from Arwen. She went back and noted that Arwen had a small mark on the side of her head which Ms Fletcher described as bottle top shaped. She went back inside with Arwen and then left and went to the shops. Arwen was all right when she returned and then Ms Fletcher went to work at Subway.

[25] The next morning when Ms Fletcher and Arwen got up, Ms Fletcher noted bruising and swelling on Arwen's head and face. She gave Arwen breakfast which Arwen vomited back up. Arwen was taken to the doctor. The doctor observed bruising on both her cheeks, a 10 centimetre bruise on one cheek and a two to three

centimetre bruise on the other. He also detected a slight temperature and diagnosed a virus. It is the Crown's case that a fall on the verandah could not have caused the bruising and swelling and that the symptoms that Molly had were in fact the symptoms of concussion. The Crown says that I should infer that you had inflicted a serious head injury which had caused the trauma to the frontal lobe.

[26] The defence case is that the injury observed on autopsy could have been caused at any time. It relies upon Ms Fletcher's evidence that Arwen was clumsy. Her evidence was that she, Mr Cameron and you would call Arwen "clonky". I do not accept the evidence that Arwen clumsy. Mr Cameron had no recollection of the nickname "clonky". The day care workers thought that Arwen was co-ordinated and not accident prone. I consider that when Ms Fletcher gave evidence she naturally tended to give a construction to events that favoured you because she is still emotionally connected to you. In fact she is now married to you and has had a further child with you. I consider that is a matter I can take into account in weighing her evidence on the point.

[27] Your counsel says there are a number of potential explanations says for the injury. There was evidence from Mr Cameron and Ms Fletcher which I accept, that at some time in early February Arwen ran into the edge of a glass table. There was also evidence that you had given an explanation that she had tipped her chair back into the wall and had then moved forward and hit her head on the table. Mr Borich emphasises that Dr Kelly could not exclude the possibility that the head injury had been caused by one of these alternative mechanisms. He also notes that the Crown failed to put to Dr Kelly one possible explanation for the injury Ms Fletcher had given, which was she thought when Arwen fell when she was on the deck she may have fallen into the recycling bin or else knocked her head on an overflow pipe that protruded out onto the deck. However, Dr Kelly's evidence was that it would have taken a significant incident to cause a brain injury of the nature that was detected on autopsy. Dr Synek also gave evidence relevant to the likely cause of the injury. She said:

> The interesting thing is that we see a lot of children who come to autopsy for a large number of conditions and in young children despite the fact that they

> tend to run into things and to fall, this in fact is a very unusual finding so I would – it is from that point of view striking.

[28] I have to take into account all of the evidence that I am presented with. I consider that the incident that caused the bruising and swelling to Arwen in February 2006 was obviously a very significant injury. It caused bruising to both sides of her face and swelling. I give weight to the evidence of the witness Heaslip that Arwen had bruising on her face which she described as being a Batman mask. That is how severe the bruising was around both her eyes. Given its proximity to the vomiting and concussion type symptoms, I am also satisfied that it caused a concussion.

[29] I am satisfied that the only possible explanation for that injury is that on the day you had care of Arwen she suffered a very significant trauma to her head which caused a frontal lobe contusion. I am satisfied that none of the varied explanations that were given could explain that injury. I weigh particularly Dr Synek's and Dr Kelly's evidence in reaching that view. That injury was intentionally inflicted upon Arwen and I am satisfied of that beyond reasonable doubt.

[30] In relation to the grazing, I am not able to be so satisfied. There is little information in relation to that injury. I have also given consideration to the bruising on Arwen's face which was detected in June of the previous year. Although I may strongly suspect that that also was inflicted by you, I am not able to be satisfied of that beyond reasonable doubt. That is so even if I take into account the pattern of offending by you, consisting of the February and March 2006 injuries to Arwen.

[31] So I do take into account in sentencing you as an aggravating factor that you had previously assaulted Arwen and in a serious manner on one previous occasion, February 2006.

[32] I now turn to consider mitigating factors. I do not propose to give you credit for previous good character. I note what has been said about you and your relationship with family and friends and what has been said about you in the letters of support. However, given my finding that you had previously assaulted Arwen I do not think that I could properly characterise this as an out of character incident. It is not an isolated incident. I also note that when you assaulted Arwen you were on

bail for other unrelated offending. Again, it is not appropriate that you receive credit for previous good character when you had previously offended.

[33] Your counsel has referred to the domestic circumstances highlighting your parental inadequacies and he refers to *R v Leuta* where the Court had given consideration to the fact that an offender may have struck her son when in a very stressful situation, effectively when in an extreme emotional state. Mr Borich asked me to take into account that you were in a difficult situation when you offended. You were 18. You were looking after two small children. There was evidence from the photographs that the house was in a messy state and Mr Borich submitted that it would not take a lot of imagination to consider that you would have been in a great deal of stress looking after Arwen. I do not consider that there is really any evidence upon which I can conclude that you were driven to treat Arwen as you did because you were under stress. There is no evidence of any extreme emotional or financial stressors. I have seen photographs of the house and I do not think that the situation was out of the ordinary for a young couple. The evidence was that you had had a pleasant day that day. Molly had cooked a lunch before going to work and you had spent some social time with Mr Cameron before the incident. The picture that emerged from the evidence was not one of you being under extreme stress.

[34] I do however consider that a small reduction in sentence in relation to your age is appropriate and that is in a sense related to Mr Borich's submission that you were stressed. At the time of the offending you were 18 years old. You were a young person to be left in charge of two small children on your own. Your age may be seen as reducing your culpability. However, I consider that the gravity of the offending is such that only a small allowance can be made.

[35] Mr Borich submitted that obtaining medical assistance was a mitigating factor. You are entitled to some credit for the fact that you immediately sought medical assistance for Arwen. That may well have been out of a sense of self-preservation, however whatever motivated you, you went and got medical help for Arwen. Ultimately the injuries were so bad that it was of no avail, but there is good reason why this Court should encourage and give credit to those who when having hurt a child, seek medical assistance.

[36] Mr Borich also submitted that I should give you credit for being at low risk of reoffending. I do not consider it to be a mitigating factor but I do think it is an important factor in terms of the principles and purposes of sentencing to recognise in weighing the necessary deterrent effect of a sentence that you are assessed at being at the low risk of reoffending.

[37] In fixing a starting point I have considered all the cases referred to me by your counsel and in particular *R v Waterhouse* CA33/04 13 May 2004; *R v Iorangi* already cited. I have also considered the cases referred to me by the Crown, *R v Leuta*, *R v Witika* [1993] 2 NZLR 424 and *R v Tipene* [2001] 2 NZLR 57 and *R v Ngati & Fa'asisila* HC AK CRI 2006-092-1919 15 June 2007, Lang J. I do not consider the offending in your case as serious as that in *Ngati & Fa'asisila.* In that case the little boy, a three year old, was beaten with numerous weapons, including an oar handle and a baseball bat. The fatal beating was prolonged. He was mistreated over a lengthy period of time. There was a failure to seek medical help which was an aggravating factor. Although the offending leading to death was confined to two days, there was evidence of earlier beatings. The Judge adopted starting points of 11 years for Ngati and 10 years for Fa'asisila with a final sentence of eight and a half years reflecting Ngati's willingness to plead guilty to manslaughter, enormous remorse and willingness to address her problems with anger management and Fa'asisila's previous good record and the fact that he said he was remorseful.

[38] Your offending is also not directly comparable to the offending in *Leuta,* but that case is nevertheless of some real assistance for me in sentencing you. In that case the mother beat her 5 year old son with a fan belt, so unlike you she used a weapon. It was found that she had hit him more than 60 times with it which caused him to go into shock. He vomited and aspirated the vomit causing his death. It was an aggravating factor that the mother had failed to obtain medical assistance when the son was plainly ill. But in that case there was no evidence of prior violence. In *Leuta* the offending was contrasted with offending involving single episodes of cruelty inflicted through rage and those reflecting loss of control through anger resulting in injuries often more severe than might have been contemplated. [See para 85]. In the absence of mitigating factors a sentence of 10 years was said to be entirely appropriate in that case.

[39] Your counsel also relies on *R v Iorangi*. Mr Borich says that is the most similar case to your offending. There the appellant had hit a grizzling 17 month old child who he was looking after while the child's mother was in the shower. The child cried after he was hit. The prisoner threw him across the room. He had committed much more minor assaults on the child on two previous occasions, including one where he head butted him and another occasion where he was reported to have given heavy smacks. The sentence there was four and a half years imprisonment.

[40] It is always difficult to compare offending between cases, but I think there are significant differences between that case and yours. There was no previous serious act of violence which was accepted by the Judge. There was also evidence the Court could take into account that the offender had lost control and was not coping with the parenting situation. That case also pre-dates *Leuta*, which really was a significant review of the cases in the area. Although referred to in *Leuta*, it was not commented on in any way. *Leuta* emphasises society's disapproval of violence to children. In this case I am satisfied that a starting point of six and a half to seven years which your counsel has urged upon me simply would not be sufficient to mark out society's condemnation of your conduct, to denounce your conduct or to deter you or others from future similar offending.

[41] In this case although the violence you inflicted on Arwen was not over a long period of time, it was extreme. As the Court of Appeal remarked in *Leuta*, even in cases involving a short incident of violence culpability will vary markedly. The extremity of the violence that you inflicted on Arwen is evidenced by the severity of her injuries. In attempting to explain the severity of the impact necessary to cause the injuries to Arwen, the pathologist remarked that he had never seen a fracture as long as Arwen had suffered. Dr Kelly remarked that it extended into the occiput, a part of the skull particularly difficult to fracture. Arwen's skull was literally split open from front to back. The injuries to Arwen's eyes were so severe that she would have been blind if she had survived.

[42] It takes only one quick but extremely violent act to end the life of a small child. You are a fully grown, solidly built man. I am satisfied that you brought your

full strength to bear upon Arwen. I am also satisfied that there is evidence of previous violence against Arwen by you which resulted in a serious head injury. The consequences of that previous violence were such that you must have known the seriousness of inflicting violence on the head of a child. This was not an isolated incident of a loss of control.

[43] Mr Broadhurst please stand. I fix a starting point of eight and a half years for the offending which takes into account the aggravating aspects that I have identified, including that you had previously inflicted a head injury upon Arwen. From that I am able to give you a credit of only six months to reflect the fact that you were at a young age when you committed this offending and a further six months to give some recognition to your attempts to help. That reduces the end sentence to seven and a half years imprisonment. For the offence of the manslaughter of Arwen Fletcher you are sentenced to seven years, six months imprisonment. Stand down.

Winkelmann J