IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 38/2022
[2023] NZSC 116

BETWEEN	KAINE VAN HEMERT Appellant
AND	THE KING Respondent

Hearing:	18 November 2022
Further submissions:	23 December 2022, 30 June 2023 and 7 July 2023
Court:	Glazebrook, O'Regan, Ellen France, Williams and Kós JJ
Counsel:	J R Rapley KC and S J Bird for Appellant M J Lillico and E J Hoskin for Respondent L A Scott for Criminal Bar Association New Zealand as Intervener E A Hall, D A Ewen and C A Hardy for Te Matakahi | Defence Lawyers Association New Zealand
Judgment:	31 August 2023

JUDGMENT OF THE COURT

A The appeal against sentence is allowed.

B The minimum period of imprisonment of 11 years and six months is quashed and a minimum period of imprisonment of 10 years is substituted.

REASONS

	Para No
Glazebrook, O'Regan, Ellen France and Kós JJ	[1]
Williams J	[99]

GLAZEBROOK, O'REGAN, ELLEN FRANCE AND KÓS JJ
(Given by Kós J)

Table of Contents

	Para No
Introduction	[1]
What happened	[4]
Why it happened	[11]
Mental impairment causative?	[12]
Other factors causative?	[23]
The legislation: s 102 of the Sentencing Act	[27]
Procedural history	[35]
Sentence indication (November 2020)	[38]
Sentencing (December 2020)	[40]
Court of Appeal (June 2021)	[44]
Re-sentencing (October 2021)	[51]
This appeal	[54]
Did the Court of Appeal *interpret* s 102 correctly?	[56]
Did the Court of Appeal *apply* s 102 correctly?	[63]
Brutality and vulnerability	[64]
Substance abuse and anger	[70]
Mental impairment and public safety	[71]
Our assessment	[78]
Minimum period of imprisonment	[96]
Result	[98]

Introduction

[1] Discovering his former partner had entered a new relationship propelled Mr Van Hemert into a severe psychotic episode. Mental health professionals attempted to manage this by medication, believing care of Mr Van Hemert by his family would be maintained. Owing to a misunderstanding it was not and he was left alone. Mr Van Hemert quit his house in the early morning, taking with him a large knife for "protection". He went looking for "revenge sex" with a sex worker. A disagreement broke out between him and Ms Te Pania, the young woman he selected. He attacked her with the knife and killed her.

[2] Mr Van Hemert pleaded guilty to her murder. Three matters are not contested. First, that he was fit to stand trial; secondly, that he was not legally insane (i.e. he would have appreciated the nature of his actions and that they were morally wrong); and, thirdly, that but for his psychotic state, Ms Te Pania would be alive today.

[3] The issue in this appeal is whether Mr Van Hemert's psychotic state at the time of the killing of Ms Te Pania means it would be manifestly unjust that he be sentenced to life imprisonment.[1] The High Court initially held that it would be manifestly unjust to impose a life sentence.[2] The Court of Appeal set that conclusion aside.[3] Mr Van Hemert was re-sentenced in the High Court to life imprisonment.[4] He now appeals to this Court.[5]

What happened

[4] It is an important consideration in this appeal that Mr Van Hemert pleaded guilty on the Crown summary of facts. There was no disputed facts hearing under s 24 of the Sentencing Act 2002. The following facts, all drawn from the summary pleaded to, are therefore, common ground.

[5] Over the period of Christmas 2019 Mr Van Hemert became aware that his ex-partner had entered a new relationship. The summary states that this "appears to have led to the onset of a period of deterioration in his mental health". That deterioration was noticed by his ex-partner. She notified the Canterbury District Health Board Mental Health Service. A medical team assessed Mr Van Hemert on 30 December 2019. Following consultation with his brother a decision was made that his mental health could be managed with medication, along with a voluntary appearance at Hillmorton Hospital the following day.

[6] Mr Van Hemert was prescribed medication, which caused him to fall asleep. He was left to sleep on the understanding that his family would bring him to Hillmorton the next day.

[7] At approximately 3.47 am on 31 December 2019, Mr Van Hemert was seen driving his utility vehicle in the area of Manchester Street, Christchurch. At about 4 am the front number plate was stolen from a second motor vehicle parked in Worcester Street. Other number plates were then stolen from a third motor vehicle

---

1 Sentencing Act 2002, s 102(1).
2 *R v Van Hemert* [2020] NZHC 3203 (Doogue J) [HC first sentencing].
3 *R v Van Hemert* [2021] NZCA 261 (French, Brown and Collins JJ) [CA judgment].
4 *R v Van Hemert* [2021] NZHC 2877 (Nation J) at [17] [HC re-sentencing].
5 *Van Hemert v R* [2022] NZSC 94 [SC leave judgment].

parked in Rochester Street. Mr Van Hemert attached these number plates to his vehicle with cable ties, effectively concealing the correct registration of his vehicle.

[8] At this time Ms Te Pania was working on Manchester Street as a part-time sex worker. She was standing between Aberdeen Street and Salisbury Street. Mr Van Hemert stopped and spoke to her briefly. She then got into the front passenger seat of the vehicle. They drove then to an unidentified location near Grahams Road in Burnside, where Mr Van Hemert said they had a discussion about payment and services offered by Ms Te Pania. He said a disagreement arose and Ms Te Pania attempted to strike him with a weapon. Mr Van Hemert pulled out the knife he had brought with him and stabbed her multiple times. Stab wounds were found on Ms Te Pania's arms, hands, thigh, abdomen, chest and face, including wounds to her throat. Her right internal jugular vein was virtually severed. In addition, she suffered blunt force injuries to her head. Those appear to have been effected by a rock, found later on the passenger seat of the vehicle. The major operating cause of death was external blood loss and respiratory obstruction resulting from the throat wound. Mr Van Hemert himself had a v-shaped laceration to his left hand that required surgery.

[9] Following the killing, Mr Van Hemert's vehicle was tracked on CCTV footage driving erratically through the wider Christchurch area. He drove out of Christchurch, north on State Highway 1, and then back towards the airport. At around 6.45 am he drove into the secure Air New Zealand engineering site at Orchard Road. Airline staff called the police. Ms Te Pania was found in the front passenger seat of the vehicle. The vehicle windscreen was broken. A footprint from Ms Te Pania's shoe was detected on the windscreen.

[10] Mr Van Hemert was interviewed on the morning of 31 December 2019. He said an altercation had occurred over details of the transaction for sexual services. He said Ms Te Pania attacked him and that he acted in self-defence. He said "I sliced and diced her" and stabbed her numerous times. He said, they both "saw red" and "I murdered her". He said he freaked out afterwards and drove all over Christchurch disposing of her purse and both her cell phones, ending up at the Air New Zealand engineering site.

Why it happened

[11] In this Court the Crown focused on what it alleged were three contributing factors: Mr Van Hemert's mental health breakdown, his consumption of alcohol and cannabis, and anger. Ultimately, however, it was accepted that the dominant contributing factor was the first of these. As noted at [2], it was common ground that, but for that mental health breakdown, Ms Te Pania would be alive today.

Mental impairment causative?

[12] Mr Van Hemert was 42 years of age at the time this crime was committed. He had experienced three prior reported psychotic episodes, the murder arising from the fourth. The first occurred at the age of 17 when his parents took him to Christchurch Emergency Hospital reporting that he had been "irrational, constantly babbling and being completely different than his normal self". A week prior he had been involved in a car accident and charged with driving with excess breath alcohol. The psychiatric assessment at the time was that he had presented with "[a]n acute psychotic episode which appeared hypomanic in presentation, although the possibility that this may have been drug induced was considered although we have no evidence for this". After treatment with antipsychotic medication, his symptoms resolved within a few days.

[13] The second episode was some three years later when, at the age of 21, he was admitted to Hillmorton Hospital under s 11 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Mental Health Act). He presented with sleeplessness, excessive energy, disinhibition, disorganisation and a preoccupation "with environmental issues and pollution". He "believed he could communicate with his dead Aunty and that he could swim through the ground". He said he had consumed LSD in the two weeks prior and a diagnosis of "Drug Induced Psychosis or Bipolar Affective Disorder with manic episode" was made. Mr Van Hemert's aggression meant he had to be secluded for a period. Again, treatment with antipsychotic medication resolved his symptoms within a few days. A urine drug screen undertaken was positive for cannabis only.

[14] The third episode, more than 18 years later, occurred in October 2016 when Mr Van Hemert's then-partner contacted the District Health Board Mental Health Service to report that he was not sleeping and experiencing paranoia. His father had recently died suddenly. He was smoking cannabis regularly (three times per week) and having up to eight drinks per night. He believed that two new employees in his plastering business may have planned to rob his home and steal his then two-year-old daughter. He was assessed as presenting with an episode of mood elevation and was treated as an outpatient with antipsychotic and anxiolytic medication. A urine drug screen was positive for cannabis and caffeine only. Again, his mental state settled relatively quickly, although his partner noted ongoing exacerbation of mood elevation (particularly pressured speech) during periods of alcohol intoxication. Within three weeks his mental state had stabilised, and he was discharged back to the care of his general practitioner. He continued to take medication intermittently.

[15] That brings us to the fourth episode, which culminated in the murder of Ms Te Pania. On Christmas Day 2019 Mr Van Hemert visited his ex-partner's house for a family Christmas dinner. They had separated about two years before but remained on amicable terms. During his visit, his daughter mentioned that a man had stayed over the night before. This caused acute anger on Mr Van Hemert's part, although he reported attempting to conceal it on the day. The next day he visited the house again and saw the man's van in the driveway. By this point he was speaking rapidly and had become difficult to interrupt. He consumed a significant amount of alcohol and cannabis from that point, although he denied that his alcohol consumption was significantly higher than usual (up to 24 beers and Cody's RTDs per day). He reported stopping drinking alcohol 24–48 hours before the alleged offence because he "ran out of booze". In addition to smoking cannabis, he was "eating buds" and "cakes" laced with cannabis in the days prior to the crime.

[16] On 29 December 2019, Mr Van Hemert's ex-partner contacted the Mental Health Service to report concerns about his mental health. She reported he was not sleeping and was pressured in his speech. He was behaving in a paranoid manner, suggesting friends may be undercover police officers. The next day, 30 December 2019, Mr Van Hemert's brother contacted the service, reporting that he was "rambling", "talking in riddles" and "nonsensical". At 1.10 pm a registered nurse and

a junior doctor visited Mr Van Hemert's house. He was agitated and refused to leave the shower (which he had been occupying for two hours). When not in the shower, he had been walking around the house naked, continuing to talk nonsensically to himself. The medical team attempted to engage with him when he was in the shower, but he repeatedly told them to "f*** off" while muttering to himself incoherently and sometimes shouting to himself. A preliminary diagnosis of "acute psychosis" was made.[6] The medical team decided to use s 9 of the Mental Health Act to admit him into Hillmorton Hospital for further assessment. Application and certification under ss 8A and 8B were completed.

[17] The police were contacted to assist in transferring Mr Van Hemert to Hillmorton Hospital. The medical team was under the impression that there would be a delay before the police could attend and assumed that this could be several hours. Following discussion with Mr Van Hemert's brother, a decision was made to try medication first and treat him at home. This was seen as both the least restrictive approach, and less embarrassing to him given that he might otherwise have to be removed from his house naked. The medical team understood that Mr Van Hemert's brother would be remaining with him, and steps were taken to obtain medication from a nearby pharmacy. The doctor attending phoned the police back and updated them, advising that they would give Mr Van Hemert medication to see if that settled him down, and if it did, they would not proceed to commit him.[7] The mental health team contacted Mr Van Hemert's brother at approximately 8 pm that evening. He told them that Mr Van Hemert was still in bed asleep. The brother understood the advice to be that Mr Van Hemert would remain sedated and it would be okay for him to be left alone for the night. Mr Van Hemert's brother left the house. Sometime later, Mr Van Hemert woke up. He consumed at least a significant portion, if not all, of the remaining medication left with him. This appears to have included at least four to five risperidone tablets.

---

6 The details of these events are set out clearly in a Canterbury District Health Board Serious Event Review completed on 25 June 2021.

7 HC first sentencing, above n 2, at [17].

[18] As to what occurred next, that is best set out in the report prepared by Dr Karen McDonnell, a senior forensic registrar at Hillmorton Hospital, who later examined Mr Van Hemert:[8]

> The Defendant reported that at approximately 0330-0400hrs on 31 December (the day of alleged offence) he made an impulsive decision to drive to Manchester Street for the purpose of paying a prostitute for oral sex. He reported that he was concerned with how he would obtain oral sex with only $30 cash. He reported ambivalent thoughts such as "*I'm not really sure that I want to be doing this*", that he "*didn't like the idea of being with a prostitute*" and "*worried that I might pick up a disease*". He denied that he felt anger towards any particular individual at this point, but reported that his anger "*was more directed at myself*". He also reported that he felt "*anxious*" and "*panicky*". He described his behaviour as erratic, for example he reported that he was "*driving over the footpath*" in an intoxicated state. He reported that he "*saw people being picked up*" and reported that "*I became paranoid about the cameras as it's a well-known place*".
>
> The Defendant reported that he then aborted his plan on Manchester Street returning home to smoke more cannabis. The Defendant reported that his level of paranoia was such that before returning to Manchester Street he placed a 30cm blade fishing knife in his car as a form of self-protection (he denied any specific paranoid concerns). He reported that at some stage (couldn't remember when exactly), he removed number plates from a car and placed them over the number plates on his own car. The Defendant reported that he did this because he was worried about his car being seen in that part of town. He reported that he returned to Manchester Street approximately one hour later. He reported ongoing concerns about being seen, in addition to feeling non-specifically anxious and "*paranoid*", such that he allegedly returned home once again to smoke more cannabis. The Defendant reported that he once again removed the number plates off a car and placed them over his own. Again, he could not recall exactly when or where he did this.
>
> The Defendant reported that he returned to Manchester Street for the third time, and recalled that it had to have been early morning "*since it started to get bright*". He reported that he felt "*anxious*", "*panicky*" and "*out of control*". He denied feeling anger directed at any individual at this point but reported that he felt "*angry underneath*" and "*feeling hurt, and lied to*". The Defendant reported that he approached a woman, with the stated intent to obtain oral sex (victim of alleged offence) and she entered his car. The Defendant reported that he had never met this woman before.

[19] We have described the injuries endured by Ms Te Pania at [8], and we need not re-traverse them. It is evident that an argument, probably with Ms Te Pania using a small awl either to make a point or to defend herself, spiralled into a cruel and brutal slaying, with both the knife and a rock used as weapons. As noted at [9], after his attack on Ms Te Pania, Mr Van Hemert drove his vehicle—with her body still beside

---

8 Emphasis in original.

him—out of the city, and then back towards the airport, eventually driving into the Air New Zealand engineering site. His erratic behaviour—driving back and forth into the same car park—resulted in staff calling the police. Interviewed by the police later that morning he claimed to have stolen the vehicle he was found in (it was in fact his vehicle), to have thrown the false number plates away (he had not) and to have set Ms Te Pania's body alight in a riverbed (he had not done that either). Mr Van Hemert was detained in Christchurch Men's Prison and referred to its forensic team. For some reason a urine drugs screen was not undertaken. However, following treatment he had returned to his "baseline" mood by 23 January 2020.

[20] Dr McDonnell's ultimate opinion was equivocal, although she noted that all four psychotic episodes had been associated with acute psychological stress. She offered only a "current working diagnosis", which was either "a Brief Psychotic Disorder" or "Substance-Induced Bipolar Disorder".

[21] A more experienced consultant psychiatrist, Dr Mhairi Duff, prepared a report for the defence. She concluded that Mr Van Hemert was severely mentally unwell from at least 29 December when the first calls to mental health services began. Indeed, there was evidence that he began to become unwell from Christmas Day. Her conclusion was that he was likely to have been suffering from a mental impairment related both to an acute recurrence of a relapse in his bipolar affective disorder and the shorter-term effects of the medication he had been given or had taken. She recorded that during acute periods of mental unwellness he had a history of using substances (alcohol and cannabis). These "exacerbate his illness and contribute to deteriorations in his behaviour".

[22] But she did not share Dr McDonnell's alternative diagnosis of substance-induced bipolar disorder:

> Mr Van Hemert has evidence of mania, with psychotic features during his admission in 1998 and in the episode in 2016 following the death of his father. Psychosocial stressors appear to be a prominent trigger. His background heavy use of cannabis and alcohol likely exacerbates his illness when relapses occur. There is not good evidence of either of these specific substances inducing a manic episode and although Mr Van Hemert has ascribed his illness episodes to substance use with hallucinogenic drugs … there has never been any supportive toxicology.

Other factors causative?

[23] As noted at [11], the Crown sought to focus on two causative factors other than mental health—being substance abuse and anger—although Mr Lillico placed more weight on the former. We have reservations about this submission.

[24] As Ms Hall submitted for Te Matakahi | Defence Lawyers Association New Zealand, and Ms Scott submitted for the Criminal Bar Association New Zealand, it is likely that all three factors—mental impairment, substance abuse and anger—were inextricably linked to one another. Dr McDonnell's assessment of substance abuse as a cause of Mr Van Hemert's mental impairment was entirely equivocal. It was not accepted by Dr Duff, a psychiatrist of greater experience. Furthermore, despite evidence of long-standing, persistent substance abuse, he had displayed serious psychotic symptoms on just four occasions. None of these have proven linkage to substance abuse. That suggests to us that Dr Duff's assessment at [22] above is likely to be correct. As for anger, on the evidence before us, we cannot see how that can be categorised as an independent cause of his offending, as opposed to a symptom of his mental impairment. As Mr Lillico recognised, neither expert concluded that anger was independently causative.

[25] Substance abuse did, however, exacerbate Mr Van Hemert's mental impairment. This was agreed by both Dr McDonnell and Dr Duff, and was not disputed by Mr Rapley KC. In this sense, while it was not directly causative of the offending, substance abuse was a contributing factor.

[26] On the evidence we are then left with the uncontested proposition that but for Mr Van Hemert's severe mental impairment that night, Ms Te Pania would not have been murdered. This mental impairment was not caused by, but was exacerbated by, Mr Van Hemert's substance abuse.[9]

---

[9] There was extensive argument both in written submissions and at trial as to the interaction between ss 24 and 102 of the Sentencing Act. However, as the relevant facts here are not formally disputed, it is unnecessary for us to address this issue.

The legislation: s 102 of the Sentencing Act

[27] Section 102 of the Sentencing Act provides:

> **Presumption in favour of life imprisonment for murder**
>
> (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.
>
> (2) ...

[28] Prior to that provision, life imprisonment was a mandatory sentence for murder. In 2001 three events brought about the reform represented by s 102. First, in March 2001 the Government announced a package of sentencing law reforms. These included introducing a limited discretion in sentencing for murder where a sentence of life imprisonment would be manifestly unjust.

[29] Secondly, in May 2001 the Law Commission published its report *Some Criminal Defences With Particular Reference to Battered Defendants*.[10] It recommended against the introduction of a defence of diminished responsibility, considering that a matter better taken into account in sentencing.[11] But, referencing the Government's announcement in March, it recommended the replacing of the mandatory sentence for murder with a sentencing discretion.[12] It said the arguments in favour of that were "very strong".[13] In doing so it referred to the variability of blameworthiness amongst murderers and the words of Lord Hailsham in *R v Howe*:[14]

> Murder, as every practitioner of the law knows, though often described as [a crime] of the utmost heinousness, is not in fact necessarily so, but consists in a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical and repeated offences like the so-called Moors Murders to the almost venial, if objectively immoral, "mercy killing" of a beloved partner.

---

10 Te Aka Matua o te Ture | Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001).
11 At [162].
12 At [151] and [154].
13 At [147].
14 *Regina v Howe* [1987] 1 AC 417 (HL) at 433.

[30] The Commission concluded that "murder is a very serious crime that merits a life sentence unless there are strongly mitigating circumstances".[15] It acknowledged that even where there are mitigating circumstances, there may be countervailing reasons that would make a life sentence appropriate. It recommended:[16]

> The sentencing discretion for murder should be a limited discretion. There should be an assumption that a conviction for murder will carry a life sentence. However, *where strongly mitigating factors exist, relating either to the offence or the offender*, that would render a life sentence clearly unjust, the judge may give a lesser sentence. In deciding whether to exercise his or her discretion, *the judge may also take into account any countervailing considerations and any aggravating factors.*

[31] Thirdly, in August 2001, the Government introduced the Sentencing and Parole Reform Bill.[17] Section 102 did not change materially during the parliamentary debates. The explanatory note to the Bill referred to the need for:[18]

> … a wider range of sentences for crimes of murder. Life imprisonment will be the maximum (rather than the mandatory) penalty for murder with a strong presumption in favour of its imposition in nearly every case. Finite sentences will be able to be imposed where there are particular circumstances that would make the sentence of life imprisonment manifestly unjust.

[32] Some further explanation as to the purpose underlying s 102 is found in the Minister of Justice's speech to the House when introducing the Bill:[19]

> A more flexible regime is applied to murder, requiring the court to take into account mitigating and aggravating factors. The bill retains a strong presumption in favour of life imprisonment for murder. However, in a small number of cases, such as those involving mercy killing, or where there is evidence of prolonged and severe abuse, a mandatory life sentence is not appropriate. Under this legislation, the court will be able to consider a lesser sentence. We can all think of cases where there were mitigating factors, perhaps the Janine Albury-Thomson case, which might have properly been considered murder—intentional killing—but for which a mandatory sentence of at least 10 years imprisonment would have been inappropriate. In the past, the jury has compensated for that inflexibility by finding a different verdict; in that case, manslaughter. This [reform] enables the jury to make an honest verdict, but for the sentence to be appropriate in all the circumstances.

---

15 Law Commission, above n 10, at [153].

16 At [154] (emphasis added).

17 Sentencing and Parole Reform Bill 2001 (148-1).

18 Explanatory note at 3.

19 (14 August 2001) 594 NZPD 10910–10911. See also the Sentencing and Parole Reform Bill 2001 (148-2) (select committee report) at 8, quoted in *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775 at [72] to the same effect, but adding failed suicide pacts as a further example where dispensation may be appropriate.

[33] The reference to Ms Albury-Thomson was to a case in which a mother had been convicted of manslaughter (rather than murder) for (clearly intentionally) strangling her autistic daughter.[20] Verdicts of that kind were forcing the hand of reform for murder sentencing, for murder it surely was. As Mr Rapley submitted to us, insofar as the Minister cited that case, he was echoing the Law Commission's reasoning for eschewing a diminished responsibility defence in favour of greater discretion in sentencing.[21]

[34] Section 102 must, of course, be read in conjunction with ss 103 (requiring a minimum period of imprisonment of at least 10 years where a life sentence for murder is imposed) and 104 (requiring a minimum period of at least 17 years in the case of certain categories of murder, unless manifestly unjust).[22] As Mr Lillico submitted for the Crown, s 104 would be engaged by Mr Van Hemert's actions given the degree of brutality with which the murder was committed.[23] However, the Crown accepts that it would be manifestly unjust to impose a sentence of 17 years in the face of Mr Van Hemert's mental impairment.

Procedural history

[35] Mr Van Hemert had a very limited previous criminal record, and no previous convictions for violence. Although he self-reported an incident involving a fight in a bar in which he had pushed the other man through a window, the circumstances are unclear, he was 21 at the time, and it did not give rise to any criminal charges.[24] He has four prior convictions for driving offences.

[36] The District Court engaged Dr McDonnell to undertake a psychiatric report of Mr Van Hemert under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003. Its purpose was to assess whether Mr Van Hemert was unfit to stand trial or insane in terms of s 23 of the Crimes Act 1961. Mr Van Hemert was deemed to have

---

20 *R v Albury-Thomson* (1998) 16 CRNZ 79 (CA).

21 See, for example, Law Commission, above n 10, at [150], n 125.

22 As to which, see *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830 at [43]–[44]; and *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [69]–[70]. A person subject to a sentence of life imprisonment is also liable to recall post-parole: see ss 60 and 61 of the Parole Act 2002, discussed further at [76] below.

23 Sentencing Act, s 104(1)(e).

24 He made this report in his psychiatric interviews.

a good understanding of the court process and the relevant legal matters and was thus fit to stand trial. Dr McDonnell also considered whether Mr Van Hemert should be found not guilty by reason of insanity. She concluded that he was operating under a disease of the mind at the time of the offending. Nevertheless, the evidence did not demonstrate that he was incapable of understanding the nature and quality of his actions, nor that he was unaware that what he was doing was morally wrong.[25] According to Dr McDonnell, Mr Van Hemert's description of the alleged offence was "indicative of a degree of disorganization of his mental state" but it "gave no indication that his actions in relation to the alleged offence were driven by symptoms of major mental illness". For instance, he did not suggest that he had experienced delusional thinking or perceptual interference when he carried out the offence and, in her view, he was able to logically and coherently recount the events to the police. It was Dr McDonnell's opinion that he was therefore unable to be acquitted on account of insanity.

[37] At the request of counsel for Mr Van Hemert, Dr Duff also carried out an independent psychiatric assessment, in which she agreed with Dr McDonnell's conclusion as to the unavailability of the defence of insanity.[26] Dr Duff considered that Mr Van Hemert was suffering from a disease of the mind when he offended but he nevertheless appreciated the nature and quality of the offending, including that Ms Te Pania was a human being, that she was a sex worker, that he was using a weapon and that Ms Te Pania died as a result of the injuries he inflicted. Ms Te Pania was not incorporated into any delusional beliefs Mr Van Hemert held. There was also evidence to indicate that he knew his actions were morally wrong; he attempted to dispose of evidence, contemplated hiding or destroying the body and considered fleeing from the police before deciding to "give himself up". He was therefore not legally insane at the time of the offending.

---

25 Crimes Act 1961, s 23(2).

26 As touched on above at [21]–[22], Dr Duff nevertheless disagreed with several significant elements of Dr McDonnell's report, including Dr McDonnell's diagnosis of Mr Van Hemert, the extent to which alcohol and cannabis contributed to Mr Van Hemert's psychotic episodes and whether Mr Van Hemert had provided a coherent recount of events in his police interviews.

Sentence indication (November 2020)

[38] A sentence indication was sought. It was given by Doogue J on 3 November 2020:[27]

> [27] I have reached the conclusion, that because of the extent of the psychiatric illness at the time of the homicide, and because of other factors, in this case, it would be manifestly unjust to sentence Mr Van Hemert to life imprisonment. I have no doubt whatsoever, that he would not have killed Ms Te Pania but for his illness, and for the poor response of the mental health assessors in this case. It was plain that the illness had been developing over time and that it was not recognised and not properly treated.
>
> [28] Since the dreadful event, Mr Van Hemert has been receiving treatment and his mental condition has improved and he is not currently a risk to himself or others, although, it is obvious that he has a long term need for continuing treatment. The attack on Ms Te Pania was entirely out of character, entirely out of step with his general life pattern. Against those factors I do not consider that the need to denounce the offending and to deter others requires a sentence of life imprisonment.
>
> [29] I therefore have to determine what is the appropriate period of imprisonment, having regard to the purposes and principles set out in the Sentencing Act 2002. There is no doubt that Ms Te Pania was vulnerable, she worked in an industry where the workers are vulnerable. She was a very slight person, so the physical imbalance between the two parties made her vulnerable. She was trapped in the vehicle, another manifestation of her vulnerability.
>
> [30] On the other hand, Mr Van Hemert was the subject of a serious psychotic episode, as I have described. He gave himself up, his remorse is palpable. His motivation for the murder was solely as a result of his mental illness.

[39] The sentencing indication was that if Mr Van Hemert pleaded guilty, he would be sentenced to a finite term of 10 years' imprisonment. He accepted the indication and pleaded guilty.

Sentencing (December 2020)

[40] Mr Van Hemert was sentenced by the Judge on 4 December 2020. In doing so Doogue J observed that "because of the extent of the psychiatric illness

---

[27] *R v Van Hemert* HC Christchurch CRI-2019-009-12005, 3 November 2020 (Doogue J).

[Mr Van Hemert was] suffering from at the time of the offending, it would be manifestly unjust to sentence [him] to life imprisonment".[28] The Judge said that:[29]

> I have no doubt that [Mr Van Hemert] would not have killed Ms Te Pania but for [his] illness and the seemingly inadequate supervision that [he was] under between the assessment process and the dreadful event. Having said that, [he was] not so unwell as to be able to advance the defence of insanity, so [he is] being sentenced to a term of imprisonment.

[41] The Judge reiterated the points made in her sentencing indication, noting that Mr Van Hemert's mental condition had since improved, that he was "not currently a risk to [himself] or others" and that "[t]he attack on Ms Te Pania was totally out of character, and entirely out of step with [his] general life patterns up to that point". Accordingly, the Judge said there were "exceptional circumstances" that meant a sentence of life imprisonment was not inevitable.[30]

[42] As in the sentencing indication, the Judge identified as aggravating features of Mr Van Hemert's offending, the use of a weapon, the extreme violence involved in the killing of Ms Te Pania, and her vulnerability, given the industry she worked in and her comparatively small physical size. The Judge then adopted a starting point of 18 years' imprisonment.

[43] In assessing Mr Van Hemert's personal mitigating factors, the Judge again noted the "motivation for the murder was solely as a result of [his] mental illness".[31] That deserved a discount of 25 per cent. A guilty plea discount of just under 20 per cent was also given. The Judge therefore reduced the sentence from 18 years to 10 years' imprisonment. A minimum period of imprisonment of six years and eight months was nonetheless imposed.

Court of Appeal (June 2021)

[44] The Crown appealed that outcome to the Court of Appeal. That Court began its analysis by saying:[32]

---

28 HC first sentencing, above n 2, at [31].
29 At [31].
30 At [33].
31 At [40].
32 CA judgment, above n 3 (emphasis added).

> [36] The presumption in s 102(1) of the Sentencing Act requires a compelling case to be established before an offender can be considered eligible for a sentence less than life imprisonment in cases of murder. This Court has previously explained that sentences less than life imprisonment for murder are "likely to be reached in exceptional cases only".[33]
>
> …
>
> [37] Before the presumption in s 102(1) is displaced, *the Court must be satisfied the circumstances of both the murder and the offender are such that a sentence of life imprisonment would be "manifestly unjust*".[34] *Thus, even where the circumstances of the offender might weigh in favour of a finite sentence, the presumption of life imprisonment prevails where the circumstances of the offending do not also displace the presumption and vice versa.*

[45] It continued by observing that Parliament's use of the concept "manifest injustice" in s 102(1):[35]

> … reinforces the presumption of life imprisonment for murder will be displaced only in rare circumstances and *where the evidence of the offence and the circumstances of the offender* clearly demonstrate that it would be wrong to impose a sentence of life imprisonment.

[46] Analysing the circumstances of the offence, the Court noted that the nature of the attack on Ms Te Pania was "brutal and frenzied".[36] It determined that the circumstances of the offending involved very serious aggravating features and went on to conclude:[37]

> [47] … The brutality of the murder and Ms Te Pania's vulnerability were circumstances of the offending that *precluded* the High Court from departing from the presumption of life imprisonment in s 102(1) of the Sentencing Act.

[47] The Court then addressed Mr Van Hemert's circumstances, noting three aspects requiring particular comment. It first took issue with the Judge's observation that his mental illness was the sole motivation for the murder. This mischaracterised the psychiatric evidence, that it played a "significant contributory role" in his offending. But the Court said it was not the "sole reason" why the murder occurred:[38]

---

33 *R v Rapira* [2003] 3 NZLR 794 (CA) at [121].
34 *R v Cunnard* [2014] NZCA 138 at [33]–[35]; and *R v Smail* [2007] 1 NZLR 411 (CA) at [14].
35 CA judgment, above n 3, at [42] (emphasis added) citing *R v Williams* [2005] 2 NZLR 506 (CA) at [57].
36 At [43].
37 Emphasis added.
38 At [50].

> His heavy use of alcohol and cannabis in the days leading up to Ms Te Pania's death, and the anger that appears to have been a characteristic of his behaviour that evening were also factors that contributed in varying degrees to Ms Te Pania's death.

[48] Secondly, the Court considered the Judge had not fully evaluated Mr Van Hemert's ongoing risk to the community. The Court said that there appeared to be a "close correlation between Mr Van Hemert's abuse of drugs and alcohol, which in turn triggers mental health relapses and on occasions involve acts of violence or aggression towards others". It did not think it was right to characterise his offending as "totally out of character or entirely out of step with his general life pattern".[39]

[49] The third factor requiring comment related to Mr Van Hemert's want of remorse. It accepted that in Court he may have appeared to be remorseful, but that this presentation "needed to be assessed against the observations of the writer of the pre-sentence report and the psychiatrists who said Mr Van Hemert showed little remorse".[40]

[50] The Court of Appeal concluded, in agreement with the Crown, that the circumstances of the offending and Mr Van Hemert's circumstances were such that the presumption of life imprisonment for the murder of Ms Te Pania had to be applied.[41] It remitted the case to the High Court for a further sentence indication, with leave to Mr Van Hemert to withdraw his guilty plea in light of that.

Re-sentencing (October 2021)

[51] On 28 October 2021, Mr Van Hemert was re-sentenced by Nation J in the High Court,[42] having maintained his plea of guilty, and accepted a sentence indication of life imprisonment with a minimum period of imprisonment of 11 and a half years.[43] Applying s 104, the Judge considered the brutality of the murder, Ms Te Pania's vulnerability and the "element of premeditation" present meant a 17-year starting point

---

39 At [52] contrasting *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.
40 At [53].
41 At [54].
42 HC re-sentencing, above n 4.
43 *R v Van Hemert* [2021] NZHC 2076 (Nation J).

was required.[44] The Judge allowed a credit of two years for the guilty plea. He then addressed remorse:

> [22] I do not consider you have demonstrated genuine remorse Mr Van Hemert although I note the expression of apology and condolences which your counsel gave to Court today. But I do have in mind what was said in the pre-sentence report. Nevertheless, the absence of remorse is apparent from that pre-sentence report, it is not to be treated as an aggravated feature but obviously, with that absence of remorse, you are not entitled to a further discount on that basis.

[52] The Judge noted that Mr Van Hemert's mental health issues had contributed towards the offending. The Judge continued:[45]

> Your lack of previous violent offending prior to the murder of Ms Te Pania does suggest that your mental illness was a significant factor in your offending. However, although I accept that your judgement was significantly impaired at the time of the offending, you still set out that night knowing what you were doing.

[53] The Judge gave an allowance of 20 per cent on account of Mr Van Hemert's mental illness. Together with the guilty plea, that resulted in a credit of five and a half years, producing a minimum period of imprisonment of 11 and a half years.[46]

This appeal

[54] The appeal before this Court was initially brought as a "leapfrog" application for leave to appeal against the re-sentencing of Nation J. However, following an oral leave hearing on 27 July 2022, it was accepted that the better course was that an extension of time be sought to enable the applicant to appeal the Court of Appeal's judgment. In the end leave was granted to appeal against both decisions.[47]

[55] In this Court's leave decision, we noted the appeal would focus on the correctness of the Court of Appeal's interpretation, and then application, of s 102. We noted that there were two particular issues arising from the approach to s 102 in this case which counsel should also address. First, whether the Court was correct to treat the circumstances of the offending as having "precluded" a departure from the

---

44 HC re-sentencing, above n 4, at [18]– [19].
45 At [25].
46 At [27].
47 SC leave judgment, above n 5.

presumption of life imprisonment. Secondly, the correctness of the Court's assessment of the appellant's circumstances.[48]

Did the Court of Appeal *interpret* s 102 correctly?

[56] We focus here on [37] and [47] of the Court of Appeal's decision, set out at [44] and [46] above. Despite Mr Lillico's contrary submission, we think the meaning of those passages is clear. The Court of Appeal was saying that *both* offending and offender circumstances must compel a conclusion of manifest injustice before the presumption in s 102 is displaced. In so saying, we consider the Court fell into error. Its approach construes "circumstances of the offence and the offender" as mandatory mitigatory *requirements*, rather than (as we see it) mandatory relevant *considerations* for a finding of manifest injustice. The result of the Court of Appeal's approach is that if one of the two was aggravating, rather than mitigating, that would preclude the application of s 102.

[57] The Law Commission report—quoted at [30] above—suggests it took the view that either element alone might be capable of rendering unjust the imposition of life imprisonment. The Act drew in part upon that report and there is nothing to suggest Parliament had something else in mind in enacting s 102. There is no suggestion in the parliamentary debates that the two elements together form mandatory requirements for dispensation. Absent clear indication otherwise, the more natural reading of the provision is that each of the two elements must be considered, but manifest injustice is to be found from an overall weighting, rather than investing either element with the power to veto the other. It follows that it is possible that one element might dominate the analysis in favour of dispensation under s 102.

[58] The contrary construction appears to have emerged because of the way the matter was expressed some years ago in *R v Cunnard*:[49]

> [33] The s 102(1) test is conjunctive. In combination both the circumstances of the offence and offender must justify a departure from the regime of life imprisonment.

---

48 At [6].
49 *R v Cunnard*, above n 34.

In that case, however, both elements leant in the same direction, meaning life imprisonment was manifestly unjust and dispensation under s 102 was required. It was not a case like the present appeal in which the two considerations lean in different directions. To the extent *Cunnard* is authority for the proposition that both elements must be considered—which is what we consider the passage just quoted actually says—it is correct. It is not, however, authority for any different proposition.

[59] The other authority relied upon by the Court of Appeal at [37] of its judgment was its decision in *R v Smail*.[50] However, that expressed the matter in different, and perfectly orthodox, terms:[51]

> Although the phrase "manifestly unjust" is not defined in the Act, it requires an assessment to be undertaken of the circumstances of both the offender and the circumstances of the offending having due regard to sentencing purposes and principles.

We see that passage as supporting the view we take—that what Parliament intended was that the "circumstances of the offence and the offender" are mandatory *considerations*, but are not conjunctive, mandatory *requirements*. In short, it remains possible that the circumstances of the offence may tend towards life imprisonment but be outweighed by overwhelmingly mitigatory circumstances of the offender.

[60] We record that, subsequent to its decision in the present appeal, the Court of Appeal reconsidered s 102 in *Dickey v R*.[52] That judgment does not endorse the more prescriptive approach taken in the judgment now before us. Instead, the reasoning in *Dickey* is more consistent with our understanding of s 102. The Court observed that "manifest injustice is most likely to be found where the offender can point to both mitigating circumstances of the offending and a combination of substantial personal mitigating factors".[53] That suggests an acceptance that s 102 could nonetheless apply where only one of the circumstances of the offending or of the offender would render the sentence of life imprisonment manifestly unjust.

---

50 *R v Smail*, above n 34.

51 At [14]. A similar formulation was given by the Court of Appeal in *R v Smith*, above n 22, at [38(c)].

52 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.

53 At [195] (footnotes omitted).

[61] Mr Rapley also submitted to us that, if the construction applied by the Court of Appeal was correct, culpability of the offender also formed part of the consideration of the circumstances of the offence.[54] As we have reached a different view on the construction of s 102 from the Court below, it is unnecessary for us to express any view on that argument.[55]

[62] On the approach we take, the two elements are weighed together in assessing whether imposition of life imprisonment is manifestly unjust.[56] "Manifestly" in this context simply means the injustice in imposing life imprisonment must be clear.[57] That assessment, involving the weighing of both elements referred to in s 102(1), is still made against the purposes and principles of sentencing identified in the Sentencing Act, and ss 7, 8 and 9 in particular.

Did the Court of Appeal *apply* s 102 correctly?

[63] We consider a misconstruction of s 102 led the Court of Appeal into error in treating the circumstances of the offence—its brutality and Ms Te Pania's vulnerability—as determinative. This it did at [37] and [47] of its judgment.

Brutality and vulnerability

[64] As Ms Scott submitted, there are a number of cases where brutality, sometimes in combination with vulnerability, did not preclude dispensation under s 102.

---

54 Referring to *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629; *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37; and *L (CA719/2017) v R* [2019] NZCA 676.

55 In support of his argument, Mr Rapley submitted that s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) requires an offender's mental illness be considered as part of the "circumstances of the offence" when the illness contributed to the offending. He argued that not doing so would constitute indirect discrimination on the grounds of psychiatric illness, psychological impairment or abnormality of psychological function: Human Rights Act 1993, s 21(1)(h)(iii)–(v). On our interpretation of s 102, contributory mental impairment may be weighed appropriately in an overall consideration of whether life imprisonment would be manifestly unjust. Our interpretation is therefore consistent with the Bill of Rights: s 6.

56 At the hearing, Ms Hall submitted that even on our construction of s 102, it was still necessary to determine whether mental health forms part of the circumstances of the offence or the offending. This is because it has a material impact on the onus of proof under s 24(2)(c) and (d) of the Sentencing Act. In this case, the fact that Mr Van Hemert's mental impairment caused the offending is not disputed. The Crown agrees that mental health can be assessed as part of the circumstances of the offence and, indeed, even suggests that this may be the preferable approach in this case. It is not necessary to consider burdens of proof here and we reserve this point to be decided in a future case where the issue is material.

57 *R v Rapira*, above n 33, at [121].

[65] In *R v Wihongi* a finite sentence of 12 years was imposed (without a minimum period of imprisonment) by the Court of Appeal in a case involving brutality and a measure of vulnerability, where Ms Wihongi and her victim had formerly been in a longstanding relationship, had been drinking at a mutual friend's, and an argument over money and sex had developed.[58] The victim had left Ms Wihongi's house, but Ms Wihongi followed the deceased out of the house holding a knife, lunged at him and stabbed him in the chest. He managed to drive away, but crashed his vehicle. Ms Wihongi followed and continued to punch the victim through the car window. She had suffered from substance abuse since her teens, sexual and physical abuse since childhood and was the victim of a longstanding violent relationship, all of which resulted in post-traumatic stress disorder, anxiety and depression. The Court of Appeal did not doubt that the presumption in s 102 was displaced in that case, although it increased the finite sentence from eight to 12 years.

[66] In *R v Rihia* the High Court sentenced Ms Rihia for a brutal murder, but nonetheless dispensed with a life sentence under s 102.[59] Ms Rihia had taken two knives and fatally stabbed her estranged husband in the chest with one of them as he lay on a couch. The victim was heavily affected by alcohol and was resting after Ms Rihia had just injured him by throwing a stereo speaker at his head. Physical violence was a regular feature of that relationship, as it was in her previous marriage. That day Child Youth and Family Services had just uplifted her daughter. She blamed the victim for that event, and she snapped. The trial Judge considered the murder would not have occurred had it not been for Ms Rihia's significant mental impairment.[60] A sentence of life imprisonment was considered manifestly unjust, and a finite sentence of 10 years was imposed instead.

[67] Two other cases in the High Court are also relevant. *R v Simeon,* where a finite sentence of 14 years was given for the stabbing of a domestic partner during a quarrel.[61] The Judge held that the offender's mental illness was a contributory cause of the offending and that this factor, in combination with others, met the threshold of manifest injustice. In *R v Lawrence* a finite sentence of six years, six months'

---

58 *R v Wihongi*, above n 19.
59 *R v Rihia* [2012] NZHC 2720.
60 At [28].
61 *R v Simeon* [2021] NZHC 1371.

imprisonment was imposed for a murder involving both brutality and vulnerability, with the manual strangulation of a severely disabled daughter.[62] That case involved elements of a "mercy killing" as well as the defendant's precarious emotional state caused by the pressures of caring for the victim, both of which contributed to the Judge's decision that it would be manifestly unjust to impose a sentence of life imprisonment.

[68] Murder is seldom anything other than brutal. Some murders however involve a more extreme degree of brutality. In the present case, Mr Van Hemert not only stabbed Ms Te Pania but did so in a frenzy of violence: 48 stabbings alongside 11 blows to the head. Ordinarily such brutality, while not precluding the application of s 102, would be a factor pointing strongly against it. The brutality here must nevertheless be viewed in light of the psychosis Mr Van Hemert was suffering at the time. On the evidence before us, which is unspecific on this point, we are unable to separate this brutality from the psychotic episode that preceded and accompanied it. This moderates Mr Van Hemert's culpability.[63]

[69] As an aggravating factor, Ms Te Pania's vulnerability must necessarily be viewed through the same lens.[64] Mr Van Hemert's psychosis was characterised by impaired threat perception and judgement. He does not share the culpability of someone able to accurately assess and take advantage of a victim's vulnerability. This must be considered in our overall impression of manifest injustice in this case.

Substance abuse and anger

[70] We also take a different view from the Court of Appeal as to the significance of Mr Van Hemert's persistent substance abuse and anger issues.[65] As we noted at

---

62 *R v Lawrence* [2021] NZHC 2992. Compare however *R v Smith*, above n 22, where the defendant, overwhelmed by care of her own disabled son and grandchildren with various behavioural issues, strangled one of the latter after she made a provoking observation. On a Crown appeal against a finite sentence, the Court of Appeal held that the manifest injustice threshold was not met and sentenced Ms Smith to life imprisonment with a minimum non-parole period of 10 years.

63 Sentencing Act, s 8(a).

64 Section 9(1)(g).

65 In the course of his submission on anger, Mr Lillico also argued that the circumstances of the offence involved an element of premeditation in that Mr Van Hemert set out to have revenge sex, took weapons with him and did so in a state of anger. As with anger, we see these indications of potential premeditation as manifestations of Mr Van Hemert's psychosis.

[24] to [26] above, (1) the psychiatric evidence does not justify any inference of distinct causation unrelated to mental impairment, (2) Mr Van Hemert had pleaded guilty on the basis of an agreed summary of facts that made no reference to substance abuse or anger as causative factors, and (3) the Crown had to accept that but for Mr Van Hemert's mental impairment, Ms Te Pania would not have been murdered. It is accepted by both parties that substance abuse exacerbated this mental impairment. This is not, as we see it, a case in which s 9(3) of the Sentencing Act—excluding consideration of voluntary consumption of alcohol and drugs—has any work to do: the sentencing Judges were not asked to take that into account by way of mitigation. In terms of anger, as previously stated, we see Mr Van Hemert's anger rather as a symptom of his mental impairment.

Mental impairment and public safety

[71] Our points of difference from the Court of Appeal's interpretation and application of s 102 do not, however, mean we also conclude the Court erred in the result it ultimately reached.

[72] Mr Van Hemert, not having been acquitted on the basis of insanity or being detained as a special patient,[66] inevitably will be incarcerated in a prison. The Law Commission recommended against a defence of diminished responsibility in 2001.[67] That recommendation has not been revisited, and (so far) Parliament has not seen fit to enact otherwise. The outcome of this appeal, whichever way it goes, is that Mr Van Hemert is going to be imprisoned for a very long time. No one is contending otherwise, and the potential effect of a defence based on diminished responsibility remains academic for the present time. Section 102 is not that defence.

[73] There are several material differences between the two alternative sentences of imprisonment imposed in this appeal. We sought and obtained further submissions on this aspect of the appeal. The differences relate to the ability of the Department of Corrections to manage the risk Mr Van Hemert poses to the public

---

66 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 34(1)(a).
67 Law Commission, above n 10, at [140].

under a determinate sentence as compared to a sentence of life imprisonment, and to the oversight and therapeutic support Mr Van Hemert may receive.

[74] First, under the standard sentence of life imprisonment imposed by Nation J eligibility for parole is postponed to 10 years but may not of course be granted at that point unless the Parole Board is satisfied the statutory criteria for parole are met. Under the determinate sentence initially imposed by Doogue J, eligibility arises at the conclusion of the minimum period of imprisonment of six years and eight months and Mr Van Hemert must be released at his statutory release date of 10 years.[68] The first difference may therefore be summarised as the length of time spent in custody—with a more than three-year difference in terms of parole eligibility—and the certainty of release on the expiry of the determinate sentence. Clearly, in terms of public risk management, Mr Van Hemert will receive the most intense behavioural oversight when he is detained in prison. This is particularly material when, as evidenced here, Mr Van Hemert's mental health can deteriorate at a rapid pace.

[75] The second difference lies in the release conditions. We were advised by counsel that the release condition content was identical in each scenario. However, duration differs. In the case of a determinate sentence, the conditions cannot run later than six months after the statutory release date.[69] In the case of a life sentence, standard conditions apply for life, and special conditions apply for the duration set by the Parole Board. The standard provisions of parole would require Mr Van Hemert to report to a probation officer at the officer's direction and to inform the officer of his residential address.[70] As special conditions, Mr Van Hemert could be required to participate in rehabilitative programmes, take prescription medication, and could be prohibited from consuming alcohol or cannabis.[71] He could also be required to submit to electronic or intensive monitoring.[72] These are all tools that can be employed to reduce the risk Mr Van Hemert poses to the public, although—as the Court of Appeal noted in *Dickey*—s 56(1) of the Parole Act 2002 enables an offender to apply for discharge of release conditions. The Parole Board's jurisdiction in s 58 must then be

---

68 Parole Act, ss 18(2), 29(3) and 29AA(3).
69 Sections 18(2), 29(3) and 29AA(3).
70 Section 14(1)(a)–(f).
71 Section 15(3)(b), (ba) and (d).
72 Section 15(3)(f)–(g).

exercised for proper statutory purposes, particularly ensuring release conditions are no more onerous, and last no longer, than is consistent with community safety.[73] It appears that jurisdiction has been exercised cautiously.[74]

[76] The third difference is that, unlike a determinate sentence, life imprisonment carries with it the reality that Mr Van Hemert would remain subject to rights of recall for life in the event of further criminal offending, or if he poses an undue risk to the community, or has breached release conditions.[75] In that event his further release would depend upon re-entry into the parole programme, and a further grant by the Board.[76]

[77] Fourthly, there are potential differences in the therapeutic support Mr Van Hemert would receive if sentenced to life imprisonment rather than the finite sentence imposed by Doogue J. The Department of Corrections has an obligation, as an agency of the state, to provide treatment to a serving prisoner who presents with a mental illness.[77] We note that mental health services available to incarcerated offenders may differ from those available to people in the community. Official reports and academic studies from 2016 to 2020 indicate that these services are sometimes limited, experience high demand and tend to focus on addressing offenders in crisis rather than providing regular therapeutic interventions.[78] Some rehabilitation services

---

73 *Dickey v R*, above n 52, at [184].

74 At [186].

75 Parole Act, s 61.

76 If an offender has been recalled under a final recall order, s 21(3) of the Parole Act requires the Board to consider within 12 months of the final recall order being made whether the offender should be released on parole. There is an exception where the offender has a new parole eligibility date of more than 12 months after his or her last parole hearing, in which case the Board must consider the offender for release as soon as practicable after that later parole eligibility date: s 21(1) and (2)(a).

77 Corrections Act 2004, s 75.

78 See, for example, Kate Frame-Reid and Joshua Thurston "State of mind: mental health services in New Zealand prisons" (2016) 4(2) Practice: The New Zealand Corrections Journal 38; Erik Monasterio and others "Mentally ill people in our prisons are suffering human rights violations" (2020) 133(1511) NZMJ 9 at 9–10; Peter Boshier *OPCAT Findings Report: A question of restraint – Care and management for prisoners considered to be at risk of suicide and self-harm: observations and findings from OPCAT inspectors* (Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata, 1 March 2017) at 41–42; and Ron Paterson and others *He Ara Oranga*: *Report of the Government Inquiry into Mental Health and Addiction* (November 2018) at 69 and 73. In Department of Corrections *Change Lives Shape Futures: Investing in Better Mental Health for Offenders* (2017), the Chief Executive at the time noted that "we must accept that at times our approach has not always met the mental health needs of all individuals in our care" and expressed a commitment to improving the approach of Corrections to offenders experiencing mental illness: at 4.

may not be available until an offender is parole eligible.[79] There are nevertheless a range of mental health services available to Mr Van Hemert in prison that may be tailored to his needs. These include both minor and major interventions, such as intensive drug and alcohol rehabilitation programmes, support sessions from Packages of Care providers, specialised treatment from Te Whatu Ora and hospitalisation under a compulsory treatment order in severe cases.[80] Under either sentence, Mr Van Hemert will spend a significant amount of time in prison, receiving treatment from the mental health services provided by Corrections.

Our assessment

[78] The wording of s 102 and the legislative background make clear there is a presumption of life imprisonment that will only be displaced by such strongly mitigating circumstances as would render such a sentence manifestly unjust. As *Adams on Criminal Law* observes, the courts have "rarely been persuaded that offenders who are suffering from severe mental illness or disability should avoid life imprisonment for murder".[81] However, as we noted above at [62], "manifestly unjust" simply means the injustice in imposing life imprisonment must be clear. And, as the Court of Appeal noted in *R v O'Brien*:[82]

> There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment.

[79] A substantial proportion of offenders imprisoned in New Zealand suffer from a mental impairment.[83] Where that impairment is a direct cause of criminal offending and where the defence of insanity does not apply, the normative response under the Sentencing Act remains an adjustment to the imprisonment term (or to the minimum period of imprisonment) by way of discount. That indeed was the approach taken by

---

79 *Dickey v R*, above n 52, at [182].

80 Mental Health (Compulsory Assessment and Treatment) Act 1992, s 45.

81 Simon France (ed) *Adams on Criminal Law – Sentencing* (looseleaf ed, Thomson Reuters) at [SA 102.02].

82 *R v O'Brien* (2003) 20 CRNZ 572 (CA) at [36].

83 A 2016 study found that 91 per cent of New Zealand prisoners had a lifetime diagnosis of mental health or substance use disorder: Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Department of Corrections, June 2016) at 9.

both Doogue and Nation JJ in this case. As the Court of Appeal noted in *Orchard v R*, mental health issues may mitigate the offending by "diminishing moral culpability for the offending, and thereby also diminishing deterrence, accountability and denunciation as sentencing concerns".[84] It continued:

> [48] In *E (CA689/2010) v R*, the Court noted that stage two discounts for mental health issues ranging from 12 per cent to 30 per cent had been seen as appropriate.[85] This is not to be taken to confine the upper range discount where diminished responsibility by reason of mental health deficits substantially diminishes moral culpability and the needs of deterrence, accountability and denunciation generally as sentencing concerns.

[80] Attribution of offending to mental illness is not of itself a rare event, and it was not necessarily what Parliament had in mind in enacting s 102. It has, thus far, elected not to adopt a defence of diminished responsibility. Contributory mental impairment will be a highly relevant circumstance relating to the offender, but it is only where life imprisonment would be manifestly unjust that a sentence less than life may be imposed. As noted at [62] above, in making this assessment, courts should consider and weigh all relevant purposes and principles of sentencing. We see the interests of the victim,[86] community protection,[87] the imposition of least restrictive outcomes,[88] consideration of the particular circumstances of the offender,[89] and an offender's diminished intellectual capacity or understanding at the time of the offending[90] as being especially relevant in this case.

[81] While the fact and influence of mental impairment will be a significant factor in the s 102 assessment,[91] so will community protection.[92] That point was made also by the Court of Appeal in *R v O'Brien* in the passage quoted at [78] above. Public risk is a "countervailing consideration", to use the Law Commission's terminology, relevant to the exercise of discretion.[93] Psychiatric assessments and evidence of

---

84 *Orchard v R*, above n 54, at [46] (footnote omitted).
85 *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [71].
86 Sentencing Act, ss 7(c) and 8(f).
87 Section 7(g).
88 Section 8(g).
89 Section 8(h).
90 Section 9(2)(e).
91 Section 9(2)(e). See also s 8(h).
92 Section 7(g). See *R v O'Brien*, above n 82, at [36]; *R v Wihongi*, above n 19, at [76]; and *R v Reid*, above n 39, at [19].
93 See at [30] above.

remorse will be of considerable importance in making an assessment as to public safety.[94]

[82] Mr Van Hemert lacks an inherent propensity for violence and the offending would not have occurred but for the onset of an uncontrollable psychotic episode. These facts point in favour of finding a sentence of life imprisonment to be manifestly unjust. That remains so despite the fact a defence of insanity was unavailable. Had it been, there would of course have been no need to sentence at all. In this case, the operative extent of mental impairment on the offending calls for a response going beyond adjustment of the minimum period of imprisonment imposed.

[83] Nevertheless, other sentencing principles require that conclusion to be set alongside public safety considerations,[95] and it is here the appeal runs into real difficulty. Where a sentence of life imprisonment is necessary in the interests of public safety, this will suggest that such a sentence is not manifestly unjust. The psychiatric reports in evidence were prepared in May and October 2020 for the purpose of assessing fitness to plead (concluding affirmatively) and the availability of a defence of insanity (concluding negatively). They are very helpful indeed in assessing causation of the crime, but less so in relation to the issues arising under s 102: remorse and public safety.

[84] Remorse, where genuinely held and expressed, evidences insight, enhances the prospects of rehabilitation and may give the sentencing judge greater confidence in the assessment of public safety. In this case, remorse might give rise to an available inference that the offender is more likely to avoid risk of relapse, for instance, by the avoidance of substance abuse. Its absence invokes the opposite inference.

[85] We share the Court of Appeal's concern about Mr Van Hemert's want of remorse. We find it particularly troubling. Once Mr Van Hemert returned to his baseline mood after his psychotic episode, the least self-insight would have propelled

---

94 See *R v Reid*, above n 39, at [8] and [15]: the defendant was horrified by his actions and confessed to the murder even though, if he had kept silent, it is very likely the crime would never have been discovered. The Judge considered that the defendant's suicide attempt was, in that case, evidence of the extent of his feelings of remorse. See also the discussion below at [87] of *R v Wihongi*, above n 19.

95 Sentencing Act, s 7(1)(g).

a sense of profound remorse at having taken, at random, the life of Ms Te Pania, and having destroyed the happiness of her family, in particular that of her two-year-old daughter.

[86] Doogue J described Mr Van Hemert as palpably remorseful. We enquired how that had manifested itself, there being nothing directly in evidence. Mr Rapley explained that it took the form of an expression of regret through counsel. There was, however, no tangible expression of that remorse by Mr Van Hemert directly. The psychiatrists and writer of the pre-sentence report record, to the contrary, that he showed little remorse, and little empathy for his victim.

[87] Mr Van Hemert's attitude may be contrasted with that of the defendant in *R v Wihongi*:[96]

> [25] The Judge acknowledged Ms Wihongi's deep regret and distress about killing the victim. She had demonstrated considerable insight, accepted sole responsibility and tended to blame herself for the violence in the relationship. The Judge considered that a deterrent sentence was unnecessary because of the high unlikelihood of reoffending and that protecting the community was not an operative consideration for similar reasons.

[88] Further, we share—for the most part—the Court of Appeal's concern at the assessment of community risk at the first sentencing. We are not wholly in agreement, however: as we read them, the clinical reports do not support the conclusion that Mr Van Hemert's substance abuse "triggers mental health relapses that on occasions involve acts of violence or aggression towards others".[97] Rather, the evidence was that his substance abuse exacerbates, rather than triggers, his propensity for psychotic disorder.

[89] But significant concerns remain about the potential early community release of Mr Van Hemert under a determinate sentence without extended release conditions to mitigate risk, and without right of recall in the event of further criminal offending, material breach of release conditions or developing danger. Here we had the sudden onset of a florid psychotic episode, in this instance propelling Mr Van Hemert into murdering an entirely innocent woman going about her ordinary business. The fact

---

96 *R v Wihongi*, above n 19 (footnote omitted).
97 CA judgment, above n 3, at [52].

the victim was a stranger is particularly concerning, as the killing was an unfocused consequence of his mental state, rather than an attack upon a particular person against whom he held some animus. It cannot be said the object of the offending is particular, or that it is very unlikely to be repeated. The circumstances of the murder were random, brutal and would have been utterly terrifying to Ms Te Pania.

[90] Mr Van Hemert's propensity for psychosis exists inherently and is exacerbated by substance abuse. That means treatment, release conditions, pro-social support and the backstop of recall all assume real importance in his case. Mr Van Hemert is, however, socially isolated and appears to lack pro-social support.

[91] In rare cases the High Court has applied s 102 to an offender whose offending was influenced by a serious mental impairment and who still posed a level of risk to public safety. In *R v Cole*, the offender was diagnosed with bipolar disorder and paranoid schizophrenia. He was assessed as likely suffering a relapse at the time of the offending and this relapse was seen to have contributed to the offending.[98] His limited previous convictions placed him at a low risk of reoffending but the seriousness of the murder charge meant he posed a high risk of harm to the community.[99] Mr Cole had expressed genuine remorse and was "tearful and regretful about the outcome of [his] actions".[100] A life sentence was found to be manifestly unjust. In *R v Simeon*, the defendant suffered from a psychotic disorder, likely schizophrenia.[101] While the disorder did not directly cause the offending, it was a contributing factor. There was a risk of reoffending, but Ms Simeon had shown a willingness to participate in alcohol and violence treatment programmes.[102] There is no record in the judgment of the offender displaying remorse. The Judge concluded that a determinate sentence was appropriate in the circumstances.

[92] The present case is not like those. In both *Cole* and *Simeon*, the offending was intimately connected with the offender's relationship to the victim; as a father to the victim, in Mr Cole's case, and a partner to the victim in that of Ms Simeon. Both had

---

98 *R v Cole* [2017] NZHC 517 at [17] and [25].
99 At [37]–[38].
100 At [39].
101 *R v Simeon*, above n 61, at [26]–[27].
102 At [31]–[32].

suffered violence and abuse at the hands of the victim. In contrast, Mr Van Hemert targeted a complete stranger. That suggests a heightened risk of danger to the public. Further, Mr Cole demonstrated clear remorse. While remorse was not recorded in the sentencing of Ms Simeon, her offending was contextualised within a lifetime of serious deprivation, depravation, and trauma, with violence being normalised since childhood. None of these feature in the present case.

[93] Overall, potential recall and extended release conditions, ordinary consequences of a conviction for murder, add a layer of protection for the public that are manifestly justifiable in these circumstances. They outweigh the impairment to Mr Van Hemert's way of life post-release, and it cannot be said those burdens make the sentence imposed by Nation J clearly unjust in the circumstances of this case.

[94] Mr Rapley argued that the assessment of public risk should be made based on the assumption that the Mental Health Act will be properly enforced. In this case, the District Health Board's review of its actions found that the relevant clinicians failed to follow the appropriate procedures under the Mental Health Act, resulting in Mr Van Hemert being left in the community, with no supervision. If the requisite level of care had been provided, Mr Rapley submitted, Mr Van Hemert would not have committed the crime. In our view, however, this ignores the reality that even compulsory mental health treatment under the Mental Health Act requires someone to be aware of Mr Van Hemert's mental deterioration and to make an application under s 8. Mr Van Hemert's social isolation raises real concerns as to whether appropriate support services will be notified and provided in the event of a future psychotic episode. Ongoing monitoring and oversight provided by the Parole Board for the duration of a life sentence seems to us the best and most effective way of managing public risk.

[95] Mr Van Hemert was mentally ill, but not insane, when he murdered Ms Te Pania. He is prone to relapse, well aware of what he has done, yet remains troublingly unremorseful. He lacks social support, and he lacks self-insight. In these circumstances, it is not clearly unjust that extended parole eligibility and release conditions, and potential for recall, all measures calculated to provide greater

assurance of public safety, apply to Mr Van Hemert. For these reasons in combination, we are not persuaded that the Court of Appeal misapplied s 102.

Minimum period of imprisonment

[96] Section 103 of the Sentencing Act requires the imposition of a minimum period of imprisonment of not less than 10 years, having regard to the purposes stated in s 103(2): accountability, denunciation, deterrence, and community protection. In the High Court resentencing, a minimum period of 11 years and six months was imposed. We did not receive complete submissions on what (if any) minimum period ought to be imposed in the event either an indefinite sentence was sustained, or a finite sentence was substituted. Accordingly, we sought further submissions from the parties on that point. Having considered those submissions, we consider the statutory minimum period of 10 years appropriate.

[97] The default position in this case might be a minimum period of 17 years, due to the high level of brutality involved and Ms Te Pania's vulnerability, as per s 104(1)(e) and (g). Yet, as the Crown accepts, such a sentence would be manifestly unjust in the face of Mr Van Hemert's mental impairment.[103] Having regard to the clear causal nexus between Mr Van Hemert's mental impairment and the offending, and the greater community protection associated with imposition of an indeterminate (life) sentence, we are satisfied that the minimum period of imprisonment necessary in this case is no greater than 10 years. Mr Van Hemert will remain liable to recall for life and subject to parole conditions regardless of the length of the minimum period of imprisonment. While the circumstances of this offending and of the offender, along with the availability of these tools, support the continued imposition of an indeterminate sentence, they do not support the imposition of a minimum period of more than 10 years. To that extent, the appeal will be allowed.

---

[103] See above at [34].

Result

[98] The appeal against sentence is allowed. The minimum period of imprisonment of 11 years and six months is quashed and a minimum period of imprisonment of 10 years is substituted.

WILLIAMS J

[99] This case has its difficulties. The majority fairly and clearly describes them. I disagree with the result they have reached.

[100] It is common ground that the appellant's culpability for the killing of Ms Te Pania is such that, but for the prospect of further violent offending, a life sentence would have been manifestly unjust. I consider that there is insufficient evidence to conclude that the appellant is a continuing safety risk and that to impose a life sentence without that evidence would also be manifestly unjust. In the event, aspects of the reasoning that follows were not traversed in argument before us. I would have preferred that this were not the case, and perhaps that further submissions might have been called for. I certainly hope the issues raised will be properly ventilated in a future case.

Context

[101] Mr Van Hemert murdered Ms Te Pania in a vicious, sustained, and frenzied knife attack, supplemented, it seems, by the use of a rock to inflict blunt force trauma to the victim's head. Ms Te Pania was a sex worker who Mr Van Hemert had picked up for the purposes of a sexual encounter. He had no previous knowledge of her. The details of the terrible injuries he inflicted on Ms Te Pania are set out in the judgment of the majority.[104]

[102] When he killed Ms Te Pania, Mr Van Hemert was suffering a florid psychotic event the onset of which coincided with the presence of stressors in his personal life. His mental state had deteriorated over a roughly week-long period, commencing on Christmas Day and culminating in the murder in the early hours of New Year's Eve.

---

[104] See majority reasons above at [8].

He consumed a lot of alcohol and cannabis over that period, which made his condition even worse, though his mental state was also a driver of that consumption. No one disagrees with the proposition that Mr Van Hemert would not have murdered Ms Te Pania, let alone in the terrible way he did, but for the acute onset of his mental illness. That said, the clinical consensus was that Mr Van Hemert was not legally insane when he killed Ms Te Pania. That is, he was not so unwell that he no longer understood the nature of his actions and their moral import.[105]

[103] The stressor was that during Christmas festivities at the home of his ex-partner and their daughter (the relationship had ended a couple of years earlier), Mr Van Hemert discovered that his ex-partner was seeing someone else. Up until then, the separation had been amicable, as his presence at his ex-partner's home on Christmas day demonstrates. By 29 December, Mr Van Hemert was in bad shape. He had not slept properly for nearly five days, and had become emotionally aroused, paranoid and irrational. His ex-partner contacted local mental health services to report her concerns about Mr Van Hemert's mental wellbeing. But it was not until the next day, when his brother contacted the service worried that Mr Van Hemert was "rambling", "talking in riddles", and "nonsensical", that a crisis resolution team visited Mr Van Hemert at his home. The team arrived at around 1 pm on 30 December. They made a preliminary diagnosis of acute psychosis and proposed that Mr Van Hemert be admitted to Hillmorton Hospital for assessment under the Mental Health (Compulsory Assessment and Treatment) Act 1992. Police assistance was requested, as Mr Van Hemert was initially uncooperative, but the crisis team believed that the Police might not be able to assist for some time.[106]

[104] The crisis team adopted an alternative strategy. A prescription for antipsychotic and anxiolytic medication was faxed to a local pharmacy and a family member collected it. The hope was that the medication would settle Mr Van Hemert down and compulsory intervention could be avoided. The crisis team left Mr Van Hemert in the care of his brother, advising that someone would check back later to see how Mr Van Hemert was progressing. At around 3 pm, a team member phoned, and the

---

105 Crimes Act 1961, s 23.

106 It is not clear from the Serious Event Review whether the crisis team were advised of this timeframe by the Police or whether this was an assumption made from past experience.

brother advised Mr Van Hemert had taken the medicine and was asleep. When, at 8 pm, a member of the team checked in again, the brother advised that Mr Van Hemert was still asleep.

[105] At this point, wires became crossed. The crisis team thought the brother would stay with Mr Van Hemert overnight. The brother thought Mr Van Hemert had been sedated (he had not), and that it was safe to leave him asleep and return to his own home (it was not). The brother left the remaining medication in Mr Van Hemert's house. About two hours later, Mr Van Hemert awoke. He found the medication and took it, washed down with a can of Red Bull. He then made three round trips into the city, each time intending to engage the services of a sex worker. He failed on the first two trips. As he indicated in his later narration to Dr Karen McDonnell (who prepared a report pursuant to s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003), Mr Van Hemert became increasingly angry, aggressive, and paranoid as the evening wore on into the morning hours. A fair indication of Mr Van Hemert's mental state was that at some point earlier in the evening, he called 111, said he was an undercover police officer and asked for a time machine. He needed one, he said, to return to the past and kill his deceased father.

[106] It was on the third trip to town that Mr Van Hemert picked up Ms Te Pania. He murdered her, following, he said, a disagreement over the terms of their arrangement. He pleaded guilty.

History of mental illness

[107] Two psychiatric reports were prepared prior to the entry of Mr Van Hemert's first guilty plea. These were compiled with a trial in prospect and focused on whether Mr Van Hemert was legally insane at the time of the killing. I have already mentioned the first report by Dr McDonnell. She was a Senior Forensic Psychiatric Registrar at the time. A second report was prepared by Dr Mhairi Duff, a very experienced Consultant Psychiatrist. As I have noted above, on the question of insanity, the two reports were in general agreement that Mr Van Hemert was not legally insane at the time, although he was unwell. Dr McDonnell offered a working diagnosis of either a brief psychotic disorder or a substance induced bipolar disorder. Dr Duff's diagnosis

was one of bipolar 1 disorder. The following summary of Mr Van Hemert's mental health history is drawn from the two reports.

[108] Mr Van Hemert had come to the attention of mental health services three times before. He was 17 the first time. He was exhibiting sleeplessness, irritable and hostile mood, disorganised thoughts, and paranoid ideation. The cause appeared to be that he earlier had a motor vehicle accident and had been charged with drink driving and careless use. He was prescribed antipsychotic medication and a sleeping tablet. There was no follow up, but it does not appear that there were further difficulties. Three years later his parents sought the assistance of mental health services following another psychotic episode involving similar symptoms. He was compulsorily admitted into secure care for two weeks and prescribed antipsychotics. He spent some time in seclusion due to aggression, but his symptoms resolved within a few days. In 2016, when living with his ex-partner, he had a third episode. This coincided with the sudden death of his father. He was treated as an outpatient with antipsychotic and anxiolytic medication. Again, after two weeks his mental state stabilised.

[109] In his interview with Dr McDonnell, Mr Van Hemert described himself as someone who "gets wound up easily". And, according to Dr McDonnell's report, Mr Van Hemert's ex-partner described his personality as "intense and unpredictable". Although clinicians reported that Mr Van Hemert could be hostile and irritable when unwell, none of the three prior reported events involved actual violence. Further, although Mr Van Hemert told Dr McDonnell that he tended to get into physical altercations when he became frustrated, his criminal history (which comprises only driving offences) suggests that he is not by nature a violent man, at least not when he is well. That, on the evidence, is almost all the time.

The exception to the presumption in s 102

[110] Section 102 of the Sentencing Act 2002 contains two relevant directives. The first is that the presumptive headline sentence for murder is life imprisonment. Another way of putting it is the law presumes, without the need for further evaluation, that such sentence will be just desert for any intentional or reckless homicide. This is obviously a kind of fundamental bottom line. The second directive is this: the

presumption will not apply if a life sentence would be manifestly unjust. This is a safety valve, and therefore also a fundamental bottom line. It recognises that, although judicial evaluation is generally not required in selecting a sentence for murder, there will be exceptional cases where the court must intervene to prevent injustice.[107] These two bottom lines are not necessarily in conflict, but they are in tension. Unsurprisingly, the reference points for resolving that tension are the twin perspectives at the core of ss 7–9 of the Sentencing Act: the circumstances of the offence and the offender.

[111] Manifest injustice is not a technical concept. Nothing is to be gained by picking at the words of the section in search of additional guidance or shades of meaning. So, I agree with the majority that the circumstances of the offence and offender are distinct elements of a single threshold.[108] To treat each of them as a threshold to be separately cleared could undermine the clarity of manifest injustice.

[112] As bottom lines go, manifest injustice is relatively straightforward—the court must not impose the law's automatic and most severe punishment for the law's most serious crime if, in light of the circumstances of the offence and the offender, that sentence would be plainly unjust. The difficult part is applying it to real cases. Parliament left that task to the courts because, tragically, murders and murderers are so infinitely varied that a more prescriptive framework would likely cause more problems than it solved. As would be expected, the responsible minister offered examples of plain injustice when the draft provision was debated in the House.[109] He emphasised (though this was hardly needed) that any exceptions to the presumptive sentence would be exceptional. But I read no intention either in those examples or in the words of the provision to artificially constrain plain injustice to something less than its ordinary import. For example, the drafters did not insert statutory examples, as is

---

107 Compare to the Sentencing Act 2002, ss 103–104 which provide for the minimum period of imprisonment which must be imposed when an offender is sentenced to life imprisonment. See Tim Conder "Manifestly unjust" [2017] NZLJ 177 for a discussion on the approach of the courts to the wording "manifestly unjust" in s 104 and [2017] NZLJ 213 as to the now repealed three strikes regime.

108 See majority above at [57] and [62].

109 (14 August 2001) 594 NZPD 10911.

sometimes done, to suggest, ejusdem generis, that a narrow (or indeed, a broad) approach was intended.[110]

[113] Since the enactment of s 102, categories of potential manifest injustice have crystallised in sentencing practice. It has for some time been accepted that a life sentence may be plainly unjust where the offender has killed her long-term abusive partner;[111] where the murder was a mercy killing often combined with significant stressors associated with care of the victim;[112] or where the offender had limited involvement in the killing.[113] But manifestly unjust is not a static concept. It responds to developments in our understanding of offenders and offending and it must take account of contemporary community attitudes and values. Recent evidence-based developments in sentencing youth and emerging adults for murder demonstrate this dynamic.[114] That is not to say the line is constantly shifting; it is not. Adjustments, where they are the result of judicial process, will be both incremental and necessary. The courts are entrusted with invoking the State's most coercive powers. And they must not become instruments of plain injustice.

This case

The issues

[114] The majority says that in this case, the circumstances of the offender at the time of the offending "point in favour of finding a sentence of life imprisonment to be manifestly unjust".[115] I agree, as did Doogue J when she sentenced Mr Van Hemert to

---

110 See discussion in Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 330–331. Also compare to the use of exemplary fact scenarios in legislation: for example, the Legislation Act 2019.

111 See, for example, *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; and *R v Rihia* [2012] NZHC 2720.

112 See, for example, *R v Knox* [2016] NZHC 3136; and *R v Law* (2002) 19 CRNZ 500 (CA). See also *R v Albury-Thomson* (1998) 16 CRNZ 79 (CA), which was decided before the Sentencing Act was enacted.

113 See, for example, *R v Cunnard* [2014] NZCA 138; and *R v Madams* [2017] NZHC 81.

114 See Court of Appeal decision in *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405. As noted in that decision at [153], young people convicted of murder were almost never sentenced to finite terms of imprisonment. The Court reviewed the evidence of neurological differences between adults and young people at [76]–[86] before reaching two conclusions: first, at [169] and [195], that there can be no general youth-based exception to the prescribed sentence for murder, rather each case must be assessed on its own facts by reference to the "full register" of sentencing purposes, principles and factors; but, second, at [177] that previous decisions suggesting that youth should carry little weight as a sentencing factor were wrong.

115 See majority reasons above at [82].

10 years' imprisonment.[116] The majority considers that merely adjusting the minimum period of imprisonment (MPI) would not be a sufficient recognition of the operative role of mental impairment in Mr Van Hemert's offending.[117] I agree with that too. Yet the majority has concluded, I think reluctantly, that life imprisonment is just, and that reducing the MPI is an adequate way of recognising the offender's reduced culpability. Two closely related factors have proved critical in their analysis:

(a) Mr Van Hemert lacks remorse; and

(b) he remains a risk to public safety.

[115] This brings us to the real issues in this case, which are first: where, due to the causative role of mental illness in the commission of a murder, the offender's culpability is such that a sentence of life imprisonment would plainly be unjust, in what circumstances can the exception nonetheless be inapplicable? And, relatedly, what is an appropriate analytical framework for that assessment?

Mental disorders, proportionate sentencing, and public protection

[116] Mental illness is relevant to offender culpability and so will often mitigate the severity of a sentence when linked to the offending in a relevant way—that is as a contributing or operative cause.[118] This is because sentences are retributive and so should be no more (nor less) than is deserved according to the circumstances of the offence and offender.[119] To state the obvious, a punishment that is not deserved will generally, and by definition, be plainly unjust.

[117] Public protection also has an important role in sentencing—some say it is the whole point of sentencing.[120] And, in the ordinary run of cases, just desert and public protection operate in lockstep. Where the offender has a prior record of similar

---

116 *R v Van Hemert* [2020] NZHC 3203 [HC first sentencing].

117 Above at [82].

118 See *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68]–[69]; *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [50]; and *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [108]–[109] (as to causal connection). Of course, the reverse can be true where the mental illness provides clear evidence of ongoing danger.

119 See generally Sentencing Act, ss 7–9.

120 Simon France (ed) *Adams on Criminal Law – Sentencing* (looseleaf ed, Thomson Reuters) at [SA7.06].

offending the end sentence is often increased for just desert and public protection reasons in equal measure. That is because, usually, each iteration of similar offending is both inherently more blameworthy than the one before and good evidence of increased risk of similar offending in the future. Neither of these reasons involves re-punishment of an offender for their former offending.[121]

[118] But here Mr Van Hemert has no history of violent offending, and the driver of this offence was acute mental illness triggered by life stressors, not some inherent propensity to violence. A life sentence is more difficult to characterise as proportionate where its primary purpose is protecting the public from the risks of further violent offending triggered by another psychotic episode. That is not to say such a sentence can never be just for the purposes of s 102, but, since it is effectively preventive detention, great care is required when fixing the circumstances in which it will be just. By comparison, the actual sentence of preventive detention provided by s 87 of the Sentencing Act requires the court to be satisfied that the offender is likely to commit further relevant offences.

The Australian approach

[119] In the somewhat different sentencing context of New South Wales, the High Court of Australia in *Veen v The Queen* and *Veen v The Queen (No 2)* addressed the relationship between just desert and public protection when mental illness is an operative factor in the offending.[122] It is instructive to compare the Australian approach with that generally taken in this country.

[120] Mr Veen suffered an appallingly dysfunctional upbringing. He was a chronic alcoholic from a young age and suffered permanent brain damage as a result. Due to that disability, when he drank heavily, he became violent. His weapon of choice was the knife. He stabbed himself in police custody when he was 15, puncturing a lung. At 16, he had an argument with his landlady and stabbed her, but her wounds were not fatal. He was placed in institutional care. When he was 20 and working as a sex worker, he stabbed and killed a client with whom he had a dispute over payment and

---

121 At [SA9.15].

122 *Veen v The Queen* (1979) 143 CLR 458 [*Veen (No 1)*]; and *Veen v The Queen (No 2)* (1988) 164 CLR 465 [*Veen (No 2)*].

was charged with murder. The jury found him guilty of manslaughter due to diminished responsibility, an option not available to juries in this country.[123] The trial Judge sentenced Mr Veen to life imprisonment solely for public protection reasons. The Australian High Court reduced the sentence to 12 years with no MPI.[124]

[121] Following his release eight years later, Mr Veen stabbed and killed a third victim, also a client in an unprovoked attack. He was charged with murder but pleaded down to diminished responsibility manslaughter. The question in *Veen (No 2)* was whether the maximum life sentence imposed and affirmed in the Courts below ought now to be upheld. The High Court upheld the sentence by a narrow majority but still reaffirmed the importance of proportionality in Australian sentencing practice. The essential proposition, and one intended to be of general application, is that a sentence must not be increased beyond what is proportionate to the offence and the culpability of the offender "in order merely to extend the period of protection of society from the risk of recidivism".[125] In other words, although public protection is an important factor, among others, the court may not sentence a prisoner to an effective sentence of preventive detention if that would be a disproportionate response to the circumstance of the relevant offence and the culpability of the offender. The majority acknowledged however that:[126]

> … the practical observance of a distinction between extending a sentence merely to protect society and properly looking to society's protection in determining the sentence calls for a judgment of experience and discernment.

[122] Of course, in neither of the *Veen* decisions was that Court invited or required to reject a prescribed life sentence. That is, I accept, an important point of difference. But what is striking about these leading and longstanding authorities is they demonstrate just how cautious the Australian courts are, as a matter of general principle, about adopting a purely public protection approach to sentencing.

---

123 See Crimes Act 1900 (NSW), s 23A(1). That section at the relevant time provided:
Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.

124 *Veen (No 1)*, above n 122.

125 *Veen (No 2)*, above n 122, at 472–473 per Mason CJ, Brennan, Dawson and Toohey JJ.

126 At 474 per Mason CJ, Brennan, Dawson and Toohey JJ.

New Zealand cases

[123] By contrast, and in the admittedly more constrained context of s 102, the New Zealand courts have tended overall to take the view that a mental disorder short of insanity will not, on its own, trigger the exception, even if the disorder is operative at the time of the offending. It is unnecessary to track through all the cases. Two examples provide a sense of their broad profile. In *R v Mayes* the offender suffered from a traumatic brain injury causing him to respond impulsively and aggressively to stressors. After a serious row with his girlfriend, he stabbed and killed her. The Court of Appeal considered that the brutality of the killing, Mayes' use of alcohol at the time (in breach of a bail condition), and the fact that his static and dynamic risks were best managed by amenity to lifetime recall, all counted against applying the exception.[127] Recently in *Tu v R* the Court of Appeal accepted that the offender's schizoaffective disorder contributed to his offending, but found the killing was planned rather than impulsive and, relying on expert evidence, that he remained an ongoing risk to the community that would only reduce in the controlled environment of prison.[128]

[124] Two other rarer examples show the profile of cases that have met the plainly unjust threshold. In *R v Reid,* Brewer J imposed a sentence of 10 years with no MPI.[129] The offender believed his elderly neighbour was spying on him on behalf of his employer. He went to her unit to confront her about this and when she denied it, he strangled her. He confessed soon after and was remorseful. In fact, these events drove him to attempt to take his own life. The Judge found that the offender's paranoid delusion was the but-for cause of his offending, that the attack was contrary to his "entire life's pattern", and, relying on expert advice, that treatment had neutralised any ongoing public safety issues.[130]

---

127 *R v Mayes* [2004] 1 NZLR 71 (CA) at [33]. See also *R v Morris* [2012] NZHC 616; *Te Wini v R* [2013] NZCA 201; *R v Yad-Elohim* [2018] NZHC 2494; and *R v Brackenridge* [2019] NZHC 1627. More recent decisions of the Court of Appeal are *Thompson v R* [2020] NZCA 355; and *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830.

128 *Tu v R* [2023] NZCA 53 at [31]–[38].

129 *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

130 At [12]–[13].

[125] Cull J took a similar approach in *R v Cole* where she imposed a sentence of 12 years with an MPI of 50 per cent.[131] The offender had longstanding diagnoses of bipolar affective disorder and paranoid schizophrenia. He shot and killed his son whom he believed was a threat to him and the rest of his family. There was a long history of conflict between the two and the Judge accepted there was a degree of provocation. Having shot his son, Mr Cole called 111. The Judge included an excerpt from the transcript of that call in her sentencing notes. In that excerpt, the offender references the challenges he faced in accessing mental health support:[132]

> He's been terrorising my family for 22 years and me. I'm sick of it. I've been to people, I've asked you people for help in the past, we never got any – none! No mental health help. So now I've put him out of his misery.

A rights perspective

[126] For Mr Van Hemert, Mr Rapley submitted that, s 19—the anti-discrimination provision in the New Zealand Bill of Rights Act 1990 (NZBORA)—applied to his case, although the focus of his challenge was the double threshold approach to manifest injustice (wrongly) attributed to cases such as *R v Cunnard*.[133] He argued this excluded proper consideration of Mr Van Hemert's mental illness and was therefore discriminatory. As can be seen from the reasons of the majority, resort to s 19 was not required to establish that the approach in earlier cases was in error.[134]

[127] But NZBORA is relevant in another way. It provides a rights-based analytical framework for determining whether, and if so when, a disproportionate sentence in just desert terms may nonetheless be imposed on public protection grounds.

[128] Section 19 provides that everyone has the right to freedom from discrimination on the grounds enumerated in the Human Rights Act 1993 (HRA). Section 21(1)(h) of the HRA provides that disability is one of the 13 prohibited grounds of

---

131 *R v Cole* [2017] NZHC 517.

132 At [27]. Although it is not entirely clear, it appears that the healthcare Mr Cole had sought was for his son, who had a drug addiction. It is possible Mr Cole was referencing his own needs.

133 *R v Cunnard*, above n 113. I agree with the majority's comments about *R v Cunnard* above at [58].

134 See majority reasons above at [61] and n 55. The majority confirmed that in any event, the approach now favoured is consistent with the New Zealand Bill of Rights Act 1990. I agree.

discrimination, and expressly includes "psychiatric illness" as one of the seven categories of disability.[135]

[129] In this context, the relevant effect of s 5 of NZBORA is that the right of persons suffering from psychiatric illness to be free from discrimination on that ground "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 6 then directs the court to prefer a construction of s 102 of the Sentencing Act that is consistent with the framework of ss 5 and 19 of NZBORA, although such direction does not permit the court to step outside the bounds of its constitutional function of interpreting and applying legislation.[136]

[130] In *Ministry of Health v Atkinson* the Court of Appeal sitting as a full bench found that differential treatment on a prohibited ground will be discriminatory if, when viewed in context, it imposes a material disadvantage.[137] The court must first determine whether the subject person, possessing the relevant s 21 HRA characteristic, is materially disadvantaged due to different treatment when compared to the treatment of a comparator group without that characteristic.[138] The point of the comparator group exercise is to control for other potentially relevant characteristics in order to isolate the true role of the prohibited ground of discrimination in the challenged decision.

[131] What then is the appropriate comparator group in the case of Mr Van Hemert? The evidence is clear that he is not a risk to public safety when he is well. And, on the one occasion when he was a very serious risk to others, it was *because* he was unwell. In other words, if Mr Van Hemert becomes dangerous in the future, it will be because of his disability.[139] It is this mix of mitigating factors that led the majority (rightly with respect) to conclude that his degree of culpability would otherwise have triggered the

---

135 Human Rights Act 1993, s 21(1)(h)(iii).

136 New Zealand Bill of Rights Act, s 4. See Mathew Downs (ed) *Adams on Criminal Law – Rights and Powers* (looseleaf ed, Thomson Reuters) at [BC4.02].

137 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109].

138 At [55].

139 I do not discount the role of drink and drugs in Mr Van Hemert's periods of psychiatric illness, but they are clearly not sufficient causes in their own right, because as he reported, he has been a heavy consumer of both since his adolescence without that resulting in a history of violence.

s 102 exception.[140] It seems to me therefore that the correct comparator group is murderers who do not suffer from risk-generating psychiatric illness, and whose culpability would, for some other reason, also have triggered the s 102 exception.[141]

[132] Mr Van Hemert was re-sentenced to life imprisonment due to ongoing risk associated with his psychiatric illness when he would not otherwise have received such a sentence because his culpability meant that would be manifestly unjust. He has therefore been treated differently to someone in the comparator group on a prohibited ground. This has obviously resulted in serious material disadvantage.

[133] If discrimination is established, then any justification for limiting the right will be addressed under s 5 of NZBORA, which is the focus of stage two of the analysis.[142] The demonstrable justification standard thus provides a robust way of determining when it will be lawful to subject a person to differential treatment because of psychiatric illness, even where it inflicts material disadvantage. This framing of the issue disciplines sentencing courts into ensuring that, alongside the requirements of public safety, due weight is given to the fundamental right of people with disability to be free from discrimination on that basis.

[134] With that framework in place, I turn now to address the key factors of remorse and risk.

Remorse and context

[135] I deal with remorse first. The assessment of the Courts below and the majority in this Court, that Mr Van Hemert lacked remorse, is derived from comments in both

---

140 See majority reasons above at [82].

141 In *Purvis v New South Wales* [2003] HCA 62, (2003) 217 CLR 92 the majority view was that removal from the classroom of a child whose intellectual disability caused him to become violent was not discrimination on the basis of disability. The appropriate comparator group for the analysis was a person without the disability who exhibited the same behaviours (see discussion of Gummow, Hayne and Heydon JJ at [222]–[232]). This approach was convincingly rejected by McHugh and Kirby JJ in the minority. They reasoned that disability is different to race or gender in that the purpose of the comparator group analysis would be defeated if it enabled a characteristic arising from the disability to be attributed to the comparator—for example the learning effects of blindness, or the mobility effects of being an amputee (at [130]). More recently, in *Moore v British Columbia* 2012 SCC 61, [2012] 3 SCR 360, at issue was the treatment of a student with dyslexia. The Canadian Supreme Court unanimously adopted an approach consistent with that of the minority in *Purvis*.

142 See generally *Ministry of Health v Atkinson*, above n 137, at [143].

psychiatric reports and the Provision of Advice to Courts (PAC) report.[143] The PAC report comment was in these terms:

> Mr Van Hemert took responsibility for his offending; however, he showe[d] little in the way of remorse for the victim, stating that he felt let down by the authorities for failing to relocate him to a secure hospital.

[136] Dr McDonnell suggested Mr Van Hemert had "a tendency to absolve himself of responsibility and externalise blame". Dr Duff described him as showing "little empathy for his victim" and reflecting only on "the negative effects on himself" such as his fear of retribution from relations of Ms Te Pania who were now fellow inmates. By contrast, Doogue J described Mr Van Hemert's remorse as "palpable".[144]

[137] For the following reasons I consider the true situation is more nuanced than the majority would have it. First, Mr Van Hemert pleaded guilty twice. Once following Doogue J's sentencing indication and then a second time, following Nation J's reconsideration based on the Court of Appeal's decision. I acknowledge that in *Hessell v R* this Court rejected the suggestion that guilty pleas are inherently expressions of remorse,[145] but it seems to me that pleading guilty to murder is in a category of its own. And to do so twice, including knowing on the final occasion that the mandatory sentence would apply, should be a much weightier consideration. Further, there is the fact that by pleading guilty, Mr Van Hemert avoided putting Ms Te Pania's whānau through the ordeal of a trial. That, too, ought to count.

[138] Second, it seems to me that Mr Van Hemert is right to feel badly let down by mental health services and the Police. After all, the formal assessment of the crisis team was that he was a threat to the safety of himself or others.[146] Had the Police been able to attend earlier so that Mr Van Hemert could be placed in secure care, or if clearer instructions had been given to his brother to watch over Mr Van Hemert, Ms Te Pania

---

143 See *R v Van Hemert* [2021] NZCA 261 (French, Brown and Collins JJ) at [22] and [53].

144 HC first sentencing, above n 116, at [40].

145 See *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [63]–[64]. I note that the Court of Appeal in *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 considered that guilty pleas in murder sentencing ought not to be covered by the guilty plea discount guideline set out in that decision, and specifically referenced the role of s 102 at [63].

146 See generally Mental Health (Compulsory Assessment and Treatment) Act 1992, s 8A. See also s 2 definition of "mental disorder".

would still be alive. That complicating factor is important and ought to be acknowledged in the sentencing outcome.

[139] Finally, Mr Van Hemert's narrative was that Ms Te Pania attacked him first. This is specifically recorded in the summary of facts. He provided some detail about this in his initial police interview. We will never know what actually happened because Mr Van Hemert was in such a badly disordered state at the time. As Dr Duff notes, that state likely involved distorted threat perception and poor insight into the way he presented to others. But this distorted, though apparently honest, belief may be a factor in Mr Van Hemert's apparent lack of empathy.

Risk and community protection

[140] The majority says that Ms Te Pania was a stranger, not an intimate (as in other cases where s 102 has been invoked), and the killing was random. It is suggested this makes him inherently more dangerous than an offender who kills her long-term abuser. In a sense of course it is true that Ms Te Pania could have been any sex worker in Christchurch that night, given Mr Van Hemert was looking for "revenge sex" (as he termed it). And it is also true that the long-term provocation often apparent in relationship-centred homicides that meet the s 102 threshold, is not present in this case. So, I agree that there is the potential that Mr Van Hemert presents an ongoing risk of serious harm, and that risk must be carefully assessed against the wider context of his case.

[141] That said, I think it is necessary to clarify that no one suggests Mr Van Hemert deliberately set out to kill a sex worker (or anyone else) that night. On his second and third trips into the city, Mr Van Hemert took with him a knife (and perhaps a rock), and he attached stolen registration plates to his car. He explained that he was afraid of being tracked by police or CCTV, hence the plates; and of being hurt in some way when cruising the redlight district in Christchurch, hence the knife. This behaviour was consistent with his general state of paranoia, as Dr Duff concludes.

[142] The evidence is that after Ms Te Pania got into the car, there was a trigger—some kind of disagreement over the terms and price of their transaction. Ms Te Pania made her position clear in some way, and Mr Van Hemert erupted. He took up his

weapons and attacked her. It seems that his psychotic paranoia caused him to focus his prior, but now greatly magnified, anger on a completely innocent victim.

[143] Although Mr Van Hemert has no prior history of violent offending of any kind, the majority says the possibility cannot be discounted that he might suffer from another psychotic episode causing him to offend violently again. Further, the evidence is he is somewhat estranged from his family and socially isolated—that is, he lacks safeguarding supports of his own. This means, it is said, the best way of protecting the community against the prospect of relapse is a life sentence because it subjects Mr Van Hemert to supervision and possible recall for life.

[144] As I have said, I accept that in some cases evidence as to continuing risk may be such that differential treatment will be necessary for community protection, but this is not a step to be taken lightly. It will be appropriate where other less intrusive options for mitigating risk have been discounted and where the evidence (including expert advice) is there is a real likelihood of violent relapse. But in this case, the evidence does not come close to supporting the proposition that a discriminatory life sentence is demonstrably justified. There has been no discussion of options that may be pursued at the end of a finite sentence to mitigate risk. And the psychiatric experts have not expressed an opinion on future risk. They have not even been asked for one.

[145] To the extent that they have referred, in passing, to future risk, the comments of the psychiatrists fall well short of sufficient in my view. For example, Dr Duff contrasts Mr Van Hemert's self-report of long-term substance abuse and regular "conduct disorder" when younger, with an adult history free of anti-social offending, in which he has maintained a stable relationship and long term, apparently profitable self-employment; all despite rare episodic mental illness. Dr McDonnell, who took a generally dim view of Mr Van Hemert, suggested he possessed narcissistic and anti-social personality traits, but even she acknowledged that these traits did not appear to have "behavioural manifestations", such as a history of criminal offending or significant violence.

Conclusion

[146] In my view, Mr Van Hemert should not be sentenced to life imprisonment without a proper assessment of future risk and possible measures for managing that risk. His term of imprisonment should be no longer than—(a) what is proportionate to culpability; and (b) (if risk exceeds culpability) that which is demonstrably justifiable for risk management purposes. Any other sentence would unlawfully breach his fundamental right to be free from discrimination that has not otherwise been demonstrably justified. In other words, any other sentence would be manifestly unjust. Nor, in my view, is reducing the MPI to the statutory default for life sentences, a compliant response without the required assessment.

[147] At the very least I would adjourn the appeal and direct that appropriate reports be provided to this Court for its consideration alongside such further submissions as counsel may wish to provide. In the alternative, I would have allowed the appeal and remitted the matter back to the High Court for resentencing on a proper evidential basis.

Solicitors:
Crown Law Office, Wellington for Respondent
Holland Beckett Law, Tauranga for Criminal Bar Association New Zealand as Intervener