IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CRI-2005-054-102

THE QUEEN

v

DEMIS PETER CHEYNNE PAUL

Appearances: S C Holt for Crown
D G Harvey and E Killeen for Prisoner

Sentence: 28 November 2005

SENTENCE OF GENDALL J

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[1] Demis Peter Cheynne Paul, you appear for sentence having been found guilty by a jury in the Palmerston North High Court of the crime of murder.

[2] The facts upon which I sentence you are as follows. On 22 December 2004 you were living with a woman and her two children at an address in Palmerston North. She had staying with her, her sister and her young nephew. You were at that time serving a custodial sentence but had been released on back end home detention. That custodial sentence was two years' three months' imprisonment for crimes of burglary. On the evening of 22 December the women in the household proposed to do Christmas shopping for the children. You were entrusted by them to babysit the three children, all of whom were under the age of six. The youngest, Mereana was 14 months old. By reason of an illness which was developing in her body she was crying from time to time because the illness was causing her

intermittent pain. She cried (on your assessment) for five minutes at most and you lost your temper with the child, who I accept was lying in her bed. You assaulted her violently by striking her with great force in the abdomen. The force of the blow was described by doctors at trial as being "massive" and resulted in a complete rupture of the bowel and a tearing of the mesentry artery which led to extensive haemorrhage and blood loss from which the infant succumbed and died within a short period. The abdominal organs had been forced by the impact of your blow against the child's spine so as to rupture the bowel. According to the pathologist those injuries were similar to those seen with aircraft or motor accident victims where the amount of force put onto the abdominal wall from deceleration is so great to cause this grievous type of injury and usually death.

[3] You went to obtain help from neighbours but the child was clinically dead by the time she was transported by ambulance to hospital. You said to the neighbours, to the ambulance officers, and to your de facto partner as well as to the police, that you had come upon the two years eight months' old cousin of the child jumping upon her so as to cause her to be injured. That was a lie and it caused extreme distress to the family and particularly the little boy's mother. It was a self-protecting lie designed to deflect blame elsewhere and to avoid the consequences of that which you knew you had done. You maintained that lie through depositions (that is the preliminary hearing stage) and for a period of 11 months until shortly before trial.

[4] Although I have no doubt that initially it was panic that caused you to lie this pretence was kept up for many months and was not just a lie of denial of your culpability but endeavouring to place blame upon a little boy. Eventually, however, a week before trial, in the company of your counsel, you sought a further interview with the police at which you finally acknowledged responsibility and explained how you had inflicted the punch to the child's body so as to cause her death. You said you had been hot under the collar because of an earlier disagreement with the child's mother, although the evidence of that is fairly thin. But you describe the blow as being "quite severe" and "sometimes I don't know my own strength…I chuck everything into it". And that is what you did on that occasion.

[5] The victim impact reports, as you can imagine, make distressing reading. The victims did not just include the deceased child but her mother, her brother, and her extended family. But your victims extended to include the mother of the little boy who you initially blamed and who had to endure the agony and torment at the hospital whilst efforts were being made to resuscitate Mereana, believing that her son had caused the child's death.

[6] You pleaded not guilty but acknowledged killing by a wrongful act. But the jury found you to be guilty of murder, accepting the Crown's case that it had proved you had the necessary intent when killing by an unlawful act. That is, you meant to cause bodily injury known by you to be likely to cause death and you were reckless whether death ensued or not.

[7] This was a dreadful killing of a defenceless infant – just a baby – who was lying helpless in her bed. She was the baby of a woman who had offered you the haven of her home so that you could be on home detention and without her generosity you would have remained in prison.

[8] The Sentencing Act 2002 provides that where a person is convicted of murder they must be sentenced to life imprisonment unless given the circumstances of the offence or the offender such a sentence would be manifestly unjust. There is nothing in the circumstances of your crime, or your background or personal circumstances, that enables me to conclude that a sentence of life imprisonment would be manifestly unjust. The child was a vulnerable baby, violently assaulted with extreme force by a grown man serving a custodial sentence on home detention. Accordingly, given the jury's verdict you are sentenced to a term of life imprisonment.

[9] By law a minimum period of imprisonment of 10 years must be served. But Parliament has provided in s104 of the Sentencing Act 2002 that in certain circumstances a minimum non-parole period of at least 17 years must be fixed by the Court unless it is satisfied that it would be manifestly unjust to do so. One of the circumstances is described by the statute as being "if the deceased was particularly vulnerable because of his or her age, health, or any other factor". Beyond doubt a

14-month old infant weighing about 12 kilograms in the circumstances of being minded by an adult male is particularly vulnerable. The provisions of s104 as Parliament has laid down apply to you. They remove to a large extent a Judge's discretion. A Judge has no option but to make such an order unless he or she is satisfied that it would be manifestly unjust to do so. You have heard counsel's submissions in discussion with the Bench during the sentencing process.

[10] Consideration of the application of s104 was given by the Court of Appeal in ***R v Williams & Olsen*** (CA64/04 and CA117/04, 20 December 2004) where the Court emphasised that the mere presence of a factor under this section does not automatically give rise to a 17-year minimum term in every case. A two-step approach by the sentencing Judge has to be followed. First, the sentencing Judge should consider the aggravating and mitigating factors to assess the degree of culpability in your case against what is said to be the standard range of murders (if there could ever be a "standard range"). The policy of s104 is that generally, the presence of one or more of those factors establishes that a murder is sufficiently serious to justify a minimum term of imprisonment of not less than 17 years. I then have to decide what minimum term of imprisonment is prima facie justified in all the circumstances including those that are personal to you.

[11] The Court of Appeal has said that a sentencing Judge cannot approach sentencing in s104 cases on the basis that the 17-year minimum can be reduced whenever he or she considers that is appropriate. There is no warrant to interpret the provision as a guide to judicial discretion. The question of whether the outcome of the assessment would make a 17-year minimum term manifestly unjust the Court of Appeal says, has to be approached in a principled way.

[12] So in the context of the law that Parliament has said Judges must apply, "manifestly unjust" requires that the injustice of a minimum non-parole period of 17 years be clearly demonstrated before this Court can exercise its sentencing discretion to impose a lesser term. So the specified minimum period although not confined to exceptional cases, cannot be departed from lightly despite whatever the sympathies of a sentencing Judge may be. Parliament has spoken in clear terms. A prisoner must show why a sentence is manifestly unjust so as to be disproportionate

to the circumstances of the offence, or the offender's personal circumstances. As your counsel has emphasised the Court of Appeal in ***R v Williams*** (supra) said at [67]:

> "a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder."

[13] Mr Harvey has very ably and responsibly accepted that life imprisonment must follow but he has submitted that s104 does not apply. He argued that it would be manifestly unjust to impose a minimum non-parole period of 17 years upon you because:

(1) Outside the fact of the vulnerability of the child there are no other aggravating features;

(2) Your actions were momentary without prolonged violence where you acted under stress through poor parenting skills and lost your temper; and

(3) Thereafter, your actions were those borne of panic.

[14] Mr Harvey accepts that you were not acting under any provocation as required by law. Let me say now, as I have indicated, a crying 14-months old baby is not, and cannot, in the circumstances of your case be such as to deprive an ordinary person of the power of self-control so as to bring about what you did. Mr Harvey did not and does not assert, that that was the case, although he submits that this was not a frenzied attack and not planned. So he contends there are factors personal to the offence that would make the statutory 17-year period manifestly unjust. But in addition, he submits your age (you are now aged 25), your remorse and poor upbringing as a teenager puts you into a category of case quite different to the cases referred to by the Crown which, for completeness, I simply mention ***R v Williams*** (supra); ***R v Mackness*** (CA160/03, 24 November 2003); and ***R v***

Harrison-Taylor (High Court, Auckland, CRI-2004-092-001510, 12 September 2005, Ellen France J).

[15] The Crown says there are serious aggravating features. You acknowledged a major problem in dealing with anger. You were on home detention which although it is said was not relevant, I consider that being on home detention or being on parole when one commits serious crimes is an aggravating feature. The Crown says your blaming it on this child until six days pre-trial when pretence was futile was aggravating and that great harm has resulted to the family from the death of his child. And of course, that latter feature is always the case in murders.

[16] When I come to consider concepts such as "manifestly unjust" it is obvious that the task of the sentencing Judge has to be offence specific, that is specifically related to your crime and the circumstance of it, and offender specific.

[17] Your personal circumstances and background are sad but that is not unusual for violent criminal offenders. You cannot call in aid a blameless life and factors relevant to the sentencing task include some serious aggravating features. You have 21 previous convictions including 11 for burglary, theft, receiving, one for possession of an offensive weapon, and one for wilfully damaging property by fire or explosives so as to endanger life, that is the crime of arson. You have been sentenced to terms of imprisonment of up to two years and three months in December 2000, July 2003 and have received prison sentences for 13 offences in total, although some of course have been served concurrently. As I have said you were on home detention subject to a custodial sentence when you killed Mereana and I regard it as aggravating that you callously and falsely sought to blame a child who was not able to respond or dispute that and maintained that for 11 months.

[18] I accept there are killings of children where there are multiple acts of violence over a prolonged period, and your actions do not fall into that category. I have had to give very anxious thought to s104. But for the statutory requirement I think a non-parole period of more than 10 years but less than 17 years might well have been imposed. I would have had in mind 15 years. But I have had to go on to

consider whether such a term of 17 years minimum non-parole would be manifestly unjust. The Court of Appeal in ***R v Williams*** (supra) said this at [54]:

> "In cases where the first step points to a lesser minimum term than justified, the Court would go on to the second step and consider whether to impose a minimum term of 17 years' imprisonment would be manifestly unjust. If it is, the minimum term must be reassessed to what the Court considers to be justified."

[19] Earlier, the Court said at [52]:

> "This element [that is that the murder is sufficiently serious] is necessary to ensure that effect is given to the legislative policy underlying s 104, which requires [and this is the critical words] *Courts at times to impose higher minimum terms of imprisonment than they might have done had s 104 not been enacted*." (emphasis added)

[20] And so despite my inclination that a term of 15 years minimum non-parole might have been imposed but for Parliament passing s104, I cannot conclude that it would be manifestly unjust to adhere to the Parliamentary policy. I cannot conclude that your crime and your circumstances fall outside the scope of the policy that Parliament laid down that murders of babies, vulnerable in the way this child was, will generally attract the term that Parliament has said has to be imposed. Matters such as your remorse, which I accept, is recognised but that is not alone sufficient to place your case into the sort of category that Parliament has said it would be manifestly unjust to adhere to its general policy.

[21] I am not permitted to allow subjective sympathies to enter into my sentencing discretion. Objectively viewed, as I must, I can find no grounds to rebut the presumption in s104 in finding that a minimum non-parole period of 17 years would be manifestly unjust. The qualifying factor of vulnerability of the baby was central to your crime and I cannot find powerful mitigating circumstances bearing upon the offence or your personal circumstances as such that the presumption should be displaced. Regrettably yours is not an unusual or exceptional case and accordingly, I cannot conclude that manifest injustice would arise from the imposition of the 17-year minimum non-parole period that Parliament has required. So, you are sentenced to life imprisonment and pursuant to ss103 and 104 of the Sentencing Act 2002 you are directed to serve a minimum period of imprisonment of 17 years.

[22] Stand down thank you.

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J W Gendall J

Solicitors:
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