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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 110/2025
[2026] NZSC 177

BETWEEN	JESSICA MULFORD Appellant
AND	THE KING Respondent

Hearing: 31 March 2026

Court: Ellen France, Williams, Kós, Miller and Cooke JJ

Counsel: N M Dutch and R E Webby for Appellant
P D Marshall and N J Wynne for Respondent

Judgment: 19 November 2026

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of five years and seven months' imprisonment is quashed, and a sentence of four years' imprisonment is substituted.

REASONS

	Para No
Ellen France, Kós, Miller and Cooke JJ	[1]
Williams J	[73]

ELLEN FRANCE, KÓS, MILLER AND COOKE JJ
(Given by Kós J)

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Introduction

[1] This sentence appeal arises from the tragic killing of a two-year-old child, Harlee-Rose Niven, in April 2022. The appellant, Ms Mulford, was Harlee-Rose's primary caregiver. She was found guilty of manslaughter after a trial by jury on a charge of murder, and guilty also of earlier injuring Harlee-Rose with intent to injure, in respect of an act involving strangulation. In February 2025, she was sentenced to five years and seven months' imprisonment for the manslaughter and discharged on the injuring charge.[1] The Court of Appeal dismissed her appeal against sentence.[2] From that decision, Ms Mulford now appeals.

[2] The sentence at issue in this appeal was imposed before the entry into force of the Sentencing (Reform) Amendment Act 2025 in June 2025.[3] That Act amended several of the provisions relevant to the appeal. But it is the prior version of the Sentencing Act 2002 that governs this appeal.[4]

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1 *R v Mulford* [2025] NZHC 249 (Campbell J) [HC sentencing notes].
2 *Mulford v R* [2025] NZCA 444, [2025] 3 NZLR 641 (French P, Jagose and Gault JJ) [CA judgment].
3 See s 2.
4 See the current version of the Sentencing Act 2002, sch 1AA cls 26–27.

The killing of Harlee-Rose Niven

[3] In early 2019, Ms Mulford entered into a relationship with Dylan Berry. She was 15 years old; he was 17. They lived in Tauranga.

[4] Harlee-Rose was then born in January 2020. Her parents were Mr Berry and another young woman, Paige Niven. She was conceived and born while Ms Mulford and Mr Berry were still in a relationship.

[5] Harlee-Rose lived with her mother, Ms Niven, for the first 18 months of her life. But Ms Niven became unable to continue to care for her. In August 2021, Harlee-Rose came to live with Ms Mulford, Mr Berry and Ms Mulford's mother at the latter's home. Under the new living arrangements, Ms Mulford became Harlee-Rose's primary caregiver. As Campbell J noted at sentencing, Ms Mulford at this time:[5]

> … carried out much of Harlee-Rose's day-to-day care. There was evidence during the trial that at times you cared very well for Harlee-Rose and that you formed a bond with her. But it was also clear that at times you struggled to cope with the demands and stresses of caring for a young child at your young age. In addition, you sometimes expressed frustration and anger at having to care for a child who was not yours.

[6] In November 2021—when Ms Mulford was 17 years of age—Harlee-Rose was seriously injured while in Ms Mulford's care. On the back of the child's neck were dark purple-red discolouration, petechiae and scratch marks. The whole of her face was swollen and discoloured. Ms Mulford said at the time that Harlee-Rose's injuries were the result of her having fallen off the deck while out of sight. Police investigated the matter but ultimately took it no further.

[7] In March 2022—shortly after Ms Mulford turned 18 years old—she, Mr Berry and Harlee-Rose moved to Hamilton. The sentencing Judge noted that this removed Ms Mulford from the immediate support of her mother and wider family and corresponded with an increase in Ms Mulford's frustration:[6]

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5 HC sentencing notes, above n 1, at [8].
6 At [10].

> On 3 April 2022, you sent a message to [Harlee-Rose's mother] telling her that you were "so over" looking after a child that she had chosen to keep and give birth to, that it was so stressful looking after a kid that was not yours and that you were struggling.

[8] On 9 April 2022, Harlee-Rose was again seriously injured while in Ms Mulford's care. Ms Mulford fetched Mr Berry from outside their house to help Harlee-Rose, who by then was unresponsive in her bed. Mr Berry performed CPR, then left with Harlee-Rose and a neighbour for Waikato Hospital. On the way, he flagged down a police officer, who performed further CPR. Harlee-Rose had bruises all over her body and blood in her nappy and mouth. It transpired that the child's liver, pancreas and small bowel were lacerated. Surgical intervention proved futile. She died in hospital the next day from hypovolemic shock. Ms Mulford again claimed Harlee-Rose's injuries were the result of an accident, telling police Harlee-Rose fell from her tricycle the day before her death.

[9] In November 2022, Ms Mulford was charged with the murder of Harlee-Rose. In August 2023, she was also charged with having injured Harlee-Rose with intent to injure by strangulation in relation to the incident in November 2021. She was tried in the High Court.[7]

[10] Ms Mulford maintained at trial that all the injuries were accidental. The jury accepted, however, that she had strangled Harlee-Rose in the first incident, finding her guilty of injuring with intent to injure. The jury also accepted the Crown's case that, in the second incident, Ms Mulford had applied force to Harlee-Rose's abdomen, rupturing her internal organs. The exact mechanism for injury was unknown, but Campbell J noted the injuries were consistent with stomping, kicking or punching.[8] The jury stopped short of finding Ms Mulford guilty of murder, returning a verdict of manslaughter.

[11] A pre-sentence report identified a "propensity for violence, a lack of parenting skills, and poor problem solving skills" as factors contributing to Ms Mulford's

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7 As this Court alluded to in *F (SC 98/2025) v R* [2026] NZSC 78, the strangulation may have been dealt with in the Youth Court had Ms Mulford been charged before her 19th birthday, but she was not: at [38] per Ellen France, Williams, Kós and Cooke JJ.

8 HC sentencing notes, above n 1, at [11].

offending. It nevertheless concluded the probability of her re-offending was low. Psychiatric and psychological reports identified that she experienced intermittent, serious depressive episodes and anxiety. She consumed cannabis regularly and methamphetamine occasionally.

High Court sentencing

[12] Campbell J discharged Ms Mulford on the injuring charge. Since Ms Mulford would be imprisoned anyway for manslaughter, that was the effect of s 18(1) of the Sentencing Act.[9] At the time she was sentenced, s 18(1) provided:[10]

> No court may impose a sentence of imprisonment on an offender in respect of a particular offence, other than a category 4 offence, or a category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years, if, at the time of the commission of the offence, the offender was under the age of 18 years.

[13] The Judge was therefore required only to determine an appropriate sentence for manslaughter. As to starting point, he sought to place Ms Mulford's offending against comparable manslaughter cases: *R v Wichman*, *R v Ikamanu*, *R v Pene* and *Robinson v R*.[11] That second case involved a father who asked his children to stop playing noisily. After his daughter failed to do so, he grabbed her arm and slammed her into a wall and then stomped on her pelvic area. He called for help and rendered aid when she began having seizures, but she died. The Judge there adopted an eight-year starting point. The other cases involved starting points between five and seven and a half years' imprisonment.

[14] The Judge compared Ms Mulford's offending against the offending in those cases to reach a starting point of seven years' imprisonment.[12] He cited serious violence, Harlee-Rose's vulnerability and breach of the trust inherent in the family unit as aggravating factors. And, "although the violence would have been of short duration and was likely to have been an impulsive reaction to … stress", Ms Mulford

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9 At [34].
10 Section 18 was replaced in June 2025 by s 11 of the Sentencing (Reform) Amendment Act 2025.
11 At [23]–[26] discussing *R v Wichman* [2016] NZHC 1663, *R v Ikamanu* [2012] NZHC 2755, *R v Pene* [2010] NZCA 387 and *Robinson v R* [2011] NZCA 479.
12 At [29].

had strangled Harlee-Rose five months earlier.[13] However, Ms Mulford's offending did not involve a prolonged attack, and there was no pattern of violence in the period immediately preceding the attack. Ms Mulford also sought help promptly.[14] The Judge considered the offending not to be as serious as in *Ikamanu* but more serious than the others because of the earlier strangulation.[15]

[15] The Judge noted that the seven-year starting point was within the applicable five- to 10-year band in the Court of Appeal's guideline judgment, *R v Taueki*.[16] The aggravating features placing Ms Mulford's offending in that band were "serious injury (and death), vulnerability and breach of trust".[17] And although *Taueki* deals with grievous bodily harm offending (not manslaughter), he considered it could be used provided adjustment was made to account for the fact Harlee-Rose had died.[18]

[16] The Judge did not, at least expressly, account for any mitigating factors when cross-checking starting point against the *Taueki* bands. He did note, however, that he set aside two considerations in setting starting point. First, he set aside the fact that Ms Mulford had experienced mental health issues from an early age. The psychologist who prepared the relevant pre-sentencing report had refrained from expressing a view as to whether Ms Mulford's mental health issues caused her offending. At most, they put her "on a path to … offending", and could only in the Judge's view be considered at stage two.[19] Likewise, he deferred consideration of "lack of parenting skills" and youth to stage two.[20]

[17] After setting a starting point of seven years' imprisonment at stage one of the sentencing methodology, the Judge turned to stage two—adjustments to the starting point to account for personal factors relating to Ms Mulford. The Judge considered

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13 At [27].
14 At [28].
15 At [29].
16 At [30] citing *R v Taueki* [2005] 3 NZLR 372 (CA) at [34(b)].
17 At [30], n 12.
18 At [30] citing *R v Tai* [2010] NZCA 598 at [12]. See also *Everett v R* [2019] NZCA 68 at [23]–[27].
19 At [32] citing *JB v R* [2024] NZCA 669 at [34].
20 At [33].

first that Ms Mulford's youth and consequent lack of parenting skills contributed to her offending:[21]

> … your young age, combined with your consequent lack of parenting skills, was a contributing factor to your offending. There was evidence that for the most part you were a diligent and attentive caregiver. This is consistent with the character references that Ms Webby supplied with her submissions. Your offending was impulsive and caused by an inability to control yourself in times of high stress.

[18] Secondly, he noted Ms Mulford, as a young person, had superior prospects of rehabilitation.[22] He added that although Ms Mulford continued to deny wrongdoing:[23]

> For this type of offending, I do not consider that acceptance of responsibility is necessary before one can rehabilitate in the sense of addressing the underlying causes of the offending. You do not have any other criminal history. You were engaged in vocational training and employment while awaiting trial. Your comments to the pre-sentence report writer and to the writers of the report on your background and personal circumstances indicate you wish to continue with that training. The character references show that you are well supported by your family and others. I accept therefore that you have good prospects of rehabilitation.

[19] Those personal factors warranted a 15 per cent discount—a modest one, in the Judge's view, given Ms Mulford's offending involved serious violence against a child.[24] The Judge considered addiction not to have contributed to Ms Mulford's offending.[25] He allowed, however, a five per cent discount in recognition of the contribution a traumatic incident earlier in Ms Mulford's life made to the offending. That discount had to be modest to avoid double-counting the discount made for youth.[26]

[20] The final sentence for manslaughter, deducting 20 per cent from the seven-year starting point, was five years and seven months' imprisonment.[27]

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21 At [37].
22 At [36].
23 At [38].
24 At [39].
25 At [43].
26 At [44].
27 At [46] and [48].

Court of Appeal decision

[21] Ms Mulford appealed against sentence to the Court of Appeal. The Court dismissed the appeal.[28] Three arguments advanced there are relevant to the present appeal.

[22] First, Ms Mulford argued the Judge impermissibly treated the earlier strangulation as an aggravating feature in setting starting point. That course, she argued, breached s 18 of the Sentencing Act. She called in aid the Court of Appeal authority *Diaz v R*, where the Court held that when sentencing an offender, a judge cannot uplift the sentence on account of offending captured by s 18.[29]

[23] That argument did not succeed. The Court of Appeal said that in *Diaz* the s 18 offending "had no relevance to the culpability of the lead offence", whereas Ms Mulford's strangulation of Harlee-Rose "was directly and intimately connected with the more serious offence".[30] The strangulation:[31]

> … was logically an aggravating feature of the manslaughter, and without it, the later offending could properly have been seen as less culpable. As it was, it meant the killing was not a one-off loss of control but rather an escalation in a pattern of violence. Furthermore, it shows the killing could even have been avoided had Ms Mulford told the truth about the earlier offending and sought greater support.

[24] Secondly, Ms Mulford argued the youth discount should have been 30 per cent, near the top of the usual 10–30 per cent range, in light of the Judge's findings as to the relevance of youth and Ms Mulford's consequent lack of parenting skills. However, the Court of Appeal considered the discount appropriate as against the "extreme violence against a defenceless toddler".[32]

[25] Thirdly, she argued that other background factors—addiction and mental health issues—warranted a discount between 10 and 15 per cent. The Court did not accept the argument as to addiction, since there was no evidence of it contributing to

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28 CA judgment, above n 2.
29 *Diaz v R* [2021] NZCA 426 at [32]–[34] per Thomas and Wylie JJ and [59] per Goddard J.
30 CA judgment, above n 2, at [27].
31 At [27] (footnote omitted).
32 At [34].

the offending.[33] Nor did it consider the Judge erred as to the discount given for mental health issues:

> [41] In relation to the mental health issues, it is noteworthy that because Ms Mulford denied killing Harlee-Rose, the psychologist report writer deliberately refrained from giving an opinion on any purported causal nexus between her psychological difficulties and the offending. Instead, the report was said to provide a psychological formulation of the context within which to understand Ms Mulford's functioning and how she interacted within intimate relationships.
>
> [42] It is clear that the Judge was cognisant of the limitations of the report but also took into account the contextual point made in the report and did so in a principled way consistent with *Berkland v R*. As with the youth discount, we accept that another Judge may have given a slightly greater discount but of itself that does not warrant appellate intervention.

Issues on appeal

[26] We first address the appropriate starting point, including whether youth-related considerations such as isolation, inexperience, impulsivity and inability to cope with stress, and associated mental health issues including depression and mental distress, bear on setting that starting point. Thereafter we consider whether s 18 of the Sentencing Act prevents the earlier injuring of Harlee-Rose by strangulation being considered as an aggravating feature in the manslaughter sentencing and, then, what sentence should have been imposed.

Setting the sentence starting point

[27] We start with a brief encapsulation of the submissions made to us.

Submissions

[28] Counsel for Ms Mulford submitted that personal factors affecting agency may go to starting point—youth being one such factor. Ms Mulford was a step-parent who had only just become an adult in criminal law terms, and she had no experience in, or tools for, looking after children. That diminished her agency and culpability—and therefore the gravity of the homicide. Guideline judgments and many comparator cases lack relevance, since they involve offending by mature adults. Were this Court

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[33] At [40].

to adopt that approach, discounts at stage two would still be available to the extent personal factors are unrelated to agency—e.g., rehabilitative prospects and disproportionate severity of imprisonment.

[29] Crown counsel submitted that youth arises only as a stage two consideration. While there is room to consider culpability in setting starting point, it is limited to the *conduct* of the offender, such as the spontaneity of his or her offending. Personal mitigating factors "intrinsic to the person"—e.g., history of having been abused, mental health issues, youth, capacity for rehabilitation—have generally and properly been considered after setting a starting point. This orthodox approach transparently explains sentencing, and promotes predictability and consistency. Crown counsel submitted Ms Mulford's proposed approach was overly complex and created a risk that youth-related factors are double counted at each stage in the sentencing exercise.

Discussion

[30] We do not consider the fixed line drawn by the Crown—excluding youth-related factors that diminish culpability from stage one—is correct, at least on the facts of this case. The considerations relevant to setting the starting point at stage one can be complex and nuanced, and may include youth-related factors where causative of the offending. We now explain, first in summary, why that is so.

[31] The essential focus in setting the starting point at stage one is on the gravity of the offending—a consideration which includes the culpability of the offender—as s 8(a) of the Sentencing Act requires. Moral culpability—and, therefore, gravity—is diminished by mitigating considerations that are an operative or proximate cause of the offending,[34] thus also reducing the imperatives of general and specific deterrence, denunciation and accountability.[35] In violence cases, a very substantial number of different factors may be weighed in setting the starting point, and not all are merely

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34 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [91] and [108] per Winkelmann CJ, William Young, Glazebrook and Williams JJ; *JB*, above n 19, at [34]; *L (CA719/2017) v R* [2019] NZCA 676 at [48]; and *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [45]–[46] and [50].

35 Sentencing Act, s 7(1)(a) and (e)–(f).

descriptive of the conduct of the offender and what they did to the victim.[36] In certain circumstances, impulsivity, mental health and youth-related factors may all diminish culpability and bear upon the sentence starting point at stage one. Furthermore, individualised sentencing requires the starting point in each case to bear a rational relationship to comparator cases.[37] A starting point set for an adult offender in a guideline judgment or comparator case is unlikely to be appropriate where youth-related factors are an operative or proximate cause of the offending.

[32] We now explain our reasoning in more detail.

[33] Prior to the Sentencing Act, the Court of Appeal developed the forerunner of the current two-stage sentencing methodology in *R v Mako*.[38] The first stage involved a starting point based on seriousness of the offending, which could then lend itself to a case-by-case tariff or guideline comparison, and the second stage adjusted the starting point depending on the offender's personal circumstances:[39]

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36 See for example the many factors identified in *Taueki,* above n 16, as potentially aggravating or mitigating the stage one starting point in grievous bodily harm offending: at [31]–[32].

37 As this Court has said, more than once, while Parliament was concerned with consistency in sentencing—s 8(e) of the Sentencing Act referring to the "general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances"—it was equally concerned that sentencing be appropriate in the particular case: *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38]; and *Berkland*, above n 34, at [22] per Winkelmann CJ, William Young, Glazebrook and Williams JJ and [200] per Ellen France J. In *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, a Full Court of the Court of Appeal re-emphasised that sentencing must achieve justice in individual cases, requiring flexibility and discretion in setting a sentence notwithstanding general guideline judgments; that consistency is not an absolute end; that sentencing remains an evaluative exercise; that guideline judgments must not be applied in a mechanistic way; and that sentencing outside bands is not forbidden, but must be justified: at [10(a)], [48], [120] and [242]. In *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [35], the Court of Appeal emphasised the need in a case where *Taueki* is the guideline judgment to go beyond simple addition of aggravating factors, but instead to compare the index offending being sentenced with the specific examples given in that judgment: see *Taueki*, above n 16, at [37], [39] and [41].

38 *R v Mako* [2000] 2 NZLR 170 (CA). Before *Mako*, the Court of Appeal had described different two-step approaches in various cases: see for example *R v Hereora* [1986] 2 NZLR 164 (CA) at 169–171; *R v Tana* (1989) 5 CRNZ 162 (CA) at 163–164; *R v Rose* [1990] 2 NZLR 552 (CA) at 557; and *R v A* [1994] 2 NZLR 129 (CA) at 130–132.

39 At [34]. See also [53].

> Once the seriousness of the particular combination of features is assessed and a starting point reached, it will be necessary to consider whether overall the crime is aggravated or mitigated by the offender's particular personal circumstances such that the sentence to be imposed should be higher or lower than the starting point. We emphasise, to dispel any doubt, that in this context a starting point is the sentence considered appropriate for the particular offending (the combination of features) for an adult offender after a defended trial.

[34] That two-stage methodology was not, however, prescribed by Parliament in the subsequent Sentencing Act. Sections 7 and 8, setting out purposes and principles of sentencing, do so without mandating a particular methodology. Nevertheless, this two-stage methodology—now commonly referred to as the "*Taueki* methodology"—has continued to be applied.

[35] Section 8(a) of the Sentencing Act provides that a court "must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender". Parliament thereby made clear that offender culpability should form part of the assessment of gravity of the offending. "Culpability" here refers to moral responsibility for the offending—requiring consideration of motive, intent, recklessness, dishonesty and role.[40] The assignment of criminal legal responsibility "is a juridical response to an offender's willed choice to offend".[41] Where will is impaired, and thereby diminished, culpability is diminished also.

[36] In *Berkland v R*, this Court likewise explained that culpability "must be assessed by reference to the offender [as well as the offence] because punishment is premised on offender agency".[42] As the Court of Appeal has said on numerous occasions, where a mitigating consideration relating to the offender is an operative or proximate cause of the offending, it affects gravity by diminishing moral culpability,[43]

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40 Andrew Ashworth and Rory Kelly *Sentencing and Criminal Justice* (7th ed, Hart Publishing, Oxford, 2021) at 137–139 citing Andrew von Hirsch *Past or Future Crimes* (Manchester University Press, Manchester, 1985) at 64–65. English and Welsh sentencing guidelines provide that culpability—part of the stage one analysis, where the court determines seriousness—"is assessed with reference to the offender's role, level of intention and/or premeditation and the extent and sophistication of planning": see Mark Lucraft and Lyndon Harris (eds) *Archbold: Sentencing Guidelines* (2027 ed, Sweet & Maxwell, London, 2026) at [SI-19.2].

41 *Shailer*, above n 34, at [50]. See also *R v Tuia* CA312/02, 27 November 2002 at [15].

42 *Berkland*, above n 34, at [91] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

43 *JB*, above n 19, at [34]. See also *Shailer*, above n 34, at [45]–[46] and [50]; *L (CA719/2017) v R*, above n 34, at [48]; and *Berkland*, above n 34, at [108] per Winkelmann CJ, William Young, Glazebrook and Williams JJ. *Berkland*, however, did not deal substantively with setting sentence starting point at stage one.

reducing the Sentencing Act imperatives of general and specific deterrence, denunciation and accountability.[44] Such a consideration is likely to be relevant in setting the sentence starting point at stage one. But if the consideration relates to personal background that only helps to explain the drivers of the offending[45] or is only operative at sentencing—e.g., because it makes incarceration relatively more severe for that offender—its relevance lies at stage two.[46]

[37] A very large number of factors may go into setting starting point, potentially making case-by-case comparison a complex task. While most of the factors identified in *Taueki* are descriptive of what the defendant did to the victim (i.e., the offending itself), not all are: premeditation, for instance, is an aggravating factor. Provocation (by the victim) and excessive self-defence (against the victim) are mitigating factors and are plainly matters that affect the culpability of the defendant—the very thing s 8(a) requires to be considered in assessing the gravity of the offending.[47] It has never been suggested that such lists of aggravating and mitigating features are closed and complete.[48] *Taueki* puts 16 ingredients into stage one (and its list is incomplete). Section 9 of the Sentencing Act adds many more not referred to in *Taueki*,[49] and that list, too, is incomplete.[50] Given personal liberty is at stake, determining sentence starting point *should* be a sophisticated exercise. It should also be *accurate*.

[38] Premeditation is an aggravating factor under *Taueki*.[51] Its counterpart is impulsive or spontaneous offending—although that is not listed as a mitigating factor.

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44 See *Berkland*, above n 34, at [92] per Winkelmann CJ, William Young, Glazebrook and Williams JJ; and Sentencing Act, s 7(1)(a) and (e)–(f).

45 See Sentencing Act, s 8(i). Such considerations make what was described in *Berkland* as a "causative contribution" to the offending: see *Berkland*, above n 34, at [109] and [120] per Winkelmann CJ, William Young, Glazebrook and Williams JJ. See also *Carr v R* [2020] NZCA 357 at [65] and [71].

46 *JB*, above n 19, at [34]; and Sentencing Act, s 8(h).

47 See *Taueki*, above n 16, at [31]–[32].

48 See *Mako*, above n 38, at [35]; *Taueki*, above n 16, at [28]; and *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [36]. See also Sentencing Act, s 9(4).

49 For instance, offending while on bail (s 9(1)(c)) or subject to a protection order (para (ca)) or restraining order (para (cab)); persistent and prolonged causation of distress (para (cac)); offending in conjunction with a child (para (cb)); digital transmission of the offending (para (cc)); particular cruelty (para (e)); or offending against a public transport worker (para (fc))—some of which post-date the offending here (and none of which apply to it).

50 See s 9(4)(a).

51 *Taueki*, above n 16, at [31(b)].

In *Orchard v R*, the impulsivity of the defendant's action mitigated the aggravating use of a car as a weapon (the victim being a passenger) at stage one.[52] In the present appeal, Mr Marshall for the Crown accepted that impulsivity or spontaneity of offending, and lack of foresight of consequences, were relevant to stage one.[53] These factors may be closely connected with youth.

[39] A number of modern appellate authorities have also acknowledged that mental health issues may alter the stage one starting point where they directly diminish offender culpability. In *L (CA719/2017) v R*, the Court of Appeal distinguished between mental disorder as a factor at sentencing of retrospective relevance—e.g., where the disorder diminishes moral responsibility, therefore demanding reduction in starting point—and as a factor of prospective relevance—e.g., where a sentence weighs more heavily due to mental disorder, warranting discount at stage two,[54] adding:

> [50] We do not agree with the Crown that allowing discounts at both stages for the same mental health disorder is to double count. On the contrary, to fail to properly account for all relevant aspects of the offence and the offender is to undercount. It is not the cause of the reduced culpability or extra burden of imprisonment, but the presence of those aspects which must be provided for under ss 7–9 of the Sentencing Act 2002 … and in accordance with *Taueki* methodology.

[40] A similar approach was taken by the Court of Appeal in *JB v R*, where a 20-year-old single mother, who suffered from reactive attachment disorder, fatally shook her newborn child. She pleaded guilty to manslaughter. The Court approached the sentencing exercise in this way:[55]

> … in sentencing, the court should first assess the evidence of an offender's mental health condition and then determine its connection to the offending. Where the nature and strength of the connection is operative or proximate and goes to the degree of culpability of the offender, diminishing their willed choice, it should be taken into account when fixing the starting point. Background factors, often historic but which have effectively put an offender on a path to the offending such that they can be considered to have made a causative contribution, are then more properly addressed at the second stage of sentencing, when taking into account in mitigation factors personal to the offender.

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52 *Orchard*, above n 37, at [34].
53 Campbell J in fact referred to impulsivity at both stages: see above at [14] and [17].
54 *L (CA719/2017) v R*, above n 34, at [48]–[49].
55 *JB*, above n 19, at [34].

The Court was satisfied there was evidence of the causative impact of the condition on the appellant's culpability.[56] It directly affected her ability to cope with her children and therefore diminished her willed choice. That warranted a lower starting point.[57]

[41] Focusing now on youth-related factors, in *G (SC 130/2024) v R* this Court recently summarised what was described as the product of "[s]ettled science and years of judicial experience in relation to the distinctive nature of offending by young people" in these terms:[58]

> (a) Adolescent behaviour is driven by biology. It reflects the fact that development of the parts of the brain that control executive functioning is not complete until around age 25. Young people tend therefore to undervalue risk, lack foresight and impulse control, and be more susceptible to peer influence.
>
> (b) Young people who commit serious offences will often also have intellectual deficits, mental illness and/or have suffered abuse or other childhood trauma. These characteristics also tend, separately, to mitigate culpability.
>
> (c) Prison is particularly harmful for young people: they are often targeted by older, hardened prisoners; they tend to engage in peer and adult-led antisocial behaviours in prison; and, whether seeking protection from endemic prison violence or a secure sense of identity, young people are far more likely to take on rigid counter-social identities while serving prison sentences.
>
> (d) On the other hand, if they can be kept out of prison, young people are more receptive to treatment than adult offenders and therefore have better prospects of rehabilitation, this because anti-social behaviours tend to be less entrenched than is the case for adult offenders.
>
> (e) Young offending is almost always a passing phase; at best imprisonment lengthens the phase, delaying eventual desistence, and at worst it turns a temporary phenomenon into a resilient characteristic or even a life course.

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56 At [45].

57 At [54]. Against this line of authority are cases where mental health issues have been left to stage two. That approach may have been taken because mental health issues were not on the facts considered to have caused the offending (as in *Shailer,* above n 34) or because they did not affect the "character and gravity of the offending" (as in *Orchard*, above n 37, at [45]), or because mental health issues had earlier been understood generally to be a stage two consideration (as in *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411).

58 *G (SC 130/2024) v R* [2026] NZSC 19 at [38] per Winkelmann CJ, Glazebrook, Williams and Kós JJ (footnotes omitted).

[42] Past sentencing authority has not always recognised the relevance of points (a) and (b) to the culpability of young offenders, and thereby to the gravity of their offending at stage one of the sentencing analysis. The guideline judgment formulation given in *Mako*—based on an adult offender—did not require all youth-related mitigating or aggravating factors to be removed to stage two of the sentencing process any more than it did mental health issues, impulsivity or other causative factors associated directly with the offender. Youth and immaturity are often reasons why offending is impulsive. Guideline starting points for adult offenders are not necessarily appropriate in the case of a youth offender, particularly where youth-related factors are directly causative of the offending.[59]

[43] We also observe that for courts to give a simple "discount for youth" is inherently incoherent. Attribution to reason is required. Reasons differ.[60] Some youth-related reasons—e.g., inexperience, inability to cope as an adult might when stressed, impaired self-control, impaired capacity to assess risk, susceptibility to peer pressure and absence of family support—may directly affect culpability. Others, such as depression and mental distress or other mental health issues experienced by a teenage offender, may be better characterised as relating to mental health. These factors may or may not alter the starting point depending on whether they are an operative or proximate cause of the offending. A very different consideration is the disproportionate severity of imprisonment for young people—reflected in ss 8(h) and 9(2)(a) of the Sentencing Act. A third, and quite different, consideration is the way in which youth impacts upon rehabilitation: a young person without prior convictions is likely to have materially better prospects of rehabilitation.[61] These are dealt with discretely under stage two—the third consideration by giving credit separately for past good character and for rehabilitation prospects.

[44] Ultimately, what matters most in setting a just but consistent sentence starting point at stage one is identifying factors that bear on gravity and culpability, and then relating those in a rational way to starting points imposed in appropriate

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59 At [72] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.
60 See above at [41]–[42].
61 *R v Chankau* [2007] NZCA 587 at [26]–[27].

comparator cases.[62] That is the approach we will take when turning to consider what sentence should have been imposed here. But first, we consider the effect of s 18 of the Sentencing Act.

What effect does s 18 of the Sentencing Act have?

[45] Campbell J and the Court of Appeal both considered the earlier injuring of Harlee-Rose by strangulation was an aggravating consideration in sentencing Ms Mulford for the manslaughter.[63]

Submissions

[46] Counsel for Ms Mulford submitted before us that s 18 of the Sentencing Act precluded an uplift in starting point for the strangulation. The uplift meant she was now effectively serving a sentence of imprisonment for the strangulation. There was no basis in the Act to make the distinction drawn by the Court of Appeal—between, on the one hand, s 18 offending of "no relevance to the culpability of the lead offence" and that which is "directly and intimately connected" with it.[64] Had Ms Mulford been charged at the time, or promptly, either for injuring with intent to injure or criminal neglect, she would have been dealt with in the Youth Court and likely received a discharge without notation under s 282 of the Oranga Tamariki Act 1989. It was inherently unfair that Ms Mulford was sentenced to a higher term of imprisonment only because the prosecution was not promptly commenced.

[47] Mr Marshall for the Crown submitted that s 18 did not apply in this case, except as applied by the Judge in discharging Ms Mulford for strangulation. Section 18 applies only to category one, two and some category three offences committed when the offender was under 18 years old. Section 18 does not apply to Ms Mulford's manslaughter offending—a category 4 offence committed at age 18 and for which imprisonment was imposed. The Court of Appeal was correct to distinguish *Diaz* because s 18 does not require sentencing judges to blind themselves to relevant

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62 See *Orchard*, above n 37, at [35].
63 See above at [14] and [22]–[23].
64 CA judgment, above n 2, at [27].

aggravating conduct. A "blinkered approach" is inconsistent with the Sentencing Act and would prevent courts from duly administering justice.

Discussion

[48] Section 18 arose from s 8 of the Criminal Justice Act 1985, which provided:[65]

> **8 Limitation on imprisonment of persons under 16 years**
>
> (1) No court shall impose a sentence of imprisonment on a person who *at the time of conviction* is under the age of 16 years except for a purely indictable offence.
>
> …

Section 8 was added to that Act at select committee stage, without explicit explanation,[66] although the Minister of Justice at the time, the Hon Geoffrey Palmer, later said that the provision "arises from widely held concerns about the detrimental effects of penal institutions on very young offenders".[67]

[49] Section 18 as it was at the relevant time here is different. As noted above at [12], until 2025, and at the time of Ms Mulford's offending, s 18(1) provided:[68]

> **18 Limitation on imprisonment of person under 18 years**
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> (1) No court may impose a sentence of imprisonment on an offender in respect of a particular offence, other than a category 4 offence, or a category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years, if, *at the time of the commission of the offence*, the offender was under the age of 18 years.

[50] Offending caught by s 18(1), in circumstances where the offender nevertheless will be sentenced to imprisonment on other charges, ordinarily results in conviction

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65 Emphasis added.

66 Criminal Justice (No 2) Bill 1984 (70-2), cl 7A; and (12 June 1985) 463 NZPD 4759.

67 (23 July 1985) 464 NZPD 5833. See also GCPA Wallace *Report to the Secretary for Justice on the Enquiry into ACORD Complaints Concerning Detention of Young Persons* (21 November 1984), a report cited by the Minister, at 22–24.

68 Emphasis added. As noted above n 10, s 18 was replaced in 2025 by s 11 of the Sentencing (Reform) Amendment Act (which does not govern this appeal). Subsection (4) now provides that the prohibition on imprisonment "does not apply if the offender is already serving a sentence of imprisonment for any other offence that they committed, in whole or in part, before, with, or after the offence".

and discharge.[69] Campbell J took that approach to the injuring charge, which was caught by s 18.[70]

[51] A series of Court of Appeal decisions has held that offending caught by s 18(1) must not be used to uplift a prison sentence for other offending. In *Diaz*, for instance, Thomas and Wylie JJ held:[71]

> It would be inconsistent with the policy underpinning s 18 for the Court to uplift a sentence of imprisonment by reference to a charge which, pursuant to s 18, could not itself result in a sentence of imprisonment. Such an uplift would result in the young person spending (additional) time in prison as a result of the less serious charge: the very thing that s 18 is intended to preclude.

[52] The question here is whether relevant prior serious violent offending against Harlee-Rose may be taken into account as an aggravating feature of the subsequent manslaughter. In a nutshell, does the prior strangulation of Harlee-Rose enlarge the gravity of the subsequent violence resulting in her death? But for s 18, the answer would plainly be yes.

[53] In our view, s 18 did not require Campbell J to disregard relevant prior offending which increased the gravity of the imprisonable offending. As was noted in *Van Hemert v R*:[72]

> Where the offender has a prior record of similar 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.

The essential focus is on the gravity of the index offending, for which a sentence of imprisonment is available. The controlling consideration is culpability for that offending.

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69 See for example *A (CA104/2022) v R* [2022] NZCA 651 at [80]; *Wiwarena v R* [2023] NZCA 384 at [31]; *R v Ormsby-Turner* [2023] NZHC 1817 at [53]; *Martin v R* [2024] NZHC 2772 at [9] and [12]; and *R v Lama* [2025] NZHC 2059 at [57] and [117].

70 See above at [12].

71 *Diaz*, above n 29, at [32]. See also at [59] per Goddard J. See further *Waikato-Tuhenga v R* [2021] NZCA 503 at [27]; *A (CA104/2022) v R*, above n 69, at [79]–[80]; and *[H] v R* [2024] NZCA 500 at [152].

72 *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at [117] per Williams J dissenting (footnote omitted).

[54] Section 18 simply does what it says, which is to preclude a sentence of imprisonment being imposed on some category 3 and all category 1 and 2 offending. That may not in fact necessitate conviction and discharge for those offences, but that has been the sentencing practice. The practice of *uplifting* sentence for other offending imposes a sentence for that other offending, as the Court of Appeal in *Diaz* recognised in the passage cited above at [51].

[55] But s 18 does not expressly or necessarily compel the sentencing judge to disregard prior conduct directly aggravating culpability for the *index offence* of manslaughter—here, prior violence against the same victim. The prior offending against Harlee-Rose increases the seriousness of the manslaughter because it was not a one-off act of violence against her, and because the first occasion should have brought home to Ms Mulford her capacity to lose control.

[56] At the same time, however, it would be appropriate to take into account that the earlier violence occurred when the offender was a child, subject to very similar agency-reducing circumstances as applied at the time of the index offending, which in turn reduces its significance in terms of culpability. In the present case, the violence against Harlee-Rose began when Ms Mulford was 17. So, the increased gravity of the later offending is qualified by youth factors applying at the time of the earlier offending.

What sentence should have been imposed?

[57] The foregoing reasoning requires this Court to reconstruct the sentencing of Ms Mulford on the manslaughter charge, taking into account both (1) youth-related factors of isolation, inexperience, impulsivity and inability to cope with stress, and associated mental health issues, including depression and mental distress and (2) the prior offending against Harlee-Rose, at stage one. Obviously, those factors pull in opposite directions.

Starting point

[58] In this case, youth-related factors of isolation, inexperience, impulsivity and inability to cope with stress, and associated mental health issues including depression

and mental distress, must be accepted as an operative or proximate cause of the crime committed. Campbell J noted that there was evidence that Ms Mulford had mostly cared very well for Harlee-Rose and had formed a bond with her. But she struggled to cope with the demands and stresses of caring for a young child at her own young age. The Judge was also satisfied that Ms Mulford's youth, and consequent lack of parenting skills, was a contributing factor to the offending. Her offending was "impulsive and caused by an inability to control [herself] in times of high stress".[73] We accept that these youth-related factors and associated mental health issues were an operative and proximate cause of the offending. These are matters calling for consideration in setting the sentence starting point.

[59] Bearing that conclusion in mind, we now look for comparable cases. In doing so, we record that we do not find those concerning angry, adult fathers harming their children of much assistance.[74] The circumstances of the present appeal, and the other cases we are about to mention, are far removed from them. Most involve the not uncommon phenomenon of a devoted caregiver who momentarily loses control and kills the child they are caring for.

[60] In *E (CA689/10) v R*, the appellant had killed her 13-month-old son by leaving him in deep bath water, unsupervised for 15 minutes.[75] Only the week before the offending, she saved the child from drowning when he had fallen forward into the bath water. She was therefore taken to know acutely about the risk of leaving her child in the bath.[76] However, against that, the neglect was one-off, and the appellant left her son alone in the bath to care for her daughter.[77] A starting point of three years was adopted before consideration of the appellant's depressive disorder.[78]

[61] In *R v Paea*, Venning J adopted a starting point of three years and nine months' imprisonment in sentencing the young mother who—when 18 years old—had shaken

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73 See above at [5] and [17].
74 Counsel referred to *R v Iorangi* CA533/99, 30 March 2000; *R v Broadhurst* [2008] NZCA 454; *Woodcock v R* [2010] NZCA 489; and *Ikamanu*, above n 11, aff'd [2013] NZCA 510.
75 *E (CA689/10) v R*, above n 57.
76 At [64].
77 At [65]–[66].
78 At [67].

her seven-week-old son to death.[79] She had been alone with her son at home. On three occasions when the child was unsettled and cried, she rocked him to the point she shook him. The Judge noted the offending was a one-off incident where Ms Paea could not cope with her son crying.[80] He also noted that while psychiatric reports did not support a reduction in the charge to infanticide, they identified personality dysfunction from severe abuse and a significant history of drug and alcohol use.[81] Before setting the starting point, the Judge made these remarks:

> [13] I take into account in your favour the matters that Ms Epati and Mr Rishworth refer to. You were only 18 years old at the time of this incident. You are immature for your age. You, as I have noted, suffered severe abuse and trauma as a child and suffer personal psychological dysfunction. This was a one-off incident. You were a very young and ill-equipped new mother. You entered a guilty plea and accepted responsibility through that guilty plea at an early stage. You clearly show emotion for the consequences of your actions on that day.

[62] In *JB*—the details of which we described above at [40]—the Court of Appeal acknowledged circumstances suggesting the mother in that case, who also shook her baby, was less culpable than Ms Paea:[82]

> … some aspects of the appellant's circumstances suggest her culpability was even less than Ms Paea's. The two mothers were similar in age but Ms Paea was living with her partner, had not consistently asked for help, signalling her fear of becoming angry with her baby, and did not have the additional significant challenge of also looking after, on her own, a two and a half year old with impaired cognitive and physical function.

However, the Court considered *Paea* "somewhat of an outlier".[83] Other factors bearing on starting point included that Ms JB failed to obtain medical treatment even though it was clear her baby needed it, that she had earlier assaulted him, and her reactive attachment disorder.[84] The Court adopted a starting point of four years and eight months' imprisonment.

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79 *R v Paea* [2016] NZHC 822 at [14].
80 At [11].
81 At [6]–[8].
82 *JB*, above n 19, at [49].
83 At [50].
84 At [51] and [54].

[63] In *Pene*, there had been a pattern of violence over two months, culminating in the foster mother hitting, shaking and ultimately killing her crying 13-month-old.[85] On the Solicitor-General's appeal, the Court of Appeal adopted a five-year starting point—one year more than the sentencing Judge. That was the lowest possible starting point available—the range being between five and seven years—by reference to cases of comparable seriousness.[86] The Court of Appeal noted that Ms Pene was stressed in the period preceding the homicide.[87] It also noted the sentencing Judge had considered at both stages one and two a psychiatrist's tentative conclusion that significant depressive illness may have played a role in the offending, and held that that was an error leading to too low a starting point.[88] Having corrected the starting point, the Court was not inclined to disturb the 12-month discount at stage two, noting that Ms Pene had been "badly let down by her partner and by her partner's family and her own".[89]

[64] The 24-year-old father in *R v Wallis* had killed his premature five-month-old daughter by smacking her in the head two or three times in response to her crying.[90] The child's age and vulnerability, the breach of trust, and the violence were aggravating factors.[91] But a neonatal nurse had said the father was caring and loving. The Judge observed the offending involved a spontaneous loss of control, possibly explained by overwhelm, stress and tiredness, and noted the father immediately sought assistance.[92] These led to a starting point of five and a half years' imprisonment.[93]

[65] Finally, in *Robinson*, a foster mother in her late 30s had killed a 14-month-old child in her care, probably by violently shaking her.[94] The appellant had five children of her own and had brought 18 children through her care over a three-year period. A psychiatric report noted the appellant had experienced thoughts of suicide,

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85 *Pene*, above n 11.
86 At [11] and [15].
87 At [8].
88 At [6] and [9]–[10].
89 At [16]. Ms Pene was sentenced under the methodology in *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298. Contrast *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [45]–[47]. Accordingly, a further discount was given in a *third* stage on account of Ms Pene's guilty plea—another discount the Court of Appeal did not disturb: *Pene*, above n 11, at [17].
90 *R v Wallis* [2023] NZHC 2029.
91 At [30].
92 At [31] and [34].
93 At [35].
94 *Robinson*, above n 11.

self-harm and depressed mood in adolescence but had achieved a functional life prior to the offending with support from her family and husband. Following the child's death, however, the appellant had experienced serious anxiety and stress, leading to admission to a mental health facility on three occasions. There was also an incident—probably of self-harm—leading to amputation of her left lower leg.

[66] The Court of Appeal upheld the seven-and-a-half-year starting point, taking into particular account the observations the Court had made in *R v Leuta*:[95]

> Violence inflicted upon a child is worse than that directed at another adult. Defencelessness and vulnerability are significant features, as is abuse of a position of power and responsibility. The fragility of young children, particularly infants, is frequently referred to, and too often overlooked. The lethal consequences of shaking and striking babies is often enough publicised. There can be little reduction in criminality these days for a claim that the danger was not realised.

The appellant's mental health issues justified a two-year discount at stage two,[96] but were not taken into account in setting the starting point.

[67] We accept the evidence here shows that twice Ms Mulford reached the end of her capacity to cope meaningfully with the situation she found herself in—isolated, under great stress and emotionally and otherwise unsupported by her partner. On the second occasion, that occurred in a context in which she lacked the support mechanism of her family, who remained behind in Tauranga. We accept, as Campbell J did, that Ms Mulford had been for the most part a diligent and attentive caregiver, and the offending was both impulsive and caused by an inability to cope with high levels of stress.[97] In considering the effect of youth generally on Ms Mulford's offending, we bear in mind Ms Mulford's isolated living circumstances and mental health issues we have described.

[68] If the effect of youth-related factors on Ms Mulford's culpability, including isolation, inexperience, impulsivity and inability to cope with stress, and associated mental health issues including depression and mental distress, were put to one side,

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95 At [11] citing *R v Leuta* [2002] 1 NZLR 215 (CA) at [77] per Elias CJ, Gault, Blanchard and McGrath JJ.

96 At [27]–[32].

97 See above at [5], [14] and [17].

but the prior offending was taken into account, six years' imprisonment would be the appropriate starting point for the manslaughter of Harlee-Rose by an adult offender. However, in light of the authorities discussed above, and now taking account of those considerations just put to one side, we conclude that a starting point of four years and nine months' imprisonment is appropriate here.

End point

[69] Campbell J allowed a five per cent reduction (the equivalent of three months' imprisonment from our starting point) for prior trauma and (partially related) mental health considerations too remote to be considered at stage one.[98] We agree that is still appropriate here. We would add to that a further reduction of about 10 per cent (six months) for Ms Mulford's good rehabilitation prospects. We note the Judge had wrapped that into his stage two discount for youth.[99]

[70] The end sentence, therefore, is one of four years' imprisonment.

Result

[71] The appeal is allowed.

[72] The sentence of five years and seven months' imprisonment is quashed, and a sentence of four years' imprisonment is substituted.

WILLIAMS J

[73] I dissent only in relation to the majority's view of the effect of s 18(1) of the Sentencing Act 2002, which proscribes the imposition of imprisonment for the offence categories referred to.[100]

[74] The issue is whether the court can increase a sentence for separate offending not covered by s 18 because an earlier offence within the scope of s 18 increases the

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98 See above at [19].
99 See above at [18].
100 Section 18(1) as it applied at the time Ms Mulford was sentenced is reproduced above at [12] and [49].

gravity of the later offending. I consider that it cannot. The point remains important despite the amendment of s 18 in 2025 excluding its application to offenders who are "already serving a sentence of imprisonment" for another offence.[101] That amendment does not, on its face, exclude cases such as Ms Mulford's from the protection of s 18 because she was not serving a prison sentence for the manslaughter of Harlee-Rose when she was sentenced for the injuring offence.[102]

[75] The trigger for the application of the predecessor to s 18(1)—s 8(1) of the Criminal Justice Act 1985—was the age of the offender at the time of their conviction. Under s 18(1) it is now the age of the offender at the time of the offence. This brought the section into line with the approach in s 2(2) of the Oranga Tamariki Act 1989.[103] It was common ground before us that s 18(1) prevented Ms Mulford from being formally sentenced to imprisonment for injuring Harlee-Rose, as she committed that offence when she was 17. She was convicted and discharged in the High Court accordingly.[104]

[76] In the High Court, Campbell J considered that the prior injuring offence increased Ms Mulford's culpability for the manslaughter. It meant that Harlee-Rose's death was not the result of an isolated act of violence but part of a pattern.[105] Although the Judge did not attribute a particular value to that feature when arriving at his starting point of seven years, it was plainly important in his evaluation: but for the earlier offence, the starting point for the later offence would not have been as high.

[77] In my view, s 18(1) not only prevents the court from sentencing Ms Mulford to prison for the earlier offence but also prevents it from using the offence as an

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101 Sentencing (Reform) Amendment Act 2025, s 11.

102 According to the Departmental Report on the Sentencing (Reform) Amendment Bill 2025 (77-1), the amendment was intended to address the anomaly that young offenders serving a term of imprisonment could not receive a further sentence for offending committed while in prison. The examples given were assaults on other prisoners or Corrections officers. See Ministry of Justice | Tāhū o te Ture *Departmental Report: Sentencing (Reform) Amendment Bill* (12 December 2024) at [211]–[212].

103 The Departmental Report on the Sentencing and Parole Reform Bill 2001 (148-1) noted that age had "been raised to 17 at the time of offending to align it with the Human Rights Act [1993] and the [Children, Young Persons, and Their Families Act 1989]": Ministry of Justice | Tāhū o te Ture *Sentencing and Parole Reform Bill — Report of the Ministry of Justice, Department of Corrections and Department for Courts (3)* (11 December 2001) at 22.

104 *R v Mulford* [2025] NZHC 249 (Campbell J) at [48].

105 At [27] and [29].

indirect justification for increasing her term of imprisonment for later offending. I consider that the narrower approach favoured by the majority is too formalistic in light of the important interests s 18(1) purports to protect.

[78] There are two circumstances in which a sentencing Judge might increase a sentence on account of earlier offending. The first is where the sentence for a lead offence is increased by way of punishment for other lesser offences that fall to be sentenced at the same time. This was the situation in *Diaz v R* as cited by the majority.[106] Increases of this kind are not permitted if the other offence is covered by s 18. The second is the kind of increase applied to the sentence for an index offence to take account of earlier offending, for which the offender has often already been sentenced.[107] These increases are, as I said dissenting in *Van Hemert v R*, justified in part on the basis that a pattern of prior relevant offending increases the offender's culpability for the index offence.[108]

[79] The majority's approach in this case locates the increase applied to Ms Mulford's sentence on account of the injuring offence in the second category I have just described. The majority treats the earlier injuring offence as aggravating Ms Mulford's culpability for the manslaughter, rather than as offending attracting its own punishment through an adjustment to the manslaughter sentence. In my view, that distinction does not take the increase outside s 18(1).

[80] I accept that, as I said in *Van Hemert*, an increase in the second category does not involve re-punishment.[109] It is nevertheless difficult to see why increases of the type applied in Ms Mulford's case are not "in respect of" the earlier offence and therefore caught by s 18(1). "In respect of" is a common phrase of wide import which is regularly deployed in legislation and legal discourse. It just means "by reason of", "in connection with" or "in relation to". It is admittedly somewhat elastic, but unless the context suggests to the contrary, the connection between subject and object need

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106 See above at [51] citing *Diaz v R* [2021] NZCA 426.

107 Ms Mulford's case is unusual in that the earlier offending was dealt with at the same time as the manslaughter charge. As the majority notes, this resulted from the fact that police investigated the earlier offending at the time it occurred but took it no further: see above at [6].

108 *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at [117].

109 At [117].

not be direct as a matter of ordinary usage, as long as it is apparent. It is plainly apparent in this case.

[81] Should recourse to statutory intent be required, then it can also be said that this broader construction is consistent with the purpose of s 18(1), which is to prevent those who were under 18 when they offended from being imprisoned "in respect of" the offence categories there described. That the relevant trigger was changed from the date of conviction to the date of offence is of some significance in that respect. As this Court noted recently in *G (SC 130/2024) v R* and in *F (SC 98/2025) v R*, that change reflects the fact that the culpability of a young offender does not increase with the passage of time after their offending.[110] Further, while a pattern of offending will usually increase the culpability of an offender facing sentence for its latest iteration, that proposition is less compelling in the case of young offenders. As the majority acknowledges, even where there is an increase on account of earlier offending, the impact of the earlier offending on the gravity of the later offending "is qualified by youth factors applying at the time of the earlier offending".[111] The recognition of those youth factors in sentencing is, I suggest, the very point of s 18(1). Section 18(1) gives those youth factors a specific prohibitory consequence. It does not merely require them to be given mitigating weight: where the earlier offence falls within s 18(1), it cannot be used to increase the term of imprisonment for the later offence.

[82] To suggest that a separate offence (injuring with intent) committed at a different time (five months earlier) and the subject of a separate form of disposition (conviction and discharge) can still increase the index sentence (manslaughter) without that increase being "in respect of" the earlier offence seems, to me, artificial. From the perspective of the prisoner, the increase is what counts, and the sole justification for the increase is clear. But for the injuring offence, the sentence would have been shorter.

[83] I acknowledge that the offending in this case was against the same victim, so there is at least a degree of proximity between the earlier offence and the

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110 *G (SC 130/2024) v R* [2026] NZSC 19 at [9] and [67] per Winkelmann CJ, Glazebrook, Williams and Kós JJ; and *F (SC 98/2025) v R* [2026] NZSC 78 at [1] per Ellen France, Williams, Kós and Cooke JJ.

111 Above at [56].

index offence. However, the use of this factor by the majority as increasing Ms Mulford's culpability for manslaughter does not, in my view, resolve the statutory question of whether the increase is "in respect of" an offence to which s 18 applies.[112]

[84] In any event, I doubt the earlier offending was of aggravating significance. As the majority acknowledges, it occurred in very similar agency-reducing circumstances to the manslaughter.[113] I see it as further evidence that Ms Mulford was not coping with the demands of caring for Harlee-Rose. Viewed in that light, it helps to explain the later offending as another manifestation of her immaturity and inability to cope, rather than necessarily increasing her culpability for the manslaughter. My interpretation of s 18(1) therefore aligns with the justice of this case.

[85] For these reasons, I consider that s 18(1) prevented the injuring offence from being used to increase Ms Mulford's term of imprisonment for manslaughter. As I have noted, the precise effect of the injuring offence on the starting point is not clear.[114] In the circumstances, taking an evaluative approach, I would reduce the adjusted starting point adopted by the majority by a further six months to exclude the aggravating effect of the injuring offence. Applying the majority's approach to discounts,[115] which I agree with, I would have quashed the sentence imposed and substituted an end sentence of three years and seven months' imprisonment.

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112 See above at [55].
113 See above at [56].
114 Above at [76].
115 See above at [69].