Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

KAINE VAN HEMERT v THE KING

(SC 38/2022) [2023] NZSC 116

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

Over the Christmas period of 2019, Mr Van Hemert discovered that his ex-partner had entered a new relationship. His mental health deteriorated into a severe psychotic episode. Mental health assistance was given, but due to a misunderstanding he was left alone overnight. In the early morning of 31 December 2019, he left his house, taking with him a large knife. He sought to engage the services of Ms Te Pania, who was working as a sex worker. She got into the passenger seat, but a disagreement arose. In the course of that disagreement Mr Van Hemert killed Ms Te Pania, using the knife and a rock.

Procedural history

After receiving a sentence indication, Mr Van Hemert pleaded guilty to the murder of Ms Te Pania. At sentencing, the High Court Judge held that, due to the extent of the mental illness that Mr Van Hemert was suffering from at the time of the offending, it would be manifestly unjust to sentence him to life imprisonment. Consequently, the presumption of life imprisonment under s 102 of the Sentencing Act 2002 did not apply. The Judge sentenced Mr Van Hemert to a finite sentence of 10 years' imprisonment and imposed a minimum period of imprisonment (MPI) of six years and eight months.

The Crown appealed to the Court of Appeal. The Court of Appeal held that the High Court had misapplied s 102. It determined that, before the presumption in s 102 is displaced, a court must be satisfied that the circumstances of both the offence and the offender are such that life

imprisonment would be manifestly unjust. In this case, the circumstances of the offending (the brutality of the murder and Ms Te Pania's vulnerability) precluded the High Court from displacing the presumption of life imprisonment. The Court also considered Mr Van Hemert's mental illness was not the sole reason for the murder, with his abuse of drugs and alcohol, and his anger also contributing in varying degrees to Ms Te Pania's death. The Court of Appeal remitted the matter back to the High Court for a further sentence indication.

Following the second sentence indication, Mr Van Hemert again pleaded guilty. The High Court sentenced Mr Van Hemert to life imprisonment with an MPI of 11 and half years.

The Supreme Court granted leave to appeal against both the second High Court sentencing decision and the Court of Appeal decision. The approved question was whether the Court of Appeal was correct to conclude that the presumption in favour of life imprisonment in s 102 of the Sentencing Act was not displaced given the circumstances of the offence and of the offender.

Relevant legislation

Section 102(1) of the Sentencing Act states that "[a]n 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".

Supreme Court decision

The Supreme Court has allowed the appeal against sentence in part. A majority, comprising Glazebrook, O'Regan, Ellen France and Kós JJ, found that the Court of Appeal interpreted s 102 incorrectly, but was correct to find that a sentence of life imprisonment was not manifestly unjust in this case. It nevertheless quashed the MPI of 11 years and six months and substituted an MPI of 10 years.

Looking first at the question of whether the Court of Appeal interpreted s 102 correctly, the majority held that the Court of Appeal erred in construing the "circumstances of the offence and the offender" as mandatory mitigatory *requirements*, rather than mandatory relevant *considerations*. Manifest injustice is to be found from an overall weighing of both elements referred to in s 102(1), rather than investing either element with the power to veto the other. This assessment is made against the purposes and principles of sentencing identified in the Sentencing Act and ss 7–9 in particular. "Manifestly" in this context simply means the injustice in imposing life imprisonment must be clear.

Turning to whether the Court of Appeal applied s 102 correctly, the majority found that the Court of Appeal's misconstruction of s 102 led it into error in treating the circumstances of the offence as determinative. Furthermore, the brutality of the murder and Ms Te Pania's vulnerability had to be viewed in light of the psychosis that Mr Van Hemert was suffering at the time. The majority did not agree that substance abuse and anger issues were distinct causes of the offending unrelated to mental impairment. The Crown had accepted that, but for Mr Van Hemert's mental impairment, Ms Te Pania would not have been murdered.

Nevertheless, the Court of Appeal did not err in the result it ultimately reached. While the fact and influence of mental impairment will be a significant factor in the s 102 assessment, so will community protection. 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. Psychiatric assessments and evidence of remorse will be of considerable importance in making an assessment as to public safety. The majority shared the Court of Appeal's concern about Mr Van Hemert's lack of remorse and self-insight. It also recognised that Mr Van Hemert's propensity for psychosis exists inherently and is exacerbated by substance abuse. He is prone to relapse and his psychotic episodes come on suddenly. He attacked a complete stranger, which suggests that the object of the offending is not particular, and it cannot be said that the offending is very unlikely to be repeated. He appears to lack pro-social support. In these circumstances, a sentence of life imprisonment adds a layer of protection for the public that is manifestly justifiable. Unlike a finite sentence, a sentence of life imprisonment involves potential recall to prison for life and extended release conditions to mitigate risk.

Turning finally to the MPI, the majority noted that s 103 of the Sentencing Act requires the imposition of an MPI of not less than 10 years, having regard to the purposes stated in s 103(2). The majority was satisfied that the minimum period of imprisonment necessary in this case was no greater than 10 years given the clear causal nexus between Mr Van Hemert's mental impairment and the offending and the greater community protection provided by a life sentence as detailed above.

Williams J, dissenting in part, agreed with the majority that the circumstances of the offence and offender are distinct elements of a single threshold under s 102. In this case, due to the causative role of mental illness in the commission of a murder, a sentence of life imprisonment would plainly be unjust. Williams J considered that the New Zealand Bill of Rights Act 1990 (NZBORA) provided an appropriate rights-based framework for determining whether and when a disproportionate sentence may nonetheless be imposed for public protection reasons.

Section 19 of the NZBORA and s 21(1)(h) of the Human Rights Act (HRA) provide that everyone has the right to freedom from discrimination on the grounds of disability, including psychiatric illness. The effect of s 5 of the NZBORA is that limitations on this right must be reasonable and demonstrably justified in a free and democratic society. Section 6 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 the NZBORA.

Here, by being re-sentenced to life imprisonment, Mr Van Hemert had been treated differently to an appropriate comparator: 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. This resulted in a material disadvantage. In considering whether this differential treatment was demonstrably justified, Williams J considered both remorse and public safety. In relation to remorse, he considered that the situation was more nuanced than the majority would have it. In relation to public risk, Williams J emphasised that there had been no discussion of options that might have been pursued at the end of a finite sentence to mitigate risk and that the psychiatric experts had not expressed or been asked to express an opinion on future risk.

Overall, he concluded that Mr Van Hemert should not be sentenced to life imprisonment without a proper assessment of future risk and possible measures for managing that risk. At the very least, Williams J would have adjourned the appeal and directed that appropriate reports be provided to this Court for its consideration, alongside such further submissions as counsel may wish to provide. In the alternative he would have allowed the appeal and remitted the matter back to the High Court for resentencing on a proper evidential basis.

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