NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 38/2022
[2022] NZSC Trans 25

KAINE VAN HEMERT
Appellant

v

THE KING
Respondent

CRIMINAL BAR ASSOCIATION
DEFENCE LAWYERS ASSOCIATION
Interveners

Hearing:	18 November 2022
Court:	Glazebrook J O'Regan J Ellen France J Williams J Kós J
Counsel:	J R Rapley KC and S J Bird for the Appellant M J Lillico and E J Hoskin for the Respondent

L A Scott for the Intervener Criminal Bar Association
E A Hall, D A Ewen and C A Hardy for the
Intervener Defence Lawyers Association

CRIMINAL APPEAL

MR RAPLEY KC:

E ngā Kaiwhakawā, tēnā koutou. Ki te mana whenua o tēnei wāhi ātaahua, tēnā koutou. E ngā maunga, awa, e ngā wāhi tapu, tēnā koutou. Anei a James Rapley māua ko Mr Bird, ngā rōia mō the appellant, Mr Van Hemert, tēnā koutou.

GLAZEBROOK J:

Tēnā kōrua.

MR LILLICO:

E ngā Kaiwhakawā, tēnā koutou, ko Lillico ahau. Kei kōnei māua ko Ms Hoskin, mō te Karauna.

GLAZEBROOK J:

Tēnā kōrua.

MS HALL:

E ngā Kaiwhakawā, tēnā koutou, ko Elizabeth Hall taku ingoa. Kei kōnei mātou ko Douglas Ewen, ko Christine Hardy mō te Te Matakahi – Defence Lawyers Association.

GLAZEBROOK J:

Tēnā koutou.

MS SCOTT:

E ngā Kaiwhakawā, tēnā koutou, ko Ms Scott tōku ingoa. Kei kōnei ahau mō te Criminal Bar Association.

GLAZEBROOK J:

Tēnā koe. Before we start, just to let everybody know that the Judges all accept and, as we understand, the Crown also, the fact that this was a serious and brutal murder doesn't preclude the operation of section 102, so we don't need submissions on that although obviously – so effectively move straight to how the section in your submission operates and how it should have been applied in this case. So if that's helpful to counsel, Mr Rapley.

0905

MR RAPLEY KC:

Yes, thank you. That's very helpful, thank you.

May it please the Court. Punishment is a condemnatory sanction of course, based on blameworthiness and culpability in the ordinary sense of those words with an important factor of risk assessment, and punishment must be grounded in a moral assessment of the offender. So sentencing and the sentencing inquiry is always of an evaluative and fact-specific nature, and with that in mind I would like to – as long as the Court is happy with it – to emphasise the key and relevant facts, and these are set out in the submissions in a very fully way but there are some very important facts which need emphasising.

So at the time of the offence on 31 January 2019 the appellant was 42 years old and, importantly, he had been treated, as we now know, for the psychiatric issues on three occasions prior, and a summary of that is set out by Dr Mhairi Duff, consultant psychiatrist, who I suggest gave a very good and details report, and Dr Karen McDonnell, psychiatric registrar does the same for the section 38 report.

Now first in 1995 when he was only 17 and he was involved in this car crash and charged with driving with excess blood alcohol and careless driving, there was a disproportionate reaction to that, a life stressor, and that's the important thing, where he behaved bizarrely and led to his hospitalisation. Crucially, he was babbling nonsensically and a diagnosis of acute psychotic episode, and there was a possibility, and this is key because the Court of Appeal suggest

may have emphasised the connection with a drug-induced psychosis, but there was only a possibility but no evidence, more a suspicion he might have taken drugs, and his symptoms remitted several days after treatment with antipsychotic, and this is a theme that we'll see because on 31 January after Mr Van Hemert was apprehended and he was indeed treated, his symptoms dissipate. And secondly, of course, in 1998 he was compulsorily admitted to hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992, again he had grandiose and persecutory delusions and he believed he could communicate with his dead aunty and that he could swim through the ground. Now this delusional belief is something that comes up again and, we see later, at the time he committed this crime of killing Ms Te Pania. And he claimed though to have consumed LSD, the toxicology tests didn't detect any, and I suggest that's important because he claimed, and when he was arrested he said he was acting bizarrely and he was asked to explain it and he said think someone might have spiked his drink or he had methamphetamine, he's used these descriptions to try and explain what happened to him, and there was differential diagnosis there of *possible* drug-induced psychosis.

And then, and so that 2000, that 1998 episode occurred, and in 2016 there was another episode where his then-partner contacted the mental health services to report he was wasn't sleeping, paranoia, believed his employees were planning to rob him and steal his daughter, and again that paranoia was prevalent later when he believes people were trying to get him, on 31 January 2019, believes that the pimps and narks will track him and get him, and it continues through, and it again occurred as a result of a life stressor, being the sudden death of his father and long-standing issues he had with his father.

So another life stressor occurred and happened to Mr Van Hemert on Christmas Day, and so sometime prior to the murder, where he learned that –

KÓS J:

Could we just take the score at the moment though?

MR RAPLEY KC:

Yes.

KÓS J:

In each of those three prior events there was evidence of either alcohol, the first case, this, it's an EBA case, so it was alcohol.

MR RAPLEY KC:

Yes.

KÓS J:

And in the second cannabis though not LSD, and in the third one cannabis.

MR RAPLEY KC:

The first one –

GLAZEBROOK J:

Okay, can we perhaps just get our dates again when we're talking about it first, just so that I make sure I've got the notes right, that's all.

MR RAPLEY KC:

Sure. 1995 was his first one, when he was 17, and he had excess blood alcohol and drink-driving, and then he reacted badly to that. My understanding that there wasn't a concern that he'd taken alcohol to cause him to act psychotic, but there was a possibility that he had some drugs at that time and…

KÓS J:

Well, it says no evidence on that point, yes.

MR RAPLEY KC:

But there was no evidence of it, yes. So his first episode was a week after the car crash, so he was having alcohol at the time then, for sure, because he was charged with drink-driving. So there wasn't any – there was a possibility it was drug-induced but no evidence other than just a suspicion, but he was babbling

nonsensically, and so it seems it was a severe and abnormal reaction to the stress of this court case.

The second one, where he was –

GLAZEBROOK J:
And that's 1998, is it?

MR RAPLEY KC:
It's 1998, you're quite right. He claimed to have consumed LSD but toxicology tests didn't detect any, because he was admitted, so, and he was tested in a hospital environment, and he seemed to suggest when he's self-reporting, to explain his behaviour, and we've seen one of Dr Duff's reports, I believe, claiming that someone must have spiked his drink, to explain it. Now the –

ELLEN FRANCE J:
In 1998 there was cannabis?

MR RAPLEY KC:
Yes, and he says himself he's been drinking heavily since he was 14, and also consuming cannabis, so that factor is important and looms large in the Court of Appeal judgment, he clearly seems to be a functioning alcoholic or with a high consumption of cannabis. But what's important is he's carrying, holding down this plastering job and behaving in a manner that is not violent, and whilst he's consuming alcohol every day, he seems to be consuming an enormous amount, a box of beers and these Cody's, and he reports around the 31st of January an ounce a week or something like that of cannabis. But what was a feature of that is that that's happening but then a life stressor happens, which he can't deal with, whether it's the car crashing, that happening, whether it's the death of his father, the breakup of his relationship or, in this last case, the fourth, when he learns his partner has got a new partner and hasn't introduced him to him first before they meet with their five year old daughter, and his reaction is disproportionate and he can't handle that and he starts to deteriorate, and what, the 2016 one was in the context of the sudden death of

his father and an unresolved issue of where he hadn't seen his father for years and was upset with them and there was some sort of dispute and falling out about some property and the like. But on Christmas Day in 2019 when he learns about this, and deteriorates, he reports himself drinking excessive amounts of alcohol, and that is true, we've got that there. But he says he ran out of beer 24 to 48 hours prior to the offending, prior to the murder, but he said he smoked and ate cannabis, including on the night of the offence.

0915

Now my learned junior, Mr Bird, will deal with substance abuse and alcohol in another segment, if that's all right with the Court, but what is important is this consuming at this point, just if I can, this consuming of cannabis at the time, just like before the killing, is when he's in the throes of a mental illness, of course, and so he wakes up, consumes the rest of his medication, drives into town – I'm jumping ahead a little bit – but drives into town and worried about narks and pimps, bizarrely puts on sunglasses and a sunhat – this is 4 o'clock in the morning – changes the number plates once because he's worried that the pimps can track him. Doesn't do anything. Comes back. Drives in again. Changes the number plate again. He's writing some diary called The Scientist. Consumes cannabis during this sort of time, and then drives in a third time.

But prior to that, and I've jumped a wee bit, but prior to that, on the 29th of December, we have the appellant's ex-partner who probably doesn't want to have much to do with what's happening but feels, and to her credit she must, calls Mental Health Services to express her concern about his paranoia and he suspects his friends are undercover police officers. So again there's this paranoia that we saw, and she later calls 111 to request some assistance, saying he's absolutely manic, paranoid and talking nonsense about undercover and time machines.

Now he calls 111 and asks first if he can join the police, rambles about narks and drugs, so that's all happening in his mind, and then asks for a time machine so he can travel back in time to kill his dead father. Now this is merely hours before the killing.

His estranged brother, who he hasn't seen for two years, who also is obviously not wanting to be involved, feels so concerned he calls Mental Health Services himself and says he's talking in riddles and nonsensical.

So that's what we've got on the 30th of December and the killing occurs on the morning of the 31st. Just after 1 o'clock on the 30th of December we –

KÓS J:
AM, pm?

MR RAPLEY KC:
PM. PM, yes, in the afternoon. We have a doctor, and it was just tragic, but a doctor, first day at Hillmorton, and a very experienced nurse, and they arrive at – been requested to go there, and find him in the shower and he's been in there for two hours, talking, babbling, nonsensical, talking to himself, shouting and angry, and so they – he refuses to engage with them and shouts at them.
0920

Now that anger, and that's a feature because it does come up, of course, in the Court of Appeal, that anger is anger whilst in a psychotic episode. He's angry at everything around him and the doctor and nurse actually wouldn't come into the house and deal with him, and they considered the situation was such that they believed on reasonable grounds the appellant was mentally disordered at that point, and that's the clinical position they reached. And, as we've set out, they say Kaine is acutely psychotic, characterised by delusions and a disorder of perception, so the delusions and disorder of perception are relevant of course when it comes to what later happens is his delusions and disorder of perception about what is happening when he's with Ms Te Pania and what he's doing, I suggest, and the doctor and senior nurse say he exhibited paranoia and was talking incoherently to himself as if responding to voices: "In my opinion Kaine poses a risk to himself due to his reduced ability to perform self-cares." Now I emphasise that why that's important, he's, so they're saying he's got no ability to perform self-care. If he's in that state and then we are looking at his

consumption of drugs later as to whether that is truly a voluntary act and an act where he knows that this may exacerbate the state that he's in, is important.

KÓS J:

On that point, is there any evidence before us as to the effect of his over-consumption of medication? This is not a person who has failed to consume, he has consumed the lot, and the question is what's the effect of that?

MR RAPLEY KC:

Yes. Dr Mhairi Duff does talk about that –

KÓS J:

Whereabouts?

MR RAPLEY KC:

Good question. She talks about it more in relation to how he presented at the – I'll see if I can find it – how he presented at the interview, because at the interview he is fairly flat and she's very critical of the court site nurse who says he appeared calm and co-operative and then he's sort of very matter-of-fact with his responses, and it is used to sort of show, suggest that his psychosis wasn't as bad as it – so it's, I think it's at paragraph 74, CA 54 –

KÓS J:

Yes, but that doesn't really say what the effect of that is. I mean, it's supposed to be a fundamental point here. This is the main narcotic consumption immediately prior to the event, and we don't know what the effect of that consumption is.

MR RAPLEY KC:

No, but both psychiatrists both agree that he is still at the time of the offending suffering from a disease of the mind. So he takes a Red Bull and the rest of his medication, all of it, and cannabis, and, you know, so you're quite right that

no one seems to address, well, you know, what state is he in when he actually kills and murders Ms Te Pania.

WILLIAMS J:

Well, what's the likely effect of that bottle of pills? Not on whether he had a disease of the mind, because that's common ground but it's power as a contributory element to what took place.

MR RAPLEY KC:

Yes. Well, what do know is that what took place, you know, when we look at what he did, is he kills Ms Te Pania, he drives off and then drives around with her in the car and goes to Air New Zealand, and he's seen driving in and out, in and out of the carpark, so it's –

GLAZEBROOK J:

It's the only –

O'REGAN J:

We know that, but what we're trying to establish is was the fact that he took all of the prescribed medication at once, was that a factor that caused him to be in the delusional state he was when he committed the murder?

MR RAPLEY KC:

Yes, although –

O'REGAN J:

And the Crown witness doesn't seem to mention it at all –

MR RAPLEY KC:

No.

O'REGAN J:

– and Dr Duff just says he took it but she doesn't say what effect it would have had on him.

MR RAPLEY KC:

Yes. Well, correct, and so we're left with that, but –

GLAZEBROOK J:

Do we just infer that it didn't make him better and it didn't make him worse, because it wasn't mentioned?

0925

MR RAPLEY KC:

Well, I was going to suggest that you could infer it. It certainly didn't make him better because of those acts. For example, he –

GLAZEBROOK J:

No, no, I understand that, but is that the sort of inference?

MR RAPLEY KC:

That – yes.

GLAZEBROOK J:

It didn't make him better and, because they don't mention it, it probably didn't have an effect of making him worse either. So is it neutral?

MR RAPLEY KC:

Yes. Yes.

GLAZEBROOK J:

Is that all we can – I'm not – it may be that if it had been addressed, that question might have been addressed, but at the moment on the evidence all we can say is that it clearly wasn't a factor either way –

MR RAPLEY KC:

No.

GLAZEBROOK J:

– according to – on the evidence.

MR RAPLEY KC:

Correct.

GLAZEBROOK J:

Is that fair?

MR RAPLEY KC:

It is fair and certainly it didn't make him better and you'd think it would. That's what it's supposed to do, isn't it, reduce the psychosis?

GLAZEBROOK J:

Well, usually taking more doesn't make you more – any better than you would if you'd take – but I mean –

MR RAPLEY KC:

True, if you're overdosing, correct.

GLAZEBROOK J:

In fact, if anything, it could make you very ill, I suppose, if it…

MR RAPLEY KC:

Yes.

KÓS J:

I think you're treating it as a symptom of the state he was in.

MR RAPLEY KC:

I am, and so when he wakes up and he takes all of that, with a Red Bull, you know, what is he thinking, what is he doing, and that is a symptom, and he shouldn't be taking – so I think everyone would agree, in that state he shouldn't be taking his medication voluntarily. It should be prescribed to him or under supervision and, of course, that would've happened if he'd been committed to Hillmorton. So therefore in the state, in the argument of whether he, in a reasoned and rational way, consumed his medication or cannabis, I suggest it wasn't at all.

And so what we do know is that, as I mentioned, that the police couldn't come because there was a changeover unfortunately and it was thought it would be better too that he appear voluntarily the next day and some errors –

O'REGAN J:

Do we know that? The incident report in the case on appeal just seems to say that the doctor, the house surgeon and the nurse just assumed that the police couldn't come.

MR RAPLEY KC:

Yes. Yes, I think in the 111 they said there will be a delay, and then they said, they'll get back to you, and then there's the clinicians say they –

O'REGAN J:

Right, so the police actually said: "There will be a delay," did they?

MR RAPLEY KC:

Yes, yes, couple of hours.

KÓS J:

Did they say that?

MR RAPLEY KC:

I –

KÓS J:

Paragraph 20 of Justice Doogue's sentencing notes, which is page 65 of the Court of Appeal casebook, seems to have more detail than I could find in the rest of the record.

MR RAPLEY KC:

Yes, I –

KÓS J:

And you quote that in your submissions.

MR RAPLEY KC:

Yes, I think maybe just need to be careful, but that is my memory from seeing the transcripts. There was certainly a delay. They certainly said there would be a delay, and so there's several calls and they said: "Thank you, we'll get back to you," and then the brief from the doctor says that they decided, to avoid embarrassment, that – and there is an overarching where they try, if possible, to have him appear voluntarily and with family and I can sort of sympathise to some extent with that, of course. The problem was once they'd made that diagnosis and filled out the section 8B certificates he has to be assessed forthwith, as soon as possible, and given this diagnosis…

So my learned junior has told me: "The police didn't specify length of delay. Doctor called police to call off request for assistance." So there isn't a length. I thought it was a couple of hours. That's my mistake.

But there was going –

GLAZEBROOK J:

Is that – I mean it sounds as though that's because they thought they could deal with it in another way. Is that – the doctors, I mean.

0930

MR RAPLEY KC:

The doctor and nurse, but the report says that, you know, this shouldn't occur, but the doctor and nurse thought that if the brother gave him the drugs and then looked after him, monitored him. Now there was the falling down because the brother's estranged and then the brother says, rightly or wrongly, he was told it would knock him out for the whole night and he would be gone. But even if that was the case he was still left alone on his own, and what I have seen is they did phone at 8 o'clock to ask how he was and was told that he was knocked out and asleep, so the mental health doctors did follow up in that respect. But what wasn't said there was: "I'm not with him," he was on his own. So then when he woke up he found himself all alone and, as he says, he felt panicky and anxious. And then there's this aspect of the case which has taken a direction or

trajectory, I suggest, that is not the appropriate way to look at it, and the Court of Appeal have done this: he woke up and he said he decided to impulsively solicit the services of a sex worker to somehow level the playing field and, with his ex-partner, and combined with that though he says he felt angry and let down by his partner and so on, and this starts to bring in sort of the anger issue, I suggest, that the Court of Appeal have focused on. But again this shows how he, you know, not thinking and reasoning and thinking logically how on earth would that level the playing field with [his ex-partner], who doesn't want to have anything to do with him, is separated from him, and of course it's to have sex with the prostitute, not to go and harm her or do something, and so there's a bit of a link, I suggest, or movement of that anger, and that's when he goes into town and steals the number plates that we've talked about, and this paranoia, because he does take a weapon with him, a couple, and he says he's worried about the gangs and the narks and that's why he puts the weapons in there and drives bizarrely at 4 o'clock, as I said, the sunglasses and the hat on, into town, coming back and forth.

KÓS J:

But there's not suggestion that the weapon is indicative of rage.

MR RAPLEY KC:

No.

KÓS J:

It's, the suggestion is it's a defensive, pre-emptive defensive act.

MR RAPLEY KC:

Yes. Although it was, it has been suggested, especially in the early stages of sentencing, that there was some sort of form of premeditation and that's, you know, because he arms himself before he goes into town, and I suggest that that can't be made here because he is –

WILLIAMS J:

Why would it matter? Are you suggesting psychotics can't plan? Is that the suggestion?

MR RAPLEY KC:

Well, yes, it would only matter –

WILLIAMS J:

There's lots of examples of very psychotic people planning very carefully.

MR RAPLEY KC:

Yes, but in this case I suggest there wasn't any, yes, and it's just more to answer a factor.

GLAZEBROOK J:

Well, it might come under circumstances of the offence, I suppose, if it was planned, even if it was planned in a psychotic state. And you're saying here that isn't present, is that as I understand the submission?

MR RAPLEY KC:

Yes, that is. And because it's the hurt and lied to and angry underneath to make him go into town, there are Court of Appeal submissions that there is this prevailing sort of anger going through in a violent disposition, and I'm suggesting that we don't have that at all. This is a man with no prior convictions for violence, except for drink-driving, and we've got the self-reported, which the Court of Appeal later talk about, self-reported pushing someone through the window when he was 20 as evidence of a violent disposition and anger throughout. Now it's focused on by the Court of Appeal, in my submission, and we have the anger of course in the psychotic state when he's in the shower and then feeling hurt and lied to an angry underneath when he wakes up and wants to go into town to have revenge sex. But then he goes into town and he must have been appearing pretty unusually to Ms Te Pania and this incident happens where he kills her and then drives around with her body. Importantly, I suggest, for this psychotic episode as to whether it's still operative and causative, the

witnesses describe him when he's arriving as acting very strangely: "Acting drunk but I couldn't smell alcohol on his breath or about him and he was spaced out like he didn't know where he was."

0935

KÓS J:

This was at the Air New Zealand carpark?

MR RAPLEY KC:

This is Air New Zealand. He tells, asks one of them: "Have you come for me?" and another I believe he says he's just about to start work. And there is a difference, and you would have seen it between Dr McDonnell and Dr Mhairi Duff's descriptions, and Dr Duff is fairly firm that she's a bit concerned about unconscious bias here with segments that have been taken out of context. And he was, you know, literally back in and out, in and out of the carpark, because it had a barrier and you couldn't get in, and then eventually someone let him in. When he was interviewed by the police: "I made various confused statements," and that is important as well, because there is a lot of reference or there certainly was made at sentencing about some pretty harsh statements that he makes about killing Ms Te Pania and "sliced and diced her" and things like that. But, and in that statement though he is on video, one can see him there, bleeding, bandaged up, and with a lot of leading questions just answering, and very suggestive, as Dr Mhairi Duff says. But he says these things: he says he stole the car and it was his own, he said that, at one stage, from memory, he dragged Ms Te Pania into the car, and he didn't, she hopped in there, and he says he took her to the Waimakariri River and burnt her body, which he didn't, and he says he want to an ATM with her to get some money and there's no evidence of that, we've seen the ATMs, seen the CCTV, and the threw the false number plates away and he didn't, he had different ones on each end of the car. So these are all things, I suggest, that show, even at that time, he's still delusional and suffering from a mental illness.

Now Dr Duff and McDonnell both agree he laboured under that disease of the mind, so when one's looking at the circumstances of the offence and identifying,

weighing up the circumstances of the offence, as we mention in our submissions, section 8A is the key section requiring gravity of the offence to include a culpability of the offender, and so when one looks at, you know, which we do, objectively brutal fact, and we have the facts saying it's brutal or it's callous or it's gruesome, of which there's no doubt it was, very much so, that that requires though, that's been caused by a man with a mental illness in that frenzy by a disease of the mind short of insanity, and so a –

GLAZEBROOK J:

Well, insanity as defined…

MR RAPLEY KC:

Under section 23, which is incredibly high, as we all know, in the –

GLAZEBROOK J:

Which has been criticised for years of course.

MR RAPLEY KC:

Yes. And so when most, when we talk to lay people about someone, about Mr Van Hemert during these hours, they would probably say: "He sounds mad," or "He's insane." But legally we say no, that's not right, because he understood he was killing a person, hadn't put that person into their delusions and knew the difference from right or wrong. But when he inflicts those injuries he is doing so with a different mind to the mind that he now possesses, for example, now that he's being managed in Paparua Prison. So –

0940

WILLIAMS J:

So you say that when weighing the circumstances of the offence think of section 8A culpability, disease of the mind, et cetera?

MR RAPLEY KC:

Yes.

WILLIAMS J:

Do you say this is a circumstance of the offence or the offender and does it matter?

MR RAPLEY KC:

It's the circumstances of the offence, so as to his culpability and when one is looking at these objective acts.

WILLIAMS J:

Who do you – this is the essence of my question – why do you say it's considered as an offence issue and not an offender issue? What's the point?

MR RAPLEY KC:

I say it's come into the equation twice, because the act of a person who is able to – the blameworthiness, I say culpability because section 8 says you have to look at the culpability of the offender, so that means you have to look at his culpability of doing the act, when you come to circumstances of the offender, that's his background and history and the like, but culpability must be on his blameworthiness for doing the prescribed and prohibited act.

GLAZEBROOK J:

Aren't you double-counting if you do it at both points? It probably doesn't matter where you do it but don't you risk double-counting?

MR RAPLEY KC:

I suggest, well, I say no, you don't, and it's done all the time. It's done in 106 discharges where you look at the circumstances of the offence, the offending.

WILLIAMS J:

But if you look at, if you say that culpability is a matter of mental state at the time, why is history not relevant to culpability also?

MR RAPLEY KC:

The history of that…

WILLIAMS J:

The individual.

MR RAPLEY KC:

Of that individual? Well, it has to, as long as it's operative and causative.

WILLIAMS J:

Well, those are two different words. Be careful.

MR RAPLEY KC:

Yes, okay, well, so I'm saying on behalf of Mr Van Hemert, and the psychiatrists I suggest are saying as well, that the disease of the mind was operating at the time that he did these acts, so therefore his ability to reason and think what he was doing was not the same as another offender who doesn't have that impairment.

WILLIAMS J:

I understand but why do you say it's appropriate to take that into account at that stage when it seems to me reasonably orthodox that you take into account other matters of background at the second stage in general terms? What's the difference between these two contexts of the offender?

MR RAPLEY KC:

Well, I say that –

GLAZEBROOK J:

And you say you take them into account at both stages, so I do still want to know about double-counting as well.

MR RAPLEY KC:

Yes, so, I mean it does imply two – the circumstances of the offence and offender does imply two mutually exclusive concepts, so…

GLAZEBROOK J:

Well, it may not but…

KÓS J:

But this is – in a way, I wonder if Justice Williams' point about "does it really matter" isn't the point? We've all been wrestling for years with how you reconcile section 8A with the *R v Taueki* [2005] 3 NZLR 372 (CA) two-stage sentencing approach. The thing we know in this case is we don't have to because section 102 says you take into account both of them. So whether it's offender or offence, we know it gets taken into account and we know we have to consider both of them. So does it really matter here?

MR RAPLEY KC:

Well, I suggest…

KÓS J:

This is not *Taueki*.

MR RAPLEY KC:

Yes, yes. I suggest it does because there may be situations like *Shailer v R* [2017] NZCA 338, [2017] 2 NZLR 629 or *L (CA719/2017) v R* [2019] NZCA 676 where they have a history of psychiatric problems and thus, when you're looking at the circumstances of the offender, imprisonment might be unjustifiably harsh or there has been a real difficulty in their life that's sort of led them to this point but when they were actually doing the act the mental illness wasn't causative or operative, or wasn't present to the extent that it reduces their culpability, and that does –

WILLIAMS J:

But isn't that just a matter of understanding that and applying it in your analysis? Why do you have to say one belongs to that box and another belongs to that box? Clearly it's more potent where it is both contributory or causative, or whatever word you want to use, than as a matter of impact of a particular sentencing choice. But you don't need a separate box to figure that out.

0945

MR RAPLEY KC:

I suppose it's helpful because when you're looking at words like "brutal" or "callous" or "depraved", or you're looking at lengthy planning or premeditation, these facts that you are taking out as part of this evaluative exercise for sentencing, you have to weigh that and say, well, you know, has that person really premeditated or thought that through or is it – I mean objectively it's brutal to us but you're sentencing this person for something that they have to have taken into account and appreciated. So, for example, vulnerability is an aggravating feature, but it has to be known to offender.

WILLIAMS J:

Doesn't that just mean that the sentencing Judge needs to be very clear-eyed as best he or she can about the nature of mental illness and its potential impacts?

MR RAPLEY KC:

Yes.

WILLIAMS J:

Not be cowed, if that's what you're saying, by the nature of, the mechanical nature of the offence, if there is a counter-balancing set of circumstances, however applied, however worked into the analysis.

MR RAPLEY KC:

I agree, and the sentencing exercise has become a bit mechanical, and that's the problem.

GLAZEBROOK J:

Well, of course, the brutal nature can be the very symptom of the psychotic episode and the disordered thinking that occurs effectively, which I think is the point you're making…

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

So you don't say it's just brutal and premeditated, you say: "Why is that?", and if in fact it's because of the psychosis and in fact a symptom and an indication of psychosis, that over-reaction and brutality, is that…

MR RAPLEY KC:

Yes, that is it, thank you, Ma'am, and –

GLAZEBROOK J:

Well, I suppose what we're saying is if it's taken into account does it matter quite how you take it into account, as long as you do.

MR RAPLEY KC:

As long as you do take it into account. I mean, it may lessen the need to deter the offender, of course…

GLAZEBROOK J:

Absolutely.

MR RAPLEY KC:

And, you know, section 7, and –

GLAZEBROOK J:

So I suppose the other issue though is in 102 you're looking at manifestly unjust –

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

– and certainly Parliament was assuming that it would be in relatively narrow circumstances so just…

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

I mean, I'm assuming you're coming on to that, because at the moment we're just looking at the facts, aren't we?

MR RAPLEY KC:

Yes, quite. And you're right, Parliament was, and, you know, listed things like battered woman syndrome or mercy killing in their debates, and diminished responsibility is where this comes into it as, I suggest, another feature. So –

KÓS J:

But what happens here is that the mental health deficit, which in other circumstances would get a substantial discount from a finite sentence, only here applies effectively to the MPI.

MR RAPLEY KC:

That's right.

KÓS J:

The life imprisonment element is firm and fixed and Parliament seems to think, as the presiding Judge indicates, that it is only in a rare number of cases that that will be changed.

MR RAPLEY KC:

Yes. And I have some difficulty with that, you know, use of the word "rare", because that statistical sort of concept or analysis that's dependent upon: "Well, sorry, we've a Van Hemert this year, we can only have one or two a year."

GLAZEBROOK J:

No, no, we definitely understand the point, this is what we were making ourselves but…

MR RAPLEY KC:

So, but that is said, isn't it? So it comes back to the point that, the sanctity of life and the enormity of the crime that's been committed.

GLAZEBROOK J:

I suppose what we –

O'REGAN J:

But it is an exception, isn't it, section 102 is an exception to the rule.

MR RAPLEY KC:

Yes, quite, yes.

O'REGAN J:

So in that sense – I mean, I agree with you, it doesn't matter whether there's one a year or 20 a year, but there has still got to be a rule.

MR RAPLEY KC:

There does.

GLAZEBROOK J:

And the issue is when they were thinking rare, because obviously the hundred-year storm you can get three in two years, but when they were saying "rare" does that say something about how narrow the exception should be is, I think, the, well, the question I was asking.

0950

MR RAPLEY KC:

Yes, and so when one sees them look at other cases, and that's what becomes difficult, one looks a something like *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011 who's suffering from a mental illness but doesn't have the alcohol there and who goes back home and kills an elderly woman who's his neighbour who he's been working with on the Body Corp because he thinks she's spying on him and he's suffering from a delusion, and he gets it. *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775 has got drugs or alcohol on board and been beaten up and suffered a terrible traumatic post stress lifestyle. So it requires, I suggest, that's why it really does require that analysis of their culpability. I mean *R v Mayes* [2004] 1 NZLR 71 (CA), he was on bail, from

memory, for violence against the victim. So, you know, these components are all part of that exercise.

Sorry, I've lost my train of thought, but…

O'REGAN J:
Is there anything more about the facts you want to take us to or are you…

MR RAPLEY KC:
No, I don't think –

WILLIAMS J:
So your starting point is these facts indicate this is one of those exceptions if you have to go there.

MR RAPLEY KC:
Yes.

WILLIAMS J:
Now you're going to take us beyond that, I take it, in response to Justice Glazebrook's –

MR RAPLEY KC:
Yes.

GLAZEBROOK J:
Well, perhaps if we just – so the finding at least of one, or the defence psychologist, was that it was a significant – I've forgotten the wording actually – a significant contributory cause or –

MR RAPLEY KC:
Contributing, yes, yes.

GLAZEBROOK J:
So are you – is that what you're standing on?

MR RAPLEY KC:

Yes, I am and even with Dr McDonnell, she accepts it was a cause and is then just unsure as to the role played by alcohol and drugs and says, she says – let me go through this – so they both agree laboured under disease of the mind. They diverge on the precise interaction between the substance use and recurrent psychosis. Dr McDonnell says there's a differential diagnosis of brief psychotic disorder or substance induced bipolar disorder and she says and agrees all four episodes are associated with acute psychological stress, and so she is very clear on that, and she says that alcohol and cannabis intoxication was a major factor in his mental state disturbance but noted that features of pronounced alcohol withdrawal were not clearly identified, and she says overall the severity of his "mental state disturbance was beyond what would be wholly explained by alcohol and cannabis intoxication" – that's quoting from paragraph 24 of my submissions – and it suggests a mental disorder which has either been caused or exacerbated by substance abuse.

Now that sort of goes back to that issue we were talking about a little bit before about if he'd run out of beer 24 to 48 hours earlier then he had been taking cannabis during the throes of a psychotic episode, even if it is exacerbated by his substance abuse it cannot be the case, or I suggest it shouldn't be, that he cannot rely on the fact that he's suffering a disease of the mind and how much is it exacerbated by? What are we talking about?

My learned junior deals with, well, I'd like him to deal with, the substance abuse and alcohol. Would you like to hear that now?

0955

GLAZEBROOK J:

No, I just really wanted to just see exactly – so you effectively are relying on McDonnell in terms of the, whatever it was, significant contributory cause, and we'll hear later about the legal aspect of, I presume, the legal aspect of that substance abuse related to mental illness, will we, is that the…

MR RAPLEY KC:

Yes.

GLAZEBROOK J:

But I just, yes, so we're looking at facts at the moment, so that you're not – possibly Justice Doogue – well, do you accept that Justice Doogue probably put, that the causative aspect went a bit higher than the evidence, or do you not say that, do you not accept that? I mean, I know you say it doesn't matter, I'm just trying to know what you say the facts are, I suppose.

MR RAPLEY KC:

Yes, I mean, that's a good question. Justice Doogue said that, well, I'm pretty sure she says this, that she's very clear that this wouldn't have happened but for the psychosis that you experienced, and the Court of Appeal criticised that and talk about anger and alcohol and substance abuse and then a previous disposition for violence when they refer to his pushing someone through – so I suggest that's not open to the Court of Appeal. But what I do agree with Justice Doogue is that he has had these episodes with stresses in the past and it has caused him to react in a way that's required treatment, but he has been functioning, as I say, as a plasterer, consuming alcohol and drugs, and not, and not harming anyone at any sort, there's no suggestion otherwise, and his partner –

KÓS J:

But, more to the point, he's been consuming these matters for a long period without creating a psychotic response.

MR RAPLEY KC:

Exactly, exactly. So when they say this, it's a drug induced psychosis, well, it just doesn't withstand scrutiny.

GLAZEBROOK J:

Well, you say it's drug plus major life stressor – well, sorry, you say it's major life stressor and that any psychotic episode is exacerbated by drugs, is that – or alcohol?

MR RAPLEY KC:

Well, it may –

GLAZEBROOK J:

Probably cannabis more than…

MR RAPLEY KC:

Yes, probably cannabis, and it may well be. But I say it's the life stresses causes the psychotic episodes rather than drugs, and this is where my junior will address you on it, because that's when section 9(3) comes into play, and voluntary consumption of alcohol and drugs and then people having less sympathy for someone forming a psychosis as a result. But I say in this instance he has a history, a clear history, of psychiatric illness in the form of significant mental illness, and it occurs every time there's a life stressor, and here there is one, and then he no doubt self-medicates with alcohol or drugs, it's hard to tell, because he's always taking drugs and alcohol anyway, and goes from there. So that's why the Judge said that it was, the crime was entirely out of step with his general life pattern, that's what her Honour said, and it is, and that's why ultimately her Honour said that a combination of those features rendered less applicable the principles of denunciation and deterrence, and her Honour noted that there was the vulnerability of Ms Te Pania of course, and then she, you know, her Honour did say the motivation for the murder was solely as a result of his mental illness. Now he in that mental illness decides he wants to have, level the playing field, and the Court of Appeal refer to the word "revenge sex", have sex with a prostitute, but it's the mental illness that's motivating him to do that and suggesting to him that he should go and do that, and in that throes of that he commits this crime. So I suggest the Judge was right, and there we have it.

Now the Court of Appeal disagreed and –

1000

GLAZEBROOK J:

Okay, so you're saying that on the evidence her findings were not only available but right, is that…

MR RAPLEY KC:

Yes, yes, I do, yes, and –

KÓS J:

May I ask another question? In the Court of Appeal's decision it talks about the psychiatrist saying he showed a lack of remorse. I couldn't find that in the psychiatrist's reports. Where does that derive from?

MR RAPLEY KC:

I think it might be the – is it – or the pre-sentence report it might even be.

KÓS J:

Well, that's not the psychiatrist's reports.

MR RAPLEY KC:

No, it isn't. Is it Dr Duff's – it's in Dr Duff's…

KÓS J:

Is it?

MR RAPLEY KC:

Page 49 at paragraph 49.

KÓS J:

Thank you.

WILLIAMS J:

Sorry, I didn't hear that.

MR RAPLEY KC:

Page 49, was it?

GLAZEBROOK J:

49 of…

MR RAPLEY KC:

49 of the Court of Appeal's casebook at paragraph 49.

ELLEN FRANCE J:

"He continued to show little empathy," is…

WILLIAMS J:

Where is that?

ELLEN FRANCE J:

Paragraph 49.

KÓS J:

"Continued to show little empathy for his victim"?

MR RAPLEY KC:

Yes.

KÓS J:

Right.

MR RAPLEY KC:

And so in response to that – and the Court of Appeal do note that, it's not an aggravating feature but maybe lack of mitigating feature – but I suggest when he was interviewed too this was a person who may well have been feeling let down by the system at the time and finding himself in prison for the first time in his life and his manner was such that he may have been inward-looking as to focusing on himself and the fairness of whether he is looking at life imprisonment for something done by someone he, I suggest, could quite rightly

say: “That wasn’t me,” you know, “that’s not me that did that, I’m not like that, that was another person who was acting with a different mind in a different mental state.”

So that may bring us to the position of looking at 102, is that what your Honours would like me to address now, and the –

KÓS J:

Whereabouts in your speaking notes are you up to, it might be useful.

MR RAPLEY KC:

Well…

KÓS J:

Just so, just to pin it to something.

MR RAPLEY KC:

Well, my junior made these for me so I kept on track. Well, I’ve skipped the circumstance of the offence, para 7, I’ve sort of skipped that, given the indication given, and para 9, identifying and weighing the circumstance of the offence, I suggest we’ve sort of probably dealt with a lot of that through the recent questions, and that really brings us down to the substance use on my speaking notes, which might be appropriate, if that’s all right for Mr Bird to address you?

GLAZEBROOK J:

I think that would be a good idea.

MR RAPLEY KC:

Thank you.

GLAZEBROOK J:

So Mr Bird, thank you.

MR BIRD:

May it please the Court – yes, a very inauspicious start.

KÓS J:

It's all right, Mr Bird, I dropped the water jug the first time.

MR BIRD:

Well, I'm following in very good footsteps.

WILLIAMS J:

I tipped one of those all over the Court of Appeal Judge who wrote the judgment we're dealing with, in the Privy Council, so…

1005

MR BIRD:

Hopefully accidentally.

WILLIAMS J:

So you're just getting started.

MR BIRD:

Now as Mr Rapley indicated I just want to take up on our speaking note under the substance abuse point. Now the ultimate proposition that I want to make good is that Mr Van Hemert's ability to rely on his end mental state at the time of the offence in mitigation is not tempered at all by the fact that he took drug and drink in the hours and days preceding his offending.

Mr Rapley took you through various of the underlying facts and we indicate in our written submissions beginning at paragraph 68 why, in our submission, it can't be said that his psychosis was the product of, was caused by, either alcohol or drugs. The highest that the matter could be put is in Dr McDonnell's evidence that it was a possibility which she couldn't be sure of, and insofar as we accept that as a matter of fact his resort to substances to an unquantified

extent exacerbated his mental illness we say that that's irrelevant to his culpability.

Now just a preliminary or sort of preface to some of the submissions that I'm going to make is, as we indicate in the speaking note, the distinction that we say, with respect, wasn't observed by the Court of Appeal and it isn't observed at times by the Crown in this Court between factual and legal causes.

Now perhaps with that distinction adverted to, if we can go into the Court of Appeal judgment so I can indicate where we say the Court failed to observe this distinction, in this Court's casebook at 48, the Court of Appeal's para 50…

GLAZEBROOK J:
Page number, sorry?

MR BIRD:
48, Ma'am. In fact, if we begin with para 53 at the bottom of that page, the Court indicates that Mr Van Hemert's substance use triggers mental health relapses, and then skipping back to para 50 that his anger and his substance use "contributed in varying degrees to Ms Te Pania's death".

ELLEN FRANCE J:
Sorry, just pause a moment. So it's para 52?

MR BIRD:
53. So we're…

ELLEN FRANCE J:
52, I think.

MR BIRD:
Is it 52? 52, beg pardon.

GLAZEBROOK J:

I don't seem to be on the same…

KÓS J:

Paragraph 52.

MR BIRD:

Sorry, para 52. Casebook 48.

KÓS J:

"There appears to be a close correlation" – it's that sentence.

GLAZEBROOK J:

I don't seem to have…

O'REGAN J:

You're in the Supreme Court case on appeal, page 48?

MR BIRD:

Supreme Court casebook.

GLAZEBROOK J:

Page?

MR BIRD:

48. Court of Appeal's paragraph 52.

O'REGAN J:

At paragraph 52: "…a close correlation between Mr Van Hemert's abuse of drugs and alcohol…"

GLAZEBROOK J:

I see.

KÓS J:

But what's the evidential basis for that?

MR BIRD:

It's, we say, by unduly elevating the certainty with which Dr McDonnell expressed herself about the possibility that Mr Van Hemert's present psychosis and certain of his past psychoses were developed around the same time, contemporaneously with or soon after the consumption of alcohol and drugs, which is then…

KÓS J:

Which is a daily event.

MR BIRD:

Which is a daily event.

KÓS J:

And we have four instances, one of which was at the age of 18 or 17, I think.
1010

MR BIRD:

That's right, 17, yes. So we say as a matter of fact the Court of Appeal was wrong to characterise alcohol and drugs as causes of the appellant's psychosis, and I note that the Crown doesn't advance a defence of that role of alcohol and drugs in its submissions, it instead saying that – and this is in its submissions at paras 65 and 66 – that it simply exacerbated already extant symptoms.

KÓS J:

That's based on Dr McDonnell, presumably?

MR BIRD:

Dr McDonnell, and Dr Duff agrees that to some unquantified extent the resort to cannabis likely exacerbated, is it the intensity of symptoms. And for your

notes, your Honour, Dr Duff addresses that at Court of Appeal casebook 51 per paragraph 58.

Now the Court of Appeal deployed its finding of fact in response to Justice Doogue's suggest that Mr Van Hemert's mental illness had been his sole motivation for committing the offence, and we respectfully would submit in that regard that if one construes Justice Doogue's remark as having pertained to Mr Van Hemert's sole relevant or sole legally relevant motivation, then she was right to say what she did and the Court of Appeal was wrong as a matter of fact to say that alcohol and drugs caused, either partly or wholly, the psychosis, and the Court of Appeal was wrong and the Crown is likewise wrong with respect to regards the extent to which it exacerbated his symptoms as in some way attenuating his ability to rely on his ultimate mental state in mitigation.

Now another –

GLAZEBROOK J:

Just in paragraph 52, they're talking there about the risk to the public rather than necessarily making a finding on causation, and I know that the submission on risk to the public is going to be "but there hasn't been that history of violence", so I'm not, so in fact that answers that paragraph, that submission.

MR BIRD:

Yes, and if –

GLAZEBROOK J:

But you're saying that as part of that they have mischaracterised what caused this incident, is that…

MR BIRD:

Yes, and –

GLAZEBROOK J:

In a factual sense or a legal sense, or…

MR BIRD:

Well…

GLAZEBROOK J:

Sorry. Because you did make that distinction and I wasn't entirely certain what that distinction, what that distinction was in your submission.

MR BIRD:

As a matter of fact we say the Court of Appeal didn't have a sufficient basis to infer that alcohol or drugs caused the psychosis.

GLAZEBROOK J:

Yes.

MR BIRD:

Now if your Honours are minded to interpret para 52 as not including a finding about the causative impact of alcohol and drugs, then we're happy to accept that. But just to indicate that if you were minded to so interpret it then that's our submission.

ELLEN FRANCE J:

Just in terms of the facts, Dr Duff in paragraph 58, page 51 of the Court of Appeal casebook, doesn't discount entirely the diagnosis of a substance-induced bipolar disorder, et cetera, does she? She just, she says that's possible but not, in her opinion, the preferred approach.

1015

MR BIRD:

That's respectfully right, Ma'am, and perhaps a good way to lead into a submission I just want to make about what the standard of proof is in this context and on whom the onus falls. Now we indicate in our written submissions, which were directed at rebutting a perceived use of alcohol and drugs by the Court of Appeal as a causative influence, that insofar as the Court relied on the presence of alcohol and drugs it would have been to disprove a

mitigating feature related to the nature of the offence and the offender's role in it, and so according to section 24(2)(c) of the Sentencing Act 2002 would require proof beyond a reasonable doubt and we say that that couldn't be proven.

Now just really in summary on this issue, in our submission it's somewhat unclear, with respect, quite how the Crown says as a matter of law the appellant's resort to alcohol and drugs does impact on his culpability. For instance, though the Crown says that it's relevant to note the presence of alcohol and drugs and to give it as a reason why this case is less deserving of a finite sentence than a case like *Reid* where there wasn't the influence of alcohol and drugs, we say, well, if that's to be – is it the case, we say rhetorically, and no doubt the Crown will indicate, that the appellant's use of alcohol and drugs has been regarded as aggravating his culpability, in which case it would clearly require proof beyond a reasonable doubt which we say it couldn't, and I'll get a little more into the reasons why in a moment, or is it the case that it's been advanced to justify, or advanced to disprove the mitigating fact that the appellant can rely in an unattenuated manner on his ultimate mental state, regardless that it may partly have been caused by alcohol or drugs? In our submission it's somewhat unclear how the Crown says that the factual influence of alcohol and drugs sounds as a relevant fact to the appellant's culpability in his sentence.

O'REGAN J:

Why do you say "unattenuated" when both the witnesses say it was exacerbated by alcohol and drugs?

MR BIRD:

Well, it was exacerbated in fact, your Honour –

O'REGAN J:

So that means it is attenuated, doesn't it?

MR BIRD:

It doesn't mean it's legally attenuated, with respect, your Honour. Our submission is that insofar as the appellant, after about the 29th of December, took alcohol or drugs, it wasn't voluntarily taken and so isn't caught by section 9(3) and isn't otherwise…

O'REGAN J:

Well, do the experts say that?

MR BIRD:

With respect, that would be a legal question. The experts can give their analysis as to the composition, the causal composition of the appellant's ultimate mental state. But as to whether certain of those causes moderate his culpability, that's, in our submission, a legal question which I would like to go on to now in more detail, if that's all right.

1020

KÓS J:

This is a very difficult argument. You have a person who is consistently taking alcohol, consistently taking drugs and intermittently suffers from a psychotic episode. Now we don't know and can't know from the evidence whether his consumption of alcohol and drugs was rendered – which was an ordinary activity, ordinary voluntary activity on his part – was rendered somehow involuntary by the fact of the supervening psychotic episode. It sounds to me actually quite unlikely, inasmuch as it was his ordinary voluntary act. So how do you make this argument that it became an, the consumption of alcohol and drug became an involuntary act because of a supervening event when he was taking alcohol and drugs anyway?

MR BIRD:

In I hope the following way, your Honour. I think I just want to – I will get to the question, I promise.

KÓS J:

Right. You've got 10 minutes before the break.

MR BIRD:

Okay. I just –

GLAZEBROOK J:

Yes, and we do have to be quite defendant about the actual times of the breaks…

MR BIRD:

Yes.

GLAZEBROOK J:

So I'll try and keep an eye on that if you could also please.

MR BIRD:

Yes, of course.

Well, in terms of voluntariness, in our submission that a couple of key constituent concepts underlying it, which we allude to in the speaking note, which are that the relevant consumption is by the person's free choice and that the person is informed as to the nature of what it is they are consuming and the consequences that are likely to attend their consumption of it. So, for instance, someone who knows that they're drinking alcohol but whose drink has been spiked, doesn't know some property about the drink and in one sense they are voluntarily drinking alcohol but that surely wouldn't preclude them relying on the mental state that that –

GLAZEBROOK J:

Well, we're not in that, there's no suggestion here that that was the case, so.

MR BIRD:

No, no, that's true.

GLAZEBROOK J:

There was on an earlier occasion I think but probably it actually hadn't happened.

MR BIRD:

So the appellant says, yes.

GLAZEBROOK J:

Sorry, it wasn't either voluntary or spiked though.

MR BIRD:

Indeed. I use that example just as a predicate to what I'd like to say now, which is that if someone is not mistaken as to some inherent property of the drink that they're about to drink, they realise that it has a certain level of alcohol but they're mistaken as to some other circumstance of the world, some circumstance internal to them for instance, and they don't realise that if by ingesting the alcohol or the drug that they are going to induce in themselves not the ordinary effects of the consumption of that alcohol but some distinct mental state, like a psychosis, we submit that they haven't voluntarily assumed the consequences of what they're about to do because they're deceived as to the –

KÓS J:

The evidence does not support the proposition that alcohol and drugs induced the psychosis. The word "exacerbate" I take to mean "makes effects worse". So the error here, if any, was as to if there was a supervening psychotic episode, how that would differ, with or without alcohol and cannabis.

MR BIRD:

And to that we would add, crucially we say, to what extent was Mr Van Hemert culpable for taking alcohol or drugs, which exacerbated existing psychotic symptoms? Did he, could it be said that he foresaw or even ought to have foreseen, not that his consumption of cannabis would have it's usual effect on him, or alcohol have its usual effect on him, but that it would exacerbate the intensity of the psychotic symptoms?

GLAZEBROOK J:

Where do you get that from the statutory language?

MR BIRD:

Well, we say that it's inherent in the nature of voluntariness…

GLAZEBROOK J:

Well, is that…

1025

WILLIAMS J:

I think you're right, that "voluntary" is pretty elastic. Some things can be more voluntary, some less, and the classic case that's dealt with in sentencing is addiction. So you get free choice to some extent but your choice is sometimes very severely limited if you're thoroughly addicted, to a drug, for example, and sentencing judges take that into account all the time, notwithstanding section 9(3).

MR BIRD:

Yes.

WILLIAMS J:

Isn't that the territory you're in?

MR BIRD:

Well, it –

WILLIAMS J:

Why do we need this very clever thought experiment?

MR BIRD:

Just trying to meet Justice Kós' question.

WILLIAMS J:

It's his fault? You've poured water on two people then.

MR BIRD:

Well, the distinction that I'm attempting to draw between the ordinary effects of intoxication, which is what we say 9(3) deals with, and unforeseeable abnormal effects of intoxication…

GLAZEBROOK J:

Well, aren't you always going to get unforeseeable effects? I mean, I suppose what you say is 9(3) absent mental illness, it might be: "I'm an angry drunk rather than a maudlin drunk and therefore I should know that I shouldn't drink because if I get angry something might happen," and you say that that's different from this case?

MR BIRD:

Yes, even if a maudlin drunk did, after taking drink, become aggressive, it would be regarded as that that is part and parcel of the possible – it's within the range of possible effects of alcohol and so they couldn't – so that they hadn't voluntarily taken the alcohol simply because there was a slight –

GLAZEBROOK J:

A different or out of character event –

MR BIRD:

– a slightly different outcome than usual. Now we indicate in our written submissions that the distinction I was trying to draw between the ordinary effects and any effects in a but-for manner from the voluntary consumption of alcohol is traded in in *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 insofar as addiction is ultimate, ultimately originates in the successive voluntary consumption of alcohol but that it produces a distinct mental state is sufficient to evade capture by section 9(3), and we say that distinction is also evidenced in the English and some of the New Zealand cases about voluntary intoxication which causes a disease of the mind sufficient to amount to insanity merely because the behaviour has been unwise or perhaps culpable in drinking oneself into a dangerous position. The person can still rely in the, for the quite drastic

result of receiving an acquittal, on the fact of their mental state, notwithstanding –

O'REGAN J:

But section 9(3) doesn't apply to that, to acquittal. It's only a sentencing matter, isn't it?

MR BIRD:

That's right. All we say about that is that if a mental state which originates in voluntary intoxication can lead to an acquittal, in the much less drastic situation when one induces in themselves a disease of the mind which is just short of insanity, it would seem not to comport with the way it's dealt with in the –

O'REGAN J:

But that's saying the more you drink the more likely you are you can discount section 9(3). That can't be right.

MR BIRD:

Sorry, your Honour, I'm not sure I apprehend the –

GLAZEBROOK J:

I think you're saying –

O'REGAN J:

Well, you're saying if you get intoxicated up to a certain level section 9(3) applies but if you get intoxicated so that you completely lose your mind and do something terrible you can rely on it, you can exclude section 9(3).

MR BIRD:

Well, if it's simply the effects of intoxication, extreme intoxication without more, then section 9(3) does apply, but it's where it triggers a distinct mental disorder which almost by definition will involve it triggering some internal cause and –

O'REGAN J:

But haven't we established it didn't trigger it?

KÓS J:

Exactly.

O'REGAN J:

Your whole case is that drink didn't trigger it and now you're arguing that it did. I just don't understand that.

MR BIRD:

Well, I'm certainly not retreating about –

KÓS J:

10.30.

O'REGAN J:

It's 10.30.

MR BIRD:

A good place to pause, yes.

O'REGAN J:

We'll give you time to think about it.

GLAZEBROOK J:

So we'll take the adjournment. So it's 15 minutes.

COURT ADJOURNS: 10.30 AM

COURT RESUMES: 10.45 AM

MR BIRD:

Your Honour, before I tied myself in knots just before the break –

GLAZEBROOK J:

Or we tied you in knots…

MR BIRD:

Oh, well, I'm…

GLAZEBROOK J:

But you're too polite to say.

MR BIRD:

I just perhaps want to recapitulate a wee bit and make a couple of hopefully pithy submissions and then I'll had back over to Mr Rapley.

Our submission on the relevance, the legal relevance on the alcohol and drugs exacerbating his psychotic symptoms is first that the extent of the exacerbation is unquantified and probably unquantifiable, and so caution would need to be observed before investing some significance in the fact for sentencing purposes. The second point is that because the consumption of alcohol and drugs intensified psychotic symptoms rather than delivered its ordinary effects or effects which he ought to have foreseen, Mr Van Hemert wasn't informed in any real sense in his consumption of those substances –

GLAZEBROOK J:

I'm just wondering whether "informed" is the right word or whether you, it's easier to say that the culpability was lessened, or do you say "voluntary" means you have to know what will happen, or is it just related to the mental illness aspect of it?

MR BIRD:

Well, I'm just wanting to avoid, or rather to evade, section 9(3), because as a matter of fact both psychiatrists agree that the consumption of substances has partly contributed to his ultimate mental state, and so my submission is that Mr Van Hemert's consumption of them, to the extent that they exacerbated a psychosis rather than visited on him the normal effects of drunkenness or intoxication, wasn't voluntary to any real extent, and so the policy behind section 9(3) isn't engaged. Section 9(3) tries to manifest the principle of culpability, it says those who take drink or drugs voluntarily assume the ordinary

and probable consequences of them, but that doesn't bite where we have quite extraordinary consequences that the person taking the drink or drugs can't foresee.

KÓS J:

Well, you could approach this in a couple of ways. One is to ask on a but for approach: "Would this have occurred but for the psychotic episode?" I think the inevitable answer has to be no. Consuming alcohol and cannabis doesn't turn him into a killer on a day-by-day basis. So then how does section 9(3) work? You could think of it like a bar graph, and I'm not going to demonstrate one. The blue highlighter pen is the effects of mental health on the incident, the pink upper bit of the bar graph is the effect of alcohol and drugs. The effect of section 9(3) is to say to the extent that's a voluntary act we take that out, so we'll take it out. We don't know if it's that much or that much or that much, we have no idea, that's your unquantified bit, but we just take that away, we're left with the mental health bar graph bit. Isn't that what 9(3) does?

1050

MR BIRD:

To the extent that the presence of the pink highlighter was by dint a voluntary act, yes.

KÓS J:

Yes.

MR BIRD:

Yes.

WILLIAMS J:

But again it depends of what you mean by a "voluntary act", and that's the difficulty in section 9(3).

KÓS J:

Yes.

WILLIAMS J:

Because if your choice is reduced by the fact that you can't really operate without it, say, i.e. you're addicted, then to ignore that is to ignore something quite important about the quality of the choice.

MR BIRD:

Well, we respectfully agree with that, your Honour, and it leads to the last submission I want to make about this, which is that by the time, certainly by the 29th of December and into the 30th of December, when he was attended on by the doctors, the doctor and the nurse, and assessed as mentally disordered according to section 2 of Mental Health (Compulsory Treatment) Act, he was not in a state where though his decision to take alcohol or drugs mimicked what he might have done when he was not psychotic, it didn't – the fact that he was psychotic impaired to a meaningful extent whether his behaviour in that state could be regarded as voluntary. He didn't exercise a free choice or a free will because of his psychotic symptoms. Now he's undertaking an activity that he ordinarily undertakes, but that correspondence shouldn't lead to one excluding the role in impairing the freedom of his choice and, if we look at section 2 of the Mental Health Act, it requires that the person has an abnormal state of mind characterised by "delusions, disorders, or disorders of mood or perception or volition or cognition of such a degree that it poses a serious danger to the health or safety of that person or of others or seriously diminishes the capacity of that person to take care of himself or herself". Now we say that that as a description of Mr Van Hemert is highly relevant in deciding whether drugs taken or alcohol taken after the 29th of December were voluntarily taken. And finally on that point, the fact that he also is assessed as having, as the evidence clearly establishes, a severe cannabis use disorder and a severe alcohol use disorder, is also relevant when determining the extent to which his consumption of those substances after the 29th of December was truly voluntary.

ELLEN FRANCE J:

Putting to one side addiction, are there other cases that, or what is the best case that supports your, what I see to be your second submission about lacking

voluntariness when in a mentally disordered state? So what's the best authority for the proposition that that's not then voluntary in terms of 9(3)?

MR BIRD:

Can I have a think about that, your Honour, and perhaps we can indicate in our reply?

ELLEN FRANCE J:

Sure.

MR BIRD:

I just want to reflect on that, if that's all right?

GLAZEBROOK J:

Well, I suppose your submission would be that if there isn't any authority we should be providing that authority because 9(3) has to be interpreted in, I hesitate to say "the real world", but a world where clearly those substance abuse disorders are often, and especially with older people, totally associated with mental health and it's hard to extricate or, as you said, to quantify the exacerbating effect even, let alone causative aspect of it.

1055

MR BIRD:

Yes, your Honour, indeed.

KÓS J:

Picking up on that point, do you think we've really got the help we need in this case in the reports we have which are section 38 reports focused on insanity and fitness to plead and do not really address the degree of exacerbation? They're not really focused on the 9(3) question.

MR BIRD:

Yes, I do agree with that, your Honour, in that they both are directed at answering, if we put aside the fitness to plead question, whether the salience

of the mental disorder satisfied section 23. Well, if the answer to that as it was is "no" then what we're dealing with here is his only tangentially being addressed by the fact that both doctors were dealing with section 23 and Dr McDonnell's report, for example, after she concludes that the appellant wasn't so driven that he was labouring under an insane delusion, that's where it's left. There's not – though difficult it might be, not even an attempt to quantify such as might be helpful to a sentencing court to track precisely the extent to which volition and perception are impaired. So yes, unfortunately that is in some ways a product of the instructions given to a psychiatrist in this context when it is directed at determining the defined issues about insanity and fitness to pleading.

And Mr Rapley indicates that Dr Duff's report does attempt to advance in a little more granular detail the respects in which, though it didn't amount to an insane delusion, the appellant's mental disorder affected him.

But I suppose the final point I would, relevant to your question, your Honour, and generally, is that the standard and onus of proof is very important in this context. Insofar as there is a suggestion that alcohol or substance use disentitles in some way the appellant to rely to the full extent on his ultimate mental state, that does, in our submission, need to be proven beyond a reasonable doubt as an attempt to disprove a mitigating feature under section 24 as I indicated earlier.

Unless there are any further questions, on that rather difficult issue – yes.

WILLIAMS J:

Can I just, so is your argument this, that the 9(3) exclusion falls away when its purpose, not rewarding culpable choices, is undermined by an underlying illness that would have prevented proper understanding of consequences of an ordinary safe activity, at least in his daily life experience?

MR BIRD:

Yes, that…

WILLIAMS J:

Right, thank you.

GLAZEBROOK J:

Can I just check on the disproving mitigating factor –

MR BIRD:

Yes.

GLAZEBROOK J:

– because wouldn't first there have to be the proof of the mitigating factor and just the mental disorder isn't enough? It would have to – you'd accept surely – well, do you accept that it's not just the mental disorder, that you'd have to prove that link between the two? Now I'm talking here in respect of diminishing culpability rather than saying prison would be absolutely the wrong place for this person because of their mental disorder or they shouldn't be there for as long or we should try for a community, so picking up on the two aspects of it. I mean here you say yes, it diminishes culpability, and that's clear from everything. But absent that, wouldn't you at least have to get to that stage to show it is a mitigating factor in terms of, and that it wasn't the alcohol that caused it?

1100

MR BIRD:

Oh, sure. We accept that according to section 24 we'd have to raise a more than fanciful or specious case as to the mitigating fact, and that fact we formulate in our written submissions. And as through no fault of his own the appellant suffered from a mental disorder which reduces culpability to a certain extent, and then if that was to be controverted by the Crown by recourse or such, it would be incumbent on them to prove that beyond reasonable doubt.

GLAZEBROOK J:

Thank you.

MR BIRD:

Thank you, your Honour.

MR RAPLEY KC:

I'm conscious of time and where we're at in the submissions. I thought we were at the position where I could talk about the circumstances of the offender, and we've dealt with some aspects of that, particularly a history of aggression and remorse. But one that is an important feature is community protection, that risk aspect, as –

KÓS J:

So this is point 20 in your note?

MR RAPLEY KC:

Yes, and it's point 87 in the submissions, and so the personal circumstances aspect which has to be considered is the circumstances of the offender. As I said, I'll leave the history of aggression which was mentioned, because I believe we've dealt with that, but future risk has to be assessed, as is set out in the speaking notes there, on the basis that the Mental Health Act is properly enforced, and so community protection of course is a principle of sentencing and highly relevant in 102, so the Court of Appeal clearly were focused on that and were concerned about it. But when the risk of future offending is properly assessed there has to be a reasonable relationship between the penalty, by the gravity of the offence, and the principle in the Sentencing Act, section 8(a) and (g), as constrained by that community protection requiring the offence's gravity to be considered and for the least restrictive penalty to be imposed. So this appellant's future risk, well, he wasn't on a course of prescribed medication at the time, there was an issue and both psychiatrists talk about it with him showing an unawareness of his mental illness to some extent. But he is now on it and it remains to be seen, as we see there, whether his condition can be appropriately managed in the future.

Now as at sentencing I provided reports, well, they were very informal emails from Dr Panckhurst, Justice Panckhurst's son, who's a psychiatrist at Paparua

Prison, saying that he was being well managed, Mr Van Hemert was managing well, and there were every indication that he would continue to improve. So that brings us to the question, well, is 10 years insufficient, as to that's what he was sentenced to, to reduce that risk? And should –

1105

GLAZEBROOK J:

Is that the question?

KÓS J:

No, that's not the question. I mean the issue here is whether life sentence is or isn't imposed.

MR RAPLEY KC:

Yes.

KÓS J:

That's really about recall.

MR RAPLEY KC:

Yes, correct.

KÓS J:

The fact that he remains subject to recall for the rest of his life.

MR RAPLEY KC:

Correct, and –

KÓS J:

Isn't that the real issue here?

MR RAPLEY KC:

That is, and it's being subject to recall, how that manages his risk more than a set term though of imprisonment because if he is being medicated and if the mental health authorities are monitoring him and ensuring that he is getting the

help that he is, then there's no, I suggest, ability to argue that life recall will ensure that he doesn't suffer a mental episode or there won't be a risk. So the – it shouldn't be determined on the basis that the mental health authorities won't be able to look after him and it can't be the reason. If he had been hospitalised and was under supervision, he wouldn't have committed the crime that he did. So it has to be assumed that there'd be minimum levels of care provided to him. So I cannot see –

GLAZEBROOK J:

Unless you've got a compulsory treatment order, it's all going to be based on voluntary compliance, isn't it?

MR RAPLEY KC:

Correct –

GLAZEBROOK J:

And often they don't voluntary comply for very good reason because these things have side effects and when they feel well they think they can stop taking medication.

MR RAPLEY KC:

Yes, yes, but if there's a major stress or something happens does the deterrent aspect of a life recall, is that really going to pose the protection that seems to be suggested and I suggest it can't be.

O'REGAN J:

I think we know what your argument is.

MR RAPLEY KC:

Yes. All right.

So I've dealt with remorse. So that's the last of the personal circumstance –

GLAZEBROOK J:

But what do you say, it's irrelevant or…

O'REGAN J:

It's not. It's the lack of a mitigating factor. It's not an aggravating factor.

MR RAPLEY KC:

Yes, it is. Not a –

GLAZEBROOK J:

But is that all the submission –

MR RAPLEY KC:

That's all it is.

GLAZEBROOK J:

That's fine, thank you.

MR RAPLEY KC:

Yes, yes, and that it needs to be tempered a little bit because when it comes down to it it's absence of an aggravating – yes, it doesn't aggravate it but I suggest the Court of Appeal failed to put it into context of the reports that at the time of his sentencing he was looking at his own position and the fact he didn't display remorse in and of itself at that point in time may not be that unusual, given –

ELLEN FRANCE J:

Just in relation to that, Justice Doogue did say: "Your remorse is palpable."

MR RAPLEY KC:

Yes.

ELLEN FRANCE J:

So are you saying she was wrong about that?

MR RAPLEY KC:

No, she – well, her Honour, I was there and my impression was from how he was presenting in court. It was quite emotionally charged, I have to say. They did a haka. The victim's family, brother, came in and was allowed past the bar. He came in and did it and stood there and faced it and it was a bit, you know, there was a lot of emotion there for that, and so my take on that was from that's where her Honour got that from because the Court of Appeal did comment on that and say, well, that doesn't sit very well with what's set out in the psychiatric reports.

KÓS J:

Well, which weren't focused on sentencing as we've just discussed. Was there a letter of remorse? Because we don't have the full file.

MR RAPLEY KC:

No, no, there wasn't a letter sent.

KÓS J:

No, okay. I mean, yes.

MR RAPLEY KC:

No, other than an expression through me, yes, in sentencing.

1110

KÓS J:

Yes.

MR RAPLEY KC:

And I turned, faced the haka, and then apologised on his behalf through him, yes.

So that's all I'd like to say at this point, unless there's any questions?

GLAZEBROOK J:

No, thank you very much, Mr Rapley.

Now we have the interveners, and I'm not sure whether you've discussed in what order you're speaking and what you are speaking about. Ms Hall, is it?

MS HALL:

Yes, thank you, Ma'am.

GLAZEBROOK J:

Thank you.

MS HALL:

We had reached a decision, your Honour, that we wouldn't make oral submissions unless it was of assistance to the Court, but sitting in the back it's often very difficult to not just stand up and…

So there are two matters that I would like to address the Court on. One is the issue that's primarily being discussed by your Honour Justice Williams in terms of which, does it matter whether it's culpability or second-stage mitigating factor, does it matter, if it's there it's there, and the second is this concept of voluntariness, which has taken up some of the Court's time this morning.

If there are questions that your Honours have in relation to the manifestly unjust aspect in the wording of 102 and 104 and how that operates, our submissions are very fulsome. Mr Ewen is more than happy to answer any of those questions though.

What is clear, and again we do note that it was your Honour Justice Kós that wrote the *Shailer* decision, so the concept this –

KÓS J:

Yes, well, *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 is actually the more important decision by far.

MS HALL:

In terms of the concept that it can lead into both culpability and/or second stage. One of the points that we would make in addition to the arguments that you've heard this morning is that – well, our written submissions refer to the Court of Appeal case in *L v R* where the question is asked not more whether it's double-counting but whether it would be under-counting if you didn't include it in both arms, and one relevant factor here is that the, while they may, the factors may lend itself to an analysis under both culpability and second stage, under section 24 of the Sentencing Act the Crown bears the burden of disproving a mitigating factor that's relevant to the offence itself. And so it does become important when looking at that burden of proof issue where it fits into the offence or into the second stage. So in this case the appellant has an evidential burden to raise the issue that the mental health factors contributed to a cause of the offending, and then it falls to the Crown to disprove that beyond reasonable doubt. But if the mental health factors only go to the circumstances of the offender then the defence must carry the onus of proof on the balance of probabilities. And so that is a relevant consideration when looking at what factors are available and how the Court should deal with them. I just raise that in addition to the arguments that your Honour heard this morning on behalf of the intervener.

The second brief point that I would seek to assist the Court with is the concept of voluntariness and, Justice Kós, your highlighter example, I suspect what's happened – and if I can make the submission – is that experts haven't really been invited to go into section 9(3), there's been almost a blanket treatment of any kind of literal voluntary, so literal, drugs or alcohol being ingested, really then meaning that there's little consideration of the impact of that on either culpability or on second stage, and experts in New Zealand probably haven't been taxed in the way that we would like them to be taxed in terms of drilling down on those factors, and probably a shift since the *Zhang* decision and focusing on addiction and its actual effect and what that actually means. Because, for example, even in this case there's a reference to him having a substance use disorder and there's a reference to long-standing alcohol and drug consumption from a very young age. But there doesn't really seem to be

that expert analysis of, well, why does he drink alcohol, why does he take the drugs, and why was he doing it on this day, and then what does that mean for the offence?

1115

So this concept, Sir, of the but for, "but for the alcohol and drugs" we can take the pink highlighter away, that's helpful for the culpability part of the question, but of course it doesn't really assist with second stage would be –

KÓS J:

No, the but for point I raised was to start with the mental health thing. But for the mental health disorder, would the murder have occurred? I think we all know the answer to that.

MS HALL:

Yes, it's no.

KÓS J:

Correct.

MS HALL:

Yes.

KÓS J:

So then we were dealing with exacerbation which means it made the mental health effects worse. Well, perhaps you could take that away under section 9(3). I'm not sure we know how much difference it makes, and so we have to look at this in the round, which is we just don't have the expert assistance.

MS HALL:

That's I suppose the point that I'm making, is that with a more mature understanding from everyone in terms of the way – you can't just say someone has an addiction and then step out of the arena. It has to be an analysis.

Yes, they have an addiction. Where does it come from and what does that mean in terms of their behaviour? I suspect that we haven't really enquired into that second step because of the way that section 9(3) is worded and because of a very surface level appreciation, probably, of what "voluntary" means.

The point that the Defence Lawyers Association would make is that in a context where New Zealanders are suffering from greater mental health issues than probably ever before and addiction issues and the inextricable linking of those mental health disorders, that that time has come for a good examination of what "voluntary" means, and in terms of whether your Honours have the assistance in this appeal, we would've liked to have had some expert assistance to help your Honours with unpicking those, but they are probably reasonably fact-specific and case-specific. But we do encourage –

GLAZEBROOK J:

It may be that we wouldn't get anything more than – the psychiatrist or psychologist would not be prepared to say anything more than they already have said in those reports in any event because that's really not a focus of what they do.

MS HALL:

That's a very fair point, Ma'am. I think that the Criminal Bar Association have made that point in their written submissions, and on the whole, there's that tension between over-medicalising the human condition and also just stepping back and, as your Honour said earlier, in the real world, what was going on here? In the real world, there are all of these inextricably linked factors. What we've tried to assist the Court with is to provide some basis for, you know, either alcohol and drugs can lead to mental health disorders, the mental health disorders can lead to the alcohol and drugs, but they are very entwined.

It may be in cases that it is artificial to unpick that, but there may be cases where it is very clear that the alcohol and the drugs were being used to dampen down the symptoms of mental health distress and that's a very clear reason why

people end up with alcohol use disorders, because it's a way of trying to dampen the pain and the distress.

WILLIAMS J:

So the essence of your argument is that section 9(3) has to be read in that "real world context" to quote another Judge, and don't dumb life down to fit section 9(3).

MS HALL:

Correct, and don't be mean about it, really.

WILLIAMS J:

Yes, well that –

MS HALL:

That's what Ms Hall said: "Don't be mean. Thank you, thank you." Drop mic.

WILLIAMS J:

The "don't be mean" principle, yes.

MS HALL:

Well, it's become – I think it had been allowed to become so artificially constructed that "voluntary" literally meant: "Did you pick the drink up and drink it? Well, too bad."

What the Canadian – the citation that we've put into the submissions and Ms Hardy, I'm grateful, located the Manitoba Court of Appeal, the *R v Friesen* 2016 MBCA 50 decision. It's at paragraph 64 of our submissions. There was, you know: "In our case law, voluntary intoxication is rarely capable of supporting an argument of diminished responsibility." Agreed. "In this case, however, one must recognise the diagnosis of pFAS and what that entails. Given that the accused was prone to impulsive and irrational actions and with limited ability to foresee the consequence of his actions, to suggest that his self-knowledge of the effects of alcohol should lead him not to indulge is, with respect, placing too

high of an expectation on someone with his diagnosis. It is inconsistent with the medical evidence. Given his diagnosis, I am of the view that his lack of control when intoxicated was a factor in his unprovoked assault. Such conduct stems from his condition and it should have been considered as a mitigating factor."

So a more secondary analysis of not such labelling the addiction, not such labelling the use disorder, but what does that mean in terms of voluntariness and action and so we would encourage an analysis of, you know, really drilling down into that voluntariness, and then the cases will, you know, be very fact-specific following that, but a better understanding is allowable by the Sentencing Act than we've probably been using.

WILLIAMS J:
Yes, and what that means is a sentencing judge has to really understand the facts.

MS HALL:
Yes.

WILLIAMS J:
Not just of the offending, but the background facts related in its various kind of different number all the way back to context and background.

MS HALL:
Absolutely Sir, and all of the input information, and I know that in this appeal, for example, anger has been, you know, raised as a factor, and what the Defence Lawyers Association would encourage the Court to do is to again call for that to be put into the context of where does it come from, how does it play out, how is it triggered, and to really examine this underlying assumption that all people before the Courts exercise rational free choice at all time, that they knew what they were doing, they could foresee the consequences, and they made the decision anyway, which is divorced, in many respects from, certainly the facts here, but many of the facts that fall before our criminal courts.

Unless your Honours have any further matters, I appreciate our role as intervener is just to assist if we can.

WILLIAMS J:

What do you predict would be the impact on the use of section 102 systemically if we were to agree with you?

GLAZEBROOK J:

Maybe that comes down to the manifestly unjust, and did you say that Mr Ewen…

MS HALL:

He's happy to answer questions about the formulation of 102 and 104. I mean we've, certainly in our written submissions we've made the point that this, the legislation requires the Court to apply the manifest unjust test, and Parliament is saying it's rare, and references to exceptional, don't really assist in the consideration of a particular case because it doesn't matter, as we've discussed earlier, how many have gone before that year, or how many are coming in the pipeline. It only matters that if on these facts this offence, this offending is manifestly unjust, and so again the door closing because of this concern that words like "rare" and "exceptional" must mean that we err on the side of caution in terms of exercising the 102/104 analysis, isn't a position that the Defence Lawyers Association would endorse. It's got to be –

GLAZEBROOK J:

So what do you – or is it better that we hear from Mr Ewen on this in terms of what do you say then – it's hard to say a test to manifestly unjust, because you would probably say well it just depends on the facts, but again if it's just a but for mental illness test, would that mean anybody who was mentally ill could come under manifestly – would come under manifestly unjust, because there are a lot of cases where that's been held not to be the case, and also cases where there have been unbelievable stresses in someone's life over a long period.

MS HALL:

Yes a case immediately springs to mind that was argued.

GLAZEBROOK J:

Yes.

MS HALL:

I did promise Mr Ewen that I wouldn't step on his toes for 102/104 and I know that he could assist with that, so if I could.

GLAZEBROOK J:

No, if that's the best way of proceeding.

MS HALL:

I think it is Ma'am, unless you have any questions for me on the matters that I've dealt with, thank you.

GLAZEBROOK J:

Then in terms of hearing from Ms Scott, have you talked about how that's going to split or…

MS SCOTT:

I'm conscious, Ma'am, that I don't simply want to repeat what's been said by my friends.

GLAZEBROOK J:

Why don't we see – so if you could leave time enough for us to hear from Ms Scott if she feels that she wants to add something.

MR EWEN:

Your Honour, I'm going to be uncharacteristically brief.

KÓS J:

I'm going to hold you to that Mr Ewen.

O'REGAN J:

It's in the transcript now.

1125

MR EWEN:

The fact is, the test is what the test is, which is one of manifest injustice. There is, the position of the Defence Lawyers Association, far too much reference to the Minster's speeches, to the House in relation to what he thinks the number of occurrences will be. It is purely a test of law and the Court, in my submission, simply needs no assistance from parliamentary materials. Manifestly unjust has got, in terms of manifestly, it's clear, it's been used in a number of contexts but it all simply boils down to this is a clear case of. It is not, in the case of manifest injustice, it is not just this does not look right. It must have a higher character than that, and Justice O'Regan's point is okay it's not just manifestly unjust, it is a rule that requires displacing by manifestly unjustness, so that may again elevate it slightly because it is displacing a rule, but even that is not uncommon.

I mean under the former section 382 of the Crimes Act 1961, which is the appeal by way of case stated provision to the Court of Appeal, and used to be the Crown's only vehicle to challenge jury verdicts. The Court, the ordinary provision is the Court can disallow the appeal if there's no substantial miscarriage of justice. The exception in the case of the Crown appeals though is the Court was enjoined not to allow the appeal unless a substantial wrong or miscarriage of justice had been visited on the trial. It meant that what would otherwise go for a defence appeal may not necessarily go for a Crown appeal, but again it means that, the rule is this is what is going to happen.

O'REGAN J:

There's actually two rules here, isn't there, because once you decide section 104 applies you have to displace that, and then you have to displace section 102.

MR EWEN:

Yes.

O'REGAN J:

So there's actually two manifest injustices required, isn't it?

MR EWEN:

And the matter is in the written submissions on this, the Court of Appeal has in the past kind of differentiated between the 104 manifest injustice and the 102. With respect that is without obvious justification as to why the position should be that way, because it can't be ignored that the principal effect of the Sentencing Act was to make life sentences in New Zealand discretionary rather than mandatory, and that was a very big change in and of itself. It's still the position in England and Wales that life sentences are mandatory. The only wiggle room is in relation to setting of the tariff, which again, I'm not going to raise *Wheeler* points, because *Wheeler* will go to the Court of Appeal, and leave has been declined, but it gave a degree of wiggle room in terms of ameliorating the harsh outcome of a mandatory life sentence that they still have. We now have, the fact that it's become discretionary, subject to jumping the manifest injustice test. But as I say manifest injustice, in the context of legal aid appeals you also find manifestly unreasonable as the criteria on which a legal aid decision can be tipped over under the Legal Services Act 2011, and again in *Fainu v LSA* and other cases, it should be the Court, the High Court, and I think *Martelli* as well, so it simply means a clear case of it does not imply rarity, also in practice it may be uncommon, and it does not require that, by the circumstances of the offence and the offender must be a credit balance for the defendant before the test is engaged. But in my submission –

KÓS J:

But you're stripping that out of context aren't you? I mean this was a failed attempt to introduce a defence of diminished responsibility, a reform which many might see as being highly beneficial, but it wasn't adopted. So here there was a slackening off slightly of the inevitability of a life sentence.

MR EWEN:

The question becomes, does the Sentencing Act incorporate, is there sufficient latitude in the Sentencing Act effectively to accept diminished responsibility, and I'm not going to repeat anything that Mr Rapley has said because these are the provisions from the Law Commission's report in relation to that. They dovetail perfectly well with the provisions of the Sentencing Act, and whilst we are still shackled with the insanity test, which was created before psychiatry was even in its infancy as a discipline, until there is parliamentary movement on that, it is what it is. The quid pro quo must be that there is sufficient movement in the Sentencing Act to allow for diminished responsibility, and without taking a position this would appear to be a paradigm case for it. But I said I was going to be brief.

GLAZEBROOK J:

Can you deal with Justice Williams' question about the systemic effect, because the systemic effect seems to be – well it seems to be a position that probably a number of the cases referred to by the Crown were wrongly decided in terms of the test you say should apply?

MR EWEN:

It is the Defence Lawyers Association position that the test has been pitched at too high a level, and also the principle reason for that I think, I'd submit has been overreferenced to the Honourable Phil Goff speeches in the House about how rare, and not just how rare, but how fact-specific – the Minister gave two particular examples, and those seem to have applied to trammel the inquiry ever since, when the test is what the test is. It is a legal test which lawyers and judges are familiar with. So I would say that, yes, the test as previously applied has been pitched too high and systemically there will be more occasion to look at this, but again the facts are always going to have to be exceptional to get over, even a manifestly injustice test.

GLAZEBROOK J:

Given the prevalence of mental health issues in the prison injury, and head injury and foetal alcohol syndrome, do you really want to say the facts have to

be exceptional, or are you just saying that it has to be a clear case of diminished responsibility?

MR EWEN:

Exactly your Honour because one of the points raised by the Court of Appeal, which are deeply saddening, to simply say that mental health problems are prevalent in society therefore that does not make it exceptional, was a terrible act of surrender.

GLAZEBROOK J:

So it's not exceptional it's just that it has to be a clear case of diminished responsibility, which is a very fact-specific enquiry, is it?

MR EWEN:

Well, again a point that Ms Hall raised was also raised by the appellants in relation to that. It does rather depend where you put diminished responsibility because if you put it in, in relation to –

GLAZEBROOK J:

Yes, I understood that question.

MR EWEN:

– the offence then in case of it being a clear case, it may not necessarily require a – clearly the evidential foundation that the defence are going to have to get over is going to be not insubstantial, but again it means it wouldn't actually fall to the ground to rebut it. But –

GLAZEBROOK J:

To be honest I think it's probably more in this context a question of what the Court thinks on the basis of the evidence in front of it. I don't know that burdens or standards of proof are terribly helpful in a case where you're probably talking about immeasurables.

MR EWEN:

And therein lies the problem for the defence, because it is so – there is – noted psychiatrists, getting psychiatrists or even lawyers to agree, it's all a bit impossible, because there are so many different –

GLAZEBROOK J:

But they will tell you whether there's a mental disorder or not.

MR EWEN:

Yes.

GLAZEBROOK J:

And so the Court then, from that evidence, and the surrounding evidence, which Mr Rapley has taken us to, will infer whatever the issue is in terms of whether it's a clear case or not.

MR EWEN:

Yes, yes, indeed and when it comes to matters of, again briefly contribution causation, I simply make the submission that the Court of Appeal seemed to focus on it not being the only cause. Well whether that's the case or not, in order to found criminal liability the actus reus need not be the sole or even the predominant cause of death. It is inconsistent with criminal liability for something that is a substantial and contributing cause of death to found liability but that it's, the position taken on sentencing is not commensurate. It is kind of relegated when that cuts across fundamental principles of criminal liability. Unless I can assist –

1135

WILLIAMS J:

I guess what you're pushing against, and have been pushing against since 102 was enacted, is that 102 is a statutory encapsulation of a cultural artefact, which is the core significance of the idea of life for life and a past reluctance to step back from that except in the most compelling cases.

MR EWEN:

Well, of course, your Honour, but prior to the –

WILLIAMS J:

That's why section 104, manifestly unjust, is being effectively read differently to section 102.

KÓS J:

That's perhaps right, but also history has, here and other aspects, 102's not simply a generous act, it also takes away, and what it was taking away was the option for juries – or make it easier for juries to say: "Well, actually, we're not going to convict for murder, we're going to convict on manslaughter." Now, there was an option, which jurors would become aware of because jurors do become aware of these things, we know, that life didn't necessarily flow from a murder conviction. So in that sense, 102 was an ungenerous act.

MR EWEN:

But it did, for the first time, make a less-than-life sentence possible for murder. Something that really hasn't received much attention is the gradation between the different forms of 167 liability in any event. Because, let's face it, the difference between a 188(1) conviction for causing grievous bodily harm with intent to cause GBH and murder is the existence of a pulse.

KÓS J:

Exactly.

WILLIAMS J:

That's quite important, though.

MR EWEN:

Yes, I know, but the difference between that and attempted murder, and again the –

GLAZEBROOK J:

Well, sentence on consequences rather than actions, I suppose, is the perennial debate in that context. Careless driving causing death, for instance, as against careless driving.

MR EWEN:

Well, yes, and as I say Judge Rea pointed out that, in the Law Commission roadshow that the Evidence Act – and I was quoting Judge Rea because as I say the difference between a careless driving and a manslaughter is a pulse, and his Honour was generally correct about that. But I've said more than I was going to, so unless there's any questions, I'll sit down.

GLAZEBROOK J:

Thank you, Mr Ewen. So, Ms Scott?

MS SCOTT:

I'm conscious of the time but I'll be briefer than my friend.

WILLIAMS J:

That's also in the record now, Ms Scott.

MS SCOTT:

It's what they always say about me.

GLAZEBROOK J:

No, but you're actually fine because an hour was dedicated, so there's really no issue in terms of – so thank you very much for one, for splitting the arguments in the way that you have without overlapping, and two, for keeping to the time, so thank you.

MS SCOTT:

Thank you, Ma'am, may it please the Court. On behalf of the Criminal Bar Association I'm conscious that we're essentially in agreement with the appellant

and with my friends from DLANZ, and so I am conscious not to reiterate what's already been succinctly said.

But I do wish to raise two points, and they flow on from the comment of the Court about the reference to the application of section 102 being rare, and are we essentially saying that you've got it wrong on a number of occasions, and the Criminal Bar Association agrees with DLANZ that yes, essentially, we're saying that is the case.

It's highlighted by the Crown submissions at paragraph 41 where they, having discussed the case of *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830, refer to the fact that regardless of an offender's mitigating features, there may be cases where the aggravating features are so great that 102 can't be – the life presumption can't be displaced.

With respect, I disagree with that because it has to be a balancing exercise pursuant to section 102. What if the mitigating features are equally as great? What if we have aggravating features up here but personal mitigating features up here as well, as there was in *Smith*? Section 102 is not saying if the aggravating features exist, then they must outweigh. It's not saying that.

In my submission, the Court can look at the history which led to the imposition of section 102 to support that submission. The mere fact of battered defendants being referred to, and mercy killings being referred to, they were often cases that had significant aggravating features. *R v Albury-Thompson* (1998) 16 CRNZ 79 is often referred to, both in the history and in discussion of section 102, and whilst it's a manslaughter conviction, it was deemed to be as a result of what his Honour Justice Kós referred to earlier as a jury simply wanting a lenient outcome, and there was murderous intent in existence, and if you look at the aggravating features of *Albury-Thompson* they are exactly akin to that of *Smith*. They involve a deliberate strangulation of a vulnerable victim. In fact in *Albury-Thompson* the victim could be seen to be more vulnerable than the granddaughter in *Smith*, and yet the Court of Appeal in *Smith* said notwithstanding her extreme personal mitigating features, those aggravating

features meant that section 102 could not apply, and in my submission that is not a proper assessment of section 102, and by the Crown's reference in their submission at paragraph 41 they're essentially trying to undermine what has to be a weighted assessment of all the particular factors attributable to the circumstances of the offender and of the offence in the particular case before the Court, and if that means, as my friends have said, that this year there's five and next year there's one, well so be it, because the application must be put in place on those particular facts before it, and the Court in *R v Knox* [2016] NZHC 3136 recognised that. They said we must not be blinded by the fact that a life has been taken, and we must look at the particular circumstances in the case before the Court, and the Criminal Bar Association urges that to be the application of section 102.

In doing so, just briefly, on the application of the circumstances of the offence, that has to, at times, also include the circumstances of the offender. My friends referred to section 8, and of course the gravity of the offending includes the degree of culpability, and a good example of that, which may assist the Court, is referred to in *Knox* where they're talking about provocation, and at paragraph 6: "… the factors that provoke a person into loss of self-control will be relevant in considering whether life imprisonment is manifestly unjust. These might include the nature, duration, gravity and timing of the provocation; the timing and proportionality of your response; whether the response was caused by the provocation, as well as factors…" relevant to your psychological state.

And it is clear when you look at those factors distilled down there, that the Court in *Knox* were considering, its clear that the personal circumstances of the offender are relevant to some of those factors when determining the overall gravity of the offending. That does not then preclude the Court to then say, and now let's look at the personal circumstances of the offender generally, not solely in relation to the offence, but overall, and that is not double counting, it is a proper application of assessing culpability and then assessing the personal circumstances of an offender.

WILLIAMS J:

A question I have about that is really how to find a logical division between those two things because they are – I mean what makes mental illness of a person, stage 1, but brutal upbringing of a person, stage 2? What's the logic in that?

MS SCOTT:

And with respect, Sir, I think the Court should be reluctant to try and differentiate it between stages. I think it is factually specific to the case before the Court, and at times both of those points your Honour has just raised may be relevant to the circumstances of the offending, and in others they may not. *Smith*, for example, she snapped as a result of the carer burnout, but in relation to the actual circumstances of the offending, it was a very brief offence, for a very short period of time. It took less than around a minute for the strangulation to occur, and then immediately she came out of the state she was in. That's very different to the case before the Court here where we have a more prolonged state of unwellness and – so that in my submission we don't need to necessarily lock in to a logical stage 1, stage 2.

1145

It's fact-specific of what's before the Court, and that was definitely the way that the case of *R v Rihia* [2012] NZHC 2720 and *Wihongi* were applied, and the Criminal Bar Association rely on those cases, in our submissions, as being properly applied by the Court, and a proper assessment of section 102, both in terms of the personal circumstances of these battered women and how that allowed section 102 to operate regardless of what could've been seen as relative serious aggravating features: stabbing twice to the chest to chasing the car down the road, trying to climb in to continue the assault. We're not talking about a brief momentary snapping. We're talking about a prolonged, over minutes, continued attack.

But their personal circumstances, battered woman and the – well if we look at *Rihia*, for example, and I refer to it at paragraph 61 of my submissions, a long-standing history of alcohol abuse, a long-standing history of domestic violence – on three out of the 33 callouts, she was the offender – and a history

of deprivation. In that case, section 102 was said to apply, and in my submission, correctly so, and it also segues into the proper use, in my submission, of section 9(3) and the impact of alcohol consumption on the person's mental health and the contributing factor to the offending.

If we use the example, because I don't want to miss out, of his Honour Justice Kós, we have the mental health –

UNIDENTIFIED MALE SPEAKER: (11:46:56)
It was blue.

MS SCOTT:
I don't have blue. I like green and pink. We have the mental health of Ms Rihia and that was, but for that the killing wouldn't have occurred. Then we add to that her substance abuse disorder, long-standing, for years and years and years, she's been using alcohol. Leaving it there does not go contrary to section 9(3) because she was no longer, in my submission, on the evidence before the Court, voluntarily consuming that alcohol. She was unwell and she was not the type of person or offender that section 9(3) is trying to address.

WILLIAMS J:
Is it that binary? Do you just need to read section 9(3) so that there are gradations of "voluntary"? At one level, she clearly was voluntarily consuming. Just that level of voluntariness compared with someone who has the occasional wine is the difference between black and white.

MS SCOTT:
Well, unfortunately, Sir, the Court has been looking at it in black and white, in my submission –

WILLIAMS J:
I know, well I'm asking you whether that's the problem.

MS SCOTT:

On appeal in *Rihia* that – *Wihongi*, I think, that was the issue because on appeal, the respondent said that the Court had placed too much weight on that and they weren't allowed to in section 9(3).

KÓS J:

But I think we have to deal with section 9(3) in this case happily. We don't have to deal with *Taueki* and the two-stage sentencing approach which the Court of Appeal will have to grapple with, and so, to that extent, your excellent submission needs to be directed to another place, the one I used to occupy. But in this case, you get in your – the personal circumstances of the offender or the mental health deficit the offender has within the section 102 test anyway because we all agreed today, everyone in this courtroom, that that has to come in. It comes in as either circumstances of the offence or circumstances of the offender.

GLAZEBROOK J:

You're probably not talking about mitigating or aggravating, you're talking about whether it's manifestly unjust, which is a totally different test. Which is why I say that section 24, I suspect, doesn't have much to give in this because it's a question for the Judge whether it's manifestly unjust given all of the circumstances which will include their level of culpability.

MS SCOTT:

Yes, Ma'am.

GLAZEBROOK J:

And being impaired, I mean, by whatever it happens to be impaired by.

MS SCOTT:

Yes, Ma'am, I would agree with that and I would simply stress that –

GLAZEBROOK J:

For some reason –

O'REGAN J:

Just stay next to the microphone.

GLAZEBROOK J:

Yes, otherwise it doesn't come through on the transcript.

MS SCOTT:

And I would simply endorse that all of those circumstances of the offence and the offender have to be taken into account regardless of how many there are. It is an overall assessment on that particular case so once you're over 104 the presence of aggravating features, in and of themselves, does not preclude the application of section 102.

Otherwise, unless there were any questions, from the Criminal Bar Association submissions, I'll ask Mr Ewen to answer them.

GLAZEBROOK J:

Thank you. Mr Lillico, we've got 10 minutes before lunch.

MR LILLICO:

I think in the moments I've got before lunch it might be best to deal with the test under 102, because actually the facts of the case and the application of the test is really receiving more prominence, and I think I can probably deal with what I wanted to say about it in the time we have before lunch. Mr Ewen submitted to you that the test was the test, and I agree with him. There isn't much to be said about it. The other things that have been said about it, whether it's rare reminds us, as Justice O'Regan says, that it's supposed to be an exceptional window, or an exception to the presumption, and it's not a way of guiding the judge. There is other commentary as well. One of the more useful bits of commentary is to substitute "manifest" with "clear", which is probably less entrusted by history as a word, and is probably more useful and modern, so clear injustice will allow you to escape life imprisonment, and that seems a useful word.

There's two remaining pieces of commentary to the test which I think have some use, although aren't the test, and the first aspect is what Justice Williams really called a cultural artefact, and that's where it said that the presumption reflects a long-standing and strong presumption "reflecting the sanctity accorded to human life in our society and its associated abhorrence of the crime of murder." So I think that probably drives – that's from the case of *R v Williams* [2005] 2 NZLR 506 (CA) at 57 of the judgment. So getting to the point that's really being raised there by his Honour. So perhaps an underlying policy if you like or an underlying cultural reason for that presumption.

KÓS J:

It's much more complicated than that because it's how do you deal then with manslaughter which involves the loss of the sanctity of life and yet –

MR LILLICO:

There's no presumption.

KÓS J:

– very low sentences apply in the case of manslaughter, and that's the difficulty we're dealing with here, because this is a case that in a sense might, a slightly different paradigm, had been a manslaughter case.

MR LILLICO:

Yes, you might have to break up the elegance of that sentence in *Williams* by inserting the sanctity of life that's taken away in circumstances that amount to either the expanded definition for "homicide" or not, but we know what they mean.

KÓS J:

Well I'm not sure I do.

GLAZEBROOK J:

Well maybe the intentional, but the actual intentional is probably, because expanded definitions bring it into the…

MR LILLICO:

Yes.

GLAZEBROOK J:

I suspect into the category of, that's not what *Williams* is talking about?

MR LILLICO:

No. Thank you your Honour. The last aspect of commentary, as I call it, I would submit to you is quite a useful encapsulation of the issues in the case of *R v O'Brien* (2003) 20 CRNZ 572 (CA), and it's useful because it seems to reflect the kind of reasoning or thought process that ought to go through a sentencing judge's mind when they're contemplating 102, and in *O'Brien* at 36 of the judgment, the Court says: "… there may be cases where the circumstances of a murder may not be so warranting denunciation, and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment," and the Court went on in that case to say that the test wasn't met. So on my submission, that –

1155

GLAZEBROOK J:

Was that an "or" or an "and"?

MR LILLICO:

I'll go the –

GLAZEBROOK J:

I'm sorry, we perhaps – maybe we can go to that after the break.

MR LILLICO:

The clock says I've got five minutes, your Honour, so should we knock it off now? So *O'Brien* is in the Crown bundle, tab 2, I think.

GLAZEBROOK J:

I seem to be having trouble – Crown bundle tab 2.

O'REGAN J:

It's "and".

KÓS J:

Which paragraph is it?

O'REGAN J:

36. "There may be cases where the circumstances of a murder may not be so warranting denunciation *and* the mental or intellectual impairment of the offender may be so mitigating" –

GLAZEBROOK J:

Well, it surely should be "or".

O'REGAN J:

Or "and/or" because it could be both.

GLAZEBROOK J:

Well, "and/or".

MR LILLICO:

Could be both. So that's useful in my submission because not only does it drive at the culpability of the offence – is the culpability, in this case, either because of the offence or the offender, is it so low that we can avoid the presumption of life imprisonment? But it's useful because it also imports and pays attention to the fact that what is being asked here is whether life imprisonment is imposed, which is obviously the most stringent and coercive sentence that can be imposed, and does the public interest and risk warrant that. So, we've concentrated on culpability and Mr Rapley addressed you briefly at the end about risk, but that is also in play here because that is the very question we're asking, because the feature, of course, of life imprisonment is that you can be

at your liberty in a general sense outside the walls of the prison, but you have to report and comply with any other conditions that are imposed on you and you are liable to re-call. So *O'Brien* may have a fault or two depending on where we put the "and" or the "or" or both, but it has a beauty, in my submission, or a usefulness, as a piece of commentary or a piece of guidance because it incorporates both culpability and risk.

GLAZEBROOK J:

I understand the risk aspect of it, but it would surely have to be "or" because otherwise what we all agree was wrong –

MR LILLICO:

Yes, no, I agree.

GLAZEBROOK J:

– that the circumstances of the offence can preclude it, so if you have an incredibly brutal murder which may only be because of the delusional view of provocation or whatever caused by mental illness or the delusional view of the threat posed by somebody caused by mental illness.

MR LILLICO:

Yes.

GLAZEBROOK J:

So you accept it's an "and/or"?

MR LILLICO:

It's an aggregation. I think the word "balanced" has been used. You've got to –

GLAZEBROOK J:

Well, how can you balance them though?

MR LILLICO:

You can't. I'm saying that that's not the case. If the aggregation – aggravation – trip so easily over the words of the tongue of the Crown – you have to look at

whether the circumstances of the offence and the nature of the – sorry, the circumstances of the *offender* and the circumstances of the offence together, mean the matter is –

GLAZEBROOK J:

Okay. All right, no that's fine. That's fine.

MR LILLICO:

Does that assist?

GLAZEBROOK J:

Yes. I think we're at midday. The reason we have a got a two hour break is because we have to clear the court so that we give a proper one hour lunch hour to the staff. What we can do is, the one hour lunch hour is from 12.30 to 1.30. If everybody is back in the courtroom before 2 o'clock, then we can start earlier, but it will depend on that ability to get people back into the courtroom.

MR LILLICO:

So the doors might be open quite close to two, your Honour, is it?

GLAZEBROOK J:

I think it's probably likely to be 2 o'clock so that's why we're taking the two hours. So unfortunately everybody does have to clear the courtroom during this lunch break.

MR LILLICO:

As your Honour pleases.

MR EWEN:

Could I just advise that Ms Hall is late because it's the defence lawyers conference this weekend? She's the co-chair, so she's been required to go to Auckland. I don't think it's because she lost her temper with her junior.

GLAZEBROOK J:

Thank you. We certainly assumed there was a good reason.

WILLIAMS J:
Oh, it's not to be discounted, Mr Ewen.

GLAZEBROOK J:
Thank you, we'll take the adjournment now.

COURT ADJOURNS: 12.00 PM

COURT RESUMES: 2.02 PM

MR LILLICO:
May it please the Court. Before lunch, you will recall that I addressed the Court about aspects of the test or what I refer to as the commentary about the test, and I intend now to take the Court through why the Crown say that the test isn't met in this case, and I expect that after giving an outline about that, there's a number of questions that arise from it.

So, I've taken from this statement about the Crown's position on why the test doesn't apply, I've taken it as my model, if you like, the *O'Brien* dicta which I brought you to before lunch, and so we would – and I've tried to use "clearly" instead of "manifestly". So the Crown say it's not clearly unjust to impose life imprisonment on Mr Van Hemert when he is a high risk of re-offending. His offence involves three section 104 aggravating factors, being vulnerability, brutality and premeditation, and his mental health does not have a strong link to the offence. Coupled with that, issues of –

GLAZEBROOK J:
Mental health what, sorry?

MR LILLICO:
His mental health does not have a strong link or a strong enough link to the offence. Further, issues of public risk arise.

KÓS J:

At some point, we will need counsel to help us with the exact difference in sentencing outcome here that the sentence represents. What its – I mean that's the question that really arises. He's convicted, so the question is, of the two alternative sentencing options, what's the difference between them? So at some point, will you address that, and likewise, Mr Rapley?

They're two obvious points, one is the potential for life recall, and the other is the parole date, parole eligibility date.

MR LILLICO:

Yes.

GLAZEBROOK J:

You're also going to go through why, you don't need to go through why there's three aggravating factors, we can work that out ourselves, but why there's a high risk of re-offending, why it doesn't have a strong link, and what you say the issues of public risk are? I'm assuming you're going to do that because those assertions don't help much without going to the facts –

O'REGAN J:

Yes, I think you're just outlining what you're going to say, aren't you?

MR LILLICO:

Yes, I'm just –

GLAZEBROOK J:

I'm just making sure that was what you were doing.

MR LILLICO:

It's a good idea to keep me on task your Honour. Not easy. So I probably should say about having been asked not to address it, your Honour I'm sorry, but not all of those factors are as present as strongly as one another. So brutality and vulnerability are very present. The premeditation point

probably needs some slight unpacking because, as Justice Nation found, he wasn't, he didn't go out that night to stab a sex worker. That wasn't his intention. Rather it's, and I think it's in this Court's case on appeal at 18. Page 18 that is, and it's at paragraph 8.

O'REGAN J:

So this is Justice Nation's sentence is it?

MR LILLICO:

Yes your Honour yes. You'll recall that the Court of Appeal sent the matter back for re-sentencing, so the Court of Appeal didn't deal with the present, really, in any deciding sense, about 104. So: "You may not have planned to kill a working girl that morning when you left home but I am satisfied, from the summary of facts and… psychiatric reports, that you knew you were going to be in a situation with her were you thought you had to be armed and you did not want others to know what you were doing."

WILLIAMS J:

Can you just give me the paragraph number again?

MR LILLICO:

Sorry, paragraph 8 your Honour. Page 18 of this Court's case.

WILLIAMS J:

This is Justice Nation's sentencing?

MR LILLICO:

It's the sentencing, yes.

WILLIAMS J:

Paragraph 8?

KÓS J:

It's not paragraph 8 that I've got.

WILLIAMS J:

No, that's not what I've got?

ELLEN FRANCE J:

In the sentencing indication.

MR LILLICO:

Sorry, it's the indication. Yes, you have to read both together I'm afraid because he deals with some of the detail in the indication and refers back to it. So premeditation present, but in the sense really that Mr Van Hemert was in control of the situation. He had decided that he was going to have revenge sex to level the playing field, to use his words. He took weapons with him including a knife, or knives, and a rock, and importantly he went in a state of anger, also of intoxication, and also affected in a mentally acute way, but in a state of anger, which is a point which perhaps hasn't received much attention to date, but if we look in the Court of Appeal's case at page 31, and it should be at paragraph 42.

O'REGAN J:

This is Ms Duff is it? Or is it…

MR LILLICO:

McDonnell your Honour, yes.

O'REGAN J:

Dr McDonnell, right.

MR LILLICO:

Where we see there that – sorry, I'm just trying to find the place. Sorry, paragraph 41, where he reported to Dr McDonnell that he felt anxious, panicky and out of control. Denied feeling anger directly at any individual at this point. He didn't know, there's no evidence that he knew the deceased, but reported that he felt angry underneath and feeling hurt and lied to. So this is driven by the agreement of course that he had with his partner, he thought, that she would tell him if she formed a new relationship with an eye to the parenting

of their daughter. So I don't want to overstate premeditation to the extent that we're saying that he set out to kill a sex worker, but he was in an angry state. He went there to have sex in a revenge sense, however that makes sense to anyone, and he did so in this angry state where he took weapons, and of course it was his car and this…

1410

WILLIAMS J:

It's hard to know what to make of that in the context of a man who's clearly mentally unwell.

MR LILLICO:

Yes, and the difficulty in expressing all of this is that we don't deny he's mentally unwell, but there are other causes in play including anger, we say, and including –

WILLIAMS J:

Yes, but I mean, how do you divide anger from mental unwellness? You've dealt with people with psychoses before as a prosecutor and as defence counsel. I mean, this doesn't – this analysis, I mean, it's not your fault, it's working with the statute. This analysis just doesn't make sense on these facts.

MR LILLICO:

Well, I'm going to suggest that it does when you are – when you have a look at – so there's more similarities than differences, I say, between experts, and one of the similarities, and this was seized on by the Court of Appeal, is that in terms of drug use and alcohol, it was a, it exacerbated the mental health picture, if you like.

WILLIAMS J:

Yes, there's no – can't be any doubt about that, but isolating careful planning, to some extent that must be so, the guy puts a weapon in his car and changes the plates and wears sunglasses and a hat, 1 o'clock in the morning. But he does so in the context of being clearly, floridly unwell.

MR LILLICO:

Yes, and that probably brings us to one of Justice Glazebrook's questions, I think, which is about the link, I think, the strongest or otherwise the link between the mental health issue and the offending itself, and I would suggest that the clearest expression of the mechanics of that link, how did that link operate on stabbing the sex worker at this time, getting away from what we all agree about, in a macro kind of a sense that he was unwell, he was getting away from the macro of "but for him being unwell, it wouldn't have happened". So what are the mechanics, bearing in mind we're dealing with the human brain and some of that stuff is unknowable, but from the experts, what's the best expression of that, and I say that it's in Dr Duff's report. So if I could take you to the case on appeal at 58. Sorry this is the Court of Appeal's case on appeal.

KÓS J:

Dr Duff's report?

MR LILLICO:

Yes, your Honour.

WILLIAMS J:

Paragraph?

MR LILLICO:

Paragraph 99. So at one point, Dr Duff elsewhere in the report says that the mental health – she says bipolar, you'll recall? It's a bipolar disorder, and earlier on in the report, she says that that's a contribution to the offending in reasonably general terms. But at paragraph 99, and this is the wording that's adopted by the Court of Appeal, she says significant contribution, and she teases that out by saying that because of this, "Mr Van Hemert would have been more sensitive to perceived threats, that he was emotionally labile and that his judgement and insight were impaired. Together these issues are likely to have played a significant" – *a* significant – "contributory role in the offending."

We can't, of course – I think this is part of Justice Williams' point, I think – we can't ascertain or quantify how much the other causes that the Crown say are in play here. We can't – and also this was Justice Kós' demonstration with the highlighters – we can't quantify, can we, on the state of the papers we have at the moment, and it may or may not be because they were directed towards another purpose, perhaps. We can't quantify how much alcohol played, how much mental health played, how much anger played, but we can look –

GLAZEBROOK J:

What does she say then are the other causes?

MR LILLICO:

She says that –

GLAZEBROOK J:

Well can you just refer us to the particular paragraph where she says there are other causes?

MR LILLICO:

Sure, but just to summarise, alcohol she says exacerbates it. You'll recall the discussion before where we say that Dr McDonnell is more strongly, although not conclusive, about the inducing – she's in the inducing camp more strongly. Dr Duff is less strongly in that camp. She's more strongly in the exacerbating camp. She doesn't – neither of them say directly that anger is a cause. I take that from what Mr Van Hemert himself says about the offending because of course, he says – he doesn't raise a psychotic explanation as we might see in the other cases for what he does to Ms Te Pania. He says –

WILLIAMS J:

But psychosis is experienced as anger. How do you divide those two things? That's why psychotic people do violent things.

MR LILLICO:

Well psychosis is just a variance with reality, isn't it, your Honour? Here his anger –

WILLIAMS J:

Yes, but it's usually in a paranoid form triggering fight or flight, and in the case such as this, fight.

MR LILLICO:

Except there's quite a coherent – there's not a coherent reason for slicing and dicing someone, I'm not saying that.

WILLIAMS J:

No.

MR LILLICO:

But there's quite a coherent reason for him to be angry. He's had this news on Christmas Day which he does not like and –

WILLIAMS J:

Yes, no doubt about that, and often these things are triggered by these stressor events, but you can't say there's anger over here and there's psychosis over there because they're probably the same thing.

MR LILLICO:

Well, they might be different things acting on the same action.

KÓS J:

Well, anyway, the experts – it's interesting having Dr Lillico's opinion on this point, but you don't get much out of the experts on this point, do you?

MR LILLICO:

They don't say anger's a cause.

KÓS J:

No.

MR LILLICO:

But Mr Van Hemert says: "I was angry. I saw red." He says that about the offending itself and he says it about what was happening when he was doing this toing and froing, smoking, coming back to the red light district, going away. He said he was in an angry state from that passage I read from McDonnell, and although I'm not a doctor, equally, the doctors don't say there's a reason to discount this narrative that Mr Van Hemert himself says about what he did.

WILLIAMS J:

We do have to understand it in its context, and the crucial thing is no matter which side of the debate you're on here, not dumb it down.

MR LILLICO:

I'm not dumbing it down. I'm just drawing on what he says himself about what happened and the 158 women who died in the last 10 years as a result of homicide.

WILLIAMS J:

That's not going to work, Mr Lillico.

MR LILLICO:

No.

WILLIAMS J:

That's not the issue.

MR LILLICO:

We don't need to look – what I'm saying is, we don't need to look past necessarily what he says himself.

WILLIAMS J:

But we have to understand what he says or we'll make a mistake. We'll misapply a sense of moral judgement that may or may not be justified if we understood the situation properly. That's what I'm asking you to engage with me on.

MR LILLICO:

Yes. So, if we look at this, the mechanics –

GLAZEBROOK J:

Perhaps, also, it's not a case where he's angry with the victim, where you might say there's a rational basis for anger. It has to be an irrational basis for anger, doesn't it, in this case?

MR LILLICO:

Well, of course, he gives that narrative too, doesn't he, your Honour, about the dispute about what services were going to be provided and how much, and he says in fact that a weapon was pulled by him, and just to finish what I was going to –

WILLIAMS J:

Pulled on him, you mean?

MR LILLICO:

Yes. It was the –

WILLIAMS J:

You said "pulled by him", you mean pulled on him –

MR LILLICO:

Pulled on him. It was the –

WILLIAMS J:

– by Ms Te Pania?

MR LILLICO:

The awl, yes.

WILLIAMS J:

Yes.

1420

MR LILLICO:

So, what I was going to finish with, Sir, was, looking at the mechanics of what Dr Duff says about how his brain was operating at the time of the offence, so the passage being "emotionally labile", "sensitive to perceived threats" and "that his judgement and insight were impaired". So, in my submission, the exacerbation of the alcohol and the anger explain the gap between emotional ability, if that's the word, and sensitivity to perceived threats and the very gross overreaction that he had when stabbing Ms Te Pania. So if – and that really – and some of those matters, two of those three matters, we don't allow mitigation for. If we go back to Justice Kós' example with the highlighters where the blue highlighter was for mental health and the pink was for alcohol, the only difference I would say of course is that it should have been a red one for anger, that if we stack – if that's accepted –

GLAZEBROOK J:

But how can you split out the sensitivity to perceived threats from anger?

MR LILLICO:

Well, because it's a cognitive problem, isn't it, your Honour? You perceive a problem and you totally overreact.

GLAZEBROOK J:

Yes, I know, but I'm just having difficulty splitting anger out in a situation where it is actually totally irrational anger and related to perceived threats that are very much perceived and only because of his mental illness.

MR LILLICO:

No, I think what we're saying, your Honour, is that – just harking back to my exchange with Justice Williams just before, is that some of the anger might well be psychotic, I think is the word we used. Some of it, though, has its origins in this bus of real life, yes.

WILLIAMS J:

Real life.

MR LILLICO:

The real life, yes.

KÓS J:

Yes, except he's only in that context because the psychotic event that's happened earlier in the evening, so, you know, you go back to a but for proposition I put to you before, I mean it all hangs around psychosis. Do you disagree with the proposition that but for the psychotic episode he had, we wouldn't have had a dead Ms Te Pania?

MR LILLICO:

Yes, I do, but we're talking about it on the level of what can explain, or what can – he's pleaded guilty to murder and we can make some assumptions by looking at the statute about what the mens rea was. What takes him below that and how far does he get? That's really the judicial evaluation that happens under 102, isn't it? How far do we drop down while still being guilty and not being insane? How far do we drop down, and here, the submission essentially is, is that mental health does drop you down.

But, part of what he did was explainable by factors which are simply not – we don't accept the mitigatory aside from the argument about voluntariness, and that's where – Justice Williams, as you say, Sir, that's very, very difficult to tease out.

KÓS J:

Right, but then what do we do? For start, we have psychiatric reports here that are directed to different issues. So the passage that you're particularly quoting from, from Dr Duff, is really about the section 23 defence, and you're drawing some straws out of that paragraph to help you, and I understand that.

But let's say we could split it up. Let's say Dr Duff had then properly addressed the issue and she said it was 75% mental health, and then there was 20% alcohol causation, plus 5% anger that's not attributable to psychosis. Well, what do we do then? Does that take him outside section 102?

MR LILLICO:

Yes, I mean, this particular section in the Sentencing Act doesn't express the numbers unlike the threshold for home detention which is probably the only one that is. That's why it causes so much trouble.

KÓS J:

But I mean, this is what you're arguing. Now you've got to address the problem that I've just put to you, which is that you have a dominant cause which is mental health plus some other perhaps non-associated causes. Even if we could split them up, we don't have the evidence, but let's just imagine this as a think piece.

MR LILLICO:

Well, the closer you get to explaining the slicing and dicing the way that he offended – the closer you get to that through a mental health explanation, the more likely you are to drop out of 102, and 75%, you're awful long way there. The difficulty is, here, we've got quite a coherent – well, on the one hand we got quite a coherent explanation of why he's angry and what drugs might've done. Well, as far as saying they exacerbate.

KÓS J:

Yes, which makes it worse, so we start with mental health and it becomes worse because of the drugs.

MR LILLICO:

So we have that on the one hand, and on the other hand we have a mechanical description, whatever its limitations are because it's in the wrong report, we have a mechanical description of how the brain might've been operating at that point which talks about impairment and overreaction. Well this is not an overreaction. This is a gross treatment of Ms Te Pania in a pretty, in what should've been something that, well, I think Justice Williams' words earlier to my friend were, and something that felt normal or was part of his life, perhaps. So it's a situation in which some people might've felt unsafe, but it was, for some people, an ordinary situation, and he acted in a gross way. The words "impairment", the words, is it "overreaction", don't get us there. So I say, well, the culpability of what he did doesn't drop down so far that we're out of what is the presumed response by the legal system to the taking of a life.

WILLIAMS J:

I guess the stark difficulty with that is that your common or garden brutal murderer have an MPI of at least 17 years and –

GLAZEBROOK J:

Justice Williams, I'm just wondering whether it's being picked up on the –

WILLIAMS J:

It's not usual that people can't hear me. Usually, I'm getting the opposite reaction.

GLAZEBROOK J:

No, I know, we can hear you, just wondering about the transcript that was all.

WILLIAMS J:

And this –

MR LILLICO:

We need your words for posterity.

WILLIAMS J:

Well thank you, Mr Lillico, that's a very kind thing for you to say. This guy who we all agree meets the "but for" test gets a credit of six and a half years against your common or garden brutal savage murderer.

MR LILLICO:

This is the reduction from the MPI, yes.

WILLIAMS J:

Yes. I mean, given what we know about this man, don't we have some problem with manifest injustice there?

MR LILLICO:

This is the thesis in a paper that I can get hold of for you. It's one which synthesises all the statistics in relation to, you know, this clustering that happens with MPIs around 17 years.

WILLIAMS J:

Yes.

MR LILLICO:

It's pointed out in that paper that manifest injustice is the test for 104, 102 and so forth, and it leads to different results, mainly around statistics which aren't always that helpful, but the point is about 104 is that you're already in a – you're already in life imprisonment at that point and it's an adjustment to the guaranteed time that you'll do, if you like, imprisonment.

So it's not going to be – because it's not for the same purpose, it's not going to be observed in the same way, and in my submission, coherently, the Crown here is saying, and I don't want to be misunderstood to be saying otherwise, is that the mental health, the significant mental health problem, the significant contribution as the psychiatrist said had to be recognised some way, and that's how it's expressed.

WILLIAMS J:

Okay.

1430

MR LILLICO:

Just looking at your Honour's questions, Justice Glazebrook, the other two questions, the first question was about re-offending I think, and the third one was about public risk. So just to take that first one, the re-offending point. The Crown is not saying that Mr Van Hemert has, he's only got a record for drink-driving, I think that's right, four convictions for drink-driving, and as Justice Kós has pointed out, these other episodes that he's had, these four other episodes the last one in 2016 apart from this, didn't result in any serious violent offending. So the Crown are not saying that, and this probably arises in comparison with *Reid* where the Judge comment in *Reid* that this is wholly out of his, the life pattern of Mr Reid. So we're not saying that Mr Van Hemert's life pattern is a catalogue of violent offending, we're not saying that at all. But he, we are saying that in terms of his life pattern it does involve anger, which spills over into more than ordinary aggression, and that is, it's not entirely out of character, as it was for Mr Reid.

ELLEN FRANCE J:

What's the illustration of it spilling over into more than ordinary aggression other than the pushing into the window incident?

MR LILLICO:

We don't have much. Probably the other incident is the being restrained during one of his admissions. So there's restraint and seclusion during one of his admissions. It's in the Court of Appeal's case on appeal at 48, paragraph 46.

O'REGAN J:

What do you say to Mr Rapley's point that we should assume the mental health system would be able to cope with it? That it will function in a way that will address that?

MR LILLICO:

I think when there's a forensic overlay we expect there to be some, and the presumption expects there to be some oversight from the Parole Board as well as the mental health authorities, also remembering that this ties into something mentioned by Justice Glazebrook before, that at the point this offending happened he didn't have any compulsory status. So in 2016 he had been prescribed some medication and then he was just referred to the family doctor. So the system – so in other words he wasn't, as Justice Glazebrook points out, he wasn't under a compulsory treatment order in the community at that point. He was being left to deal with it, as anyone else would, and –

O'REGAN J:

But I mean if things had gone according to the norm here his mental health problem would have been addressed in a way that didn't lead to this outcome. If he had been sectioned when they started the section 8 process, are you saying that's a risk the community shouldn't take, that the mental health system may not function effectively enough to deal with his potential future psychoses?

MR LILLICO:

Yes because the focus of the mental health system is on danger to self or others, and the Parole Board's test, I don't want to misstate it, but in general terms it's about safety to the community. Also bearing in mind that the mental health system deals with risk on quite a continuum from failing to feed yourself properly because you're unwell to perhaps doing physical harm to people, and Mr Van Hemert, at least in this instance, has, his mental health has resulted in the death of another person. So it's a situation where we would put that, with that forensic element, we would want, in my submission, the Parole Board supervising the assessment of that risk.

GLAZEBROOK J:

But that doesn't actually – that seems to come under the public safety, it doesn't seem to come under risk of re-offending.

MR LILLICO:

No. No, it –

GLAZEBROOK J:

In fact, we don't seem to have much at all about the risk of re-offending, certainly not in terms of criminal history apart from a self-reported incident.

MR LILLICO:

No, and I didn't want to be understood to be relying on the risk of re-offending, what I'm saying to the Court is that –

GLAZEBROOK J:

Well, you did say that was one of the four factors and it was the first one you gave that said it shouldn't be under 102.

MR LILLICO:

Oh, I should've said risk to the public.

GLAZEBROOK J:

Oh, you said that is number 4, but all right.

MR LILLICO:

Sorry.

WILLIAMS J:

Yes, you said "high risk of re-offending". You meant high risk to public safety?

MR LILLICO:

Risk to public safety, yes, I think is a better way of saying –

O'REGAN J:

Yes, I mean, they're two sides of the same coin, really, I think. That if there's a risk he'll re-offend again in a way that's a danger to the public, that's a public safety issue.

MR LILLICO:

Yes, they're related. If I say risk of re-offending, it sort of implies that he's got some sort of lengthy list of previous violence convictions but he simply doesn't have that. What I want to emphasise is that he has described being angry. He categorises himself as a jealous partner. He characterises himself as an angry man. So when we talk about whether this is out of character, it is, in terms of if we're looking at violence offences, but it's not totally misaligned, if I can put it that way, because he does have this – he characterises himself as this sort of character.

O'REGAN J:

The probation reports did say he was a high risk of re-offending, didn't it?

MR LILLICO:

It did, and –

GLAZEBROOK J:

It's difficult to get out of it when you have already offended in such a serious way though, I think, on the way they do re-offending.

MR LILLICO:

It wouldn't –

O'REGAN J:

So, I mean, you're really accepting that that's probably not a fair assumption?

MR LILLICO:

My understanding is their tool is quite limited. They apply it in quite a short way to lots and lots of people, and so – I'm not an expert on this. I'm also not a doctor. But –

O'REGAN J:

You keep saying that.

MR LILLICO:

It's just a list of things I'm not. Persuasive, either. But my understanding is they look at whether the matter is admitted, the seriousness of the offence, as well as things like previous convictions, and it's quite a simple tool that's applied by probation officers when they're writing the PAC reports.

WILLIAMS J:

This is ROC*ROI, is it?

KÓS J:

It's not even that, I think. No.

O'REGAN J:

No, I don't think it's even that. It's simpler than that.

MR LILLICO:

I don't think it's – no, because that's applied by – it's a tool applied by psychologists, I think. I'm told no by my friend. He can tell you about ROC*ROI.

ELLEN FRANCE J:

Sorry Mr Lillico, so how would you describe the risk to public safety that you say is posed?

MR LILLICO:

Well, the risk to public safety is that it revolves around firstly his lack of acknowledgement of the offence in terms of his empathy for the complainant. That's how that's relevant. It's not relevant because it's an aggravating feature as such. So you were taken to that passage during my friend's submissions, but also that he is said to have limited insight into his mental illness and the relationship between his illness and his use of alcohol and cannabis and his risk to himself and others as a result. So that's in the case on appeal, page 42, paragraph 19.

GLAZEBROOK J:

So that's the Court of Appeal case on appeal paragraph 19?

MR LILLICO:

Yes, 42, 19, yes.

WILLIAMS J:

What's that document?

MR LILLICO:

That's Dr Duff.

WILLIAMS J:

Duff. All right, thank you.

1440

MR LILLICO:

So Dr Duff there is talking about the type of disposition that might be appropriate. "Mr Van Hemert continues to have limited insight into his mental illness and the relationship between this and his use of alcohol and cannabis, and his risks to himself and others." So lacking that insight the conditions under which this happened, if it coincides I think importantly with significant life stresses, because as Justice Kós has pointed out, this is not a regular event in terms of his life. He has one, the first one at 17, and then he's had four others. So –

KÓS J:

But it is worrying that when this has had such a dreadful outcome that there isn't more insight in this part into, I mean it's one of those things where you would understand that in his life with the miseries associated with it, he might well choose to abuse alcohol and cannabis, but you think he might rather knock off that if it exacerbated things in a contributive way to the homicide. Now that's the lack of insight I think that Dr Duff is getting at?

MR LILLICO:

Yes, and not to get away from the fact that the sectioning was dealt with in the way it was, but it is rather shifting the blame, isn't it, to say that the system has let you down to a probation officer who is assessing you and what your sentence might be.

WILLIAMS J:

I've certainly seen that before as a collateral personality disorder to mental illness. These things are really complicated.

MR LILLICO:

Yes. I don't disagree with you Sir. It happens, the other aspects of risk, to answer your Honour's question, involved the fact that the mental health deterioration happens very quickly. So case on appeal, page 48, 51 and 56, Dr Duff points out that in these episodes there's been sudden onset mental health deterioration triggered by psychosocial stressors or life events. Because it's not just about alcohol, he'd be doing this every day on account of his alcohol dependence and cannabis dependence, such as relationship problems or losses, and then the way he reacts to that is he tends to increase reliance on substances, which exacerbates his illness, and contributes to deterioration in his behaviour. That's at page 39 of the case at paragraph 2, and when he has got to that point he is having an acute phase of his mental illness, that's marked by irritable, aggressive and hostile behaviour. So that's page 57 at paragraph 89. Sorry, those are all references to the Court of Appeal's case.

GLAZEBROOK J:

Have you finished on those references or is there something else you want to say on risk to the public?

MR LILLICO:

I just might take the Court very briefly through the genesis of the illness.

GLAZEBROOK J:

Can I just ask you, I just don't understand paragraph 18, and unconscious bias. What on earth is that all about?

MR LILLICO:

This is Dr Duff?

GLAZEBROOK J:

Yes.

MR LILLICO:

There's a passage –

KÓS J:

That's explained later on. This is her complaint about Dr McDonnell writing a report when she was part of the Hillmorton team that was responsible for the failure in the process before.

MR LILLICO:

Yes, so she was asked, your Honour, part of the brief was to critique Dr McDonnell's report, and so she is critical for various reasons. That she's more junior.

KÓS J:

Well that's a fair complaint.

MR LILLICO:

Yes, fair complaint. Some of it isn't.

KÓS J:

I'm pretty surprised, frankly, that a section 38 report in a case like this would be tendered by a registrar rather than a consultant.

MR LILLICO:

Though it's under supervision.

KÓS J:

Well I appreciate as a doctor you'd understand the difference.

MR LILLICO:

Don't worry, I'm under supervision today.

KÓS J:

I can see that.

MR LILLICO:

She can come and take over in a minute. So it's part of –

GLAZEBROOK J:

Is that all it is, because it actually doesn't make any sense whatsoever in the context of a critique of the report itself, but you're saying it doesn't mean that, it just means it shouldn't have been her, is that what you're saying?

MR LILLICO:

I'll have to remind myself what paragraph 18 said, but it's…

GLAZEBROOK J:

It doesn't seem to be apropos of anything that's all.

MR LILLICO:

I think it might be to do with the alcohol I think, because one of Dr Duff's criticisms, you'll recall, of Dr McDonnell is that she takes the self-reports of Mr Van Hemert that he was affected by methamphetamine or other Class A drugs say, and she says, and Dr Duff says well that's not borne out by the toxicology, and so she's been biased by self-reports of Mr Van Hemert and others that he was affected by drugs when actually the only thing he'd taken was –

GLAZEBROOK J:

It just doesn't seem to be in favour of the Crown, that's what I'm saying. What she's saying doesn't seem in favour of the Crown, that's what I'm puzzled about.

MR LILLICO:

No, she's instructed by the defence.

GLAZEBROOK J:

Because if anything to take self-reports of alcohol or drugs actually is better for you rather than worse.

O'REGAN J:

You mean what Dr McDonnell says isn't in favour of the Crown?

GLAZEBROOK J:

No, what –

O'REGAN J:

Because Dr Duff is a defence witness so she wouldn't be.

GLAZEBROOK J:

Hmm?

O'REGAN J:

Dr Duff is a defence witness so she's critiquing –

GLAZEBROOK J:

No, I get I don't understand that's all.

MR LILLICO:

The reason I was bringing you to Dr Duff's report again was just to really address the genesis of the illness around Christmas Day, because the best report of that is in her paper. So as I said earlier, and I believe this is at 29 of the case.

WILLIAMS J:

Page 29 of the case?

MR LILLICO:

Yes your Honour.

O'REGAN J:

Of the Court of Appeal case?

MR LILLICO:

Sorry, yes, the Court of Appeal case.

O'REGAN J:

So that's Dr McDonnell?

MR LILLICO:

Oh is it McDonnell?

O'REGAN J:

Yes.

MR LILLICO:

Sorry Sir. So this is a narrative that's taken from Mr Van Hemert about what happened at Christmas time and so he learns about it on Christmas Day and he's ruminating about it, this is at paragraph 30 where he says on Boxing Day, the 26th, he saw the: "… new partner's van in the driveway and that his mind was racing… felt anxious, betrayed and angry. He recalled that he was speaking rapidly and difficult to interrupt."

Then at 32 reported: "… two days prior to the alleged offence, he began 'tripping balls' and having 'scary thoughts'… mind was racing, with ruminative thoughts…" and at the risk of provoking Justice Kós, typical manic project writing a book, The Scientist, which he couldn't finish. So quite pronounced symptoms of a mental health crisis at this point, and we know from page 47 that the mechanism that we've left him with, the mechanism we've left him and his family with is that he's in the care of his family doctor after the 2016 incident. So despite having those – despite "tripping balls" and these racing thoughts and

the project with the book, et cetera, the mechanism wasn't up to it. He didn't refer himself, or no one referred him to the doctor at this point, and that's part of the reason, I say, that supervision of the Parole Board, which has risk in relation to forensic matters, and public safety needs to be guaranteed by life imprisonment.

1450

KÓS J:

So that goes back I think to the question I asked before, which is if we look at the two potential sentencing outcomes here, what is or isn't manifestly unjust about life imprisonment, the fundamental differences, I think, being recall and parole eligibility. There may be others.

MR LILLICO:

Recall for your natural life and an ability to be on conditions. Say he – say there's another life stressor. He's with the probation officer, the probation officer knows of this and can get him the appropriate help, assuming he's in the community by this stage. So that is the difference, isn't it, that for his natural life, there is some supervision of him.

KÓS J:

Plus, I've forgotten, was it a 10-year determinate sentence? Eleven years? So he's eligible for parole at, what, half way through that?

O'REGAN J:

It was 10 –

MR LILLICO:

I think Justice Doogue gave six and a half?

O'REGAN J:

Six years, eight months it was.

MR LILLICO:

Six and a half years.

KÓS J:

Right.

MR LILLICO:

Six years, nine months, sorry.

GLAZEBROOK J:

As against 10?

MR LILLICO:

Well, 10's the minimum. Justice Nation gave 11 and a half.

O'REGAN J:

So it's basically a five-year difference in terms of his eligibility for parole.

MR LILLICO:

Yes, but I would say the test is addressed to life imprisonment and that's what we're determining, whether he should have the imposition that – the most deterrent, most coercive sentence imposed on him which brings the benefit, I say, in terms of public risk, that he's supervised for his natural life.

O'REGAN J:

So it's not just the risk of recall. It's actually active supervision by the Probation Service, is that what you're saying?

MR LILLICO:

Yes, and attendance as directed.

O'REGAN J:

Right, and that kind of ongoing supervision isn't possible with a finite sentence?

MR LILLICO:

No, it comes to an end, and then you may be under a compulsory treatment order as Justice Glazebrook points out, but I don't think he either has been or you may simply be at your own resources as he was at the time of this offence.

O'REGAN J:

He wouldn't be eligible for any of the sort of extended supervision type orders?

MR LILLICO:

No. No, Sir.

WILLIAMS J:

Why not?

MR LILLICO:

He wouldn't be eligible for extended supervision.

WILLIAMS J:

Well, you got PPOs, ESOs, CPOs, any of them?

MR LILLICO:

He wouldn't be eligible for extended supervision. Having – public protection orders are very high threshold. I'm not sure he would be eligible for that.

GLAZEBROOK J:

Well, it possibly depends how ill he is at the time.

WILLIAMS J:

Exactly. You'd want a very high threshold if this was otherwise a manifestly unjust sentence.

MR LILLICO:

I think there's one person who's subject to it at the moment, I think I'm right in saying.

O'REGAN J:

Yes, it wouldn't be a PPO. If it's not an ESO, it wouldn't be anything, I don't think.

KÓS J:

So your argument is that in the face of the public risk, those additional impositions of later parole and continued supervision do not make the life imprisonment sentence –

MR LILLICO:

Manifestly unjust?

KÓS J:

Manifestly unjust.

MR LILLICO:

Well, clearly, I'd like the Court to say.

KÓS J:

Yes, or clearly unjust, that's your – I mean that really is a – I mean, for all the psychiatric evidence we've gone through, to my mind actually, the appeal boils down probably to this point. It's the relative outcomes and whether there's a manifest injustice in that, given we all agree the man has severe mental health issues, they were substantially contributive to what happened here.

MR LILLICO:

Yes. At the risk of repeating myself, the test is directed towards life imprisonment and life imprisonment has the best ability to deal with ongoing risk to the community. While the discussion might focus, as it has earlier today on culpability and the Crown have to satisfy you that this isn't, in the words of *O'Brien*, it's not a case which may be so, "… not be so warranting denunciation, and the mental or intellectual impairment of the offender may be so mitigating of moral culpability…" we still have to deal with that, and whether we have

dropped down low enough in terms of culpability to avoid, or to avoid, rebut the presumption, but there is another aspect to it which shouldn't be forgotten.

GLAZEBROOK J:

So there you are saying actually we shouldn't be using slice and dice given what he'd said, but you are saying that you have to try and in some way split up what's actually happening here, and I suppose the difficulty I'm having is that we don't have the sort of evidence that Justice Kós was talking about.

MR LILLICO:

Or the one that's directed at disposition rather than insanity defences and other things.

GLAZEBROOK J:

Well it's just that nobody really says – well I suppose you say he says he was angry, but we don't know the extent to which that anger was related to his perceptions that were skewed by the mental illness.

MR LILLICO:

Yes, how much of it is psychotic anger or –

GLAZEBROOK J:

Well exactly and we don't know – we can assume that alcohol exacerbates because both say that, one might be more causative than the other, but what do we do with that in terms of – so how do you get someone down to culpability, does it just have to be just mental illness? Do we have to say that 75% mental illness? What's the…

MR LILLICO:

Well mental illness, we can't say, can we. It's not negligence, you can't pop yourself into a category and say this is a battered women's case therefore you're out of, you know, you're out of life imprisonment. This is an assisted suicide case, so you're out of life imprisonment, and the same is true of mental health.

GLAZEBROOK J:

Well you may do.

MR LILLICO:

You may do.

GLAZEBROOK J:

You may do if you say it reduces culpability, but what's enough in the Crown submission, that's what I'm really asking, because it may be that it does, if it's just mental illness, but not reaching quite the extent.

MR LILLICO:

I can't answer anything more than you have to reach the extent where it's clearly so mitigating, so clearly unjust, so clearly mitigating of moral culpability, and I can't define the test with any more precision than that, other than to say in this case you've got to evaluate the facts, and in the facts we see in the mechanics of how the mental health operated at the time, that we're talking about impairment, we're talking about overreaction. Well this is not impairment and overreaction. This is gross treatment of another human being. With a knife.

KÓS J:

Well there's possibly another element which differentiates this case, and it's the, that in the others like *Wihongi*, *Rihia*, *Simpson*, those sorts of cases, you're dealing with the murder of someone who is a close family member or – and the prospects of repetition are probably relatively low. In other words a battered wife is unlikely to go round killing other people at large. The overstressed parent, likewise.

MR LILLICO:

Albury-Thompson, yes.

KÓS J:

Yes, exactly, but the risk here seems to be associated with a response to the mental health problem, perhaps exacerbated by other things, which resulted in the death of a completely random person off the street, literally off the street.

MR LILLICO:

A stranger.

KÓS J:

That seems to be possibly a point of difference, and I'm interested to see what you – I'm asking you this question that helps you, so I'm really asking Mr Rapley.

MR LILLICO:

We have cases where there's strong pleas for culpability being reduced because in the mental health, those situations aren't mental health ones as such. Where the mental health issue can be tied very directly to the victim who was harmed, who was murdered, and that is a more plausible, in my submission, way of reducing culpability to a point where life imprisonment becomes unjust, so –

1500

GLAZEBROOK J:

But that's blaming the victim in that sense. I mean here the fact it's a random stranger may be more clearly evidence that it is related to mental illness than it is to anything else.

MR LILLICO:

It certainly is related to mental illness, and this is a difficulty expressed earlier to Justice Williams. It certainly is related to mental illness, but it's not strongly related, and you'll recall that Dr McDonnell says when he gives this narrative of being angry prior, this is not the seeing red. He says in the car he saw red, but this is the generalised feelings of anger he – I took you to the passage where he describes going backwards and forwards in the car, and it wasn't at anyone

in particular, but he felt hurt by what had happened with his partner. Now stronger to relate – and that anger pops up again, he sees red – stronger to relate mental health to the offending where – and the point is that she says, he didn't provide a psychotic reason for the murder when he gives that narrative, popping back to get the cannabis and being hurt because of what his partner had done and so forth. So more persuasive, in my submission, in a case where there's a psychotic description about the murder, the, you know, there's an instruction from God and the deceased is a demon or what have you –

WILLIAMS J:

That would be easy, we wouldn't be here. This question is tiptoeing close to the line, that's what makes it so difficult.

MR LILLICO:

Well *R v Brackenridge* [2019] NZHC 1627 was a case where they were found not guilty, they weren't found not guilty by reason of insanity, and there was a kind of a psychotic – of course if the rationale was too psychotic you'd be not guilty you would think. But there isn't even an analysis or a repetition by him of some sort of story which has those psychotic kind of tones. He's simply angry. It's 3 o'clock, or just past it?

GLAZEBROOK J:

Yes, we need to take the adjournment, so 15 minutes.

COURT ADJOURNS: 3.02 PM

COURT RESUMES: 3.17 PM

MR LILLICO:

Just before I leave the Court to Mr Rapley's three pages of speaking notes in reply, I'd just like to pick up on a point about voluntariness, and Justice Williams you raised that perhaps the voluntariness has been seen in a, I think, black and white way and not in the real world, and the submission I have to say, the Crown

ones at least, aren't of massive assistance on this, but the general, the thrust of the Crown submission here is that voluntariness is seen in the criminal law usually in a fairly narrow way so that, reading from a paper that you don't have but I can file, from the Auckland University Law Review, where talking about automatism seen as a subclass of involuntariness and therefore governed by those principles. "The principal feature of involuntariness is that the conduct is not willed, the 'mind does not go with what is being done'…" and the example is given of an epileptic person in the throes of a fit "… is an automaton, because the conduct is not willed."

So I'm suggesting, basically on a first principles basis, that that's the variety of voluntariness that the Sentencing Act is contemplating. I don't have any specific case law, and I don't believe my friend has found any in relation to voluntariness in the –

GLAZEBROOK J:
But we're talking in respect of section 9(3).

MR LILLICO:
Yes.

GLAZEBROOK J:
So if you're saying that you know you're drinking alcohol 9(3) applies whether the alcohol is related to the mental health or not? Sorry, it's really just getting what the Crown submission is on that?

MR LILLICO:
Yes, so, if you wield the drinking of the alcohol probably, or the cannabis is probably the more apposite aspect of it because intoxication can't be mitigating. If you voluntarily drink or take cannabis, then you can't rely on the intoxication effects of that in mitigation.

1520

So, harking back to Justice Kós' highlighter example, the highlighter that represented intoxication would have to be taken away, the pink one, would have to be taken away because of that, the operation of 9(3). If you wield taking the alcohol or the cannabis, my friend would say: "No, no, it's wider. You have to have informed consent," or whatever, but the criminal law doesn't normally conceive of voluntariness in those terms. It usually – and this is a criticism probably from Justice Williams who sees it in more black and white terms, it doesn't look at those wider issues about whether you are predisposed to it or otherwise.

GLAZEBROOK J:

So in terms of the highlighter example on culpability, you say you go down from mental health but to the extent – and we have no idea how much or not it was exacerbated.

MR LILLICO:

We don't, no.

GLAZEBROOK J:

You go back up again? Or you can't go down further, or what?

MR LILLICO:

You can't go down further, I suppose is – you can't meaningfully mitigate the culpability or undermine the culpability relying on intoxication because section 9(3) bars it.

ELLEN FRANCE J:

So how does that fit, for example, with what's said in *Zhang* in relation to addiction?

MR LILLICO:

Addiction? So addiction can reduce culpability if it provides an adequate explanation for the offending, so the example perhaps given in *Zhang* is of subsistence dealing. So the addiction entirely explains your supply and

subsistence dealing, you know, you buy a point and you deal enough to buy your next point and take the rest, and it doesn't – it is fair to say that because if addiction is a mental illness, which it is, you're compelled to have it, and if you're compelled to have it, then the subsistence dealing that you're taking part in is pretty much entirely explained by your mental health problem. But it's not if beyond cutting out the point and selling some of it, you're shifting kilos.

WILLIAMS J:

Yes, that works for *Zhang* because intoxication is not relevant presumably to the point of getting caught.

MR LILLICO:

You know, hide the whole time you're dealing. Yes.

WILLIAMS J:

Yes. You can help me because I don't know. What about alcoholic repeat drunk drivers? What's the general sentencing approach in those circumstances these days?

MR LILLICO:

Well you have to drink but you don't have to drive, I suppose is the point there. So the reason –

WILLIAMS J:

Yes, I wasn't looking for a slogan. I mean if someone drives drunk partly because they're addicted to the substance, how do sentencing judges in the District Court deal with those sorts of situations? Do they send them to rehab or do they throw the book at them and send them to jail?

MR LILLICO:

Well, they might do, your Honour, yes.

WILLIAMS J:

Well, I mean, because that's –

MR LILLICO:

They might rehabilitate them, yes.

WILLIAMS J:

That raises the section 9(3) question. Because if you're –

MR LILLICO:

No, but –

WILLIAMS J:

– if you could not take account of the voluntary consumption of alcohol in that context, you'd have to say that addiction was something separate from that and warranting a different sentencing response despite 9(3).

MR LILLICO:

Well, there's a couple of things going on. I mean the judges are sentencing – well more than a couple, but at least two things going on when the judges are sentencing for repeat drink-driving. So they could react to the alcoholism by saying, look, you've done this repeatedly and we have stepped up through the hierarchy of sentences through fines, through community work, you're still doing it. Your drink-driving means that my next response is to make you do something about it, so I'm going to give you, you know, community work and supervision. So that's one response, and that would be legitimate. So the alcoholism drives a rehabilitative response under the purposes of sentencing in that situation. What the Judge couldn't do is say we've come up through the hierarchy, you've tried and failed to do something about your drinking or your alcoholism, I'm going to give you jail. But I'm going to discount the amount of jail because you're an alcoholic.

WILLIAMS J:

That's right, so the situation here is not dissimilar to that, because although this guy is drinking and exacerbating in the moment, he's also addicted to intoxicating substances, and that's not to be ignored.

MR LILLICO:

No, but there's a lot of distance between – so if we accept that there's a short distance between being addicted and the subsistence dealer that I was talking about before, they're very close, you have to take the drugs. You can't afford it. You deal to get the drug. If we accept that there's a close link there, here the link between addiction and him acting this way is not strong, because there are so many steps that are made between him being addicted to either cannabis or alcohol and him killing Ms Te Pania.

WILLIAMS J:

But you agree that's not a section 9(3) matter? However you might analyse that, section 9(3) doesn't preclude you from analysing that in an appropriate way. Just because he was drunk at the time.

MR LILLICO:

As long as we're clear that we're, and of course the Crown don't agree, but as long as we're clear that we're saying the addiction is mitigating, we say it's not, but not the intoxication at the time that he – so, the cannabis exacerbating his mental health, as long as we're not mitigating for that, and we're mitigating for the addiction, that's fine.

WILLIAMS J:

Right so we have to unpick the very driver for the consumption that exacerbates, creates the lability and so on, from the, if I remember how I started that sentence, from the addiction itself.

MR LILLICO:

We have to unpick the driver.

WILLIAMS J:

Yes. That doesn't make a lot of sense, does it? Just in terms of undertaking an appropriately rational and logical and methodical assessment to culpability and so on, separating out addiction from particular consumption, when clearly one is driving the other, doesn't make a lot of sense.

MR LILLICO:

But it's driven, isn't it, by the, by two things. It's driven by the bar in 9(3) and –

WILLIAMS J:

I get what it's driven by, I'm just telling you that it makes the analysis very difficult because you have to create this artificial division between consumption in the moment, and the driver of consumption in the first place.

MR LILLICO:

Well I think you said before about another issue, you had to be, it was to do whether you placed mental health in, you know, a circumstance of the offence, or the offender, and you said you had to be clear-eyed about it, and that's true of this aspect as well, and if you're going to, if a judge is going to mitigate or allow someone to rebut the presumption because of addiction, they're going to need to be very clear-eyed about that and make sure that what they're actually doing is not mitigating for the intoxication at the time in the car when he's with the sex worker. Does that help?

WILLIAMS J:

By the way you mentioned an article earlier on, if you just –

MR LILLICO:

Yes, statistics in the –

WILLIAMS J:

Yes, just for my own personal edification I'd appreciate a copy of it at some point, thanks.

MR LILLICO:

I'll send it in.

WILLIAMS J:

Thank you.

MR LILLICO:

Those are the matters I wished to pick up on, but are there any other matters that I can assist with?

1530

GLAZEBROOK J:

Are we back to the submissions on sole cause then, or are we not quite on those? Because the – I'm just not clear the link between the oral submissions and the written submissions.

MR LILLICO:

In what way, your Honour?

GLAZEBROOK J:

Well, I suppose the difficulty I have is how you actually unpick what you're asking us to unpick, and I am still having difficulty with the consumption in the moment and the consumption generally. Especially when it's linked to mental health. There's not terribly much difficulty, probably, when it's not linked to mental health.

MR LILLICO:

The consumption?

GLAZEBROOK J:

Mmm.

MR LILLICO:

Well, we – I can't say to you if –

GLAZEBROOK J:

So you just say we have to somehow, based on the – well, I suppose, who has to show what because it's been said that you have to, as the Crown, prove the alcohol side beyond reasonable doubt. I mean, I don't think that's the right analysis at least in this instance, but –

MR LILLICO:

No, because the dispute of that section is aimed at mitigatory factors, and while in a broad sense, the argument to drop out of life imprisonment is mitigatory because you want the sentence to be lesser, you don't want life imprisonment, you want a finite sentence, the Crown aren't attempting to prove an aggravating feature and the defence aren't attempting to prove a mitigating one. It doesn't make any sense in the evaluative judgment on the 102 where the circumstances are brought together in aggregation and a decision is made about whether it's clearly unjust or not.

KÓS J:

I think this is resolved a slightly different way from your written submissions, and it really resolves around your accepting the highlighter analogy which I understand you to do.

MR LILLICO:

Yes.

KÓS J:

So we're not really concerned anymore with the idea of something being this – mental health being the sole cause?

MR LILLICO:

No, you could have – we don't have to – the argument isn't win or loss for anyone by saying that it's a sole cause, it's the extent to which it influences the offending, and the best we have or the best I can say for the Crown is that description by Dr Duff about the impairment of the judgement, the overreaction to provocation – provocation is not the word used, but – so, that is the best I can do, and there's a gap between that and what I say is the gross way in which Ms Te Pania was treated.

WILLIAMS J:

Can I –

GLAZEBROOK J:

I'm just not sure where we get the gap from or where we get the gap in the evidence. My question is, where in the evidence do we – yes, it exacerbated it, but how do we know how much it exacerbated it and – from the evidence, I mean.

MR LILLICO:

Yes, we don't, apart from my submission about the mildness of the language in that mechanical passage versus what happened to her, and it really leads to Justice Kós' point about the purpose for which these reports were done and that – in fact, the section 38 report can be asked for in relation to that specific point, what that sentence should be and what was operative and what was culpable.

KÓS J:

I think we all rather feel, based on conversation we've had, that it would've been very helpful to have had updated reports here. These are some time ago and written for a different purpose.

MR LILLICO:

This is not to excuse any inactivity by counsel, but the Court of course can order a report specifically in relation to disposition. So the Court having found an error –

WILLIAMS J:

So in –

MR LILLICO:

Sorry, Sir. The Court having found an error – *Tutakangahau* in relation to the Criminal Procedure Act says that *Shipton* applies and if you find an error, then you're in the business of re-sentencing, in which case you'd need an order – need a report.

WILLIAMS J:

Because the relevant – you identify alcohol, anger as a driver and of course mental illness. You agree mental illness meets the but for. You might even agree that so does alcohol and anger. So what facts need to be proved or disproved in that assessment before you get to the evaluative judgment is where section 24 either applies or doesn't apply. One question is was alcohol and drug consumption a material driver of this offending, say? Someone has to prove that, don't they, unless it's accepted?

MR LILLICO:

Well if we take the position that the disputed facts procedure doesn't apply and we're in the state of judicial evaluation, then it's something –

WILLIAMS J:

But you need some facts to evaluate against, that's the –

MR LILLICO:

Then it's something the Judge has to be satisfied of, and the furthest we get here is we don't use words, or the psychiatrist don't use words like "significant contribution" which is used in relation to mental health, in relation to alcohol. We just, they use the word "exacerbate" and that's as far as it gets on the evidence.

WILLIAMS J:

So you think that to the extent that there are facts here, upon which the evaluation about relative contribution and so on, must be made by a judge, those facts are actually not in dispute?

MR LILLICO:

The fact of…

WILLIAMS J:

The contributing facts, whatever you might say about alcohol, anger, on your analysis, and mental illness, the relevant facts from which the evaluation must be made, are not in contest between the parties?

MR LILLICO:

I'm not sure I'd go that – well. I hadn't heard a contest about that. The judge, or the Court rather, in the Court of Appeal found that they were contributions. That they were factors in the offending.

WILLIAMS J:

The rest is for evaluation, you say?

MR LILLICO:

No. All I'm submitting to you essentially is that the Court found that they were a contributions to the offence. Alcohol, mental health, of course –

GLAZEBROOK J:

Can I just think because I think I might finally have caught up with your submission on the Duff evidence. Is it that an impairment of, and I can't remember the words, but an impairment –

MR LILLICO:

A judgement.

GLAZEBROOK J:

Of judgement, that she doesn't say that the mental health caused an impairment of judgement to the extent that it is explanatory apart from, as a contributory cause of what actually happened.

MR LILLICO:

No, no, she does, she certainly says it's a significant contribution –

GLAZEBROOK J:

No, no, I understand that, but just as a contribution, assuming then that the exacerbation pushed it over the edge. I just don't know quite what, where you get from the mild words, because if you have an overreaction because of a mental illness, then what happened here seems the classic overreaction.

MR LILLICO:

Well the submission, of course, is it's a bit more than an overreaction. An overreaction might be reacting violently to an disagreement about payment. Here he's, you know, he's gone much further than that.

GLAZEBROOK J:

Yes, but if that's because of having an impaired understanding, and an impaired view of threat, isn't it related to the mental illness?

MR LILLICO:

Oh, yes, absolutely it is.

GLAZEBROOK J:

Okay, all right. But just not enough, you say?

MR LILLICO:

Yes.

GLAZEBROOK J:

Okay.

MR LILLICO:

And it doesn't do all the explanatory work for what was done.

WILLIAMS J:

So your, taking us back to nine – well, no, actually, taking us back to section 24, is your argument is really that the evaluation of causational or contributory, contributional, whatever that right word is, potency is a matter of judicial evaluation, not a question of fact or mixed fact in law?

1540

MR LILLICO:

Well, the facts have to be in front of the Court. There's no particular onus on anyone because they're not, it's not a question of proving mitigating or aggravating features.

WILLIAMS J:

Yes, that's the point. I don't quite understand *that* point. It seems to me that the relevant facts, whether aggravating or mitigating, upon which any evaluation is based, are caught by section 24. They've got to be.

MR LILLICO:

Mr Rapley agrees.

WILLIAMS J:

Well yes, yes, that wasn't helping Mr Rapley. Unless I'm missing something about your argument?

MR LILLICO:

I mean of course if – sorry I'm going to deal with this in a practical sense. But if the Court is sailing along, this sometimes happens, they're sailing along and they're ignorant of, because people hide it, ignorant of a mental health problem, they know from the summary of facts or from formal statements that there's alcohol involved. Mr Van Hemert has made a statement about being angry and being in an angry state he says that to his ex-partner say, so that's part of a factual matrix. Defence know that, in fact, having talked to Mr Van Hemert that he has something of a mental health history, that these things were in play at the time, then in an evidential burden sense they would want that put before the Court. They don't have an onus of proof or that's not the appropriate way of talking –

WILLIAMS J:

Well they will if its disputed, unless it relates to the offence itself or the actions of the offender in the context of the offence.

MR LILLICO:

So they've got to put it in front of the Court, don't they Sir.

WILLIAMS J:

That's right, yes.

MR LILLICO:

And they have the means to do so because their client will agree to being interviewed, what have you. Then it stands for the Judge to make an evaluation of that and I can't see that in the absence of a burden that there's anything more than the Judge is obliged to do other than be satisfied, which is the usual outcome when we say that there's no burden operating, in the criminal context at least.

KÓS J:

But haven't we passed beyond there being disputed facts? You accept that but for his mental health condition Ms Te Pania would be alive. You accept that the mental health condition was a substantial, even a very substantial contribution, to her death, and Mr Rapley accepts that the alcohol and drug abuse exacerbate it. So all those facts are agreed?

MR LILLICO:

Mmm.

KÓS J:

No need to prove, no burdens, all agreed.

MR LILLICO:

Mmm.

GLAZEBROOK J:

Just we don't know –

KÓS J:

Absolutely, we don't know.

GLAZEBROOK J:

– on your analysis, how much it's exacerbated and then therefore the extent to which we can't take that into account in terms of determining culpability.

MR LILLICO:

Yes, I agree – well –

GLAZEBROOK J:

Because we really don't have anything in the evidence, and I think you agree with this as well, that allows us to do that.

MR LILLICO:

The only caveat, I agree with all of that your Honour, except for the caveat that, and it may, pointing the difference in the contrast between the quite mild language of the mechanics of what happened, and what actually happened in the car, that's the submission I make about the extent of the exacerbation.

GLAZEBROOK J:

Whose mild language?

MR LILLICO:

Dr Duff's. Impairment and overreaction and so forth.

WILLIAMS J:

Oh I see. So you would accept, though, that section 24, this is a conceptual question not necessarily directly related to this, section 24 would be in play if your psychiatrist said the contribution was 25%, and his psychiatrist said the contribution was 75%?

MR LILLICO:

No because the sections enact when we're dealing with a judicial evaluation of 102, which is not –

WILLIAMS J:

Ah, so you say manifest injustice is so inherently non-burden invoking that section 24 just doesn't speak to it?

MR LILLICO:

Yes Sir. But you might have a practical burden, an evidential burden because certain facts aren't before the Court.

WILLIAMS J:

Sure, but have you got authority for that? I'm not suggesting that you're wrong, I don't know, I haven't thought about it hard enough, but it'd be good to have some authority if that's what…

MR LILLICO:

No I haven't. I'm attempting to follow the Court's interest, but…

GLAZEBROOK J:

Well I think what you say is it's just the wording of the section, don't you, and that "manifest" means "clear" and so you have to decide there's a clear injustice which probably doesn't mean 75%, 25% because of what – well, first of all, I doubt you'd get anybody saying that.

MR LILLICO:

No.

GLAZEBROOK J:

But secondly, of what, really. So your submission is that the overreaction was much, much greater than Dr Duff has said would have been the result of the mental illness?

MR LILLICO:

Yes. Yes, thank you.

GLAZEBROOK J:

Recognising she probably wasn't asked, how close are you to insanity, and of course not, because you either are –

MR LILLICO:

Or you're not.

GLAZEBROOK J:

– or not, really.

MR LILLICO:

Mmm. No, I mean, and you can imagine any number of questions that might be asked in a dispositive section 38 report: what were the factors in play, to what extent were they each in play, how did they relate to one another. You'd expect a brief along those lines, I think.

GLAZEBROOK J:

Thank you. Mr Rapley?

MR RAPLEY KC:

Thank you. Perhaps dealing with the public safety issue first which was a significant point obviously that the Court is concerned about. What happened here was an aberration and it was a doctor – junior doctor on his first day at Hillmorton with a senior nurse. Two days prior, his family members had contacted the police and the mental health authorities asking for help, and he had phoned 111 himself, and in the 111 call, he was told to call mental health by the police.

KÓS J:

Sorry, this is Mr?

MR RAPLEY KC:

Mr Van Hemert.

KÓS J:

Yes, but it wasn't a cry for help. It was a cry to recruit.

MR RAPLEY KC:

Yes, yes, and –

KÓS J:

Hoping that it would find its way through the earth to his mother.

MR RAPLEY KC:

Yes, well it was that he asked for a time machine, if he could go back. But they said: "I think you should call mental health."

KÓS J:

Right.

MR RAPLEY KC:

Yes, but what –

GLAZEBROOK J:

Not really surprising.

MR RAPLEY KC:

No, no. Exactly right. But what – there is a system in place already for public protection and that's for mental health compulsory treatment assessment procedure.

WILLIAMS J:

It's surprising that the dispatch person at the end of the 111 phone doesn't have instructions to refer on, because he or she will have the phone number and the name of the individual.

MR RAPLEY KC:

Yes, no, quite. So that has happened and there's been this serious incident report, so Mr Van Hemert, when we're talking about public safety for him, is now very much on their radar, you would think. That, you know, the next time there's an incident, if there is one, hopefully there isn't, the mental health authorities would respond accordingly, one would hope. That's what we've been talking about is, well what if he is failed by the system again? Should he be given life in –

GLAZEBROOK J:

Well, not really, because they have to be called first, don't they? Because there's nobody that's assessing – I think the submission was that if he was subject to recall, there could be conditions in terms of somebody being there to check whether he has deteriorated.

MR RAPLEY KC:

Well, I was just wondering about that though for parole conditions, what parole conditions would there be in place? I mean, it was suggested that he had to report to his probation officer or, you know, and how frequently, and so the probation officer – let's say the probation officer here met with him in this case on the 25th of December and then didn't meet with him until 10 January because it's holiday time. We'd be in the same position.

1550

So, I do say that the imposition of life imprisonment to then enable him to be eligible for recall or to have a parole officer there – and as a parole officer – well, first of all, not medically trained, but to carry out an assessment of how he's behaving, and in any instance, we had the family here who were monitoring him and making the appropriate steps to get him assessed. So, when it comes to his risk, should he be released? I should've thought any call by family members or by him will be attended to immediately.

Just on that point, and her Honour Justice Doogue talked about this in her sentencing notes. If I can find this. In the case on appeal of the Court of Appeal

casebook at page 86, paragraph 33, because I provided an updated – a little bit informal – but updated information, as I said from a clinician Dr Panckhurst, her Honour says: "Since the dreadful event, you have been receiving treatment, and your mental condition has improved and you are not currently a risk to yourself or others." So that's as at the sentencing time then. He's now been moved out to Rolleston Prison, a low security prison.

So, when it comes to public safety, I suggest, you know, as I say, what occurred was an aberration and therefore one can take – can look at it in that way as to that one can't keep him in prison potentially for life because there's a risk the MHA, that health officials won't act accordingly. So that's the public safety matter I wanted to discuss.

One matter I did want to address, and that was in relation to what my learned friend said about effectively the circumstances of the offence, but his explanations that he gave to the police officer, and my learned friend said there was a coherent explanation, and this is talking about this gap that my learned friend kept mentioning, and refer to that, the things he said there about the actual act in the car. It wasn't coherent and Dr Duff talks about that, says they were leading questions and he answered accordingly, and the interview, as I mentioned, is full of things that just plainly are untrue, and I mentioned that, that he burnt the victim, dropped her at the Waimakariri River, that he stole the car, that he went to an ATM and other things.

So he isn't giving a coherent account of what happened, and so he is still, I suggest, even then, and Dr Duff, Mhairi Duff, talks about that and suggests also that given he's taken all the medication, that is probably why he's appearing calm and somewhat coherent, but in reality, he's not. That's what I wanted to say about that.

There was a question from her Honour Justice France to Mr Bird, so I wonder whether I should address that. It was in response to the query about section 9(3) and the submission that it doesn't apply when the person is not aware of or ought to have been aware of the consequences of consumption,

and the question was is there authority to support that proposition or submission, and the short answer is no, no there isn't.

As to circumstances of the offending and how we say it should apply, without going through that and I don't want to given the time, we set that out at section 45 through 51 of the submissions and draw the Court's attention particularly to paragraph 48, where we talk about mental health and where it can apply, and it's not mutually exclusive concepts that can bridge that gap between the offence and the offender.

There was a question about the relationship between 102 and 104, and I don't know whether the Court wants me to address that, but now, if an aggravating – and we address it at paragraph 82 of the submissions – but if there is an aggravating feature that's been properly ascertained as falling within section 104, particularly the "cruelty, depravity, or callousness" feature, and then that has been properly considered insofar as in terms of looking at it with culpability and predicated on judgement of moral turpitude, well then, if that is found to apply and be present, then it's much more likely that 102 would apply of course because it's the same exercise that you're doing and the combination of whether one looks at 102 first or 104 may not then matter.

Those are probably the only matters I felt necessary to address in reply unless there's any other matters that the Court would like me to cover off? Thank you, may it please your Honours.

GLAZEBROOK J:

Thank you very much, and thank you counsel for your careful submissions, and thank you very much to the interveners who have been prepared to come and intervene today with very helpful submissions. Thank you. We'll take time to consider and give judgment in due course. Thank you.

COURT ADJOURNS: 3.59 PM