**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA** **SC 38/2022**

**BETWEEN** ***KAINE VAN HEMERT***

Appellant

**AND** ***THE KING***

Respondent

# APPELLANT'S SUBMISSIONS

**11 October 2022**

James Rapley KC

Barrister

BRIDGESIDE CHAMBERS
Level 6, 77 Hereford Street
P O Box 3180
Christchurch 8140
Telephone (03) 964 8000
Email: jrr@bridgeside.co.nz

**MAY IT PLEASE THE COURT:**

**Introduction and background**

1. Kaine Van Hemert called 111 to ask for a time machine so he could travel back in time to kill his (already deceased) father. Soon after, he was found at home, banging his head against a wall and speaking in riddles. A doctor and nurse attended and assessed him to be "acutely psychotic" with "delusions", "disorders of perception" and "paranoia". He spoke "incoherently as if responding to voices". They decided to commit him to hospital for psychiatric assessment.[1] The Police were called to help commit him, but they were delayed, so the clinicians altered their plan and left him at home with medication. The appellant, left alone, fell asleep for the first time in two days. He awoke some hours later, took all his medication, drove into central Christchurch, solicited sexual services from Bella Te Pania and in an argument over payment, killed her. He was later found driving in and out of the same parking space, with Ms Te Pania's body beside him.

2. Two psychiatrists concluded that the appellant suffered from a disease of the mind during the killing, but that he appreciated the nature of his conduct and its wrongfulness. He accepted a sentence indication and pleaded guilty to murder. The High Court held, in reliance on s 102 of the Sentencing Act 2002 ('SA' or 'the Act'), that a life sentence would be manifestly unjust. It sentenced him instead to 10 years' imprisonment, with a minimum period (MPI) of six years and eight months.[2]

3. The Court of Appeal allowed the Crown's appeal against that sentence. It held the appellant's actions disclosed "serious aggravating features" which "precluded" a finite sentence. It quashed the sentence and remitted the case for a further sentence indication consistent with its judgment.[3] A life sentence with an MPI of 11 and a half years was ultimately imposed.[4] The appellant appeals against that sentence with leave.[5]

---

[1] Under s 8A of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHA).
[2] *R v Van Hemert* [2020] NZHC 3203 ('Doogue J sentencing notes'), 01 SC Casebook p 23
[3] *R v Van Hemert* [2021] NZCA 261(COA judgment), 01 SC Casebook p34
[4] *R v Van Hemert* [2021] NZHC 2877, 01 SC Casebook p 9
[5] *Van Hemert v R* [2022] NZSC 94, 01 SC Casebook p 6.

**Summary of the Appellant's Argument**

4. First, s 102 requires consideration of "the circumstances of the offence *and* the offender". "And" does not mean "or" and the circumstances of the offence cannot 'preclude' a finite sentence without considering the offender's circumstances.

5. Second, the criteria by which the relevant "circumstances of the offence" are selected and given weight are contained in ss 7, 8 and 9 of the Act. Among them is the offender's culpability. The Court of Appeal wrongly omitted to consider the effect of the appellant's mental disorder on his perception, rationality and volition as a circumstance of the offence which diminished his culpability. Instead, it translated the objective characteristics of a "brutal and frenzied attack" into aggravating features of dispositive weight, unmodified to account for the fact they were committed by a mentally disordered, emotionally labile and paranoid offender.

6. Third, unless a mental disorder which causally contributes to the offence is considered a 'circumstance of the offence', s 102 offends s 19 of the New Zealand Bill of Rights Act 1990 ('NZBORA'). On the premise that identifying the relevant circumstances includes gleaning an offender's culpability, and that mental disorder can diminish culpability, preventing mentally disordered offenders praying it in aid to show reduced culpability indirectly discriminates against them. They are unable to have their culpability for committing the offence properly assessed, unlike other offenders. Neither s 102's text or purpose is transgressed by requiring it to be read consistent with s 19, and ordinary principles of statutory interpretation require that it be so read.

7. Fourth, it was not proven to the requisite standard (s 24, SA) that the voluntary consumption of substances caused the appellant's psychosis. Alternatively, such consumption did not deprive his psychosis of mitigatory force: "drunkenness is one thing and the diseases to which drunkenness leads are different things". That principle survives s 9(3) SA as *Zhang* illustrates: mental disorder consequent on voluntary substance use (there, addiction) can mitigate offending despite its origin in such consumption.

8. Fifth, the Court wrongly reasoned that a murder was "not totally out of character" because the appellant reported problems controlling his temper, and because he pushed someone in a bar, aged 21. Moreover, the Court failed to consider, in assessing the appellant's future risk, that proper implementation of the MHA would have prevented the offence.

**The appellant's psychiatric history**

9. At the time of the offence on 31 January 2019, the appellant was 42 years' old. He had been treated for psychiatric issues on three prior occasions. A summary of each is necessary to understand the diagnoses made by Dr Mhairi Duff (a consultant psychiatrist) and Dr Karen McDonnell (a psychiatric registrar) of the appellant's general condition and his mental state during the offending.

10. First, in 1995 (aged 17) the appellant was involved in a car crash and was charged for driving with excess blood alcohol and operating a vehicle carelessly. Disproportionate distress and bizarre behaviour in its wake led to his presentation at hospital "babbling nonsensically" and a diagnosis of an "acute psychotic episode". Doctors considered the "possibility" it was drug-induced but had "no evidence" for their suspicion.[6] His symptoms remitted after several days, after treatment with an antipsychotic.

11. Second, in 1998 he was compulsorily admitted to hospital under the MHA. He held grandiose and persecutory delusions and "believed he could communicate with his dead Aunty and that he could swim through the ground".[7] He claimed to have consumed LSD, though toxicology tests did not detect any. He was again treated (successfully) with an antipsychotic. He was diagnosed with bipolar affective disorder with psychotic features. A differential diagnoses was made of a possible drug-induced psychosis.

12. Third, in 2016 the appellant's then-partner contacted mental health services to report that he was "not sleeping and [was] experiencing paranoia" and that he believed his employees were planning to rob him

---

[6] Report of Dr Karen McDonnell, 19 May 2020 ('McDonnell'), [14]-[15], 02 CA Casebook p 26; Report of Dr Mhairi Duff, 12 October 2020 ('Duff') at [37], 02 CA Casebook p 46.
[7] McDonnell [16]; 02 CA Casebook p 26-27; Duff [38]-[39], 02 CA Casebook p 46-47.

and to steal his daughter. As Dr McDonnell notes, "the context was the sudden death of his father and longstanding issues in his relationship with his parents".[8] He was diagnosed with an acute polymorphic psychosis.

**Events leading to the offending**

13. The appellant became aware on Christmas Day 2019 that, contrary to an agreement between them, his former partner (from whom he had separated two years prior) had introduced their daughter to her new partner without consulting him. He perceived that others at the Christmas gathering were aware of the arrangement, which made him feel "pitied" and "stupid".[9] The appellant believed this discovery likely precipitated the deterioration in his mental state.[10]

14. He reported ruminating about what he regarded as his former partners betrayal. He resorted to excessive amounts of alcohol, which he said ran out 24-48 hours before the offence, and said he smoked and ate cannabis, including on the night of the offence.[11] He told Dr McDonnell that he began to write a book ("The Scientist"), and that save for several short naps, he did not sleep in the five days before 31 December. He described "heightened anxiety, disorganised thinking and paranoia".[12]

15. On 29 December his former partner called mental health services to express concern at the appellant's paranoia (he suspected his friends were undercover police officers). She later called 111 to request that someone visit him since he was "absolutely manic", "paranoid" and "talking all sorts of nonsense about undercover Police and time machines".[13] On 30 December the appellant also called 111, asked the operator if he could join the Police, rambled about 'narks' and drugs, and asked for a time machine so he could travel back in time to kill his father.[14] The appellant's brother likewise called mental health services

---

[8] McDonnell [17] 02 CA Casebook p 27; Duff [39]-[42], 02 CA Casebook p 47.
[9] Duff [53] 02 CA Casebook p 50.
[10] McDonnell [29] 02 CA Casebook p 29.
[11] At [30]-[33], 02 CA Casebook p 29. Duff [3]-[5] 02 CA Casebook p 39-40.
[12] McDonnell [32] 02 CA Casebook p 29.
[13] Duff [23](i) 02 CA Casebook p 43; Transcript of 111 Call of his former partner 30/12/19 at p 2.
[14] Duff [23](e), 02 CA Casebook p 43; Transcript of 111 call by Kaine Van Hemert, 30/12/19 p 4.

and said that the appellant was "nonsensical", and was "talking in riddles".[15]

16. Just after 1pm on 30 December, a doctor and nurse ('the clinicians') from Hillmorton Hospital arrived at the appellant's home. His brother advised that the appellant had been in the shower since 11am, that he had not slept the night before, and that he had been talking nonsensically to himself since the day before. The appellant refused to engage with the clinicians, shouted at them, and shouted at himself. The clinicians determined the appellant needed to be compulsorily committed to hospital for assessment. The doctor certified under s 8B of the MHA that there were reasonable grounds to believe the appellant was "mentally disordered", and noted that:[16]

> Kaine is acutely psychotic, characterised by delusions and disorder of perception. Kaine exhibited paranoia and was talking incoherently to himself as if responding to voices. In my opinion, Kaine poses a risk to himself due to his reduced ability to perform self cares. He had remained in his shower naked for hours, and had not eaten or slept for one day.

17. The nurse called Police for assistance to transfer the appellant to hospital. She said, "he actually isn't aggressive, um although I, I certainly wouldn't like to get too close to him, he is psychotic".[17] The operator advised that the Police's arrival would be delayed. Their anticipated delay and a perception that the appellant might feel 'embarrassment' at being taken to hospital combined to prompt the clinicians, in consultation with his brother, to prescribe medication to the appellant and to leave him at home.[18] The doctor accordingly called Police to withdraw the request for assistance but asked that the "job" be kept open in case help was later needed. In the meantime, his brother collected the medication, administered a dose of it and at 8pm notified the clinicians that the appellant had fallen asleep. He was then left unsupervised.

---

[15] Medical notes of nurse at Canterbury District Health Board recorded in Serious Incident Review ('CDHB SIR'), 25 June 2021, 01 SC Casebook p 56-57.
[16] *R v Van Hemert*, 3 November 2020 (Doogue J SI) at [18], 02 CA Casebook p 64.
[17] At [20] 02 CA Casebook p 65.
[18] CDHB SIR, 01 SC Casebook p 59. Duff p 4 02 CA Casebook p 40, [15], 02 CA Casebook p 42.

**The offending**

18. The appellant said he awoke at some point in the night and felt "panicky" and anxious. He took all the medication prescribed to him earlier that day. He said he decided impulsively to solicit the services of a sex worker (somehow) to 'level the playing field' with his former partner (from whom, it should be recalled, he had separated two years before).[19] He reported he was concerned that his home address could be identified by gangs from his car's numberplate - so he stole plates from another car.[20] At 4:30am he texted a workmate, "can you help me please?"[21]

19. He drove into central Christchurch, only to abort the trip and return home, where he consumed cannabis. He decided to put a fishing knife in his car for protection and proceeded into the city again (he thought maybe an hour later).[22] He aborted that trip too and returned home to smoke cannabis. On his third trip, he substituted a second set of stolen numberplates for the first set of stolen number plates, and drove into town, while feeling "panicky", "out of control", "hurt and lied to" and "angry underneath".[23]

20. Ms Te Pania got into the appellant's car at about 5:30am. He said they discussed what services could be provided for the $30 he had. He reported dissatisfaction (and then anger) at her response that it could purchase a 'hand job'. He said that Ms Te Pania pulled out a rudimentary weapon and that in trying to stab him in the groin area, she inflicted a wound to his hand.[24] Dr Duff recorded the appellant's recollection of reaching for the fishing knife in his door and attacking Ms Te Pania repeatedly. The Summary of Facts records the gruesome injuries he inflicted to Ms Te Pania's face, thighs and abdomen. Her trachea was also severed.

---

[19] Duff [5], 02 CA Casebook p 40; [54], 02 CA Casebook p 50.
[20] As above.
[21] FWS of work colleague at [66]
[22] McDonnell [40], 02 CA Casebook p 31; Duff [5], 02 CA Casebook p 40.
[23] As above, and following.
[24] Duff [6], 02 CA Casebook p 40.

21. With Ms Te Pania's body in the front seat, the appellant drove around and at 6:45am entered the Air New Zealand employee carpark at the airport. One witness described the appellant as "acting very strangely" and "acting drunk but I couldn't smell any alcohol on his breath or about him… he was spaced out like he didn't know where he was".[25] Another said "I did not smell any alcohol on the male and he was not 'out of it'…I don't think he knew where he was".[26] The appellant was noticed by a further witness "backing back and forth in the same car park".[27]

22. Police interviewed the appellant that morning. He made various confused statements, including that he stole the vehicle he was found in, with details of how he stole it (he in fact owned it), that he set the victim's body on fire in a riverbed (he had not) and that he threw the false number plates away (he did not).

***Psychiatric assessments***

23. Dr Duff and Dr McDonnell agreed that the appellant laboured under a disease of the mind at the time of the offending, but that he was capable of appreciating the nature and quality of his actions (that he was attacking a person) and their moral wrongfulness (shown by his professed consideration of hiding Ms Te Pania's body).[28] The psychiatrists agreed the appellant was fit to stand trial. They further agreed that, as Dr McDonnell put it, Mr Van Hemert suffered from "brief psychotic episodes, typically during times of acute psychological stress, which is exacerbated by alcohol and substance use".[29] Indeed, his use of alcohol and cannabis prompted diagnoses by each psychiatrist of a "substance use disorder" for his "prolonged heavy use" of each.[30]

24. The psychiatrists diverged as to the precise interaction between the appellant's substance use and his recurrent psychoses. Dr McDonnell favoured differential diagnoses of "Brief Psychotic Disorder or

---

[25] Duff [66], 02 CA Casebook p 52.
[26] At [67].
[27] At [68].
[28] Dr Duff considered this followed from her assessment that the appellant remained "mentally disordered" within s 2 of the MHA during the offending, while Dr McDonnell did not explain her conception of 'disease of the mind'.
[29] McDonnell [78], 02 CA Casebook p 36.
[30] McDonnell [75]-[76] 02 CA Casebook p 36; Duff [59]; 02 CA Casebook p 51.

Substance Induced Bipolar Disorder".[31] She said that in three of the appellant's four previous episodes there was evidence to suggest that symptoms developed "during or soon after substance intoxication".[32] She did, however, note that "all four episodes are associated with acute psychological stress", and that if symptoms preceded such use (or persisted long after it) a diagnosis of bipolar affective disorder could be considered.[33] As to the appellant's state on 31 December 2019, she posited that the prompt remission in his symptoms supported her theory that alcohol and cannabis intoxication was a "major factor" in his mental state disturbance, but noted that "features of pronounced alcohol withdrawal were not clearly identified".[34] Overall she noted that he suffered from a "significant disturbance" in his mental state and that:[35]

> The severity of this mental state disturbance was beyond what would be wholly explained by alcohol and cannabis intoxication, and it suggests a mental disorder which has either been caused or exacerbated by substance use.

25. Dr McDonnell did not explain how she considered the appellant's mental disorder conditioned his perception, rationality or volition. Finally, after describing this "significant disturbance" in his mental state and its status as a disease of the mind, she reproduced s 23 of the Crimes Act, asserted that the appellant's actions were not "driven by symptoms of major illness" and that "therefore" the insanity defence was unavailable. It is submitted that the location of this remark (while considering whether his disease of the mind satisfied s 23) and her earlier recognition of the appellant's illness as "significant" suggest that the purport of Dr McDonnell's comment was that the appellant's mental disturbance did not so drive his behaviour as to justify a finding of insanity.

26. Dr Duff diagnosed the appellant with Bipolar (I) Disorder. His history of mania with psychotic features appeared to have been triggered by "psychosocial stressors" like the death of his father in 2016.[36] She

---

[31] McDonnell [73], 02 CA Casebook p 35.
[32] As above.
[33] As above.
[34] At [79], 02 CA Casebook p 37.
[35] At [78], 02 CA Casebook p 36.
[36] Duff [58], 02 CA Casebook p 51.

considered, but rejected, a diagnosis of substance induced bipolar disorder. Suggestions that hallucinogenic or stimulant drugs induced past episodes lacked supporting toxicology, despite timely testing in 1998 and 2016.[37] Dr Duff likewise noted that the remission in the appellant's symptoms after the offence "followed a very similar pattern to his previous acute relapses in mental illness".[38] That is, they were "typically short-lived and responsive to antipsychotic medication".[39] Moreover, she criticised Dr McDonnell for omitting to analyse the effect that the appellant's consumption of several days' worth of medication - lorazepam (a benzodiazepine) and risperidone (an antipsychotic) - would have had on the remission of his symptoms.[40] The correspondence between the appellant's behaviour, including the remission in his symptoms, and the lack of evidence indicating his past psychoses were substance induced, led Dr Duff to conclude that substance use exacerbated, rather than caused his psychosis.

27. As to the effects of the appellants mental disorder, Dr Duff considered the appellant would have been "more sensitive to perceived threats", "emotionally labile" with impaired judgement and insight, which together likely played a "significant contributory role" in the offending.[41]

**Sentence indication and sentencing**

28. Doogue J premised her conclusion that life imprisonment was manifestly unjust on "the extent of [the appellant's] psychiatric illness at the time of the homicide, and because of other factors".[42] Second, she held that the appellant did not remain a risk to others, though he required ongoing treatment. Third, she noted that the crime was "entirely out of step with his general life pattern".[43] In combination, these features rendered less applicable the principles of denunciation and deterrence. Fourth, the Judge noted Ms Te Pania's vulnerability - as a sex worker, a slight

---

[37] Duff [42], 02 CA Casebook p 47.
[38] At [97], 02 CA Casebook p 58.
[39] At [95], 02 CA Casebook p 58.
[40] At [74], 02 CA Casebook p 54.
[41] At [99], 02 CA Casebook p 58.
[42] Doogue J SI, at [27], 02 CA Casebook p 66. The Judge did not specify what she meant by "other factors" - whether it was a reference to the appellant's guilty plea or to something else.
[43] At [28].

person and as one "trapped" in the appellant's vehicle. Finally, the Judge commented that Mr Van Hemert's "motivation for the murder was solely as a result of his mental illness".[44]

29. At sentencing the Judge developed her analysis on the appropriate finite term. She adopted a starting point of 18 years' imprisonment, after identifying the appellant's extreme violence, use of a weapon and Ms Te Pania's vulnerability as aggravating features.[45] 25% was deducted for the appellant's mental illness and 19% for his guilty plea. The final term was 10 years' imprisonment with an MPI of six years, eight months.

**The Court of Appeal judgment**

30. The Crown appealed. The Court cited several cases of offenders with (an array of) "mental illness" who received life sentences.[46] It called *Reid* a "notable exception to that line of cases", in which the offence was "entirely out of character" and "against [Mr Reid's] entire life's pattern".[47] The Court concluded that:[48]

> Rarely have the Courts been persuaded that offenders who are suffering from severe mental illness should avoid a sentence of life imprisonment for murder.

31. In passages we reproduce below, the Court considered the appellant's conduct disclosed "very serious aggravating features".[49] His attack was "brutal and frenzied" and Ms Te Pania was vulnerable. It concluded:[50]

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

32. The Court made "comment" in a "provisional assessment" of three aspects of the appellant's personal circumstances.[51] First, it criticised Doogue J's remark that the appellant's mental illness was his sole

---

[44] At [29]-[30], 02 CA Casebook p 67

[45] Doogue J Sentencing notes, above n 4, at [36]-[38], 01 SC Casebook pp 31 - 31

[46] COA judgment above n 3, at [40], 1 SC Casebook pp 45 - 46 citing *R v Mayes* [2004] 1 NZLR 71 (CA); *R v Morris* [2012] NZHC 616; *Te Wini v R* [2013] NZCA 201; *R v Yad-Elohim* [2018] NZHC 2494; and *R v Brackenridge* [2019] NZHC 1627.

[47] At [40]-[41], 01 SC Casebook pp 45 – 46; *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

[48] At [40], 01 SC Casebook p 45

[49] At [47], 01 SC Casebook p 47

[50] As above.

[51] At [48] and [51] respectively, 01 SC Casebook pp 47 - 48

motivation for the murder. The Court countered that his use of alcohol and drugs contributed to his conduct, as did "the anger that appears to have been a characteristic of his behaviour that evening".[52] Second, it said the Judge did not "fully evaluate" the risk the appellant posed to the community. Referring to its earlier description of the appellant once pushing someone through a window, the Court said:[53]

> There appears to be a close correlation between Mr Van Hemert's abuse of drugs and alcohol, *which in turn triggers* mental health relapses that on occasions involve acts of violence or aggression towards others. Unlike in *R v Reid*, we do not think it was right to characterise Mr Van Hemert's offending as totally out of character or entirely out of step with his general life pattern.

33. Third, it was said that Doogue J wrongly overlooked that the appellant failed to show remorse.[54]

**Sentencing for murder - history and context**

34. Murder carried a mandatory life sentence until the commencement of the SA. The Sentencing and Parole Bill 2001 ('the Bill'), which became the Act, had its first reading on 14 August 2001. Earlier that year, the Law Commission delivered a report on certain partial defences, which included chapters on whether to adopt a defence of diminished responsibility (to murder) and whether to introduce a discretion to sentence murderers to less than a life sentence, respectively.[55]

35. The Commission's recommendation not to introduce a defence of diminished responsibility was closely linked to its recommendation to introduce a discretion to sentence murderers to less than life. It discussed the defence in England,[56] but observed that it was a "difficult concept to define", "difficult in practice" and "the circumstances giving rise to diminished responsibility are matters better considered at

---

[52] At [50] 01 SC Casebook p 48
[53] At [52], 01 SC Casebook p 48, emphasis added.
[54] At [53] 01 SC Casebook p 48
[55] "Some criminal defences with particular reference to battered defendants", NZLC R73, 2001.
[56] At [122]-[140].

sentencing".[57] It therefore did "not support the retention or creation of partial defences once a sentencing discretion is available for murder".[58]

36. The government had in March 2001 indicated its intention to introduce a discretion in murder sentencing, and cl. 91 of the Bill it tabled in August mirrored wording suggested by the Commission.[59] The Bill's Explanatory Note, the Select Committee and the relevant Minister in his first reading speech, described the clause as containing a "strong presumption" in favour of life imprisonment.[60] He continued:[61]

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

37. In Ms Albury-Thompson's case, a jury acquitted her of murder, but convicted her of manslaughter, for (plainly intentionally) strangling her autistic daughter. Insofar as the Minister cited her case to argue that mitigating features of intentional killings ought to be considered at sentencing, rather than in determining liability, he echoed the Law Commission's reasoning for eschewing the diminished responsibility defence in favour of greater discretion in sentencing.

38. Clause 91 survived an attempted amendment by an opposition MP to replace it with a requirement that a sentence of at least 10 years be imposed and the Act received Royal Assent on 5 May 2002.[62]

---

[57] At [137] and [162] respectively. Clause 180 of the Crimes Bill 1960 (61-2) contained a partial defence of diminished responsibility, but which did not survive into the Crimes Act 1961.
[58] At [161].
[59] At [173]: "the sentence for murder should be life imprisonment unless the circumstances of the offending or offender would make such a sentence clearly unjust."
[60] Explanatory Note, Sentencing and Parole Reform Bill (148-2), at 3; Report of the Justice and Electoral Committee on the Sentencing and Parole Reform Bill, at 8.
[61] Explanatory Note p 3; Speech of Mr Phil Goff (14 August 2001) Vol. 594 p 292.
[62] (18 April 2002) Vol. 599 at p 657.

**Structure of submissions**

39. The approach to s 102 is first addressed with reference to the SA and then supplemented by reference to the NZBORA. Mr Van Hemert's substance use is then discussed, before a submission about the proper identification of the circumstances of the offence and the offender.

**Section 102 of the Sentencing Act**

40. Section 102(1) provides that:

> An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.

41. The test was elucidated in *Rapira*, in a passage whose correctness the appellant does not seek to challenge:[63]

> The test is that the sentence of life imprisonment is manifestly unjust. That conclusion has to be made on the basis of the circumstances of the offence and the offender. It is an overall assessment. The injustice must be clear, as the use of "manifestly" requires. The assessment of manifest injustice falls to be undertaken against the register of sentencing purposes and principles identified in the Sentencing Act 2002 and in particular in the light of ss 7, 8 and 9. It is a conclusion likely to be reached in exceptional cases only, as the legislative history of s 102 suggests was the expectation.

42. Several general interpretive points arise, especially in the context of mentally disordered offenders.

*Circumstances of the offence "and" the offender*

43. First, both the circumstances of the offence "and" the offender must be considered in an "overall assessment".[64] If little weight is given to either, that can only be because, after consideration, the principles or purposes of sentencing in ss 7, 8 and 9 justify that opinion. An assessment of one, however dispositive of the result it might seem, never precludes consideration of the other.[65] For good reason, as Megarry V-C noted:[66]

---

[63] *R v Rapira* [2003] 3 NZLR 794 (CA), at [121].
[64] *R v Cunnard* [2014] NZCA 138 at [33]: the test is "conjunctive".
[65] In fairness, Collins J later emphasised the conjunctive nature of the test in a judgment delivered after the Court of Appeal decision in this case: *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830, at [38](c).
[66] *John v Rees* [1970] Ch 345 (ChD), 402.

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

44. The Court of Appeal failed to follow the statutory command to consider both sets of circumstances. It said expressly that the former "precluded" departure from the s 102 presumption, before it considered the appellant's circumstances. It then described its treatment of his circumstances as "provisional". Further, it gave no indication that it weighed the circumstances of the offence against the appellant's circumstances, as one might have expected in a case where the High Court considered the appellant's circumstances so powerful that the presumption was displaced.

*Identifying "the circumstances of the offence"*

45. Second and perhaps obviously, the selection of the facts relevant to determining whether a life sentence would be manifestly unjust, and the weight to be ascribed to them, must be governed by criteria independent of the facts themselves. Facts do not determine their own significance, and each fact must be evaluated to determine *why* it favours or disfavours the conclusion that a life sentence is clearly unjust. This would ordinarily be a trite or trivial observation undeserving of mention. Where, however, the offender's mental disorder is said to pervade his faculties of perception, reasoning and volition, facts which would ordinarily be reflexively assumed to constitute aggravating features may have their status as such tempered or negated by principles (which we identify below) which make the offender's mental faculties relevant to the identification of aggravating factors.

46. Third, as Elias CJ noted, the Act provides the (mandatory) criteria for selecting the relevant facts and ascribing weight to them. Section 7 provides "the purposes for which a court may sentence", s 8 the principles the court "must" take into account and s 9 a non-exhaustive list of aggravating and mitigating features which courts "must take into account". The ultimate evaluative conclusion, whether a life sentence is manifestly unjust, can be drawn only by assessing the facts against the

full register of those principles. Reasoning from a factual premise to an evaluative conclusion requires an evaluative premise. In an s 102 case, the court must reason from the facts of the offence to a conclusion that a life sentence is or is not manifestly unjust via the premise that a fact favours or disfavours that conclusion *because* it is required by the pertinent principles or purposes of the Act.

47. Fourth, particular sentencing purposes in s 7 implicated (to varying extents) in this case include accountability, deterrence, denunciation, rehabilitation, and community protection. Particular principles engaged are the need to consider "the gravity of the offending…including the degree of culpability of the offender" (s 8(a)) and that the sentence must constitute the "least restrictive outcome" available (s 8(g)).

48. Fifth, the phrase "circumstances of the offence and the offender" does not imply two mutually exclusive concepts. A single fact, such as that the offender was addled by illness during the offence, can for different reasons, and according to different principles or purposes of sentencing, be relevant to each concept. Insofar as the "offending" imports cognisance of the offender's culpability (s 8(a)), illness may be relevant to it. The illness may also engage considerations best conceived as relating to offender rather than offence. For instance, it may lessen the need to deter the offender (s 7(f)), and may require an otherwise appropriate sentence to be modified to further their rehabilitative needs (s 7(1)(h)). That does not constitute 'double-counting' the illness in mitigation: it is a corollary of the Act's definition of the "offending".[67]

49. Sixth, mental disorders which causally contribute to the offence may be recognised as a circumstance which alters its "intrinsic seriousness" or "character and gravity of the offending itself".[68] "Gravity" (or "seriousness", in the *Taueki* phraseology) is a normative concept, composed of the aggravating and mitigating features.[69] In the Act:[70]

---

[67] *L (CA719/2017) v R* [2019] NZCA 676 at [50]*:"*On the contrary, to fail to properly account for all relevant aspects of the offence and the offender is to undercount."

[68] *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37, at [45]; *L (CA719/2017) v R* above n 67, at [50].

[69] *R v Taueki* [2005] 3 NZLR 372 (CA), at [28]-[33].

[70] *Shailer v R* [2017] NZCA 338, [2017] 2 NZLR 629, at [46].

> The juristic concept of "offending" includes aggravating and mitigating features relating to the commission of the offence. That includes, as s 8(a) confirms, the offender's personal culpability.

50. The fact an offender laboured under a mental disorder while committing an offence is as much a fact of the offending as the *actus reus*.[71]

51. The reasons why mental disorders which contribute to a person's decision to offend may diminish culpability is settled.[72] It follows from the premise, variously expressed, that "criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend".[73] Mental disorder which vitiates or impairs an offender's rationality, perception or capacity to exercise self-control renders them an unsuitable recipient of criminal punishment in unqualified form.

*Mental disorder and the circumstances of the offender*

52. Mental disorder is likely also to be relevant in ways more neatly regarded as part of the offender's circumstances. If operative during the crime, the presence of a disorder merits moderated denunciation of the offender's conduct, and their diminished agency renders them less accountable for the harm than if they were of sound mind.[74] Such offenders are likewise less responsive to deterrent sentences[75] and "poor subject[s] for general deterrence".[76] For this reason, O'Regan P said in *Wihongi* that the deterrence of others is unlikely to have a "*major"* impact in s 102 cases which, by definition, are exceptional and may involve features which implicate other principles, like rehabilitation.[77] Contrariwise, recurrent, unpredictable or untreatable illnesses may call for a lengthier sentence for the public's protection (s 7(1)(g)).

---

[71] Reflected in the intuition that an offence would not have been accurately described if no reference was made to a characteristic which significantly diminished the offender's moral culpability. It would merely be a list of facts, arbitrarily curated to exclude certain facts about the offender.

[72] For cases before the Act: *R v Abraham* (1993) 10 CRNZ 446 (CA), 449; *R v Wright* [2001] 3 NZLR 22 (CA), at [22]; *R v Tapueluelu* CA172/99, 29 July 1999 at [15]; *R v Nilsson* CA552/99, 27 July 2000 at [10].

[73] *E (CA689/2010) v R* [2011] NZCA 13, (2011) 24 CRNZ 411 at [68]; *Shailer a*bove n 70, at [50].

[74] *Shailer* above n 70, at [50]; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, at [138].

[75] *E (CA689/2010) v R*, above at [69]-[70]; *Shailer*, above n 70, at [47]-[48]; *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551, at [138] (ft. 180) (Winkelmann CJ) and [167] (O'Regan and Arnold JJ); *Zhang*, at [145].

[76] *L (CA719/2017) v R,* above n 67, at [54].

[77] *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775, at [93] (original emphasis).

53. To these reasons for treating mental disorder as a mitigating feature we venture to add another, which relates not to its curtailment of the offender's capacity or agency, but to the distinction between the offender as the person who committed the offence, and the offender as the person who is punished.[78] Pervasive, but transient, mental disorder may implant in a person ideas and desires until then foreign to them, inconsistent with their normal character and perhaps accompanied by reduced volitional control, making more likely that those desires will be acted upon. If a person is in the throes of such a disorder for a matter of hours or days in the course of their life, there is a real sense in which the character they display across those few hours or days is not *theirs*. It does not reflect the personality or character they have developed. Yet provided minimum conditions under s 23 are satisfied, punishment for the crime committed in furtherance of the temporary desires is visited on the offender of sound mind, who might quite intelligibly say that the behaviour was not 'really his', or that 'he would *never* contemplate' acting as he did. Such statements are in one sense false - the law ascribes sufficient responsibility to him for liability. Yet they hint at, we suggest, a sound intuition: the person being punished is not *straightforwardly* the same person who committed the crime. If that is so, the demands of accountability and denunciation must be moderated.

*Assessing the import of mental disorder*

54. Seventh, "mental illness" is a portmanteau term for a variety of different medical conditions which does not capture (to any meaningful extent) a set of symptoms common to its sufferers. The Court of Appeal erred by invoking it in aid of the proposition that 'mentally ill offenders' "rarely" displace the presumption in s 102.[79] While that may be true as an empirical generalisation, it lacks practical utility or normative force - the ambiguity of the concept prevents its use as a meaningful comparator between offenders. Moreover, even two offenders with the same medical condition may experience entirely different symptoms. Each

---

[78] The broadening of focus beyond the defendant's capacity is discussed by Ronald Dworkin in chapter 10 of *Justice for Hedgehogs*, Belknap Press (2011), especially pp 241-252.
[79] COA judgment, above n 3, at [40], 01 SC Casebook p 45

may also be differently able to bear what objectively seem similar symptoms.

55. It is unsurprising, then, that despite characterising the cases it cited as a "line of cases" (entailing a connection between them), the Court attempted no more granular analysis between how the defendants in those cases were affected by illness compared to the appellant. Such analysis would have been unenlightening, since the line of case encompassed those with head injuries (*Mayes; Mikaele*), post-traumatic stress disorder (*Te Wini*) and schizophrenia (*Morris; Brackenridge*). It is submitted, therefore, that while not wholly inapt, comparisons between mentally ill offenders might productively focus on whether, or to what extent, the illness impaired their faculties of reason and decision, rather than the bare fact that such offenders were mentally ill.

56. In this regard, and given the Law Commission's posited relation between s 102 and the defence of diminished responsibility, the criteria for its availability in England and Wales provide useful indicia for assessing the significance of a mental disorder. It applies where an "abnormality of mental functioning" arising from a "recognised medical condition" "substantially impaired" the offender's ability to understand the nature of their conduct, to form a rational judgment; or to exercise self-control.[80] Consistent with such language, sentencing courts in England and Wales are directed to judge whether mental disorder affected culpability by:[81]

> impairing the offender's ability to exercise appropriate judgment, or to make rational choices, or to understand the consequences of his actions, or whether it caused the offender to behave in a disinhibited way.

57. The appellant suggests that this passage, and s 2 of the Homicide Act, provide helpful criteria by which to assess the impact of mental disorder on an offender's mind.

*"Manifestly unjust"*

58. Eighth, the concept of manifest injustice provides a (conceptually) clear yardstick by which to assess the application of s 102 (even if its

---

[80] Homicide Act 1957 (UK), s 2

[81] *R v PS* [2019] EWCA Crim 2286, [2020] 4 WLR 13, at [8] per Lord Burnett of Maldon CJ.

application to certain facts is contentious). It denotes clear unfairness or injustice and insofar as satisfying the standard requires the displacement of a presumption, it is plainly intended to apply exceptionally. Beyond those implications from the statutory language, it is submitted that little is gained from attempts further to qualify or supplement its meaning by recourse to adjectives (such as "strong" or "very strong") transposed from parliamentary materials. There is no evidence whether others who voted for the measure agreed with the Minister or the Select Committee on anything beyond the text for which they voted.[82] Wording which does not appear in the statutory text cannot be elevated to parity with it.

**Section 19 of the NZBORA as an interpretive aid to s 102 SA**

59. For the following argument to have independent force, the SA must not require, but must permit,[83] "the circumstances of the offence" in s 102 to be interpreted to include an offender's mental illness.[84] The argument above was that the SA indeed requires that reading, but if that is unsound, recourse should be had to the NZBORA in the following way.

*Application of s 19 of the NZBORA*

60. First, fundamental rights can be abridged only be express words, and Parliament will not readily be imputed with the intention to breach the NZBORA.[85] Second, s 19 of the NZBORA provides that "everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993" ('HRA'). Section 21(1)(h) of the HRA provides among the "prohibited grounds of discrimination" any

---

[82] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, at [65] per Lord Nicholls, "it should not be supposed that members necessarily agreed with the minister's reasoning", and at [111] per Lord Hope: "it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the executive". See the discussion by Lord Reed PSC in *R (SC) v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223, at [163]-[185].

[83] There is no provision in this case equivalent to s 9 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 like in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 which at least superficially suggested an NZBORA-compliant interpretation was contrary to the statutory purpose.

[84] That is, it must (obviously) hold good without reference to s 8(a) of the SA.

[85] *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL), 131; *D (SC 31/2019) v New Zealand Police,* above n 83, at [74]-[75] and [96]-[102]; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [89]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289, at [90]-[91]; *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745, at [100] and [161]. Ordinary interpretive principles yield a meaning of s 102 which complies with the NZBORA without need to resort to s 5 NZBORA or a *Hansen* justificatory analysis.

"disability", which includes "psychiatric illness", "psychological disability or impairment", or "any other loss or abnormality of psychological, physiological, or anatomical structure or function". The terms in s 21(1)(h) are not further defined.[86] Third, the concept of discrimination in the HRA encompasses both direct and indirect discrimination. The latter is defined in s 65 of the HRA to encompass:

> …any conduct, practice, requirement or condition…which has the effect of treating a person or group of persons differently on 1 of the prohibited grounds…

61. Fourth, as the Court of Appeal held in *Atkinson*:[87]

> the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

62. The Court explained that the requisite "discriminatory effect" consists in the group discriminated against incurring "material disadvantage".[88] This approach was followed in *Ngaronoa*, where the Court gave as an example of indirect discrimination *Eldridge's* case in Canada which involved:[89]

> …a policy in a public health system which [did] not fund the provision of translation services to deaf patients who could otherwise use state care. The provision did not mention deafness, and did not explicitly exclude deaf patients from the benefit of state care, but a failure to provide translation services to deaf patients effectively denied them equal access to important benefits that were available to other persons who were not deaf. Accordingly, the discrimination does not need to be direct.

63. The Court in *Ngaronoa* referred to a second Canadian case - *BCGEU* - where an ostensibly neutral aerobic standard adopted by a provincial government for local fire brigades had a disparate impact on women because it was set at a level unattainable by most women.[90] As the

---

[86] Given the evidence from both psychiatrists that the appellant suffered from a disease of the mind, it is thought that his illness is a paradigmatic instance of a "psychiatric illness".

[87] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, at [55].

[88] At [109].

[89] *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643, at [119], citing *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624.

[90] *British Columbia (Public Service Employee Relations Commission) v BCGEU* [1999] 3 SCR 3, discussed in *Ngaronoa* at [136]-[137].

disparate impact was a product of inherent psychological differences between men and women, it constituted indirect discrimination on the ground of sex and required justification. Underlying both Canadian cases is the fundamental principle that "like cases should be treated alike, and different cases treated differently", which Elias LJ called "perhaps the most fundamental principle of justice".[91]

64. Fifth, a comparator group must be selected to illustrate that the divergent treatment complained of is a function of a prohibited ground.[92] It is submitted that the appropriate comparator group is those convicted of murder who did not suffer from a psychiatric illness at the time of the offending. That group mirrors the appellant's position, save for the psychiatric illness on the basis of which he claims disparate treatment. It also presents a contrast between two notional people (or groups), both of whom wish to have their culpability for committing a murder assessed.

*The discrimination in this case*

65. This submission depends on three premises. First, that identifying the circumstances of the offence requires an inquiry into its gravity. Second, that judgements of gravity depend in part on the offender's culpability: the court is, after all, deciding how long a person deserves to go to prison for.[93] And third, that mental illness may mitigate culpability. If those assumptions are sound, an offender whose psychiatric disorder contributes to their offending and whose culpability is diminished for that reason, is unable to rely on relevant evidence of their culpability by a construction of the "circumstances of the offence" which omits consideration of their mental state. The comparator offender has no such problem and can make submissions and provide evidence about the seriousness of their offending.

---

[91] *AM (Somalia)* [2009] EWCA Civ 634, [2009] UKHRR 1073, at [34]. Laws LJ elsewhere considered it was underlain by a yet deeper principle of consistency: *R (MA) v Work and Pensions Secretary* [2013] EWHC 2213, [2013] PTSR 1321, at [37]-[48].

[92] *Atkinson* at [60].

[93] *R v Bridger* [2003] 1 NZLR 636 (CA) at [42]: "criminal punishment has an essentially moral base and lesser moral fault requires recognition"; *R v Tuia* CA312/02, 27 November 2002 at [15].

66. The discrimination is not avoided by considering the mitigatory impact of the mental disorder as a "circumstance of the offender" unless it invites wholesale reevaluation of the gravity of the offence. If it does not, the mentally disordered offender's prospect of displacing the presumption in s 102 is materially reduced by the circumstances of the offence being determined without reference to their disorder, which circumstances are in its absence more serious. An inability to pray in mitigation a significant mitigating factor would deny the appellant "the equal protection and equal benefit of the law" and the equal "concern, respect and consideration" which s 19 seeks to secure.[94]

67. The Crown's submission on the leave application to this Court that the appellant's "mental state at the time of the offending may have been best considered as a circumstance of the offence" entails an acceptance that the Act can be so read.[95] The phrase "the circumstances of the offence" is sufficiently capacious to permit the offender's mental state to be considered a part of it. If the foregoing submission about s 19's import is sound, s 102 must be read to include mental disorder as a circumstance of the offence, lest s 19 of the NZBORA is abridged.

**Alcohol and substance use**

68. For three reasons, the Court of Appeal was wrong to aver and regard as relevant that the appellant's substance use "triggers mental health relapses".[96]

*Requirement of proof beyond reasonable doubt - s 24 SA*

69. Assuming *arguendo* that a mental disorder is deprived of some mitigatory force if (at least partly) the product of voluntary alcohol or drug consumption, the Court's proposition is best conceived as an attempt to disprove a mitigating factor; that factor being that the appellant, through no fault of his own, suffered from a mental disorder. As such, the Court's proposition must be proven beyond reasonable doubt: s 24(2)(c).

---

[94] *Ngaronoa* at [115]; *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143, 171f respectively.
[95] Respondent's submissions opposing leave, 19 May 2022, at [21].
[96] COA judgment, above n 3, at [52], 01 SC Casebook p 48. It is assumed for this section that substances consumed while the appellant was psychotic were not voluntarily taken. The discussion relates instead to the cause of the psychosis.

70. On the evidence, it was not. First, Dr Duff did not consider the psychosis substance induced. Second, Dr McDonnell was not sure it was substance-induced: she said it had "*either* been caused or exacerbated by substance use", hence her differential diagnosis of "Brief Psychotic Disorder *or* Substance Induced Bipolar Disorder". Third, the surrounding evidence supports Dr Duff's view. Evidence of prior episodes being substance-induced (on which Dr McDonnell relied) came from the appellant's self-report which was falsified in both 1998 and 2016 by toxicology testing. As a doctor noted on the appellant's file in 2016, there was "no evidence" for the suspicion that substances contributed to inducing the illness. Fourth, the appellant's routine abuse of cannabis and alcohol is not reflected in correspondingly regular psychotic states.

71. To be sure that the Court's proposition is correct, one must be sure that (1) Dr Duff is wrong, (2) Dr McDonnell is wrong not to cast Substance Induced Bipolar Disorder as the only available diagnosis, and (3) that the doctor in 2016 was wrong to think there "no evidence" to suggest the appellant's past psychoses were substance induced. It is submitted that one cannot be sure of any of these points.

*If a contributory cause of psychosis, substance use was involuntary*

72. The uncontroverted evidence from the psychiatrists is that the appellant suffered at the time from a Substance Use Disorder in respect of both cannabis and alcohol, which Dr McDonnell regarded as "severe". For that reason, the appellant's resort to drink or drugs, "during or soon after" when his symptoms began, was involuntary, as in service of that Disorder.[97] Section 9(3) of the SA would not prevent reliance on his use of those substances, and the Court of Appeal ought to have considered the extent to which their consumption was truly culpable and whether they reduced the mitigatory force of the appellant's psychosis.

*Mental disorder caused by voluntary substance use still mitigatory*

73. Even if the foregoing points are resolved against the appellant, a psychosis partly caused by voluntary substance use is capable of being

---

[97] *Zhang* at [137] and [144] and following. An alcohol use disorder can constitute an "abnormality of mind" entitling the offender to plead diminished responsibility in England: *R v Wood* [2008] EWCA Crim 1305, [2009] 1 WLR 496, per Sir Igor Judge P.

a mitigating feature. First, it is not in doubt that the appellant's ultimate condition was a product partly of "acute psychosocial stress" (Dr McDonnell) or "psychological stressors" (Dr Duff). Even on Dr McDonnell's view, therefore, the possibility that the episode was caused by substance use was only a concurrent, and not the sole cause.

74. Second, it cannot be right that, however mentally disordered in committing the crime, an offender cannot invoke the disorder in mitigation simply because it was partly caused by substance use. Since at least 1881 the common law has distinguished between drunkenness "and the diseases to which drunkenness leads".[98] At common law, insanity remains available where voluntary intoxication causes a distinct disease of the mind.[99] Moreover, in England and Wales a finding of diminished responsibility is permitted where "voluntary intoxication has triggered the psychotic state".[100] It would indeed be surprising if a person who consumed a recreational amount of cannabis or alcohol was precluded from pleading in mitigation their psychotic state unforeseeably induced by such consumption. That such a result seems unacceptable suggests there is no general rule precluding reliance on a mental disorder in mitigation where its origin was in the voluntary consumption of substances.[101]

75. Third, it is submitted that the correctness of *Zhang's* holding that a "pre-existing state of addiction contributing to the index offending" can be a mitigating feature (despite s 9(3)) is predicated on the distinction adverted to above between "intoxication and a disease of the mind induced by intoxicants".[102] Addiction originates in (successive instances of) voluntary substance consumption. It is suggested that this reflects an

---

[98] *R v Davis* (1881) 14 Cox CC 563 (Stephen J); *Beard v DPP* [1920] AC 479, 500-1.

[99] *A-G for Northern Ireland v Gallagher* [1963] AC 349, 375 and 381; *R v Kingston* [1995] 2 AC 355, 369; *R v Dixon* [2008] 2 NZLR 617 (CA), at [39]-[41]. The Court of Appeal in *C (CA223/2020) v R* [2021] NZCA 80, [2021] 3 NZLR 152 said 'sexsomnia' amounted to insane automatism and (at [93]): "it was open to the appellant to rely on his intoxication on this occasion and the evidence that intoxication sometimes triggers his sexsomnia to support the possibility that he was in a state of [insane] automatism".

[100] *R v Kay* [2017] EWCA Crim 647, [2017] 4 WLR 121 at [16].

[101] In *Tarapata v R* [2016] NZCA 500, (2016) 28 CRNZ 126 at [51]-[53] the Court declined to grapple with the Crown submission that a disorder caused by substances could not amount to a disease of the mind (see *Burnskey v Police* (1992) 8 CRNZ 582 (HC)). The Court said "but see" *Beard* and *R v Cottle* [1958] 1 NZLR 999 (CA) at 1011. In the latter, "extreme intoxication" was said not to be a disease of the mind, which is surely correct, but a different point to whether a distinct disorder it causes is such a disease.

[102] *Zhang* at [143]-[144]; *R v Coley* [2013] EWCA Crim 223 at [14]-[17] per Hughes LJ.

appropriate focus on distilling the offender's culpability for their mental state at the time of the crime, regardless that it may be the consequence of many inadvisable or unattractive prior choices.[103] Culpability for inducing the particular state of mind at the time of the crime should require, as discussed below, subjective foresight of the risk that certain behaviour (like taking drink) will trigger certain consequences.[104]

*The better approach*

76. The proposition that a mental disorder caused by the voluntary consumption of substances *may* be pleaded in mitigation says nothing about the role such consumption *should* have. The following points might be made about its proper place. First, whether voluntary substance use qualifies the mitigatory force of a mental disorder it induces should depend on the objective risk that such use would induce a mental disorder, and the offender's awareness of it. There seems a significant distinction between A, unaware of the risk and whose ordinary consumption of a substance triggers a psychosis, and B, who realises there is a substantial chance of it occurring and unreasonably runs that risk, which is then realised.

77. Second, the relevant 'risk' which, if foreseen by the offender makes their substance use more culpable, is the risk not only of inducing a certain mental condition, but the risk that in such condition they may behave in a manner like they ultimately do in committing the offence. Foresight of inducing a disorder in general is not the same as foresight of inducing a disorder known by the offender to have certain behavioural incidents.[105]

78. In this case, the appellant had psychotic episodes at ages 17, 21 and 39. According to the doctor in 2016, supported by the toxicology, there was "no evidence" that they were substance induced. In that knowledge, and the knowledge that he could frequently drink and take cannabis heavily without causing any psychoses, the appellant was not 'on notice'

---

[103] This is consonant with New Zealand law's focus, in determining liability, on "the fact" of D's intent, even if the reason D lacked *mens rea* was because they were voluntarily drunk: *R v Kamipeli* [1975] 2 NZLR 610 (CA), 616; *R v Storer* CA368/05, 2 May 2006, at [17]. Cf. the English position, where voluntary intoxication is treated as evidence of recklessness: *R v Majewski* [1977] AC 443, 474-6.

[104] What Findlay Stark calls "experiential foresight": "Prior Fault", [2014] C.L.J Vol. 73(1), 8-11.

[105] COA judgment, above n 3, at [43] – [44], 01 SC Casebook pp 46 – 47

that any behaviour he might adopt would increase his risk of inducing an episode. For substantially the reasons given above, it could not be said (still less beyond reasonable doubt) that he was aware, or ought to have been aware, of a material risk in inducing in himself a violent psychosis when he took drink and drugs in the final week of 2019.

**The circumstances of the offence in this case**

79. The Court of Appeal said of the circumstances of the offence that:

> [43] Ms Te Pania's death involved a high degree of brutality…. The attack on Ms Te Pania can be fairly described as brutal and frenzied.
>
> [44] Ms Te Pania was a vulnerable victim. Her work frequently involved her getting into vehicles driven by men she did not know, often late at night. Ms Te Pania's vulnerability was compounded by her comparatively slight physique.

80. The following points arise. First, the passage above is a fair description of the crime without reference to the appellant's mental state. Ms Te Pania was objectively vulnerable, the attack was frenetic, and the injuries inflicted extensive. But an inventory of the physical facts is not to be conflated with its aggravating features, or as exhaustively constituting the circumstances of the offence.

81. Second, *why* the appellant made contact with Ms Te Pania helps to elicit the pervasiveness of his mental disorder and why it was a "significant contributory factor" in his behaviour. In his impaired state he (wholly irrationally) considered that to receive sexual services at 4am on Manchester Street would amount to "revenge" against a partner from whom he separated two years prior. Third, he placed the murder weapon in his car for protection from gangs, whom he thought could deduce his address from his car's numberplate, and somehow even from the stolen numberplates he affixed to his car, which he then replaced with a second set of stolen plates. Fourth, his anger was, *pace* the Court of Appeal, not an independent and concurrent cause of his behaviour, but a symptom of his psychosis. He did not repeatedly bang his head against the wall and shout expletives at others (and himself) *despite* his disorder. He did so because of it.

82. Fifth, the frenzy and violence of the attack was a product of paranoia, emotional lability and extreme disinhibition: "it was like I was watching from outside of my body"; "once I started, I couldn't stop".[106] It is not evidence of a cruel disregard for the victim's life, as it would be if committed by a person of sound mind. The mind directing the blows was the same mind with which the appellant called 111 to ask for a time machine, changed the first set of stolen numberplates for a second and then, after the murder, drove the car back and forth into the same parking space. The Court of Appeal ought to have recognised that, as the wording of s 104(1)(e) indicates, "brutality" is not just a descriptive term when used to designate an aggravating feature but must be predicated on a judgement of moral turpitude, as its inclusion in a list with the words "cruelty, depravity, or callousness" shows.[107]

83. Sixth, a victim's vulnerability aggravates offending only if "known to the offender".[108] It seems unlikely that the appellant subjectively registered the victim's vulnerability and sought in some way to exploit it. He was determined to visit a sex worker for incoherent reasons in a state of mind described at length above. To attribute to him a close awareness of the nature of his surroundings or to act in coherent or logical furtherance of a desire is to invest more agency in him than the evidence warrants.

**The circumstances of the offender in this case**

*"History of aggression"*

84. The Court was wrong to find (as an aggravating factor, requiring proof beyond reasonable doubt) that the appellant had a "history of aggression".[109] More than 20 years previously, while in the throes of a psychosis, he was aggressive and required seclusion in the mental health hospital he was in. The "most serious" incident of violence when the appellant was not psychotic was "a fight in a bar that resulted in him pushing another man through a window" after being hit in the head with

---

[106] Pre-sentence report p1, 02 CA Casebook p 16

[107] That an event was objectively brutal (as this crime was) does not *necessarily* mean the offender's behaviour was made worse by their causing the brutality - that depends on their appreciation of their surroundings, their rationality, and their volition.

[108] Section 9(1)(g), SA.

[109] COA judgment, above n 3, at [52], 01 SC Casebook at p 48

a baseball bat.[110] No charges arose from it, and there is no evidence whether the window was open. He was 21 years' old at the time.

85. Second, the "difficulties managing his anger" the appellant volunteered are of negligible relevance. That these were not consummated in any violence apart from that mentioned above indicates that it is an insignificant problem.

86. Taken together, these facts fall some distance short of justifying (beyond reasonable doubt: s 24) a conclusion that a murder was "not totally out of character". If it is not out of character for a 42 year old with two documented incidents of violence (one when psychotic, the other when 21) and apparent "difficulty" controlling his temper to commit a murder, then there are a great many people for whom, apparently, a murder would not be out of character. With respect, this is a strained conclusion which has a distinct air of *post hoc* reasoning.

*Community protection*

87. Section 7(1)(g) of the Act makes community protection a principle of sentencing, and various decisions affirm its relevance to s 102.[111] Risk of future offending, properly assessed, can justify a longer sentence than would otherwise be appropriate, provided a "reasonable relationship to the penalty justified by the gravity of the offence" is maintained.[112] This principle, formulated before the SA, is immanent in ss 8(a) and (g), it is submitted, which constrain any contemplated extension of a sentence for community protection by requiring account of the offence's gravity to be considered and for the least restrictive penalty to be imposed.

88. It is submitted that several points should be borne in mind in assessing the appellant's future risk. First, he was not on a course of prescribed medication at the time of the offending.[113] It remains to be seen whether his condition can be appropriately managed in future. Second, the important question is whether in 10 years insufficient rehabilitative work

---

[110] At [21]. 01 SC Casebook p 41; Duff at [34] & [46], 02 CA Casebook pp 46 & 48, McDonnell at [27], 02 CA Casebook p 28

[111] *Wihongi* at [90].

[112] *R v Ward* [1976] 1 NZLR 588 (CA), 591 L40.

[113] CDHB Series Incident Review p 6, 01 SC Casebook p 56

will have been done and excessive residual risk will remain. Third, unless it is proven that the appellant's psychoses are substance induced, it is highly doubtful that liability to recall on parole for life would secure any greater protection for the community than a finite sentence. If the psychoses are substance induced, then parole conditions prohibiting such substance use might, if scrupulously enforced, permit intervention before any dangerous psychosis is caused. Yet if, as is contended above, there is scant evidence of substances causing the psychoses, it is difficult to conceive of benefits afforded by parole conditions which could materially reduce any risk the appellant posed.

89. Fourth, the risk the appellant poses should be determined on the basis that, in future, mental health services comply with the MHA. The Canterbury District Health Board's ('CDHB') review of the appellant's case, issued after the Court of Appeal decision, demonstrates that the clinicians in charge of the appellant failed to abide the MHA and relevant CDHB guidance.[114] Once they invoked ss 8A and 8B of the MHA they lacked authority to decide that he would not be committed to hospital, for specious reasons unrelated to his condition, namely, in order to prevent him being 'embarrassed' by admission to hospital with Police help.[115] Section 9(1) requires that after a determination is made under s 8A, clinicians "*must* make the necessary arrangements for the proposed patient to immediately undergo an assessment examination". Their decision to terminate the committal process and to rescind their request to Police was made by a nurse, a junior doctor on his first day working in mental health care and without consulting any senior psychiatrist.[116] Moreover they failed adequately to communicate to the appellant's brother what was expected of him.

90. In the result, the appellant was not hospitalised as he plainly should have been, nor left under supervision, as he plainly should have been. Such a clear failure to comply with the MHA and common sense cannot be the basis on which his risk is assessed. It must be assumed that a minimum level of competence will be shown by health staff in future.

---

[114] Ibid, p 67 and p70

[115] Ibid

[116] CDHB Series Incident Review p 6, 01 SC Casebook p 70

*Remorse*

91. Remorse is a mitigating factor (s 9(2) SA), and its absence does not aggravate the offending. Nevertheless, the Court erred by failing to put in context reports that apart from at his sentencing the appellant did not display remorse.[117] This is an unusual case. The appellant has no history of violence of any note, was deemed so ill he needed to be hospitalised, but is liable to a severe sentence for a crime committed while in that same state. He told the PAC report writer his memory of the offence was "blurry", that "once I started, I couldn't stop" and "it was like I was watching from outside of my body". In discerning the extent of his remorse, which Doogue J thought "palpable", it is important to recall the challenging and highly unusual situation he found himself; punished for something he would never in his right mind have contemplated doing.

**Conclusion**

92. The appeal should be allowed and the sentence imposed by Doogue J restored.

**Dated** at Christchurch this 11th day of October 2022

……..

J R Rapley KC / S J Bird

Counsel for the appellant

[117] COA decision at [22] & [53], 01 SC Casebook pp 41 & 48. The appellant's comments in the PAC report, on which the Court relied, was in the context of his feeling let down by the authorities for failing to take him to hospital: see CDHB SIR, 01 SC Casebook p 62.

**LIST OF AUTHORITIES**

1. *R v Mayes* [2004] 1 NZLR 71 (CA)
2. *R v Morris* [2012] NZHC 616
3. *Te Wini v R* [2013] NZCA 201
4. *R v Yad-Elohim* [2018] NZHC 2494
5. *R v Brackenridge* [2019] NZHC 1627
6. *R v Rapira* [2003] 3 NZLR 794 (CA)
7. *R v Cunnard* [2014] NZCA 138
8. *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830
9. *John v Rees* [1970] Ch 345 (ChD)
10. *L (CA719/2017) v R* [2019] NZCA 676
11. *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37
12. *R v Taueki* [2005] 3 NZLR 372 (CA)
13. *Shailer v R* [2017] NZCA 338, [2017] 2 NZLR 629
14. *R v Abraham* (1993) 10 CRNZ 446 (CA)
15. *R v Wright* [2001] 3 NZLR 22 (CA)
16. *R v Tapueluelu* CA172/99, 29 July 1999
17. *R v Nilsson* CA552/99, 27 July 2000
18. *E (CA689/2010) v R* [2011] NZCA 13, (2011) 24 CRNZ 411
19. *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648
20. *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551
21. *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775
22. *R v PS* [2019] EWCA Crim 2286, [2020] 4 WLR 13
23. *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816
24. *R (SC) v Work and Pensions Secretary* [2021] UKSC 26, [2022] AC 223

25. *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213

26. *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115

27. *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1

28. *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289

29. *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745

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

31. *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643

32. *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624

33. *British Columbia (Public Service Employee Relations Commission) v BCGEU* [1999] 3 SCR 3

34. *AM (Somalia)* [2009] EWCA Civ 634, [2009] UKHRR 1073

35. *R (MA) v Work and Pensions Secretary* [2013] EWHC 2213, [2013] PTSR 1321

36. *R v Bridger* [2003] 1 NZLR 636 (CA)

37. *R v Tuia* CA312/02, 27 November 2002

38. *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143

39. *R v Wood* [2008] EWCA Crim 1305, [2009] 1 WLR 496

40. *Beard v DPP* [1920] AC 479

41. *A-G for Northern Ireland v Gallagher* [1963] AC 349

42. *R v Kingston* [1995] 2 AC 355

43. *R v Dixon* [2008] 2 NZLR 617 (CA)

44. *Cameron v R* [2021] NZCA 80, [2021] 3 NZLR 152

45. *R v Kay* [2017] EWCA Crim 647, [2017] 4 WLR 121

46. *Tarapata v R* [2016] NZCA 500, (2016) 28 CRNZ 126

47. *R v Cottle* [1958] 1 NZLR 999 (CA)

48. *R v Coley* [2013] EWCA Crim 223

49. *R v Kamipeli* [1975] 2 NZLR 610 (CA)

50. *R v Majewski* [1977] AC 443

51. *R v Ward* [1976] 1 NZLR 588 (CA)

**INDEX OF MATERIALS:**

52. Findlay Stark, “Prior Fault”, [2014] C.L.J Vol. 73(1), 8-11

53. “Some Criminal Defences with Particular Reference to Battered Defendants”, NZLC R73, 2001.