JUDICIARY OF ENGLAND AND WALES

The Queen

-v-

Chelsea Cuthbertson

Sentencing Remarks of Mr Justice Spencer

Winchester Crown Court

Thursday 22nd July 2021

1. Chelsea Cuthbertson, you are 28 years old. I have to sentence you for the unlawful killing of your 6 week old son, Malakai, in the family home in Hythe on the morning of Saturday 2nd February 2019. You were convicted by the jury of manslaughter after a trial lasting 5 weeks. You were acquitted of murder. You denied that it was you who caused his fatal injuries. You blamed the child's father. The jury rejected your account. As the jury's verdict demonstrates, it was you who caused the fatal injuries after the father had left for work that morning.

2. Only you know precisely what you did to Malakai to cause those fatal injuries. Only you know why you did it. I sentence you on the basis that it was not a premeditated act. In all likelihood it was a response to his crying soon after you woke up that morning, against the background of the stress of coping with three children under the age of 3 and a running argument with the baby's father in a heated exchange of text messages after he had left for work.

3. During the trial, on the basis of the expert medical evidence, it became clear that Malakai had been gripped and squeezed so hard that three posterior ribs were fractured.

He must have been shaken with sufficient force to cause the familiar classic triad of injuries resulting from repeated over-extension and flexion of a baby's head: severe brain damage caused by lack of oxygen and blood to the brain, extensive subdural bleeding, and retinal haemorrhages. In addition there was bruising beneath Malakai's scalp in the right parietal area, with haemorrhage in the layers underneath protecting the brain, which indicates trauma to the back of the head probably associated with the shaking. During the trial there was no challenge to the expert evidence which supported the scenario of the perpetrator picking up Malakai from his crib, squeezing him hard enough to fracture three ribs, shaking him, then throwing him back down into his crib causing an impact to the back of his head.

4. I sentence you on the basis that this is what you must have done to Malakai that morning to cause the fatal injuries and the three posterior rib fractures. By acquitting you of murder the jury were not sure you intended to cause Malakai really serious bodily harm when you shook and squeezed him in this way. However, by convicting you of manslaughter the jury were sure that any sober and reasonable person would have appreciated the real risk of some physical harm to Malakai from what you did to him. More importantly, in the course of your own evidence, under cross-examination, you acknowledged that you knew how dangerous it would be to shake a baby and that it was likely to cause the baby very serious harm. Although I approach with some caution such an admission made by a defendant who is denying doing the act at all, you certainly knew the importance of supporting a baby's head at all times. Any mother knows that, and knows the danger of shaking her baby.There was even a photograph taken on your phone during the night of Malakai feeding, with your hand prominently supporting his head.

5. Malakai was a tiny baby. He was born premature at 33 weeks 3 days. At the time of his death he weighed only 7lb 3oz. He was a twin. The babies had been discharged to your care from the neo-natal unit at the hospital on 9th January 2019, three weeks before Malakai's death. It is plain from the evidence that Malakai was the smaller of the two babies and the more difficult. In the week leading up to his death you described him in text messages on the Monday as "more whingey" and "definitely hard work". You said you had been up all night with him.

6. You had a tempestuous relationship with the father of the twins, Dell Watts. He is 16 years older than you. Your relationship began in August 2014. You had a daughter together, born in February 2016, who was nearly 3 years old at the time of Malakai's death. You and Dell Watts had lived together on and off for four years up to the fatal weekend. Both of you described it as something of a love/hate relationship. You could not live without each other but nor could you live together peaceably. You were constantly arguing. You berated him regularly in foul mouthed angry text messages for treating your flat as a hotel and for not helping sufficiently with the care of the children.

7. You were both heavy cannabis smokers. You told the jury quite openly that you smoked cannabis every day from the moment you got up to the moment you went to bed. You attempted to conceal this from the health visitor and other health professionals who came to the flat. You realised that if they knew the true position you would be likely to lose the children. When the health visitor came to the house on 16th January you were warned that if cannabis was being smoked (which you denied) she would have to raise it as a safeguarding issue because it would be a risk for an intoxicated mother to care for children. You thought you knew better. You told the jury that your habitual constant cannabis smoking had no impact at all on your care of the children. The reality is that you selfishly put your cannabis smoking ahead of your children's welfare. On the evening before you inflicted the fatal injuries you were ordering £40 worth of cannabis from your supplier and planning to take a taxi to collect it, at a time when there was almost no food in the house and insufficient money to pay for the electricity needed to heat the house properly.

8. You had been complaining the previous morning about Dell Watts leaving the storage heater on in the lounge when he got up early and left for work. You were so angry with him that you told him you wanted him out of the house altogether, for good. That row continued by exchanges of text messages throughout the day. When he came home that evening, however, you made up as you almost always did. During the evening you smoked several cannabis joints. You also drank a whole bottle of wine. The twins were on a four hourly feeding regime. You fed the twins, between you, at around midnight and again at around 4.30am. Malakai was crying and took a while to settle. You had a tiff with Dell Watts who went to sleep on the sofa in the lounge leaving you in the bedroom with the twins in their cribs alongside the bed.

9. It is apparent from the analysis of your mobile phone that you did not get to sleep until around 5.40am. Dell Watts left the house for work just after 8am. You must have been asleep for some 3 hours because the next use of your phone was at 8.54am. At 9.28am you phoned 999 to report that you had just found Malakai blue and not breathing. Only you know what really happened in that intervening half hour. But I am quite sure that it was during that half hour that you inflicted the fatal injuries to Malakai and caused his three posterior rib fractures.

10. It is significant that soon after you woke up and accessed your phone you saw a text from Dell Watts, sent from work, telling you how cold a morning it was and that he had left the heating on in the flat. That provoked a continuation of the previous day's row about what you perceived as his selfishness in putting the heating on for himself when you could not afford it.

11. During the early part of this half hour period you were accessing various applications on your phone and checking that your universal credit benefit had been duly paid into your bank account overnight. You were also using Facebook. However, there were also significant gaps of inactivity on your phone, notably 7 minutes immediately after 9am and 5 minutes immediately before the 999 call. Your evidence to the jury was that you had left the bedroom for most of the half hour period in order to attend to your daughter and to have your first cannabis joint of the day. You claimed, improbably, that despite the freezing temperature you had gone outside to smoke your cannabis joint for 15-20 minutes dressed only in your night attire with a cardigan on top. The first police officer to enter the bedroom within a few minutes of the 999 call was immediately struck by the overpowering smell of cannabis in the bedroom. I strongly suspect, although I cannot be sure, that it was in the bedroom that you smoked the cannabis joint, not outside the house.

12. It is plain from all the evidence, and from the report of the psychologist, that you habitually smoked cannabis to calm yourself down. I cannot be sure whether on this occasion you smoked cannabis after shaking Malakai soon after you woke up, or before shaking him much closer to the 999 call. But whatever the sequence of events, the uncomfortable truth is that you were angry and stressed by the continuing row with your partner and took it out on your baby son Malakai. He may well have been crying.

That may well have been the final straw which caused you to lose your temper. If he was crying it would hardly have been surprising, as by now it was over an hour after his next feed was due. Rather than attend to him straightaway when you woke up you apparently chose to smoke your cannabis joint.

13. I accept that you attempted CPR on Malakai in accordance with the instructions you were being given over the phone by the emergency services. The consultant who first treated Malakai on arrival at hospital, Dr Griksaitis, assured you that had it not been for your efforts the paramedics who took over would never have been able to regain heart activity. I also accept, for the purpose of sentencing you, that Malakai's four anterior rib fractures may have been caused by the extensive CPR carried out by the paramedics. I ignore those fractures in sentencing you.

14. There was, however, also an older posterior fracture of the first rib which must have been caused by a previous episode of squeezing Malakai's chest very forcefully. During the trial it was accepted that whoever shook Malakai and inflicted the fatal injuries must also have been responsible for causing this earlier rib fracture. It would be too much of a coincidence for two perpetrators to have caused such fractures on different occasions independently. I am sure on all the evidence that you caused that earlier rib fracture as well. Malakai would have been in great pain for several minutes. You must have known you had hurt him. You may well also have shaken him on that occasion, although there was no brain damage or other injury to prove it. Indeed, the fact that you had squeezed him and handled him roughly without any apparent long-lasting ill-effects may have led you to believe that shaking and squeezing him again would not cause him serious injury, tending to negate any intent to cause him really serious harm.

15. Sadly no medical intervention was able to save Malakai's life. As Dr Griksaitis put it, "when he arrived at hospital, he was dying in front of us". He had suffered catastrophic brain damage. It was soon apparent that no surgery could help him and that palliative care was the only option. Mercifully he would have known nothing of his suffering. He never regained full consciousness. He died peacefully on the afternoon of 6th February 2019. He leaves a grieving family. His two sisters now live with their maternal aunt, Dell Watts' sister, following care proceedings in the Family Court. In her moving witness statement, read to the court, the aunt speaks of the impact on them of the loss

of their brother which they feel keenly despite their young age and (as yet) incomplete knowledge of the circumstances of his death.

16. In deciding the length of your inevitable sentence of imprisonment I am required to follow the Sentencing Council's guideline for unlawful act manslaughter. I first have to determine the level of your culpability. The prosecution submit that this is a level B case of high culpability because the death was caused in the course of an unlawful act which carried a high risk of grievous bodily harm which was or ought to have been obvious to you. It is submitted on your behalf that it is a level C case of medium culpability, because the death was caused in the course of an unlawful act which involved an intention on your part to cause harm, or recklessness as to whether harm would be caused, that falls between high and lower culpability. If it is level B, the starting point under the guideline is 12 years' custody, with a range of 8 to 16 years. If it is level C, the starting point under the guideline is 6 years' custody, with a range of 3 to 9 years. The guideline cautions against an overly mechanistic application of the factors which determine the level of culpability. It also advises that where a case does not fall squarely within a category, adjustment from the starting point may be required before further adjusment for aggravating and mitigating factors.

17. In my judgment your culpability falls between level B and level C, but closer to level B. It does not fall squarely into either category. As I have already observed, you admitted in the course of your evidence that if you had squeezed and shaken Malakai as alleged you would have realised that you were likely to cause him very serious harm. On the other hand, the medical evidence is that the fatal brain damage could have resulted from only one or two shakes and the degree of force required need not have been great, as distinct from the very considerable force required in squeezing his chest to cause the posterior rib fractures. The overall force used in the incident is an important factor in assessing how obvious to you the risk of really serious harm ought to have been. Nevertheless, perhaps generously, I propose to take a starting point of 9 years, midway between the two categories.

18. I next have to consider and balance the aggravating factors and mitigating factors which may justify departure from that starting point. Under the guideline I find there are the following aggravating factors.

19. First, and most obviously, Malakai was particularly vulnerable due to his age. I bear in mind, however, that it is because he was such a tiny baby that there was such a high risk of really serious bodily harm which was or ought to have been obvious to you. To an extent this aggravating factor has therefore already been taken into account in determining your level of culpability. The guideline cautions against double counting.

20. Second, by assaulting your baby son in this way you grossly abused your position of trust. He was a helpless baby. It was your duty as his mother to protect him. Instead you shook him knowing how dangerous it was to do so, and you squeezed him hard enough to fracture three of his ribs. Again, however, to an extent this factor has already been taken into account in determining your level of culpability.

21. Third, the offence was committed in the presence of your other two children in the sense that they were both in the flat at the time. Your two year old daughter was not in the same room when you inflicted the fatal injuries, but she was in the same room when you were making the lengthy distressing 999 call and performing CPR on her dying brother, and she was evidently clearly distressed by the sudden and dramatic arrival of the paramedics and police. Both she and Malakai's twin sister will have to come to terms when they are older with the fact of what happened to Malakai that morning when they were in the flat with him. Some of that distress and psychological damage is already apparent from their aunt's impact statement.

22. Fourth, you falsely and shamelessly placed the blame on Dell Watts. The issue for the jury was very stark. There was no suggestion that Malaki had died from natural causes. There were only two candidates for perpetrator, you and Dell Watts. Although you were reluctant to blame him in your police interviews, at trial you dishonestly accused Dell Watts of inflicting the fatal injuries before he left for work that morning. You knew he was innocent. You knew how distressing it must have been for him to be accused of killing his own son. I have taken into account his impact statement which was read to the court.

23. Fifth, although I cannot be sure whether you inflicted the fatal injuries before or after you smoked cannabis that morning, and therefore cannot that be sure you were under the influence of cannabis when you committed the offence, it is an aggravating factor generally that your ability to care properly for Malakai and the other children must have been affected by your cannabis use. That is precisely why you did not want to reveal it to the authorities.

24. Sixth and finally, my finding that you caused Malakai's earlier rib fracture means that there was some history of violence by you towards Malakai.

25. The combination of these aggravating factors would justify a significant increase from the starting point. I have to balance that against the following mitigating factors.

26. First and foremost. I accept that there was a lack of premeditation in this assault on your baby son. I accept that it arose on the spur of the moment when you were stressed by your domestic circumstances and probably also by the baby's crying. That said, for the reasons I have explained, I am satisfied that this was not the first time you had used significant force towards Malakai. You had caused the earlier rib fracture. That too was probably when you were finding it difficult to cope with his crying. When you shook him and inflicted the fatal injuries you were, to some extent at least, taking out on this tiny baby your frustration and annoyance with Dell Watts.

27. Second, I accept that you attempted to assist Malakai by genuinely carrying out CPR to the best of your ability. That was a demonstration of your immediate remorse for what you had done.

28. Third, I accept that initially at least you were overcome with remorse. That was tempered by the lies you immediately began to tell in covering up for what you had done. True remorse would have been shown by a frank and honest admission of responsibility at the outset, followed in due course by a guilty plea. Nevertheless I accept that there is other evidence of remorse. Soon after Malakai's death you made an attempt on your own life by taking an overdose. You told the psychologist, Dr Beaton, that you miss Malakai every day and are "haunted" by the image of him blue in his cot.

29. Fourth, although you are not put forward as a person of good character, you have no relevant previous convictions. That must be balanced against the fact that you deliberately injured a previous child of yours in 2013 when he too was only a baby, 6 months old. There was no prosecution. You admitted the offence and it was dealt with by way of a community resolution. You were suffering from post-natal depression at the time and received treatment for it. I also note that in March 2021, whilst on bail in the present case, you pleaded guilty to a common assault on your younger brother arising from a domestic argument when you were visiting the family home, for which you were fined by the magistrates' court. That tends to confirm that you have trouble controlling your temper.

30. Fifth, I bear in mind that you have some degree of learning disability. I have read the report dated 14th June 2021 from Dr Anne Beaton, a clinical psychologist. It confirms that, on the basis of the tests she administered, your cognitive abilities lie in the low range, in the lowest 2% for people of your age. That was far from apparent when you gave evidence. Nor does it square with the apparent ease which you are able to compose lengthy text messages and cope with daily life. You may lack formal intellectual ability, but you are streetwise and mature. In my judgment your limited cognitive ability in no way reduced your culpability for this very serious and fatal assault on your baby son. Nor is that suggested on your behalf. You knew what you were doing.

31. More generally, I bear in mind the content of the pre-sentence report which was prepared for your recent appearance in the magistrates' court, and the content of the psychologist's report. They refer to your troubled upbringing and the problems you yourself went through as a child. You suffered from ADHD. You witnessed domestic violence and were yourself, you allege, the victim of sexual abuse. I note that to the probation officer you deceitfully denied any use of cannabis. To the psychologist, very shortly before the trial, you admitted the extent of your cannabis addiction, and that you smoked cannabis to help you keep calm.

32. The sad reality is that although you have given birth to three other children as well as Malakai, by the intervention of the local authority's Children's Services you have been deprived, properly and necessarily, of the care of each of them, although you will continue to have contact with your two daughters now aged 5 years and 2 years. The

length of the sentence that you must serve will mean that you will miss out on regular normal contact with them for a very long time to come. That will be hard for you and for them. Above all you have to live with and come to terms with the responsibility of killing your own son.

33. I bear in mind the delay in the case coming on for trial, in part as a consequence of the pandemic. It is 2½ years now since Malakai died. It is a year since you were first charged with murder. You had that allegation hanging over you for a very long time.

34. I also bear in mind that for the first few months of your sentence at least, it is likely that prison conditions will continue to be harder for you, as for all prisoners, through the impact of the pandemic.

35. Although I have been referred by counsel to several reported decisions of the Court of Appeal on sentence for manslaughter in cases of this kind, with one exception they all predate the new Sentencing Council guideline for manslaughter. They are all fact specific and establish no additional principle. The exception is the very recent case of *R v Doak* [2021] EWCA Crim 536, which I have considered carefully in assessing the level of your culpability under the guideline.

36. Weighing and balancing all the aggravating and mitigating factors I have concluded that the least sentence I can impose for this offence of manslaughter is **9 years' imprisonment.**

37. The days you have already served in custody on remand, when first arrested and since your conviction earlier this week, will automatically count towards sentence. In addition you are entitled to credit for one-half of the number of days when you were on bail but your liberty was curtailed by an electronically monitored curfew. The total number of such days is 338. Half is 169. I therefore declare and direct that those 169 days will count towards sentence. If this calculation is mistaken, the court will order an amendment of the record with the correct period. You have also been subject to an untagged curfew during the trial. Those days do not count in the same way towards your sentence but I have taken them into account in deciding the overall length of your sentence.

Chelsea Cuthbertson, stand up please:

38. For the manslaughter of your son Malakai I sentence you to imprisonment for a term of **9 years.** You will serve two-thirds of that sentence in custody. Under current arrangements you will then be released on licence to serve the remainder of the sentence in the community. If you breach the terms of your licence or commit any further offence you will be liable to be returned to prison to serve the remainder of your sentence.
    You may go down.