IN THE SUPREME COURT OF NEW ZEALAND

I TE KOTI MANA NUI O AOTEAROA

SC 38/2022

KAINE VAN HEMERT
Appellant

v

THE KING
Respondent

SUBMISSIONS ON BEHALF OF THE CRIMINAL BAR ASSOCIATION AS INTERVENOR

Dated 18 October 2022

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Counsel certify that these submissions do not contain any suppressed material.

MAY IT PLEASE THE COURT

INTRODUCTION

1. The Criminal Bar Association (the CBA) has been granted leave to intervene in the appeal against the sentence of life imprisonment imposed on Mr Kaine Van Hemert (the Appellant). The Court has requested the intervenors focus on two questions raised by the Appellant.

2. First, whether the Court was correct to treat the circumstances of the offending (namely the brutality of the murder and the vulnerability of the victim) as precluding the application of s 102 of the Sentencing Act 2002; and second, whether the Appellant's mental illness can or should be treated as distinct from other aspects of their behaviour.

SUMMARY OF INTERVENOR'S POSITION

Question One

3. The judicial assessment pursuant to section 102 of the Sentencing Act 2002 (the SA) requires a holistic approach of the circumstances in the round, balancing both the facts personal to the offender and of the offence to weigh and assess the manifest injustice arising from the imposition of life imprisonment. One cannot preclude the consideration of the other as the very nature of the word "and" is conjunctive. The legislative history of section 102, the previous sentencing methodology it was intended to replace and the application of section 102 to date, all support the conclusion that one cannot preclude the other from displacing the presumption.

4. The personal circumstances of an offender may be so compelling that the presumption of life imprisonment can be displaced, notwithstanding the circumstances of the offence.

5. Further the CBA submits the "circumstances of the offence" as referred to in section 102 is not limited to an assessment of severity or brutality of the way in which the killing took place, the role of the offender or the vulnerability of the victim. Circumstances of the offending can include

factors also linked to the personal circumstances of the offender and are mandatory sentencing considerations.

Question Two

6. The Court was incorrect to treat the Appellant's consumption of alcohol and drugs as separate and distinct from his mental illness. In so doing the court minimised the evidence of diminished culpability and artificially severed two intertwined contributors to the offending. The CBA submits that recognising the existence of a substance abuse disorder is not in contravention of section 9(3) of Sentencing Act 2002 (the SA).

QUESTION ONE

The Relevant Legal History and Provisions

The Origins of Determinate Sentencing

7. Section 102 of the Act introduced the possibility of a determinate sentence for murder, in effect introducing a 'degrees of murder' scheme in New Zealand. Sentencing Judges became tasked with determining whether cases warranted a determinate sentence,[1] a standard life sentence[2] or a sentence of life with a Minimum Period of Imprisonment (MPI) of more than 17 years.[3]

8. By introducing the possibility of a determinate sentence Parliament was acknowledging that an assessment of an offender's individual culpability could on occasion trump the strong presumption of life that otherwise applied. Parliament recognised there were examples of murder that may nevertheless fall outside of the life-for-life policy that had applied ever since abolition.

9. This push for change was driven in part by cases where juries had returned verdicts of manslaughter in cases which appeared to satisfy the requirements of murder.[4] In particular, manslaughter verdicts had been returned in several cases involving battered female defendants, which the

[1] Sentencing Act 2002, s 102.
[2] Section 103.
[3] Section 104.
[4] Rt Hon Geoffrey Palmer's failed Crime Bill 1989 and the Degrees of Murder Bill introduced by Brian Neeson in 1996 would have recognised cases of murder that warranted a sentence of less than life imprisonment. The debates around the 1999 amendments had also included the suggestion (from then opposition MP Hon Phil Goff among others)[4] of introducing the option of imposing a sentence less than life imprisonment in cases that warranted it.

Court of Appeal described as 'merciful'.[5] Likewise in the case of Janine Albury-Thomson, the mother of a severely autistic girl was convicted of manslaughter, having killed her daughter after becoming overwhelmed with the reality of caring for her.[6] This verdict was considered to reflect the Jury's discontent with the prospect of a mandatory life sentence for this kind of unique offending.[7]

10. The Justice and Electoral Committee addressed these concerns in its report on the Sentencing and Parole Reform Bill, referring to:[8]

> A very small number… will receive a sentence less than life imprisonment. These may include "mercy killings", failed suicide pacts and situations in which the accused is termed a "battered defendant". There is a very strong presumption in favour of life imprisonment for murder in the Bill.

11. This aligned with the Law Commissions conclusions released at almost the same time – undertaking a review of the law of provocation, with a particular focus on so-called battered defendants, the Law Commission concluded:[9]

> The sentencing discretion for murder should be a limited discretion. There should be an assumption that a conviction for murder will carry a life sentence. However, where strongly mitigating factors exist, **relating either to the offence or the offender**, that would render a life sentence clearly unjust, the judge may give a lesser sentence. In deciding whether to exercise his or her discretion, the judge may also take into account any countervailing considerations and any aggravating factors. The Government's recently announced sentencing reform, which will introduce a limited discretion in sentencing for murder, is along similar lines.

12. These examples, and the oft-repeated reference to Janine Albury-Thompson, demonstrate that the discretion was not intended to be limited to cases where the offence itself was at the low end.

13. Ms Albury-Thompson was convicted of manslaughter after killing her severely autistic daughter, Casey. She was recognised by the Court as a

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[5] R v Simpson HC Auckland T010609, 12 October 2001.
[6] R *v Albury-Thomson* (1998) 16 CRNZ 79.
[7] R *v Law* (2002) 19 CRNZ 500 (HC) at [25].
[8] Sentencing and Parole Reform Bill 2002 (148-2), (select committee report) at 8.
[9] Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, May 2001) at [154].

loving mother who had been heavily impacted by the burden of her day-to-day care of Casey and ultimately snapped and killed her. This was found to be provocation within the broader language of the 1961 definition of provocation,[10] largely on the basis of the stress that Ms Albury-Thompson was under. However, the crime itself reflected an intentional strangulation by a mother of her daughter – a serious example of murder, that could well have met the threshold of s 104. Despite this, the Court of Appeal imposed a sentence of 18 months' imprisonment (effectively time served) to reflect the unique circumstances that had led to the crime.

14. This case (and the unusual verdict), were specifically referred to in Parliament's discussions on the s 102 clause in the Sentencing and Parole Bill. Ms Albury-Thompson's case was recognised as a paradigm example of a murder that warranted a non-life outcome. The personal circumstances and culpability of a defendant were viewed as an adequate justification for a non-life sentence, without reference to the seriousness of the killing itself.

15. While the Act was not a response to the Commission's report, the two both capture the same spirit and reflect the prevailing opinion at the time. The Commission's focus was on the individual culpability of defendants, rather than on the crimes they committed. Indeed, the Commission's work directly identified the potential sexism created by the existing provocation approach – which failed to recognise the unique ways in which women offend, which may appear on their surface more serious. Accordingly, this also justifies the conclusion that the legislation was intended to address both less serious offences and less culpable offenders – without a requirement that the case satisfy both elements separately.

16. As these reforms (aimed at increasing sentences in serious cases) were taking place, several in Parliament were calling for reforms to allow for non-life sentences in appropriate cases.[11] Particularly cases where juries had returned verdicts of manslaughter (on the basis of provocation) in situations that did not fit the traditional conception of provocation. These cases, which involved "battered" defendants or others who had faced similarly severe circumstances, were viewed as not warranting the usual consequence for murder – life imprisonment.

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[10] Crimes Act 1961, s 2.
[11] Dr Wayne Mapp (22 June 1999) 578 NZPD 17579; Brian Neeson (22 June 1999) NZPD 17582; Hon Phil Goff (2 March 1999) 575 NZPD 15183.

17. *R v Suluape* is the paradigm case of a woman who killed her abusive partner – receiving a sentence of five years' imprisonment for manslaughter on appeal.[12] That case involved a victim who was attacked from behind with at least nine blows to the head with an axe – a reasonably brutal killing that would have approached the s 104 standard. Despite this, the sentence imposed reflects a recognition by the Court of Appeal that her culpability was significantly lower. Another case in this category is *R v Rongonui*, where a defendant who had all the hallmarks of a battered defendant killed her neighbour in a brutal stabbing attack that contained elements of torture.[13] The sentence of 10 years' imprisonment that was imposed shows Ms Rongonui's offending was treated more seriously than Suluape's, but nevertheless reflects her significantly reduced culpability which falls within the category in which Parliament would have expected a sentence less than life imprisonment to be imposed.

18. A second category – apparent mercy killings – can also be seen in the pre-Act decisions. There are cases of what may be regarded as 'traditional mercy killings' that attracted sentences of less than imprisonment.[14] Even in the unusual case of *R v Stead*, where the defendant made multiple unsuccessful attempts to kill his mother, before finally stabbing her to death, warranted a sentence of three-and-a-half years' imprisonment.[15] Finally, in *R v Simpson*, where a manslaughter verdict was returned on the basis that it was a mercy killing (despite the multiple attempts and the fact the victim never asked to be killed), a sentence of three years' imprisonment was imposed.[16]

19. In making references to 'mercy killings' it can be presumed that the Select Committee had in mind this same category of cases. Again, this indicates that the emphasis was on the defendant's culpability – rather than the seriousness of the particular case. The example of *Simpson* is particularly striking in this regard – given that the core element of a victim who wishes to die was absent. Despite this, the Court focused on the subjective perspective of the defendant by treating him in the same way as those who had committed traditional mercy killings.

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[12] *R v Suluape* (2002) 19 CRNZ 492 (CA).
[13] *R v Rongonui* CA321/00, 9 May 2001.
[14] *R v Karnon* HC Auckland S14/99, 29 April 1999 – manslaughter; *R v Ruscoe* (1992) 8 CRNZ 68 (CA) – aiding and abetting suicide; *R v Novis* HC Hamilton T42/87, 5 February 1988.
[15] *R v Stead* (1991) 7 CRNZ 291 (CA) – manslaughter.
[16] *R v Simpson* HC Auckland T010609, 12 October 2001.

20. The Sentencing and Parole Reform Bill that followed was focused on both increasing sentences in serious cases[17] (addressing a perceived leniency from the judiciary),[18] and ensuring better individualisation of sentences with the implementation of statutory aggravating and mitigating factors to be considered on sentencing.[19] Proportionality was placed at the heart of the sentencing exercise.[20] The changes to the murder regime also reflected these same two influences – a desire to increase sentences in serious cases and at the other end of the scale, to ensure that sentences were not disproportionately severe.

Current Application of section 102

21. The presumption of life imprisonment pursuant to section 102 of the Act may only be displaced if such a sentence would be "manifestly unjust" having regard to the circumstances of the offence and the offender. It is a high standard met only in exceptional cases. Examples of such cases include mercy killings,[21] or where the defendant is suffering from post-traumatic stress disorder relating to family violence.[22]

22. The determinative period imposed must be one that holds the offender accountable, denounces and deters the conduct and protects the community from the offender.

23. The decision of the Court of Appeal in *R v Cunnard*[23] has provided guidance to date as to the appropriate approach to whether a sentence less than life imprisonment can be imposed. The Court stated:

> [16] Parliament has mandated that life imprisonment should be the standard sentencing response to a conviction for murder, reflecting society's recognition of the sanctity of human life and its condemnation of anybody who wrongfully takes another life. Life imprisonment is the ultimate penal sanction available, reinforcing the purposes of deterrence, denunciation, protection of society and accountability.

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17 Sentencing and Parole Reform Bill 2002 (148-2), cl 8.
18 The Wither's Referendum itself tends to show this concern at a public level. In Parliament, it was a feature of debate but it also appears to be the rationale behind the change from a mandatory start point for aggravated murder to a mandatory endpoint: Sentencing and Parole Reform Bill 2002 (148-2), (select committee report) at 8.
19 Clause 9.
20 Particularly ss 8(a), (b) and (e). The purposes set out in ss 7(a),(b),(e) and (f) also require a proportionality focus in sentencing.
21 *R v Knox* [2016] NZHC 3136
22 *R v Wihongi* [2011] NZCA 592
23 *R v Cunnard* [2014] NZCA 138 at [16]-[17]

> [17] However Parliament has deliberately empowered High Court Judges to impose a lesser sentence according to **the all-encompassing criterion of manifest injustice**. Its terms authorise a sentencing judge to **take into account other relevant sentencing purposes, in particular aggravating and mitigating factors relating to the offence and offender**. Of relevance to [the Court in the appeal under consideration were] the gravity of the offending and the degree of the offender's culpability; the general desirability of consistency with appropriate sentencing levels; an offender's limited involvement in the offending; and assistance with an offender's rehabilitation and reintegration. (emphasis added)

24. The Court of Appeal has held the outcome of the manifestly unjust assessment must be approached in a principled way.[24] However as discussed in *Wihongi,* the sentencing discretion within the manifestly unjust rubric must not be placed in a strait jacket.[25] By its very introduction, s 102 allowed a discretionary approach to sentencing for murder.

25. The purpose of Parliament enacting s 104 was to ensure that offenders who committed particularly callous or brutal murders were not released for a lengthy period of time. Accordingly, where one or more of the s 104 factors applies, it is less likely that the manifestly unjust threshold will be reach under s 102.[26] Such cases will ordinarily be exceptional but need not be rare.[27]

Section 102 Analysis: Circumstances of the Offence vs Offender

26. Turning firstly to the language of section 102 itself, the CBA submits that the clear and plain reading of the section indicates that Parliament intended people who commit murder to be eligible for a determinate sentence when their personal circumstances warrant it. The offending itself cannot preclude consideration of the circumstances of the offender.

27. The wording is capable of two possible interpretations either (1) the Court must make a holistic assessment of the circumstances of the offence and offender to determine whether life imprisonment is manifestly unjust, or (2) the Court must separately determine that the offence itself does not warrant

[24] *R v Gottermeyer*[2014] NZCA 205.
[25] *R v Wihongi* [2011] NZCA 592, at [60].
[26] At [70].
[27] At [73].

life imprisonment and separately, that the offender themselves does not otherwise deserve life imprisonment.

28. The CBA submit that the preferred interpretation is that the Court must consider both offender and offence together, but that either factor may be sufficient to justify departure from the presumption. That is – even a very serious murder may result in a determinate sentence where the defendant's circumstances are so compelling (as in *Rongonui* or *Reid*). Conversely a murder conviction that lacks the usual markers of seriousness may warrant a determinate sentence, even where the defendant's personal circumstances are not entirely sympathetic (cases of reduced involvement such as *Cunnard*[28] or *Madams*[29] where even an offender with a serious criminal history may not justify a life sentence).

29. Where there are mitigating factors relating to the offender that reduces their culpability the court is to consider them in the context of the offending.[30] It is acknowledged that this will require a balance – and the nature of the murder *may* mean personal circumstances that may be otherwise compelling will be insufficient to justify a determinate sentence.[31] However, it should not be the case that a particular crime 'precludes' consideration of a determinate sentence – rather all of the factors must be considered in the round and a holistic decision reached as to whether life imprisonment would be manifestly unjust.

30. The assessment of "manifestly unjust" must be made with regard to the purposes and sentencing principles contained within sections 7 and 9 of the SA. While it is a high bar and has been referred on occasion to only being met in "exceptional cases"[32] notably that specific wording is not contained within the section itself.

Circumstances of the offence

31. The Court of Appeal when assessing the circumstances of the Appellant's offending, discussed how the death involved a high degree of brutality and

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[28] Mr Cunnard received a determinate sentence in *R v McNaughton* [2012] NZHC 815, which was upheld on a solicitor general's appeal in *R v Cunnard* [2014] NZCA 138. However, it should be noted that following a successful conviction appeal in *McNaughton v R* [2013] NZCA 657, the principal offender was acquitted of murder, with the result that Mr Cunnard's conviction (as a party to the murder) was also quashed.
[29] *R v Madams* [2017] NZHC 81
[30] *R v O'Brien* (2003) i20 CRNZ 572.
[31] Counsel notes *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 and *Te Wini v R* [2013] NZCA 201 as typifying this kind of case.
[32] *R v Rapira* (2003) 20 CRNZ 396 (CA) at 828.

due to the victim's size and role as a sex worker,, she was particularly vulnerable. At [43] the Court stated "Ms Te Pania's death involved a high degree of brutality… The attack on Ms Te Pania can be fairly descried as brutal and frenzied"[33]. The description and weight attached to these aggravating factors precluded any further assessment.

32. The assessment of the "circumstances of the offence" requires more than an assessment as to the gravity or seriousness of the murder. An assessment consistent with section 8(a) of the SA is required where the consideration of the gravity of the offending **includes** the degree of culpability of the offender. A brutal or frenzied attack can be as indicative of a mental impairment as the diagnosis itself. Further the legislature has specifically not referred to the gravity of the offending in s 102 (as in s 106 of the SA for example) but instead the overall circumstances

33. It is submitted that collectively the cases referred to above – especially with regard to battered defendants – demonstrate the pre-Act practice was not dependent on murders which were considered less brutal or less serious. Indeed, *Rongonui* in particular shows a level of violence that easily reaches the level of s 104(1)(e) yet a sentence well short of life imprisonment was appropriate. This indicates that Parliament, in passing the Act, was at least aware s 102 could be applied in cases of brutal or otherwise very serious murder and therefore intended the Court to retain a discretion to impose a non-life sentences, even in serious cases of murder.

Relevant Authorities

34. Cases under s 102 have been rare, with only 12 defendants receiving determinate final sentences.[34] The majority of these cases fall in the categories described by the Select Committee: namely mercy killings,[35] battered defendants,[36] secondary parties,[37] or cases which can be viewed as spanning two or more of these categories.[38] However, and importantly,

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[33] COA judgement at [43], SC casebook page 46

[34] Without either the sentence or the conviction being overturned on appeal.

[35] *R v Law* (2002) 19 CRNZ 500 (HC); *R v Knox* [2016] NZHC 3136 and *R v Lawrence* [2021] NZHC 2992; *R v Simeon* [2021] NZHC 1371.

[36] *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *R v Ribia* [2012] NZHC 2720.

[37] *R v Madams* [2017] NZHC 81.

[38] *R v Knox* [2016] NZHC 3136 is a case very similar to *Albury-Thompson* and involved elements of mercy killing and a defendant who was "battered" as a consequence of the experience of caring for her very disabled daughter; *R v Cole* [2017] NZHC 517 involved a defendant who was experiencing mental illness short of insanity, but who also held concerns about safety from the victim who had been abusive, including with physical violence, towards him and his family for 22 years.

these cases are not limited to cases where the murder itself was not particularly serious. Some cases involved elements such as breaches of trust or callousness, that placed them in a serious category even for the inherently serious crime of murder.

35. The case of *R v Rihia*[39] is of assistance when considering the proper approach to the s 102 assessment. Ms Rihia took two knives and fatally stabbed her estranged husband in the chest as he lay on the couch. On the day in question CYFS had uplifted her daughter. She felt she had lost everything and "just snapped". The personal circumstances of the defendant included her serious and longstanding alcohol problem; being the victim of significant violence herself (both by prior partners and the victim); and a psychologial report which confirmed she was suffering from "borderline personality disorder and "complex post-traumatic stress disorder" related to the experienced domestic violence and. It was said these personality disorders are characterised by alcohol abuse, emotional dysregulation, outbursts of anger and feelings of abandonment.[40]

36. Toogood J considered that the murder would not have occurred "had it not been for the significant mental impairment you suffered through years of alcohol abuse and physical abuse",[41] and that background of abuse leading to three of her children being taken from her. She was described as "just snapping".[42] A sentence of life imprisonment was considered to be manifestly unjust given Ms Rihia's overwhelming personal circumstances. Instead, a starting point of 12 years' imprisonment was adopted to reflect the seriousness of the offending.

37. The court in imposing a finite sentence on Ms Rihia relied on the earlier decision of *R v Wihongi.*[43] On appeal in *Wihongi,* a finite sentence of 12 years was imposed with no MPI. Ms Wihongi and her victim had been in a longstanding relationship. He was the father of five of her six children but they were not living together at the time of his death. The pair spent the afternoon drinking and an argument over money developed. The victim walked out of the house but Ms Wihongi followed him out holding a knife. She lunged at him stabbing him in the chest. There were two stab wounds. He drove away and crashed his vehicle. It appeared that Ms Wihongi

[39] [2012] NZHC 2720.
[40] At [20].
[41] *R v Rihia* at [28].
[42] *Ibid,* para [28].
[43] *R v Wihongi* [2011] NZCA 592

followed and continued to attack him. Reports at sentencing confirmed that she had suffered since her teens from alcohol abuse and was the victim of a longstanding violent relationship. She suffered from post-traumatic stress disorder, anxiety and depression. It was reported that she was psychologically vulnerable and suffered significant cognitive impairment.

38. Both cases involved a stabbing to the chest area while the victim was partially vulnerable, lying intoxicated on the couch or trapped in a car. In *Wihongi* the attack continued for some time. The Court in both cases properly considered the significant aggravating factors pursuant to s 9 of the SA, but nevertheless considered the offenders' personal circumstances displaced the presumption. The factors were considered in the round and properly weighed against each other. Neither factor precluded the Court from exercising their discretion pursuant to s 102 to displace the presumption of life imprisonment.

39. Therefore, in answer to the first question, the CBA respectfully submits the Court was wrong to treat the aggravating circumstances of the offending as precluding the application of section 102. The discretion pursuant to section 102 requires an overall assessment in line with the intent of the legislature and the principles of the Sentencing Act. The circumstances of the offence cannot be limited to its seriousness or brutality and cannot preclude an assessment of an offender's personal factors.

QUESTION TWO

The Interplay between Mental Health and Substance Abuse

40. Four years Courts have grappled with the relationship between "external" agents such as the consumption of alcohol and the interplay with mental illnesses in properly assessing levels of legal culpability. The most pertinent area being the development of the defence of insanity with an emergent diagnosis of substance induced psychosis.

41. Section 23(2) of the Crimes Act 1961 does not specifically refer to substance induced psychosis and is still based on the 1843 M'Nagthen rules. It instead requires a two stage approach, first requiring a disease of the mind and second being unable to appreciate the nature or quality of the act. The Courts have held that disease of the mind is a term that "defies precise

definition"[44] and its application is largely dependent on case law. It is a purely legal construct.

42. In *R v Quick* [1973] QB 910, the Court of Appeal in England debated the definition of "disease of the mind" under the M'Naghten Rules. Delivering the judgement of the court Lawton LJ said (at p. 922):

> ... Our task has been to decide what the law means now by the words 'disease of the mind.' In our judgment the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease. Such malfunctioning, unlike that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility.

43. A transient state of psychosis induced **solely** by substance use is not readily accepted as a disease of the mind for the purposes of an insanity defence, yet offenders with an underlying mental disorder in which psychotic symptoms are precipitated by substance use can have diminished responsibility.[45]

44. Contemporary research on psychoses associated with drug use has revealed that ingestion of drugs have a multiplicity of complex effects on the central nervous system with a variety of time-courses. There is no solid scientific basis for separating the contribution of internal factors versus external agents on a psychotic episode in an individual and experts caution against simply reaching a conclusion:

> Although ultimately the insanity defence requires a categorical decision, it is important that mental health experts resist attempts by the courts to suborn medical science to shore up useful, but ultimately fictional, legal categories such as "internal" versus "external" causation. Expert witnesses should resist any pressure placed on them to come up with scientifically unsupportable "solutions" to placate the courts and policy makers[46].

45. As Dr Fraser Todd notes in his work titled "Te Ariari o te Oranga – the assessment and management of People with Co-exisitng mental health and substance use problems 2010," there have been few published studies in

[44] Mcsherry 1993, cited "Drug Associated psychoses and criminal responsibility" Behav Sci Law 2008; 26(5)
[45] ibid at 633.
[46] Ibid at 649

New Zealand of prevalence rates of substance use disorders in people with mental health problems. A survey of 28 acute psychiatric units nationally reported that 48% of current psychiatric inpatients also had a current "substance use issue" documented in their clinical file (Ministry of Health 1997)). More generally speaking, Dr Todd noted that between 30-50% of those in mental health settings have a co-existing substance abuse problem as shown in table 2.1.

46. **Table 2.1 » Prevalence rates of substance use disorders, by psychiatric diagnosis**

Psychiatric disorder	% who suffer substance use disorder
Antisocial personality disorder	80
Borderline personality disorder	50
Bipolar disorder	50
Schizophrenia	50
Depressive disorders	30
Anxiety disorders	30

Sources: Galanter and Castenada 1991; Miller, N.S. et al. 1994; Trull 2000. [47]

47. These figures are supported by a more recent report that estimates that 50% of mental health service users have co-existing substance abuse problems.[48] This figure is much greater in the prison setting with a 2016 study concluding 91% of prisoners had a lifetime diagnosis of a mental health or substance use disorder. 62% had this diagnosis in the past 12 months.[49]

48. Along with the increase in the prevalence of a dual diagnosis comes an increased awareness that substance abuse can precipitate or perpetuate a psychiatric illness. A qualitative study on the insanity defence and methamphetamine use in New Zealand involving 50% of psychiatrists, found identifying a primary cause when both psychosis and drug use were present, was challenging for expert witnesses.[50] As noted by Dr Mellsop et

[47] Cited Dr Fraser C Todd 2010 *"Te Ariari o te Oranga – the assessment and management of people with co-existing mental health and substance use problems"*: Ministry of Health, Wellington.
[48] *He Ara Oranga – Report of the Government Inquiry into Mental Health and Addiction;* 2018

[49] D Indig, C Gear and K Wilhelm. 2016. *Comorbid Substance Use Disorders and Mental Health Disorders among New Zealand Prisoners.* Wellington: Department of Corrections .

[50] *"Drug driven psychoses and legal responsibility or insanity in six-Western Pacific Nations"* international Journal of Law and Psychiatry 47 (2016) 68-73.

al the real-world complexity often does not align well with legal definition, where the latter focuses on dualism rather than multiplicity.[51]

49. This is indicative of the reality that the consumption of alcohol and drugs can be a symptom directly linked to the underlying psychological impairment or alternatively a form of self-medication of it. To attempt to separate the two becomes an artificial construct too heavily reliant on expert evidence. The competing opinions in relation to the Appellant are an example of the challenge experts face when a primary diagnosis is sought.

50. In Dr McDonnell's clinical opinion, the Appellant's transient affective (mood) and psychotic episodes did not fit into any clear diagnostic category. Having met the criteria for an Alcohol and Cannabis Use Disorder (severe), Dr McDonnell opines the current working diagnosis could be formulated as either a Brief Psychotic Disorder or a Substance-Induced Bipolar Disorder. They concluded the severity of the alcohol and cannabis use disorder and lack of sustained periods of abstinence made it difficult to establish the exact nature of any underlying mental disorder. The substance use was seen as a significant contributing factor to past episodes of mental illness and the offending[52].

51. While Dr Duff acknowledged the role that alcohol and substance use played in exacerbating the Appellant's psychotic symptoms, the clear nexus between his mental illness and actions could not be discounted. Dr Duff agreed that Mr Van Hemert met the criteria for a diagnosis of substance use disorder (alcohol and cannabis). Dr Duff considered the Appellant presented with a history supportive of a diagnosis of Bipolar 1 Disorder. In reference to previous episodes of mania, Dr Duff considered the alternative diagnoses of a substance induced bipolar and related disorder diagnosis were not preferred[53].

Sentencing Act Principles and Relevant Authorities

52. The Sentencing Act 2002 codified previous case law seeking to clarify and make more accessible the mitigating and aggravating features to be accounted for on sentence. As the learned authors of Adams on criminal law observe, s 9 does not represent any major departure from existing

[51] *Ibid* page 71.
[52] Dr McDonnell s38 report dated 19 May 2020; COA page 23
[53] Dr Duff report dated 12 October 2020, COA page 39

sentencing practice, the exception being s 9(3) which re-enacts the s12A of the Criminal Justice Act 1985 (as inserted in 1987).

53. As recognised in the case of *E (CA689/10) v R*[54] and *Shailer v R*[55] mental impairment falling short of a defence of insanity can impact on the sentencing exercise in two ways. First, a causal link may exist between the impairment and the offending itself so as to reduce moral culpability (as opposed to legal responsibility for the offending). Second, the mental impairment and how it presents in the offender may have a direct bearing on the proper weight to be attached to the s 7 purposes of sentencing including the need for deterrence or protection of the community.[56] Discounts from sentence starting points of between 20-30% have been afforded offenders in orthodox sentencing matters to recognise these two contributors of mental impairment.

54. The Court is precluded from considering the voluntary consumption of alcohol[57] as a mitigating feature reducing a sentence. However when the consumption of alcohol is in fact **involuntary** (as the offender's independent mental disorder **leads** to the consumption of alcohol), the Court cannot ignore what is a permissible consideration reducing culpability.[58]

55. The Select Committee when considering the application of section 9(3) commented: [59]

> The Alliance member has a concern with clause 9(3) over "voluntary consumption or use of alcohol or any drug or other substance" as it relates to an addicted person. While it is accepted the voluntary consumption of alcohol cannot excuse the offending it would be expected that addiction should be taken into account when choosing the type of sentence.

56. The CBA submits the second sentence demonstrates that the expectation of the select committee was that the wider context of intoxication would be a relevant factor to be taken into account, limiting the scope of s 9(3) to the immediate effects of intoxication – not to the wider interactions between intoxication and endemic health.

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[54] *E (CA689/10) v* R (2011) 25 CRNZ 411 at [68]-[70].
[55] *Shailer v* R [2017] NZCA 38, [2017] 2 NZLR 629 at [43]-[50].
[56] Orchard v R [2019] NZCA 529, [2020] 2 NZLR 37, (2019) 29 CRNZ 674 at [46].
[57] Section 9(3) of the Sentencing Act 2002
[58] Section 9(2) of the Sentencing Act 2002, *R v Wihongi*, [2011] NZCA 592 at [55]. *R v Parker* [2012] NZHC 2458).

57. The Court of Appeal stated in the recent sentencing authority of *R v Zhang,*[60] what becomes relevant when assessing the effect of mental illness on the level of culpability is the presence, not the cause of the reduced culpability. The court positively stated that something which erodes a person's rational choice is a relevant consideration on sentence and .

58. The Court's assessment of the interplay between the consumption of alcohol and a disease of the mind can be seen in the decision of the Court of Appeal in *R v Rihia.*[61] In that case the abuse of alcohol by Ms Rihia was not seen to prevent the necessary weight to be attached to the mental impairment so to preclude a finite sentence. Notably in *Rihia* as in the Appellant's case, there had been past acts of violence by the offender.

61. In *Rihia,* the deceased was 57 years old and Ms Rihia was 45. The violence of the relationship is demonstrated by the 36 incidents between Ms Rihia and the deceased attended by the Police over the period of 11 years up until May 2009. The Police noted that alcohol was involved in 23 of those incidents. On 33 occasions, according to the Police, the deceased was the primary aggressor but on three of those occasions, including one in which Ms Rihia attacked the deceased repeatedly over the head with a table leg, Ms Rihia was the attacker. It is reasonable to infer that there were far more than only three or four violent incidents a year while they were together, but it does appear that, between May 2009 and the deceased's death in April 2010, the Police were not involved.

62. The Court accepted Ms Rihia's personality disorders had their origin in longstanding physical abuse by others since childhood and the abuse of alcohol over many, many years.

> [20] The clinical psychologists, who examined you for the purpose of reporting to the Court, refer to this background. They say you have a personality structure which may be described as a "complex post-traumatic stress disorder" related to the violence of your relationships, and that you have a "borderline personality disorder". It is said these personality disorders are characterised by alcohol abuse, emotional dysregulation, outbursts of anger and feelings of abandonment.

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[59] Sentencing and Parole Reform Bill 2002 (148-2), select committee report at 11.
[60] *Zhang v R* [2019] NZCA 507
[61] *R v Rihia* [2012] NZHC 2720

> [21] The factors which the psychologists have concluded led to your fatally stabbing Mr Rihia are the longstanding history of violence within your relationships and within this relationship in particular; the recent uplifting of your daughter by social workers; Mr Rihia's remaining at the house; your emotional dysregulation and propensity for angry outbursts; your claimed fear of a retaliatory beating by Mr Rihia; and significant alcohol intoxication. They do not attempt to specify the relative weight to be given to those factors as contributors to this offence, but **agree that the salient or most significant factors are likely to be your emotional dysregulation in the context of significant alcohol consumption.**
>
> […]
>
> [23] I need to make it clear that the law prevents me taking into account, as a mitigating factor or excuse in relation to your offending, the fact that you were obviously seriously impaired by alcohol at the time Mr Rihia was stabbed. I do not take that into account as an excuse. However, I have regard to the personality disorders from which you suffer and which have, as the reports make clear, their origin in longstanding physical abuse by others since childhood and the abuse of alcohol over many many years. **While intoxication was a factor in your offending, it was the loss of your child and the impaired ability to deal with that event which, in my view, was the key factor in the over-reaction which led to Mr Rihia's tragic death.**

63. The Court considered despite the absence of a physical element such as brain damage (as in *Wihongi*), Ms Rihia's case fell in the same category:

> [27] [re Wihongi] She had a background similar to yours of alcohol abuse since her teen years and of a longstanding violent relationship fuelled by alcohol and containing violence by both parties. Ms Wihongi also was said to suffer from post-traumatic stress disorder, anxiety and depression. It was said that she was psychologically vulnerable; that she had limited ability to make judgments, and suffered significant cognitive impairment — that is, the ability to reason things. In the assessment of the specialists who examined her, Ms Wihongi posed some future risk of violent offending. While holding that the effects of alcohol at the time of the offending had no relevance, the Court of Appeal accepted that Ms Wihongi's impairments resulting from her appalling childhood and background played a part in her offending. In Ms Wihongi's case she was suffering from brain damage, but absence of that physical element here does not, in my view, necessarily take your case out of the same category as the offending there.

64. Put simply, the focus of the Court was correctly on the independent mental impairment that **lead** to the consumption of alcohol. The consumption of

alcohol was therefore not 'voluntary' in the ordinary sense of the word as anticipated by s 9(3) of the Act.

Application to the Appellant's Case

65. An analogy can be drawn between *Rihia* and *Wihongi* and the appellant Mr Van Hemert. Both Dr McDonnell and Dr Duff agreed the Appellant suffered a substance abuse disorder (Dr McDonnell considered it severe) and he was suffering a psychotic episode at the time. There was sufficient evidence before the Court as required in *Zhang* to satisfy a causal connection between the disorder and the consumption of alcohol and drugs. Therefore, the Court was incorrect to treat the Appellant's consumption of alcohol and drugs as "voluntary" and distinct from his mental illness. The two were so intertwined that to try to extrapolate the effect of one on the other was an artificial distinction to draw and diminished the proper weight that should have been afforded the Appellant for his mental illness at the time of the offending.

66. Of assistance to the point on appeal the prior violence demonstrated by Ms Rihia was considered a relevant consideration to the assessment of future risk, as required by the s 7 of the Act. It was treated as a distinct enquiry that did not in turn diminish the weight afforded her impaired cognitive functioning (in part influenced by substance abuse). As in *Wihongi* the future risk was considered to be manageable by appropriate oversight, rather than requiring a life sentence.

67. Counsel submits that this is the correct approach to the consideration of past violence on the application of s 102. The relevance becomes attributable to future risk and should not in and of itself, weigh against a finite sentence as it did in the Appellant's case.

CONCLUSION

68. The CBA consider that the Court was incorrect to treat the Appellant's consumption of alcohol and drugs as separate and distinct from his mental illness. In doing so the court minimised the evidence of diminished culpability and artificially severed two intertwined contributors to the offending.
69. The discretion to impose a finite sentence pursuant to section 102 requires an overall assessment of the circumstances of the offender as well as the

offence – the latter cannot preclude consideration of the offender's personal circumstances in that assessment.

DATED at WELLINGTON this 18th day of October 2022

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Lucie Scott
On behalf of the Criminal Bar Association

TO THE Registrar of the Supreme Court of New Zealand
AND TO counsel for the appellant J Rapley KC
AND TO The respondent, Crown Law Office, Wellington
AND TO DLANZ as Intervenor