IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 1110/25

JESSICA MULFORD

Appellant

v

THE KING

Respondent

DEFENCE SUBMISSIONS AS TO APPEAL AGAINST SENTENCE

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MAY IT PLEASE THE COURT:

Introduction

1. The appellant appeals against her Court of Appeal decision against sentencing.

2. The approved question in the leave judgment dated 18 December 2025 is whether the Court of Appeal was correct to dismiss the sentence appeal in the Court of Appeal. This gives rise to two distinct questions:

   Whether s 18 of the Sentencing Act (as it was at the relevant time of the appellant's sentence) prohibited the imposition of a prison sentence for offending when she was 18 years of age.

   a. Related to this question was whether the Court of Appeal correctly distinguished the case of *Diaz v R*[1] or whether Diaz stated the law correctly.

   b. In the Court of Appeal, it was argued that the starting point not only incorrectly took into account the injuring with intent to injure offending (the youth offending) but also was too high;

   c. This question involves a wider enquiry however, because inherent in the issue of whether there was incorrect uplift for the youth offending and whether s 18 was breached is not the only issue.

   d. For this ground of appeal to succeed the Court will need to look at the correct starting point for the offending of an 18 year old.

   Whether insufficient discounts were given for the personal mitigating factors.

[1] [2021] NZCA 46

a. In particular, not only was offending as a youth taken into account in setting the starting point, it is submitted there is also direct causal connection between the youth of the appellant and her offending. This point is two-fold:

b. If the first ground of appeal fails and the offending as a youth was correctly taken into account in raising the starting point for the manslaughter offending, then this factors into the youth discount when offending as a youth offender has been taken into account in setting a prison sentence.

c. This aspect of the appeal will involve a consideration of how to calculate youth discounts for very young offenders. Here the appellant had just turned 18 at the time of the offence and was at the lowest possible age of responsibility to be an adult offender.

Background

3. The appellant was convicted at trial of two offences:

   a. Injuring with intent. This was an offence committed under the age of 18. However, she was only charged with this after she turned 18 and after the second charge of murder was laid.

   b. Manslaughter by a jury in the Hamilton High Court.

4. The appellant was sentenced to 5 years 7 months imprisonment.

5. This was a difficult case to make an assessment of the factual basis to which the appellant should be sentenced. The High Court noted that the deceased child was the daughter of the appellant's partner and was conceived and born whilst the appellant was in a relationship with her

partner, the father of the child. The appellant was not the mother of the child.[2]

6. For the first 18 months of her life the deceased lived with her mother and others. In August 2021 the deceased came to live with the appellant and her ex-partner. At that time the appellant was 17.[3]

7. From August 2021, the appellant was responsible for much of the deceased's day to day care. It was noted *'but it was also clear that at times she struggled to cope with the demands and stressors of caring for a young child at your young age.'*[4] This is an important factual finding which was clear from the evidence as to the appellant's age and parenting ability. It was directly relevant to the subsequent offending.

8. On 9 November 2021, the appellant has been convicted by the jury of injuring the deceased with intent to injure pursuant to s 189(2) of the Crimes Act. This has a 5 year maximum penalty. This is the charge that leads to the s 18 issue and the uplift issue. The Crown case, which must have been accepted by the jury, was that the appellant had strangled the child somehow and deliberately caused the injuries she suffered while she was in the appellant's care.[5]

9. Whilst the precise mechanism of these injuries was unclear, there was some type of impeding of breath. It was different to the injuries of the subsequent manslaughter.

10. On 9 April 2022 the appellant was 18 years and 2½ months of age. The appellant was born on 23 January 2004. The jury found her guilty of manslaughter which is summed up at paragraph 11 of the sentencing notes. The key issue for setting a starting point was that whilst the jury

[2] Paragraphs 5, 6 and 7 of Sentencing Notes
[3] Paragraphs 8 and 9 Sentencing Notes
[4] Paragraph 8 Sentencing Notes
[5] Paragraph 9 Sentencing Notes

must have found that the appellant had applied fatal force to the deceased's abdomen *'the precise mechanism of injury is not known.'*[6]

11. The injuries were described by the trial Judge as being consistent with her having been stomped, kicked or punched in the abdomen. In addition, it was noted at page 345 of the notes of evidence that the fatal aspect of the injury could have been caused by standing or kneeling on the upper abdomen of the deceased child for some time.

12. The difficulty for setting the starting point by considering comparable cases, is that there is no possible way to determine what the exact mechanism of injury was or what exactly has happened. This makes the case much harder to assess from the *Taueki* basis, as a cross-check to manslaughter decisions.

13. The only evidence given at trial which could be used to assess the method of injury was the medical evidence of the various doctors and pathologists and other expert witnesses. That is because the father of the deceased who gave evidence at trial said he was just outside the house at the property at the time of the infliction of the injuries, however did not see anything. Further, he did not hear anything consistent with the infliction of the injuries by any of the above methods.

14. Therefore, at trial there was no direct evidence of exactly what had happened and no noises heard by the father of the child , which does not indicate that there was a prolonged noisy assault by the appellant. What is important is the Judge's finding[7] as follows:

> The jury's manslaughter verdict means they were not sure that you intended to kill the deceased. I must sentence you on the basis of that verdict. However I also sentence you on the basis you didn't intend to cause the deceased bodily injury that was more than minor in nature. Such an

[6] Paragraph 11 Sentencing Notes
[7] Paragraph 14 Sentencing Notes

> intention is an irresistible inference given the level of force you must have applied in order to cause the deceased's injuries. It is also consistent with the question the jury asked shortly before reaching the manslaughter verdict.

15. In summary the important background factors are that the strangulation was found to have occurred when the appellant was 17, however not charged until after the manslaughter charge was laid.

16. The manslaughter occurred when the appellant was 18 years and 2½ months old. The precise mechanism of injury was unknown.

17. Finally, the offending was directly related to the appellant's age and the limited parenting skills that she had because of her age.

First ground of appeal – correct starting point

18. It is submitted that despite s 18 of the Sentencing Act as it then was, the trial Judge used the strangulation as an aggravating factor to increase the starting point on the manslaughter. Section 18 at the time provided:

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

19. What this meant was the appellant could not be sentenced to imprisonment for the charge of strangulation because the maximum penalty on that charge is five years imprisonment. The Sentencing Act was quite prescriptive at the time, that no Court may impose a sentence of imprisonment in the circumstance.

20. This section, in Counsel's submission is a clear prohibition. It is unambiguous and the legislature has intended it to say exactly what it says. There was no qualification in the provision at the time. The Court

in sentencing acknowledged[8] because the appellant was 17 at the time the injuring with intent was committed, she could not be sent to prison for that because the court was quite clear that no sentence of imprisonment could be imposed for this offending, as set out below:

> [34] I now turn to the injuring with intent offence. You were aged 17 at the time of that offence. Parliament has provided in s 18 of the Sentencing Act that for offences of this type committed when the offender was under 18, the court cannot impose a sentence of imprisonment. Because you will in any case be sentenced to imprisonment for the manslaughter offence, this means that the only sentence I can impose for the injuring with intent offence is a discharge

21. This needs to be contrasted with paragraph 29 of the sentencing decision, where the Court makes it clear that it has assessed the starting point as being less serious than the case of *Ikamanu* but the Court incorporates the earlier incident of strangulation.

> [29] I consider that your offending was not as bad as in Ikamanu, where the starting point was eight years. Your offending was broadly in line with the other cases to which I have referred, in which the starting points ranged from five years' to seven years and six months' imprisonment. *However, those cases involved one-off incidents whereas in your case there was the earlier incident of strangulation*. Taking all this into account, the appropriate starting point for the manslaughter of the deceased is a sentence of seven years' imprisonment.

22. Importantly, a distinction has been made in setting the starting point between (highlighted in the passages quoted above) cases involving one-off incidents and cases involving earlier offending. Thus, the earlier incident of strangulation has increased the starting point. So effectively, the starting point has been increased because of an offence that the appellant could not receive imprisonment for.

23. The approach the sentencing court took means that the starting point has been uplifted, which inevitably means that the appellant will serve a longer sentence of imprisonment.

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[8] At paragraph [34]

24. The injuring with intent charge of which the appellant was convicted occurred when she was a youth. If it had been laid at the time of the initial police involvement with her, it would have been dealt with in the Youth Court. The police investigation was largely complete shortly after that incident, and the report from Dr Lala, who was called at trial, was available to the police however, no prosecution was commenced. This results in an inherent unfairness as the appellant has been sentenced to a higher prison sentence, because the prosecution was not commenced at the time.

25. If she had been dealt with in the Youth Court as a first offender, she would have likely received a discharge under s 282 of the Oranga Tamariki Act 1989 after a Family Group Conference plan, which would have included counselling, and community work. The youth advocate would have submitted that the objectives of the Oranga Tamariki Act would have mitigated against transfer to the District Court. It is a case that is usually determined in the Youth Court. Further, the prohibition upon sending the appellant to prison in the District Court would have made such a transfer somewhat pointless in the circumstances. The relevant youth justice principles would have applied. These are set out in section 208 of the Oranga Tamariki Act.

> 208 Subject to section 5 of this Act, any Court which, or person who, exercises any powers conferred by or under this Part or Part 5 or sections 351 to 360 of this Act shall be guided by the following principles…
>
> (c) the principle that any measures for dealing with offending by children or young persons should be designed-
>
> > (i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and
> >
> > (ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:
>
> (d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

> (e) the principle that a child's or young person's age is a mitigating factor in determining-
>
> > (i) whether or not to impose sanctions in respect of offending by a child or young person; and
> >
> > (ii) the nature of any such sanctions:
>
> (f) the principle that any sanctions imposed on a child or young person who commits an offence should-
>
> > (i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group; and
> >
> > (ii) take the least restrictive form that is appropriate in the circumstances:
>
> (fa) the principle that any measures for dealing with offending by a child or young person should so far as it is practicable to do so address the causes underlying the child's or young person's offending…

26. Looking at the starting point for the injuring with intent to injure charge on the basis of what an adult would have received is unfair, as the starting point / outcome in the Youth Court would have been much different. Further, the uplift on the manslaughter sentence has to be looked at on the basis of what an adult would have received when being dealt with in the adult court for this type of offending. Therefore, no uplift should have been imposed.

27. The relevant case law is *Diaz v R*[9]. As such, the only appropriate way to deal with this charge was to discharge the appellant on this charge. The sole relevance to this charge should have been to assist the jury with making a decision about the manslaughter and murder charges and about her intentions, not to justify an uplift in sentencing. The Court in Diaz were clear and this paragraph was in fact cited in the Court of Appeal decision set out below.

> 32 It would be inconsistent with the policy underpinning s 18 for the Court to uplift a sentence of imprisonment by reference to a charge which, pursuant to s 18, could not itself result in a sentence of imprisonment. Such

[9] [2021] NZCA 426 at [32]

> an uplift would result in the young person spending (additional) time in prison as a result of the less serious charge: the very thing that s 18 is intended to preclude.

28. The Court of Appeal make a distinction with *Diaz* at paragraph 27 on the basis that the offending caught by s 18 by Mr Diaz had no relevance to the culpability of the lead offence.

29. The difficulty with this distinction is there is no basis in the statute to make that distinction. Section 18 did not specify that an adjustment could be made as to whether or not the offending was relevant to culpability. The fact that the injuring offence was with the same victim does not change the wording of s 18 and whether or not it would be as noted by the Court of Appeal[10]:

> Logically an aggravating feature of the manslaughter is not the issue.

30. There is a clear statutory bar on imposing an uplift for the injuring with intent to injure conviction, which is what the court has done. The Sentencing Act was quite specific about the category of offences under the Criminal Procedures Act that s 18 applied to. The clear legislative intent and policy cannot be got round by a logical assessment. The difficulty with the logical assessment is that it ignores the fact that this was offending by a youth and it is clearly set out in the statutory framework and the case law that youth offending has a different culpability to adult offending.

31. The Court of Appeal, then at paragraph 28, go on to consider a High Court case where the theft of a car used in an aggravated robbery was used in aggravating feature in the offence. In Counsel's submission, this decision is also incorrect.

[10] Paragraph 27

32. Whilst logically the Court may think that there should be an uplift for offending, two points arise. Firstly, that was not what Parliament intended and the use of the word logically itself is problematic. What is required is an assessment of the statutory wording and the age of an offender. The use of logic appears to ignore the age issue, or it certainly does not address it. It is submitted therefore that *Matkovich v Police*[11] at paragraph 30 is incorrect.

33. At paragraph 28 the Court of Appeal makes the following comment:

> It cannot be, as the Judge put it in that case, that s 18 was intended to prevent a court from considering as an aggravating feature conduct that truly aggravated the culpability of another offence just because it happened to also amount to a separate offence within s 18.

34. This comment ignores the reality of what has occurred by noting that when there is another offence, s 18 cannot prevent the court from using the culpability of another offence just because it amounts to a separate offence within s 18.

35. Of course, what is particularly relevant to the appellant's case is this was a prosecutorial decision to lay the injuring with intent charge when the appellant was an adult. It is not a coincidence that this charge was before the Court and is not a situation where it happened to amount to a separate offence. It was a deliberate decision by the prosecution to lay the offence and lay the charge. It was also due to prosecutorial delay that they were able to do. The charge had been fully investigated by detectives earlier. If the charge had been laid when investigated, the charge would have been dealt with well before she turned 18 and before the homicide investigation commenced. Given that she was convicted of the injuring with intent to injure charge, it is also clear that there was sufficient evidence for the prosecution

[11] [2021] NZHC 1660

because the conviction is obtained on the basis of material that the Police investigated and held when she was still a youth.

36. Other offending was disclosed in the course of the trial by the appellant and others, for example, to do with drug use and drug possession. This potential offending was known prior to charging decisions. It was the Crown choice not to lay charges with respect to this offending. The laying of the charge is a deliberate decision when the appellant was an adult, specifically engages s 18, and the charge is laid with the knowledge of the existence of s 18.

37. Further, the logical analysis, which is used to distinguish the case of *Diaz* is problematic because the justice system relies on age limits for criminal responsibility in a variety of ways. These are going to be arbitrary dates and that is not necessarily the best way to assess legislative intent when it comes to criminal sentencing policy. A logical assessment of the Sentencing Act and sentencing policy independent of what the legislature says would produce numerous outcomes which are different to what is intended by the legislator.

38. Further, the legislature has taken into account a variety of factors in setting sentencing policy. It is dangerous to take a logical assessment of the facts without considering all the underlying reasons for sentencing policy.

39. Consideration of the s 18 issue needs to consider the overall starting point. The sentence would need to be manifestly excessive or wrong in principle to be disturbed. To look at the underlying sentence is therefore necessary and as to how the starting point is calculated in general terms to determine the *Diaz* point, and whether the sentencing arrived at a correct amount.

40. The first issue on this is at paragraph 31-33, which contains factors the Court did not take into account in setting the starting point. It is submitted that these factors ought to have been. It is submitted that the Court was wrong to find there was no operative connection between the psychological factors and difficulties in the psychological report of Dr Nuth and the offending. There was an operative connection, which diminished the appellant's will to choose and this should be taken into account setting the starting point. The psychological difficulties were not merely a path to the offending but inherent in the causal nexus of the offending.

41. Secondly and relatedly, is the appellant's lack of parenting skills and young age at the time of her offending. These should not be seen as simply mitigating factors. The age and lack of parenting skills have a clear causal connection and operative connection to the offending. The appellant's inability, difficulties with parenting and lack of skills is a causal nexus and substantive operating cause of the offending. No other operative cause of the offending can be identified other than the psychological difficulties referred to in the report, and in particular her age and parenting skills. They are not simply telling the story or a pathway to the offending. It is admitted they are the primary cause of the offending, which should have resulted in a lower starting point.

42. In *R v Paea*[12] Ms Paea was 18 years at the time. She was left at home with her seven week old son, Milton. Her partner had gone out for the day. Members of her family had been visiting for several hours and then she was left alone. On three separate occasions when he was crying and unsettled, she responded by picking him up and rocking him to a point that she was shaking him. Ms Paea acknowledged in her Police interview that she was very angry with him because he would

[12] [2016] NZHC 822

not keep quiet and at one point she yelled at him to be quiet. She then became stressed and frustrated because Milton would not stop crying. She then rocked him and shook him to stop him crying. She could not control herself. Later that night when trying to feed him, there was some difficulty and attempts were made to do CPR the next morning but he died later that morning.

43. The Court specifically state at paragraph 12-13:

> Regrettably as I say in New Zealand such offending and the tragic outcome of it is all too common. Young and defenceless infants or children are killed by young and inadequate parents who do not have sufficient skills or maturity to enable them to cope with the responsibilities and demands of parenthood, despite the resources that are available for support in such cases.

44. The Court considered her age of 18 years old at the time of this incident. That she was immature for her age. The Court continues to state that she is a very young and ill-equipped new mother.

45. The Court took a starting point of 3 years 9 months imprisonment.

46. The comments quoted above regarding young inadequate parents are directly relevant to the present case as is the starting point in that case.

47. In considering *Paea* it is clear that the Court can take into account, when setting an appropriate starting point, the ill-equipped and lack of parenting skills that young people have in determining culpability. Both of those cases involved young people and the Court made specific comment about the abilities of the young people in the parenting area.

48. Other cases with higher starting points tend to relate to significantly older adults who don't have a lack of maturity or parenting skills.

49. The appellant clearly falls into this category. The pre-sentence report confirms she had a lack of parenting skills, which is consistent with her age and stage in life at the time of the offending.

50. Another way to look at this concept is to look at the concept of agency. In setting the starting point the Court should take account of the appellants agency at the time of the offending. This is described as the level of the '*impairment of the ability to exercise rational choice, which is what diminishes culpability and justifies discounting the sentence'*.[13]

51. Again, the Supreme Court in *Berkland* referred to the assessment of culpability of an offender as directly related to their "agency"[14] at

> … An offender's background may affect the extent of that agency. The obvious examples are offender age and mental wellbeing or capacity, but deprivation in its various forms can also have an impact on culpability.

52. The agency of an offender is therefore of direct relevance in the assessment of an offender's culpability for their actions.

53. The present case is a case where the appellant's age, mental well-being, and parenting skills are directly relevant to her agency as discussed in *Berkland*. These factors ought to be taken into account in setting their starting point, not simply left as mitigating factors.

54. Turning to setting the starting point in general, the following cases were considered by the Court of Appeal and the High Court.

55. In terms of the assessment of culpability, the Court needs to consider, *Zhang v R*[15] which was cited in the case of *Berkland*[16]. This was not considered by the sentencing Court.

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[13] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, see para [147] as cited by the New Zealand Supreme Court in *Berkland* at para [36].
[14] *Berkland v R* [2022] NZSC 143, see para 91
[15] [2019] NZCA 507 paragraph [147]
[16] At [36]

56. Another relevant case is *E (CA 689-10) v R*[17] where it was said:

> The moderation of culpability follows from the principle of any general or criminal liabilities founded on conduct performed rationally by one who exercises a willed choice to offend.

57. These comments are particularly relevant to the manslaughter verdict and the findings about intention inherent in that type of verdict.

58. Further, in setting the starting point it is submitted that the Court can and should take account of the age of the offender at this stage. Taking into account the fact that the defendant was at the youngest possible age to be classed as an adult at the time of the offending would ensure that the sentence reflects the gravity of the offending actually committed in terms of s 8(a) of the Sentencing Act. It is artificial to relegate "youth" and all associated characteristics to the "second stage" subject to only mathematical discounts. This is an artificial constraint which distorts the sentencing analysis. It is contrary to the approach in *Berkland* considering an offender's *agency* when calculating the starting point.

59. Particularly with manslaughter case's such as the appellant's involving young victims and parenting abilities, this is a key factor in assessing the starting point.

Setting the starting point by consideration of similar cases

60. Whilst *R v Tai*[18] says *Taueki* is relevant where manslaughter involves serious violence and the sentencing Judge found that that was what the appellant had done in this case, the wide available ranges of causes and mechanisms of death and scenarios combined with the fact that the father of the child was just outside and probably did not hear

[17] [2010] NZCA 13 at [68]
[18] [2010] 598 at paragraph [12]

anything occur, means that the Court needs to be cautious in assessing the matter on this basis.

61. The case of *R v Jamieson*[19] is apposite in that case. The Court of Appeal observed that *Taueki* would not always be relevant in manslaughter sentencing given that manslaughter may involve moderate or minor personal culpability on the offender's part. However, *Taueki* is relevant where the offending involved serious violence. The Court said in *R v Jamieson*:

> The present case, however involved serious violence where serious injury (if not death) was a foreseeable outcome. We think in cases of this nature the guideline of *R v Taueki* is of considerable assistance in fixing the penalty for manslaughter. The matters which contribute to the seriousness or mitigate the seriousness (or not) of this grievous bodily harm offending as discussed in paragraphs 31-33 of *Taueki* are also relevant to the assessment of culpability of manslaughter of the present kind.

62. Counsel notes in *R v Taueki* the decision was the guideline judgment for offences under s 188(1) of the Crimes Act. This obviously requires the defendant to have an intention to cause grievous bodily harm.

63. By contrast the manslaughter conviction simply required that the appellant intended to cause bodily harm that was more than minor in nature. The jury must have answered no to the question that "the appellant intended to kill the deceased."

64. The jury must also have answered no to question 3(3)(i) of the question trail which was that the appellant intended to cause the deceased bodily injury that was more minor in nature; and (ii) knew that her actions would likely cause the deceased's death; and (iii) consciously ran the risk that the deceased could die as a result of her actions.

65. Given the jury's answer of no to these questions to find manslaughter, and *Taueki* focusing on intention to cause grievous bodily harm, it is

[19] [2009] NZCA 555

not of as much assistance in this case as it could be in other factual scenarios because the jury has not made findings that the appellant intended to cause bodily injury or intended to cause grievous bodily harm and the mechanism of injury and what has actually happened is quite unclear.

66. A further case for consideration is *R v Wichman*[20]. In this particular case, Mr Wichman caused the death of his daughter Teagan. At the time, Mr Wichman had just turned 17, and he shook Teagan therefore causing her a brain injury. He and his girlfriend were just 16 years at the time and were the parents of twins born 15 weeks premature. It seems that Teagan was a difficult baby. She did not sleep well and she cried a lot. While there was some family assistance, it seems that the day on which Teagan died was very stressful and it was during this day that Mr Wichman shook Teagan and caused her brain injury. The only account of what happened came from Mr Wichman and it seems he tried to give Teagan her bottle to comfort her. Teagan continued to cry and a frustrated Mr Wichman shook her head. Teagan's head did not come into contact with anything but she was still a baby and a frail. Teagan lost consciousness and Mr Wichman immediately called for help.

67. The Court in considering this case took a starting point of 5½ years. It notes that in considering the starting point, it was a case of loving parents, probably out of their depth doing their best and a mistake being made, borne not out of anger but out of frustration. The Court notes that there was none of the terrible, sustained abuse one sees in other cases. The violence here consisted of shaking.

68. The Court continues saying when one turns to consider the other facts, it would be wrong not to recognise the very difficult situation that

[20] [2016] NZHC 1663

these young parents were in. They were only teenagers. It recognised this and reduced the sentence accordingly, not to condone in anyway what happened, but to recognise an offender's blameworthiness can vary according to the circumstances.

69. The Court adopted a starting point of 5½ to 6 years and then took off a variety of other factors.

70. In Counsel submission that is similar to that of the appellant's case. She was a young woman for the most part being under 18 years of age caring for the child. In Counsel's submission, it is likely that she was out of her depth, doing the best that she could in the circumstances. Using a comparable cases approach there is no basis for the appellant's starting point to have been higher than this.

71. *R v Iorangi*[21] . The father in that case has lost his temper and threw his 17 month old son across the room. Mr Iorangi was found guilty of manslaughter. Later cases have calculated the starting point must have been between 6 and 7 years.

72. *R v Ikamanu*[22]. In that case Mr Ikamanu was looking after the children. They were playing noisily and running around. He asked them to stop. The deceased ignored his request and just looked at Mr Ikamanu. She continued to run around. He was sitting in his chair. He grabbed out for the child's arm, pulled her towards him and his swung her across in front of him before letting her go. She propelled into the wall. As a result of this she sustained a fracture to her right shoulder, but most significantly, she suffered serious head injuries. As part of the incident and while still angry with her he went across while she was lying on her

[21] (CA533/99, 30 March 2000)
[22] [2012] NZHC 2755

back on the floor and stamped on her pelvic area. This caused pelvic fractures.

73. Very shortly after that, the child began fitting and having seizures. He called his wife at work. She arranged to come home. During that period while he was waiting for his wife to come home Mr Ikamanu gave her water, took her to the shower and tried CPR. Given her serious injuries his efforts to help her were ineffectual. When his wife arrived home, she called an ambulance and she was taken to hospital in a critical condition with life threatening head injuries.

74. In considering this case, there was a starting point of 8 years imprisonment. However, Counsel notes that this was significantly more serious than that of the appellant's matter. There was not a blatant throwing him against a wall. Further, it appears there was only one incident as opposed to two in the Ikamanu case whereby the child was being thrown against a wall and also then stomped on. Therefore, in terms of assessing the culpability of the appellant, it is less in the current case.

75. *R v Pene*[23]. The defendant was the foster mother of a 13 month old infant. He died because Ms Pene during the night hit him on the head three or four times and angrily shook him because he was crying. These assaults damaged his spinal cord, which compromised his respiratory function. He suffered brain damage, leading to his death.

76. On the Solicitor-General's appeal, the Court of Appeal held a starting point of 5 to 7 years was appropriate in the circumstances and a starting point of 5 years was adopted.

[23] [2010] NZCA 387

77. *R v Paea* as discussed above is also a relevant authority. In *R v Paea* the Court took a starting point of 3 years 9 months. That was based on the defendant being 18 years of age, immature, and being a very young, ill-equipped mother.

78. It is submitted to cross-checking with *Taueki* is difficult given the intention in this case. In his decision, the Court of Appeal, determined the starting point was in range by comparing cases involving a caregiver's manslaughter of a child as a result of a single violent incident. They noted this led to a starting point between 5 and 10 years imprisonment. The Court of Appeal agreed that *Robinson v R*, *Ikumanu v R* and *Broadhurst v R* were the most comparable cases.

79. *Robinson v R*[24], as noted in the High Court decision as being 38 years of age and having, importantly, five children of her own. She had also worked as a foster parent. She had 18 children through her care as a foster parent. As such the defendant in Robinson could not be more of a contrast from the appellant. She was clearly experienced in looking after not only her own children, but other people's children, having looked after 18 foster children, and she was 38 years of age. This is an example of someone once again getting a higher sentence who has significant parenting skills and is much older. So the two comparative cases taken by the Court of Appeal as being very similar are quite different, particularly on this aspect.

80. Other authorities which need to be considered as well are *R v JB*[25]. JB was 20 years old at the time of the offending. At paragraph 10 the offending is described as a loss of control. Unlike in the appellant's case JB did not call an ambulance immediately or take the victim to hospital in a timely matter. It took over 12 hours for JB to transport the

[24] 27 November 2009, High Court Rotorua at Paragraph 15
[25] [2024] NZHC 2033[sic]

deceased to hospital. At paragraph 20 the High Court highlighted the comments in *R v Roberts*[26] regarding failure to seek medical attention being a significant aggravating factor. A starting point of 6 years 3 months was taken with an uplift of 9 months for assaults on a different child. In this case, a discount of 25% covered youth and other personal mitigating factors.

81. *R v Ngawhika* [27] is also of assistance. The defendant was 27 years of age and also delayed seeking medical treatment. Whilst this case was less serious and a starting point of 3 years 6 months was taken. This did not take into account the defendant's mental illness which was taken into account at the second stage mitigating factors stage. It is however a significantly lower starting point than that for the appellant.

82. *R v Wallis* [28] is also of relevance. The defendant was 24 years old at the time of the offending. In this case the deceased child was very young and small and the Court noted it was hard to imagine a more vulnerable victim.[29] A five year starting point was taken.

83. The starting point for the appellant ought to have been in the range of 4 to 5 years taking into account s 18 considerations outlined above, along with the reduced agency.

Second ground of appeal - insufficient discounts for mitigating factors

84. The next ground of appeal to consider is discounts for youth and other personal factors. It is important when considering a discount for youth that the appellant was 18 years and 2 months old at the time of the offending. She could not have been younger and still being classed as

[26] *R v Roberts* 2021 NZHC 146 at 20.
[27] [2023] NZHC 520
[28] [2023] NZHC 2029
[29] Para 30

an adult by the Court. In the Court of Appeal decision it says, at paragraph 34:

> We accept that another Judge may in the exercise of their discretion have given a slightly greater discount on account of age. However, equally we are not persuaded that an allowance of 15 per cent amounts to error warranting appellate intervention in a case involving, as this one did, such extreme violence against a defenceless toddler. It is well established that discounts, including discounts for youth, may be tempered by the seriousness of the offending. In that regard, we note this Court recently held that a 10 per cent discount for background factors was appropriate in the case of a 20-year-old who killed a newborn baby.

85. Paragraph 34 of the Court of Appeal decision highlights the underlying issue with this appeal. That paragraph makes it clear from the Court of Appeal's view, there is some discretion in the imposition of youth discounts. In this situation, another High Court Judge could have legitimately provided a different discount for the same circumstances. Whilst discretion obviously involves a particular Judge's assessment of the facts, this should produce a consistent result, particularly for offenders at the highest possible youth level for an adult because of her age (18 years and 2 weeks) and where youth is a clear factor in the causes of the offence and should not be in the position that youth discounts vary to a large extent. The basis of youth discounts is a principled basis based on evidence and proven scientific analysis recognised by the courts in cases from *Churchward* onwards.

86. In terms of a discount for youth the Court of Appeal identified a number of factors in the Churchward decision, in particular:

    (a) There are age-related neurological differences between young people and adults, including that young people may be more vulnerable or susceptible to negative influences and outside pressures (including peer pressure) and may be more impulsive than adults.

(b) The effect of imprisonment on young people, including the fact that long sentences may be crushing on young people.

(c) Young people have a greater capacity for rehabilitation, particularly given that the character of a juvenile is not as well formed as that of an adult. (footnotes omitted)

87. In the appellant's case the most relevant consideration is her being impulsiveness and the ability for rehabilitation. Consideration such as a momentary loss of self-control, willingness to resort to violence with much younger and vulnerable children and babies, would suggest a level of impulsiveness. This is associated with youth. As to rehabilitation, there is room for that to occur.

88. In early 2023, the Court of Appeal released its decision in *Dickey v R*[30]. That case provides a summary of research findings that have arisen since the Court issued its decision in *Churchwood*:

(a) Adolescent behaviour reflects the slow pace of the development of those parts of the brain that control higher-order executive functioning, such as impulse control, risk assessment and planning ability. Young people behave and react differently from adults due to biological rather than behavioural or personality factors. As Ms Brook for the Crown said, "[a]ll young people suffer from these cognitive deficits; and all will eventually develop fully to overcome them (assuming no cognitive impairment exists)".

(b) Neurological development may not be complete until the age of 25.

(c) Young persons who commit serious offences frequently exhibit other characteristics which also tend to mitigate culpability,

[30] [2023] NZCA 2

notably intellectual deficits, mental illness and experiences of abuse or other childhood trauma.

(d) Young people are more receptive to treatment and therefore have better prospects of rehabilitation than adult offenders, who find it more difficult to alter entrenched behaviours.

89. No substantive authority has been handed down by the Supreme Court regarding the application of the youth discount. However, in *Mehrok v R*[31], where the appellant had been sentenced for manslaughter – the Court denied an application for leave to appeal that concerned the provision of the discount. However, the Supreme Court made comment that the youth discount required revisiting, but ultimately that Mr Mehrok was 24 years old and was only entitled to the 5% that was initially provided for him.

90. At paragraph 36 of the sentencing decision, the High Court accepted that youth was a mitigating factor, and the two relevant reasons for the appellant were age-related neurological differences between young people and adults, as well as young people having a greater capacity for rehabilitation. The Court considered both reasons applied to the appellant. The Court considered the case of *Churchward v R*[32]. The research in that case shows that neurological development may not be complete until the age of 25.[33] The court made the following finding:[34]

> I am satisfied, having presided at your trial, that your young age, combined with your consequent lack of parenting skills, was a contributing factor to your offending. There was evidence that for the most part you were a diligent and attentive caregiver. This is consistent with the character references that Ms Webby supplied with her submissions. Your offending

[31] [2021] NZSC 155
[32] [2011] NZCA 531
[33] *Dickey v R* [2023] NZCA 2 at [86]
[34] Paragraph 37 sentencing notes

> was impulsive and caused by an inability to control yourself in times of high stress.

91. It is submitted this finding is contrary to the finding at paragraph 33, that the parenting skills and age were not matters which were so strong as to have an operative connection to the offending, diminishing the appellant's world choice.

92. The Court then went on to make findings that the appellant had good prospects of rehabilitation.

93. In the sentencing in the High Court, the youth discount discretion is addressed in paragraph 39:

> [39] These factors therefore require an adjustment to the starting point. The Court of Appeal has recently noted that adjustments of 10 to 30 per cent are common for youth. I consider that some restraint needs to be exercised in cases of serious violence against children, given s 9A of the Sentencing Act. I allow 15 percent.

94. This paragraph illustrates the difficulty with the approach of taken by the Court of Appeal in this matter, which is simply that the Court can pick a number between 10 and 30% and arrive at 15%, despite a clear basis for youth discounts and the appellant being at the age, which should justify the high end of the youth discount based on the neurological development analysis.

95. The appellant was young at the time of this offending. Here there is a particular nexus between the youthfulness and the offending as it relates to skills that the defendant at her stage of life and as such a discount of 20% for youth is appropriate.

Other mitigating factors

Addiction

96. There should then be a separate discount for addiction.

97. A comprehensive report from Cade & Co was provided at sentence. The report sets out the appellant's family and cultural background. While the appellant has a supportive family insofar as her mother, the relationship with her father is more strained for the reasons set out in the report.

98. In terms of section 27 factors, it is submitted, there is a nexus between the defendant's upbringing and particularly the incident when she was 13, leading to strained relationships with her father and her becoming involved in a relationship with her ex-partner at a very young and immature age. The key issue in this case is that the appellant got involved with ex-partner when she was 15 years old and ended up in a full time relationship with him. They started living together when she was 16 and she was too young and not equipped to be in this type of full time living together relationship with the lack of support, financial issues, adding to that ex-partner's child who was the victim in this matter, was conceived while in a relationship with the appellant however she was not the child's mother.

99. The High Court have recognised that while intoxication with alcohol or drugs can never be a mitigating factor, a pre-existing state of addiction, contributing to offending may be[35]. Addiction reduces the ability of an individual to make rational choices. It can overcome otherwise pro-social tendencies and result in isolation from whanau and community. That is the level of culpability for offending that is causally linked to addiction may be reduced.[36]

100. The appellant at the time of the offending has been diagnosed with severe cannabis use disorder. While she now meets the threshold for early remission, her abstinence is only being supported by her being in

[35] *Zhang v R* [2019] NZCA 507 at [144]
[36] *Feilding v R* [2012] HZHC 2753

a controlled environment. Further, at the time of the offending the appellant denied she was using methamphetamine, however, previous to and after the death of the victim she was abusing the drug exhibiting symptoms of a moderate to severe methamphetamine use disorder. The appellant has never had any substance treatment in respect of either of those. The report writer notes that the appellant would benefit from the drug treatment unit programs offered by the Department of Corrections, and in fact the appellant identified that she needs assistance to learn to manage cravings and said she was concerned that she could easily pull back into it.

101. These factors, combined with the use of drugs and alcohol from an early age, a discount of 10% is appropriate for the factors in this report, in addition to the youth discount. There is clear causal connection between these matters and the offending.

102. Counsel notes that the sentencing Judge did not allow a separate discount for addiction matters however, one should have been allowed because the combination of the factors in the report is directly connected to how the appellant ended up in the situation she was in at the time of the offending and clearly contributed to the offending.

103. Counsel notes there is some crossover for youth and addiction factors. There is sufficient evidence in the reports to have a discount for these factors as well, as only a 5% allowance at paragraph [44] for the other matters in the report which was the traumatic incident in the appellant's early adolescence.

104. The sentencing Judge says:

> I consider those issues cannot be considered an operative cause of your offending. They are part of the explanation for your offending. They are part of the reasons you were unable to cope with the pressures of being a caregiver for the deceased. In other words they did contribute to your offending.

105. It is submitted that given the lack of parenting and coping skills was a clear contributing substantial operative and causative cause of this offending, a greater discount should have been allowed for these matters.[37]

106. Accordingly, it is submitted the appropriate discounts should have been:

a. 30% for youth;

b. 10% - 15% for other factors noted above;

leading to a discount of 40-45%.

Dated at Tauranga this 6th day of March 2026

Nicholas Dutch
Counsel for Appellant

To: The Registrar
Supreme Court

And to: Crown Law Office
Wellington

[37] Note *Berkland v R* [2022] NZSC 143, [2022] NZLR 509 at [109]

I Nicholas Dutch Counsel for Ms Mulford, certify that to the best of my knowledge, this submission marked A is suitable for publication (that is, it does not contain any suppressed information);

Dated at Tauranga this 30th March 2026