IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 38/2022
[2022] NZSC 94

BETWEEN	KAINE VAN HEMERT Applicant
AND	THE QUEEN Respondent

Hearing:	27 July 2022
Court:	Ellen France, Williams and Kós JJ
Counsel:	J R Rapley QC and S J Bird for Applicant M J Lillico for Respondent
Judgment:	3 August 2022

JUDGMENT OF THE COURT

A The applications for an extension of time to apply for leave to appeal against the decision of the Court of Appeal (*R v Van Hemert* [2021] NZCA 261) [the Court of Appeal judgment] and the decision of the High Court (*R v Van Hemert* [2021] NZHC 2877) resentencing Mr Van Hemert [the resentencing judgment] are granted.

B Leave to appeal against the Court of Appeal judgment and the resentencing judgment is granted.

C The approved question is whether the Court of Appeal was correct to conclude that the presumption in favour of life imprisonment in s 102 of the Sentencing Act 2002 was not displaced given the circumstances of the offence and of the applicant.

REASONS

[1] We held an oral hearing to consider the application for leave to appeal in part because of the procedural muddle created by the way in which this matter has proceeded. We need to briefly explain the way in which matters unfolded.

[2] Following a sentence indication, the applicant pleaded guilty to the murder of Ms Te Pania. In sentencing the applicant, the High Court Judge determined a sentence of life imprisonment would be manifestly unjust so that the presumption in favour of life imprisonment in s 102 of the Sentencing Act 2002 did not apply.[1] A finite sentence of 10 years' imprisonment with the requirement that the applicant serve a minimum period of imprisonment (MPI) of six years and eight months was imposed.

[3] On appeal against sentence by the Solicitor-General to the Court of Appeal, the Court concluded the High Court had misapplied s 102 with the result that there was no basis to depart from the presumption that life imprisonment should be imposed.[2] The appeal was allowed. The Court did not resentence the applicant but, rather, the matter was remitted back to the High Court for a further sentence indication which was to be consistent with the reasons given by the Court of Appeal in allowing the appeal. A further sentence indication was provided and the applicant maintained his guilty plea. He was resentenced by Nation J to life imprisonment with an MPI of 11 and a half years.[3]

[4] Against this background, the applicant filed a notice of application for leave to this Court to appeal against the resentencing judgment in the High Court. However, his real challenge is to the earlier Court of Appeal judgment, in particular, to the approach taken by the Court to the presumption in s 102. Given that focus, as we discussed with counsel, the better course would have been for the applicant to appeal against the Court of Appeal judgment at the time.

[5] Counsel provided some explanation for the procedural course adopted and we accept that there was no attempt to gain any tactical advantage by the process followed.

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1 *R v Van Hemert* [2020] NZHC 3203 (Doogue J).
2 *R v Van Hemert* [2021] NZCA 261 (French, Brown and Collins JJ) [Court of Appeal judgment].
3 *R v Van Hemert* [2021] NZHC 2877.

In these circumstances, we agree with the parties that the better course is to grant an extension of time to enable the applicant to appeal against the Court of Appeal judgment. However, because the sentence ultimately imposed is that of Nation J in the resentencing judgment, we also grant an extension of time and leave to appeal against that judgment. That will avoid any possibility of further procedural problems.

[6] As will be apparent from this narrative and from the terms of the approved question, on the appeal counsel should focus on the correctness of the Court of Appeal's interpretation, and application, of s 102. There are two particular issues arising from the approach to s 102 in this case which counsel should also address. They are, first, whether the Court was correct to treat the circumstances of the offending (the brutality of the murder and Ms Te Pania's vulnerability) as having "precluded" a departure from the presumption of life imprisonment.[4] The second matter relates to the correctness of the Court's assessment of the applicant's circumstances. In particular, we refer to the discussion of the extent to which the applicant's mental health contributed to the offending and whether his mental illness can or should be treated as distinct from other aspects of the applicant's behaviour, such as his heavy use of alcohol and drugs, and his anger over the relevant period.[5]

[7] Given the nature of the issues raised by the appeal, it may be that the Criminal Bar Association of New Zealand and/or the Defence Lawyers Association New Zealand | Te Matakahi may wish to seek leave to intervene to present submissions at the hearing or file written submissions. The Registrar is asked to provide copies of this judgment to both bodies. It would assist the Court if any applications in this regard were filed promptly.

Solicitors:
Crown Law Office, Wellington for Respondent

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4 Court of Appeal judgment, above n 2, at [47].
5 At [50]–[51].