

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 35/2023  
[2024] NZSC 15

BETWEEN                      JIAXIN TU  
   Applicant

AND                              THE KING  
   Respondent

Court:                      Glazebrook and Kós JJ  
  
Counsel:                      R M Mansfield KC and T J Conder for Applicant  
   J E L Carruthers for Respondent  
  
Judgment:                      23 February 2024

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JUDGMENT OF THE COURT

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**The application for leave to appeal is dismissed.**

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REASONS

[1]      Mr Tu attacked and killed his flatmate, Mr Hawe-Wilson, with a hammer. At the time the victim was asleep with his girlfriend, C. Following the attack, Mr Tu climbed into the bed and tried to undress C. Only then did she wake and realise the victim had been injured. Mr Tu was charged with murder. The defence was one of insanity, based on schizoaffective and autism spectrum disorders. The jury rejected that defence and found him guilty. Whata J sentenced him to life imprisonment (with a minimum term of 12 years).<sup>1</sup>

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<sup>1</sup>      *R v Tu* [2016] NZHC 1780 [HC decision].

[2] Mr Tu unsuccessfully appealed that sentence, contending life imprisonment was manifestly unjust due to the role his mental health played in his offending and his unique rehabilitative needs.<sup>2</sup>

[3] Leave is sought to appeal to this Court. Counsel submit the appeal “is a paradigm case for the Court to consider when significant mental illness falling short of insanity may displace the presumption of life imprisonment.”

### **Our assessment**

[4] We do not consider the criteria for leave to appeal are met in this case. In August 2023 this Court delivered its decision in *Van Hemert v R* dealing with that very issue.<sup>3</sup> We do not consider Mr Tu’s circumstances can materially be distinguished from Mr van Hemert’s. There are some limited points of distinction: Mr Tu’s mental health deficits are more profound (but still did not constitute insanity), they are more consistently operative (he has autism and schizoaffective disorders; Mr van Hemert had rare psychotic episodes) and the victim was not a stranger in this case. Mr Tu is assessed as being at risk of further violent offending and, according to one of the psychiatrist’s reports, “continues to present with a complex, concerning and at times befuddling mix of mental health and related issues which both give cause for concern for his risk of further offending and undermine his ability to live independently and function in the community.” Consistently with Mr van Hemert, Mr Tu lacked evident insight or remorse.<sup>4</sup>

[5] With commendable frankness, Mr Mansfield KC makes clear in his submissions that Mr Tu’s application is really an invitation to this Court to now follow the approach of the dissenting Judge, rather than the majority, in *Van Hemert*. For the reasons given above, however, we do not consider the circumstances in the present application sufficiently distinctive to justify departure now from the principles set down in that very recent decision. Accordingly, we do not consider it raises a matter

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<sup>2</sup> *Tu v R* [2023] NZCA 53 (Katz, Wylie and Palmer JJ).

<sup>3</sup> *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412.

<sup>4</sup> HC decision, above n 1, at [32]. We recognise the point Professor Brookbanks makes as to the potential difficulty to form or discern remorse in a person suffering severe mental problems: Warren Brookbanks “The Challenges of Mental Impairment in Sentencing for Murder” [2024] NZLJ 16 at 20–21.

of general or public importance,<sup>5</sup> and nor do we discern in the sentence imposed, which is not inconsistent with the analysis in *Van Hemert*, a substantial miscarriage of justice.<sup>6</sup> It follows that we do not consider it necessary in the interests of justice for the Court to hear and determine the appeal.<sup>7</sup>

## **Result**

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

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>5</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>6</sup> Section 74(2)(b).

<sup>7</sup> Section 74(1).