IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 128/2019
[2020] NZSC 19

BETWEEN	SILAPEA MOMOISEA Applicant
AND	THE QUEEN Respondent

Court:	Winkelmann CJ, Glazebrook and Ellen France JJ
Counsel:	R J Stevens and R T Nye-Wood for Applicant A J Ewing for Respondent
Judgment:	13 March 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Ms Momoisea was convicted of the murder of her former partner and the attempted murder of his wife. She pleaded guilty. On the murder charge, Downs J sentenced her to life imprisonment with a minimum period of imprisonment (MPI) of 14 and a half years.[1] Her appeal against sentence to the Court of Appeal was dismissed.[2] She seeks leave to appeal to this Court on two grounds:

(a) The Court of Appeal was wrong to uphold the 18-month discount given by Downs J as a discount for her guilty plea; and

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1 *R v Momoisea* [2018] NZHC 1577.
2 *Momoisea v R* [2019] NZCA 528 (Courtney, Duffy and Wylie JJ) [CA judgment].

(b) The Court should have treated the actions of the deceased victim as a mitigating factor under s 9(2)(c) of the Sentencing Act 2002.

[2] In relation to the first ground, Ms Momoisea wishes to argue that the approach to guilty pleas in *Hessell v R*,[3] that is, allowing up to a 25 per cent discount, should be applied to all MPIs for murder.

Background

[3] The facts are set out in the Court of Appeal judgment.[4] Ms Momoisea killed the deceased and tried to kill his wife after the deceased ended his relationship of some four years' duration with Ms Momoisea.

[4] In sentencing, Downs J considered the case was one to which s 104 of the Sentencing Act applied, that is, an MPI of at least 17 years had to be imposed unless it was manifestly unjust to do so.[5] The Judge found a 17-year MPI would be manifestly unjust because of Ms Momoisea's guilty plea, her prior good character and the cultural dimensions outlined.[6] In assessing potential mitigating factors, the Judge found that Ms Momoisea was not remorseful so gave no allowance for remorse. Nor did the Judge consider this was a case where provocation mitigated the sentence.[7]

[5] The Court of Appeal said it was satisfied the Judge paid sufficient regard to personal mitigating factors and the guilty plea. The Court also concluded the Judge was right not to reduce the MPI for provocation. In comparison with the circumstances in *Hamidzadeh v R* relied on by Ms Momoisea, the Court considered

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3 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

4 CA judgment, above n 2, at [4]–[12].

5 The Judge considered s 104 applied because of the additional features of an attempted murder of the deceased's wife and because the offending involved the unlawful presence in the deceased's home.

6 The Judge referred to the effect on Ms Momoisea of banishment from her village in Samoa and her family's engagement with Ifoga, a Samoan cultural process that involves seeking forgiveness.

7 The Judge found that nothing the deceased victim had done approached the threshold required to mitigate a sentence of murder.

this was not a case where the culpable conduct could be attributed to a loss of control.[8]

The proposed appeal

[6] The proposed appeal would re-run the argument in the Court of Appeal. It may be that at some point this Court may wish to consider the approach to s 104 of the Sentencing Act and the 17-year MPI. But in this case we consider that would be an abstract exercise and not one suitable for a grant of leave as we now explain.

[7] Section 104 provides that in the circumstances set out in that section,[9] an MPI of at least 17 years must be imposed unless the court is satisfied it would be "manifestly unjust to do so". The logic of the proposed argument relating to the application of the approach in *Hessell v R* to guilty pleas in a case under s 104 must be that it would be "manifestly unjust" not to apply that approach. That argument has insufficient prospects of success to justify a grant of leave.[10] The only issue for the Court in this case would accordingly be whether there should have been a credit for the plea and, if so, how much. That does not raise any issue of principle.

[8] Nor do we see sufficient prospects of success in the argument that greater credit should have been given to mitigating factors in this case given the features of the offending referred to by the Court of Appeal, that is, "[t]he nature of the deliberate attack, which only by chance resulted in one death",[11] and the absence of remorse.

[9] Nothing raised by Ms Momoisea gives rise to the appearance of a miscarriage of justice in the assessment of the Court of Appeal of the effect of the mitigating factors in this case. The criteria for leave to appeal are not met.[12]

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8 *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369. Nor did the Court consider the circumstances of this offending was analogous with the circumstances in *R v Suluape* (2002) 19 CRNZ 492 (CA) and *R v Fate* (1998) 16 CRNZ 88 (CA): CA judgment, above n 2, at [20]–[28].

9 The specified circumstances include, for example, home invasion: s 104(1)(c).

10 See *Malik v R* [2015] NZCA 597 at [35]–[37]. As the submissions for the respondent note, a 25 per cent reduction for a guilty plea would mean an MPI of 12 years and nine months which is very close to the statutory minimum of 10 years mandated by s 103(2) of the Sentencing Act.

11 CA judgment, above n 2, at [19].

12 Senior Courts Act 2016, s 74(2).

[10] The application for leave to appeal is dismissed.

Solicitors:
Public Defence Service, Auckland for Applicant
Crown Law Office, Wellington for Respondent