NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES OF THE APPELLANT'S ELDEST CHILDREN REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 76/2024
[2026] NZSC 178

	BETWEEN	SOUTHERN CHEYENNE THOMPSON Appellant
	AND	THE KING Respondent

Hearing: 7 July 2026

Court: Winkelmann CJ, Ellen France, Williams, Miller and Cooke JJ

Counsel: S J Gray and C Shao for Appellant
M J Lillico and B So for Respondent

Judgment: 19 November 2026

JUDGMENT OF THE COURT

A The application to adduce new evidence is granted.

B The appeal is allowed.

C The proceeding is remitted to the High Court for resentencing.

D Pursuant to s 57(1)(c) of the Bail Act 2000, the appellant is remanded in custody.

REASONS
(Given by Ellen France J)

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The appeal

[1] Southern Thompson pleaded guilty to the murder of her 18-month-old daughter, Comfort, and to two charges of ill-treatment along with one charge of injuring with intent to injure. Ms Thompson was sentenced by Lang J in the High Court to life imprisonment with a minimum period of imprisonment (MPI) of 17 years on the charge of murder.[1] She appealed to the Court of Appeal against the length of the MPI on the basis that sentence was manifestly unjust. The Court of Appeal dismissed the appeal.[2] Ms Thompson was given leave to appeal to this Court.[3] Leave was granted so that the Court could "address the correct approach to manifest

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1 *R v Thompson* [2022] NZHC 1038 [Sentencing remarks]. On the remaining charges, Ms Thompson was sentenced to three years' imprisonment. All the sentences were to be served concurrently: see at [35].

2 *Thompson v R* [2024] NZCA 266 (Katz, Palmer and Jagose JJ) [CA judgment].

3 *Thompson v R* [2026] NZSC 12 (Ellen France, Miller and Cooke JJ).

injustice under s 104(1A)(h) of the Sentencing Act 2002 and its application to the facts of this case".[4]

[2] The question as to the approach to the test of manifest injustice arises in this way. Under s 104 of the Sentencing Act, a person sentenced to life imprisonment for murder must be sentenced to an MPI of at least 17 years if one or more of the circumstances set out in s 104(1A) apply. There is an exception to the requirement to impose an MPI of 17 years where the court is satisfied that to do so "would be manifestly unjust".[5] There is no dispute that at least one of the listed circumstances applies, namely, that Comfort "was particularly vulnerable because of [her] age" (s 104(1A)(h)). Ms Thompson's case is that an MPI of less than 17 years should nonetheless have been imposed because the 17-year term was manifestly unjust given her mental state at the time of the offending. Supporting the judgment of the Court of Appeal, the Crown says that the test for manifest injustice was not met here.

[3] We begin by setting out the background, canvassing the facts, the key statutory provisions, and the approach to sentencing taken in the High Court and the Court of Appeal.

Facts

[4] Comfort was born on 12 January 2017. She was the middle child of three. As we shall discuss, during the months leading up to Comfort's death, the family's living arrangements were described by the sentencing Judge as "particularly abysmal".[6] Ms Thompson and her partner and children were living with other family members and their children in squalid conditions, and tensions between family members were "high".[7] Over the relevant period Ms Thompson often cared for a family member's young child. In April 2018, another child who was also living in the house, Ms Thompson's sister's baby, died.

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4 At [1].
5 Sentencing Act 2002, s 104(1).
6 Sentencing remarks, above n 1, at [30].
7 At [30].

[5] Comfort spent the first four months of her life in hospital to receive treatment for gastroschisis, a condition she had at birth. Her condition meant she needed extra care in the early stages of her life.

[6] Comfort was 18 months old when, on 24 July 2018, she died in hospital as a result of head injuries caused by blunt force trauma.

[7] The post-mortem examination and police investigation subsequently revealed that Comfort had been physically ill-treated and abused in various ways over the period from January 2018 until her death. The abuse appears to have commenced about the time Ms Thompson gave birth to her third child on 30 January 2018, and the injuries for which Ms Thompson was sentenced were inflicted after that date.[8] Comfort's older sibling was aged three in January 2018. Ms Thompson's other children did not show any signs of neglect or abuse.

[8] The sentencing Judge referred to the fact that over the six months from January 2018, Ms Thompson had assaulted Comfort by slapping and hitting her head, face and body. Ms Thompson would grab Comfort with considerable force and scratch her with her fingers. She failed to change Comfort's dirty nappies and did not keep her clean and warm. Nor was Comfort provided with enough food to ensure she was well nourished. Ms Thompson would also keep her confined to her cot and a couch for extended periods and would physically punish her if she tried to leave these areas.

[9] The Judge noted that the ill-treatment occurred on a regular basis. At one point Comfort was seen by witnesses to have two black eyes. The post-mortem examination showed "extensive soft tissue bruising to almost every part" of Comfort's body.[9] She also had "extensive scratch marks all over her body, particularly on her neck and chest".[10] The nappy rash that she experienced was "so severe that large parts of her skin were peeling off parts of her buttocks".[11] Comfort also had what the Judge

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8 The ill-treatment charge covered the period from 1 January 2018 until the day before Comfort's death.

9 Sentencing remarks, above n 1, at [5].

10 At [5].

11 At [6].

described as "a large, and undoubtedly painful, ulcer under her chin".[12] It appeared this was most likely caused by Comfort dribbling and Ms Thompson not cleaning her face.

[10] At the time of her death, Comfort weighed just eight kilograms and was malnourished.

[11] The assault that led to the charge of injuring with intent to injure left Comfort with a torn frenulum, the thin membrane of skin between the top of her lip and her gum. The assault which caused this injury likely led to the loss of one tooth and the loosening of another. The Judge said it was "likely that this assault occurred within two weeks prior to her death".[13] Ms Thompson had admitted to assaulting Comfort on the face and mouth leading to swollen lips and a bloody mouth.

[12] The charge of ill-treatment of Comfort by not seeking medical advice and care for her concerned a healing fracture discovered on her left clavicle. That fracture was apparent as a protrusion under the skin and would have been noticeable to Ms Thompson. The injury would have caused Comfort a lot of pain.

[13] In relation to the cause of death, the Court of Appeal noted:[14]

> [6] The pathologist found that Comfort died of head injuries caused by blunt force trauma. She had suffered a number of impacts to her head that caused both a subdural and subarachnoid haemorrhage. She also had extensive retinal haemorrhaging, which is indicative of blunt force trauma to the head. In addition, Comfort was found to have extensive bruising in many locations on her scalp. Precisely how these injuries were caused is not known.

[14] Ms Thompson initially pleaded not guilty to the various charges. Her trial was set down for 9 February 2021 but she absconded prior to trial and did not surrender until after the jury had been discharged. She subsequently entered guilty pleas on the charges of ill-treatment on 30 July 2021 and pleaded guilty to the murder and injuring with intent to injure charges on 8 April 2022, one month before her second trial was scheduled to begin.

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12 At [6].
13 At [8].
14 CA judgment, above n 2.

The key statutory provisions — ss 102–104 of the Sentencing Act 2002

[15] Section 102(1) of the Sentencing Act enacts a presumption in favour of life imprisonment for murder except where that term would be manifestly unjust.

[16] Under s 103(1)(a), where a court sentences an offender convicted of murder to imprisonment for life, the court must also order that the offender serve an MPI under that sentence. The MPI may not be less than 10 years and must be the minimum term of imprisonment that the court considers necessary to satisfy what are often termed "law and order" purposes, that is:[15]

> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.

[17] Under s 104(1), the court must make an order under s 103 imposing an MPI of at least 17 years if any of the circumstances set out in subsection (1A) of s 104 apply, except where the court "is satisfied that it would be manifestly unjust to do so". Relevantly in Ms Thompson's case, those circumstances include where the deceased was "particularly vulnerable because of their age, health, or any other factor", and where the murder was committed "with a high level of brutality, cruelty, depravity, or callousness".[16]

The approach taken to sentencing in the High Court and Court of Appeal

The High Court

[18] In the High Court, Lang J said the key question was the length of the MPI to be imposed.[17] That was because it was agreed s 104 was engaged which required an MPI of at least 17 years unless that would be manifestly unjust. It was common ground

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15 Section 103(2).

16 Sentencing Act, s 104(1A)(e) and (h). At the time of sentencing, the circumstances were listed in s 104(1). Following amendments in 2025, the list is now found in s 104(1A): Sentencing (Reinstating Three Strikes) Amendment Act 2024, s 10(1).

17 Sentencing remarks, above n 1, at [17].

that s 104 applied due to Comfort's particular vulnerability because of her age and complete reliance on the appellant for protection.[18] There was a dispute as to whether s 104(1A)(e) relating to cruelty and callousness was also engaged. The Crown said it was because the murder was committed with a high level of cruelty and callousness. Ms Thompson disputed that. The High Court accepted this type of physical violence on a young child must engage both cruelty and callousness to an extent, particularly where there was no effort to obtain medical help for the injuries that resulted, but noted that exactly how the fatal blows were inflicted was unknown, making it difficult to determine whether they comprised the high level of brutality or callousness required to engage s 104(1A)(e).[19] As we discuss below, the elements of cruelty and callousness were treated as aggravating features, although it is not entirely clear whether the Court considered the case involved two discrete s 104(1A) circumstances.[20]

[19] The Court first turned to consider what the MPI would have been but for the application of s 104. The Judge's assessment was that, in comparable cases, MPIs of 17 to 20 years featured regularly. Given the aggravating features of this offending, the Judge saw the notional MPI as 18 and a half years' imprisonment.[21]

[20] The Judge next addressed the extent to which, putting s 104 to the side, the MPI should be increased or decreased to reflect aggravating and mitigating factors personal to the appellant. As the appellant's previous notations and convictions did not relate to offending involving serious violence, the focus here was on mitigating factors. The Court considered a reduction of the minimum term by nine months was appropriate to reflect the late guilty pleas entered in the face of what the Judge considered was "an extremely strong Crown case".[22]

[21] Ms Thompson's personal circumstances were then considered. A psychologist's report and a cultural report filed under s 27 of the Sentencing Act made it plain Ms Thompson had "led an extraordinarily disadvantaged life".[23]

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18 Sentencing Act, s 104(1A)(h).
19 Sentencing remarks, above n 1, at [18].
20 See below at [85]–[89].
21 Sentencing remarks, above n 1, at [21].
22 At [26].
23 At [28].

Her family environment was dysfunctional and she grew up in poverty and deprivation. Physical violence was part of her parents' relationship and she was the subject of familial sexual abuse. As a result, she became involved with drugs and alcohol at an early stage and had a methamphetamine addiction for many years. The reports before the Court indicated Ms Thompson was "likely to have suffered from post-natal depression" and "may well suffer from post-traumatic stress disorder as a result of the many episodes of violence and abuse" which featured in her early years.[24]

[22] The Judge said that Ms Thompson's relationship with her partner had particular difficulties, including gang associations and violence. Their relationship produced three children who similarly had been subjected to a lifestyle of deprivation and poverty. The family's living arrangements during the months leading up to Comfort's death were described as "particularly abysmal".[25] Ms Thompson was living, along with other family members and their children, "in circumstances that can realistically be described as squalor".[26] The house was overcrowded and there were tensions between family members, with no one prepared to take responsibility for caring for the children. Consumption of methamphetamine and alcohol was a feature. The Judge accepted that these factors were "likely to have exacerbated the stress" Ms Thompson was under given that she had three young children to care for.[27] The Judge also accepted that Ms Thompson was remorseful and determined to get her life back on track. The notional MPI was reduced by a further 12 months to reflect Ms Thompson's upbringing and the likely link this had to the current offending.[28]

[23] There was a further reduction of six months to reflect remorse, insight and Ms Thompson's determination to rehabilitate. That would reduce the MPI to one of 16 years three months' imprisonment.[29]

[24] The last stage in the sentencing process was to determine whether it would be manifestly unjust to require Ms Thompson to serve an MPI of 17 years rather than

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24 At [28].
25 At [30].
26 At [30].
27 At [30].
28 At [33].
29 At [33].

16 years and three months as would have been the case but for s 104. The High Court said the test to be applied was whether "as a matter of overall impression" the offending was of a type to which Parliament intended s 104 to apply.[30] Given the systematic physical abuse and neglect of a young defenceless child reliant on her mother for protection, the Judge considered this case fell squarely within the type of offending to which s 104 was intended to apply. It was therefore not manifestly unjust to require Ms Thompson to spend 17 years in prison before being eligible to apply for parole.[31]

The Court of Appeal

[25] In setting out the law, the Court of Appeal noted that in *Davis v R* the Court had outlined a three-step process for cases where s 104 is engaged.[32] Those steps required determining, first, what notional MPI is appropriate under s 103; second, whether any of the s 104 categories applied; and, third, where s 104 is engaged, but the notional MPI appropriate under s 103 would be less than 17 years, whether the imposition of a 17-year MPI would be manifestly unjust.

[26] Turning to the first step, the Court of Appeal addressed whether the High Court had been wrong in its analysis of the appropriate notional MPI. The Court noted that the appellant had not taken issue with the Judge's starting MPI of 18 and a half years' imprisonment or the nine-month reduction for the late guilty plea.[33] Rather, the Court said, the appellant's submission was that the Judge had given insufficient weight to her personal circumstances and her remorse.[34]

[27] The Court made the point that applying discounts to the notional MPI in murder cases does not strictly mirror the approach taken to applying sentence discounts more generally. That is because in relation to murder, the MPI is not the end sentence. Rather, the sentence is life imprisonment and the MPI is "simply the

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30 At [34].
31 At [34].
32 CA judgment, above n 2, at [9] citing *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [25].
33 Ms Gray observed this was subject to sufficient recognition then being given to Ms Thompson's mental state.
34 CA judgment, above n 2, at [16]. At that point, the appellant's case was that with adequate recognition for these factors, an appropriate notional MPI would have been around 14 years' imprisonment.

minimum period of imprisonment that must be served before an offender can apply for parole".[35] It is not possible to just apply a percentage discount to a term of life imprisonment. However, the way in which some recognition of mitigating circumstances is achieved is by adjusting the MPI. Importantly, in the present context, the Court went on to state, referring to *Frost v R* and *Webber v R*, that the "legislative policy mandated for murder means personal mitigating factors carry less weight in murder sentencing".[36]

[28] The Court found that the 18-month discount to the notional MPI here was within the available range. The Court considered that the necessary "causative contribution" between Ms Thompson's background and personal circumstances to the culpability of her offending was not sufficient to require any larger discount.[37] The relevant background or personal circumstances also had to constrain or impair the offender's agency, that is, "their ability to make free, autonomous decisions".[38] The Court did not consider that threshold was met. It followed that, although the Court agreed with the High Court that there was a causal nexus between the appellant's background and her culpability, the Court did not see the linkage as being "as strong as in some other cases".[39]

[29] There was no error in determining that 18 months was the appropriate discount from the notional MPI to reflect Ms Thompson's background factors, including remorse. On this basis, the notional MPI was correctly set at 16 years and three months' imprisonment. Because in the Court of Appeal the submission for Ms Thompson about manifest injustice was linked to the submissions about a lower notional MPI, the Court did not consider manifest injustice in any detail. In considering whether the case fell outside the scope of legislative policy, the Court did note that Comfort was very vulnerable because of her age, medical condition, and the systematic physical abuse and neglect that took place in the months leading up to

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35 At [25].
36 At [26] citing *Frost v R* [2023] NZCA 294 at [41] and *Webber v R* [2021] NZCA 133 at [33].
37 At [28] and [30] citing *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [91] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.
38 At [29].
39 At [30].

the murder. The offending was serious and involved elements of cruelty and callousness.

The case for the parties

[30] We deal with the detail of the submissions in the discussion of the issues which follows but provide a brief summary here by way of an overview.

[31] The appellant says that the Courts below erred by treating her mental state, including postnatal depression, as mere background. The appellant's case is that her mental state deteriorated after the birth of her third child in January 2018, coinciding with the commencement of the offending. That timing supports the conclusion that her culpability was affected by that mental state and so reduced the gravity of her offending. A discount of at least 20 per cent should have been afforded here. If applied to the starting point of 18 and a half years, along with a higher discount — 10 to 20 per cent rather than five per cent — for personal circumstances, the nine months discount for a guilty plea and the six-month discount for remorse and commitment to rehabilitation, the Court would arrive at a notional MPI of 12 to 13 years. When those figures are compared to an MPI of 17 years, the proper conclusion was that a 17-year term would have been manifestly unjust.

[32] By contrast, the Crown says an MPI of 18 years and six months was available as a starting point and the discounts afforded were appropriate. Ms Thompson's mental state was a contributory factor but the extent of that factor has been appropriately recognised in the discounts given by the Courts below. The appellant's argument, the Crown says, is in reality no more than a criticism of the weight attached to that factor. Furthermore, the appellant's argument overlooks the fact that in the present context, the mere presence of personal mitigating factors is rarely sufficient to meet the manifest injustice threshold. Rather, as the Court of Appeal said in *Williams*, powerful mitigating circumstances bearing on the offence are usually required.[40]

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40 *R v Williams* [2005] 2 NZLR 506 (CA) at [66].

The issues

[33] The principal issue raised by these arguments, as the Court of Appeal identified, is whether the appropriate MPI under s 103 was correctly assessed at 16 years and three months. The appeal also raises issues as to the correct approach to s 104, including the meaning of manifestly unjust, particularly as it applies when the s 104(1A) circumstance in issue is vulnerability because of age, and the impact of personal mitigating factors. We then discuss the way in which Ms Thompson's circumstances were assessed in considering the notional MPI. Some explanation of the expert evidence is required to deal with that issue. It is helpful to begin with that material to put the discussion which follows in its factual context.

The expert evidence

[34] As we have noted, the sentencing Judge had the benefit of a cultural report of 6 May 2022 prepared under s 27 of the Sentencing Act, and a report of 18 April 2022 prepared by Ms Jensen, a clinical psychologist and neuropsychologist. As we shall discuss, we have been provided with four other relevant reports which were not before the sentencing Judge or the Court of Appeal. With the exception of the second report of Dr Dean, a consultant psychiatrist, of 2 November 2025, there is no objection to the admissibility of these further reports. In the absence of any opposition, we have treated this expert evidence as evidence properly before this Court. The Crown opposes the admission of Dr Dean's second report. We deal with the admissibility of that report below.[41]

[35] The cultural report notes that Ms Thompson identifies as Māori.[42] The description from the sentencing remarks set out at [21] and [22] above encapsulates the key parts of the cultural report. The report writer referred to "severe family dysfunction" in Ms Thompson's childhood, her substance abuse, intimate partner violence in adulthood and postnatal depression.

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41 See below at [48]–[52].

42 The cultural report refers only to Ngāti Tukorehe descent, but other reports refer also to Te Arawa descent.

[36] Ms Jensen had been asked to address a number of questions by counsel for Ms Thompson in her report including whether Ms Thompson had foetal alcohol spectrum disorder (FASD).[43] The report discusses the deterioration in Ms Thompson's mental state following the birth of her third child and records that situation was exacerbated by the death of Ms Thompson's sister's baby in April 2018. As we have noted, they were living in the house with Ms Thompson and her family. Ms Thompson had experienced post-traumatic stress disorder (PTSD) as an adolescent and as an adult. While alcohol abuse "to some extent" would have "masked her other mental health issues", Ms Jensen said it appeared that Ms Thompson "was experiencing symptoms of depression at the time of the index offending". She also considered it likely Ms Thompson's PTSD impacted on her day-to-day functioning.[44]

[37] Ms Jensen considered there were many factors contributing to the offending but stated that Ms Thompson's "mental health difficulties" had a "significant impact" on her offending. She said:

> Ms Thompson described irritability, feeling overwhelmed, withdrawal from others, impaired decision making and fatigue. All of these were significant destabilisers with regards to how she interacted with others including her own children and in particular Comfort. Over time, her ability to reality test diminished as did her judgment with regards to seeking help and providing her children with a safe and loving family environment.

[38] Ms Jensen said it was difficult to answer the question about why Comfort was treated differently from Ms Thompson's other children "definitively".

[39] Dr Eggleston, a registered clinical psychologist, prepared a report in November 2020 prior to the entry of the plea to murder and aspects of it are referred to in Ms Jensen's report. It appears from the report that Dr Eggleston's brief was to undertake an assessment of Ms Thompson's cognitive functioning. Limitations on the assessment because of Ms Thompson's situation at the time were noted, but Dr Eggleston said there were deficits in the area of executive functioning.

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[43] At the time of this report, Ms Jensen was not able to advise whether Ms Thompson had FASD.

[44] Ms Jensen said alcohol use would have had "a significant impact". When intoxicated, Ms Thompson "would likely have been more disinhibited and at risk of lashing out" when angry.

[40] As noted, Dr Dean's initial report of 16 December 2020 was not before the Courts below although Ms Jensen refers to it in her report. It appears Dr Dean was asked to address the availability of infanticide as a partial defence.

[41] Dr Dean stated that Ms Thompson had received diagnoses of a persistent depressive disorder and PTSD after she made a claim with ACC. At the time of assessment she presented "with symptoms of persistent depressive disorder". He also noted her "history of significant substance abuse, in particular, that is likely to have contributed to her depressive symptoms".

[42] Dr Dean considered Ms Thompson demonstrated "maladaptive coping, resulting in anger and affective instability". Having been "modelled physical abuse as a means to parent and to respond to anger", she had not learnt adaptive parenting. Use of substances and an abusive relationship further complicated matters. Dr Dean also made the point Ms Thompson did not bond well with Comfort, having been separated initially from her because Comfort had to stay in hospital after birth for several months. Dr Dean accepted that Ms Thompson:

> … may have experienced some recent depressive symptoms following pregnancy and delivery, this was in the context of difficult interpersonal relationships, substance use and dysfunctional personality. This made her more vulnerable to using physical abuse when under stress or for discipline. Her [daughter's] lack of response, which may also be a sign of poor bonding, helped further aggravate [Ms Thompson] and increase her aggressive response.

[43] However, Dr Dean ultimately concluded that the partial defence of infanticide would not likely apply to Ms Thompson.

[44] In a further report of 24 February 2025, which was not before the Courts below, Ms Jensen returned to the question of whether the criteria for FASD were met. She answered that question in the negative.[45] The key passages of this report, however, first set out Ms Thompson's view that her attachment to Comfort was less than to her other children because she did not have the same "close early contact" with Comfort. Second, Ms Jensen records Ms Thompson's description of "a rapid

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[45] We add that, in contrast to Dr Eggleston, Ms Jensen did not find an impairment in executive functioning.

change of her attitudes particularly towards Comfort" after the birth of her third child, J. Ms Thompson said she worried about J's safety because of what she saw as Comfort's impulsiveness. She also became increasingly isolated and worried about others caring for her children.

[45] In his second report, Dr Dean noted that Ms Thompson had "an established diagnosis of PTSD secondary to childhood abuse". Dr Dean referred to her showing a pattern of both heavy and persistent substance use and "maladaptive coping". He said he had previously referred to the fact Ms Thompson had symptoms of persistent depressive disorder. He referred also to his interview with Ms Thompson in 2020 and a later interview with Ms Jensen, and said:

> … [s]he described bio-vegetative symptoms of depression around the time her third child was born. She described being exhausted, was not sleeping, lacked motivation and had increased irritability. This would be consistent with major depressive disorder superimposed on persistent depressive disorder, in the perinatal period. This condition is in remission.

[46] Dr Dean then discussed infanticide. From that discussion, it seems that the view, set out in his first report, that the defence of infanticide was unlikely to be available reflects perceived difficulties in attributing the psychological responses and behaviour leading to the offending to the effects of childbirth or lactation. Those difficulties in attribution arose because of Ms Thompson's pre-existing combination of a history of PTSD, depressed mood, personality dysfunction, substance abuse, and dysfunctional family relationships.[46]

[47] Dr Dean noted the problems of alignment between the partial defence of infanticide and psychiatric conditions and concepts. He considered it was "less clear" whether a postnatal depression, as he had defined it for Ms Thompson, or exacerbation of a depressive disorder in the postnatal period, would or would not be accepted as being a condition consequent upon childbirth or lactation. He thought it "possible, if not likely" that her "depressive disorder was exacerbated by childbirth". Whether this was sufficient for the condition to comprise infanticide would be a matter for

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[46] If the suggestion is that the disturbance needs to be solely by reason of the effects of childbirth, then this does not conform with the approach taken in the cases we discuss later: see below at [71]–[76].

the Court. He was also unclear whether the defence would apply in the context of "more persistent child abuse".

Admissibility of Dr Dean's second report

[48] Because we rely on Dr Dean's second report for our conclusion about the relevance of the parallels with infanticide, we address the Crown's opposition to the admission of this report. As we have indicated, this report was not before the Courts below.

[49] The Crown argues, first, that a part of Dr Dean's report is inadmissible. This is a reference to a discussion in the report about why Ms Thompson may have treated Comfort differently to her other children. This discussion is based on facts provided to Dr Dean by Ms Thompson where she has not filed an affidavit to provide an evidential foundation for Dr Dean's opinion and the Crown has not had the opportunity to test her account under cross-examination. The Crown says this is expert opinion evidence outside the general knowledge of Dr Dean's expertise. The effect of s 25(3) of the Evidence Act 2006 is that it must therefore be based on facts that are or will be proved or judicially noticed in the proceeding.

[50] Second, it is submitted the evidence is based on an account of the facts inconsistent with the narrative Ms Thompson first described to Ms Jensen. Third, the Crown submits the evidence is not fresh. Finally, it is argued the evidence is insufficiently cogent and does not add to the materials available to the High Court.

[51] We accept the gravamen of the submissions as they relate to Dr Dean's conclusion at [47] of his report about the impact of Ms Thompson's lack of bonding with Comfort. However, s 25(3) anticipates that facts outside the body of knowledge of an expert may be proven in the proceeding. Our decision as to the outcome of this appeal will provide an opportunity to do so here. It will also give the Crown an opportunity to test Ms Thompson's account of events. We accept that her account has changed over time, albeit that is not surprising given her mental state. It was accepted on behalf of Ms Thompson that she may need to provide an affidavit.

[52] Importantly, we consider this evidence could reasonably have led to a more favourable sentencing outcome. Given its cogency, we will admit this evidence.

The approach to s 104

[53] We agree with the Court of Appeal that the approach to s 104 is helpfully set out in *Davis*,[47] where the Court clarified the approach to reflect the body of caselaw that has developed since *Williams*.[48] As the Court of Appeal in this case also noted, the Court in *Davis* observed that the first two steps in the methodology outlined did not have to be followed in that strict order. Rather, the sequencing may depend on the category and the circumstances.

[54] The appellant takes issue with two aspects of this test. First, she proposes an alternative three-step approach. At the first step, the Court should ask whether a s 104(1A) circumstance applies; step two would consider whether a 17-year MPI would be grossly disproportionate, taking into account the offender's personal mitigating factors; and the final step is whether a 17-year MPI would be unnecessary, having regard to the principles and purposes in ss 7 and 8 of the Sentencing Act. Given our approach to this case, it is not strictly necessary for us to address this submission. There is however merit in the respondent's submission that, overall, the appellant's proposed approach runs the risk of eliding the statutory test which makes it clear that the 17-year minimum MPI is mandatory except where that would lead to manifest injustice.

[55] Second, the appellant is critical of that part of the analysis, applied by the High Court, which directs the court to draw an "overall impression". She says that this phraseology is both too broad and too blunt to perform the safety valve function intended by the legislature. Rather, given the nature of the offending typically involved, the wording is susceptible to instinctively prejudicial thinking without meaningful examination of the drivers of the offending. As we shall discuss, we agree there has been insufficient attention to those drivers here. But we do not accept that the use of the words "overall impression" is meant to convey more than that the

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47 *Davis*, above n 32.
48 *Williams*, above n 40.

sentencing judge should stand back and assess the offending and the offender against all relevant sentencing purposes, principles and factors.

[56] The Court of Appeal applied the meaning given to "manifestly unjust" in *Williams*, which was set out with reference to *R v Rapira*.[49] Relevantly, the Court relied on the observation in *Williams* that the presence of mitigating factors under s 9(2) relating to an offender's personal circumstances "would rarely displace the presumption" of a 17-year MPI.[50] Rather, "[p]owerful mitigating circumstances bearing on the offence are more likely to do so".[51] The Court also cited the following passage from *Williams*:[52]

> [67] We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. …

[57] *Rapira* had been seen as authority for the proposition that it is extremely difficult to establish manifest injustice under s 102.[53] That proposition has not been good law since *R v Harrison* and *Dickey v R* put it to rest.[54] To illustrate the point, it is sufficient to refer to *Dickey* which, like *Rapira*, dealt with the approach to manifest injustice for youth offenders. The Court of Appeal in *Dickey* reiterated that, under s 102, manifest injustice was to "be assessed as a matter of overall impression".[55] The Court then said:[56]

> [195] The assessment must begin with the gravity of the offending and culpability of the offender. Personal aggravating and mitigating factors should then be taken into account. As we have explained at [167], each case must be assessed on its own merits, having regard to the full register of sentencing principles, purposes and factors. We observe that manifest injustice is most likely to be found where the offender can point to both mitigating

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49 *Williams*, above n 40, at [55]–[56] citing *R v Rapira* [2003] 3 NZLR 794 (CA).
50 CA judgment, above n 2, at [10] citing *Williams*, above n 40, at [66].
51 *Williams*, above n 40, at [66].
52 CA judgment, above n 2, at [10] citing *Williams*, above n 40.
53 *Rapira*, above n 49.
54 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602; and *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.
55 *Dickey*, above n 54, at [194].
56 Footnotes omitted.

> circumstances of the offending and a combination of substantial personal mitigating factors.

[58] Nor, in association with the reliance on *Rapira*, is it correct to say that personal circumstances will only displace the presumption in "rare" cases.[57] The threshold as now well-settled in the authorities is either met or it is not. And, as the Court of Appeal has said, the meaning of manifest injustice is flexible and varies with the circumstances.

[59] It is relevant in this respect that the aggravating circumstances listed in s 104(1A) differ in kind. Some, such as whether there are two or more counts of murder or "vulnerability", reflect a status. In other words, as the respondent submits, such circumstances do not require judgments of quality and degree, albeit in some cases the descriptor "particular" vulnerability may require a degree of evaluative judgment.[58] But, by contrast, other circumstances such as cruelty and callousness will always involve an evaluative judgment. As the appellant submits, where the circumstance engaging s 104 is a status, it can be difficult to look past the abhorrent nature of the offending. But the very availability of the manifest injustice exception indicates that presence of this status does not automatically equate to the "worst murder". As the Court of Appeal put it in *Lackner v R*:[59]

> The categories in s 104 capture some murders for which there may well be extenuating circumstances. Notably, s 104(1)(g) addresses a single characteristic of the victim — particular vulnerability — that is only one circumstance of the offence. The legislation does not preclude recognition of extenuating circumstances provided they cross the manifest injustice threshold.

[60] As we shall discuss further, powerful factors that reduced Ms Thompson's agency and hence her culpability were not adequately weighed or not addressed. The Court of Appeal and the High Court in this case have effectively discounted the background factors, such as the appellant's difficult childhood characterised by deprivation, the fact her parents modelled abusive behaviour, and the conditions of overcrowding and poverty in which her whānau lived, which deteriorated further

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57 See above at [56].

58 The wording of s 104(1A)(h) is whether the deceased was "particularly vulnerable because of their age, health, or any other factor".

59 *Lackner v R* [2016] NZCA 29 at [9]. At the time *Lackner* was decided, "particular vulnerability" was contained in s 104(1)(g). The relevant provision is now s 104(1A)(h).

following the birth of Ms Thompson's third child.[60] The approach adopted is not consistent with the requirements of the section. Nor, as we discuss, was adequate weight given to her mental state. Under s 104, a case-by-case analysis is required in the course of which the sentencing judge is required to form an overall impression.

The appropriate treatment of Ms Thompson's circumstances

[61] Applying the correct approach to s 104, the appellant is right to say that her circumstances were treated only as general mitigating background justifying the modest discount given by the High Court. The Court of Appeal said it was not suggested that the Judge had overlooked either the psychological or the s 27 reports, but rather, it was argued the Court had not given sufficient weight to them.[61] Further, the Court noted that the High Court had observed that although it was "really no surprise" that the appellant was before the Court, her background provided "an explanation, but not an excuse" for the way in which she had treated Comfort.[62] Finally, the Court referred to the fact the Judge had noted that the appellant "was also likely to have suffered from depression, as well as possible post-traumatic stress disorder as a result of violence and abuse" but did not see that as altering the calculus.[63]

[62] However, the expert evidence is of persistent depressive disorder and a deterioration in Ms Thompson's mental health following the birth of her third child in January 2018.[64] Importantly, as part of that deterioration, the evidence was that she developed disordered thinking. As we have noted, there were other aspects to be considered as well, including the death of another child living in the house and the squalid conditions in which the family were living. The narrative is consistent with postnatal depression.

[63] We do not agree with the Court of Appeal's conclusion that the evidence showed increased agency. The Court attached significance to the fact the abuse centred on Comfort and that her other children had not shown any signs of neglect or abuse. The Court also contrasted this case with that of a "one off" angry outburst

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60 See below at [61]–[64].
61 See CA judgment, above n 2, at [18] and [20].
62 At [19] citing Sentencing remarks, above n 1, at [32].
63 At [18].
64 We note that some of that expert evidence, as indicated, was not before the Courts below.

by a parent with poor coping skills resulting in fatal consequences.[65] Instead, the Court considered that the appellant had "engaged in a sustained pattern of neglect and abuse, in relation to one of her children only, over an extended period, culminating in a final fatal assault".[66] The Court said that such offending, by its very nature, "suggests the exercise of a higher degree of agency than a homicide resulting from a one-off angry outburst by an offender with poor impulse control".[67]

[64] But the evidence of Ms Jensen suggested that Ms Thompson had compromised agency and the features relied on by the Court of Appeal could, in fact, be evidence of a lack of agency. What emerges from the expert evidence, particularly Dr Dean's second report (which was not, as we have said, before the Courts below) is that there are clear parallels with infanticide noting that the offending appears to have commenced around the time Ms Thompson gave birth to her third child and none of her other children showed any signs of neglect or abuse. The key part of Dr Dean's conclusion was expressed as follows:

> … Ms Thompson may have experienced increased depressive symptoms following pregnancy and delivery, but this was in the context of difficult interpersonal relationships, substance use and dysfunctional personality. Her current self-report appears she may have underplayed the extent of this at the previous assessment with me. She gave a more convincing description of a change after her son was born, with notable irritability and fatigue. Her description appears to be consistent with symptoms she described to [Ms Jensen]. It is therefore possible, if not likely, Ms Thompson's depressive disorder was exacerbated by childbirth. As above, it would be a matter for the court whether the court consider[s] this to be sufficient for the condition to be an effect of childbirth and that this condition is of a sufficient extent that she should not be held fully responsible. Alternatively, the court might consider whether this needs to be further considered in mitigation.

[65] The relevance of these parallels in terms of the sentencing outcomes does not appear to have been addressed. It appears that counsel considered the issue of the defence of infanticide early in the proceeding, but did not proceed with it.[68] We have no information about why the possibility of a defence of infanticide was not pursued, and we make no comment on the availability or not of that defence in this case. To explain why we consider ignoring the parallels with infanticide has led to an error

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65 CA judgment, above n 2, at [30].
66 At [30].
67 At [30].
68 There is a reference to the defence of infanticide in the first report of Dr Dean.

in principle here, we first need to set out the requirements for infanticide, its policy underpinnings, and impact on sentencing.

Infanticide

[66] Infanticide is both an offence and a matter that can be raised as a partial defence to a charge of murder or manslaughter. Section 178(1) of the Crimes Act 1961 provides that a woman who causes the death of "any child of hers under the age of 10 years" in a manner comprising culpable homicide may be found guilty of infanticide and not of murder or manslaughter where:

> … at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any other child, or by reason of the effect of lactation, or by reason of any disorder consequent upon childbirth or lactation, to such an extent that she should not be held fully responsible, …

[67] The maximum punishment for the offence of infanticide is a term of imprisonment of three years.[69] The child killed need not be the same child whose birth occasioned the defendant's disturbance of mind.

[68] Section 178(2) of the Crimes Act provides that where a defendant is on trial for the murder or manslaughter of her child under the age of 10 years, and where there is evidence that would support a verdict of infanticide for the defendant, the jury may return a verdict of infanticide instead of murder or manslaughter.

[69] Section 178(3) deals with the situations in which a special verdict of acquittal on account of insanity caused by childbirth may be entered. The threshold for that is obviously higher, requiring a disturbance of the defendant's mind by reason of childbirth or other related events, "to such an extent that she was insane". In that situation, the jury is to return a special verdict of acquittal on account of insanity caused by childbirth.

[70] There is a helpful discussion in *Adams on Criminal Law* on the requirements to establish the necessary state of mind under s 178(1).[70] As the authors note, the first

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69 Crimes Act 1961, s 178(1).

70 Mathew Downs (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at [CA178.03].

requirement is that there is evidence that at the time the offence was committed, the defendant's mind was disturbed. Second, that disturbance must be a result of not having fully recovered from the effect of giving birth to the victim or any other child, or the result of lactation, or any other "disorder consequent upon childbirth or lactation".[71] The authors note that causation is not normally difficult but becomes more complicated where a defendant is affected by another mental or psychological condition. As an illustration of the issue, the authors refer to the decision of the Court of Appeal of England and Wales in *Regina v Tunstill*.[72]

[71] By way of explanatory background only, we note that in that case in addressing whether infanticide should have been left to the jury, the Court of Appeal held that the phrase "by reason of her not having fully recovered from the effect of giving birth" in the equivalent English provision did not need to be read as if it said "solely by reason of".[73] Rather, it was sufficient that the failure to recover from the effects of childbirth was an operative or substantial cause of the disturbance.[74]

[72] The final requirement to establish infanticide is that the disturbance to the balance of the mind has to be to "such an extent" that the defendant "should not be held fully responsible" for the death of the child.[75] It is not a requirement that the act or omission causing the death itself was caused by the mental disturbance. Rather, the connection required is essentially temporal, namely, that mental disturbance must have been present at the time and the result of the matters identified in the section. Professor Warren Brookbanks notes that the offence/defence of infanticide is unusual in this regard. Professor Brookbanks says:[76]

> This means that any murder of a child under the age of ten years by its maternal caregiver, for whatever reason, is capable of amounting to infanticide provided that at the time of the killing the balance of her mind was disturbed.

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71 Section 178(1).
72 *Regina v Tunstill* [2018] EWCA Crim 1696, [2019] 1 WLR 416 at [31]–[32].
73 At [31]. Section 1(1) of the Infanticide Act 1938 (UK) 1 & 2 Geo 6 c 36 refers to "the balance of her mind" being "disturbed *by reason of* her not having fully recovered from the effect of giving birth" (emphasis added).
74 At [31].
75 Section 178(1).
76 Warren Brookbanks "Infanticide — an unusual crime" [2023] NZLJ 292 at 292.

[73] Similarly, the Court of Appeal in *Tunstill* noted of the equivalent provision in England that:[77]

> … the relevant causation is that the balance of a mother's mind is disturbed as a result of not having fully recovered from the effect of giving birth to her child: there is no required causal link between the disturbance of balance of mind and the act or omission causing death.

[74] As is also noted by the authors of *Adams*, there has been little discussion of these issues in New Zealand. The authors suggest that some guidance as to the meaning of disturbance of the balance of mind may be found in the decision of the Supreme Court of Canada in *R v Borowiec.*[78] That case dealt with a similar statutory provision. The Supreme Court of Canada said that the reference to a disturbance of the mind was not a legal or medical term of art and did not require any defined psychological condition to be identified. The issue was rather whether the defendant was at the relevant time "mentally agitated", "mentally unstable" or in a state of "mental discomposure".[79]

[75] The policy considerations underlying the availability of infanticide are discussed in *R v P*, in which Heron J noted:[80]

> I think it is of considerable relevance that the defence of diminished responsibility is no part of the law of New Zealand and therefore in this special area it is to be anticipated that the law would be required to recognise a lesser offence of infanticide as an alternative to murder to meet the circumstances that may confront a woman following recent childbirth. Those circumstances may be a mixture of social, economic, mental and physiological stresses, and while she continues to have responsibilities for the newborn child and other children in her care there will be occasions when all are vulnerable.

[76] As is apparent from this discussion, there are similar provisions in comparable jurisdictions. In its recent consultation paper on homicide offences, the England and Wales Law Commission makes the point that "[t]he underlying purpose of the doctrine of infanticide is to show leniency within the criminal justice process to vulnerable

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77 *Tunstill*, above n 72, at [32].
78 *R v Borowiec* 2016 SCC 11, [2016] 1 SCR 80.
79 At [35].
80 *R v P* [1991] 2 NZLR 116 (HC) at 118.

mothers who kill their children in exceptional circumstances".[81] The Commission notes that:[82]

> The doctrine of infanticide does not exist because the harm is lesser, but because the mother's culpability is understood to be reduced in certain circumstances. As explained above, the specific vulnerabilities a mother may experience can arise as a result of both bio-psychiatric and/or acute socio-economic explanations.

[77] There have been criticisms of the medical bases for an infanticide defence,[83] but the Commission was nonetheless of the view that these were "legitimate bases upon which the culpability of a mother who kills her infant child is reduced".[84]

[78] There have been very few recent cases of infanticide in New Zealand.[85] The majority of these involve defendants who were first charged with murder but pleaded guilty to infanticide when the charge was altered following the receipt of psychiatric reports. As noted by the High Court in *R v Golovale-Siaosi*, "[a] review of cases shows that supervision (that is a non-custodial sentence) is the course that is almost invariably adopted by the Courts".[86] A similar pattern is evident in England, as can be seen in *Sainsbury*.[87]

[79] In terms of the impact on sentencing for other offences, in *R v Wright* the Court of Appeal in hearing a sentence appeal for manslaughter drew an analogy with

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81 England and Wales Law Commission *Homicide Offences: Consultation Paper* (Consultation Paper No 277, 2026) at [9.27] (footnote omitted).

82 At [9.27].

83 See for example Ian Lambie "Mothers who kill: the crime of infanticide" (2001) 24 Intl J L & Psychiatry 71 at 76 and 78; Brookbanks, above n 76; and Debra Wilson "The Offence/Partial Defence of Infanticide in New Zealand Law: Past, Current and Future Use" (2022) 17 Otago LR 335 at 359–360 and 363. See also England and Wales Law Commission *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) at [8.24]–[8.25]; and Karen Brennan and Emma Milne (eds) *100 Years of the Infanticide Act: Legacy, Impact and Future Directions* (Hart Publishing, Oxford, 2023) at 30–31.

84 England and Wales Law Commission, above n 81, at [9.27].

85 Our searches have identified seven cases since the Sentencing Act 2002: *R v Metuatini* HC Auckland T025795, 18 November 2003; *R v RHH* HC Auckland T023428, 19 March 2004; *R v Golovale-Siaosi* HC Dunedin CRI-2006-012-2533, 11 December 2007; *R v RLT* HC Dunedin CRI-2008-012-5987, 18 December 2008; *R v JRH* HC Wellington CRI-2007-032-2799, 31 July 2009; *R v CRS* [2012] NZHC 709, (2012) 25 CRNZ 839; and *R v G* [2024] NZHC 1201. A further case, *R v A* HC Invercargill CRI-2009-025-329, 9 March 2010 involved attempted infanticide.

86 *Golovale-Siaosi*, above n 85, at [7]. For example, on an appeal in 1979, a sentence of two years' imprisonment for infanticide was reduced to a term of six months plus one year's probation: *R v Henry* CA187/78, 21 March 1979.

87 *Sainsbury* (1989) 11 Cr App R (S) 533 (CA) at 534–535.

infanticide.[88] It recognised the analogy in terms of legal recognition via infanticide of the mitigating factor of disturbance following birth, and the approaches applicable to sentencing for the murder or manslaughter of a child by a mother where culpability is reduced because of mental disorder "where issues of deterrence and risk to others have limited application".[89] *Wright* involved the killing of Ms Wright's son. She admitted harming the child in various ways prior to killing him. She was initially charged with murder but, after an expert psychiatric opinion confirmed a diagnosis of a serious mental disorder, the charge was reduced to manslaughter. Ms Wright pleaded guilty to that charge. On her appeal against a term of seven years' imprisonment, the term was reduced to four years.

[80] Anderson J for the Court noted that s 178, and the jurisprudence of comparable jurisdictions, that is, England, Canada and Australia, "regard postnatal consequences for a mother as capable of mitigating criminal responsibility for violence to children".[90] The Court said, "the jurisprudence we must apply is informed by long-standing statutory recognition that significantly mitigating circumstances may occur in connection with parturition and lactation".[91] Applying this approach to the current sentencing regime suggests that this policy should at least inform the comparator class when the court is undertaking the exercise required by the first limb of *Williams* and *Davis* to decide what notional MPI is appropriate under s 103. While *Wright* was decided under the predecessor legislation to the Sentencing Act, the underlying policy considerations remain the same.

[81] The Crown maintains that the work done by potential parallels with infanticide is achieved through the "manifest injustice" exception. The Crown further submits that the policy behind considering infanticide, that is, allowing a compassionate response to human frailties is permissible only where mental health factors, personal circumstances and deprivation mean that the defendant's agency has been so undermined the s 104 category no longer truly applies because it has become peripheral. If that was correct, it would mean that the choice in a case like this would essentially be between infanticide at one end, with the usual punishment comprising

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88 *R v Wright* [2001] 3 NZLR 22 (CA).
89 At [7].
90 At [23].
91 At [26].

intensive supervision, and life imprisonment with an MPI of 17 years at the other. That unduly stark choice is the logical effect of the Crown's argument it was necessary to have a "bridge", meaning a close causal connection, between the features of mental health relied on and the killing of Comfort.

[82] The aspects of mental health relied on must in the context of s 104 affect culpability. That said, the impact of the importance placed on consistency in sentencing means it cannot be right that the court should ignore the fact that, in very similar factual situations, the sentencing outcomes for one mother would be completely different from those of another. The better view of the statutory scheme and its underlying policy considerations is that, in cases where the factual narrative puts the murder of a child by their mother at a point on the spectrum which is close to a narrative establishing a partial defence of infanticide, the policy manifested in the availability of that defence may be taken into account in mitigation of sentence. This factual congruence may affect what will constitute appropriate comparator cases. That in turn may impact on the calculation of the appropriate MPI under s 103, and hence the question of whether an MPI of 17 years is manifestly unjust under s 104, which will almost invariably apply in such cases by reason of the child's age alone.

[83] Given the way this case has been presented and argued to date, it is perhaps not surprising that the parallels with infanticide have not featured. It also has to be said that there are complexities in this case which may also provide part of the explanation for this. As the discussion of the facts and of the expert evidence indicates, a range of factors have contributed to the suffering and ultimately the tragic death of Comfort, a vulnerable child who should have been kept safe. And there were, as we have said, aspects of cruelty, for example in Ms Thompson's failure to seek medical care for Comfort when the need for that care would have been obvious. These complexities appear, however, to have obscured the potential for the relevance of comparisons with sentencing for infanticide. As the excerpt we have cited above from Heron J in *R v P* demonstrates, childbirth need not be the only stressor in cases where these parallels will be relevant.[92]

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92 Above at [75].

[84] Ultimately, regardless of how the position was reached, the result is that ignoring the parallels with infanticide was an error in principle. We need to address next the argument for the Crown that the Courts below have nonetheless dealt appropriately with what was before them.

Manifest injustice?

[85] We first address the Crown submission that this case involves two of the s 104(1A) circumstances, that is, cruelty and callousness as well as vulnerability. In developing this submission, the Crown submits that this case is closer in fact to cases such as *R v Sio* and *R v Loffley*.[93] Mr Sio was 25 years old at the time of sentencing. He pleaded guilty to the murder, ill-treatment and assault of his five-year-old son. He appealed unsuccessfully against the imposition of an MPI of 17 years.[94] In that case, the Court of Appeal considered that the level of brutality, cruelty and callousness involved on the last day of the victim's life brought the offending within s 104(1A)(e), as well as engaging the particular vulnerability circumstance because of the victim's age.

[86] The offending involved ongoing assaults of Mr Sio's son over a period of time during the course of which teachers at his kōhanga reo raised concerns about bruising and pinch-type marks on numerous parts of the victim's body. Mr Sio was described as having unrealistic expectations of his son. He would assault him, hitting him across the head, ears and mouth, kicking him and dragging him when he did not meet those expectations, often for minor things, such as failing to sit still. The victim was also confined for various periods. Two days before his death, he was seen hobbling with Mr Sio pushing him along from behind. In that case, the Court of Appeal considered a 17-year MPI was not manifestly unjust where two limbs of s 104 could not be described as of peripheral significance only. While Mr Sio should receive some discount for personal circumstances and his guilty plea, given his culpability, the policy of s 104 and as a matter of overall impression, a 17-year MPI was not manifestly unjust.

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93 *R v Sio* [2021] NZHC 1709; and *R v Loffley* [2013] NZHC 201. In this category, the Crown also included *R v Kapea* HC Auckland CRI-2007-092-16885, 25 November 2008; and *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008.

94 *Sio v R* [2022] NZCA 337.

[87] In *Loffley*, Mr Loffley was convicted after trial of the murder of his partner's two-and-a-half-year-old son. The child's liver and pancreas had been split in two and there was a pattern of injuries apparent over a five-month period during which Mr Loffley was living with the child's mother. He did not seek medical help and sought to conceal the injuries he had caused to the child. A 19-year MPI was imposed.

[88] It is difficult to make comparisons between these two cases and the present where all three obviously involve grave offending but quite different circumstances. However, we note that the abuse in *Sio* extended over some 16 and a half months with the child dying from "multiple blunt force traumas from a sustained and severe beating".[95] The cause of death in *Loffley* was described as involving "quite extraordinary force" that led to "highly unusual" injuries.[96]

[89] The Crown also relies on the ill-treatment of Comfort in the period leading up to her death. Those actions, however, have to be seen in light of Ms Thompson's mental state at that time. As this Court said in *Van Hemert v R*, the two s 104(1A) circumstances engaged there, brutality and vulnerability, had to "be viewed in light of" the psychosis Mr Van Hemert was experiencing at the time.[97] Further, if Ms Thompson's case is treated as involving two s 104(1A) factors, the two overlap here, and Ms Thompson's reduced culpability responds to both. That said, there are aggravating features.

[90] We turn then to the first of the Crown arguments made in support of the notional MPI adopted, namely, that Ms Thompson's undoubted difficulties fell rather into the category of general personal mitigating factors. There are certainly aspects present which fall into the category of personal mitigating factors but the clear picture emerging from the expert evidence before us is that the violence towards Comfort commenced after the birth of her third child in January 2018.[98] In other words, there are reasons why Comfort was singled out that are consistent with disordered thinking and a mental state relevant to culpability. Indeed, both Courts accepted there was some

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95 At [62].

96 *Loffley*, above n 93, at [2] and see at [4].

97 *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at [68] and [69] per Glazebrook, O'Regan, Ellen France and Kós JJ.

98 As noted above at [7], n 8, she was also charged on the basis that the conduct comprising the ill-treatment charge began during the period commencing 1 January 2018.

connection. As we see it, while accepting the connection, there was no real overall assessment of the picture that had emerged.

[91] The respondent similarly accepts that the appellant's mental state was causative in some part. But the Crown says that this was not to a sufficient degree and the expert reports do not establish the necessary causation to justify a greater reduction. For example, Ms Jensen refers to mental health issues and alcohol use having a "significant impact" on the offending. On the respondent's analysis, a "significant impact" does not comprise the necessary causative link or bridge between the various issues Ms Thompson was dealing with and what happened to Comfort. The Crown submits that the facts of the cases decided to date involving murder of children in which a lesser MPI than 17 years has been imposed demonstrate the need for a stronger causal connection.

[92] To put this submission in context, it is useful first to say a little about the 40 cases referred to by the Crown involving the murder of a child by a parent or caregiver.[99] The first point to note is that in only four of these 40 cases, the child or children were murdered by their mother. If we include the present one,[100] then the five cases comprise some 12.2 per cent of the cases. Part of the explanation for the small percentage of mothers in this category may be the significant number, in relative terms, of mothers who are charged with murder but found guilty of manslaughter, or those charged with manslaughter or murder who then plead guilty to infanticide. There is a further category of mothers who kill their child but are charged with manslaughter or infanticide rather than murder.[101]

[93] In our view, a comparison between the approach taken in the present case and that in the other four cases involving children who were murdered by their mother supports Ms Thompson's case. Of the five cases, including the present one, all defendants, apart from the mother in *R v Dickason*, were sentenced to life imprisonment.[102] An MPI of 17 years was imposed in two of the five cases, namely

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99 We have included a list of the cases referred to in the appendix to this judgment.

100 The present case is not included in the Crown's list of 40 cases.

101 Again, these numbers are significant in relative terms.

102 *R v Dickason* [2024] NZHC 1704. Ms Dickason's appeal against conviction is to be heard by the Court of Appeal in 2027.

R v Pickering[103] and the present case. In Ms Dickason's case, no MPI was imposed and in *Lee v R* the Court of Appeal reduced the MPI from 17 years to 10 years.[104] The final case in this group is *R v Harrison-Taylor* in which the MPI was 12 years.[105]

[94] In terms of *Pickering*, where an MPI of 17 years was imposed, the defendant was the adoptive mother of the three-year-old victim. The offending was found to involve both a high level of brutality and vulnerability. The child died as a result of a head injury; there were numerous older injuries, both internal and external; and a failure to obtain medical treatment. Ms Pickering was found guilty after trial. In sentencing her, the Judge made the point that she showed no remorse, there were no mitigating factors, and she displayed no insight into the offending. The latter factors stand in contrast to the present case.

[95] Ms Dickason was convicted after trial of the murder of her three children. The jury rejected both the defence of insanity and the partial defence of infanticide. The Judge accordingly said he had to sentence Ms Dickason on the basis that she knew her actions in killing the children were morally wrong. While in terms of the infanticide defence it had been accepted the balance of Ms Dickason's mind was disturbed, there was a dispute about the cause of that. The Judge was nonetheless satisfied that what occurred would not have taken place "but for [Ms Dickason's] major depressive episode".[106]

[96] The Judge determined under s 102 that a sentence of life imprisonment would be manifestly unjust where Ms Dickason's actions could not "be meaningfully separated from [her] psychiatric state at the time and that there existed a strong causal nexus".[107] A sentence of 18 years' imprisonment with no MPI was imposed. An order for detention as a special patient in a hospital was made.[108]

[97] We accept that the expert evidence in Ms Dickason's case was both more expansive and more focused than that before the Courts below here. That probably

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103 *R v Pickering* HC Auckland CRI-2008-055-1273, 30 July 2010.
104 *Lee v R* [2026] NZCA 399.
105 *R v Harrison-Taylor* HC Auckland CRI-2004-092-1510, 12 September 2005.
106 *Dickason*, above n 102, at [48] and see also at [49] and [50].
107 At [64].
108 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 34(1)(a)(i).

reflects the fact that the matter went to trial at which both insanity and infanticide were pursued. Nonetheless, we agree with the appellant that her case has some parallels with that of Ms Dickason. As for Ms Dickason, here there was evidence of a major depressive disorder, warped thoughts, and a sense of hopelessness which should have been treated as reducing her culpability. We add also that Ms Dickason was sentenced on the basis that three of the circumstances in s 104(1A) were present, namely, a high level of brutality; particular vulnerability; and the murder of more than one victim. Finally, Ms Dickason did not have other stressors that were present for Ms Thompson.

[98] Ms Lee was convicted of the murder of her two young children after her defence of insanity was rejected by the jury. Ms Lee's offending was found to have engaged two s 104 factors, namely, vulnerability given the children's age, and the fact there were two victims. In addition, Ms Lee concealed the children's bodies in suitcases to avoid discovery.

[99] On appeal, the sentence of life imprisonment with an MPI of 17 years imposed by the High Court was set aside and a sentence of life imprisonment with an MPI of 10 years substituted. An order detaining Ms Lee as a special patient was maintained.[109] In concluding that an MPI of 17 years was manifestly unjust, the Court of Appeal emphasised Ms Lee's offending was "clearly linked to disability"; she posed no community risk; and given "the role of disability as a primary cause" of offending, "rehabilitative prospects" had to be given some weight.[110] Ms Thompson similarly can draw upon the acknowledged contribution of her mental state to her offending which, on our assessment of the expert evidence to date, is strong. We apprehend very little need for community protection and her rehabilitative prospects also warrant weight.

[100] In *Harrison-Taylor*, the jury rejected the defence of infanticide and found Ms Harrison-Taylor guilty of murder rather than manslaughter after the killing of her eight-month-old son. The baby died as a result of strangulation, suffocation or a combination of the two. Ms Harrison-Taylor was not seen as posing any future risk to the public. The Court of Appeal distinguished this case from that of Ms Thompson in

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109 Criminal Procedure (Mentally Impaired Persons) Act, s 34(1)(a)(i).
110 *Lee*, above n 104, at [76].

part on the basis the death was as a result of a one-off incident. But the outcome in *Harrison-Taylor* was also based on a recognition of the impact of psychological factors raised in support of the defence of infanticide on culpability. In sentencing Ms Harrison-Taylor, the High Court noted:[111]

> [46] … there is a unique combination of circumstances in your case such that overall a 17 year term would be manifestly unjust. I base this primarily on the evidence of Dr Chaplow, which left me in no doubt that the various factors combined sufficiently affect [Ms Harrison-Taylor's] culpability to make 17 years excessive.

[101] We turn then to another subset of the 40 cases relied on by the Crown, namely, the other cases where a child was murdered by a caregiver other than the mother and the MPI imposed was less than 17 years.

[102] We note here that in terms of these 36 other cases involving the murder of a child, 11 resulted in the imposition of an MPI of less than 17 years.[112] In two of those cases the offender was the child's grandmother, namely, *R v Cooper* and *R v Smith*.[113]

[103] The Crown submission focuses on the adult offenders in another subset of the 40 cases, namely, those with psychiatric conditions for whom the 17-year MPI was found to be manifestly unjust. We interpolate here that in two decisions involving young defendants, MPIs of less than 17 years have been imposed.[114] The cases relied on in this subset by the Crown are *Dickason*, which we have discussed, and *R v Smith*, *R v Savage*, and *R v McIsaac*.[115] The Crown says these cases all involve a much stronger link between the mental health of the defendant and the offending than is present in Ms Thompson's case.

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111 *Harrison-Taylor*, above n 105.

112 In four out of the 40 cases, life imprisonment with an MPI of more than 17 years was imposed: *R v Joachim* HC Nelson CRI-2008-042-2437, 29 October 2008; *R v Curran*, above n 93; *R v Curtis* HC Rotorua CRI-2007-063-4149, 4 February 2009; and *Loffley*, above n 93.

113 *R v Cooper* [2017] NZHC 2498; and *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830.

114 *R v Ellery* [2013] NZHC 2609 (Mr Ellery had only just turned 21 years at the time of offending and the MPI imposed was 13 years and six months) and *R v Wilson* [2023] NZHC 2640 (Mr Wilson was 21 years old when he killed his 10-month-old nephew and the MPI imposed was 15 years).

115 *Smith*, above n 113; *R v Savage* [2020] NZHC 2553; and *R v McIsaac* [2016] NZHC 1544.

[104] Ms Smith pleaded guilty to the murder of her 13-year-old granddaughter by strangling her. On a successful appeal by the Solicitor-General, the sentence of 12 years' imprisonment with an MPI of six years imposed by the High Court was quashed and substituted with a sentence of life imprisonment with an MPI of 10 years. In concluding that a 17-year MPI would be manifestly unjust, the Court of Appeal said Ms Smith's offending had been "strongly influenced by her deteriorating mental health"; she did not pose any risk to the community; and her remorse was "profound".[116]

[105] Mr Savage drowned his two-year-old daughter in a river. He was convicted after a trial in which the jury rejected his defence of insanity. In concluding that a 17-year MPI would be manifestly unjust, the sentencing Judge relied on Mr Savage's "general mental instability and illness at the time of" the offending.[117] His "disturbed mental state" was treated as "clearly a significant contributing factor" in his offending.[118] A 14-year MPI was imposed.

[106] As the Crown submits, it is difficult to assess *R v McIsaac* as a comparator. That is because the sentencing Judge expressly said he would "not traverse" publicly Mr McIsaac's "psychiatric difficulties".[119] The Judge did note the conclusion in one of the reports to the effect that although Mr McIsaac had no "obvious, diagnosable mental illness", he had "clear mental health problems".[120] The report stated it was "open to conclude" those "problems contributed" to the offending.[121] In imposing an MPI of 14 years, the sentencing Judge concluded Mr McIsaac's "mental health issues were a factor in" the decision to murder his 10-year-old relative.[122]

[107] We add that, as was the case in *Dickason*, in all three of these cases the sentencing Judges had the benefit of comprehensive psychiatric reports.

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116 *Smith*, above n 113, at [49].
117 *Savage*, above n 115, at [67].
118 At [80].
119 *McIsaac*, above n 115, at [15].
120 At [15].
121 At [15].
122 At [46].

[108] We do not see these cases as so far removed from the present as to confirm the approach to sentencing taken in Ms Thompson's case. In other words, we do not accept the Crown submission these other cases involve a much stronger link between the defendants' mental health and their offending. That is particularly so where, as in *Dickason* and *Harrison-Taylor*, factual elements that would be relevant to the defence of infanticide were present, so that lens needed to be applied. The Crown also places weight on the fact that, apart from *Dickason*, none of these cases involved an additional s 104(1A) circumstance. As we have indicated, we do see some parallels between the present case and *Dickason*.

[109] We add that an MPI of 14 years was imposed in *R v Li*, a case involving two s 104 circumstances: vulnerability and the commission of the murder in the course of another serious offence.[123] Mr Li pleaded guilty part-way through his trial to the murder of his 10-year-old stepson, having struck his head at least eight times with a table leg, and to the attempted murder of his wife. The factors identified as leading to the finding of manifest injustice were his guilty plea and remorse, personal circumstances and state of mind at the time, the fact no attempt was made to hide the offending and the fact that police were called immediately, and the absence of previous convictions.

[110] It is also part of the analysis of the strength of the causal link, from the Crown's perspective, that at least some of the appellant's actions were simply reflective of anger. The result in the Crown submission is that, as a matter of overall impression, the case still comes within s 104 territory because Ms Thompson was a person who was quick to anger and not bonded with Comfort.

[111] The Crown made a similar argument in *Dickason*.[124] Namely, that anger and frustration at the children's behaviour on the evening in question caused Ms Dickason to kill her three children. The sentencing Judge did not discount that Ms Dickason was angry and frustrated with her children that night but saw that as "likely to have been a further stressor" adding to Ms Dickason's "sense of hopelessness about" her situation "as a result of [her] distorted and impaired cognition that was the product of"

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123 *R v Li* HC Auckland T024483, 15 December 2003.
124 *Dickason*, above n 102.

depression.[125] We see the present case as not dissimilar in this respect. Finally, we observe that attributing parental violence to anger is of limited assistance if consideration is not also given to what drives that anger.

Conclusions

[112] As is apparent from what we have said, we consider there was an error in principle. Powerful factors that reduced Ms Thompson's agency and hence her culpability were not adequately weighed and the parallels with infanticide were not addressed. While the evidence is not as well-developed as has been the case in some of the other decisions, the psychological and psychiatric reports before us do provide a picture of a woman whose mental health was sufficiently linked to her offending to reduce her culpability in a way that should have been recognised in considering the applicability of the manifestly unjust exception in s 104(1). The parallels with infanticide should also have informed the relevant comparator cases. Albeit there were other factors at play, we emphasise the evidence supporting a narrative of postnatal depression combined with her pre-existing mental health difficulties all while living in squalid and difficult conditions; the absence of any need for community protection; and Ms Thompson's rehabilitative prospects.

[113] We add that we accept also the appellant's submission that some weight can be placed on the fact that this was reckless murder and not intentional although, as the Crown says, there are other aggravating factors including post-offending conduct that mean the weight to be attached to this aspect is not great.[126] This was serious offending on a particularly vulnerable child but the factors we have identified mean that our overall impression is that an MPI of 17 years was manifestly unjust. The appeal will be allowed.

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125 At [46].

126 *R v Paul* CA496/05, 1 August 2006 at [35] citing *R v Paul* HC Palmerston North CRI-2005-054-102, 28 November 2005 at [6]; and *R v Williams* HC Wellington CRI-2004-078-1816, 24 February 2006 at [20].

Decision

[114] Having established there were errors in the approach adopted by the Court of Appeal, the question that arises is whether we should proceed to resentence Ms Thompson or whether the proceeding should be remitted to the High Court.

[115] As to that, we are concerned that, in part because of the lack of focus on the parallels with infanticide, the relevant factual questions have not been addressed and appropriately focused expert evidence provided. Further, the Crown should have an opportunity to interrogate the evidence if it chooses to do so. There are also institutional reasons for allowing the High Court to resentence, namely, that Ms Thompson under that approach would have a right of appeal and the Court of Appeal could review the matter at that point. This is consistent with the approach taken by this Court recently in *G (SC 130/2024) v R* and *F (SC 98/2025) v R*.[127]

[116] The application for leave to adduce the evidence of Dr Dean will be granted. We also record that, in the absence of any opposition, we have treated the other expert evidence before us but not before the Courts below as evidence properly before this Court.

Result

[117] The application to adduce new evidence is granted.

[118] The appeal is allowed.

[119] The proceeding is remitted to the High Court for resentencing.

[120] Pursuant to s 57(1)(c) of the Bail Act 2000, the appellant is remanded in custody.

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127 *G (SC 130/2024) v R* [2026] NZSC 19; and *F (SC 98/2025) v R* [2026] NZSC 78.

Appendix — list of cases involving murder of a child by a parent or caregiver[128]

1. *R v Mackness* HC Hamilton T023921, 14 April 2003.
2. *R v Li* HC Auckland T024483, 15 December 2003.
3. *R v Williams* [2005] 2 NZLR 506 (CA).
4. *R v Harrison-Taylor* HC Auckland CRI-2004-092-1510, 12 September 2005.
5. *R v Williams* HC Wellington CRI-2004-078-1816, 24 February 2006.
6. *R v Paul* CA496/05, 1 August 2006.
7. *R v Little* [2007] NZCA 491.
8. *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008.
9. *R v Joachim* HC Nelson CRI-2008-042-2437, 29 October 2008.
10. *R v Kapea* HC Auckland CRI-2007-092-16885, 25 November 2008.
11. *R v Curtis* HC Rotorua CRI-2007-063-4149, 4 February 2009.
12. *R v Pickering* HC Auckland CRI-2008-055-1273, 30 July 2010 (conviction appeal dismissed: *Pickering v R* [2012] NZCA 311, [2012] 3 NZLR 498).
13. *Mahomed v R* [2010] NZCA 419.
14. *Ngatai-Check v R* [2011] NZCA 543.
15. *R v Hemana* [2012] NZHC 376.
16. *R v Loffley* [2013] NZHC 201.
17. *R v Ellery* [2013] NZHC 2609.
18. *Filihia v R* [2014] NZCA 401.
19. *Lackner v R* [2016] NZCA 29.
20. *R v McIsaac* [2016] NZHC 1544.
21. *R v Solomon* [2016] NZHC 1653.
22. *R v Taylor* [2017] NZHC 1257.
23. *R v MS* [2017] NZHC 2066.
24. *R v Cooper* [2017] NZHC 2498.
25. *R v Wakefield* [2019] NZHC 1629.
26. *Duff v R* [2020] NZCA 116.

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[128] These cases were provided to the Court by the Crown.

27. *R v Savage* [2020] NZHC 2553.
28. *R v Sinclair* [2021] NZHC 569.
29. *R v Clancy* [2021] NZHC 1021.
30. *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830.
31. *R v Barriball* [2022] NZHC 1555.
32. *Sio v R* [2022] NZCA 337.
33. *R v Brown* [2023] NZHC 1267.
34. *R v Wilson* [2023] NZHC 2640.
35. *Izett v R* [2024] NZCA 64.
36. *R v Sopo* [2024] NZHC 1015.
37. *R v Dickason* [2024] NZHC 1704.
38. *R v Te Ahuru* [2024] NZHC 1851.
39. *R v Topp* [2024] NZHC 1958.
40. *R v Lee* [2025] NZHC 3630 (sentence appeal allowed: *Lee v R* [2026] NZCA 399).