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

SC 157/2025
SC 158/2025
[2026] NZSC Trans 15

LORI-LEA WAIROA TE WINI
First Appellant

COURTNEY PAULINE CHURCHWARD
Second Appellant

v

THE KING
Respondent

Hearing:	03 August 2026
Court:	Winkelmann CJ Williams J Kós J Cooke J Campbell J
Counsel:	C W J Stevenson KC and O H Fredrickson for the First Appellant Te Wini H G de Groot, T J Conder and R H Hohaia for the Second Appellant Churchward Z R Johnston and M R Davie for the Respondent E P Priest and S Wood for Intervener, The Law Association of New Zealand

CRIMINAL APPEAL

MR STEVENSON KC:
Tēnā koutou e ngā Kaiwhakawā. Stevenson and Fredrickson for Ms Te Wini.

WINKELMANN CJ:
Tēnā kōrua.

MR STEVENSON KC:
If I just mention now, Ms Te Wini is watching this application and appeal by way of the link along with her long-time supporter and mentor Dr Tracey McIntosh.

WINKELMANN CJ:
Thank you, Mr Stevenson.

MR de GROOT:
May it please your Honours, de Groot together with Mr Conder and Ms Hohaia for Courtney Churchward and I just point out that Ms Churchward is present in the court today with her support worker Ms Hennessey.

WINKELMANN CJ:
Tēnā koutou.

MS JOHNSTON:
May it please the Court, tēnā koutou e ngā Kaiwhakawā. Ms Johnston and here with Mr Davie on behalf of the Crown as respondent.

WINKELMANN CJ:
Tēnā kōrua.

MS PRIEST:
Tēnā koutou e ngā Kaiwhakawā, may it please the Court. Counsel's name is Ms Priest. I appear with Ms Wood for The Law Association as intervener.

WINKELMANN CJ:

And Ms Kincade is not appearing, she is just watching, is she?

MS PRIEST:

She's otherwise engaged in Sāmoa.

WINKELMANN CJ:

Yes.

MS PRIEST:

Teaching litigation skills over there, unfortunately.

WINKELMANN CJ:

Thank you. Mr Stevenson.

MR STEVENSON KC:

Yes, if it pleases the Court, the applicants/appellants have conferred as to hopefully the most economic and convenient way to the Court for presenting the argument and we propose to proceed as follows.

Dealing with the leave application first, Mr Fredrickson will address this Court outlining the legal framework for determining leave out of time, speaking to *R v Knight* [1998] 1 NZLR 583 (CA), *Taylor v R* [2018] NZCA 498, et cetera.

Mr Conder would then speak to the change in the law in this case, as the applicants put it, and the unique nature of life imprisonment as a sentence.

I would then, on behalf of Ms Te Wini, deal with the merits and Mr de Groot speak to the merits on behalf of Ms Churchward.

WINKELMANN CJ:

Thank you, Mr Stevenson, and what we'll try and do is not interrupt you for the first 20 minutes apart from minor points of detail – or won't interrupt Mr Fredrickson.

MR FREDRICKSON:

Tēnā koutou e ngā Kaiwhakawā. As Mr Stevenson says, I will just begin by addressing the legal framework governing applications for leave to appeal out of time.

These are, of course, appeals against sentence. For reasons of both policy and convenience, Parliament has imposed time limits for bringing sentence appeals as with other forms of appeals. Those limits as to time are, of course, not absolute. Appellate courts retain an open-ended and broad discretion to extend the time in which an appellant may bring an appeal.

Now, whilst that discretion is open-ended, it is still to be exercised in a principled manner and in New Zealand the guiding principles as to that discretion can be traced back to the Court of Appeal's decision in *R v Knight*. In *Knight,* a full bench of the Court of Appeal held that when an appellate court is considering an application for leave to appeal out of time, the touchstone or the yardstick to be applied is the interests of justice in the particular case. The courts, in particular the Court of Appeal, have consistently affirmed that standard in subsequent cases such as *R v Lee* [2006] 3 NZLR 42 (CA), *Taylor* and recently in *Kriel v R* [2024] NZCA 45, as well, and on behalf of Ms Te Wini we endorse that test outlined in *Knight*, the standard being the interests of justice.

And so, where the interests of justice lie in a particular case will depend on a range of factors, depending on the particular case. And in *Knight* itself the Court of Appeal outlined a non-exhaustive list but some considerations that may be relevant and those include, of course, the merits of the particular case which will often assume quite central relevance. The appellate courts will be slow if not entirely unwilling to accept an appeal or to take on an appeal devoid of merit. So, too, relevant is the length of delay and the reasons for it. The impact on the administration of justice – another way of saying the potential floodgates that may – floodgate considerations that may occur. Any prejudice to the Crown or to any victims. And so, too, in our submission importantly, the general respect that is traditionally shown to the liberty of citizens in our society. And so in the particular case, these considerations will be balanced together and

the Court will make an ultimate assessment as to where the interests of justice lie.

Some of the cases in which an appeal is brought out of time involve a subsequent change of the law, and that was the case in *Knight* itself and, of course, is the case in the present, as well. So in such cases, the authorities both in New Zealand and in the United Kingdom, as well, make clear that a mere change in the law and no more is not sufficient. Something more is required, and the New Zealand authorities, outlined I would suggest most clearly in *Taylor v R* by the Court of Appeal, have held that a substantial injustice would otherwise need to occur. So an applicant bringing an application for leave to appeal out of time based on a subsequent change of the law would need to demonstrate that if leave were not granted, a substantial injustice would arise.

And that, too, is a global assessment taking into account all of the factors in the particular case, but I would suggest, in our submission, as one reviews those authorities it becomes clear once again that the merits of the case are of particular relevance and leave is likely to be granted, in other words, a substantial injustice is likely to occur, where that change of the law would legitimately have affected the outcome of the particular case.

KÓS J:

I'm not interrupting.

MR FREDRICKSON:

You're more than welcome to, your Honour.

KÓS J:

But there's obviously a difference in the authorities between the effect on a conviction and the effect on a sentence.

MR FREDRICKSON:

There is, there is. And *Taylor* itself was an example of a sentence appeal, whereas *Knight*, as your Honour identifies, was a conviction. But *Taylor*, in our submission, is of particular relevance given the similarities between the two, *Taylor*, of course, was a case in which the applicant was sentenced to preventive detention which, following a subsequent decision of this Court, was held to be unavailable given his age at the time of the offending.

In *Taylor*, reflecting on that, the Court of Appeal at paragraph 20, and I'll just put it up on the ClickShare. I think hopefully…

WINKELMANN CJ:

You're having to operate it yourself.

MR FREDRICKSON:

I know, I know. Both hats, both hats. So this is paragraph 20, an ultimate I would suggest and very clear distillation as to what the Court's task is, and this is at paragraph 20, again recognising that in *Taylor* the Court accepted that the sentence of preventive detention should never have been imposed given the applicant's age at the time. I read from paragraph 20: "Ultimately, we think it objectionable and unjust that Mr Taylor be compelled for the sake of finality to serve a sentence which, had the law been correctly understood at the time, would not have been imposed." And so a sentence appeal, of course, but nevertheless a substantial injustice arises.

KÓS J:

Well, a very substantial sentence given it was preventive detention.

MR FREDRICKSON:

Indeed, and a point –

KÓS J:

So that's really the most fundamental of liberty issues.

MR FREDRICKSON:

It is, and if this were an ordinary sentence appeal I could say, where the applicant says "I got seven years, but I should've got five", absolutely that's a matter of categorial difference. But a point that Mr Conder will pick up, and it's outlined in the written submissions, is just how profound this difference is between a life sentence and a finite sentence. It's not a matter of a year or two, it's a matter of life and a lifetime curtailment of liberties and a lifetime stigma that goes along with it.

WINKELMANN CJ:

Am I correct, *Taylor*, he delayed, after *Mist v R* [2006] 3 NZLR 145 (CA), didn't he?

MR FREDRICKSON:

Seven years. Yes, that's right, and so the Court, I think it's actually on that screen at paragraph 18, recognised that that delay had occurred but nevertheless as Justice Kós outlines, given the nature and the magnitude of that injustice, serving a sentence that otherwise should not have been and would not have been imposed, nevertheless displaces the presumption of finality.

1015

And a similar approach was taken by the Court of Appeal in *Kriel* and, of course, in even closer, if not identical facts to the present, in that case a group of five applicants in precisely the position of Ms Te Wini and Ms Churchward brought sentence appeals against their sentence of life imprisonment that had been imposed when they were teenagers.

The Court of Appeal in *Kriel* granted leave to one of those five applicants, a Mr Lo, and in doing so stated that: "We consider that it is possible that, if Mr Lo was sentenced today post-*Dickey*, he may have received a finite sentence." I will just do my best to put that on, as well, because it's a helpful summary of the position, or the approach that has been taken.

WINKELMANN CJ:

My share screen is not working, so if you just tell me what number it is?

MR FREDRICKSON:

Oh, of course. So, this is paragraph 113.

WINKELMANN CJ:

No, what number.

WILLIAMS J:

Page number.

MR FREDRICKSON:

Oh, sorry, page number in the bundle?

WINKELMANN CJ:

Yes, what authority number?

MR FREDRICKSON:

This is *Kriel v R*.

WINKELMANN CJ:

Yes, I'm trying to find it.

MR FREDRICKSON:

At paragraph 113 of that decision.

COOKE J:

Authority number 55.

WILLIAMS J:

Can you give me the bundle number too, what is it?

MR FREDRICKSON:

Certainly, Sir, page 67 to 68.

WINKELMANN CJ:

Authority number 55, thank you.

MR FREDRICKSON:

Page 67.

WILLIAMS J:

Page six-seven.

MR FREDRICKSON:

Page 67 of the appellant's materials and so it's just at the very top of the ClickShare for those for whom that's working.

KÓS J:

Which appellant? We have two.

MR FREDRICKSON:

Pardon me?

KÓS J:

Which appellant?

WILLIAMS J:

Te Wini.

MR FREDRICKSON:

Te Wini.

KÓS J:

Te Wini, right. We have two sets of bundles, I think.

MR FREDRICKSON:

Pardon me?

KÓS J:

We have leave authorities and we have substantive authorities. Oh, there is *Kriel*, 55, thank you.

MR FREDRICKSON:

Indeed. That is just to say that the key sentence, and I'm happy to read if that is more effective, the Court of Appeal reflecting on these different applicants and whether or not their appeals against sentence should be permitted to come through, leave should be granted. They do grant leave to Mr Lo because they say: "We consider that it is possible that, if Mr Lo was sentenced today post-*Dickey*, he may have received a finite sentence."

And, on behalf of Ms Te Wini, our submission is that precisely the same applies to her. If she were to have been sentenced today post-*Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405, for the reasons that Mr Conder will address squarely, in our submission, she would have instead received a finite sentence. And because she did not, because she instead received a life sentence, it will remain with her and she will remain under for the next 40, 50, 60 years with all its attendant stigma and curtailment of rights, it is our position that a substantial injustice would occur and that's a point that Mr Stevenson will expand upon.

And so that is the framework within which these applications are brought and just a very brief overview of Ms Te Wini's position. If your Honours have no questions for me, I'm grateful for the 20 minutes of indulgence and very fortunate to have been –

WINKELMANN CJ:

Perhaps we will have to transfer some of the benefit of that to, who is the next person?

MR FREDRICKSON:

Mr Conder.

WINKELMANN CJ:

Mr Conder, right. Mr Conder?

MR FREDRICKSON:

I'm grateful, thank you.

MR CONDER:

And I'm quite happy to forego the two minutes of indulgence that I'm entitled to. Thank you, your Honours.

In *Dickey*, the Court of Appeal recognised the unique impact of youth both as a mitigating factor and a factor that can impact culpability directly, and that this meant that a non-life outcome should be carefully considered in every case involving offending by children, people under 18. This directly and expressly reversed the earlier position in *R v Rapira* [2003] 3 NZLR 794 (CA).

In this application for leave, Ms Churchward argues that the three paragraphs in which her request for a non-life sentence in the Court of Appeal were dismissed falls well short of what she should have received in terms of consideration. She asks this Court to reconsider the question directly. She –

KÓS J:

I do think this three-paragraph thing is a real overstatement, or perhaps understatement of what was a very thoughtful judgment.

MR CONDER:

I accept that, your Honour. I think that it is different from what is suggested in *Dickey*. *Dickey* says that this is something that we need to go to in every case involving someone under 18 and consider it quite carefully.

The language used in this decision and I accept what your Honour says, that a lot of care was put into the judgment particularly around the impacts of youth. The description of this application in particular, though, was that to raise the question of a non-life sentence was "highly optimistic". In my submission, it's

that comment really that indicates the distance between what the Court in *Churchward v R* [2011] NZCA 531 was doing –

KÓS J:

Which of the three paragraphs you say –

MR CONDER:

That is the first sentence, your Honour, at paragraph 63.

KÓS J:

Paragraph 63.

MR CONDER:

"Mr Tennet's first submission on the sentence appeal is highly optimistic."

WINKELMANN CJ:

Is your point that the Court – you're not criticising the Court, your point is that they were operating on the basis that settled law was that youth could not displace — absent exceptional circumstances, I think? Youth could not displace the presumption of life imprisonment?

MR CONDER:

That's precisely the point that I'm making. *Rapira* treats youth as almost a secondary factor. It treats it as a very minor question in the context of a life or non-life sentence and suggests that the reason for a non-life sentence must really be found independently of youth. That's the approach that the Court of Appeal in *Churchward* took based on that earlier decision and very expressly based on that earlier decision. They quite directly point to that as the reason for their finding.

What I'm going to go on to submit is that the way that *Dickey* has moved the law in this area or has elucidated, if you like, the relevance of youth in these cases, means that that foundation is now missing and therefore those conclusions have become unsound.

The way I propose to do this, I'm going to speak briefly about the difference between conviction appeals and sentence appeals in this context, and in particular why guideline judgments and sentencing methodology judgments should be treated as somewhat different. There's not a great deal of distance between my friends for the Crown and myself on this point so I won't spend too long on it.

I'm then going to deal with the *Rapira* decision itself and the way in which we submit *Dickey* has corrected an error in that decision and what the error and the impact of it was.

I'm then going to talk about the significance of a life sentence, and in doing that I'm going to touch on the question of floodgates.

I will then turn to apply those reasons to this case and talk about how leave should be considered here.

WINKELMANN CJ:

I'm interested in the extent to which the youth factor was generally wrapped up in an approach to the presumption, s 102, not just in youth but generally. Are you going to address that?

MR CONDER:

I will talk about the way that s 102 is to be approached, and in doing so I will adopt the position that the Law Association has put forward that s 102 should be a prior question, and I will be talking about the manner in which the s 102 question should be asked, but my fundamental position there will be that this remains a question of overall impression.

It is one of categorisation, that what we have effectively in s 102 is a judicially-driven degrees of murder scheme where the courts are meant to be identifying these categories between seriously mitigated murder cases where the presumption of "a life for a life" isn't applicable or shouldn't be applicable, the

typical run of the mill cases that attract the s 103 sentence, and then the special category of aggravated murder, if that addresses your Honour's point, but I'm happy to engage further on that question if it assists.

WINKELMANN CJ:

I think – is it your submissions that refer to the run of cases including *McNaughton v R* [2013] NZCA 657, or is that The Law Association's?

MR CONDER:

I think that's The Law Association, your Honour.

WINKELMANN CJ:

Okay, all right. No, we're happy to wait for The Law Association then.

MR CONDER:

Turning then to this question around conviction and sentence appeals for late appeals, I would adopt what Mr Fredrickson has said about the test overall, but in the sentencing context it's necessary to distinguish – apologies, I'm just going to try and get ClickShare onto the correct screen…

WINKELMANN CJ:

So if you can just be particular with where you're directing us to, because my ClickShare screen is malfunctioning.

MR CONDER:

Yes, I was trying to get it prepared and it's now headed in the wrong direction, which is unhelpful.

COOKE J:

So I think probably the important thing is to give us the reference you're taking us to as well, so –

MR CONDER:

Yes. Thank you, your Honour. So I'm going to begin by talking about the two decisions of *Taylor* and *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259.

Beginning with *Taylor*, and this is tab 18 of our bundle of authorities, this is, as Mr Fredrickson said, effectively the application of *Knight* and of that line of cases in the sentencing context where, in very similar language the Court of Appeal, there concluded that ultimately it is: "… objectionable and unjust that Mr Taylor be compelled for the sake of finality to serve a sentence which, had the law been correctly understood at the time, would not have been imposed." 1025

And that is a reflection of the law in that case and it was summarised: "… whether preserving finality of a judicial decision," and this is at paragraph 15, "in a criminal case (here, a sentencing decision) in the face of later judicial recognition of evaluative error in that decision would work a substantial injustice."

So, the decision in *Taylor* is an application of that substantial injustice test in this context and I gather that the Crown agree, perhaps with some different shades of emphasis, that that is the applicable test here.

Where we see differences –

KÓS J:

The next, given these are my words, the next sentence is quite important: "The authorities discussed above demonstrate that the answer to that question is not invariably affirmative."

MR CONDER:

Yes, that is correct, your Honour. My submission there is that really what we are talking about is whether or not that is a substantial injustice. Mr Fredrickson has spoken about the impact of life as compared to a difference of years as something that's a major factor. There is also room for a separate practice which is what's recognised in *Cheung* around guideline judgments being treated differently and that's more to do with the principle of retrospectivity.

I was going to touch on the significance of the life sentence later, but the critical submission is that where the difference is between a finite and a non-determinative sentence, that will necessarily be a substantial injustice if it shouldn't have been imposed. It's different from the difference of term of years which is what my friend has said and what I agree with.

There is, however, also the approach in *Cheung* which should be distinguished and, again, I think the Crown largely agrees with this, which is that where a decision is a guideline judgment both because it specifies that that's what it is but also because what it is engaged in is correcting sentencing methodology, it's engaged in moving the bands within which discretion is being expressed, that's fundamentally different to the practice of correcting of an error and so our –

KÓS J:

I think the distinction here is one between evolution and error, and guideline judgments for the most part evolve. Sentencing tariffs, they shift from one tariff to another tariff or establish a tariff in the context of determinate sentences. You have got to show us I think here that there is a fundamental error.

MR CONDER:

Yes, your Honour.

WINKELMANN CJ:

So it's not just a change of sentencing methodology but it's an error that has been corrected.

MR CONDER:

That's correct and that is what our submission is.

WILLIAMS J:

I would've thought the way to think about this is that tariff judgments are statements of judicial policy. What you have to demonstrate is an error more fundamental than that shift in policy.

MR CONDER:

Yes, your Honour I –

WILLIAMS J:

Either an error of fact or law that's caused a substantial injustice. A change in policy you are stuck with.

MR CONDER:

Yes, I agree with that entirely, your Honour. That's precisely the distinction that I'm drawing between *Cheung* and *Taylor*.

WILLIAMS J:

But I guess describing it as evolutionary or seismic probably doesn't help the analysis. I mean, with the deepest respect to the author of that judgment we are discussing, it's the difference between policy and law, or policy and fact.

KÓS J:

Well, it's not made in that judgment. It's something we're discussing now, really.

MR CONDER:

Yes, your Honour. The language that I would use for that distinction is it's not so much that the law has changed as that the law has been corrected. That's the distinction between what – even if you look at the way that Justice Tipping approaches it in *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 and talking about the judge-made law that might be done in a progressive and forward-looking only fashion, because it is a recognition of what the law ought to be moving forward – compared to the settled practice that exists.

Here, we're saying that this is more fundamental. This is in the category where *Rapira* was incorrect and that error has been corrected. And that is the reason why we say this is not just a change in judicial policy. This is a correction of an error and something that therefore leads to a substantial injustice if it is not reflected even for those cases that were decided previously.

WILLIAMS J:

There are two kinds of error that might produce substantial injustice. One is an error of law and the other is an error of fact. Isn't *Dickey* really about errors of fact?

MR CONDER:

That's a very difficult question. I think that it can be framed in both ways. Sentencing practice necessarily builds into it a judicial understanding of the societal background and the factual background against which a culpability assessment is being made.

In one sense *Dickey* looks into the mind of individual defendants and says: "actually, the culpability here is radically different to what the Court in *Rapira* was saying". But *Rapira* wasn't attempting –

WILLIAMS J:

That's not about societal values. That's about science.

MR CONDER:

It is about science and so it is factual in that sense, your Honour. But I would draw a distinction between – it is factual in that sense, but it is factual at a policy level. What I mean by that is that it is not limited to the individual cases before the Court, but it is a recognition of something that is endemic amongst a category of people and so when –

WILLIAMS J:

Yes, but that's not a policy point, that's a question of fact.

MR CONDER:

Policy is perhaps the wrong word. It is a question of fact. But it is a question of fact that goes well beyond an individual case and certainly if we turn to the decision in *Rapira*, the language that is being used there is language that does not say "this defendant" – sorry, your Honour, this is tab 3 of our bundle of authorities and if we go to paragraph 120 of that decision. There the comment

is that: "Youth is not, regrettably, an unusual feature of offences of serious violence. It can have little weight when balanced against the public interest in denunciation and ensuring responsibility for offending."

Based within that is an assumption about fact and is –

CAMPBELL J:

Can I just ask something about that? That particular passage is emphasised a lot in both sets of the applicants' submissions, but that's just a summary that the Court is giving of the Crown argument in that case. It's not part of the Court's reasons. The reasons start at paragraph 121.

MR CONDER:

Yes, your Honour. So, probably the critical paragraph then is just a little further down at paragraph 123 where I would say that that rationale is adopted: "The Sentencing Act contains no restriction on a sentence of life imprisonment on a young person who is criminally responsible." So that's the legal conclusion. "The presumption expressed by s 102 is legislative identification of the public interest in maintaining life imprisonment as the standard response …"

Then the next sentence of that: "Youth of itself could not be a sufficient reason to make life imprisonment manifestly unjust if the offender had the necessary intent …"

WINKELMANN CJ:

So, if we look at *Dickey*.

MR CONDER:

Yes.

WINKELMANN CJ:

There is some – I would look at paragraphs 176 and 177. Well, about paragraph 174 following on and it looks, when you start at paragraph 174, it looks like policy. They actually use the language of policy, judicial policy, at

points. But when you get to paragraph 177, it looks more as if it's a legal question.

MR CONDER:

Yes, your Honour and what I would say here is that what the Court in *Dickey* is grappling with in that passage is not a change in the law per se, not a change in societal expectations or social mores that mean that it is now appropriate to recognise a different approach to sentencing. What it is reflecting there is that over time we have gathered more information, we have learned more about this category of offenders who are particularly young and, therefore, we now understand the way in which that factor, from a scientific perspective, impacts on their culpability and now have reached a point where the assumptions that were inherent in the decision in *Rapira* no longer hold.

WINKELMANN CJ:

So they're really creating a principle of law at paragraph 177: "For these reasons, we accept the Crown's submission that when sentencing a young person for murder a court must always undertake a s 102 analysis, giving careful consideration to whether life imprisonment is manifestly unjust." And that looks like a different legal position than in *Rapira* which was saying basically, it doesn't require that analysis at the s 102 stage.

MR CONDER:

Yes, your Honour, that's exactly what we are saying, is that between *Rapira* and *Dickey* we have learned enough about the mental abilities of young people that where at the time of *Rapira* the Court said: "look, that factor by itself cannot have a sufficient impact on culpability that we need to seriously consider this unless there is something really additional to that that adds on top of it".

In *Dickey*, the Court says: "No, we now understand the way that a young person's brain works to a much greater extent. That means that this assumption that we've made that young people have the culpability that is inherent in a murder conviction the same as adults is no longer correct. And, for that reason, the assumption we've been making this whole time that the

presumption that applies to people in that category applies to young people is no longer a safe one. It needs to be carefully examined". And so it takes it from being a conclusion that the Court can draw across the entire population. Young people have the ability to form these intents and therefore young people have the culpability that implies that life is the appropriate sentence.
1035

Dickey says we now know, not just in an individual case but at a population level, that that's not the case, and for that reason it is now necessary to move away from the assumption that youth won't get us there and to be very careful when we're dealing with young people, because we are in a case where the culpability is perhaps at the margins already and where other factors are going to become much more impactful than they might be in cases involving older defendants.

WILLIAMS J:
So going back to thing I've been harping on about, they changed the applicable approach because they discovered that the factual basis upon which earlier courts had sentenced was wrong, in the sense that they did not understand that the nature of the youth brain is different.

MR CONDER:
Correct.

WILLIAMS J:
Therefore, youth will itself provide a basis for exceptionality, with or without unusualness. In a sense, what the *Dickey* Court said was that if youth is unusual, that is irrelevant. What we are looking for is exceptionality and youth provides at least a presumptive exceptionality.

KÓS J:
That's what the *Rapira* Court said.

WILLIAMS J:

No, that's what the *Dickey* Court said.

WINKELMANN CJ:

No, no, the *Rapira* Court didn't say that.

MR CONDER:

I would like to adopt that submission, your Honour, because that is the position that I am taking. I think the Court in *Dickey* was a little more restrained than that and that the Court in *Dickey* was quite careful to say that it remained the opinion of the Court of Appeal that youth by itself would not be sufficient. It was always going to be youth plus.

WINKELMANN CJ:

You don't really need to go past that last sentence in 177, do you, because it's just saying that youth is a sufficient area of – it's, we know now enough about youth today that you have to undertake that particular analysis at the s 102 stage because there's a good question as to whether it is manifestly unjust.

MR CONDER:

Yes, your Honour. The way that I would frame that is that s 102 is about a presumption. It is about the assumption that "a life for a life" is appropriate in cases where murderous intent is present, and what *Dickey* does, in my submission, is it recognises that the core assumption there is potentially unsafe for young people and so it needs to be carefully considered.

In the case of an adult offender, it will take something dramatic to justify a non-life sentence because that core presumption of "a life for a life" is appropriate and it takes something serious to displace it.

In the case of youth, we have to hold that presumption with more care. It's much more likely to lead to unsafe and unsatisfactory outcomes, and for that reason it is necessary to examine much more closely whether it is warranted in a particular case.

WILLIAMS J:

Doesn't that get you to youth, subject to some evidence about the nature of the youth in the subject sentence, can itself be exceptional?

MR CONDER:

Yes, your Honour. I'd point to two things there. The first is sort of the one exceptional case pre-*Dickey* that goes to this, which is the case of *R v Nelson* [2012] NZHC 3570. In *Nelson*, what you have is you have a young man who murdered his caregiver on the understanding that by doing so he would be able to go back and live with his mother. A fundamental misunderstanding but something that was really driven by a very youthful perspective on the world and Justice Heath's decision there, without really anything additional other than his youthful naïvety, the Court was satisfied that in his circumstances a life sentence was not applicable.

And so there are examples, I would say, where youth by itself or the panoply of things that are included in youth or caused by youth can themselves tip the balance in appropriate cases. I wouldn't go so far as to say that every case of youth gets you there, but certainly it is a real prospect in every case involving a child.

I would then also point to, as I will go on to later in my submissions to say, manifest injustice is always recognised as being a matter of overall impression and the best evidence, if you like, of the overall impressions involving young people has been the approach of the High Court and the Court of Appeal in sentencing people following *Dickey* and the number that we have provided in our written submissions is about 75% of children who had been sentenced for murder following the *Dickey* decision have received non-life sentences. That is compared to one out of 40 in the period prior to *Dickey* and so it is our submission that when we take the impact of youth on culpability seriously, we end up in a situation where that presumption is very unsafe and where we are at the margins where the Court needs to seriously consider in each circumstance whether a life sentence remains warranted.

WINKELMANN CJ:

Mr Conder, are you going to address the floodgates issue? Because –

MR CONDER:

I am going to address the floodgates issue.

WINKELMANN CJ:

I'm not asking you to do it now, but at some point. Just whilst I recall, we are interested in the figures, because I think there are some in *Dickey* and there are some perhaps in the submissions. It would just be good if you could help us with where we find all the relevant figures or if we need more.

MR CONDER:

Yes, your Honour. So because we are dealing here exclusively with people under the age of 18, the number that we're relying on in our submissions is the 40 children identified in *Dickey* as being the relevant category for a floodgates analysis.

WINKELMANN CJ:

Yes.

MR CONDER:

I'll come to this in more detail later on, but it will be our position when I come to it that the degree of injustice in imposing a wrongful life sentence on a child is such that the Court should simply open the floodgates. This is a case where it is appropriate for the Court to deal with the administrative burden which that creates, and we will be saying that it's not overly great when weighed against the gravity of what has been imposed on those children.

KÓS J:

Can we go back please to paragraph 123 of *Rapira*?

MR CONDER:

Yes, certainly, your Honour.

KÓS J:

Which seems to express the ratio. And the core sentence in the middle is: "Youth of itself could not be a sufficient reason to make life imprisonment manifestly unjust …"

MR CONDER:

Yes.

KÓS J:

I don't understand you to say that *Dickey* actually changes that core ratio?

MR CONDER:

No I don't, your Honour, in the sense that those words can continue to be used and are used in *Dickey* but with quite a different emphasis. What the Court in *Rapira* did or certainly was understood by the High Court to be doing was to say that youth was a factor of limited relevance in this context. That was certainly the effect of *Rapira* on subsequent decisions and, in my submission, you can see that in the decision of the Court of Appeal in this case, that it has the effect of muting to a very substantial effect the impact of youth in the s 102 context.

WINKELMANN CJ:

Mr Conder, there are cases where it's actually cited for that proposition. You don't have those to hand, do you?

MR CONDER:

I don't have them on the spot, your Honour, but yes, it is cited regularly for that purpose. Perhaps I'll come back to that point immediately after the break with the references.

CAMPBELL J:

I'd be more interested in how the Court of Appeal in the two decisions that we're concerned with dealt with this part of – well dealt with *Rapira*, because in Ms Te Wini's Court of Appeal judgment it seems to me the Court was engaged

in quite a close analysis of the various circumstances and certainly doesn't make any reference to paragraph 120 of *Rapira* which, as I said earlier, is at the forefront of both sets of submissions.

WINKELMANN CJ:

Anyway, I'd like to see those authorities. Thanks, Mr Conder.

MR CONDER:

Yes, your Honour. I'll address that a little later on.

KÓS J:

Okay, just so you've got my follow-up question clearly in your head, my quick follow-up question is whether therefore *Dickey* is an evolution from *Rapira* as opposed to a fundamental change. In other words, it's a combination of taking what is the correct statement in *Rapira* but applying it in a more modern understanding.

MR CONDER:

I would say no, your Honour, and the reason why I would say no is because what sits behind that, and this will come out when I go through the authorities that the Chief Justice has referred to, the approach taken post-*Rapira* both numerically and in terms of the approach that it encouraged was to treat youth as something that wasn't irrelevant to the s 102 discretion but wasn't of particular weight. *Dickey* recognised that that wasn't correct, that youth meant we were in a category where it was necessary to carefully consider this in each and every case, and that distinction, even though both of them say youth alone is not enough, the difference between saying youth won't really put you in this category and saying youth gets you close to the line but there needs to be another layer of exceptionality, that is still quite a radical difference between the two.

And I would say I hear your Honour's point that that could be seen as evolving methodology but, in my submission, that's not what's happening here. What is happening here is a recognition that *Rapira* was based on a fundamentally

incorrect understanding of the culpability in these cases, so it's grounded in that factual error that Justice Williams was talking about, and that has led to a conclusion that results in us treating a life sentence as appropriate for people who have never had the level of culpability that is implicit in that sentence.

1045

That is the fundamental disconnect and that is the reason why this is erroneous reasoning, not simply a development of the common law.

WILLIAMS J:

Well, more particularly statistically a shift from one in 40, to 75%.

MR CONDER:

Yes, your Honour.

WILLIAMS J:

Is a revolution.

MR CONDER:

And I do put a lot of weight on that, because the Court of Appeal has repeatedly talked about manifest injustice as a question of overall impression. It's meant to be for the cases where the injustice is clear. Post-*Dickey*, 75% of cases clearly do not warrant a life sentence in the opinions of the judges tasked with deciding that. In my submission, that is relevant. And what it indicates, if I am perhaps to unhelpfully adopt some floodgates language of my own, *Rapira* has been holding back the flood of these cases and the conclusions that ought to have been reached and that is –

WINKELMANN CJ:

So, I mean, the Court of Appeal, certainly in *Dickey*, seemed to have thought that they were making a change because – and they set out, the parts of *Rapira* they set out suggest that they thought it was different to the position they arrived at.

MR CONDER:

Yes, your Honour, and the language of paragraph 177 is the critical piece: "For these reasons, we think it is no longer correct to say ... that youth can carry little weight ..." so it is still correct to say that youth is not a determinative factor, but it is not correct to say that it carries little weight.

Now, I acknowledge Justice Kós' point that they are there citing what was the Crown submissions but, as I say, it's my submission that what follows indicates that the Court had adopted that as its reasoning. That is the position that was reflected in *Rapira* and was taken in other cases.

I have already addressed this to a certain extent but it is inherent in the submissions that we are making that we say that the conclusion in *Dickey* is correct and that this Court should adopt it. The presumption of life imprisonment is predicated on this idea that the culpability of murder calls for a unique response and that a "life for a life" equation is appropriate because of the culpability that is inherent in murderous intent. That was at the core of what the court was or what Parliament was recognising when it instituted s 102.

This presumption, which is founded on concepts of deterrence and of a deliberative idea about what goes into murderous intent, is fundamentally ill-suited to young people who are, in many ways, diminished in their capacity to understand those very things.

The core facts that underpin that presumption, the idea of moral culpability that is inherent in that assumed sentence and that assumed equivalence, no longer holds when we understand the extent to which young people are limited in their ability to understand the future and to make rational choices.

This is consistent with what I would say is the growing recognition that youth is a factor relevant not only to the impact of a sentence into these personal circumstances factors but can go directly to the question of culpability and therefore to starting point. And in many ways, I would say that categorisation within the ss 102, 103, 104 scheme is similar to a starting point, it is a

recognition of the overall culpability of a case. And that is something that youth is now recognised as being directly relevant to, in a way that was only emerging when this case was decided in the Court of Appeal.

It is also compatible, in my submission, to put this category alongside the categories that were expressly discussed when s 102 was being passed. In the select committee report there is discussion of mercy killings and battered women as the main examples. When the Bill was being introduced, the Minister of Justice also spoke about the case of Ms Aubrey Thomas as an example of someone who was responding to extreme personal stressors such that her decision could not be regarded as having that implicit connection or that implicit presumption was appropriate.

We submit that all of these are examples where that presumption breaks down, where the inherent culpability in in murderous intent doesn't attach to the particular case.

We say that the impact of youth is the same. It impacts the culpability of the person committing that offence. That means that the seriousness of their conduct, the culpability of what they have done, should not trigger that automatic reaction in the way that it does for adults, because they do not have that same moral calculus that is at the heart of that presumption.

It is also relevant and I will touch on this only briefly here, because I am going to touch on it later, that the other half of that calculation changes for young people. A life sentence for an adult is fundamentally different from a life sentence for a young person.

The impact of an MPI that for a child will be more than half their life already lived is substantial. It has the very real risk of being crushing. The lifelong effect of a life sentence runs counter to what is recognised even in the Court of Appeal's decision in this case, the unique ability for youth to be rehabilitated, because it suggests that a person will never reach a point where they have been fully rehabilitated.

I acknowledge my friend's point that it's wrong to talk about the recall jurisdiction as being a reversal of the presumption of innocence, but the effect for a life-sentenced parolee is similar. They can be exposed to a risk of imprisonment on the basis of suspicion rather than proof and that is a very real impact that they will continue to carry for the rest of their life for a sentence that will often be multiples of what even the longest determinate sentence imposed in these cases would otherwise be. So the impact of a life sentence on youth means that not only is the culpability side of the equation quite different, but the impact side of the equation is, as well. It increases the chance that there is a clear and manifest injustice occasioned by a life sentence.

COOKE J:

Those factors would have been apparent when *Rapira* was decided. It's just the other factor about the knowledge of neurological effects, that's the change.

MR CONDER:

I think that that is the driving difference. But the other issue here, there is a case for saying that *Rapira* may have been correct in 2003, but it became incorrect when the boundaries around –

WINKELMANN CJ:

Well, is that right, Mr Conder, because doesn't the Court in *Dickey* acknowledge that pretty much all the science was there at the time of *Churchward*?

MR CONDER:

Yes, it does. It does and it says –

WINKELMANN CJ:

So, it is really not – it's not so much that it is changing knowledge, it's a change in the legal approach.

MR CONDER:

I would say that it's taken time for that knowledge to bed in. There's been a long way to travel between *Rapira* and *Dickey* and this case and the Court of Appeal is something of a halfway house between those two things. It's where we begin to recognise the impact of youth in the s 104 context and it becomes a real grounding point for the way that youth goes on to develop. But the experience in our courts following this case, the relevance that youth has continued to have and the growing relevance that it has had in sentencing decisions demonstrates that although the science may have been present in 2011, our recognition of the significance of that was not. And I would say it is not simply a change in sentencing methodology. We've not chosen between two equally legitimate pathways. It simply has taken this long for the other shoe to drop – for us recognise the necessary consequences.

WINKELMANN CJ:

Well, that is the way the common law works, isn't it? You move in one area and in this case, in *Churchward,* the Court said, well, we're focusing on this and that other area were not really, it's too ambitious an argument. But slowly the law works through and people make arguments and law does evolve. That idea flows through other parts.

MR CONDER:

That is the way that the common law works. But equally, the common law is typically recognised as acting retrospectively and so, in my submission, if the Crown wants to take the position, or if the Court were to reach the conclusion that this is a decision that should have prospective impact only, that's actually the more exceptional conclusion to reach, in my submission. As we recognise that the law should be different, we are typically prepared to give the benefit of that in a backward-looking fashion in cases like this. And, in my submission, even though it may be that that greater recognition is a gradual growth of the common law, nevertheless, it is one which offenders under the earlier regime should be entitled to have the benefit of when the result otherwise will be a substantial injustice – a sentence which a Court today would recognise they should not be required to serve.

KÓS J:

Well, we do that if they still have a right of appeal. But what about the people who have exhausted their rights of appeal and there may be, maybe in this case, there are a few. I don't think we have the figures for that. I presume that most people here who were sentenced under the *Rapira* approach who were youths at the time didn't seek leave to appeal to the Supreme Court or the Privy Council, if that was applicable then.

MR CONDER:

No, they didn't. I don't have the precise figures. There would at least be four defendants who are in a difficult position because there's the three in *Kriel* who were seeking non-life sentences and were declined leave. So, for them, the pathway of a leapfrog appeal would be quite challenging.

1055

There is Mr Renata, who sought leave to this Court and had it declined, running very similar arguments to what we're discussing today. It may be that those people, through the tactical decisions that they and their lawyers have made, have closed a door on something, which would be unfortunate. It is a necessary injustice that the end of the appeals pathway can create, although obviously the Court has a recall jurisdiction if it were seen as being appropriate to do that, but I recognise that that would be a steeper climb than this application.

At the same time, I don't think we repair the injustice to those potential appellants by telling other appellants that they simply have to endure the same sentence, and so I acknowledge that the necessary consequence of what I'm saying is that those people may be treated unfairly, but we should not treat these people unfairly because others have ended up in that position.

At this point I'd like to turn briefly to the decision in *Kriel* itself and to talk about the approach that the Court of Appeal has taken here. What we say about *Kriel* is that *Kriel* has made a mistake in that it treated the post-*Dickey* change as really being a marginal change. It's resulted in an approach where it is only those cases that were already quite close to the line, say at a 10- or 11-year

MPI where there are no s 104 factors present, are cases where leave should be entertained, so it continues to view youth as being a factor at limited relevance in these cases.

It's significant that, in my submission, the only case that *Kriel* allowed to proceed was a case where s 102 could well have been engaged on the parties' issue even before the question of youth was raised, and throughout the *Kriel* decision there is discussion in a few places about the relevance of the s 104 factors. In my submission, that approach means that the Court has not fully engaged with the kind of culpability difference that's being recognised in *Dickey.* It's treating the presumption as still having a reasonably firm foundation for young people in requiring quite a high standard of evidence to establish additional factors beyond that, and so, in our submission, the Court should be more open-minded about the fact that *Rapira* has closed the door on other cases. The statistics here are something that I would point to quite strongly and say, if 75% of appellants now or 75% of defendants now are receiving non-life sentences, it's surprising that there is only two from the period before that, plus the three who are actually appellants in *Dickey*, who have come through to receive finite sentences.

It suggests that the gateway there has been set at too high a standard, or at least a different standard to where the standard is being set now, and that's consistent with the approach that the Court has taken in *Kriel*, the emphasis on any elevated culpability factors, any s 104 factors being relevant, as closing the door, effectively, on the consideration of a non-life sentence.

CAMPBELL J:

Do you want to take us to particular passages in *Kriel* to illustrate this?

MR CONDER:

Where I would point to in *Kriel* is I would go particularly to the way the individual cases are dealt with here, so –

WINKELMANN CJ:

What number is *Kriel*?

MR CONDER:

Kriel is 55. So you can see in Mr Kriel's application at paragraph 106(a), it's the direct relevance of s 104 and the fact that youth is the only mitigating factor in his case results in the conclusion that if he were sentenced today, it's highly likely he would receive the same sentence. Similarly for Mr Nattrass-Bergquist and Mr Wallace-Loretz, although recognising that it's the felony murder rule, which is a different approach to murderous intent, nevertheless it engaged s 104 and on this basis alone, their cases are distinguishable from that in *Dickey*, and for that reason culpability is at a higher level and so, despite their youth and what is noted subsequently, the significant social deprivation that they faced, nevertheless a life sentence is still something that is not really going to change if they're granted leave. That is the approach that's taken there.

This is consistent with youth being, in my submission, quite a modest factor in these decisions compared to the way that it is approached in *Dickey* and the way that it has been approached in the post-*Dickey* cases. That is consistent more with maintaining much of what is present in *Rapira*, this idea that youth has limited relevance in the s 102 discretion.

It's important to note here that when talking about the s 104 factors, the way in which those impact on culpability is shaped by the prior decision, we would say, on what has happened under s 102. What I mean by that is if the culpability equation for s102 doesn't justify a life sentence, the assumptions that s 104 makes about when – of the effect of aggravation and the way in which culpability in those cases is aggravated may also be unsound. This is why we say that the approach proposed by The Law Association here is the correct one.

This can be seen in some of the other factors that are in s 104 and I would point in particular to the example that's used by the select committee of mercy killings. Almost inherently in the idea of mercy killings is the fact that the victim will also be vulnerable, which is a triggering factor under s 104. Despite that,

those are seen as being a case apart where s 102 is directly engaged. That reflects the fact that the culpability assumed by s 104 may not be present if the s 102 presumption doesn't apply. You sort of need to have s 102 applying in order for the conclusions implied by s 104 to be safe and so for that reason we say that the s 102 then s 104 approach would be preferable and is more consistent with what's at the heart of this appeal, the idea that young people have a unique culpability that requires recognition in a different way.

CAMPBELL J:

Are you suggesting that *Kriel* has misunderstood *Taylor*? Which would seem ambitious given it was Justice Collins both times, just a few months apart.

MR CONDER:

Yes, your Honour, and in fact the Court in that decision does – refers to it being its own decision that reached these conclusions and I suppose there are two ways to read *Kriel*. One is to say it's a clarification on *Dickey*, to say *Dickey* has been misunderstood and really we didn't mean to go so far as certainly the appellants in this case have sought to take it and the emphasis, if we go to paragraph 102, is there: "This Court in *Dickey* explicitly stated that the judgment did not create an exception to life imprisonment for all youth murders." It acknowledges that: "in *Dickey* we departed from what is being said in *Rapira*," this is at paragraph 103, but then goes on to say that it really was and this is paragraph 104, the special circumstances of all of those individual appellants that justified the conclusion.

So it does seem to be a reasonable step back from what seems to be the case or certainly what was our submission as to what the impact of *Dickey* was, but that's where I would point to the statistical analysis again, I suppose, and to say we know that s 102 is a question of overall impression. We know that when we're no longer saying youth is a factor that can't have particular weight, the result of that has been that a large number of these cases have received non-life sentences and, in my submission, that is at odds with the way that the Court in *Dickey*, particularly at paragraph 104, goes to say that the critical factor there was not youth but was all of these other factors that have been additional to it.

WINKELMANN CJ:

It's not, of course, the same court, is it.

MR CONDER:

It's not the same court, but it is –

WINKELMANN CJ:

Justice Collins is the –

MR CONDER:

Justice Collins was across both decisions and the Court is very clear in *Kriel* that it is wanting to clarify what it had said in the earlier decision. So I think I have to acknowledge that the Court of Appeal is seeking to say that *Dickey* would be misunderstood if it went as far as probably what I am submitting today.

COOKE J:

What it seems to be saying in *Kriel* is that if you are under s 104, you can't avoid life imprisonment which really is coming to your other point about –

MR CONDER:

Yes, it is.

COOKE J:

– about whether that's getting it the wrong way around and you could –

MR CONDER:

And in my submission, there's a few things that go to that. I mean, there's the *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 decisions which all say: "look, circumstances of offence and offender, you have to consider it even if the offence is particularly grave, there may be personal factors". It can't be – you can't close the door just because s 104 is triggered. There are the factors in s 104 that would create problems if you take that approach and it's particularly the vulnerable victims factor where that could lead to defendants who have a very low culpability being included, not accidentally, but in circumstances where

it would be quite unfair to take the s 102 decision away simply because of s 104 and that's why we say, look, s 102 needs to come first.

1105

Those factors are still relevant. They are aggravating factors under s 9(2) and they need to be factored in when assessing: "is a life sentence manifestly unjust for this defendant?" But you need to have that kind of close consideration that's described in *Dickey* where the culpability of each of those factors is interrogated to see whether it's still applicable given the other conclusions that we've reached about the impact that youth has had on culpability.

KÓS J:

But in addition to Justice Cooke's point, paragraph 104 of *Kriel* does seem to walk back a bit from *Dickey*, doesn't it? I mean it's making the point that *Dickey* was justified not just by age but by profound social disadvantage, which is a different consideration, and in the case of Mr Brown, significant cognitive limitation.

MR CONDER:

Yes, it does seem to step back, your Honour, and that is I suppose consistent with the approach which the Court goes on to take, although particularly for Mr Nattrass-Bergquist and Mr Wallace-Loretz there is an acknowledgement there that their cases, youth plus substantial social deprivation but nevertheless the presence of a s 104 factor, or a couple of s 104 factors, leads to the conclusion that life just can't be departed from. But yes, I acknowledge that in paragraph 104 the Court of Appeal appears to be stepping back a little bit from *Dickey* and saying that it's "youth plus" in every case.

I suppose in response to that, you can take it one of two ways. *Dickey* does say, look, youth by itself won't be sufficient and therefore you need a youth plus approach in some sense, and we get to the point where we're talking about how close to the line –

WINKELMANN CJ:

Where does it say that?

CAMPBELL J:

Paragraph 177.

MR CONDER:

Yes.

WINKELMANN CJ:

Oh, now my computer's gone off.

MR CONDER:

The middle sentence there: "It also remains generally true to say that youth alone is not enough to establish manifest injustice." Critically the word "generally" in that sentence is important because, of course, there is the example of the *Nelson* case where it really just is –

WILLIAMS J:

Just a moment. The Chief Justice has crashed.

WINKELMANN CJ:

Thank you for that helpful comment. I'm not quite sure how to fix this.

WILLIAMS J:

I think you might need to get someone to fix it for you.

CAMPBELL J:

Was the *Nelson* case where the co-offender –

WINKELMANN CJ:

Well – just pausing a moment. We're just pausing a moment.

KÓS J:

We've lost the computer.

WINKELMANN CJ:

I'm just wondering if we should adjourn for a moment so I can get my screens fixed. We'll just do that.

MR CONDER:

I'm happy to do that. Thank you, your Honour.

COOKE J:

Shall we take the morning adjournment?

WINKELMANN CJ:

Oh, what time is it?

WILLIAMS J:

It's 10 past.

WINKELMANN CJ:

No, that doesn't suit.

KÓS J:

No, a bit early.

WINKELMANN CJ:

Yes, we'll just adjourn for a moment.

COURT ADJOURNS: 11.07 AM

COURT RESUMES: 11.18 AM

WINKELMANN CJ:

My apologies, it wanted to update itself.

MR CONDER:

Your Honour, I have attempted during the break to corral some of the decisions that have applied *Rapira* in the way that we've been discussing. Where I begin

is to first go back to *Rapira* itself and paragraph 122 is probably the most direct point where the Court says how we should deal with youth. The second sentence there: "Where the offending is grave, the scope to take account of youth may be greatly circumscribed." And that's what leads into the conclusion that youth alone is unlikely to be a sufficient factor.

The way that that has been applied –

WINKELMANN CJ:
Sorry, so what paragraph was it?

MR CONDER:
It's paragraph 122 of *Rapira*. Then there are obviously these two cases as examples where that's seen as closing the door reasonably firmly. But another example comes from the Court of Appeal's decision in *R v O'Brien* (2003) 20 CRNZ 572 (CA) where at paragraph 36 the Court said: "Youth is not necessarily immune to wickedness and, regrettably, that is demonstrated in this case. In our view, low intellectual capacity unrelated to the mental elements of criminal responsibility, is seldom likely to justify a departure from the statutory presumption."

Similarly, in *Gempton v R*, there –

WILLIAMS J:
Sorry, you're going to have to – I'm going to have to try and catch up with you. I think the case you just referred to was?

MR CONDER:
O'Brien v R.

WILLIAMS J:
Okay and then *Kempton*?

MR CONDER:

And then *Gempton* – G-E-M-P-T-O-N. That case described the factors that were raised, youth, alcohol, and provocative conduct, as — and this is the quote: "Characteristics that are frequently seen in serious assaults and killings". And therefore went on to conclude that they could not justify finding that a life sentence was manifestly unjust, that's a paragraph 25 of that decision.

So that's a smattering of examples of the way in which *Rapira* was taken to mean that youth really couldn't raise any question about s 102, that it needed to come from somewhere else and really *Gempton* demonstrates – founded on that core idea that if young people can be convicted of murder, therefore necessarily the assumption is that they fall within that category where the presumption is appropriate.

What I want to turn back to then is the discussion that we were having before the break about where the law is moving between *Dickey* and *Kriel*. I begin by saying it is clear what *Dickey* is saying in two parts. *Dickey* concludes that it is not correct to say that youth will have little weight in these contexts, so that's a direct response to that sentence I have just read in paragraph 122, it goes on to conclude that a close consideration of s 102 will be required in every case, and so those are probably the two clear take aways the *Dickey* decision gives us.

What *Dickey* is less clear on in itself is how far youth culpability will then take you. It doesn't really suggest where the line will sit in cases where youth is a significant factor and that's where we would say you have to turn to the approach that's been taken following *Dickey* to demonstrate –

KÓS J:

Can you just, sorry, just remind me where "youth has little weight" is found in *Rapira*?

MR CONDER:

In *Rapira* the paragraph that I am pointing to is the Court reaching that conclusion as opposed to the Crown, is paragraph 122: "Where the offending is grave, the scope to take account of youth may be greatly circumscribed." And I'm saying that that reflects the Court adopting the Crown submission that's recorded at paragraph 120 and leads on to the conclusion in paragraph 123 that says: "Youth of itself could not be a sufficient reason to make life imprisonment manifestly unjust."

KÓS J:

Well, none of that is saying youth has little weight. I mean, it clearly has considerable weight and the question is whether you need more than that?

MR CONDER:

I disagree your Honour. It's about how much further do you have to go beyond youth and what the Court is saying at paragraph 122 is that the impact of youth is "greatly circumscribed" and then goes on to say that it can: "... [never be sufficient] to make life imprisonment manifestly unjust ...". That speaks to a conclusion and certainly those examples I have just pointed to in *O'Brien* and *Gempton* show –

KÓS J:

Well, youth, paragraph 123: "Youth of itself ...".

MR CONDER:

Yes, so that is talking about youth plus.

KÓS J:

Yes, that's right.

MR CONDER:

And *Dickey* is also talking about youth plus.

KÓS J:

Correct.

MR CONDER:

But what I'm saying is that the difference when you –

KÓS J:

And if I might anticipate arguments to come.

MR CONDER:

Certainly.

KÓS J:

Clearly, so are we in this case. We're not just dealing with youth in this case.

MR CONDER:

No, we're not. No, we are saying that the other factors are present here and that youth gets us close to the boundary and then those factors take us across, but it's that question of how much does youth raise a question about the core presumption? That's really what we say the difference between *Rapira* where youth is "greatly circumscribed", it can never itself justify a non-life sentence, that's indicating that youth is a more modest factor. *Dickey* –

WINKELMANN CJ:

That's two different propositions, isn't it? It is "greatly circumscribed". It can never justify on its own not imposing a life sentence. But then, what's the difference between *Rapira* and *Dickey*, do you say?

MR CONDER:

So we say you can see it in two ways. *Dickey* says: "... it is no longer correct to say ... that youth [will have] little weight ..." and that's pointing back to the extent to which I say paragraph 122 and the subsequent cases show that youth has been "greatly circumscribed" to use the language of *Rapira* in these cases.

It then says that it's still going to be the case that youth will generally not be sufficient to overturn the presumption, leaving open the possibility that it might, which implies that we've moved significantly closer to the boundary, but then goes on to say as soon as we have youth, we require this close consideration of life or non-life which implies we have now landed in a position where the presumption is at a much greater risk in cases involving youth than what *Rapira* and the following cases imply by their reasoning.

1125

WILLIAMS J:

Look, generally speaking, when youth arises in cases like this it's part of a matrix of factors.

MR CONDER:

Yes.

WILLIAMS J:

And if sentencing is a case-specific exercise, how helpful is it to isolate youth and try to analyse what the statute requires when youth almost always comes with other factors? You can perhaps understand why a judge would say the fact that you're 15 isn't going to be enough, but with all these other factors that are indicators of your 15-ness, that will be enough. So, the isolating out of age by itself without more is probably unrealistic as a matter of evaluation anyway. That's not how judges work, nor should it be.

MR CONDER:

I agree with that. I'd say the two things I'd say in response to that are, one, what your Honour has sort of tacitly acknowledged in that is that there is the possibility of a *Nelson* decision where it is youth in all its forms that collectively outweighs the presumption without any extraneous factor, without anything that's independent of youth, but you're right to say that in every case, it will be necessary to evaluate youth alongside other personal circumstances, alongside the gravity of the offence, and we're not trying to suggest –

WILLIAMS J:

Well, and the nature of – because they're not widgets. Youth manifests itself in different ways with different individuals. We have to understand the actual individual involved. Youth is a flag.

MR CONDER:

Yes, your Honour, I agree with that. The two things there are first of all that youth is a flag, and I think that *Rapira* certainly doesn't recognise that, and I would suggest that *Rapira* in fact discourages that type of reasoning and suggests that we should see youth as something that will have limited impact in this category of cases.

KÓS J:

I just don't agree with you on that point, Mr Conder. I need to let you know that I'm not with you on that point at all.

MR CONDER:

No, I appreciate that, your Honour. I think I can't take that point a great deal further. I think that the language of being "greatly circumscribed", the conclusion that it can never be relevant – that it can never be determinative, collectively point to that conclusion. I would certainly say that even if your Honour was of the view that *Rapira* didn't mean that, the subsequent cases suggest that that is the way that *Rapira* has been applied, and if all that *Dickey* was doing was correcting the error in the way that *Rapira* had been applied, I think we would be in the same situation here where we would say, these are appellants who deserve the benefit of that change of position.

WINKELMANN CJ:

Well, certainly the court in *Dickey* understood itself to be changing things from *Rapira*, and that's your point.

MR CONDER:

That is my point, and alongside that the subsequent experience in the High Court demonstrates that it did move the needle in terms of how these

cases are being determined in the end. What we see in *Kriel*, then, is an attempt by the Court there to try and hypothesise what the effect of *Dickey* will be, what the effect of *Dickey* should be. It's doing that without the benefit of the subsequent cases that we now have that demonstrate when you take the bridle off the youth factor, what will happen in the High Court, but I would also submit that what it is doing, to a certain extent, is walking back the conclusion in *Dickey* and linking it particularly to those s 104 factors to say that those will be fatal in most cases where they are present which, in my submission, isn't justified.

WINKELMANN CJ:

And there's no suggestion of that in *Dickey*, that reference to the s 104 factors?

MR CONDER:

It's not raised because none of – the two cases there don't have s 104 factors present. They're focused very much on youth and some pretty dramatic social deprivation as the grounds in each of those cases. That's where I would say the difference really arises.

Apologies, your Honour, I'm now having my own technical difficulties.

WINKELMANN CJ:

Well, we can take the morning adjournment at this point.

WILLIAMS J:

Your computer already has.

MR CONDER:

It's a little ahead of me. Yes, it may be that it's going to take me a couple of minutes to come back. Sorry, your Honour, I'm very apologetic.

WINKELMANN CJ:

Thank you.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47 AM

MR CONDER:

Thank you, your Honours. What I propose to do now is effectively to wrap up this part on error to move on to discuss the ways in which the life sentence is different and needs to be approached differently, then to talk about floodgates and then to talk about leave in this particular appeal.

At the end of the day, *Dickey* achieves at least two things. It recognises that where *Rapira* said that youth could of itself not be sufficient, *Dickey* recognises with that word "generally" that there is a possibility. It also centrally finds that it must be considered in every case involving youth, which suggests that youth raises the red flag in every case about whether the presumption is a safe one to apply, whether the foundation on which it is based is justified.

Even if the distance between the decision in *Rapira* and the decision in *Dickey* is not overly broad, what is broad is the gulf between the approach that followed *Rapira*, including in the Court of Appeal, and the approach that has since followed *Dickey*.

In our submission, there is a clear difference in approach between those two periods and the only justification for that can be a belated recognition of the significance of youth in that culpability calculus. That is why *Dickey* is the breaking point where the Court has re-evaluated the impact of youth and concluded that it does raise that red flag in every case and requires that serious consideration.

What this means is that defendants and appellants should receive the benefit of that close assessment. If they are children when they commit the crime of murder, it needs to be closely considered whether a life sentence is appropriate for them. What is relevant always is whether the sentence would be different if it were imposed today. That is at the heart of the statutory language in both

s 353 of the Crimes Act 1961 which applies here and the equivalent test under s 250 of the Criminal Procedure Act 2011 which is the modern version for that test.

KÓS J:

Yes, but that won't get you leave.

MR CONDER:

No, it won't.

KÓS J:

It has to be a substantial injustice, so, yes.

MR CONDER:

Which is what I am about to turn to, to say that the one thing that is additional to that that requires late leave is that that difference in sentence needs to be a substantial injustice. And that is where I turn to the impact of a life sentence and I say that a wrongfully imposed life sentence, a life sentence that has been imposed because of presumption that simply doesn't apply or should not apply in these circumstances, is a substantial injustice.

WILLIAMS J:

Isn't it really the same thing? If s 102 is satisfied, then the leave criterion is satisfied. It's the same test.

MR CONDER:

That is my position here, your Honour. Yes, it's the same.

WILLIAMS J:

But it is on the words of the statute, isn't it, and the words of the authorities in respect of late leave?

MR CONDER:

I think the difference is, I say that here, where what is at issue is a life sentence, then an incorrect sentence will always be a substantial injustice. I leave open –

WILLIAMS J:

But if a life sentence would be manifestly unjust, because that's what you've got to get to, then you obviously have a substantial injustice.

MR CONDER:

Yes, your Honour, you're quite correct. Sorry, I missed the reference to the statutory language. Yes, I would say that if you can satisfy s 102, then necessarily there is a substantial injustice and that statutory language is significant there for that reason.

It's also inherent in the nature of the life and non-life exercise. First, there is simply the jurisdictional point. This appeal can only be brought because the appellants continue to serve that sentence for the rest of their life. The jurisdiction to bring a sentence appeal never expires.

It's relevant here that in *R v Mitchell* [1977] 1 WLR 753, it was the fact that the offender would be required to continue serving a sentence for something that the Court considered was not an offence that was the determining factor in late leave. And that's relevant here, as well, we say, because these sentences continue to have that impact, that manifestly unjust impact, until they are corrected. That's where the substantial injustice is found.

It's relevant also because the main reason for limiting late appeals is the principle of finality. But a life sentence lacks finality in a way that other sentences do not. Both for the defendant, who continues to be subject to the sentence and therefore has to continue carrying the weight of that injustice for the rest of their life. But, in reality, the way that a life sentence works, it's likely to continue engaging the victims for a much more extended period than a finite sentence, meaning that for them it does not have the same finality that a different sentence might. It has much greater finality for them than for the appellants, I would concede that, but it is never fully closed because there are always questions of recall and parole and other matters that –

WINKELMANN CJ:

For victims?

MR CONDER:

Yes, your Honour because –

WINKELMANN CJ:

So what's the submission you're making based on that? Are you not submitting that a life sentence is not better for victims?

MR CONDER:

I'm not saying that a life sentence is not better. I'm saying that viewed only through the lens of finality, a life sentence often continues to engage victims in the criminal justice process in some way, shape or form, albeit in a different form for a much longer period, than does a determinate sentence. And so what I'm submitting here is that finality carries less weight when we are dealing with an indefinite sentence that continues to be administered in that way indefinitely.

COOKE J:

You mean because they continue to be consulted on parole decisions?

MR CONDER:

That's it, your Honour. They remain a party to this process in a sense for the duration of that sentence in the same way that the defendant does. I don't suggest for a second that it's their preference that they not have a life sentence, but finality itself has less emphasis here.

COOKE J:

So for a lifer after release, does the Parole Board automatically see them, or is it that they only see the offender if there's an application made to vary the conditions?

MR CONDER:

The Parole Board would only see them in those circumstances, or if there are recall applications. Those are generally the moments where the Parole Board will continue to be engaged. There are circumstances where there will be ongoing review of conditions for a period of time, but it certainly would be the case that a life sentence going well would cease to actively engage the Parole Board after a certain point in time, probably a few years after release on parole.

From the defendant's perspective, it's quite different, of course, and this is analysed in quite a bit of detail in *Dickey*. They continue to have reporting conditions and conditions like this for the rest of their life unless, as has happened in two cases in New Zealand, they have those conditions removed, in which case it is only the risk of recall that continues.

The third factor is that there is just a categorical difference between a life and a non-life sentence. They are fundamentally different things. The way that they have an impact on a person is more than just a matter of scale. It is a matter of categorisation. This is particularly true for a young person who necessarily, by a life sentence, will end up being subject to that sentence for multiple times what the length of the determinate sentence might be. Even taking a lengthy determinate sentence of say 20 years, most defendants facing a life sentence before they are 18 will be looking at two or three times that length for the period that they are subject to the sentence. It's almost an order of magnitude greater.

1155

The fourth, which is related, is what I said earlier. The ss 102, 103, 104 scheme is effectively a judicially managed degrees of murder scheme. There is a recognition that these are not just shades of difference along a spectrum. They are different categories for where the different presumptions do or do not apply. Mis-categorisation in those assessments is more than just a mis-adjustment of a sentencing discount. It is a mis-categorisation of where the case belongs at all, and for that reason it's my submission that it's that error, and I'd pick up on Justice Williams' comments here, that the manifest injustice test really points to.

Error in that categorisation will constitute, in my submission, a miscarriage of justice, and I would probably go so far as to say that categorisation in that sense should be viewed as more of an analytical test than a discretionary one, and it may well be the case that the correct approach when assessing whether there is an error in the s 102 or 104 categorisation is better viewed in an *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 sense than in a *Kacem v Bashir* [2010] NZSC 112 sense because what we're asking is a question that should be clear to all, not a question on which reasonable minds may differ.

In my submission, all of these together point to the same conclusion, which is that where a life sentence is wrongly imposed, where a sentence that is manifestly unjust is the sentence that the defendant is ordered to serve for the rest of their life, that will be a substantial injustice. And therefore if the Court is satisfied that this is a case where a different sentence ought to have been imposed at the time, necessarily it is also a case where a substantial injustice has resulted, and so in many ways, this boils down to a similar position to what the Crown has outlined if the Court seriously entertains the possibility that these are cases where a non-life outcome should have been entertained, then that by itself suggests that this is a case where it is necessary to grant leave and consider that question closely.

Turning, then, to the question of the floodgates, I mentioned earlier that we take the numerical position from *Dickey*. When we're talking about defendants under the age of 18, we're talking about around about 40 cases. This is not an overly large number, even if all of them were to appeal, and obviously some of them already have, and have at least on the face of it run out their appeal grounds.

KÓS J:

Well, how robust is that statistic? Somewhere else we saw a figure of 30 – 30 out of 322, I think? I'm not quite sure what that relates to.

MR CONDER:

I don't have at my fingers what that was, your Honour. I took the number from *Dickey* that it was around 40 children and that those two numbers are similar, so it may just be those who have finally appealed and those who haven't, between those two numbers. Certainly, they're in that same, low tens of numbers.

KÓS J:

Right, right.

MR CONDER:

More fundamentally –

WILLIAMS J:

It's in The Law Association's submissions.

MR CONDER:

Yes, I think they've had a closer look at the numbers, your Honour, and they can probably address that.

COOKE J:

Is there – but there will be 18-year-olds and 19-year-olds and 20-year-olds, as well, it'll be – do we only look at the under-18s?

WILLIAMS J:

I think The Law Association's are under-19s, aren't they?

MR CONDER:

I believe that is the case, yes.

KÓS J:

Yes, it was, footnote 27.

MR CONDER:

Yes, and in *Dickey* there are different numbers discussed for under-18s and then for under-25s, the emerging adolescents category. Here, both of the applicants were under 18 at the time and so we are pointing at that category as being the appropriate one. I acknowledge that that raises questions about what we do about people on the margins of that category, and what do we do about people who are getting further into adulthood? I would say that these are, because they're under 18, the clearest cases. There is room for a straightforward answer here. It may be more complicated when we move into that other setting.

COOKE J:

Well, if we've got to assess the floodgates, we've got to assess the whole dam behind the gates, don't we, rather than just doing little bits of it?

MR CONDER:

At a certain point that question will need to be answered, yes, your Honour, but your Honour can answer the question in this case without opening the floodgates on the rest of the dam, although I acknowledge that opening this part of the dam will invite some people to come and knock on the door about the rest of it.

WINKELMANN CJ:

Well, perhaps we don't – your proposition is that it's not a flood.

MR CONDER:

That really is, or –

WINKELMANN CJ:

And not a dam, so…

MR CONDER:

It is a proportionate flood.

WINKELMANN CJ:

So just take care in accepting Justice Cooke's language. So…

KÓS J:

Well, that's if the water is all murder, but if the water includes drug offending and other very similar serious crime, then we have the makings of a dam.

WINKELMANN CJ:

Well, does it mean drugs, so life imprisonment?

WILLIAMS J:

Although s 102 is about murder.

WINKELMANN CJ:

Yes, yes.

MR CONDER:

Section 102, your Honour, I think is quite a specific categorisation, and so –

WINKELMANN CJ:

Yes.

KÓS J:

Well, that's what you've got to limit it to.

WINKELMANN CJ:

Yes.

MR CONDER:

Yes, and so I think if we're talking about s 102 for under 18s and we say, look, every time there is an under 18-year-old and we're looking at s 102, the red flag is raised, we must look at it very carefully and we must reflect the fact that around about 75% of these cases will end up with a non-life sentence, or at least that's the best data we have today.

WINKELMANN CJ:

Because your starting point is that there is something special about a life imprisonment sentence?

MR CONDER:

Precisely. I'm not suggesting for a moment that the law won't continue to develop in other areas around youth. It will and these kinds of conversations will be necessary as we plumb the depths of what this culpability analysis leads to, but what we're inviting the Court to do here is to identify this category of around about 40 cases and say: "these are cases that really need to be considered very closely". And where there is a real prospect of a different outcome, and we would submit that that is probably the case for a good portion of them, that is a situation where their cases should be examined more closely and the Court should be prepared to carry the administrative burden of 40 appellants who otherwise are facing life sentences that are manifestly unjust.

It's not irrelevant that in *Dickey* the Court was talking about s 102 as being in part a tool that ensures there are not grossly disproportionate sentences. That is what it is designed to do.

KÓS J:

Some of this logically would apply to preventive detention sentences, although I suspect there are not many imposed on adolescents?

WINKELMANN CJ:

None.

MR CONDER:

No. The effect of *Mist* is that –

KÓS J:

Well, they can't be, that's right. That's right, of course, that's right.

MR CONDER:

– those are all over 21.

KÓS J:

Correct, that's right.

MR CONDER:

And so we already have there a protection for people in this category. It's missing in the murder context.

KÓS J:

Right.

MR CONDER:

Obviously –

KÓS J:

Well, that's a point in your favour.

MR CONDER:

Yes, your Honour, it is. We are dealing with a much more confined category. It's indeterminate sentences for young people or for children which are only arising in this context, and there are around 40 of them, and at the end of the day it is my submission that if there is a flood of 40 young people who want to bring further appeals because they were wrongly sentenced to life imprisonment, correcting those injustices is a sufficient justification for allowing that flood to proceed.

COOKE J:

Do we know how many of the 40 are still in prison?

MR CONDER:

We don't, your Honour. I don't have any statistics on that to hand, no. We can – anything would be a back of the envelope calculation. I think that would be unfair to the Court. It's simply unclear. Not all of them are, clearly we have

two applicants here who are not. But equally the impact of a life sentence after parole, in my submission, is still substantial. I don't think it would be safe to conclude that only those who are in custody would appeal, nor do I think it would be appropriate to conclude that only those in custody should be granted leave to appeal. I think the impact of that life sentence lifelong is something that always requires revisiting, even if they are on parole, as is the case here.

WILLIAMS J:
Are these numbers available?

MR CONDER:
I'm simply taking them from the numbers in *Dickey*, Sir. That's where I have taken them from. There was some detailed evidence in that case on these specific points which is where those numbers have been taken from.

WILLIAMS J:
Are they independently available from Corrections returns?

WINKELMANN CJ:
Ms Johnston might know that, and she can tell us when she's making her submissions.

MR CONDER:
Yes, thank you. So those are the grounds in which we say that although this would have the potential to bring a significant number of further cases before the Court, that is proportionate in the circumstances and therefore not a reason, in our submission, for refusing leave to these two applicants.

So what do we say about leave in this particular case? Fundamentally we say that this was a case where the red flag was raised and where that kind of close analysis did not take place in the way that it should have.

WINKELMANN CJ:
So are you talking about –

MR CONDER:

I'm talking about Ms Churchward at this stage.

WINKELMANN CJ:

Okay, so you're dealing with the merits?

MR CONDER:

Now I'm dealing – I'm dealing only with the merits of the leave test.

WINKELMANN CJ:

Oh, okay. Sorry.

MR CONDER:

Not with the merits of the substantive appeal, which my learned friend will address.

WINKELMANN CJ:

Okay, right. Got it.

MR CONDER:

I'm simply saying that this is a case that warranted close consideration and, in my submission, didn't receive the kind of close consideration that it would have received today, and for the reasons that my friend will expand on, is a case where a non-life outcome was a real prospect, indeed should have been imposed, and in those circumstances we say there is the substantial injustice that warrants late leave being granted. Even looking at the other factors on a conventional late leave application, there are reasons here to take this application seriously.

The difference between a life and a non-life sentence is always very material. Even if the Court were not to accept our analysis around *Rapira* and *Dickey* there is evidence both from Ms Churchward and the s 9 statement dealing with what her lawyer has said that demonstrate that she wasn't cognisant of the appeal right that she had or the opportunity to bring this kind of appeal

challenging the approach to life sentencing for children, and certainly until such time as *Dickey* had been.

1205

WINKELMANN CJ:

Sorry, now where does that – there is evidence, is that in her statements?

MR CONDER:

Her affirmation, and then there is the s 9 statement of the advice from her lawyer which indicates that it had been his suggestion to wait, that this was a matter that needed to be looked at a different day, and there no evidence to say that she took that advice but that is consistent with what then happened.

In any event, it is our submission that at the time of the Court of Appeal's decision in this case, there wasn't a clear reason to think that taking it further would lead to a different outcome. It was only after *Dickey* and in particular after the changed practice in the High Court following *Dickey* that it became that there really was a good substantial basis for this appeal. And so in similar circumstances to what can be seen in the *Taylor* decision, there was a good justification for waiting. It's not a case where that delay is unexplained. There is a rational explanation for it that justifies the approach that has been taken.

This, when viewed in light of what I've talked about as the diminished relevance of finality, should be sufficient to outweigh that principle and say that this is a substantial injustice that should be corrected.

WINKELMANN CJ:

So you're saying that even if there wasn't a shift from *Rapira* to – even if *Dickey* didn't represent a change in the law, we can be confident that Ms Churchward was relying upon legal advice in not taking her appeal further, and that shouldn't be held against held against her in terms of granting leave?

MR CONDER:

Effectively, that's the submission, yes.

CAMPBELL J:

Where do we see that s 9 statement?

WINKELMANN CJ:

It's in the materials came in Friday. Came in Friday.

MR CONDER:

It was very recently filed, your Honour. I believe it came on Friday.

WINKELMANN CJ:

It was. We received it on Friday.

MR CONDER:

It's quite brief, but just summarises what was in the affidavit that hasn't been provided to the Court.

COOKE J:

It's slightly unusual advice, I would have thought, to wait. Wait for what?

MR CONDER:

I accept that, your Honour. The position between the Crown and ourselves is that there is a large volume of information in that affidavit that probably isn't appropriate to have before the Court.

COOKE J:

Yes.

MR CONDER:

But in any event, that was the expert advice that was given to a vulnerable defendant who appears to have acted on it and whether the advice was the appropriate advice is not really an issue when assessing her decision-making. When she saw the change in position in the High Court, that's a sufficient reason to want to bring this appeal and, in our submission, that is the delay well explained.

So that is what I had to say on the question of leave. Unless there are further questions, I will pass back to Mr Stevenson to address the substantive merits.

WINKELMANN CJ:
Thank you, Mr Conder.

MR CONDER:
Thank you.

WINKELMANN CJ:
So we're back to Ms Te Wini.

MR STEVENSON KC:
Yes, and if the Court pleases, I propose now to speak to the merits of her case in a post-*Dickey* environment. I'm grateful to my learned friend for the heavy lifting in respect of the leave application and what has happened between *Rapira*, *Churchward* and this matter before the Court.

Just to say that the position, in summarising this now for Ms Te Wini, is that we see a relatively straightforward error correction by the Court of Appeal in *Dickey*, and that the Court expressed itself accurately then when it said that *Rapira* is "no longer correct".

Rapira, as the Court of Appeal in *Dickey* articulated it, said that youth could be given little weight and that for the reasons set out by the Court of Appeal in *Dickey* "[that] is no longer correct". And it's that change in the law, in our submission, which is the doorway through which these applicants potentially pass.

In terms of the approach, going back a long time now, of course, taken by Justice Woolford, there had already been quite some history in Ms Te Wini's case by then. She had stood trial, been convicted, given inept advice as to a number of things including the question of a plea of guilty. Her conviction was overturned.

Part of her appeal included the briefing of Dr Myers, an adolescent psychiatrist, who helpfully had been treating Ms Te Wini when she was remanded to a youth care facility, so knew her situation well.

Dr Myers — and I will come to this shortly, because it's a very important case or part of the case, I should say, for Ms Te Wini — opined that on account of a whole host of factors relating to this child, really, at 14 years old, on account of a whole host of factors relating to her background, Dr Myers opined that she was unlikely to have been able to foresee the risk of death. And that evidence was to be led at a retrial.

The Crown were aware of that. The Crown amended the indictment, effectively, as your Honours have probably seen, and charged Ms Te Wini with felony murder, or so-called felony murder, which was that she intended to cause really serious harm or grievous bodily harm, and that somebody died in the course of the associated robbery. And it is at that point she pleaded guilty.

Justice Woolford, it couldn't be suggested was unthoughtful in the sentencing exercise. He took a very careful approach and described it as a very "sad" case. But ultimately, he was circumscribed, the applicant says, by *Rapira* in the way Mr Conder addressed the Court earlier. Having described, as I said, the case as a very "sad" one, he concluded by citing *Rapira* and saying: "the offender's age and remorse can have only limited effect as well," footnoting *R v Rapira.* That's in the Supreme Court casebook at page 89, paragraph 66 of Justice Woolford's sentencing decision.

Now, in the Court of Appeal, that point was dealt with carefully on sentence appeal. Justice Wild, as your Honours might recall, writing for the Court of Appeal, said that youth – or the Judge couldn't be faulted for his approach to youth, and the reference for that is Supreme Court casebook page 24, I think it is, at paragraph 29 of that decision, dealing with youth.

So, I propose then to do a somewhat orthodox –

WINKELMANN CJ:

So, paragraph 29?

MR STEVENSON KC:

Yes.

CAMPBELL J:

Isn't it paragraph 17, when they've cited passages from Justice Woolford and say: "We consider those passages set out, in a flawless way, the approach a Judge must take when considering departing from the s 102 …"?

MR STEVENSON KC:

That's the preamble to it, that's certainly the lead-in, Justice Campbell. I think his Honour goes on to – for the Court we might just bring that up.

WINKELMANN CJ:

Well, extreme youth is at paragraph 26 and following. And at paragraph 29 they say: "… we see no basis for criticism," for the approach that Justice Woolford took, how he factored in her youth.

MR STEVENSON KC:

Yes, yes.

WINKELMANN CJ:

That's it, counsel.

MR STEVENSON KC:

That's the portion I was adverting to.

KÓS J:

I mean, part of the problem here is that this appeal came after *Churchward* and, in a sense, there the path had been scoured in *Churchward*, as they make clear at various points in their judgment. If not *Churchward*, then why *Te Wini*? And there is a reason why.

MR STEVENSON KC:

Yes.

KÓS J:

There are differences.

MR STEVENSON KC:

Yes, significant differences which I'll come to which are self-evident on the papers, respectfully.

1215

So, Ms Te Wini's case, in my submission, and some of this is difficult territory and I will be as appropriately general as I can, but Ms Te Wini's case can be positioned, in my submission, by asking: "why would a 14-year-old girl be attempting on multiple occasions to effectively end things?", as we have seen referred to in the psychiatric reports eventually prepared for sentencing. What sort of suffering lies beneath that sort of conduct by a 14-year-old girl? Well, here we see the reasons laid bare.

This child was, as the Supreme Court of the United States put it, raised within a brutal, chaotic "crime producing setting", an environment which that Court explained oftentimes children are prisoners to and cannot escape. There was gross abuse and Dr Te Wini [*sic*] explained, importantly in my submission –

WINKELMANN CJ:

Dr Myers.

MR STEVENSON KC:

I beg your pardon – Dr Myers, Elizabeth Myers, explained that this abuse further impeded the already youthful development for this 14-year-old. And it's within this context, of course, she did what she did on this night, when her and her cousin decided to jump the fence and steal things from the older gentleman next door. On any view, objectively irrational.

Now, her conduct, of course, led to more prison. Having been a prisoner for many years to her environment, she was a prisoner for 12 years. And now is a young mother who I have described in submissions and I think, respectfully, it's accurate, as a gentle, crime-free mother and I should say a creative person also, your Honours may have seen some reference to that.

KÓS J:
Where do we find the evidence for that?

WINKELMANN CJ:
The poem.

MR STEVENSON KC:
I beg your pardon?

WINKELMANN CJ:
It was attached to her affidavit but did it make it into our records, Mr Stevenson, the poem? Because I don't think it did.

MR STEVENSON KC:
I - right.

WINKELMANN CJ:
It seems to have been omitted from it. I don't know if that's your failure or our failure.

MR STEVENSON KC:
All right, we'll see that that's included. If one's interested, some of the poetry is set out in a paper by Dr Tracey McIntosh, "Indigenous Rights, Poetry and Decarceration".

WINKELMANN CJ:
Yes, and it's been read out at the UN.

MR STEVENSON KC:

At the United Nations, that's right. And Sir Ron Young at the Parole Board, one of the hearings, it's in the materials in the Supreme Court casebook, I think, described her as a talented poet and that her poems had been distributed internationally.

So we have this young mother, gentle, crime-free, in fact had no previous convictions prior to the offending for which this Court is now considering, who is still in some respects, one might say, a prisoner. She is subject to life imprisonment with all of the attendant prejudices. You have already heard Mr Conder speak to some of those.

WINKELMANN CJ:

Well, do you want to speak to them, from her perspective?

MR STEVENSON KC:

Yes and I will come back to those, your Honour.

WINKELMANN CJ:

Okay, thank you.

MR STEVENSON KC:

So, in terms then of the classic s 102 manifest injustice considerations vis-à-vis the offence and the offender, I intend to deal with the offence first and the matters relating to Ms Te Wini second.

Now, my submission and this picks up on something Mr Conder said earlier, one doesn't assess the offending by simply having reference to the objective criminality of what happened. Rather, in my submission, one has to consider the moral blameworthiness, as it were, of somebody like Ms Te Wini and here, in my submission, youth is potent. It can and does, in Ms Te Wini's case, drive down moral blameworthiness in terms of the offence.

And here, we can have regard to taking into account the "deserts principle", also described as proportionality, which is sometimes said to give sentencing or the sentencing exercise its political legitimacy. So, sentences must be proportionate, not just to the objective criminality of what happened but the moral blameworthiness of the offender, having regard to what they did and the circumstances in which they were. And here, of course, we say that youth is an incredibly important factor.

In *Dickey* itself at paragraph 177, the Court of Appeal said youth may mitigate the offence and recently this Court in *G (SC 130/2024) v R* [2026] NZSC 19, I think the age out case, said at paragraph 47 age is implicitly a feature of offender culpability in assessing gravity of offence. And an example of this approach can be seen in *Dickey* itself in respect of Ms Epiha. Youth, in respect of the approach to Ms Epiha, whose life imprisonment sentence was set aside, obviously on the Court's analysis mitigated culpability.

Now, what I have said about the importance of not diverting this consideration to the offender but rather looking at these matters in relation to the offence, accords with the expert evidence that was before the Court in *Dickey* itself from Dr Lambie at paragraph 77. And to paraphrase things that are reasonably well-known now but go directly to the culpability of the young person: their brains are underdeveloped, they tend to be impulsive and have less self-control, they are less able to consider consequences, they are less able to consider alternative courses, they are more vulnerable to the influence of peers and we've seen that here, and all of this is especially so in "stressful situations."

KÓS J:

Just to be clear, your argument here is this goes to setting the starting point?

MR STEVENSON KC:

Correct, yes.

KÓS J:

On the basis of the offence.

MR STEVENSON KC:

Correct.

KÓS J:

The characteristics of the offence, the culpability of the offence.

MR STEVENSON KC:

Correct.

KÓS J:

Right.

MR STEVENSON KC:

And it wouldn't necessarily be decisive in terms of outcome, because these factors are taken in at some point but, in my submission, as a matter of principle, they are more appropriately taken into account at this stage in terms of youth.

There are other matters relating to youth, prospects of rehabilitation and reintegration and so forth. We look at them when we are having regard to the offender but it does seem to counsel for Ms Te Wini and I think my learned friends also in terms of what was said earlier, that an assessment of the gravity of the offence must have regard to the fact for Ms Te Wini, for example, you are dealing with a very stunted 14-year-old.

KÓS J:

Well, I suppose your argument is the gravity of the offence takes into account the circumstances of the victim. It might also, therefore, take into account the circumstances of the offender.

MR STEVENSON KC:

Indeed and I hadn't thought about it in that way but that –

KÓS J:

As long as there’s not a double-counting between the two counts.

MR STEVENSON KC:

No, no, no, indeed. It's counted somewhere but it rather seemed to counsel, given what as I say the Court said, albeit somewhat fleetingly, recently in *G v R*, youth is relevant, as I said –

WINKELMANN CJ:

But your point is simple, isn't it, Mr Stevenson, that at this stage when you're looking at the offence you take into account the moral blameworthiness of the offender. So personal mitigating factors are another thing but –

MR STEVENSON KC:

Correct.

WINKELMANN CJ:

– when you're looking at the seriousness of the offence – the offending, the seriousness of the offending, so it's their offending.

MR STEVENSON KC:

Yes, yes, that's right, and so we're not necessarily in any grave difficulty here because of what the Court said in *Van Hemert* recently, that it's an overall impression having regard to both matters and this is assessed at some point. But I just wanted to make the point that from this applicant's point of view, as a matter of principle, it seems appropriate to factor youth at that point.

Now, not only was Ms Te Wini, as a matter of fact, very young, I described her and was later criticised by the Court of Appeal for doing so as being on the cusp of criminal liability, but whatever the view of the legal position, not only was she as a matter of fact only 14 years old –

WINKELMANN CJ:

They said that she was 11 years – 11 months past the cusp of criminal.

1225

MR STEVENSON KC:

Yes, she was closer to her 15th birthday. But in my submission, her already, presumptively one might say, diminished youth capacity for rational decision-making was further diminished by childhood abuse. And this is an important point, in my submission, that one ought not overlook.

And it might be helpful just to refer to some passages from Dr Myers' report at this stage, which is – and we'll bring this up. It's in the Court of Appeal materials from page 62. Mr Fredrickson, just go to – scroll up and then down there, there are some passages marked with blue.

WINKELMANN CJ:

It was also covered in Dr Skipworth's report, wasn't it, this aspect?

MR STEVENSON KC:

Correct. Yes, scroll up please. Scroll down, I beg your pardon, and you'll see some margin markings. Not those ones. Carry on, carry on, keep going. All right, I think my highlighting this morning hasn't uploaded. Just give me a moment please.

COOKE J:

You did say page 62. You were on page 63 then.

MR STEVENSON KC:

Yes.

WINKELMANN CJ:

Was it at paragraph 5.1?

MR STEVENSON KC:

Yes, so page 62 using the PDF numbers. We'll go back to that, thanks. Just – yes, and just expand that please. It's the paragraph just above paragraph 3.2. Having gone through the history of Ms Te Wini, Dr Myers says that the useful, aforesaid useful information "points to pre-existing mental health problems.

The picture suggests a significant substance use disorder, emotional dysregulation, some behavioural problems, mood symptoms and possible eating disorder symptoms … evidence that Ms Te Wini had a life characterised by repeated exposure to violence", and then the following page 63 at 3.2.2 –

KÓS J:
Page 61.

WINKELMANN CJ:
Page 61 on our –

MR STEVENSON KC:
Right – yes, sorry, I'm using the PDF numbers just for ease of reference for Mr Fredrickson. The psychiatric diagnosis on 15 January 2009 recorded: "1) Acute stress disorder ... 2) Chronic Post Traumatic Stress Disorder, related to past sexual trauma. This was indicated by Ms Te Wini re-experiencing events through nightmares and flashbacks, and disassociating." And further down under paragraph 3.2.3: "... experience of psychotic symptoms ie, hallucinations, wase seen as related to her PTSD," which was related to historic matters, so that was a long-standing diagnosis of PTSD.

And at page 64 of the PDF beginning: "Ms Te Wini's psychiatric presentation …" yes, it fits with, as I've said, the description of complex PTSD and importantly, which is where I'm going here: "Young people with this disorder frequently experience poor self-concept, depression, and difficulty with affective regulation. They tend to be impulsive. They may be aggressive towards themselves or others. They may also appear anxious, hyper-alert, startle easily." So not just youthful impulsivity, but here that elevated, one might say, having regard to the impact of those things which have followed years of abuse.

And then at page 66, using the PDF pages, or page 64 on the top number, so at 5.1: "There is strong evidence that trauma experienced during development, (ie, childhood and adolescence) interferes with the right hemisphere

development, which is important for processing information related to emotion, social interaction and psychological stress."

And then to the next paragraph: "Trauma can also cause increased difficulty in accessing higher cortical centres, which are the areas of the brain essential for formulating appropriate decisions. This means that especially in stressful circumstances, there can be a tendency to 'short circuit'" – your Honours might recall Dr Lambie talking about that in the materials that were put for *Dickey*, are well-established in the social sciences – "… 'short circuit' the thinking part of the brain, leading to poor consequential thinking, poor planning, and difficulty in modulating behaviour." So your Honours hopefully will understand why I've highlighted that and the relevance to the moral blameworthiness, so to speak, for Ms Te Wini.

And the final reference, if the Court pleases, from Dr Myers' report is at page 72 of the PDF numbers.

COOKE J:

I'm going off the other numbers.

WINKELMANN CJ:

Page 70?

MR STEVENSON KC:

Yes, indeed. Moving more quickly than me. And so under paragraph 7.6 – could you just expand that? It's already a poor copy, in case anyone is looking just at the ClickShare, thank you. Second paragraph under paragraph 7.6: "The combination of Ms Te Wini's youth, her early onset substance abuse, past history of trauma and current depressive illness and PTSD would have contributed significantly to executive functioning difficulties. In particular, Ms Te Wini is likely to have had an impaired ability to control her impulses, to monitor and change her behaviour as needed, and to adapt to changing situations … ."

And concluding at the bottom of that page: “Given Ms Te Wini’s past history of trauma ... [she] is very likely to have experienced an emotion-stress reaction e.g. ‘fight or flight’ response in the period leading up to the offence. This situation would be an example of ‘hot’ cognition … ‘short circuiting’ of the prefrontal cortex … .”

So, I just thought it was important to go through that to demonstrate we’re not just talking about a 14-year-old with the usual presumptive mitigating matters so far as their liability is concerned. The situation for Ms Te Wini was, sadly, more complex than that and she was diminished as regards the ordinary, one might say, run-of-the-mill 14-year-old.

So, again, this is akin to the *Epiha v R* CA645/2020 case in *Dickey* in which the Court of Appeal at paragraph 237 said there was a clear connection between her social environment into which she was born and the offending.

WINKELMANN CJ:
That “hot”, what is it, the?

MR STEVENSON KC:
The hot cognition.

WINKELMANN CJ:
Yes, that relates to the incident that occurred just before they set out from the house, does it, with a young man trying to bust into the bedroom?

MR STEVENSON KC:
Well, yes, that was one might say the genesis of it, but it’s also relevant to what’s happening inside the house. There was no plan, of course, to commit the assault that was ultimately committed. The plan was, and to use the words again of Justice Moore talking about youths, to on an “objectively irrational” basis go in and steal some money from the neighbour and get away with it and use that to buy cannabis.

1235

And it was when there was something, I suppose, of a startle by – on account of the occupant being aware of their presence, I think you would say, that then there has been this hastily formed plan to use weapons, and your Honours will have seen reference to that, and Justice Woolford in his sentencing goes through that and describes Ms Te Wini not being keen initially, putting away the heavier weapon and using a lighter weapon and not striking the first blows, and not to be said striking the head.

So, a very low level of culpability at this point, in my submission. Of course, we also have no murderous intent. I've already spoken about that, and in my submission that has perhaps not been given sufficient weight in this and other cases. For what it's worth, your Honours will have seen that this is not an uncontroversial proposition, that anyone should be convicted of murder without murderous intent, and the Supreme Court of Canada have said that it's unconstitutional, it's fundamentally unfair to convict a citizen of murder when they had no murderous intent. Here, Ms Te Wini is in a situation where she is to be considered on the basis of her plea to felony murder, s 168, that she foresaw only the risk of serious harm, not death.

So, on the facts then, to summarise, this was impetuous, ill-considered, chaotic behaviour. It had all the hallmarks of youth. There was, one might say, a clear example of hot cognition, impaired executive functioning, which is connected to foresight of consequences.

And at this juncture, I'd also just observe that the ill-hatched plan was to steal money for cannabis, and on its face, Justice Venning thought that that was a very poor background fact, your Honours might recall. But in my submission, there is a little more nuance to this. The various reports make it clear that in a sense, Ms Te Wini was engaging in some sort of rudimentary self-medication. She was in the midst of serious abuse. At one point, there appears to have been crossover, simultaneously being abused, and she was using cannabis in that context.

So, I'd then turn, if the Court pleases, to the consideration of manifest injustice regarding the offender. Whichever way one cuts it, Your Honours have heard my submissions regarding youth and reduced culpability on account of Ms Te Wini's particular, very sad background. At this point, then, in terms of the offender, we have in her mitigation, her remorse and guilty plea.

Now, as to remorse, I wanted to draw your Honours' attention and bring this up on the ClickShare, the Court of Appeal materials at 058. It's a letter from her religious counsellor while she was incarcerated.

WILLIAMS J:
So that – 058, you say?

WINKELMANN CJ:
It's 056.

MR STEVENSON KC:
Right, yes, thank you. So, just to situate your Honours, Ms Te Wini's incarcerated and she's written to this religious counsellor. As we can see in the first paragraph, she'd written to the branch requesting Bible study and almost immediately, one can see, a third of the way down, upon meeting: "... asked me if there is such a thing as an unforgivable sin and if God can forgive people who have done bad things?" She was assured that those who are: "... genuinely sorry will be shown forgiveness. Despite [that she] was very self-condemning, by saying, 'I don't think that God can forgive me.'"

And the next page please, not highlighted but just really the penultimate paragraph: "In the almost two years I have known Lori-Lea I have noticed a transformation in her attitude and personality. From a young child full of anger and distrust to a placid young adult who is trying her best to find the answers to life's important questions in the hope it will make her a better person. She displays maturity [and can] reason on subjects that [previously were beyond her. [There is] evidence of motivation and self-discipline."

Justice Woolford spoke to remorse in the Supreme Court casebook at paragraph 25 of his decision, which I think it's page 70. If you can go to paragraph 25 thanks. I beg your pardon.

COOKE J:

Paragraph 24.

MR STEVENSON KC:

Sorry, Sir?

COOKE J:

Paragraph 24.

MR STEVENSON KC:

Right. Yes, elsewhere the Judge refers to the probation report recording her remorse and I might just come back to that. We will find the reference.

KÓS J:

Paragraph 23, in fact.

MR STEVENSON KC:

Paragraph 23.

KÓS J:

Paragraph 23 he refers to it.

MR STEVENSON KC:

Yes, that's my poor handwriting. I thought I had paragraph 25. Thank you, Justice Kós.

COOKE J:

I tried.

MR STEVENSON KC:

You see there, self-evidently, expressions of remorse and insight even at that somewhat early point. And the willingness in terms of restorative justice which is understandably something that didn't go forward.

In terms of the guilty plea, if the Court pleases, I have already previously mentioned that. In my submission, in many ways Ms Te Wini was deprived the opportunity of an earlier guilty plea. Her position at trial was that involvement couldn't be proved. Not all of this is covered in the Court of Appeal decision because the Court of Appeal simply quashed her conviction on the basis that she wasn't given appropriate advice about a guilty plea.

Trial counsel gave evidence and the position for Ms Te Wini back at that time is that she had not been assessed by a psychiatrist, she was much more unwell than trial counsel realised and that seeing her in only the weeks or days leading up to trial to discuss the disclosure and the evidence against her was never going to be sufficient.

So, the background of her having stood trial, in my submission, needs to be seen within that context. There was obvious involvement and when she had representation which allowed her to review those things and the evolution, as I have discussed, as regards the indictment, she very promptly pleaded guilty and has always been remorseful, in my submission.

Turning to the prospects of rehabilitation. Many of these, if the Court pleases, are self-evident. There were no previous violence convictions. She was incident-free throughout her 10 years' – 12 years', I beg your pardon – sentence. No offences or breaches and, as I have already mentioned, discovered her talent for writing and expressing herself and her poetry during her time of incarceration, with thanks to Professor Tracey McIntosh who introduced those things to her as she was counselling young female prisoners.

1245

We've learnt, meeting – if I can just update the Court – with Ms Te Wini and Professor McIntosh over the weekend, of a very recent development which also speaks, in my submission, to prospects of rehabilitation for Ms Te Wini. Professor McIntosh is spearheading a study into incarcerated women in New Zealand and the impacts on their whānau under the auspices of the Borrin Foundation, and Ms Te Wini is a member of the advisory committee on that body in respect of that work.

So I then want to talk to the impact of life sentences on young people, and this was discussed by the Court of Appeal in *Dickey* at paragraphs 184 to 193, but unsurprisingly, again self-evident, long sentences can be damaging for young people, an indeterminate sentence can be particularly punitive for young people, mention of this already, conditions can be onerous and perceived as punitive.

I note at this point that the Court of Appeal also in *Dickey* had before it expert evidence from a Dr Lynch, which is summarised at paragraph 142. That research shows young people in most other cognate jurisdictions do receive determinate sentences, young people before the courts for murder, and New Zealand is something of an outlier in that regard.

Parole for life, in my submission, and we've seen this or can see this in the evidence from Ms Te Wini that's before the Court in her affidavit in support of the application, is creating ongoing anxiety. It is creating interruption for her family, and is, in my submission, a reality in which full autonomy can never be realised.

COOKE J:

At some stage, Mr Stevenson, I'd quite like to go to the most recent Parole Board decision just to understand exactly what her limitations now are.

MR STEVENSON KC:

Yes.

COOKE J:

Would you like to do that now or a bit later?

MR STEVENSON KC:

Well, no, I can speak to that. So her fundamental limitations –

KÓS J:

Could you take us to it?

MR STEVENSON KC:

Yes. It's in the Supreme Court casebook.

COOKE J:

Page 104.

MR STEVENSON KC:

And the obvious one, just while that's coming up, is the restriction on visiting the Eastern Bay of Plenty.

COOKE J:

Can I ask about that, because she mentions that in her affidavit. This decision at page 104, which is November 2024, varied that condition, is that right?

MR STEVENSON KC:

Yes, so that she can go there by providing notice, I think from memory. Yes.

COOKE J:

Right, so – and she raised the concern about that limitation.

MR STEVENSON KC:

Yes.

COOKE J:

The Board took into account the interests of the victim's family and reached what is described as a compromise position.

MR STEVENSON KC:

Yes. Look, in my submission, that's a good point really to situate this consideration, because it would be wrong, in my submission, Justice Cooke, to take an atomistic view to the impacts of a life sentence and life on parole. There will be the occasional interruptions and one might say aggravations and difficulty posed by conditions such as not to go to the Bay of Plenty, an application can be made and sometimes conditions will be amended.

But really, the gravity of a life sentence is different and it's to be understood from the point of view of the person who is subject to that sentence, in the sense that for the rest of their natural lives they are never able to have full autonomy. And the position I would say for Ms Te Wini, paraphrasing representations made by Professor McIntosh over the weekend about her position, is that she will never be able to be fully reintegrated into the community whilst she is subject to life imprisonment. The eternal anxiety on her part about breaching, the humiliation of a probation officer notifying the occupants of places she is visiting, for example. Those sorts of things, in my submission, subsist and are, as Justice Collins put it in the Court of Appeal for *Dickey,* understandably appreciated or perceived by people as punitive and interruptive.

COOKE J:

Is her whānau located in the place that she can't go without permission, or is that in a different location?

MR STEVENSON KC:

Both.

WINKELMANN CJ:

That's not such a hardship for her though, is it? Because she says she has made the decision not to have her tamariki exposed to her whānau from that region.

MR STEVENSON KC:

Yes, but on that point also, in my submission, it is inevitable that children growing up learn that a parent is a "lifer" and subject to a life imprisonment sentence, and that is a very real and potentially subtly damaging impact of that sort of sentence, as well.

KÓS J:

You do have to be a bit atomistic, though, don't you? There's a distinction between conditions which, if unduly onerous, can be remitted. And recall, which the Parole Board can do nothing whatsoever about. Now, clearly there has been remission of some of the conditions or modification. And in the fulness of time, one might imagine they'll probably almost all go. But recall is the thing that hangs over like the Sword of Damocles.

MR STEVENSON KC:

Yes, indeed, and I was about to come to that, but your Honour has summarised the position. There will be the checking in and reporting always to a probation officer, reinforcing the knowledge that one is subject to the life parole sentence.

COOKE J:

And that's once a month, is that right?

MR STEVENSON KC:

Yes, but also the ever-present, at least for Ms Te Wini, anxiety inducing proposition that she'll be breached, as she puts it in her affidavit, for speeding on the way to the hospital or not getting home in time or something like that.

WINKELMANN CJ:

She's not subject to any curfew now though, is she?

MR STEVENSON KC:

No.

WINKELMANN CJ:

But when she leaves her area, does she have to get consent to leave her area or can she move freely, subject to that geographic prohibition?

MR STEVENSON KC:

I'll check that over the luncheon adjournment. My understanding is that she does need to gain permission.

COOKE J:

Just looking at what we've got on page 106, paragraph 11 of that Parole Board decision. The numbers 1 to 5, and 5 seems to be the residential one, only seem to have gone on through to the end of November –

MR STEVENSON KC:

Yes.

COOKE J:

– so that they seem to have gone now. So the conditions are at 6, 7 and 8, aren't they?

MR STEVENSON KC:

It appears so. Let me check.

COOKE J:

And am I right from her affidavit that once a month reporting, there has been a degree of flexibility about that? Sometimes a probation officer has come to her address because her child needs – and occasionally it's been done by phone.

WINKELMANN CJ:

And on the phone.

MR STEVENSON KC:

Yes, yes, and she's very fair about that. She says, you know, there's been flexibility and sometimes, yes.

CAMPBELL J:

Can I just check? Something you said a moment ago suggested that reporting condition can't be lifted. Is that correct?

MR STEVENSON KC:

No.

COOKE J:

That's just a standard condition that can be varied, is that right?

CAMPBELL J:

So that itself –

MR STEVENSON KC:

Yes, I believe so.

CAMPBELL J:

– might disappear in the fulness of time?

MR STEVENSON KC:

Yes, yes.

COOKE J:

The only thing that can't disappear is the Sword of Damocles, as Justice Kós put it.

MR STEVENSON KC:

Damocles, hanging over her head, yes. And also the stigma attached to having a life sentence and, of course, the question here is whether or not one should have been imposed in the first place, and our position is it should not have. In a post-*Dickey* world, it would not have, and in those circumstances, it should be set aside.

CAMPBELL J:

Is that stigma really materially different from the stigma from the conviction for murder?

MR STEVENSON KC:

Well, I suppose it's not really for me to say. Ms Te Wini is suggestive of that, in my submission, in her evidence. And one can easily see why one would feel a stigma for having that sort of a sentence. It's reinforced, isn't it, constantly, year after year for the rest of one's natural life?

CAMPBELL J:

Well, the recall might be, but –

MR STEVENSON KC:

But the very fact of a life sentence –

CAMPBELL J:

– the conditions themselves, as Justice Kós suggested, may in the fulness of time all disappear, and if they're not, that might really be an issue with how the Parole Board is exercising its jurisdiction, rather than a sentencing issue.
1255

MR STEVENSON KC:

Yes, and all of those things are true. I suppose I can't really say any more except to say for Ms Te Wini, as this applicant, and perhaps more generally, that inevitably a life sentence is one for which that person is always cognisant of, and that will have a subtle impact on their sense of dignity and autonomy.

WINKELMANN CJ:

She describes how — the impact on her mana and on her relationship with her partner's family of this obtaining of consent. But I assume that that is a thing in the past now, too, if those conditions are gone?

MR STEVENSON KC:

It's historical, yes, yes.

KÓS J:

Where was this evidence?

WINKELMANN CJ:

It's in her affirmation or affidavit.

MR STEVENSON KC:

Yes, which I think is in the Supreme Court casebook in support of the application for leave.

KÓS J:

Right. I will find that.

COOKE J:

It's actually in a separate bundle which has mostly authorities in it, I think.

KÓS J:

Oh, yes, there it is.

MR STEVENSON KC:

Oh, I beg your pardon, right.

KÓS J:

Appeal materials.

MR STEVENSON KC:

That's right.

WINKELMANN CJ:

Sometimes our materials are hard to navigate.

MR STEVENSON KC:

There is so many of them, that's yes.

KÓS J:

Right, got it, thank you.

COOKE J:

I was trying to put together the decision of the Board with her statement because there were things that didn't match up.

MR STEVENSON KC:

Yes and her statement is somewhat dated, obviously.

COOKE J:

Yes.

MR STEVENSON KC:

Yes. I was going to speak to cases post-*Dickey*, but I think that's been dealt with by Mr Conder in terms of the comparison with what's now happening. Just the one case between *Rapira* and *Dickey*, and since *Dickey* I think the number is at least 12, isn't it?

WINKELMANN CJ:

But your point is that *Rapira*, whether or not *Rapira* stands for the proposition it was taken for, *Rapira* was operative and you can see it was operative in Justice Woolford's sentencing notes and he explicitly referred to it and its effect. And then the Court of Appeal said: "well, that's right"?

MR STEVENSON KC:

Indeed and that was indicative, in my submission, of the approach, as Mr Conder said, the judges effectively felt there was a straitjacket when it came to dealing with youth and s 102 of the Sentencing Act 2002, the great circumscribing brought by *Rapira*.

Just before the break, I just wanted to refer your Honours to one case which demonstrates the difference pre- and post-*Dickey*. Now, this is in the appellant materials at page 810. It's *M v R* [2023] NZCA 319, a Court of Appeal decision from 2023. Why we're bringing that up, the short point is this was a 14-year-old convicted of stabbing, sentenced to life with an MPI of 10 years, per *Rapira,* and then post-*Dickey* the matter is back before the Court and that sentence is set aside. We can see the result at paragraphs 92 and 99.

COOKE J:

What was the replacement sentence?

MR STEVENSON KC:

I'll just bring that up, paragraph 99.

WINKELMANN CJ:

Are you going to deal with the sentencing methodology at some point, Mr Stevenson, if you substitute a finite sentence?

MR STEVENSON KC:

I will come back to that. Yes, in terms of the construction of the sentence that's what we –

WINKELMANN CJ:

Because it seems problematic, the methodology, because it relies on very large discounts.

MR STEVENSON KC:

The *Dickey* — and the way it's subsequently been re-approached by *R v P and D* [2024] NZHC 2118, I think, Justice Johnston and talking about the implied starting points.

WINKELMANN CJ:

Yes.

MR STEVENSON KC:

Yes. Yes, we've had some time to think about that and after the luncheon adjournment I will speak to that and the approach we say should be followed for Ms Te Wini.

WINKELMANN CJ:

Right. Oh, it's lunchtime. Thank you for reminding me it was lunchtime.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.19 PM

MR STEVENSON KC:

Yes, if the Court pleases, just before the break I had mentioned a recent Court of Appeal case called *M v R*, July 2023, which we say really draws into sharp relief pre- and post-*Dickey* worlds. I am just going to bring up some references in a moment but a thumbnail sketch is this: a 14-year-old, a stabbing, a pre-*Dickey* life with an MPI of 10 years, so a *Rapira*-type approach. Post-*Dickey* Court of Appeal, no life imposed, rather a determinative sentence, 13 years, an MPI of five years two months. So we can see –

WILLIAMS J:

What was that, what was the MPI?

MR STEVENSON KC:

Five years and two months.

WILLIAMS J:

No, the one with the pre-*Dickey*?

MR STEVENSON KC:

Ten.

WILLIAMS J:

Ten.

MR STEVENSON KC:

Ten. So, this is a case which begins in the appellant's materials at page 810 but we're going to jump straight forward to the sentence appeal because there was a conviction appeal, as well, which takes up a lot of territory, paragraphs 90 and 91 and this is Justice Mallon writing for the Court of Appeal from memory: "[91] The Judge acknowledged the higher courts might alter the approach to assessing whether a sentence of life imprisonment is manifestly unjust in relation to young offenders but noted he was to sentence M in accordance with the law as it presently stood. This meant that youth itself was not a sufficient reason to make life imprisonment manifestly unjust." And life imprisonment not imposed and as I have just said to your Honour Justice Williams, MPI 10.

And then paragraph 92: "*Dickey*," with its own subheading, "[92] Since M's sentencing, this Court issued its decision in *Dickey*. In *Dickey* the Court held a more flexible approach to the presumption ... having regard to developments since ... *Rapira.*"

Then paragraph 95: "It is, however, M's young age," recalling, of course, that he was 14, "that provides some explanation for what occurred."

Paragraph 99: "We consider that M's young age significantly reduces his culpability. He was materially younger than the three appellants in *Dickey* ... ."

At paragraph 107: "We are satisfied that a sentence of life imprisonment is manifestly unjust and that a determinative sentence should be imposed."

Paragraphs 111 and 112, you can see the construction of that sentence: "[111] ... a determinate sentence of 12 years and seven months' ...", the so-called stand back approach was referred to by the Court: "[112] ... end sentence of 13 years ...", and then at paragraph 117, we see the MPI.

WINKELMANN CJ:

So he's youth plus low IQ?

MR STEVENSON KC:

Yes. A stabbing by a 14-year-old.

WINKELMANN CJ:

But if we think about *Dickey*, it's youth plus, he's, is he, is it just the low – just – but you know, what are plus factors?

MR STEVENSON KC:

Yes. I don't recall if there was significant background deprivation. My reading, really, of –

WINKELMANN CJ:

Alcohol.

MR STEVENSON KC:

– the Court of Appeal decision is it's essentially the change in *Dickey* that drives almost an automatic different outcome.

Now, just in terms of comparator –

KÓS J:

So you have an MPI of 10 years and managed to get that increased to 13?

MR STEVENSON KC:

No. A determinate, a finite sentence, I beg your pardon.

KÓS J:

A finite sentence, okay, right, thank you.

MR STEVENSON KC:

Of 13 and the MPI is five years and two months.

KÓS J:

Fine, right, thank you.

MR STEVENSON KC:

So a really low MPI.

KÓS J:

Yes, no, that's –

MR STEVENSON KC:

It's quite serious offending.

KÓS J:

Yes.

MR STEVENSON KC:

Now, in terms of comparator cases, there is a table which I thought might be useful for the Court if your Honours haven't already observed it, and that's at the end of *R v Messervy* [2024] NZHC 3770, which from memory is a High Court sentencing.

WINKELMANN CJ:

Where is that?

COOKE J:

Where will we find that, yes?

WINKELMANN CJ:

Messervy?

MR STEVENSON KC:

Oh, beg your pardon, 925 of the appellant's materials.

WINKELMANN CJ:

And that's the number?

CAMPBELL J:

54 perhaps.

1425

WINKELMANN CJ:

Yes, *Messervy*.

MR STEVENSON KC:

And I should say *Messervy* is now reserved by the, I think, five judge permanent Bench of the Court of Appeal as to which approach to take, that the implied discounts approach or the approach taken in *Dickey* and *Kriel* itself. So, in *Dickey*, for example, the starting points were in the vicinity of, when we're talking about finite sentences and the calculation of the sentence, they were 20 or just over or just below. Later, Justice Johnson, I think it was, said for transparency reasons he thought that he could infer implied reductions, and the starting points needed to be much higher. So, the controversy as between those two approaches is currently reserved.

KÓS J:

What case did Justice Johnstone say that in – was that in *Messervy?*

MR STEVENSON KC:

R v D and P [2024] NZHC 2118*.*

KÓS J:

D?

MR STEVENSON KC:

D and P, I beg, your pardon. I think that's in the materials.

WINKELMANN CJ:

D and P, or *B and D and P*.

MR STEVENSON KC:

D and P. I call it *D.*

WINKELMANN CJ:

D and P, D and P.

MR STEVENSON KC:

I beg your pardon, *D and P*. But for what it's worth, well, a helpful reference –

WINKELMANN CJ:

It's an appeal from Justice Simon France.

MR STEVENSON KC:

In the table we can see to the starting points which have been taken in *Dickey* itself. Ms Dickey and Mr Brown, finite sentences, starting points of 22 and 18. Ms Epiha, I've spoken about a few times already, a different case but also dealt with in *Dickey*, 20. We need to scroll down to the next page.

COOKE J:

I guess one of the things about that is that this is before the acknowledgement in *G v R* that some of the youth factors go to culpability and therefore, starting point.

MR STEVENSON KC:

Yes, and I mean, I appreciate that building upon that I am potentially adding another layer of complication, but that is what this Court specialises in, resolving complicated situations.

WINKELMANN CJ:

Thank you very much.

WILLIAMS J:

You were doing so well up until that point, Mr Stevenson.

MR STEVENSON KC:

Now, turning then to the –

WINKELMANN CJ:

So, what's your other layer of complication? Because it's so complicated, it had probably, it had passed me, whizzed by, no doubt.

MR STEVENSON KC:

Well, at that point perhaps your Honour I turn to the calculation which I say is open in terms of the case of Ms Te Wini and the sentencing for her, assuming a life term is manifestly unjust and we're in finite sentence calculation territory, with the qualification that counsel is often somewhat uneasy talking numbers. It doesn't happen everywhere; counsel are precluded, both defence and Crown, across the Tasman from mentioning numbers, that's not the provenance of counsel. They have a different approach and distinctive synthesis, but a very firm line, counsel are not to talk numbers, and also in the United Kingdom counsel are more restrained.

Here what I would say in terms of the calculation of sentence for Ms Te Wini, it would be broadly open for the Court to say the objective seriousness or criminality of what happened here might attract a starting point in the vicinity of 20 years. However, calculating in, as I said earlier today, the reduced moral blameworthiness for Ms Te Wini when we're actually considering the offence, what actually happened and who was involved and what that person's capacity was having regard to what you might say is an amalgam of youth, those presumptive matters Dr Lambie helped the Court about in *Dickey* and we heard about, of course, in *Churchward*, having regard to youth. But also, the matters set out by Dr Myers in respect of Ms Te Wini herself, her almost at this stage twice reduced culpability, youth and the impact of her impacted development, I would say 25% reduction at that point.

WINKELMANN CJ:

So, when you talk, are you talking about from the starting points?

MR STEVENSON KC:

Yes.

WINKELMANN CJ:

This is not before you apply any discounts, which is an unfortunate –

MR STEVENSON KC:

No, no, so we're at 15 years.

KÓS J:

Well, hang on, so this is page 39 of your written submissions?

MR STEVENSON KC:

Well, we're advancing upon that. We said the prevailing approach was that set out in Justice Johnstone's decision. We are now aware that that's up for a debate.

KÓS J:

Right.

MR STEVENSON KC:

And upon reflection, I mean we did say I think in our footnote that we didn't think that was the correct approach, and so we're really going back to *Dickey* and saying, well, let's do it in a somewhat not quite old-fashioned way, but perhaps a more orthodox way.

KÓS J:

Well, that's – isn't that what you've done? Oh, that's not what you've done at page 39?

MR STEVENSON KC:

No.

KÓS J:

No.

MR STEVENSON KC:

So here, to recapitulate, is what we suggest is open in respect of Ms Te Wini. Criminality 20, but less 25% having regard to her reduced moral blameworthiness, 15 less, a total of 35% for the mitigating factors of guilty plea, remorse, prospects of rehabilitation – so we're trying not to double-count here, as your Honour Justice Kós said earlier when I was advocating this approach, one needs to take care not to double-count youth at this point – would bring the sentence down to around 10. I think it's about 9.75.

We then have to consider, as the Court of Appeal did in *M* which I've just mentioned, adopting the *Dickey* suggestion that being true to *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 the Court has to stand back and say, as a matter of impression, is that an appropriate response to the gravity of what occurred, and there will probably be some uplift. In *M* I think it was only one year, from memory, but perhaps that takes it to 11 to 13 or something like that. And in terms of the approach of *M*, I would suggest an MPI here, had Ms Te Wini been sentenced now, would have been about six years.

KÓS J:

That seems, with respect, quite a muddled approach. I would've thought that gravity would be taken into account at the starting point and not as a standing-back factor at the end here?

MR STEVENSON KC:

The Court said in *Dickey* that it felt that was appropriate, that when you apply the deductions, at that point you're then standing back and saying is that act, having regard to the gravity of what – and the fact that a life has been lost –

KÓS J:

Yes, well, I mean you should always stand back.

MR STEVENSON KC:

Yes, yes.

KÓS J:

I'm not disagreeing with that point.

MR STEVENSON KC:

No.

KÓS J:

But I am disagreeing with the proposition that you end up with a sort of – you take it down, then you pop it all up again at the end if there's the gravity.

MR STEVENSON KC:

Yes. No, yes.

KÓS J:

The gravity of the offending should be taken into account at the first stage of the starting point.

MR STEVENSON KC:

And you're faithful to the steps that follow thereafter, yes.

WINKELMANN CJ:

Well, if you take it into account – yes. If you take it into account at the second stage, that's suggesting that you've done something wrong.

MR STEVENSON KC:

Something wrong, yes.

WINKELMANN CJ:

If you're having to re-adjust.

MR STEVENSON KC:

Yes. So if the Court pleases, that really concludes the essential argument for Ms Te Wini, unless there were any questions.

COOKE J:

I just have one additional thing just to raise with you, which concerns Justice Kós' Damocles' sword. I'm right, aren't I, that recall is not automatic? It would require a decision of the Board?

MR STEVENSON KC:

Yes, and there was evidence in *Dickey* in fact about that. There was quite a lot of evidence. There was evidence from the only two persons who'd had life parole set aside, and there was evidence from Corrections about – I think the theme of the evidence was the care with which recall applications are treated.

COOKE J:

Right.

MR STEVENSON KC:

It's not automatic in the sense: there's a shoplifting, you're automatically recalled.

COOKE J:

Well, there's criteria required.

MR STEVENSON KC:

Yes, yes.

COOKE J:

Which is either you've committed an imprisonable offence, you're an undue risk to the community, you've breached your parole conditions, are the three major ones. And then the Board has also a discretion to apply as to whether recall is necessary.

MR STEVENSON KC:

Yes, that's objectively true. Practice may be somewhat different. I think in *Dickey* there was some discussion about the commencement of a recall

application but also, of course, Ms Te Wini and persons in her situation, as she has deposed, nonetheless have the sword hanging over their head.
1435

COOKE J:
Sure.

MR STEVENSON KC:
And the attendant anxieties that that can create for the rest of one's natural life. One is essentially an outsider in many respects.

COOKE J:
Sure.

MR STEVENSON KC:
As the Court pleases.

WINKELMANN CJ:
Thank you, Mr Stevenson.

MR de GROOT:
May it please your Honours.

WINKELMANN CJ:
Mr de Groot.

MR de GROOT:
Ms Churchward's case is a difficult one, and I don't wish to pretend otherwise. But it's a difficult case which, in our submission, admits for a clear answer which is that the sentence of life imprisonment was manifestly unjust.

As terrible as this offending was, it merited the most measured and compassionate sentencing response. And in the language we've been using today, this was very much a case of youth plus, where the plus might tend to greatly understate what we're actually talking about. This suggests that there

is no reason in principle that all of the purposes and principles of sentencing could not be met by a lengthy determinative sentence in this case.

Much like Mr Stevenson, I'm going to break this down into all of the circumstances of the offence, and address some the Crown's submissions about the relevance of the s 104 cases. And then I will address the circumstances of Ms Churchward, and there I will respond to the Crown's submissions that there is not a link between Ms Churchward's circumstances and the offence, and other submissions about the absence of a guilty plea and what is alleged to be an absence of remorse.

Diving right into the offending, this was probably an offence that it would have been very difficult for a member of the public to understand casually observing from the outside. On the face of it, we have an elderly man who has been attacked in his bed and killed while he was asleep. A member of the public could reasonably take the view, what on earth is going on here? This looks like possibly gratuitous violence, or worse. It's perhaps something even more sinister than that.

As terrible as this was, the truth is much sadder and much more complex. Ms Churchward and Ms Te Wini, of course, went to trial. Ms Churchward gave evidence at that trial, and the defence theory was that there was never any intention when going into that house that somebody would be brought to serious harm. That wasn't the purpose of the offending. The girls were conducting a burglary, a burglary which may have transformed into some form of a robbery once they were in the house.

But when it came to the deployment of the violence, the defence case was that the purpose of the violence was to render Mr Rowe unconscious so as to allow the girls to go through his room. What Ms Churchward said to the jury is she understood that people usually kept their valuables in their room, their jewels in their room, and for that reason they wanted to go through it.

So it was when they were in the house that they improvised this plan to knock Mr Rowe unconscious.

KÓS J:

Well, the critical thing was they didn't take weapons to the house.

MR de GROOT:

No. There were implements taken into the house, but the findings of the –

WINKELMANN CJ:

A screwdriver.

MR de GROOT:

That's right.

KÓS J:

And a knife.

MR de GROOT:

And a knife. But Justice Woolford, at least, made specific findings on this, which were they were taken to break into the house. And, of course, the Crown put to Ms Churchward when it cross-examined her that she had a knife and she said: "well, I didn't want to harm him with a knife. I didn't want to cut him up with a knife. That was not my purpose".

Now, in all of this, Ms Churchward is fundamentally mistaken about the risks of violence. And how she could have come to be mistaken about that is something that I will come to later when talking about her personal circumstances. She was mistaken about the risks of violence and she also fundamentally misunderstands what she was doing because, as she said to the jury, this wasn't something she had ever done before.

And it's this misunderstanding which, in all likelihood, tragically turns what might have been a lesser act of violence into a more serious one. Because the fact

of the matter is that Mr Rowe was not subdued, as Ms Churchward intended, but he actually awoke and did the natural thing, which was to resist. And, of course, that has caused a reactionary cycle of further violence, and it undoubtedly increased the seriousness of the injuries. Ms Churchward turns the lights on. She doesn't fully appreciate the seriousness of what she has done at this point, but she does appreciate that it is serious. She sees blood. She wonders if Mr Rowe's nose has been broken and she leaves the room.

Now, what the girls do next is to go through the house to effectively look for small valuable items. A CD player is taken. There's an attempt to start the car. The way that trial counsel, Mr Mabey KC, dealt with this in closing was to say that that post-facto conduct, after they left the bedroom, was indicative of their lack of understanding of just how serious what they had done in the bedroom was. And similarly, the conduct the next day, where Ms Churchward appears to have quite casually just returned back to Ms Te Wini's address and spoken to her through the window was, in counsel's submission to the jury, suggestive of a lack of understanding about what had really gone on in the bedroom.

Again, this may have all been very difficult for the public to understand but, in my submission, what is highly relevant here is what the sentencing notes do not say. And what Justice Venning did not say when sentencing these girls at first instance was that the narrative that had been put in issue by the defence was one which was implausible or manifestly false. And Justice Venning was critical of other features of the defence that had been put in issue, such as the attempt to call 111, but it did not depreciate this as a theory of the events as such, and we will hear otherwise but I don't understand that the Crown has said that this is not a plausible version of what went on in the house.

The Court would be perfectly entitled to say to me: "well, the jury rejected the defence that there was a lack of murderous intent". In my submission, the vulnerability for the defence always was that two things could be true at once. On the one hand, Ms Churchward could have an expectation that a person would come to know lasting harm if they were knocked unconscious, as she had been knocked unconscious before. But simultaneously realise that there

was a risk that even if she expected that's what would happen, worse could happen and death could result.

Now the narrative that the defence put in issue drove very directly at what appears to be the basis of the verdict, which is to say a finding of murderous intent in the form of recklessness. The Crown again appears to agree that that was the basis of the verdict. But it is worth observing that this isn't the way that the Crown case was run, and of course direct intention was put in issue, and reckless intention was put in issue as the alternative. The way it's been put in the written submissions is that an intentional murder made no sense on the facts of the case and a reckless murder is the only one that makes sense. In all of the decisions touching the matter now before the Court, there seems to be a running acknowledgement that there was never an intention to cause death and what we have is a reckless offence. And it's the reckless intention of a 17-year-old and a 14-year-old girl, where Ms Churchward has very distorted ideas about the risk of violence.

1445

So it's these factors, in my submission, which lead very directly into the gravity of the offence. It tells us a great deal about the culpability of Ms Churchward. It tells us about the type of person she is and whether the policy underpinning the presumption of life applies to her, which is to say whether it is necessary to sentence her to life for reasons of community protection and the like.

Now, I understand that in their submissions, the Crown seek to put particular weight on the s 104 finding that was reached in all levels of this case. In our submission, whether or not s 104 is engaged cannot dominate the sentencing exercise because culpability may not have risen to the level where the default presumptive sentence applies.

Section 104 is narrowly concerned with delineating certain types of offences. It's not designed for the purpose of delineating cases where the presumption should apply from those where the presumption may be displaced. It's simply,

as a matter of logic, that if we have a s 104 case, we will be talking about a more serious offence, and that will go to the gravity of offending under s 102.

And it is for these reasons, as Mr Conder alluded to before, that we support the position outlined by TLANZ that s 102 should, in effect, be regarded as a gateway question when sentencing the young person. And it is only once a Court has made a decision that the presumption of life imprisonment is not displaced that s 104 should actually become operational.

We've pointed in the written submissions to some more recent cases where manifest injustice findings have been made in s 104 cases. These are decisions of Justice Moore in *R v Yu* [2023] NZHC 1391, the decision of the Court of Appeal in *R v Webster* [2026] NZCA 67, and the decision of the Court of Appeal in *Taylor v R* [2025] NZCA 693.

My learned friends have cited some other cases in their submissions which are also s 104 cases. I just wanted to briefly address a few of those. The first is, or the first two are *Renata v R* [2024] NZCA 469 and *Kriel*. Kriel was obviously the first of the *Kriel* applicants. These were very serious cases on their own terms. It's easy to see why culpability would have been judged as very high and however one looked at it, it was possibly not surprising that the presumption applied in those cases.

The cases which the Crown relies on which, in my submission, should be distinguished, are those of Mr Nattrass-Bergquist and Mr Wallace-Loretz. Those gentlemen were two of the *Kriel* applicants. They were found guilty of felony murder. They were in a circumstance which they didn't design, and they used that circumstance to improvise a robbery. And in the course of that, the victim suffered injuries which caused his death. It was prosecuted on all heads. It was prosecuted as direct intention, reckless intention and as a felony murder. But when Justice Toogood sentenced these men, he was satisfied that it was a felony murder and that they never had any foresight that the victim would die.

I think the short point that I would want to make here is that, in our respectful submission, those cases were not correctly decided. They are, in my submission, some of the least culpable offenders who have sought to challenge their life sentences on appeal. They had no foresight. They had intensely disadvantaged backgrounds – probably as disadvantaged as any of the cases that have come before the Court where life sentences have been overturned. And it is for those reasons that I submit that the Court should hold those cases lightly.

Those were, in substance my –

KÓS J:

Is this a sort of qualification to the youth plus argument that what you are saying is that if this is not an intentional murder case and there are other circumstances, then that should take you to a – youth and other disadvantage circumstances – that should take you to a determinate sentence. But the position may be different if there was an intentional murder, even if there is youth and disadvantage?

MR de GROOT:

It should certainly take you further towards. It's just a matter of looking at the specific offending that the Court has in front of it.

KÓS J:

The trouble here is we just don't know what the jury verdict was.

MR de GROOT:

In Ms Churchward's case.

KÓS J:

Yes.

MR de GROOT:

That's – that has to be right, to some degree.

WINKELMANN CJ:

Well, didn't you say the Crown's content to proceed on the basis there was a reckless intent that was found?

MR de GROOT:

I understood my friend's submissions to say that they were found guilty of reckless murder.

KÓS J:

Well, I don't know how the Crown knows that. I don't know it.

MR de GROOT:

In my submission, it's something that can be inferred from just the facts of the case, because the idea that they went into the bedroom wanting to cause death just did not make sense on the facts. It was – the violence was instrumental violence in the course of a burglary or a robbery. It wasn't violence for it's own sake.

KÓS J:

Yes, but this was a protracted beating. I mean, there were two stages to it. There was a change of weapon, I think, at one stage. You can't simply take the state of appreciation at the beginning and say that applies to the whole of it when it's a, you know, reasonably protracted course of events.

MR de GROOT:

I think at the point the first blow is struck, it is.

KÓS J:

Why does that matter?

MR de GROOT:

When we're talking about their intention, it matters what they are seeking to do when they go into the bedroom. The first blow is struck. It's very difficult, in my

submission, to infer that that was done with the intention to cause death and then –

KÓS J:

The issue, surely, is what an intent was at each lethal blow.

WINKELMANN CJ:

You're not relying on when the first blow was struck. Aren't you just standing on your submission that the whole facts speak of recklessness? These weren't young people going in to kill the man. They were simply wanting to make him not stop them rob his bedroom.

MR de GROOT:

And I would submit it is just inherently unlikely that they formed a direct intention in the heat of the moment and, in fact, as soon as the light is turned on and the gravity of the situation is more fully appreciated, that's when it stops. And that's probably not what we would expect to see if there was some intention to cause death.

WILLIAMS J:

I think you have to take into account – I know this is in respect of Ms Te Wini, but there's no real reason to think that it's different from Ms Churchward – the discussion of Dr Myers about reasoning processes in high-tense situations, don't you?

MR de GROOT:

Yes, yes, and I mean, that would – that was part of the reason that the defence was saying at trial that they didn't even form a reckless intent, let alone an intentional – let alone a direct intent.

WINKELMANN CJ:

The case that Justice Johnstone, the judgment in *D and P*, is it? That was a case of intentional murder, wasn't it?

MR de GROOT:

Sorry, I can't quite –

WINKELMANN CJ:

I think it was.

MR de GROOT:

I can’t quite summons that.

WINKELMANN CJ:

Mr Conder?

MR CONDER:

I believe it is. It was a stabbing attack, your Honour, and so the connection –

WINKELMANN CJ:

With the victim being walked away from the car?

MR CONDER:

I think it was in a car and was set upon from both sides by two defendants with knives. It's a very deliberate attack by comparison.

MR de GROOT:

The other case of an obviously direct intention is that of *Taylor v R*, the recent decision of *Taylor*. It's very tragic and there are a lot of background factors mediating what the defendant did. But there seems to be no doubt that the intention was to take his mother’s life.

WINKELMANN CJ:

And *Taylor* wasn’t a life imprisonment, and *D and P* it was.

MR de GROOT:

Taylor’s life sentence was overturned by the Court of Appeal and if it –

1455

WINKELMANN CJ:

That's what I mean, the outcome post Court of Appeal.

MR de GROOT:

Fifteen, I think it was 15 years with an MPI of eight was substituted in *Taylor*.

So unless the Court had any questions about the offence, I would move to Ms Churchward.

WINKELMANN CJ:

The offender.

MR de GROOT:

The offender. The Crown has a great deal of information about her personal circumstances. I am certainly not intending to excavate that history today. I content myself to say that it is always possible to imagine a worse case, or a worse childhood, or worse upbringing, but her case must surely be amongst the worst type of case that comes before the court.

The Crown makes the contention in their written submissions that there's –

WINKELMANN CJ:

Well, can I just take you up on that.

MR de GROOT:

Yes.

WINKELMANN CJ:

Not about your characterisation but this notion that we should be, you know, sorting people: best, worst. It's really whether the harm, whether the deprivation and trauma is at a level that it has these kind of effects that Dr Myer is talking about.

MR de GROOT:

No, I –

WINKELMANN CJ:

I just want you to address that question, because I do notice in some of the decisions it talks about not the worst, et cetera, et cetera. That's not really the issue, is it?

MR de GROOT:

No. The individual case is obviously always the issue and the degree to which we might infer that everything in the background has some explanatory effect in relation to the offending. But I mean my intention in describing things that way, your Honour, was just to say that there is so much trauma and chaos and dysfunction in this background and it is the type of background which unfortunately we tend to see every time one of these offences comes before the courts. Now, despite this, my friends have contended that there is no causal connection between the background and the commission of the offence.

I just want to take this from the general to the specific. As I've just said, there are a lot of factors in the background, and I – I mean I could list them, but I don't think there's much profit in doing so. And there might be any number of different stories that could be told about which of these factors is more operative which explains the offending, which led her from circumstance A to offending B. But on any analysis there doesn't seem to be any room to doubt the materiality of the connection between the background and the offence. Again it's the exact type of background that we see in this exact type of case, and with respect, I adopt what Justice Williams said in *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 when it was said that it's not entirely obvious why there might be a connection between a placement in a boys' home and, for example, commercial drug dealing, but there are very few who would doubt the logical or material connection between the two.

CAMPBELL J:

I think in your summary, your description of the offending, you might've glossed over a little bit the lack of impulsivity in the brutal and prolonged assault. Because it wasn't as if they came upon Mr Rowe by accident and didn't have time to discuss and plan what they were going to do with him, because they did retreat having initially thought that they might go ahead with it. They had a second thought, and then they had third thoughts. Do you want to – and that might explain the Crown's submission, I expect. So do you want to address that?

MR de GROOT:

I will. Certainly it's – what happened here is not entirely analogous to a situation where, for example –

WINKELMANN CJ:

Can you just be careful not to drift away from your microphone, Mr de Groot.

MR de GROOT:

Sorry. Your Honour is right, the impulsivity theme is not as strong as it may be in some cases, for example, when a young man becomes involved in a physical confrontation and he has to make decisions in the heat of the moment and it gets out of hand.

It probably remains relevant at the general level, in the sense that they are doing something inherently risky at the time. That's likely to have been an elevated experience for them, an adrenalised type of experience, and they are making their decisions about what to do in that context. But, as a general proposition, I accept what your Honour is saying, the impulsivity piece is of less relevance. But, for reasons that I am just about to come to, I think there are features very, very specific to this case which possibly have even better explanatory value than the idea that this was just generally impulsive. We could say roaming around the neighbourhood, going into different properties trying to steal, that is to a degree impulsive and they are in this charged environment in the house. But I accept that there could be more impulsive examples of offending.

But I think what really –

COOKE J:

Isn't part of the answer to the question that the compromised decision-making of children or young people is not limited to impulsive behaviour? It's just generally poor decision-making?

MR de GROOT:

Poor decision-making, yes, and in this case it's poor decision-making very directly conditioned by the biographies of both of these children.

I submit with respect that the Court of Appeal was right when it identified this warped desire to please others, including Ms Te Wini, as being part of the driver of the offending.

As Mr Stevenson said before, it's also very difficult to ignore the fact that Ms Churchward had arrived back in Ōpōtiki in an essentially broken state. Ms Te Wini herself was in a broken state, and they were out doing what broken people do, which was trying to source drugs – which, as Mr Stevenson described, was an effort at self-medication.

But I think possibly what is the defining feature of the causal nexus between background and offence commission in this case is what I have called in the written submissions an "unreal view of violence". Because of what Ms Churchward has been through, including what she had been through in the weeks and months leading into the offending, it supplied her with a very, very distorted view about what it meant to be knocked unconscious and about the true risks of violence.

CAMPBELL J:

Doesn't that run into the jury verdict?

MR de GROOT:

It does to a certain degree, Sir. But, as I said before, I think that the vulnerability of the defence was always that two things could be true at once. So her very distorted expectation based on her experiences, being that a person can be knocked on the head and they will wake up later with a headache. But it's not impossible to see how a jury could have found that that person with those expectations must nevertheless have realised that there was a risk of death.

So those were really the –

WINKELMANN CJ:

So what your submission is, is that effectively she had this world model that she carried with her where people were – which was quite a brutal world model? People were using other people quite instrumentally, including that you might be knocked out quite frequently and just wake up with a sore head?

1505

MR de GROOT:

Yes, because that is exactly what happened to her and that was exactly the way that Mr Mabey closed the defence case. That was the centrepiece of the defence case.

So, really, in summary, the background explains to some degree what happened and it reveals that this was not the result of her rational decision-making but the result of her biography and issues for which she had had little to none of the help that she needed. In our submission, this reduces the need for specific deterrence and the need to protect the community in the long run.

WILLIAMS J:

It's probably not right to say it wasn't the result of rational decision-making. It may not have been the result of intelligent decision-making, but the decision-making facility was seriously compromised. I don't think anyone is

arguing with that and that's your argument for s 102 not applying, s 103 not applying.

MR de GROOT:

It was – sorry, it was an aberrant rationality. It was a rationality informed by everything that had happened to her. It made no sense.

WILLIAMS J:

That must have been what the jury concluded, as you'd expect.

MR de GROOT:

Yes, and it's the type of rationality that a person who is given help can be educated away from and helped away from.

WILLIAMS J:

Or given insight into.

MR de GROOT:

Exactly. Of course, all of this is riding on top of the variable of youth. And that has already been discussed by my learned friends, but that is the youth component of the youth plus equation. And, of course, Ms Churchward is in the adolescent category identified in *Dickey*. This very, very small number of people under the age of 18 who have been convicted of murder since 2002.

Now, I just want to turn to the absence of a guilty plea. I accept this is obviously not a case where we have a guilty plea, but there was always the admission of a culpable homicide. That was the position before the jury. I'd suggest that intent was inherently arguable on the facts.

In some ways, this is not dissimilar to the case of Joel Lo, *Lo v R* [2024] NZCA 359, who had his life sentence overturned and I guess one way to put it is it wasn't held against him that he had defended the charge at trial, given that his liability as a party was an arguable question on the facts.

It may be interesting, as well, to think about what would have happened if the Crown had charged Ms Churchward in the way that it ended up charging Ms Te Wini when the retrial was convened. This is obviously quite a delicate area and care has to be taken about incentivising – sorry, I'll start this again.

But the point I wanted to make was, if this is has always been charged as a s 168 murder from the outset, nobody can unwind the clock and say exactly what Ms Churchward would have done. But one would have to think that counsel would have to have given her serious advice about the need to plead guilty to that offence, given that the Crown was relieved of the burden of proving foresight. So, the fact that this went to trial may be reflective of the way that the Crown charged the case.

And maybe one other piece is that it may be interesting to think about what the position would have been in relation to the plea if the courts, in sentencing young offenders, were not labouring under the error in *Rapira* at the time. And obviously there is a delicate balance that needs to be struck here in terms of improperly incentivising guilty pleas and the like. But, again, if it was a reasonable possibility that life would not be imposed on a guilty plea, perhaps if that outcome could have been indicated on a sentencing indication, then that would have brought about the guilty plea at the time. But as things stood, there was perhaps little incentive to give up the intention argument at trial.

WINKELMANN CJ:

Anyway, why are we concentrating on this so much? It's not a focus of the Crown's case, is it?

MR de GROOT:

Because in many of these cases there are guilty pleas that can be pointed to and obviously Ms Te Wini has pointed to her guilty plea, so – and it's a matter my friends have raised, but I move off it now.

Perhaps the last issue that, before the sentence itself, that I was going to deal with was this issue of remorse.

Somebody reading the sentencing notes and reading the Court of Appeal's decision could possibly have been left with the impression that Ms Churchward had no remorse because the pre-sentence report writer said little empathy or remorse was expressed at the time. Of course, Dr Bellve-Wack dealt with this in her evidence and suggested that if there was a failure to express remorse, this might be a reflection of an underlying coping mechanism in order to dissociate from the severity of what Ms Churchward had done. But even given that explanation, Dr Bellve-Wack reported comments from Ms Churchward which said: "I hate what I have done. I hate the fact that I listened when I should not have. I hate the fact that I hurt someone who I don't know to make someone happy".

And I think my learned friends are correct on one level to say that, you know, we have to look at what the position of the offender was at the time when we are talking about things like remorse. And I just did want to bring the Court to one document, and it's expression of remorse found in quite a strange place which is the letter that was attached to Ms Churchward's affidavit in support of an extension of time.

WINKELMANN CJ:

This is to Mr Tennet.

MR de GROOT:

That's right. So, this is a letter which it might be said Ms Churchward never expected anybody except Mr Tennet to read.

COOKE J:

Sorry, where do we find this?

MR de GROOT:

So is this clicked up on the – this is – is this on your screen, Sir?

COOKE J:
Yes.

WINKELMANN CJ:
It's the affidavit of September 2010, 14 September 2010.

MR de GROOT:
Yes, so on page 176 of the case on appeal there is this letter attached and I'm just going to read part of it starting on the seventh line down which says: "I have accepted the fact that I have done wrong and I do expect the consequences that follow, I will never be able to forgive myself but I will never stop trying to make my wrongs right. An apology to the Rowe family may not help their healing, I don't expect them to forgive me, I'd just like for them to know that I am truly sorry for causing them so much pain and that I will try my hardest to make up for such a terrible thing I have done."

Similar sentiments are expressed elsewhere in this letter, but the point is that this is contemporaneous to the offending. This dates back to 26 August 2010 and these are, if you like, Ms Churchward's private thoughts. This is not a letter to a judge who is about to sentence her. This is not a letter that has been sent to a family. This is a private piece of correspondence which records the way that she really feels about what she's done.

The only other matter I was going to deal with was about the construction of a determinate sentence if the Court was to overturn the life sentence. I acknowledge this is quite a vexed area and because of the change in approach to sentencing young people, we have quite a small pool of comparators at present. It's not easy looking through them to discern averages and to necessarily know where to start and as Mr Stevenson said, we also have a decision of the full court of the Court of Appeal outstanding, which is going to say how these sentences should be constructed.

1515

I thought the most straight-forward way I could possibly address this was to index the case to *Taylor.* That's a case where a 30-year starting point was taken on the adjusted starting point approach of Justice Johnstone in *R v D and P*. That was a 30-year starting point for an intentional murder which engaged s 104 of the Sentencing Act 2002 and 50% of that was removed for factors personal to the appellant.

KÓS J:

This was the case about the boy who thought his carer being killed would result in him going back to his mother?

MR de GROOT:

No, that was *Nelson*.

KÓS J:

That was *Nelson*, so was it –

MR de GROOT:

That was a decision of Justice Heath. *Taylor* was the decision of a boy in a very –

WINKELMANN CJ:

Killed his mother.

KÓS J:

Oh, that's the one, he killed his mother.

MR de GROOT:

– very complex relationship with his mother and killed her in her bed, yes. So there's many different ways that the sentence could be arrived at, but just taking one of the most recent cases it could be indexed to that and a 30-year starting point would result in an end sentence which meets all of the principles and purposes of sentencing.

COOKE J:
So your end sentence is 15 years, is that what you're saying?

MR de GROOT:
Yes.

KÓS J:
Well, if it's less culpable, if she is less culpable than *Taylor*, it should be a lesser sentence, should it not? Assuming everything else is equal?

MR de GROOT:
It could well be.

WINKELMANN CJ:
So this methodology, which is the *D and P* methodology, requires the youth and other factors not to be factored at the starting point, so it gives you these large discounts?

MR de GROOT:
Yes.

WINKELMANN CJ:
Which would, with more recent offenders, fall foul of the limitations in the reductions that can be made, would it not? Not for these offenders, because I think that...

MR de GROOT:
It could. You'd start to get into issues of whether the 40% cap should be displaced for basically the same reasons that a life sentence is being imposed, so it's quite difficult to project, but possibly.

I just wondered, Justice Kós, if I – in one sense, it is more serious but I wondered if I might run into trouble trying to split the difference too much.

There's things don't easily compare. They're both terrible offences, is the reality of things.

COOKE J:

When we get back to it, in any event, we are dealing with an application for leave and I think whatever the end sentence will be it's likely that it will mean they have served their time.

MR de GROOT:

That will be the consequence, yes.

COOKE J:

So the real – what do you say about that, in terms of Ms Churchward has been released. How does that impact on the application for leave?

MR de GROOT:

She served 17 and on one view, is it ideal that a person in this position is facing an abrupt transition from being subject to conditions and being subject to the oversight of the Board to nothing? In a perfect world, that might not be the case, but it's unprincipled, in my submission, to try and reverse engineer sentences to try and soften that transition. And the fact that no conditions would apply is simply a function of the unusual circumstances of these applications and the fact that the courts were labouring under what we say is an error for so long.

COOKE J:

But it is a factor for the Court to take into account in assessing the interests of justice on the application for leave?

WINKELMANN CJ:

I'm not sure. I think Justice Cooke is asking you, is it relevant that she's no longer imprisoned, so that's she's only subject to this life imprisonment sentence hanging over her like the Sword of Damocles? So it's a lesser interest

weighing in favour of the grant of leave? Is that the question? I think that's the question.

MR de GROOT:

Well, for the reasons that Mr Stevenson has very capably set out, I would submit those are as much a part of the sentence and as much a part of the severity of the sentence as the custodial portion of the sentence. The way Ms Churchward has expressed this to me is: when you're living in the community under conditions it is a fear to live. There's a fear that you, if you go down the wrong street, if you miss your bus, if you're home late, that you are going to be put back in custody. And definitionally they inhibit the ability of people to reintegrate back into society and reconnect to their community.

Ms Churchward is obviously living at an approved address at the moment and that is quite some distance from the most supportive members of her whānau, several hours' drive, which reduces the occasion on which she sees them. And as things stand, this situation will go on indefinitely.

WILLIAMS J:

Isn't it a point in your favour that the tail of this, T-A-I-L, when you're such a young offender is disproportionality long compared with, I don't know, your average adult convicted of murder?

MR de GROOT:

I gratefully accept the point. It's very different being sentenced for murder at the age of 45 when those conditions after you're out might only run for a certain length of time, than it is if you're sentenced as a young person. Because, you know, these conditions on population averages are set to run for more than 40 years at this stage.

WINKELMANN CJ:

And that's the point that's made in all the authorities, isn't it, I think?

MR de GROOT:

Yes, yes.

WILLIAMS J:

Well, a lot more than 40 years, yes.

WINKELMANN CJ:

And it's made in the decision of Justice Mallon of the Court of Appeal, which I can't remember what case that was, and it's made in *Dickey*.

MR de GROOT:

And just on the idea that they might eventually be discharged, there was evidence from Dr Paul Wood and Dr Rawiri Waretini-Karena in the Court of Appeal, which didn't get a whole lot of air-time in the judgment. But you can see from what the Court took from their evidence that those men who are some of the most sophisticated people in our society just went through endless frustration trying to have their conditions discharged and they –

WINKELMANN CJ:

Well, one of them did and one of them was reasonably prompt, I think.

MR de GROOT:

No, they both suffered setback after setback trying to get the conditions discharged, and it was more than 20 years that they were subject to them before the Board removed them.

CAMPBELL J:

Well, that may indicate a problem with the Board's approach. It doesn't go to sentencing.

COOKE J:

Ms Te Wini's seems to have been more successful. I know she's still got the monthly reporting and the recall is there, but her conditions seem to have been incrementally released as the risk diminishes.

MR de GROOT:

Certainly, you know, depending on how people travel in the community there might be space for some people to be relaxed over time. It might depend on their relationship with the probation officer, how you're going, how –

WINKELMANN CJ:

Can you take us to the part of that decision which talks about them, those two gentlemen?

MR de GROOT:

This is – Mr Conder, can you help me with – sorry, Chief Justice Winkelmann, you were right about Dr Wood was successful on his first application. It was –

WINKELMANN CJ:

I'm used to being right about these kind of things.

MR de GROOT:

It was the other applicant who struggled through.

WINKELMANN CJ:

But were they fighting to have their conditions, or were they fighting to release from the sentence? It might be that they cover both in their affidavits but it's only the life imprisonment sentence that's…

KÓS J:

It seems to be about the release conditions. I mean the fact – I mean it is unsatisfactory that release conditions suddenly end depending on the outcome of an appellate decision but it's not uncommon that that's the case when there's a reduction in sentence level.

MR de GROOT:

That's right. I think I'm taking away from the questions, but the only other thing that I think I'll feel remiss if I don't say is a very brief update from Ms Churchward, and that is that she is relatively settled on release and is

working towards social work qualifications, and her reasoning for doing that is that she never wants any young person, or any family, or any victim family to go through what she went through, so she's trying to train herself where she might be in a position to help people like her.

1525

If your Honours please, those are my submissions.

WINKELMANN CJ:

Thank you, Mr de Groot. Now, I think it is Ms Priest next, is that correct? So I think you should treat yourself as having until 4 o'clock.

MS PRIEST:

Thank you. I'm very grateful. On behalf of The Law Association, we are grateful to have been given leave to intervene in this important appeal.

There were two additional matters which we advance for the Court's consideration. Firstly, the explicit inclusion of two criteria for the determination of leave to appeal out of time and, secondly, perhaps a direct consideration of whether the manifest injustice test pursuant to s 102 ought to be considered first for young offenders where s 104 factors are in fact engaged also.

I thought perhaps I might take the Court through a fairly fast-paced policy update, if that would be of assistance?

WINKELMANN CJ:

Yes, thanks.

MS PRIEST:

But firstly, if I can make the following observation and, really, this is what the policy will answer. The Court asked whether youth alone might be enough to displace life imprisonment, and it is my submission to you that, yes, it would be.

And in fact in *Dickey* itself, perhaps if I start there at paragraphs 202 and 203 of that decision, we see reference to the factors specific to Ms Dickey. And firstly, if I can note characterisation of the offending itself in paragraph 202. It was a plan, it was premeditated, characterised as vigilante action and there was no allowance considered appropriate for perceived provocation. That's at paragraph 202. I note the final paragraph, or final sentence that: "Initially she showed no remorse."

But, importantly, under paragraph 203, in terms of consideration of Ms Dickey's personal factors we see: "youth at the time of the offending" under (a). And then if we continue to (b), an ancillary consequence of youth, her ability to participate in rehabilitation. At (c) we have the guilty plea, taking responsibility. And then in (d), really back to those youth principles again.

And so I think it was your Honour Justice Williams' question, perhaps, about whether it is always youth plus? In my submission, *Dickey* is a case of just youth and I simply wish to highlight that before I began.

WINKELMANN CJ:

Is there another way of looking at it? It's not really youth plus, but the Court would want to be satisfied they are not creating some special carve out. Just because you are young you can go around committing heinous crimes and walking away and just getting a finite sentence. It's an unlikely scenario, but that's how some people might see it. But rather, it's to look at whether there is something inherently youth-related in the offending. So if you had an extremely talented criminal genius who was 16 years old and concocted a very complex scheme, they would not be entitled to this approach, would they?

MS PRIEST:

Well, in my submission, they would still, under the current application of *Dickey,* be entitled to consideration, certainly.

WINKELMANN CJ:

Yes, consideration, yes.

MS PRIEST:

But no, there's no inevitability to it, absolutely not, and I wouldn't go so far as to suggest that.

WILLIAMS J:

The point is that youth is a flag.

MS PRIEST:

It is a flag, but that alone –

WILLIAMS J:

And that must have been what *Dickey* intended.

MS PRIEST:

Absolutely.

WILLIAMS J:

What you do with that afterwards depends on a case-specific individualised assessment.

MS PRIEST:

Absolutely.

WILLIAMS J:

There are no tick boxes here.

MS PRIEST:

I agree.

WILLIAMS J:

Either way.

MS PRIEST:

Yes, Sir. So in terms of some policy considerations, of course, *Dickey* and *Churchward* and I won't take your Honour's through that, have properly

recognised the international covenants to which New Zealand is a signatory and, of course, we see these mirrored in some of our own provisions, including ss 15B and 18 of the Sentencing Act which effectively mitigate against imprisonment for young people, certainly as a starting point. We also see it in s 128(b) of the Crimes Act, counting against imprisonment for young offenders convicted of sexual violation and also in the Misuse of Drugs Act 1975 at s 6 where age is also an explicit consideration before imprisonment can be imposed.

So, it is something that has been developing and, in my submission, cases such as *Churchward* and I'm talking about the 2011 *Churchward*, and now *Dickey*, really have built upon or aligned our law more with the international expectations.

This reflects what we see in – and I will ask Ms Wood to bring up the Mendez report. The United Nations Committee Against Torture has, of course, found that life imprisonment and lengthy sentences are grossly disproportionate, and may be cruel, inhumane or degrading when imposed on a child. And these, of course, are simply the conclusions and we see them at paragraphs 72 through to 74, but paragraph 72 noting: "The deprivation of liberty ... is intended to be an *ultima ratio* measure, to be used only for the shortest possible period of time, only if it is in the best interests of the child, and limited to exceptional cases."

And then over to paragraph 73, we see: "With regard to children deprived of their liberty within the context of the criminal justice system, the Special Rapporteur recalls that children should be charged, tried and sentenced within a [youth justice system] ...". And, of course, in New Zealand we do see not only our youth justice system but also our pilot court for young adults which I think is giving more recognition to these international expectations.

And then further at paragraph 74, partway down it notes, second paragraph: "Life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhuman or degrading when

imposed on a child. Life sentences or a sentences of an extreme length have a disproportionate impact on children ...” and the harm that, of course, follows with that.

From there, we have comments from *The New Zealand Children’s Commissioner’s Report to the United Nations Committee* and this was a recommendation, it's at 73. Yes, so this is the recommendation: “The application of punitive life sentences, of any minimum duration, on any mokopuna, is manifestly unjust. Nothing less than a total departure from retribution as the traditional objectives of criminal justice, and a public commitment to centring rehabilitation and restorative justice objectives will substantially alter this position.” And, of course, that was building on the previous report which I had referenced in terms of life imprisonment fundamentally being degrading or inhuman or cruel when imposed on a child.

So from there, there has, of course, in this Court been increasing recognition of these international obligations. We’ve seen it in the context of name suppression in the decision of *M v R*, more recently this year in *BW v Commonwealth of Australia* where the impact not only on *BW*, his relative age at the time of his offending in terms of the consideration of extradition, but also a focus on the birth of his young son, both pointing towards a finding of oppression in the context of extradition.

And then, of course, some years ago now, the decision of *Phillips* recognising the impact on children of offenders which, again, is another extrapolation of our commitment, in my submission, to these international covenants. And so more and more we’re really building on it and recognising documents to which we have been a party for a very long time, but now we’re really giving effect to them in a really concrete way in the courts.

1535

Dickey, of course, picked up where *Churchward* left off with Dr Lambie’s excellent research on youth brain development and then added to that,

concluding that, of course: "... young people suffer from cognitive deficits [from which they will fully develop as they grow]," a favourite quote of mine.

The other part of I think youth brain development really relates to the risk profile, and I simply wish to highlight some of the more recent comments on youth and risk. As we all know, youth have a greater capacity for rehabilitation. Of course, in the prison system it's resource-dependent and with our growing prison population that's making it more and more difficult in terms of access and that impacts directly on parole eligibility. Often parole eligibility date can be a trigger or a factor taken into account in terms of waitlisting and it's important to recognise the realities of that. The Office of the Inspectorate report on *Young People and Young Adults in Corrections' Custody*, it's a thematic report from December of 2024, provided the graph which is up on the screen.

WINKELMANN CJ:

Sorry, what is this report, Ms Priest?

MS PRIEST:

It's the Office of the Inspectorate's thematic report, so it's across the country, on *Young People and Young Adults in Corrections' Custody*.

KÓS J:

Which inspectorate?

WILLIAMS J:

Prison Inspectorate.

MS PRIEST:

The Office of the Inspectorate.

WINKELMANN CJ:

Prison Inspectorate.

MS PRIEST:

Yes, correct.

KÓS J:

Right, right.

MS PRIEST:

And this is at page 670 of the intervener's bundle. What we see is that a – this is completed rehabilitation for those under the age of 25 years, and what this graph really shows us is that access to offence-focused or targeted substantive rehabilitation is particularly limited for those under the age of 25. We see that borne out in this graph here, and you'll see the youth-focused programmes obviously are far fewer than the overall programmes, the youth-focused programmes being reflected in the right-hand side of the bar graph.

WILLIAMS J:

Is it possible the youth numbers have dropped?

MS PRIEST:

We hope so, Sir. That could well be the case. I haven't got those statistics but they will be available. One thing Corrections does very well is statistics so that's certainly able to be obtained.

WINKELMANN CJ:

Right, well, I see you've now got 22 minutes left so you might want to move onto your major points.

MS PRIEST:

Yes.

WINKELMANN CJ:

But that's very helpful, thank you.

MS PRIEST:

Thank you. If I might, just a couple of other features of risk with young people, very briefly.

WINKELMANN CJ:

Yes.

MS PRIEST:

The report of John Anderson, which was a paper – I'll bring that up. This considered recidivism of paroled murderers. This is not just youth murders, this is across the board. But it referenced a study in New Zealand, albeit somewhat dated, but the short point to be taken from that is that violent offenders released from a prison sentence for homicide or sex offenders had much lower violent offence reconviction rates than inmates released from prison for all other violent offences, and they also note that those who committed a second murder, of course, were a very, very low portion indeed.

WILLIAMS J:

That may be because of the existence of parole conditions permanently.

MS PRIEST:

Yes, I mean that's certainly – that's likely to be a factor, though I do note that most of the high-profile matters where homicides have been recommitted certainly in New Zealand have involved people, of course, still subject to very strict Parole conditions, nonetheless.

KÓS J:

We looked at specific conditions before in relation to Ms Te Wini.

MS PRIEST:

Yes.

KÓS J:

What are the general conditions likely to be that might impact on recidivism?

MS PRIEST:

Well, the general conditions. The standard conditions, of course, apply to everybody.

KÓS J:

Yes, yes.

MS PRIEST:

I don't have them before me, but I can pull them up. They're simply set out in the Parole Act 2002.

KÓS J:

But you'll know them off the top of your head.

MS PRIEST:

Thank you, Sir.

WINKELMANN CJ:

Well, it's rehabilitation programmes, isn't it? Attendance at rehabilitation programmes?

MS PRIEST:

That's normally a special condition.

WINKELMANN CJ:

Okay.

MS PRIEST:

Alcohol is a special condition. Whereabouts are special conditions. So reporting – very grateful to my learned appellant counsel – so must report to probation officer and continue to report on an ongoing basis. Must reside where directed to and, of course, to notify if they need to leave. Must not leave New Zealand or attempt to. Allow collection of biometric information. Not engage in employment if they've been –

WINKELMANN CJ:

Without consent.

MS PRIEST:

Without consent or to which a probation officer has directed them not to engage in. Often, that's reframed as a special condition where they're not to engage in any employment without consent of their probation officer, but this standard condition simply says that they can't engage in, effectively, prohibited employment if they've been directed not to do so. And then non-association with any person, normally victims, but any person who they've been notified in writing from their probation officer.

It does say they must take part in rehabilitative and reintegrative needs assessments as directed, but ordinarily if they're already identified prior to release, they'll be dealt with by way of special conditions. So, for example, most people subject to life imprisonment will have a requirement that they meet with a psychologist.

COOKE J:

It's s 14 of the Parole Act has them.

MS PRIEST:

Yes, yes, that's what I was reading from, yes.

COOKE J:

All right.

MS PRIEST:

Thank you Sir.

WILLIAMS J:

Can you help me with, so I just don't know the practice, the removal of these general, initially compulsory, conditions.

MS PRIEST:

Yes.

WILLIAMS J:

In what circumstances are they, does that happen, are they removed? Are they removed in an indeterminate sentence?

MS PRIEST:

So all, under s 56, there could be an application made to vary conditions.

WILLIAMS J:

Yes.

MS PRIEST:

They ordinarily, in practice, they ordinarily would start with special conditions so it might be, for example, the classic one that we seek to have removed quite early on might be to be subject to electronic monitoring as to whereabouts or curfew. So initially, a person may be released with a night curfew which is monitored with an electronic bracelet.

WILLIAMS J:

Yes, no, I'm not talking about – I'm talking about the general conditions that get imposed on everybody?

MS PRIEST:

Yes, well, that would be – initially you would have to probably remove all of the special conditions before you'd be able to be looking at the standard conditions being removed.

WINKELMANN CJ:

It's the same process, isn't it?

MS PRIEST:

It's the same process, but –

WILLIAMS J:

But what's the practice of the Parole Board or the policy of the Parole Board in respect of those compulsory conditions? Is there any pattern there that we need to know about?

MS PRIEST:

Only, I think, that there needs to be a good reason for you seeking to have them removed.

WILLIAMS J:

Right.

MS PRIEST:

And that good reason wouldn't simply be time. So, if I needed my curfew removed so that I could work a job that let me stock shelves in the night, that would be a really good reason to remove the curfew, for example. But if I simply wanted to get rid of my standard conditions, you really have to be in the position of those two quite exceptional applicants who the Court's seen were able to have their conditions removed and, as I understand it, it's quite a blanket application. It's simply, I present no risk at all anymore, I –

WINKELMANN CJ:

Wouldn't *Grinder* affect all of this?

MS PRIEST:

I hope so. It certainly is having effect, in reality, on the ground, in terms of applications to vary conditions and we can ask the Board, you know, is this condition necessary to ensure that the risk doesn't arise above undue? And, of course, that really does force the issue, or to put in a contrary way, is it necessary to ensure that risk remains less than undue or at a suitable level to ensure community safety? So yes.

WINKELMANN CJ:

Is it responding to a risk, really?

MS PRIEST:

Correct and, of course, risk is set out in s 7, there's those two different components to risk.

WINKELMANN CJ:

Right, I'm just conscious that you actually have significant things to tell us and –

MS PRIEST:

Yes, I do. So, look, I've set out in quite some detail and I can only encourage the Panel to consider the risk information which is set out in the footnotes to the written submissions.

WINKELMANN CJ:

Yes.

MS PRIEST:

But the short point is that risk prediction for young people is very, very difficult and it's inaccurate. One of the things that we've seen reflected in the Law Commission work on preventive detention, of course, being another life sentence, is there's an issues paper and then there's the final paper. And the final recommendation is that we do not have preventive detention as a sentence and the reason for this is, because predicting risk at sentencing is so very difficult and all of the preventive models ought to assess risk at the time when a person is due for release, or very close to it.

1545

And so, from a public policy perspective, this idea of assessing risk at this very early stage at sentencing is simply not founded in evidence and certainly that must be compounded by what we know about youth risk. And that is set out both in the article of John Anderson and also Ms Alderton-Armstrong, so I simply refer those to the Board.

WINKELMANN CJ:

Thank you.

MS PRIEST:

So, on that basis, it is my submission that two additional explicit grounds for leave to appeal ought to be considered. The first is youth and all this is, in my submission, is an extrapolation, or the next step from what we really are doing in any event with *Dickey* and with all of the other case law that is coming out of this Court.

It doesn't mean that every young person will get leave, but it means that where a young person, a person who is young at the time of offending, seeks leave to appeal, the Court will take that explicitly into account.

WINKELMANN CJ:

So is that leave to extend time to appeal, or just per se? Just leave, full stop?

MS PRIEST:

Oh, that's a good point. It would be – I mean I'm focused on an extension of time, certainly, on the basis that people have not considered their options fully at the time. That was the thinking behind that.

WINKELMANN CJ:

Well, this will be on the basis that they may not really fully comprehend all the issues at the time?

MS PRIEST:

Yes, or not be in a, I guess, a position to realistically consider everything ahead of them. They may be –

WINKELMANN CJ:

Full agency.

MS PRIEST:

That's right. They may be overwhelmed by the outcome of a murder conviction and feel quite despondent and hopeless and unwilling to consider those next steps within that very short timeframe. So, it's simply, I think, acknowledging

that youth is a factor, is something that our courts explicitly recognise, may be a ground for a person who is seeking leave to appeal out of time.

The second of them, and it is very much perhaps flipsides of the same coin in relation to this case, is where inalienable human rights are potentially engaged. And that's something that, of course, this Court would ordinarily – perhaps it would be caught by the overarching interests of justice test but, in my submission, it's another factor which it would do no harm to explicitly mention and, in my submission, would ensure that people who have had, or feel that their rights have been infringed by disproportionately severe punishment, which is really what we're engaging with in cases like this, have that other ground which they can rely on when they're seeking leave to appeal out of time, which is the case that we have here.

If I might briefly address the floodgate argument. I simply wish to reflect on one case, which was the decision of *Woods* that came out of this Court, and it dealt with special conditions under s 93 of the Sentencing Act which involved a – effectively, a residential restriction, or a restriction in terms of detention component.

Now, the impact of that was that the Parole Board read the *Woods* decision, and this Court may well recall, decided that what that meant is that where they were imposing curfews or residential restrictions on people on parole as a matter of course, that that also would be unlawful in the same way that the special conditions imposed at sentencing would be. The impact of that was that the Parole Board recalled 800 parolees and they re-did their parole hearings in order to ensure that there was no infringement on human rights.

And so what my submission is to you is that where we have a direct impact on human rights, that really does trump concerns around floodgates. It must trump concerns around finality, because ultimately, adherence to the rule of law, particularly with inalienable human rights, really it's not something that we can dilute. We just have to address it head on.

WILLIAMS J:

It would be easier if there were no floodgates, however.

MS PRIEST:

Certainly.

WILLIAMS J:

So, my question is about whether there are, whether there is a flood behind that dam?

WINKELMANN CJ:

You have the figures in your papers?

MS PRIEST:

Yes, but the figures that we've relied upon, if I might – I'll take the Court to them. These figures are different, in my submission, because they reflect a time period between 2016 and 2025. These were simply offered to demonstrate the sorts of numbers we're looking at going through the courts at the moment, but these are not indicative of the total number. Of course, the Sentencing Act goes back to 2002. This table only starts at 2016. So again, I must defer to the numbers in *Dickey* and those which are relied upon by the applicants in this case, but this is simply a feature we see in the age group of those 19 years and under, by year, between 2016 and 2025.

COOKE J:

Where does this come from?

MS PRIEST:

This is from the Ministry of Justice. These are publicly available.

WILLIAMS J:

Is there a page in that report that covers paroled offenders?

MS PRIEST:

I don't – not that I'm aware of, Sir, but we are happy to have a look and then –

WILLIAMS J:

Well, it would be interesting to see how many parolees for murder were under 19 at the date of offence?

MS PRIEST:

Yes.

WILLIAMS J:

If that information is available then we'd get a sense of what is behind the dam.

MS PRIEST:

Yes, no, I agree, Sir.

WINKELMANN CJ:

Do you need that? Or is it sufficient if you get a sense of who has been sentenced to life imprisonment since the date that's covered in *Dickey*, because the issue is both, isn't it? In prison and out of prison.

MS PRIEST:

Yes, certainly. So it would be the number of people who are subject to, I mean, at its broadest, the number of people who are still subject to a sentence of life imprisonment in New Zealand regardless of whether they are in custody or on parole.

WILLIAMS J:

And how many of them were 18 or under at the time.

WINKELMANN CJ:

Dickey said 40. *Dickey* said 40.

MS PRIEST:

It did, yes, but I'm not sure of the –

WILLIAMS J:

Was that all, or just over a particular period?

MS PRIEST:

Yes, I'm not sure of the scope of their statistics.

WILLIAMS J:

Right.

MS PRIEST:

But happy to look into that.

WINKELMANN CJ:

Well, they say what they are, but...

MS PRIEST:

The second issue really relates to youth culpability and an encouragement of the Court to consider s 104, sorry, to consider s 102 first when the issues of youth are engaged, even where s 104 factors are present.

And really, in my submission, this has been a developing concept through the courts and we see that first, in my submission, in the decision of *Diaz v R* [2021] NZCA 426. And I will bring up the comments of his Honour Justice Goddard where he effectively talked about what – at paragraph 61, yes – I apologise, so it starts halfway down this paragraph, so this is in the context of a wounding appeal against sentence, and this was a dissent of his Honour Justice Goddard. And he's considering this concept of what is the least restrictive sentence in the circumstances, and he says: "It seems arguable that in such cases [of a youth offender] the court should begin by asking whether a sentence of home detention or imprisonment is the least restrictive outcome ... or whether some less restrictive [outcome] is appropriate." And it is only "if no less restrictive [outcome] is appropriate" then the Court could turn to imprisonment.

And then in the next paragraph, obviously it talks at the end of paragraph 61 about needing to identify sentencing objectives and obviously a rational basis upon which an outcome would be better advanced by imprisonment rather than

home detention and, of course, public protection or community safety would be the key ones, one would expect.

But what then his Honour said in the middle of paragraph 62, was that: "It is at least arguable that there is a conceptual difficulty in taking as one's starting point the 'last resort' of imprisonment, then assessing discounts to determine whether departure from that last resort can be justified." And noting that: "... a rigid application ... could lead to an unsatisfactory result."
1555

From there, the decision of *Shute v R* [2024] NZCA 334, your Honour Justice Cooke, having been referred to the comments of Justice Goddard, also delivered a minority decision. And this is at paragraph 134, again a dissent: "A sentence of imprisonment" – this was a manslaughter case. Ms Shute was sentenced to a term of imprisonment of not long over two years. The majority rejected the appeal but this comment was made: "A sentence of imprisonment rather than home detention does have a greater punitive element. But [there are] associated adverse effects … It is true that sentencing calculations should not be approached artificially to tailor a result, but it is equally true that they should not be applied mechanically without regard to their significance in terms of Sentencing Act principles and the ultimate end sentence."

And so it's against that sort of thinking that I encourage the Court to consider when we have young people and s 104 engaged.

WINKELMANN CJ:
So reasoning by analogy?

MS PRIEST:
Correct, that when s 102 is – when the Court is considering when it's going to be manifestly unjust to impose a term of life imprisonment, step back and do this overall approach. And, of course, we have seen this coming through in the cases in this space, as well. But the natural progression of that, in my submission, is to, of course, consider any factor under s 104, but not – there's

no need, in my submission, to undertake what I say is perhaps an artificial exercise of starting at 17 years, getting down to 10 years under s 104, before turning to s 102. The reality is that the courts are well-placed to assess the overall culpability of the offender pursuant to s 102.

WINKELMANN CJ:

Well, s 104, though, is Parliament's signal to the courts that this is to be viewed as serious offending.

MS PRIEST:

Yes.

WINKELMANN CJ:

Isn't that relevant in the s 102 exercise?

MS PRIEST:

And I am not suggesting that the Court disregard it. All I'm saying is that the current process or sentencing process is to go through what I submit is something that becomes artificial when the manifest injustice test is being considered under s 102. Certainly, identify very clearly, explicitly what factors under s 104 are triggered, and that, of course, is part of the culpability of the offending, including those other factors around youth, any other issues that are relevant, but – and the reality is that's how we see it done ultimately under s 102 anyway. But that exercise that we go through in s 104, in my submission, is somewhat redundant, barring identification of the factors in s 104 as part of that assessment of culpability.

KÓS J:

Van Hemert, which is this this Court's last statement on s 102 –

MS PRIEST:

Yes.

WINKELMANN CJ:

I think you might need to turn – pull your microphone up.

KÓS J:

Van Hemert, which is this Court's last statement on s 102, certainly proceeds in that order.

MS PRIEST:

Yes, yes.

KÓS J:

Although s 104 didn't actually arise there.

MS PRIEST:

Section 104 arose –

KÓS J:

I don't think it arose in *Van Hemert*. The Court started with s 102 and then considered whether a minimum period should be imposed under s 103, perhaps s 104. I can't remember if we got to s 104.

MS PRIEST:

Yes, yes. So the exercise that's undertaken effectively is to start with the 17-year and then undertake that analysis as to what would –

KÓS J:

Well, not in *Van Hemert* it wasn't.

WINKELMANN CJ:

But, yes, Justice Kós' point is correct. It's really consistent with what you were saying.

MS PRIEST:

Yes, yes.

WINKELMANN CJ:

So you leave to one side the minimum sentence of imprisonment.

MS PRIEST:

Correct. And so in the further cases that we've seen such as *Webster*, that was an example of a s 104 case where you effectively start with the 17 and then the courts reassess that, taking into account all of the culpability to get it down to what they say is the appropriate minimum period of non-parole before they then go and undertake that s 102 exercise. And, in my submission, that's simply unnecessary.

KÓS J:

Well, it seems illogical, frankly.

MS PRIEST:

Yes, I agree.

CAMPBELL J:

It also seems rather inconsistent with how the three provisions are worded. Section 103 says if a court sentences an offender to life.

KÓS J:

Exactly.

MS PRIEST:

Yes.

CAMPBELL J:

So that suggests that s 102 is the start.

MS PRIEST:

Step.

CAMPBELL J:

And s 104, of course, assumes that there's going to be an MPI of 10 or greater.

MS PRIEST:

Yes, no, and that, of course, does endorse the approach which I'm suggesting. Thank you, unless the Panel have any questions.

WINKELMANN CJ:

Thank you. Right, we'll adjourn. Perfectly timed.

COURT ADJOURNS: 3.59 PM

COURT RESUMES ON TUESDAY 4 AUGUST 2026 AT 10.03 AM

WINKELMANN CJ:

Ms Johnston.

MS JOHNSTON:

Good morning, your Honours. I have undertaken my first attempt at a road map or outline of my submissions. I hope that's made its way to the Bench.

WINKELMANN CJ:

Yes, and we will try and be quiet for 20 minutes.

MS JOHNSTON:

I look forward to that experience.

WINKELMANN CJ:

Will it be a novel one for you in this court, Ms Johnston?

MS JOHNSTON:

I don't count, your Honour. I attempted to get the road map to one page and I have failed with that, but I have managed two pages. I'm anticipating that perhaps the majority of the Court's interest and questions will be on points 7 and 8, the strength of the proposed grounds, so I do propose to address those first six points first before we get to that. And obviously, the Court has the Crown's submissions and I don't propose to repeat matters. Rather, I would simply highlight what are key points from the Crown's perspective and, of course, to address what seems to be the key points of difference between counsel and, of course, address any questions the Court have along the way. 1005

So if I can start then by addressing, of course, the extension of time. And the principles here are relatively well-settled and I don't think intensively contested between counsel here, as set out in *Knight* and *R v Lee*, the overall inquiry is, of course, the interest of justice, and finality is an important part of that.

And that principle reflects the view, as the Court knows, that once decisions are made, that outcome should be, for the most part, final. People should be able to rely on the outcomes from our court system, have confidence in them, organise their affairs accordingly. But obviously, in a just justice system, that principle cannot and should not be a blunt and uncompromising principle and the balance that's been struck in our criminal procedure legislation, obviously, is that there is generally a first appeal as of right and second appeals are only by leave subject to the leave test that, of course, this Court knows intimately, and the balance is also struck by introducing time limits for appeals.

And those time limits have a bluntness to them in the sense that they draw a line, but they also serve an important purpose. They tell people that this is the outcome now. They give some closure. Victims can be told this is the end of the process, this is it. Police officers can close their files, return exhibits, et cetera.

Now, of course, a justice system must allow for exceptions, and when there are clear cases that what happened before was a clear miscarriage of justice, whether that be the new evidence version of that narrative or another one, and in situations where the delay is explained and there is a reason to fix it now, so a practicality to the remedy, of course, the courts will respond to that.

In this sense, an extension of time is an indulgence of the Court and it reflects that somebody is asking for an extension, somebody who is asking for an extension, must be in a different position to those who have appealed within time. So, the merits must be clearly justified and the reasons for the delay must outweigh this need for finality.

Now, if this principle isn't clearly maintained by the justice system, it does risk the public losing confidence, in the sense that if time limits aren't clearly regarded when somebody is, say, sentenced in court, the public may think: "well, is that the real sentence or might this come back again and again to be

changed and this is just a sentence that applies for now, but that original judge's sentence, or the original appeal court sentence, isn't the real one?"

And also, if the courts are too open to extensions of time, that represents something of a disadvantage to those who do exercise their appeal rights within time, because their appeal rights will then be spent and it's more difficult for them to raise things later. And that gives little incentive for people to, as we say, to put their best foot forward, put all your arguments forward in one trial, or put all your arguments forward in one appeal, have that all judged on the merits. And if that is not the way it's regarded, that sends a message to litigants that you can put argument A forward first time around and if that doesn't succeed, then, well, here's my backup argument, argument B. You go away get more evidence and run a different case at a later stage with more time for preparation.

Now, of course, sometimes when there is fresh evidence that comes up, that has to happen. But my point is that those extensions of time serve the purpose of ensuring the system isn't gamed, in that sense, that people might save up their appeal rights to wait for something to change, for something to come along that they can reopen matters later.

CAMPBELL J:
Do you see that having happened here?

MS JOHNSTON:
In the sense that it appears Ms Churchward was advised to save her sentence appeal right, there is a sense of that here, yes.

WINKELMANN CJ:
Well, is that saving it, or is it simply that there is no merit to an appeal right at this point in time?

MS JOHNSTON:
I would need to check exactly how the s 9 is worded in terms of the advice. I don't know how easily the s 9 can be brought up now. But, I mean, it's not a

point I rely heavily on, but it is perhaps a risk that might be seen more in future cases. The advice was that she had plenty of time, I think, to bring an appeal later.

CAMPBELL J:

I think it's that Mr Tennet advised her she could seek leave to appeal but that she should wait to do so.

MS JOHNSTON:

Right. Thank you, your Honour. Yes, his view was that Courtney had a long time to come back on a sentence appeal. Firm advice was to wait. There is a sense of that here, yes.

WINKELMANN CJ:

So that's his legal advice.

MS JOHNSTON:

Yes. The next point, and it is connected to the first, is my point 2: the impact on the wider community and victims in particular. That, of course, dovetails with the need for finality, and I've made the point and it's made in the written submissions about the way finality supports public confidence generally and for victims in particular.

And the trust and confidence that victims have, and I'm not just talking about immediate victims but also future victims of the justice system, is seen as one that is provisional and not one that there can be confidence in, because there will be multiple appeals and appeals many years later. That may dissuade future victims from being willing to engage, report crime, and engage with the justice system and give evidence.

Now, of course, our system gives victims informational rights that support transparency and understanding the case that affects them or their family member, and it also is said to support their dignity and wellbeing, and in the course of that victims obviously do ask: "is it over yet? Is this the last step?

What is the next step? When will this be over?" And so there are benefits to those victims, as members of the community closely connected to the case at hand, to know that there comes a point where things cannot come back up again unless there's a quite substantial injustice, special reasons, or a clear miscarriage of justice.

And there's a connection there to the principles that apply to Crown sentence appeals. Obviously the Crown has limited abilities to appeal sentence, and even when the Crown brings an appeal against sentence and the appellate court rules that the original sentence was too low, the courts are again then reluctant to increase that any more than is necessary. The courts are again reluctant to substitute a sentence of home detention to imprisonment in all but the very clearest of circumstances, and that's a reflection of the need for finality, that offender is being told: "this is your sentence." It should be an exceptional step for that to be then changed later on.

There was a point made yesterday that there's in a sense no finality for victims while parole processes continue. Now, the core point, from the Crown's perspective, is perhaps that in a sense there's no finality, really, for victims at all. Some describe their loss as their own life sentence. Now, I'm not trying to be dramatic about that, but that's the context and the reality when we're dealing with people who have lost their loved ones to homicide, and for many the symbol to them that the person who took their loved one's life has something hanging over them, somebody watching over them for life, is an important symbol. And for some of those victims, they will want to be involved in the parole processes for that reason, and perhaps also, as we've seen in this case, they'll want to be involved to ensure or to mitigate the risk of running into the offenders.

Now, it's true that victims can choose to be notified about parole, but that's at the choice of individual victims and not all victims will want to be involved. And a life sentence gives finality – sorry, gives family members of a deceased victim some assurance that public safety is being considered and reintegration of that offender is being carefully managed.

So, of course, yes, continuing engagement with the justice system can become a burden for victims but that is not a reason to remove the sentence or to remove that engagement during that time of life parole. It's more a reason, in my submission, to ensure the victims are communicated with in a manner that is appropriate and meets their needs.

1015

In terms of the victims of this offence, Mr Rowe's family, the Court has a bundle of the victim impact statements that were presented for the most recent sentencing, so Ms Te Wini's sentencing in 2012, and they refer, of course, as the Court will have seen, to the rollercoaster of the process for them and, of course, for them, the murder happened in 2008 and the justice system for them didn't end until 2013 because of the nature of what happened. And the Court will have seen that they've engaged with the Parole Board in terms of asking for conditions to avoid crossing paths with the offenders in the future.

Those family members haven't wanted to be involved in this hearing. They've undoubtedly considered matters at an end since 2013 which is, as I've said, of itself nearly five years after Mr Rowe's death. But I do ask that the Court not infer from the fact that they are not present at this proceeding, that they are in any way indifferent, or that bringing this up again is not something that impacts on them.

As the Court will have seen from the written submissions, more generally the Crown simply asks the Court to give real weight to the concern that reopening sentences many years later can have impacts on the victim and community interests. At the very least, it sends a signal to victims, perhaps, in this case or in future cases, that this process you thought was over might not in fact be over. Obviously, sometimes, that needs to happen, and the Court will respond to an injustice when it needs to. But the thrust of the Crown's submission here is that should only happen in very clear circumstances when there is a very good reason.

There is some reference, I think in Mr de Groot's submissions, to some cases where the Court of Appeal has said that the application for extension of time really comes down to the merits and the strength of the merits and perhaps the reasons. Now, those cases have generally been in drugs cases where a victim's interests, it's obviously not a victimless crime, but where victims' interests are less acute. So while often, particularly in a short few months' extension of time, yes, it will come down to the merits and the reasons those are likely to be the factors that will reach the Court's decision, but particularly in a case such as this, the victim's interests, community interests, need to be kept as part of the equation.

KÓS J:

We haven't talked about very much, we obviously will do, about youth as part of the stage 1 sentencing consideration. We will come to that no doubt. But we've sometimes looked at mental health issues as going to stage 1 of sentencing.

In *Van Hemert*, it was an important consideration there that one of the justifications for preserving a life sentence in his case, despite his evident mental health issues, was the ability to maintain some measure of supervision of him through the parole process. That doesn't, I think, have a comparator necessarily in this case. There is no suggestion that these are consistently violent young women, or even necessarily dangerous young women now so many years later.

MS JOHNSTON:

I mean, there are certainly some risks that still present themselves and, as the Court will have seen from the parole material, it's taken some time for Ms Churchward to gain the confidence of the Parole Board that parole is appropriate. But I certainly accept it's not a case like *Van Hemert* in the sense where there are acute risks of that nature.

In terms of my point 3, the length of the delay and the reasons for it, again, this is a balance. A very lengthy delay would require other factors to justify it. Here,

it's more than a decade and a long delay should require clearer merits and should only be seriously considered when there's an ongoing impact to the applicant.

And here, just referring to the submission of the interveners that youth should be relevant, the Crown acknowledges that youth would be a relevant factor for the Court to assess and has been found to be so in the Court of Appeal, which I've referred to at paragraph 86.

So that's a stronger argument if the applicant is able to articulate it and able to say: "I didn't think about it at the time because I was young and I didn't really understand my options". And I acknowledge there's a flavour of that in Ms Churchward's affidavit.

Care must be taken here, obviously, because young people are presumptively fit to stand trial and able to make decisions, and in this case, represented by counsel at the time these decisions are making, so I would caution the Court against any kind of presumption that a young person isn't able to make a decision by themselves or able to make a decision whether or not to exercise appeal rights simply because of their youth.

So, I guess my submission there is that that's not a conclusive factor but it is a factor that's appropriately in the mix when the Court is considering. But, of course, it's not a factor that goes on forever and both applicants here are well past being youths or emerging adults. I think they're both in their early 30s now, so that youth could only really be relevant in those first few years.

In terms of the specific explanations that are offered here, neither applicant actually addresses whether they received – or addressed in their affirmations – whether they received legal advice. And neither addressed when they first found out about *Dickey*, nor when they ever received legal advice about the effect of *Dickey.* Ms Te Wini gives no direct explanation as to why she didn't seek leave to bring a further appeal at the time. Ms Churchward simply says she didn't think about challenging the life sentence further.

Now, obviously it depends on the circumstances but often, where an extension of time is sought, legal advice received at the time will be relevant. Sometimes applicants say: "I didn't know that there was such a thing as the Supreme Court, I didn't know I could apply to appeal" or "I was simply unable to find a lawyer at the time." So the relevance of that factor is part of the reason why the Crown asked the question in this case and sought waivers and they were to investigate whether or not there was legal advice taken. They, of course, haven't criticised any legal advice here.

WINKELMANN CJ:
Well, do they have to?

MS JOHNSTON:
They –

WINKELMANN CJ:
I mean, on a leave, do they have to on a leave application? I mean, doesn't it speak for itself, is what I'm thinking?

MS JOHNSTON:
It's never a matter of a "have to", but it is a factor that's relevant. So, somebody who, say, didn't know they could appeal, never heard of the Supreme Court, that kind of scenario, as soon as they found out that there was jurisdiction to appeal they immediately or within a short period of time made that application, should have a stronger case for an extension versus somebody who knew all along, received advice about it, made a tactical decision.

And the cynical way that might happen is somebody – let's call it a conviction appeal scenario – finds out that they could apply to have a conviction appeal but they've got a parole hearing coming up. They decide it's better to admit their guilt now, get parole, and if they're unsuccessful then I'll bring my conviction appeal. So that's the less persuasive situation for an extension of time.

WINKELMANN CJ:

But I'm asking about – so we have Mr Tennet's advice, which we can form our own views about. But when you said no one has criticised that advice, but do they – how would they criticise it?

MS JOHNSTON:

Sorry. In their affirmations, the appellants haven't criticised their advice in the sense that neither of them say anything about the advice. So they're not saying: "I never received any advice whatsoever." And so then we have – in Ms Churchward's situation we have the advice that was given and this Court can assess that, obviously. But in the absence – looking at Ms Te Wini, in the absence of any criticism, given it's Ms Te Wini's burden to establish that an extension should be granted, it's for her to give the reasons why. So if she's not criticising her advice, in my submission, this Court has to infer that she received appropriate advice. The Court has to conclude that she did receive advice or –

WINKELMANN CJ:

What about this scenario, that it really was appropriate advice not to appeal back at the time because the law didn't – and Ms Te Wini may have received no advice, but anyway, even if she had been advised to appeal or not it would've made no difference because she wasn't likely to be successful based on the *Rapira* line. But the law has changed and therefore the delay is really post-*Dickey*.

1025

MS JOHNSTON:

One response there is that, and perhaps the more important point, is that she hasn't said that she is not aware of the ability to appeal, so we have to assume she was aware of it.

In terms of advice, perhaps the Court can draw some inferences about what advice she might have received, but the Court also needs to bear in mind that *Rapira* was never binding on this Court and it was always open to anyone,

including these applicants, to being the argument that was made in *Dickey* back in 2013.

WINKELMANN CJ:

Right.

MS JOHNSTON:

They received a measure of success in having their s 104 17-year sentences overturned. It was at least theoretically open to bring the same challenge that was brought in *Dickey*, in this Court, back in 2013.

KÓS J:

I mean *Rapira* was a bit of a super authority from the Court of Appeal though. It was a full court, the judgment delivered by Chief Justice Elias. It, you know, wasn't a promising line of attack.

MS JOHNSTON:

I understand that perspective, and I guess we will come back to the extent to which *Dickey* changed the law and the extent to which *Dickey* is different.

WINKELMANN CJ:

But if you assume that the law did change, it does seem to be a very harsh standard to hold appellants to that they should assess their appeal rights based on – that they should be criticised for not exercising what seems a hopeless appeal, because they should have been seeking to change the law, which is statistically an unlikely thing if we just view the general wash of appeals.

MS JOHNSTON:

And I guess that then brings into focus ...

WINKELMANN CJ:

Whether *Rapira* was changed by *Dickey*?

MS JOHNSTON:

Whether *Rapira* was changed by *Dickey* and also whether a change of that nature justifies reopening past sentences.

COOKE J:

And your point is we don't know what the advice was at all with Ms Te Wini, at least, and with Ms Churchward it was: "well, wait."

MS JOHNSTON:

Yes. And perhaps one comparison here that might be helpful is there was the *Taylor* decision that's referred to which is the one following *Mist.* So *Mist* was the decision where the Supreme Court held that the date, the eligibility for preventive detention was the date of the offence. So, if you were under the age, then preventive detention was not available and Mr Taylor, who had been sentenced before *Mist*, received advice that he could have his preventive detention sentence overturned, and chose not to appeal for some time and then did eventually bring the appeal.

Now, that was, that extension of time was granted and, in my submission, the distinguishing factor there, and I will return to this again, is that that case had much stronger merits because that is a much clearer, more definitive change in the law and change in the interpretation of the law in *Mist*, because the outcome of *Mist* was that preventive detention was not available as a matter of jurisdiction, which is quite different from *Dickey*.

CAMPBELL J:

A black and white answer, or brighter line.

MS JOHNSTON:

Brighter line, certainly. So in terms, unless there is anything else on the length of delay and the reasons for it, I move to my point 4 which is the wider system impacts, also known as floodgates and obviously this Court is familiar with being mindful of the impact of its decisions on future cases.

In terms of the numbers, there was some discussion of this yesterday. The best figures, in my submission, are here in paragraph 153 of *Dickey*. So between the Sentencing Act and *Dickey*, there were 40 adolescents and 131 emerging adults convicted of murder. Now, I don't have the figures of how many of those are now on parole and how many are not. Likewise, I don't have the exact figures as to how many have appealed, how many have extinguished their appeal rights or spent them, or how many have denied their extensions of time. Obviously, many of those cases are in the bundle.

And also, many of those, I submit, wouldn't actually have a tenable argument for a finite sentence because the difficulty with, sort of, looking at the flood and the body of water as these numbers is that there isn't a category exception for young people for murder. So, if we're looking at a defined flood, we're drawing a category that the Court of Appeal, at least, says doesn't exist and Parliament hasn't drawn that.

But I, in my submission, the real flood, or the real risk here, is other situations where there's been a change or restatement in sentencing law.

COOKE J:

Before you move onto that, can I just check one thing, 131, when does emerging adult end in terms of age?

MS JOHNSTON:

Twenty-five.

COOKE J:

Twenty-five.

MS JOHNSTON:

And that was the, in my submission, real difference in the psychological evidence before the Court in *Dickey* versus *Churchward.* The focus in *Churchward*, for obvious reasons, was on under-18s, but the evidence

presented in *Dickey* showed that those same matters about adolescent brain development and the cognitive capacity of young people go on to 25.

KÓS J:

So that date range is 18 to 24?

WINKELMANN CJ:

Ends at 25, yes.

MS JOHNSTON:

Ends at 25, yes.

WINKELMANN CJ:

Yes, so it's –

KÓS J:

Ends on becoming 25, so 18 years old through to 24 years old.

MS JOHNSTON:

Yes, under 25, I think.

KÓS J:

Yes, thank you.

MS JOHNSTON:

But I am sure the likes of Mr de Groot will correct me if I've got that wrong.

WINKELMANN CJ:

Or your junior.

MS JOHNSTON:

So in terms of my real flood, there are obviously other situations where the higher courts make rulings about what the appropriate weight is to place on a particular factor.

Now, if a change of that nature by the appellate courts is enough to reopen what's happened before, then that, in my submission, is the real flood. If we think about *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, for example, which was obviously a significant decision and it was a decision that set tariffs, guidelines. And because it was a guideline decision, the Court of Appeal, very clearly explained what the application of it was. So, you know: "it applies to sentencings after today and anyone who has already signalled they wish to appeal".

Now, other aspects of that *Zhang* decision addressed the causative contribution of addiction. That, of itself, is not so much a guideline. It's not something intended to guide future sentencing judges of how to approach sentencing consistently. So if that, hypothetically, was in a judgment on its own, those findings in *Zhang* and in this Court's decision in *Berkland*, if they were in – my hypothetical is a future decision, making decisions like that but without the guidelines, then that wouldn't be a guideline decision. It would be a normal evolution of the common law, declaratory theory, applies retrospectively and prospectively. So would that, in future, if this Court or the Court of Appeal were to reach a decision like that, that completely changed the weighting in three years' time, that's the flood that's the concern with –

WINKELMANN CJ:

Well, hasn't that always been lurking in the law, though? We've always had that in the law in all sorts of areas, significance of mental health, youth, for instance? I mean – and sometimes that can found an appeal out of time, but the question is one of the interests of justice, whether a substantial injustice would be done applying what's now understood to be the correct approach if we didn't apply that. So I don't know if it's bright lines and perhaps it's best to go on the basis, that when courts say this is signalling a clear change in sentencing practice, such as was in *Zhang,* and therefore it doesn't apply retrospectively, that's the best guide for us?

MS JOHNSTON:

Yes, and I certainly don't suggest we're in a place where we can draw perfect bright lines. My submission is in response, in part, to parts of the applicants' submissions where they refer to a new sentencing decision that might have a real impact on sentence, and in my submission, that can't be enough. It really needs to be a substantial injustice rather than a simple – I shouldn't say simple – rather than a different weighting, because as we're used to in all appellate courts, different judges can give different weightings.

WINKELMANN CJ:

So, not a real impact but rather a significant injustice?

MS JOHNSTON:

Yes.

COOKE J:

Don't the applicants have to establish that to get over s 102 anyway?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

As Justice Williams said yesterday.

MS JOHNSTON:

Yes, and I've reflected on that overnight and haven't been able to come up with a perfect response, but –

WILLIAMS J:

I agree.

WINKELMANN CJ:

I mean, because it's not – it's not a trap. It's quite a high threshold, isn't it?

MS JOHNSTON:

It is, but – and I take the point that "manifest" means clear and substantial. It sounds fairly similar. But I think the real difference here is that when you're considering s 102, that's at the time of sentencing and you're deciding whether or not manifest injustice, looking forward, is established.

1035

But here, today, we are talking about a substantial injustice now and in the current circumstances. What the Court is really looking at is whether it is a substantial injustice for those life parole conditions to continue.

WILLIAMS J:

That's not much difference to an appeal court, in time, taking evidence in the interim, evidence of the interim period, into account when determining whether there's manifest injustice?

MS JOHNSTON:

Yes and obviously there's a Crown response when new evidence is presented on a sentence appeal. And it's, again, the same sort of finality theme I've been covering that, you know, you should have a sentencing and an appeal should really be an exercise in error correction, not a re-sentencing. And, yes, the Court will at times need to respond to fresh evidence on sentencing but that also can be problematic if one position is presented at sentencing and someone, two, three years later, is then able to point to their rehabilitation programmes and now that they've got remorse letters that they've written a few years later and now they'd like to be re-sentenced on the basis of what I wasn't offering back then. I think the Court understands that –

WINKELMANN CJ:

Yes, but I can I ask you to restate for me, because I don't think I've been quick enough to understand your point about drawing the timing difference in relation to manifest injustice and significant injustice. What do you say is the implication? Because when you are doing this, at the time of sentence you are looking forward, you're looking at the events that have occurred and you're

saying: “is it manifestly unjust to impose a life sentence?” But as we sit here, the question for us is has – is it a substantial injustice not to allow this matter to proceed to hearing? So what's the timing point you’re making?

MS JOHNSTON:

You’ve assessing that today, whether it is a substantial injustice. Whether there are –

WINKELMANN CJ:

And what do we have regard to when we’re assessing that today? Are we having regard to whether there was a – whether we think there is a risk that there was a substantial injustice done at the time of sentence? I’m just wondering if there is, in fact, therefore a difference?

MS JOHNSTON:

Well, perhaps it's a very subtle difference.

WINKELMANN CJ:

Too subtle for me.

COOKE J:

But isn’t your point that you look at what the practical effect on the applicants is, in that now it's just them being subject to parole conditions?

MS JOHNSTON:

Yes.

COOKE J:

So asking whether there is a substantial injustice for them not to have a rehearing or an appeal on their sentence, when the practical effect on that is just it will remove their parole conditions?

MS JOHNSTON:

Yes.

KÓS J:

In fairness, the appellants put it rather more highly than that. It's also the stigma associated with being life sentence as opposed to what the day to day conditions are.

WINKELMANN CJ:

And the psychological impact.

KÓS J:

That's certainly a point they made.

MS JOHNSTON:

Yes. I'm not sure I understand the stigma point. I mean, I understand that obviously on one level, but I'm not sure I understand how the stigma of life parole is separate from the stigma of a conviction for murder.

WINKELMANN CJ:

I think it was the psychological impact was more of the focus, because a person remains subject to recall for the rest of their lives.

MS JOHNSTON:

Yes and perhaps this is a point I'll come back to when I address my –

WINKELMANN CJ:

But I mean, all the same, would you not be guilty of doing what you are accusing appellants of doing when they try to bring in fresh material? Because as you say, we are looking at the time of sentence, as to whether it's manifestly unjust and that's really unjust. We're looking at and so it's a sentence we know that carries all this heavy weight, and the Crown can't walk away from the fact that a life imprisonment sentence is a heavy weight, and you're looking at the time of sentence to see if it's manifestly unjust. And if you're starting to say: "well, at the moment, this is all it means for them", that's kind of doing a little bit of what you're criticising appellants of doing when they bring in all sorts of other things, post-fact considerations.

MS JOHNSTON:

Yes, perhaps it's a goose and gander situation.

WINKELMANN CJ:

A what?

KÓS J:

Goose and gander.

WILLIAMS J:

Not candour.

WINKELMANN CJ:

I was thinking, I've been getting a metaphor of hunting with the –

KÓS J:

Hounds.

WINKELMANN CJ:

– hounds and running with the –

COOKE J:

Hares.

WINKELMANN CJ:

– hares. I was thinking that, but no, since I can't carry it off properly, I decided not to use it.

KÓS J:

This discussion began with wider system impacts.

MS JOHNSTON:

Yes.

KÓS J:

And what we do know is there's no bright line here, that the flood of 40 will abate because some of them simply will not qualify for a determinate sentence. *Kriel* makes that clear and we can expect that in the cases, for instance, of child murderers who have acted with deliberate intent to kill, that they are most unlikely to have their sentence remitted to determinism. So I would have it's, in any event, the flood has got to be separated at some point. And some simply won't make it to a successful appeal.

MS JOHNSTON:

Yes and that –

KÓS J:

Even if we were to go with the appellant's argument.

MS JOHNSTON:

If the Court were to go with the appellant's argument, in the sense that the appellant is saying if this might have made a real difference to your sentence, then that would be a signal, at least even to the quite serious murderers, to make the application for an extension of time with all the attendant notification of victims and concern about finality.

WINKELMANN CJ:

But we are talking about, say, in the category of these two appellants, we're talking about young people, children and young people, under the age of 18 and that's a total of 40, of whom we have two. Is that too much to ask the system just to look at the issue of leave?

MS JOHNSTON:

Put that way, no, but –

WINKELMANN CJ:

Because in each case there is leave, even at the Court of Appeal level, because of the extension of time.

MS JOHNSTON:

The concern there, though, is if the Court rules that, hypothetically, as the applicant's ask, an extension of time is warranted, or there is a strong argument for an extension of time if a future sentencing decision would have a real impact on your sentence, then that doesn't draw the line at 40, because there is equally an argument about those emerging adults.

WINKELMANN CJ:

Yes. So, your concern is we are just going to say "real impact", whereas in fact what we are really concerned with is the most serious sentence that is known to the law which, you know, we have that protection – that it has to be manifestly unjust to impose it before you could possibly. So, it is quite a high threshold, in any case.

MS JOHNSTON:

A strong presumption, yes, and the effect of *Dickey*, in my submission, is that it's simply a matter of waiting. In terms of the signal that *Kriel* sends, that I would support. I guess my concern is, if the Court draws the line differently from *Kriel* then there is a risk of floodgates, but –

WINKELMANN CJ:

You're cautioning against being too – being careless in the lines we draw.

MS JOHNSTON:

Yes, but – I'm not going to try an analogy – but I'm not trying to imagine a very large flood other than the – what I've already said.

COOKE J:

A modest flood.

MS JOHNSTON:

I've touched very briefly on my point 5, the risk of prejudice to the Crown. This is obviously a factor that's most commonly of a concern in conviction appeals where there is a risk of a retrial and there is certainly Court of Appeal authorities

that talk about this being needed to be carefully considered, particularly where there is a complainant that may have to give evidence again. There is always a risk of key evidence being lost and memories being faded in the time that has been taken, and a general unfairness in reopening cases after some time.

Now, yes, this is different in sentence appeals, but it's not a factor that's completely absent. Submissions are commonly made in sentencings about culpability and about the facts, and those are more difficult for a Court to assess many years later.

One example, perhaps, is a submission that was made yesterday on behalf of Ms Churchward that perhaps maybe she would've pleaded guilty if the Crown had offered her a s 168 murder, or if she had known that she wouldn't have got a life sentence, then perhaps she would've pleaded guilty.

Now, I doubt very much the Crown would've accepted that, but it's also accepted the plea, given the facts, but there's no – and there's no evidential basis for that. But it's an example of the submission that's very hard for a Court 10, 13 years later to weigh up and consider.

CAMPBELL J:
But can't we deal with that prejudice by simply ignoring those sorts of submissions and attempts to revisit the facts?

MS JOHNSTON:
Yes.

CAMPBELL J:
Because we can see what the trial judge, in Ms Churchward's case, has said at sentencing.
1045

MS JOHNSTON:

Yes. The general point there is that this Court generally shouldn't be re-making factual findings on a second appeal on usual appellate principles, much less a decade later.

So moving then to my point 6, which is the practicality of the remedy and obviously the respect for liberty of the subject is an important factor there.

There may be cases where, say, a conviction and a short sentence imposed 20 years ago on some erroneous basis, that that, of itself, might represent an injustice, perhaps even a substantial injustice, but there is not necessarily a justification for reopening that very old sentence if that sentence, that conviction, isn't having continuing impacts upon the applicant. And that stands in stark contrast, at the other end of the spectrum, someone who remains in prison or an extreme example someone who is on life without parole.

These cases here are somewhere in the middle. No, they are no longer in prison, they are on parole, but the sentence isn't totally spent, obviously.

As to the impact of life parole, we have here the guiding principles for the Parole Board in s 7 and it's the general point there is it's important to remember that parole exists to aid in rehabilitation while protecting the community and the principles that guide the Parole Board are there in s 7.

There was a submission made yesterday about the applicants being never able to be fully reintegrated into the community while they are on parole. Now, I certainly accept the point that's made about the weight of life parole on someone, but it is also difficult, in my submission, to accept the submission that it's preventing reintegration when the whole purpose, or large part of the purpose, of parole is reintegration and also protection of the community.

KÓS J:

But isn't that more a question of the conditions – which can fall away and largely have in the case of Ms Te Wini, I think.

MS JOHNSTON:

Yes.

KÓS J:

But it's rather different in relation to the Sword of Damocles, the recall position. What do you say about that?

MS JOHNSTON:

I shouldn't use analogies, but I was proposing to describe it not so much as a Sword of Damocles but a safety value for the community, which is another way of looking at it when you look at the purpose of recall.

I accept that that is ongoing and there's obviously the policy justification. It was put, at one point yesterday, as life for a life.

KÓS J:

Right.

MS JOHNSTON:

I mean, I wouldn't put it like that, but the purpose of that is to recognise the life that has been lost and the conditions that therefore, for the ...

WINKELMANN CJ:

So you say we should put just to one side any notion that parole can prevent reintegration, but we have evidence, just trying to remember whether it was Ms Churchward or Ms Te Wini, that in fact it is doing just that and...

KÓS J:

It's Ms Te Wini, I think.

WINKELMANN CJ:

Yes and it's – that's not really challenged, is it? One person says about the advice they received, that basically with conditions reporting – who, which person is it, says about the reporting conditions? And there is only – they've

been advised that they're only suitable certain, oh, start their own business? I think it's –

MS JOHNSTON:

Ms Te Wini talks about the difficulties –

WINKELMANN CJ:

Yes.

MS JOHNSTON:

– in obtaining employment, given her reporting condition and whilst I haven't brought any particular evidential challenge to that, I would hope the Court would view that with some scepticism. I mean, she's required to report and if we can go perhaps to the standard conditions in s 14, she's required to report when – to report when –

WINKELMANN CJ:

Yes, I think she, this is about paragraphs, issues of employment, I think she's talking, when she was speaking about when she was attempting to.

COOKE J:

But there are no conditions at the moment that inhibit her employment, are there?

MS JOHNSTON:

In my submission, no. I mean, there's a requirement, I think s 14(g), not to engage in any employment that the probation officer has directed someone not to and we certainly don't have any evidence that she's been directed not to do any particular type of employment.

The condition to report is "as and when required to do so by the probation officer", so there's some flexibility there for an individual probation officer.

WINKELMANN CJ:

So the fact that they remain subject to a life imprisonment sentence doesn't just mean, I think, that they remain subject to recall. They remain subject to the possibility of further conditions being imposed upon them at any time, is that correct?

MS JOHNSTON:

Yes. But further conditions, the special conditions imposed by the Board...

WINKELMANN CJ:

I think they can be imposed.

MS JOHNSTON:

Could be imposed at any time, yes, and can be – you can apply to have them removed. And in my submission, this Court must assume that the Parole Board and individual probation officers will make those decisions in accordance with the principles that I had up before in s 7.

So, yes, there's been evidence that it's difficult and not many people have been able to have their parole conditions discharged, but I think this was addressed in perhaps *Dickey* that –

WINKELMANN CJ:

Yes.

MS JOHNSTON:

– a court can't assume that it won't be possible for these applicants – and applicants who were young people at the time of their offending, yes, those parole conditions will go for a longer period of time for them. They will also be able to submit or rely on their greater prospects of rehabilitation as young people and one would hope and, in my submission, this Court can assume that the Parole Board and probation officers would give weight to their youth at the time.

KÓS J:

Are you suggesting the complaints about the Sword of Damocles are overstated, in the sense that no one realistically is going to think that if they travel in a limited speed zone at 55 kilometres an hour, that they're going to be recalled to prison? Is that an underlying argument?

MS JOHNSTON:

Yes.

COOKE J:

Well, they can't be, in that case, because it's only if you commit an offence that's imprisonable.

KÓS J:

Yes.

MS JOHNSTON:

Yes, we have in the materials the recall provision. I think it's s 61 that refers to –

WINKELMANN CJ:

Risk.

MS JOHNSTON:

– conditions, sentences of imprisonment, or risk to the safety of the community. Yes, those are the grounds for recall.

COOKE J:

There's also some authority, certainly international authority, and there's a Court of Appeal decision that suggests there has to be some nexus between the new offending or the breach and the original offending before recall can be justified.

MS JOHNSTON:

And as I think was raised yesterday, I can't recall by who, but there's obviously recourse that applicants can have through the Parole Board and for judicial review if a probation officer or the Parole Board were not to apply those sections properly.

KÓS J:

As in *Grinder*.

MS JOHNSTON:

Yes.

WILLIAMS J:

The point is that any interaction with law enforcement authorities is going to be problematic because it'll show up on the computer and there's all this retraumatising behaviour. When you read through the Parole Board reports you can see that this is going to be a burden for her, she's has to deal with overpowering authority for more than half of her life.

MS JOHNSTON:

Yes.

WILLIAMS J:

Overpowering in the practical sense of that, and when she gets pulled up by a policeman it's going to be triggering.

MS JOHNSTON:

And some of that, while acknowledging those factors are present, some of that is attendant from or comes from the conviction itself, and –

WILLIAMS J:

Well, it comes from institutionalisation essentially and the trauma of that.

WINKELMANN CJ:

So what do you say about all of that material we were taken to yesterday about the approach around the world to not imposing life imprisonment sentences on children, because of this burden that it – I mean, are you coming to that later? I don't want to take you to it out of order.

MS JOHNSTON:

I can deal with it now. I mean, certainly those international instruments can inform the Court's assessment of manifest injustice and the relevance of youth to that, but they can't create a category, they can't overshadow the statutory test. Yes, other cognate jurisdictions have exceptions for young people, but…

WINKELMANN CJ:

I was rather saying that they reflect an assumption that it is a hard thing for a young person to carry a sentence of life imprisonment for the rest of their life. 1055

MS JOHNSTON:

Yes, and I accept that, and that can be – can and must be factored into the assessment of manifest injustice, but it can't amount to a presumption that a young person should not receive that sentence because Parliament hasn't given that presumption. Parliament has drawn the line for preventive detention after a certain age but has not done so for murder.

And I think the only other point to highlight on this topic is the reason why life imprisonment is the presumptive sentence for murder and that gives society that assurance that I've touched upon, that someone who has taken a life without justification will not be released unless they're not an undue risk to the community. Those conditions and that prospect of recall are tied to those core principles in the Parole Act designed to mitigate that risk to the community.

KÓS J:

It's not a very happy scheme though, is it? I mean we're dealing with a case where it was the terrible killing of a baby, Ms Mulford, again involving a young

person. The jury there gave a merciful verdict of manslaughter, so none of these issues arise in the case of Ms Mulford. So there's not exactly a very precise scheme where we respect the liberty and dignity and interests of young people across the board. We have this sort of exception in the case of s 102, but that's for this Court to work out how that applies, or the Courts to work out how that applies.

MS JOHNSTON:

Yes. I mean certainly Parliament has mandated a presumption that applies for murder and not for manslaughter.

KÓS J:

Correct, but it's obviously a displaceable presumption.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

But your point, simple point is that there is – Parliament has not enacted a, as the Court said in *Dickey*, it hasn't taken a category out for young people and we shouldn't proceed in that way?

MS JOHNSTON:

And the Court should not assume that conditions will necessarily apply for life. The Court has seen that Ms Te Wini, who was first paroled in 2019, has had a series of amendments to the special conditions that apply to her. She was originally on a curfew and that was lifted by 2022. There was a later request in November 2024.

WINKELMANN CJ:

Does she have to go for back parole hearings, or does it just happen without her attendance?

MS JOHNSTON:

That happens with her involvement. Whether or not it's a personal appearance, I don't know. But those applications were made by Corrections and it was heard before the Parole Board.

COOKE J:

But there are no automatic hearings anymore, are there? It's just someone has to apply to go back, in her case, to the Parole Board.

MS JOHNSTON:

We might be getting to the edges of my expertise, but the –

WINKELMANN CJ:

Yes, I think the Parole Act provides it.

MS JOHNSTON:

And certainly the special conditions that are imposed in the materials before this Court talk about the dates on which they expire and they talk about –

WINKELMANN CJ:

So there is a callback. There's sometimes callback dates or automatic fall-offs and then, other than that, it is by application and it's the Act stipulates who can apply.

MS JOHNSTON:

And certainly reference to monitoring hearings. But this situation and obviously as the Court, I think, addressed yesterday, there was the condition on Ms Te Wini not to travel to the Bay of Plenty. That she then, at some point later, requested that that be amended and it was explained to her that that – the reasons behind that, which is to avoid contact with victim family members. But there was an amendment, then, to draw that to be east of Tauranga, so that she could travel to the rest of the Bay of Plenty. So I just ask the Court to see that flexibility in those parole conditions.

WINKELMANN CJ:

So the condition that she stipulate the names of the people where she is going somewhere else, she is going to her partner's family and she has to say who is going to be there, has that now gone with the conditions that have gone?

MS JOHNSTON:

We don't have any evidence on that.

WINKELMANN CJ:

I just thought as a matter of logic we could possibly look at it through.

MS JOHNSTON:

The standard conditions in s 14 would continue to apply and a certain amount of that is by request of the probation officer. But there is certainly no special condition that says that she can never go and stay at someone else's house. I mean, she needs to advise of changes to her residence, but there's nothing in there saying she can't go on holiday to Christchurch, as I understand it. It's just the preventing her from going east of Tauranga.

I think I've probably said what I can on point 6, unless there's any –

COOKE J:

The case of Ms Churchward is very different, of course, because she's just been released and has quite significant conditions.

MS JOHNSTON:

Yes.

COOKE J:

And I guess your point there is that any successful appeal would mean she goes cold turkey, I suppose is a way of putting it.

MS JOHNSTON:

Perhaps not any successful appeal, but – because it would depend where the Court got to on a finite sentence – but there is that risk of cold turkey.

WINKELMANN CJ:

Her being free without any conditions.

MS JOHNSTON:

That's a better way of putting it, yes. I propose to move now to the strength of the appeals and obviously the merits are a necessary consideration and I would frame it as a necessary but not conclusive consideration. It can't be simply the case that someone can just point to a meritorious case or point to a good argument and therefore get an extension of time solely on that basis, because then what is our time limit meaning? So an arguable case can't be enough.

One way, I think it was put in *Taylor*, is the question is whether the measure or level of injustice is such as to compel revisiting the earlier decision and I think we've touched on this already that the test of substantial injustice, now in *Knight* in terms of change of law, the Court of Appeal described it as special reasons or special circumstances. So, a change in the law of itself doesn't justify reopening matters, that should only be granted in special circumstances.

My learned friends have adopted the English test of substantial injustice which I submit is helpful.

So the question then is how we characterise *Dickey* and obviously it's not a finding that a young person – it was not a finding that a young person is not eligible for life imprisonment, and in this sense it stands quite apart from *Mist* and *Taylor*. We've got up here paragraph 20 of *Taylor* which was referred to yesterday, and there the court found that: "Mr Taylor could not be compelled for the sake of finality to serve a sentence which, had the law been correctly understood ... would not have been imposed."

Now, another way of framing that, is that not so much that the sentence of preventive detention would not have been imposed on Mr Taylor, but could not because there was no jurisdiction for it, so that is a situation of a clear correction of the law and my submission is that *Dickey* is not of that character.

Dickey was not a finding that youth of itself necessarily changes the presumption in s 102. It's also not a finding that the gravity of the offending is not relevant to the s 102 exercise.

Now, circumstances of the offending don't have veto power, obviously, and we know from *Van Hemert* that we don't need to see mitigation in both offending and offender, circumstances of the offending and the offender. It's a more flexible overall impression test.

So what *Dickey* was imploring or requiring is a more flexible approach to that that had been taken in aspects of *Rapira*. In part, perhaps this was driven by a change in the facts that were before the Court. Obviously, when you compare *Dickey* to *Rapira* there was a different body of evidence about young people's brains, if I can put it that way, before the Court in *Dickey* than there was in *Rapira* and most of that evidence was actually before the Court in *Churchward*, *Churchward* 2011 being the seminal case on that. And what *Dickey* invited, particularly here at paragraph 171, is more weight on youth.

CAMPBELL J:

What was not before the Court in *Churchward*? Is that easy to identify, in terms of evidence?

1105

MS JOHNSTON:

There is a paragraph in *Dickey* that addresses that. It's paragraph 86 of *Dickey*.

CAMPBELL J:

Thank you.

MS JOHNSTON:

And the key point there, I don't know if we need to go to it now necessarily, but that's where the Court summarises what's new since *Churchward* and the key point, in my submission, is point (b) which is that: "Neurological development may not be complete until the age of 25," which doesn't –

WINKELMANN CJ:

Apply here.

MS JOHNSTON:

– bite here, yes.

So if we can go back then to paragraph 171 of *Dickey*.

WINKELMANN CJ:

I mean, some things: "Young persons who commit serious offences frequently exhibit other characteristics which also tend to mitigate culpability, notably intellectual deficits, mental illness and experiences of abuse or other childhood trauma." Most judges would be able to comment to that effect in any case. I wonder if that really was used.

MS JOHNSTON:

And it's certainly –

WINKELMANN CJ:

Possibly – it was possibly based on proper research as opposed to a judge's impression.

MS JOHNSTON:

And certainly that seems to have been a factor that played into the Court of Appeal's decision to displace s 104 in the Court of Appeal in this case, and certainly young people being more receptive to treatment and more able to be rehabilitated was part of the decision in *Churchward* to overturn the s 104 sentences.

WINKELMANN CJ:

In *Dickey*?

MS JOHNSTON:

The s 104 sentences in *Churchward* is what I was talking about, yes.

WINKELMANN CJ:

Oh, in *Churchward*. Okay, right.

MS JOHNSTON:

I don't know how helpful it is for me to chapter and verse through *Dickey*.

WINKELMANN CJ:

No.

MS JOHNSTON:

But my broad point is that –

WINKELMANN CJ:

It's the critical part we were at yesterday?

MS JOHNSTON:

We were there at some point yesterday…

WINKELMANN CJ:

Where we were going to – where we identified where – it looked like it was about, it's about paragraph 177.

KÓS J:

Paragraph 171.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

Well, it starts at paragraph 171 and then runs through to paragraph 177.

MS JOHNSTON:

Yes, and I'm starting at paragraph 171 to really make the broad point that that really aligns with much of what was said in *Rapira*. Paragraph 177, once we get there, yes, there's a step back, yes, there's a restatement. That's when the Court is saying it's "no longer correct to say, as the Court did in *Rapira*, that youth can carry little weight when balanced against the public interest". And now I take the point that was raised yesterday, and a point that I should've identified myself, that at that point in *Rapira* the Court was citing the Crown submission, but nevertheless I have to accept that it was interpreted in that way and I have to accept that Justice Woolford in the original sentencing of Ms Te Wini – sorry, not original sentencing, in his sentencing of Ms Te Wini referred to that aspect of *Rapira*.

CAMPBELL J:

Well, that's not how I read his sentencing, nor the appeal judgment. Both judgments refer to different parts of *Rapira*, the ones where the Court actually gives its reasons.

MS JOHNSTON:

My acknowledgement is that that particular "youth can't carry much weight" passage was referred to by Justice Woolford, but my submission is that that wasn't what led to life imprisonment being imposed here.

WINKELMANN CJ:

So you're saying Justice Woolford treated *Rapira* as authority for that proposition but his sentencing approach didn't – in fact gave youth significant weight, is that your submission?

MS JOHNSTON:

Perhaps one step down from that. That he referred to that part of it, but it wasn't necessarily part of or isn't demonstrated to be part of the reasons why.

WINKELMANN CJ:

Well, why was he referring to it? He thought it was binding authority, didn't he? He's not referring to it as the Crown's submissions in *Rapira*, he's referring to it as the –

MS JOHNSTON:

Yes, yes, yes. Perhaps if we can go then to paragraph 195 of *Dickey* just to make the Crown's interpretation of the judgment clear. It's important there to note that the Court – and here it aligns with *Van Hemert*, that: "The assessment must begin with the gravity of the offending and culpability of the offender," and here, of course, aggravating and mitigating factors are taken into account and each case must be discussed on its own merits and manifest injustice is more likely when there is mitigation in both.

So this is where I characterise *Dickey* as not so much a correction in the law, but as a whole – an evolution, perhaps in part a response to the more evidence in *Dickey.* But as I have submitted, those are more the additional psychological expert evidence in *Dickey*. But most of that evidence, in my submission, was in fact before the Court in *Churchward*.

WILLIAMS J:

Isn't it the fact that it's just taken a while to sink in? It's not uncommon. I've seen apex courts have to make points two or three times before the system responds. This is probably one of those instances, isn't it?

MS JOHNSTON:

Perhaps. Also, and here, perhaps if we are looking at the numbers of what's happened since *Dickey* and the submissions made, that, look, the High Court mostly or – I forget the exact percentages, but most of the time the High Court is imposing finite sentences for young people. Now, obviously we can't look at those figures and say: "well, even though the Court of Appeal said there is no category exception, these empirical numbers in the High Court show us there is a category exception and therefore, based on that pattern, we need to, as of fairness, give that to these applicants." That reasoning, in my submission,

would be wrong. Consistency is an important principle, but it can't come at the cost of not applying the statutory test.

WINKELMANN CJ:

Well, it might be that they're not saying it's a category exception, it's just that when you apply it, apply youth and other considerations, it becomes apparent that it is manifestly unjust in the particular cases.

MS JOHNSTON:

And that might not be – and that, in my submission, is not a function simply of paragraph 177 of *Dickey* and that restatement. That equally may be a function of the Court's greater willingness to see causal connection in offender's backgrounds.

WINKELMANN CJ:

There is a methodological change that *Dickey* instructs, isn't there? Paragraph 177: "… when sentencing a young person for murder a court must always undertake a s 102 analysis, giving careful consideration to whether life imprisonment is manifestly unjust." You must at that point undertake that analysis, which was not always happening, and give careful consideration to whether youth, young person and other circumstances – read there, the whole judgment, the rest of the whole judgment, means it is manifestly unjust.

MS JOHNSTON:

I guess I can't speak to other cases whether or not careful consideration was given to those factors. But in this particular case, in my submission, it can't be said that youth and other factors weren't given careful consideration here.

WINKELMANN CJ:

Yes, but, well, you'll take us to it, whether that methodological step was in there.

MS JOHNSTON:

The methodological step of giving careful consideration?

WINKELMANN CJ:

To whether it is manifestly unjust to impose a sentence of life imprisonment.

MS JOHNSTON:

Right and I've tried hard to think of a better way of framing the submission, but what I keep coming back to is this, is the *Churchward* – this is the case that has stood for many years as authority for understanding that young people have different drivers of crime, that young people can be rehabilitated differently.

WINKELMANN CJ:

Yes, but when you look at the Court of Appeal decision in *Churchward*, it's as if that methodological test step is just taken as read, three paragraphs, which is not intended to suggest that it at all was scant consideration. It's really the weight of *Rapira* on the Court.

KÓS J:

It's really a s 104 case.

WINKELMANN CJ:

Yes.

KÓS J:

I mean, s 102 was given a steer away in *Rapira*, so either it was not raised by counsel, in some cases, or else it was given limited consideration if it was raised. So I think paragraph 177, it's a combination of both the beginning and the end of it which represents a real change in approach. Is it a change in the law? Well, I think members of the public would say it's a change in the law. I mean, strictly you could say it's evolutionary, but it's a pretty big change. It's saying you must look at s 102 when you're dealing with young people. Now, that wasn't the position before. That's a change, isn't it?

MS JOHNSTON:

I can't accept it's a change, in the sense –

WINKELMANN CJ:

You would say it was always required?

1115

MS JOHNSTON:

Yes, of course, it was always required.

WINKELMANN CJ:

But they're saying no, no, no –

KÓS J:

Well, but it wasn't. It wasn't, because it's a presumption. Unless the defence raise the point, they're going to get a life sentence. So, you're not required to consider it under the *Rapira* approach, in fact, you are positively discouraged from considering it. Now, you must do so.

MS JOHNSTON:

I'm not sure I accept *Rapira* goes that far. It talked about the importance of the presumption and that –

WINKELMANN CJ:

Youth can carry little weight.

MS JOHNSTON:

– youth can carry little weight.

KÓS J:

So what does that tell you? If that's all you're going – if it's not youth plus, you've got a problem, don't bother.

WINKELMANN CJ:

Well, if we just look at this case, there is no such methodological step in the Court of Appeal's analysis, is there? It kind of just...

MS JOHNSTON:

Let's go there. So if we can go to *Churchward* at paragraph 64.

WILLIAMS J:

Wasn't Mr Tennet – is it in that decision Mr Tennet was described as being hopeful or optimistic in respect of a s 102 argument?

WINKELMANN CJ:

Yes, it's "optimistic".

MS JOHNSTON:

Yes, "highly optimistic". One factor the Court needs to bear in mind here is, of course, that this was a s 104 murder and in that sense this case stands apart from those considered by the Court of Appeal in *Dickey*.

WINKELMANN CJ:

That doesn't seem to detract from the force of the point, though, in *Dickey*, does it? Are you saying that that – because, in fact, is surely must be true, given the breadth of the categories in s 104, that the s 102 step must necessarily be carried out in any case, for youth?

MS JOHNSTON:

Yes, and my submission is that it was carried out here, but that when the s 102 analysis is carried out, the circumstances of the offending remain relevant and important and all aggravating and mitigating factors relating to the offending are relevant and obviously s 104 factors need to be considered as part of that, otherwise the statutory mandate in s 104 would be lost sight of and –

WINKELMANN CJ:

So when we look at paragraph 64 – paragraphs 63, 64, 65, there's no consideration of Ms Churchward's youth.

COOKE J:

And in fact, at paragraph 65 it basically says this is a “brutal murder”, it can’t apply.

WINKELMANN CJ:

Well, it's unusual in some ways, because perhaps Mr – I don’t know what, no, so paragraph 63: “He submits that there are arguments that, because of Ms Churchward’s youth and mental state, life imprisonment did not need to be imposed.” We don’t know what the submission was, properly. And then it doesn’t even, it really doesn’t – it just really puts youth to one side and goes to: “mercy killings” and “prolonged and severe abuse” and just says this is a “brutal” killing.

MS JOHNSTON:

In the context of a decision that is otherwise all about youth and youth plus the mental impairments. It's, I mean, I accept that the Court can look at the words that are said there and say, well, there’s no mention of circumstances of the offender in paragraph 65, but that doesn’t necessarily follow that the Court hasn’t considered it, given the whole rest of the judgment is all about considering those factors which were clearly before the Court.

WILLIAMS J:

Isn't the case that – isn't the case that the Court, at that point, probably thought it lacked the social licence to take that big step, because it was a big enough step to get below an MPI of 17?

MS JOHNSTON:

Perhaps and if that’s the case it, in my submission, even reinforces that this is not an appropriate case to grant an extension of time if it's a –

WILLIAMS J:

Perhaps it was wrong?

MS JOHNSTON:

It obviously depends what we mean by wrong.

WILLIAMS J:

Well, we can see in subsequent cases that that assessment, at least subsequently, became wrong, given that there are s 104 cases in which determinate sentences are imposed for young people.

MS JOHNSTON:

I'm reluctant to go into numbers but I think that it's fair to say the majority of youth s 104 cases have resulted in life sentences. And I would caution against statistics for the obvious reasons that murder is rare, and murder by a young person is rare, so it's hard to know what's statistically significant and, of course, I'm well outside of my expertise there, but given the small numbers we're dealing with, those patterns tell us something but those patterns shouldn't be guiding, or shouldn't be driving the courts.

KÓS J:

Well, I think that's exactly what you'd expect, though. As I said before, if you've got a deliberate killing by a child murderer, it's much less likely that you're going to displace s 102's presumption.

MS JOHNSTON:

Yes.

KÓS J:

I think that must be right.

CAMPBELL J:

Looking at paragraph 64, that first sentence expresses the Court of Appeal's view of what *Rapira* stood for. It doesn't reference that should be given "little weight" comment, but nonetheless that first sentence is difficult to square with, or difficult to say that it's consistent with the approach in *Dickey*. Would you

accept that? Particularly paragraph 177 of *Dickey*, the close consideration methodology, as the Chief Justice put it.

MS JOHNSTON:

My first reaction is I don't accept that, but let me just reflect for a moment. So at paragraph 64, the Court is talking about it being: "... made on the basis of all of the circumstances of the offence and the offender ...". That's still the law, so your Honour's concern is the mention of exceptional circumstances?

CAMPBELL J:

Well, and the omission of any suggestion that if the offender is a youth that close consideration should be given – sorry, "careful consideration" must always be given: "… to whether life imprisonment is manifestly unjust."

MS JOHNSTON:

I read that as careful consideration must always be given by any court deciding whether life imprisonment is manifestly unjust.

WINKELMANN CJ:

Read which as saying that? Are you reading *Dickey* as saying that? Because I –

MS JOHNSTON:

"Careful consideration" is the end of paragraph 177 of *Dickey*.

WINKELMANN CJ:

Yes. I mean, I think that's probably true as a proposition, but they're saying in the context of youth – when they're saying that, they're making the point that you must bring to bear the youth and other circumstances. Because they've already made the point these people are – we don't, it's not often you'll be seeing a young person who has come from a perfectly safe, happy background who is presenting to us. Normally, people come to us with multiple issues, including youth, and when you come to sentence them at that s 102 step, which they're reminding judges they should be undertaking, even if counsel don't

argue it, I imagine, you bring this to bear. So they are talking about the youth factors and it's apparent that the Court of Appeal in *Churchward* do not do that. It's pretty hard to jam that into their analysis.

And when I read the Court of Appeal decision in *Te Wini v R* [2013] NZCA 201 you can say that there's more discussion, but really at the end of the day the Court just comes down to – well, Ms Churchward's situation was described like this: "This Court was almost peremptory in dismissing Ms Churchward's appeal against life imprisonment on the ground that her youth and mental state made life imprisonment manifestly unjust." That's paragraph 66. That's how they read it, and then it's that that they draw together and find Ms Te Wini's appeal on that ground can't be successful.

MS JOHNSTON:

Perhaps if I can come back to Ms Te Wini, otherwise I'll lose my spot. I'll –

WINKELMANN CJ:

Yes, fair enough, Ms Johnston.

MS JOHNSTON:

I'll finish off and see if there's anything more I can say about Ms Churchward. That reference to giving "careful consideration" when someone is a young person, that goes a little further, perhaps, than saying you need to look at the circumstances of the offender but that can't be read, in my submission, as meaning that in every case, when a young person is subject to the presumption, there's a particular, I don't know, anti-presumption that applies, because that will be creating a category exception.

1125

WINKELMANN CJ:

No. No one is suggesting that. It's just a method – it's a rights protective methodological step. Rights required I suppose, not rights protective. A rights consistent methodological step.

MS JOHNSTON:

I think my concern here is if the Court is saying, because at paragraph 64 of *Churchward* there's no particular mention of youth but was mentioned as a submission in paragraph 63, that, therefore, that was somehow missed by the Court. Yes –

WINKELMANN CJ:

Well, would it be sufficient to say, as the Court of Appeal did in *Te Wini,* that they were almost peremptory, so not meeting the Court of Appeal in *Dickey's* standard of careful consideration? Or you can say you don't agree with that characterisation in *Te Wini*?

MS JOHNSTON:

Can I say I don't agree without giving a reason?

WINKELMANN CJ:

I think that would be arbitrary.

WILLIAMS J:

We do that occasionally.

COOKE J:

No, that's us.

WINKELMANN CJ:

That would be arbitrary. Well, we can come back to it after morning tea because that might be the nub of the appeal for both really, I think, possibly? So...

COOKE J:

I mean, the other factor about it is it does – I read it as saying, this is not the category of case that fits in s 102. It's the reference to the Minister's speech brings that home to me. It's not of that character, so that's why it's an optimistic submission.

WINKELMANN CJ:

Which may have been how the courts thought of s 102 at that time, because it was being read as a very strong Parliamentary signal.

MS JOHNSTON:

Yes.

KÓS J:

It's back to social licence. Now there's a pattern with sentencing, the Crown hasn't sought to reverse those sentences by Solicitor-General appeals.

MS JOHNSTON:

There has been one, at least.

KÓS J:

One.

MS JOHNSTON:

Solicitor-General appeal against a finite sentence for a –

KÓS J:

So *P and D*, is it?

MS JOHNSTON:

No. It's *R v TH* [2023] NZHC 630?

WINKELMANN CJ:

Is that before the Court of Appeal? Has it –

MS JOHNSTON:

It was. The Crown appeal was dismissed.

WINKELMANN CJ:

Right.

MS JOHNSTON:

So, there has been some.

KÓS J:

All I'm saying is the geography is different now and it doesn't seem as if the heavens have fallen in.

WINKELMANN CJ:

Or perhaps not even that. Perhaps it's just that Courts have had time to think about this provision, because sometimes in the sentencing realm Courts do take a while to think. They are human – it's a human – the Courts are a human organism really, they take a while to place legislative change within the broader fabric of the law and so that's been, as Justice Williams said, woven in over time.

MS JOHNSTON:

Yes and I don't think it's accurate to say that the numbers or the geography in recent years is solely a reflection of paragraph 177 of *Dickey*.

WILLIAMS J:

There's more going on than that.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

Well, perhaps it's a reflection of *Rapira,* misunderstood or otherwise, being taken away as the controlling decision and I think there is, you know, there is an argument that *Rapira* doesn't stand for the proposition it was constantly cited for, but it was certainly applied in that way, and *Dickey* lifting that from the law.

WILLIAMS J:

There's probably a practical thing going on here, too. Sorry to interrupt you. But it's taken a while for the Bench, generally, to get their heads around and

then buy into Dr Lambie's evidence and the fact that that evidence reflects a much wider body of science. But once they have, they've embraced it, because they had to. It's evidence.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

Right, well, it's morning tea, but you can answer that first, or you may not want to. Your option.

MS JOHNSTON:

I think morning tea is a good idea.

WINKELMANN CJ:

We will take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47 AM

WINKELMANN CJ:

Ms Johnston.

MS JOHNSTON:

The broad submission I have been making most recently is that a careful analysis of the Court of Appeal decisions in these cases show that the law was actually applied in a manner not inconsistent with the restatement in *Dickey* and I've been through Ms Churchward's case in that respect.

I propose to touch briefly on Ms Te Wini's case and if we can go then to, I've got the paragraph references in my outline, but perhaps most key, I think, is paragraph 56 of Ms Te Wini's Court of Appeal judgment.

WINKELMANN CJ:

So did you want to start with, I think Justice Campbell might like you to start with High Court, is that correct?

CAMPBELL J:

You can start with the Court of Appeal if you like, but I would have thought paragraphs 15 and 16 of the Court of Appeal decision, don't they express the principles that the Court applied there?

WINKELMANN CJ:

Of *Te Wini*.

MS JOHNSTON:

Yes, and the presumption and the statutory policy reason behind that presumption still exists post-*Dickey* and presumption is still, in my submission, constrained. Yes, *Rapira* is referred to there but when we get to the Court applying the reasoning in paragraph 56, the Court refers to it being a "stringent" test and refers to "the circumstances of the offence and the offender" which is again consistent with current law and the Court of Appeal concludes, paragraph 57: "... if it were only the circumstances of the offender ... the Judge needed to consider," it might be "manifestly unjust", but the circumstances of the offence are relevant and that, of course, remains the law and what is a strong factor there, although not specifically referred to there, is obviously the application of s 104 and the important aggravating features reflected there.

WINKELMANN CJ:

And against you, against that point of view is paragraph 66, I think, which is only factor, you would say, the Court took into account, because at paragraph 67 they say: "Drawing all this together ... ."

MS JOHNSTON:

Yes.

WINKELMANN CJ:

So paragraph 66 is where the Court, referring to the Court of Appeal's "almost peremptory" dismissal of Ms Churchward's appeal.

MS JOHNSTON:

Yes, but referring to the submission being made on the basis of her "youth and mental state".

COOKE J:

And it still seems to be saying: "look, sometimes the circumstances of the offence just neutralise the possibility of youth and personal circumstances getting you within s 102."

MS JOHNSTON:

Yes, and that remains the law, in my submission. And to the extent the Court might conclude that another judge would reach a different decision or perhaps this Court would reach a different decision, therefore there was an error in the courts below, that's an error of weight, in my submission, rather than a true legal error. It a different error from, obviously from *Taylor*, where the concern was no jurisdiction.

WINKELMANN CJ:

This is another way of viewing what happens in the Court of Appeal in *Te Wini* which is going through these factors quite faithfully, building on Justice Woolford's approach, putting to one side whether Justice Woolford was regarding *Rapira* as binding upon him, which he does seem to have been, but when they get to the bit just before conclusion, they then refer to the Court of Appeal in *Churchward* as being something which shapes the view of the offending and how available the s 102 discretion is to them and that is a matter that they weigh significantly.

MS JOHNSTON:

And there is obviously more focus on s 102 in Ms Te Wini's case, given by that time the s 104 argument had been and gone.

KÓS J:

There's also something of a hangover from the previous authorities before it, *Van Hemert*, in paragraph 67 where they seem to treat the circumstances of the offender and the offence considerations as conjunctive and we said not in *Van Hemert*.

MS JOHNSTON:

I'm not sure that that error is necessarily made in paragraph 67, because it's saying it's "the sole consideration". That doesn't necessarily mean both are not being considered – well, it doesn't necessarily mean that the Court was requiring mitigation in both offence and offender, but rather a –

KÓS J:

Yes, but it's possible, it's – anyway, that's not the main issue here.

MS JOHNSTON:

I understand the point, but I think what is bedded into that conclusion is the seriousness of the offending here and s 104's application and that's the reason why the mitigation in Ms Te Wini's circumstances wasn't enough to rebut the s 102 presumption and that remains and should remain good law. The Court of Appeal in *Kriel* talked about the relevance of s 104 and there's reference in this Court's decision in *Van Hemert* to section – the reference is *Van Hemert* at paragraph 34: "Section 102 must, of course, be read in conjunction with ss 103 ... and 104 ... ."

Perhaps this is a useful point for me to address the intervener's submission about the order in which the provisions should be approached.

WINKELMANN CJ:

How are you going for time, Ms Johnston? Not that you're under any time pressure, but...

MS JOHNSTON:

Well, I'd like to sit down soon. I mean, I'm up to –

WINKELMANN CJ:

Did you say you'd like to sit down?

KÓS J:

Yes.

MS JOHNSTON:

I'm up to 8(b)(ii) I think I've dealt with, so I'm nearly at the point where I propose to hand to Mr Davie to deal with the comparison to the cases that have followed.

WINKELMANN CJ:

Yes.

MS JOHNSTON:

I would propose to just address, now that I've found my notes, that point about s 102 versus s 104 and I don't have a great deal to say about that. There's obviously logical force to considering s 102 first. The key point – and this was addressed, I think, yesterday – provided that those s 104 factors are not lost, given the important message that Parliament has sent about how those grave murders should be treated, as this Court's well aware, that Parliamentary intent. 1155

The only other point I'd make is that any kind of strict sequential test risks, obviously, something being lost. The approach, however it's framed by this Court, needs to be flexible and ensure that all factors in those sections and otherwise in the Sentencing Act need to be considered.

KÓS J:

I mean, it just seems to me that it's relatively unlikely that if s 104 applied you would displace the s 102 presumption. Same considerations would apply, not as s 104 considerations, but simply considerations that go to the circumstances of the offending under s 102. So it comes up twice but the sequence is still s 102 first.

MS JOHNSTON:

Yes. I have tried to come up with a hypothetical where that wouldn't work but I haven't been able to. I mean, obviously the facts and circumstances can surprise us, so my main point is that both need to be considered.

WINKELMANN CJ:

You have to make sure you do the s 102 test and apply a sequence which enables both sections to have effect.

MS JOHNSTON:

Yes, and s 102 is, of course, obviously asking the Court to look at the circumstances of the offence, which would import into it aggravating features.

WILLIAMS J:

But also culpability.

MS JOHNSTON:

Yes, yes.

WILLIAMS J:

Which means youth, because the whole point of the science is that culpability is reduced as a result of brain development, et cetera.

MS JOHNSTON:

Yes, and I think that was a point that – obviously not about youth specifically, but I think that was raised and not decided, in *Van Hemert*, to what extent mental impairment could impact culpability, and I think that goes back to the point Justice Kós raised at the beginning of the day about whether youth is relevant to culpability. And there's obviously –

WILLIAMS J:

That's a question of fact, isn't it? It's not a question of, you know, sentencing approach. It either is or it isn't.

MS JOHNSTON:

It's a question of both, except it's obviously a question of fact.

WILLIAMS J:

My point is, if culpability is a stage 1 issue, then it has to be taken into account at stage 1 as a matter of fact.

MS JOHNSTON:

Yes. The concern when it comes particularly to youth is that youth is commonly a stage 2 factor, as well, for different reasons, because of rehabilitation needs and the greater impact of imprisonment on youth and all of those factors. So if the Court is going to consider culpability, youth as reducing culpability at stage 1, the Court then needs to be very clear about obviously not double-counting.

WILLIAMS J:

Yes.

MS JOHNSTON:

And also when we're looking at sentence starting points, that's what drives consistency in sentencing. So, most of the time when you've got two co-offenders they'll end up with the same starting point and then the Court then transparently, to reflect their individual circumstances and individual factors, will then reduce from that starting point.

KÓS J:

It does, but the problem is that one of the most fundamental considerations that reduces culpability is role. So, where an offender is only a bit player, you know, usually the starting point is much lower for that person, and it's hard to distinguish role from age. Each of them are things about the personality and involvement of the offender in the offence. Yes, it makes comparison a little bit harder, it's a more sophisticated, nuanced thing, but you've got to do it if you're going to take culpability seriously at stage 1.

MS JOHNSTON:

Yes, and that's – well, we could risk getting complicated in having a starting point for the offending and then a 1(a) starting point for the reduced culpability or reduced role, before then going on to look at aggravating and mitigating features. Perhaps then we're getting too complicated but that is, I guess, part of what needs to happen and provided there is evidence demonstrating that youth or whatever the other factor is has reduced culpability, I don't know that there's any principled reason for it to not be taken into account at stage 1, so long as care is taken with consistency and with not double-counting, because it's very difficult then, if you're comparing a case where a large discount is given for youth but some of that is to reflect lower culpability, because that's sometimes how the courts have done it in the past, that you're not then double counting by reducing for culpability and then getting the youth discount that other people have been getting for reduced culpability plus rehab prospects or whatever else. So that's the problem that I will leave for the Court.

I would like to just briefly take the Court to *Berkland*.

WINKELMANN CJ:

Just before we finish *Te Wini*, if counsel for Ms Te Wini is correct in that the High Court and the Court of Appeal both proceeded on the basis that *Rapira* stood for the proposition that youth can carry little weight, that would inevitably affect the analysis that's done. Certainly, it's a more thorough analysis than in *Churchward*, but if it's proceeding on that mistaken premise, then it is probably – the result is probably inevitable, as the Court saw it in *Churchward*?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

So, I just wanted to check that with you, because I don't think we've actually discussed that in relation to *Te Wini*.

MS JOHNSTON:

Yes. I think I disagree in terms of the extent to which that part of *Rapira* influenced the Court of Appeal, or influenced Justice Woolford, because *Dickey* of itself only corrects that one part of *Rapira*. The rest of *Rapira*, in my submission, remains consistent with *Dickey* and *Van Hemert* for the most part.

CAMPBELL J:

That's why I encourage you to look at paragraph 16 of the Court of Appeal's judgment, because that sets out the principles that they're applying and quotes the entirety of what Justice Woolford said about those principles, and it includes one paragraph from *Rapira* which is part of the Court of Appeal's actual reasons in that case.

MS JOHNSTON:

Right.

CAMPBELL J:

It doesn't include the, what I might call, the offending part that was addressed in *Dickey*?

MS JOHNSTON:

So I have fallen for the advocacy mistake of assuming your Honour's question was against me when in fact it was not necessarily against my point.

KÓS J:

Well, I can improve on the question then by taking a point against you, because if you look at those passages, the underlying thread seems to be that really s 102 is only displaced, the presumption is only displaced, in events of failed suicide pacts, mercy killings and battered defendants and then there is a rider in paragraph 45 where Justice Miller's judgment in *McNaughton* is referred to, or sentencing in *McNaughton*, where that was involved a role consideration but broadly, it seems to be saying, well, not youth. Is that the thrust of it?

MS JOHNSTON:

That's one interpretation of it.

KÓS J:

Yes.

MS JOHNSTON:

The difficulty I think here is that, to a large, to a great extent, in *Rapira*, the Court was referring to Hansard and Parliament's intent and that hasn't changed. Yes, there is more weight given to youth now post-*Dickey* interpretation, but it's hard to say that a Court citing the legislative intention at the time the Sentencing Act was passed is now wrong.

WINKELMANN CJ:

Yes, but it doesn't – there's no reflection in this instruction, the Judge's instruction to himself, of that point in *Dickey*, really.

MS JOHNSTON:

There's no –

WINKELMANN CJ:

Because *Rapira* is cited, we can see that when we look at the case law at the time, regularly for that proposition about, you know, youth can carry little weight. He's citing *Rapira* and I imagine other cases to similar effect and then he's talking about this narrow view of it which was apparent in *Churchward*. So it looks – doesn't look like the *Dickey* analysis. You have in your favour that there is – then he does then go through all these matters.

1205

MS JOHNSTON:

Yes, so I guess, again, it's a question of degree and the Court has then gone through all of the factors and the relevance of youth and diminished responsibility. In paragraph 40, the Court of Appeal finds "no fault" in the way

Justice Woolford assessed whether there was: "... a sufficiently close connection between ... impairments and the murder to affect the s 102 presumption."

WINKELMANN CJ:

So if Justice Woolford's wrong, the Court of Appeal's proceeding on the same wrong basis. And if he is right, they are proceeding on the same correct basis. So that's the issue for us, isn't it?

MS JOHNSTON:

Yes.

MS JOHNSTON:

If I can go to *Berkland* briefly.

KÓS J:

Can I just ask you about paragraph 23 of the *Te Wini* Court of Appeal judgment and the point the Court of Appeal makes that: "... presumption in favour of life imprisonment in s 102 applies equally to s 167 and s 168 murders." That's obviously something I keep banging on about in this hearing today, but it does seem to me that that's strictly right but, nonetheless, in the actual decision as to whether the presumption should be displaced it could be a difference. Obviously, the circumstances of the offending is a difference that gets taken into account and whether it's a s 167 or s 168 murder may make a really big difference to that. My point being, that if it's a s 167, a deliberate killing, it's probably less likely there will be displacement and a greater chance, therefore, if it's a s 168.

MS JOHNSTON:

I think the argument is stronger when – I'm just trying to find my notes on this point – but when the comparison is between s 167(a) and s 167(b) or s 168, obviously and this point is made in the materials, but Parliament has regarded s 168 murder as still murder and provided for the same maximum penalty and

the policy justification for culpability behind s 168 turns on the risks that arise from a deliberate choice to engage in violent or dangerous crime.

Here, yes, the elements of the offence that Ms Te Wini pleaded guilty to differ. In this particular case, though, she was sentenced on an agreed factual basis and it's very difficult to see from those facts how she wouldn't have realised that there would be a risk of death based on the nature of the assault that she participated in.

Plainly, Parliament intended s 168 conduct is murder and should attract that presumption and plainly a culpable homicide in the course of a robbery is appropriately considered a serious offence. Yes, I accept the mens rea is different but there is also the serious offence of robbery that is attached to s 168 here and importantly, also, that is a factor, causing someone's death in the course of another offence, that is a factor that Parliament regards seriously, hence why it is a s 104 factor.

WINKELMANN CJ:

You can't really take into account that she foresaw death because it's not an element of the offence that she pleaded guilty to.

MS JOHNSTON:

It's not. But the agreed factual basis, and there is an agreed summary of facts before the Court, and the Courts didn't draw a great deal of distinction between the two offenders, yes, there is –

WINKELMANN CJ:

But that's still, but my question is, we couldn't take into account and nor could the sentencing Judge take into account that she foresaw death when it's not an element of the offence that she pleaded guilty to? Because then we'd be sentencing her for a different – the sentencing Judge would be sentencing her for a different offence.

MS JOHNSTON:

Absolutely. But also, she was sentenced on the basis of an agreed summary of facts that reflects –

WINKELMANN CJ:

Serious violence.

MS JOHNSTON:

Serious violence, yes.

WINKELMANN CJ:

Yes and so she pleaded guilty to serious violence, because she meant to cause grievous bodily injury.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

But it's a different level of culpability, one might think, than foreseeing – intending to cause serious injury and foreseeing death, a risk of death and proceeding even so. That's a lesser culpability.

KÓS J:

Or intending it.

WINKELMANN CJ:

Or obviously intending it, yes.

KÓS J:

Yes.

MS JOHNSTON:

I certainly accept it's different from intending, and there is some difference to causing the injury under s 168(b) knowing there's a risk that death could well result.

WINKELMANN CJ:

Here's an interesting question for you. Well, you may find it uninteresting and, in fact, the answer may be obvious, but the question for Ms Churchward is: we don't know the basis on which the jury convicted her, which pathway, so is it open for the Court, this Court, to find – take a view on that? Because I don't think Justice Venning did.

MS JOHNSTON:

No, and s 168 wasn't on the indictment, I don't think.

WINKELMANN CJ:

No.

MS JOHNSTON:

So it's s 168(a) or (b) [*sic*] and I think – I proceeded on the basis that Justice Venning accepted it was s 167(b), but I did recheck the sentencing notes and that's not made express.

WINKELMANN CJ:

The facts just speak of s 167(b), don't they, really?

MS JOHNSTON:

Well, I don't know that the Crown would necessarily agree, given the nature of the assault and the fact that it was not simply one strike to the head. It was a continued attack from a number of different positions in the bedroom, and the photographs and the blood splatter evidence is quite telling on that, so in my submission, it was open to the Crown to proceed on the basis of it being an intentional killing, given the sustained level of the violence and the focus on Mr Rowe's head, but in saying that, I've accepted that the Court can proceed on the basis that it was s 167(b).

WILLIAMS J:

What's the logic of that? If the charge was laid on the basis of lack of foresight, because the Crown must've concluded that given the psychiatric evidence they

could not prove beyond a reasonable doubt that there was actual intent, how then can you sentence on the basis of actual intent where you have the same standard of proof for sentencing purposes?

MS JOHNSTON:

I'm not asking the Court to sentence on the basis of actual intent. I'm simply saying it was open for the Crown to have proceeded on that basis.

WINKELMANN CJ:

So you're content for us to proceed on the basis of the recklessness level?

MS JOHNSTON:

Yes.

WILLIAMS J:

Sorry, I misunderstood what you were saying.

MS JOHNSTON:

Sorry if that wasn't clear. And I guess the – I would then say that there's not a great deal of room to draw a distinction between s 167(b) and s 168 in circumstances such as this, when there's a summary of facts that's agreed and a joint –

WINKELMANN CJ:

Apart from the fact the sentencing judge can't assume foresight of death under s 168, whereas the sentencing judge must assume foresight of death, risk of death under s 167.

MS JOHNSTON:

Recklessness, yes.

WINKELMANN CJ:

Yes.

MS JOHNSTON:

And I guess the broad point that I'm obliged to make is that the Court should not, as a matter of course, regard a s 168 murder as necessarily less serious than a s 167 murder.

WINKELMANN CJ:

But it might interplay with youth, mightn't it? I mean the whole thing just creates a different analysis. In each case it's a different analysis as to what the conviction is and how it interacts with what we know about youth and the other disabilities, et cetera.

MS JOHNSTON:

Yes, and that distinction, in my submission, has less force in a case where the s 168 participant, if you like, is involved in the actual violence, is one of the people using an implement in order to strike the deceased.

WINKELMANN CJ:

So you would accept that s 167 and s 168 might interplay with these other factors differently in particular cases, but here you say not so because there was – the person was actively involved in the striking.

1215

MS JOHNSTON:

Yes, thank you. This is probably a good time to turn to some brief – well, perhaps I shouldn't promise them that they will be brief, but some points about the culpability of the individual offenders, which is what we've just been addressing.

And the Crown, of course, accepts that there is evidence about the neurological differences between young people and adults, and this is in large part the reason why the Court of Appeal departed from s 104 sentences here.

I do ask the Court to remember that the adult sentence would have been a minimum period of 19 years here and the Court of Appeal accepted that in *Churchward*.

And I accept, of course, that there are difficulties in both offenders' backgrounds and there is some connection between those backgrounds and the cannabis addiction that's referred to. And they were matters, in my submission, best assessed at the time in the light of the evidence then, and those were factors that resulted in those 17-year terms originally being overturned and I would invite the Court not to depart from the factual findings made at the time.

Now, maybe, post-*Zhang* and *Berkland* and/or with more evidence, another Court might reach a different view as to the extent of the causal connection. Maybe, the Court would find a – more likely, now, to find a stronger causal connection between those background factors and this offence, or in other offences. But in the particular facts of this case, it's far from a strong argument, in my submission, and this case is different from many other offences, many other murders committed by young people, in the sense that this was not, in my submission, fairly described as a hot cognition situation.

The applicants have made a conscious decision to go to a house to steal and we understand the reasons behind that are connected to the addiction. They're also targeting somebody who they know is older. They went there with implements for the burglary. I accept that we can't establish that those implements were to intend to use – intended for harm at that point. They have a look around the house. They don't find much in the way of valuables. They make a conscious decision to go into the bedroom of a sleeping person.

This is not a situation where that person has woken up and confronted them or shouted at them and then triggered a hot cognition reaction from them. He wasn't posing a threat. The evidence is he's gone to the toilet and gone back to sleep in bed. They have then, whilst he's sleeping, armed themselves, again, not in response to any sort of threat, he's still asleep at this point, they're

anticipating but they haven't been surprised by him in any way, and then they've gone into the bedroom for the purpose of –

WINKELMANN CJ:

Well, Justice Woolford found it was because they were fearing the consequences of discovery. I thought that was what Justice Venning said in his sentencing notes, too. Not that they were doing it to rob his bedroom.

MS JOHNSTON:

Well, they went into his bedroom because Ms Churchward understood that people often keep valuables in the bedroom and they didn't want to turn the light on in there because they might wake him up and they were worried that he would wake up and stop them, so that's why they had armed themselves and the intention was, Ms Churchward said, to knock him out at least.

And they've gone into the room and, yes, it's dark, but they clearly know somebody is there and was sleeping, and then they've consciously gone out of that bedroom, still not disturbed, he's still asleep, and then "encouraged one another", I think is the words used in the sentencing notes –

WINKELMANN CJ:

Was this in Justice Venning's sentencing notes?

MS JOHNSTON:

Yes. I think it's in both sentencing notes.

KÓS J:

Well, at paragraph 9 he says that during the attack he woke up, raised himself –

MS JOHNSTON:

Yes, I'm not –

KÓS J:

– which is exactly what you would expect. I mean, if you're hit with sticks, you're probably going to wake up.

MS JOHNSTON:

Yes.

KÓS J:

And he did.

MS JOHNSTON:

But the point I'm making here is that there was sufficient, if you like, executive functioning for these young people to go into the bedroom, they've gone – he's still asleep, they've gone out of the bedroom, they've encouraged one another to then decide to go back in and then they've started striking him and, yes, he's obviously woken up. There's a defensive injury to the elbow and as the Court will have seen, terrible injuries to his skull.

WINKELMANN CJ:

So, yes, at paragraph 6 Justice Woolford says that it is because: "… Ms Te Wini inadvertently caused a noise by opening a small container. [That they then fear] the consequences of discovery …".

MS JOHNSTON:

Yes, but even so, Mr Rowe is still asleep when they enter his bedroom. Now, Ms Churchward said that she had been hit on the head before and she'd blacked out and didn't think much would happen. Nevertheless, this wasn't a situation where she hit him once or even twice on the head and then ran away or made another decision. In fact, the sustained attack continued.

So, it's those facts that stand this case apart from many of the other youth homicides that are in the cases. This isn't someone who's responding to a perceived slight from somebody else. This isn't someone who is joining a fight to help a friend and stabbing someone once and then running away. It's at least

20 blows from a number of different positions, moving around the bedroom, and 12 injuries to the head and face, the defensive injury to the arm and elbow and the pathologist likened the skull fracture to like breaking an eggshell.

So, there were a number of s 104 factors present as will be apparent to the Court: brutality; the vulnerability not only of Mr Rowe's age but his small stature, medical needs, the fact he was asleep and outnumbered in the bedroom; there is also the unlawful entry into the dwelling place and the offence caused in the course of another serious offence.

I think I've covered the key culpability points, so this I think is a good moment to hand – invite Mr Davie to address the other cases, so the cases post-*Dickey* dealing with young offenders and then he'll hand it back to me to make the brief submission about the level of finite sentence and, of course, to respond to any questions that I have missed.

WINKELMANN CJ:
Mr Davie.

MR DAVIE:
May it please the Court. As part of their argument for an extension of time going to the merits element of the test, the applicants say that they may well receive determinate sentences if they were sentenced today under *Dickey*, or even stronger than that, they say that it's virtually certain that they would receive determinate sentences.

In my part of the argument, I intend to test that proposition and suggest that, in fact, it is quite arguable that if sentenced today under *Dickey* the applicants would still receive sentences of life imprisonment and to that end I wish to discuss five cases.

So, two cases where life imprisonment was imposed on adolescents which I say are analogous to this case, and the first of these is a High Court decision

of his Honour Justice Cooke and that is *R v Williamson-Atkinson* [2024] NZHC 611 from 2024 and that's in the respondent's bundle at tab 25.

COOKE J:
That case is under appeal, isn't it?

MR DAVIE:
It is, Sir, and the hearing has been held but there is no decision yet that I understand.

And the other case is, of course, *Kriel v R* and specifically the cases of Messrs Nattrass-Bergquist and Wallace-Loretz and that's tab 2 of Ms Te Wini's bundle. And I will also discuss –
1225

WINKELMANN CJ:
And against you on Nattrass-Bergquist, which you should address, it was said that that was wrong and that it's the clearest case – a clear case.

MR DAVIE:
Yes, your Honour, and I do intend to make some submissions in respect of that.

And the other three cases that I intend to discuss are s 104 murder cases involving adolescents in which determinate sentences were imposed and, as far as we're aware, these are three of nine of this category of cases and those other six, life imprisonment was imposed and I intend to attempt to distinguish each of these three cases. These three that I am going to discuss, the first –

WINKELMANN CJ:
So these were cases, three cases, where life imprisonment was not imposed?

MR DAVIE:

Correct, your Honour. So three cases where determinate sentences were imposed on adolescents in a s 104 situation and three out of nine, the other six life sentences were imposed.

And so these three: *R v Ronaki [2024] NZHC 3019*, a 2024 High Court decision that's in Ms Te Wini's bundle at tab 25; *Taylor v R*, a 2025 Court of Appeal decision in Ms Churchward's bundle at tab 47, and finally *Webster v the King* [2025] NZCA 679, a 2025 decision of the Court of Appeal, the particular decision that I am going to talk about is actually not before the Court but a successor decision is in Ms Churchward's bundle.

KÓS J:

Now, just so my brain is the right way around on this thing, *Williams-Atkinson* and *Kriel* are cases involving life sentences and *Ronaki*, *Taylor* and *Webster* are cases involving non-life sentences.

MR DAVIE:

That's correct.

KÓS J:

So, we're dealing with different propositions in each category?

MR DAVIE:

Yes, so in the first part of the argument I will say that –

WINKELMANN CJ:

That's the right approach.

MR DAVIE:

That these two cases where life was imposed, they're analogous and then the second part, these three cases where determinate sentences were imposed, I will try to distinguish them.

WINKELMANN CJ:
Distinguish them.

MR DAVIE:
Right.

WINKELMANN CJ:
And what was the one you were saying about one that's not before the Court? I couldn't follow that last bit. What case is that?

MR DAVIE:
So, this is *Webster* [2025] NZCA 679.

WINKELMANN CJ:
Yes, and that's the one we've got the appeal in front of us, so another point.

MR DAVIE:
I understand that that's correct, yes.

So, I'll just now move to *Williamson-Atkinson*. The facts of this case are set out at paragraphs 3 to 13 of the decision.

By way of brief summary, Mr Williamson-Atkinson, aged 15, was at a remote campground as part of a youth justice course. Mr Humphries, the victim, was also at the campground. Mr Williamson-Atkinson and another boy entered Mr Humphries' tent to steal his car keys, so they could steal his car. Mr Humphries woke up. Mr Williamson-Atkinson stabbed Mr Humphries through his sleeping bag with significant force, killing him, and the offender was found guilty of murder under s 168 of the Crimes Act.

WINKELMANN CJ:
How old was he, 15 did you say?

MR DAVIE:

Fifteen, your Honour.

This was a s 104 case. At paragraph 19 of the decision, Justice Cooke found that three s 104 factors were engaged. Ultimately, the High Court sentenced Mr Williamson-Atkinson to life imprisonment with an MPI of 11 years. The Crown found that life imprisonment was not manifestly unjust, even though Mr Williamson-Atkinson was 15, even though he suffered from social deprivation and also from FASD and ADHD.

The level of social deprivation is quite significant in this case, it's set out at paragraph 23 of the decision. And similarly, the health issues arising from FASD and ADHD, also significant, set out at paragraph 24 of the decision.

But in spite of all that, the Court was not satisfied that the manifest injustice exception applied and Justice Cooke's reasoning is set out at paragraph 29: "In *Dickey* the Court of Appeal held that sentences of life imprisonment on three young offenders were manifestly unjust, and they substituted sentences of 15, 13 and 12 years with MPIs of seven and a half, seven and six years. Your counsel argues that a similar approach should be adopted in your case but none of those cases involve offending where s 104 applied, and the Court held that s 104 was still relevant to the assessment of manifest injustice. Given that your case is treated as one of the more serious cases of murder identified by s 104 and given that three of the s 104 factors apply, I do not consider that it can be treated as one of the exceptional cases where it is manifest injustice to impose life imprisonment."

Now, I suggest that this case is analogous to the cases before the Court, because there is the same basic fact pattern involving unlawful entry into a dwelling for the purposes of theft, a fact pattern that tends to trigger at least one of the s 104 factors and similar to this case the offender is relatively young, suffered from social deprivation –

WINKELMANN CJ:

We can understand all those points, Mr Davie.

MR DAVIE:

Thank you, your Honour. I will now move on to *Kriel*.

WINKELMANN CJ:

But before we move on, do you say that Justice Cooke treated s 104, the fact that it was s 104, as really dispositive?

MR DAVIE:

I rely on that, I say that the right result was reached in that case, because of the seriousness of the offending.

WINKELMANN CJ:

But the Judge seemed to treat the fact it was s 104 as dispositive in the passage you took us to?

MR DAVIE:

I agree that Justice Cooke, he found that the seriousness of the offending was the decisive factor, but I certainly also say that his Honour took into account those mitigating personal factors and gave them due weight.

So turning to Nattrass-Bergquist and Wallace-Loretz. The facts of these cases are set out at paragraphs 17 to 25 of the decision.

KÓS J:

Where's that decision? I'll just find it.

MR DAVIE:

This is –

WINKELMANN CJ:

Is that in *Kriel*?

MR DAVIE:

This is *Kriel* and this is –

COOKE J:

One of the things about going through these cases, it assumes these decisions are correct. So the previous decision may be overturned by the Court of Appeal. The treatment in *Kriel* might be wrong. That's part of the issue that the applicants want potentially argued in these applications.

MR DAVIE:

Yes and perhaps this is a good point to move to a response to my learned friend's submission yesterday that *Kriel* is wrongly decided. Of course, my learned friend is entitled to make that submission but I just observe in this leave application, addressing the merits aspect of the test, the submission would be stronger if my learned friend could point to cases that support his position.

WINKELMANN CJ:

I suppose the point is, although it is useful to show us what has actually happened on the ground, it is probably not necessary to go through things in such a way as to suggest they are authoritative. It's just you are giving us a scan, aren't you, really, of what's going on, to respond to the appellants' submission that really it's a, if it was back in the High Court now, a life sentence wouldn't be imposed?

1235

MR DAVIE:

Yes. So the applicants' submission is that on the law as it currently stands, we would be likely or very likely to receive determinate sentences.

WINKELMANN CJ:

Yes.

MR DAVIE:

And my submission is simply that it's actually not that simple on the law as it currently stands. Based on these cases that I say are analogous, in fact there are arguments going the other way.

WINKELMANN CJ:

So it's not necessary to take us through them in detail, but quite happy for you to take us through kind of the general typography.

MR DAVIE:

Yes. Thank you, your Honour.

WINKELMANN CJ:

So Nattrass-Bergquist and Mr Wallace-Loretz, were they all – they were co-offenders in the murder of Mr Gillman-Harris, weren't they?

MR DAVIE:

Yes, your Honour.

WINKELMANN CJ:

And how old were they?

MR DAVIE:

They were both 17, and it's an analogous factual scenario in terms of these two offenders lured this man to a motel room and then they robbed him, killing him in the process. So it's not exactly the same, because the element of unlawful entry is missing, but on the other hand perhaps there's some greater –

WINKELMANN CJ:

More premeditation.

MR DAVIE:

Premeditation, yes, your Honour. But otherwise, there are similarities in terms of the age of the offenders, 17, and they also suffered from very severe social deprivation and mental health issues. And I won't take the Court to these

passages, but the mitigating factors are set out at paragraph 18 to 20 of the judgment and paragraph 93 to 97.

And I would just refer the Court to the Court of Appeal's reasoning at paragraph 109, and I would essentially endorse the finding at paragraph 109(c): "Mr Nattrass-Bergquist and Mr Wallace-Loretz suffered significant social deprivation which also likely contributed to their offending. Their ages and disadvantaged upbringings were important mitigating factors. Nevertheless, we do not think that these considerations would lead to the quashing of the life sentences imposed by Toogood J when he sentenced the applicants."

WINKELMANN CJ:
Why? Where is their reasoning?

MR DAVIE:
So further up the page the Court –

WINKELMANN CJ:
Is it because of s 104?

MR DAVIE:
Yes, the Court talks about the seriousness of the offending and how they were more culpable than Ms Dickey in *Dickey*, and that passage is simply the conclusion following the weighing exercise.

I'll now just move to the second part, which is to try to distinguish these three s 104 cases involving adolescents where determinate sentences have been imposed. So the first case is *Ronaki*, tab 25 of Ms Te Wini's bundle. I won't take the Court through this case in a great deal of detail, but just in –

WINKELMANN CJ:
But just tell us the age, et cetera.

MR DAVIE:

In summary, [JB], aged 17, ran over the victim twice, the second time with reckless murderous intent. This was a s 104 case.

KÓS J:

We had an application for leave to appeal this case.

MR DAVIE:

Yes, you'll be familiar with it then. [JB] was found guilty. Justice Woolford held it was manifestly unjust to sentence [JB] to life imprisonment because the offending was impulsive, because [JB] was under the influence of a co-offender and [JB] was remorseful and had low risk of reoffending.

But even with all this, Justice La Hood was still hesitant. At paragraph 53 he said that: "Given your" –

WILLIAMS J:

Was [JB] the driver?

MR DAVIE:

He was the driver, Sir.

WILLIAMS J:

Q.

That's pretty serious offending.

MR DAVIE:

Of course, it is, Sir, yes.

COOKE J:

He was being encouraged by his [co-offender] to run over [the victim].

WINKELMANN CJ:

Yes.

MR DAVIE:

Well, I mean, in this –

WINKELMANN CJ:

Perhaps you can take us back to the description of the offending, since we're just debating.

MR DAVIE:

Yes, yes. The description of the offending starts at paragraph 10 and goes on until paragraph 14. So, they're in the car. The victim is on the road. I'm just looking at paragraph 13.

WINKELMANN CJ:

Are you operating the ClickShare, as well?

MR DAVIE:

My learned friend is operating the ClickShare.

WINKELMANN CJ:

Oh, she's failing in her junior duties.

WILLIAMS J:

It's hard to get good help, Mr Davie.

MR DAVIE:

So paragraph 13: "JB, within seconds of seeing Mr Paul walking on the southern side of Station Road as you turned the corner …" – so Ms Ronaki instructs the offender to hit the victim, struck Mr Paul on the left side of the car, so this is a manslaughter charge.

WINKELMANN CJ:

But the second pass wasn't under instruction, was it?

MR DAVIE:

No, and in fact Ms Ronaki –

WINKELMANN CJ:

Grabbed the wheel.

MR DAVIE:

She certainly told him not to do it.

WINKELMANN CJ:

Anyway, she tried to influence him not to do it.

MR DAVIE:

Yes.

WINKELMANN CJ:

And so the Court of Appeal panel, Court of Appeal divisional, sitting divisionally, Justice La Hood upheld that sentence, that decision not to impose life imprisonment. Well, it wasn't at issue, was it?

COOKE J:

There was no sentence appeal.

WINKELMANN CJ:

Right.

MR DAVIE:

Yes.

WINKELMANN CJ:

Oh, so sentencing notes, right. He didn't see it straightforward, but he still didn't impose.

MR DAVIE:

Yes. So at paragraph 53 he said: "Given your case" –

KÓS J:

Just to be clear, the young person, I'm just confused by the name here. The young person is JB, is that right?

MR DAVIE:

Yes.

KÓS J:

Thank you.

MR DAVIE:

The person who is guilty of murder.

KÓS J:

Right.

MR DAVIE:

And so Justice La Hood said because of s 104 being triggered that he was: "… hesitant to treat it as an exceptional case where it is unjust to impose life imprisonment." And I, of course, agree with his Honour Justice Williams' comment that it is a serious case, but the Court found that in the circumstances, [JB] being young, he was under the influence of this other person and it was – he was placed in a situation by that other person, essentially, and it was relatively impulsive offending.

1245

WINKELMANN CJ:

I mean, you would expect a judge to be hesitant. It's a big decision, isn't it?

MR DAVIE:

Yes, yes, your Honour. And essentially what I would say about this case is that while it's, of course, serious, it is relatively more impulsive than what we have here in the present case, because it's essentially one action, driving the car into the victim, versus here –

WINKELMANN CJ:
It's two actions.

KÓS J:
Well, twice. Twice.

WINKELMANN CJ:
Quite a few actions, actually.

MR DAVIE:
In, of course, the first blow, but the second blow that led to the murder charge –

WINKELMANN CJ:
With high lethality. High lethality.

MR DAVIE:
Yes, yes.

WINKELMANN CJ:
You're wielding a considerable weapon when you're using a car as a weapon.

MR DAVIE:
Yes, but, of course, here there's a beating over a protracted period of time where many blows were inflicted.

I'll just move on now to *Taylor*. This is in tab 47 of Ms Churchward's bundle. So just in summary, Mr Taylor who was 18, after a celebration of his 18th birthday, murdered his mother while she was lying in bed by striking her head with a dumbbell. Again, this is a s 104 case. Mr Taylor pled guilty to murder.

The Court of Appeal allowed a sentence appeal and imposed a determinate sentence. The Court held that life imprisonment was manifestly unjust because Mr Taylor offended because of mental illness, and moreover there was a

relationship of abuse between him and his mother and the case was analogous to battered defendant cases.

Just a comment I have on this case is that this is, obviously, not a battered defendant case. There was no actual or perceived –

WINKELMANN CJ:

Yes, we can understand that.

MR DAVIE:

Yes, I'll move on, thank you. And just finally, *Webster*. So this is a case where Mr Webster was 18. He and other people were owed money by the victim. An older offender assaulted the victim and dragged him behind a car. Mr Webster participated in some of the violence but to a lesser degree.

WINKELMANN CJ:

So it was a protracted assault by the older offender over two locations, but Mr Webster joined in in a significant way at the second location.

MR DAVIE:

I believe it was one location, but Mr Webster wasn't involved in all of the violence.

WINKELMANN CJ:

No, there was two locations, because they picked the man up from somewhere and drove him back in the car and were assaulting him in the car.

MR DAVIE:

Oh, yes, your Honour.

COOKE J:

And then he was dragged after the second assault.

WINKELMANN CJ:

So that's three, I suppose, three locations.

COOKE J:

Yes.

MR DAVIE:

And so another s 104 case. Mr Webster pled guilty. The Court of Appeal allowed the appeal and quashed the life sentence. The Court held that life was manifestly unjust because Mr Webster was less culpable than the older primary offender.

WINKELMANN CJ:

And all he had, really, was youth at that point, or –

MR DAVIE:

He had limited intellectual capacity because of FASD, as well.

KÓS J:

That wasn't appreciated by the Court of Appeal, was it?

WINKELMANN CJ:

Was it appreciated by the Court of Appeal at that point?

MR DAVIE:

It's referred to in the Court of Appeal's judgment, yes.

KÓS J:

I thought that was the issue for us.

COOKE J:

I think that's when it became apparent.

WILLIAMS J:

Yes.

WINKELMANN CJ:

Was it when – yes.

KÓS J:

Right, okay.

WINKELMANN CJ:

18-year-old offender.

MR DAVIE:

Yes.

WINKELMANN CJ:

With some cognitive issues.

MR DAVIE:

Yes. And just in summary, in relation to *Ronaki*, *Taylor*, and *Webster*, the high-level Crown submission is that in each of these cases, despite the triggering of s 104, there were substantial mitigating factors to do with the offending and, in my submission, the same is not true in this case. The offending is extremely serious and there is little to mitigate it.

Subject to any further questions, I'll now hand back over to my leader. Thank you.

WINKELMANN CJ:

I thought you were meant to be answering the questions that – further questions, that was what Ms Johnston said, no?

KÓS J:

No, no, she was.

WINKELMANN CJ:

Right, you're answering them.

KÓS J:

It's her job.

WINKELMANN CJ:

What have we got left to do, Ms Johnston?

MS JOHNSTON:

The only thing I have left on my agenda is to address the point about what a finite sentence would be. There may well be other things that –

WINKELMANN CJ:

Yes.

MS JOHNSTON:

– the Court want me to look at, but while we are here –

WINKELMANN CJ:

Could you also explain the controversy, the implied – I think I understand it but it would be useful to have that explained – the implied starting point?

MS JOHNSTON:

Yes, so obviously in our written submissions the Crown hasn't made submissions about the finite sentence and that may reflect either optimism or naïveté on my part, but it also reflects reluctance on the Crown's part to be making submissions in the apex court about how to calculate –

WINKELMANN CJ:

Sentencing.

MS JOHNSTON:

– calculate a finite sentence, particularly in light of this issue of how to set starting points for finite being before – being live before the permanent court. So, in brief terms, what happened in *Dickey* is that finite sentences and there is obviously a lot – not a lot of comparative cases, comparator cases. *Dickey* set starting points and then reduced for usual mitigating factors and then stood back and said, goodness me, these are far too low, and then increased again, which is obviously different from other sentencing methodologies and it's from

that that an implied starting point, so if you had taken all of the factors into account and only done one discount, that's what the starting point would be.

And then in the *D and P* decision of Justice Johnstone that's been referred to, his Honour took a different approach and said, well, let's just take all factors into account, start from a – he probably used a better word, but I'm going to say real starting point, taking all factors into account and just discounted that from once.

So before the Court of Appeal permanent court in *Messervy*, the issue about which approach is right was argued and the basic submission was that there's nothing wrong with the way the Court approached it in *Dickey*, but that there are advantages in terms of transparency and consistency to doing it the alternative way.

KÓS J:
Sorry, Justice Johnstone's way?

MS JOHNSTON:
Yes.

KÓS J:
Yes.

MS JOHNSTON:
And again, I'm for obvious reasons reluctant to draw this Court in on that, and also the other obvious reason is it's a bit academic when it comes to these applicants, because certainly they will be past any MPI because the maximum MPI that could be imposed on a finite sentence is 10 years anyway and perhaps it's likely that any finite term would be finished.

In terms of my learned friend's submissions, Ms Te Wini now says that a starting point would be 20 years leading to a finite sentence, I think, of 11 to 13 years and the MPI of six years. Now, if you're taking a starting point on the, let's call it, Justice Johnstone approach, taking all factors into account in order

to ensure transparency as to discounts, the starting point, in my submission, must be much higher than that.

WINKELMANN CJ:

But how do you come up with these high starting points? Where are they plucking the high starting points out of the air, is what I can't understand? How you can start a what was, I think, 33 years or something they say in one case and –

MS JOHNSTON:

I mean, that's part of –

WINKELMANN CJ:

I think in *Webster*, it's some like 33 or 45 or something.

WILLIAMS J:

There's a 40.

WINKELMANN CJ:

Forty, I think it was –

WILLIAMS J:

There's a 40 in one that I saw in the *Messervy* table.

MS JOHNSTON:

And that's part of the difficulty. But here, if you're taking all – if you're taking a starting point for an adult offender, the MPI for Ms Te Wini should have been 19 years, so one can't say for a finite sentence, your total finite starting point could have been 20 years.

KÓS J:

But this is not unusual in drugs, serious drugs sentencing cases where a life sentence is applicable and courts have had to try and work out what means numerically.

MS JOHNSTON:

Yes.

KÓS J:

And figures in the sort of low-thirties have tended to be bantered around.

MS JOHNSTON:

Yes, but...

WILLIAMS J:

They've got a tariff decision to help.

MS JOHNSTON:

Yes and I certainly don't ask this Court to come up with a tariff on this basis, but I think –

WILLIAMS J:

No.

1255

MS JOHNSTON:

– drugs are different, right, because you don't have s 104, you don't have the MPI of 19 years that would otherwise be here.

KÓS J:

Well, no, you don't, but you're still trying to work out what life is equivalised to.

MS JOHNSTON:

Yes.

WILLIAMS J:

Equivalised – equalised.

MS JOHNSTON:

And here, if we can go back to that table in *Messervy*, if you look at the total starting point for Ms Dickey and Ms Epiha –

KÓS J:

The transfer of help hasn't helped. Yes, there we are.

MS JOHNSTON:

So both Ms Dickey and Ms Epiha, so Ms Dickey in the first line, Ms Epiha in the third, both had implied starting points of 43 years. Now, it's difficult to compare, but neither of those were s 104 murders. Neither of those were – Ms Epiha's was a simple stabbing, once, and Ms Dickey's role was, I think, holding down an offender while someone else – holding down the deceased, sorry, while someone else beat him. So, the starting point, if you were just doing pure comparison of culpability, would need to exceed by a significant margin, the Crown says, those numbers.

KÓS J:

Yes.

WILLIAMS J:

The problem with this approach is that on an actuarial basis, your starting point is 90% of her life.

MS JOHNSTON:

Yes.

WILLIAMS J:

It's completely artificial. There's got to be a better way of doing this than coming up with what proportion of your life is the starting point.

MS JOHNSTON:

I don't know if I have a better offer, a better alternative.

WILLIAMS J:

Well, Justice Johnstone's, I haven't looked at it closely at all, but that's more closer to the Australian approach.

WINKELMANN CJ:

Intuitive synthesis.

WILLIAMS J:

Yes. Gets you away from that American artificiality, I say respectfully.

MS JOHNSTON:

I mean, the other –

WILLIAMS J:

Where you just start with ridiculously big numbers and then work back?

MS JOHNSTON:

The other alternative is, if the culpability is so high you're looking at such ridiculously high numbers, what we should be doing is imposing life imprisonment and leaving the rest to the Parole Board.

WILLIAMS J:

But given that that battle has been lost, at least in these cases, we need to find a better way of doing it than fake *R v Taueki* [2005] 3 NZLR 372 (CA).

MS JOHNSTON:

Perhaps, and I guess I'm still waiting to see if the battle is lost in relation to Ms Churchward and Ms Te Wini.

WILLIAMS J:

I'm not talking about this particular case. I'm just talking about the structural approach.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

Justice Williams meant, in respect of the cases that we are being referred to, where there were ridiculously high starting points.

MS JOHNSTON:

Yes, yes.

WINKELMANN CJ:

Well, not ridiculously high – I take the word ridiculously –

MS JOHNSTON:

Yes.

WINKELMANN CJ:

– where there are very high starting points which on first impressions seem quite shocking. You know, 40-something years seems like a shocking starting point in a New Zealand context.

MS JOHNSTON:

Yes.

KÓS J:

Well, and I kind of relate that to mean life imprisonment probably in a drugs case would be comparable, so where do we get from 32 to 42 years? I mean there has to be some kind – it has to be some kind of predictable number. I don't think it depends on the age of the offender.

MS JOHNSTON:

No. There is not a lot I think I can offer on this other than to just remember that the minimum period will remain 10 years because that's the maximum. So while those numbers seem high, that doesn't preclude –

WINKELMANN CJ:

There is a disconnect, though, isn't there. I was just going to say –

WILLIAMS J:

I guess the thing you can be sure of though is that the Judge has –

WINKELMANN CJ:

Just because you've got a man's voice.

WILLIAMS J:

– the Judge has an intuitive end point.

WINKELMANN CJ:

So, I was going to say there seems to be a disconnect –

WILLIAMS J:

It's terrible getting interrupted, I'm sorry.

WINKELMANN CJ:

There seems to be a disconnect between those cases where it seems to be manifestly – it is found to be manifestly unjust because of things, fact, considerations that reduce the seriousness and those cases tend to have often much lower sentences, so, you know, mercy killing or a mother driven to despair, et cetera. This just seems to be disconnected from that in an overall framework. It seems to be a thing apart.

MS JOHNSTON:

Well, I guess, the Crown response to that is it is disconnected because it should remain at life imprisonment because of the seriousness.

WINKELMANN CJ:

No, no, but my point is that we're talking about cases where the manifest injustice threshold is crossed, shouldn't they sit within an overall framework? Not be categories, because shouldn't there be principles that thread through them?

MS JOHNSTON:

Yes, and this Court should consider that after the permanent court's, the Court of Appeal, considered it.

WINKELMANN CJ:

Yes, right.

CAMPBELL J:

Can I just ask one thing before the break. Are these high implied starting points really trying to explain that youth has not been factored in twice? Because in this exercise youth gets factored in in a very big way if manifest injustice is found, youth and other factors, of course, and it can't be right to then apply those factors a second time as somehow discounting from some other starting point. Is that what this, these implied starting points are trying to explain?

MS JOHNSTON:

In part, perhaps, but as I understand it the reason the implied starting points are calculated –

WINKELMANN CJ:

Oh, it's lunch time.

MS JOHNSTON:

– is that after discounts for mitigating factors the sentences were just too low to reflect the offending in the eyes of the Court in *Dickey*, and that's why there was then an increase.

WINKELMANN CJ:

Right, we're going to take the luncheon adjournment.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.18 PM

WINKELMANN CJ:
Ms Johnston.

MS JOHNSTON:
Thank you, your Honour. I don't think I have too much more to say this afternoon.

Just to complete my submissions about the finite sentence, the Crown submission is that the finite sentence starting point or implied total starting point, in my submission, should be well in excess of the 43 or so years for Ms Dickey and Ms Epiha, something more closer to about 50 years. I appreciate that's a big number. It's also replacing a sentence of life imprisonment and it's also one that would be discounted for mitigating factors, and taking my learned friend's approximately 50% proposed reduction that would leave a finite sentence in the order of 25 years. And there should be no conceptual problem, in my submission, with big numbers given that they are replacing what would otherwise be a sentence of life imprisonment.

The only other points that I – I should check whether there's any more questions on the finite sentence before wrapping up?

The only other points I wanted to just briefly address, going back through my notes – obviously as the Court considers whether it's a substantial injustice here, the Court will be looking at the comparison between the sentences that were imposed in these cases and the ones that have been imposed in the High Court, and I've made submissions about the risks of looking at High Court decisions now, both because they're not binding upon this Court and also because those, any trend in those decisions can't create a category that Parliament hasn't created and I just ask the Court to reflect, when looking at whether that is unfair or substantially unjust, to reflect on what would happen if

the change was actually led by Parliament rather than a change in judicial approach?

So, if Parliament was to tomorrow decide that there is a category – there will be a category exception for young people and young people cannot be sentenced to life imprisonment presumptively, say, generally speaking, a statutory change would be prospective only. It wouldn't be retrospective. And if that were to happen, there would then end up being a difference between those sentenced before and after that statutory change.

WINKELMANN CJ:

I don't know that you are right about that because it's highly unlikely that anybody – I mean, it's highly unlikely then anyone will be sentenced to life imprisonment after that clear indication of parliamentary intention and it might be capable of being construed as being retrospective. You have to explicitly say it's only prospective, and why would they do that?

MS JOHNSTON:

Generally speaking, it's much more rare for Parliament to legislate retrospectively. Perhaps my analogy works better if Parliament was to increase or to change it. So that's –

WINKELMANN CJ:

Yes. That would be the New Zealand Bill of Rights Act 1990.

MS JOHNSTON:

Yes and so then the Bill of Rights Act would step in and if we can bring that provision up, the key point I'm trying to make here is that a policy choice – bring up the Bill of Rights Act provision, please.

WINKELMANN CJ:

Section 26. Was it s 26?

MS JOHNSTON:

Section 25.

WINKELMANN CJ:

Section 25(g).

MS JOHNSTON:

Is that in terms of fairness, where Parliament has drawn the line there, is the benefit of the lesser penalty where it's varied between the commission of the offence and sentencing.

WINKELMANN CJ:

Well, that's a benefit.

MS JOHNSTON:

Yes, but that benefit doesn't extend if that change happens after sentencing and I've referred to this and perhaps it's easier, particularly given the time of the day, to refer to my submissions at paragraph 63. So, where the maximum penalty has deceased after sentencing but before an appeal, the appellate court is not required to apply the lesser penalty and that's addressed in the *Oran v R* (2003) 20 CRNZ 87 (CA) decision at footnote 81 of my submissions.

That's obviously not the situation here, but I simply highlight when the Court is assessing any perceived unfairness.

WINKELMANN CJ:

So your point is that if someone was sentenced, then Parliament – had been sentenced and then Parliament changed the law, they wouldn't be able to appeal on the grounds that it was an unjust sentence?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

Not on that ground alone, because of the section, because of the change in the law?

MS JOHNSTON:

Yes. Unless there is any other questions, that wraps up all I wanted to say, but happy obviously to answer any questions on any topic related to this case.

WINKELMANN CJ:

Thank you, Ms Johnston. Thank you.

MS JOHNSTON:

Also happy to sit down.

WINKELMANN CJ:

So I'm not sure about the order of replies given how – Mr Stevenson, is it you first?

MR STEVENSON KC:

Thank you. If the Court pleases, I have some but not many matters. Most of my points I was noting down I think were covered in the discussion that transpired between the Bench and counsel. So there are just a few things I want to pick up upon and perhaps just dealing with the penultimate matter.

My learned friend was speaking to the approach and the proposition that in New Zealand we might be sentencing youths and articulating in open court starting points of 40 to 50 years. That, of course, is under review by the permanent Bench at the Court of Appeal. But, really, our position is there is something intuitively wrong about that. It risks, potentially, some sort of reputational damage to the system, taking what are essentially artificially inflated, grossly inflated starting points. So, it was those sorts of considerations that led to us modifying our approach from our written submissions, the Johnstone approach, and the way I set it out yesterday. But –

1425

KÓS J:

If the starting points took into account the reasons why we're not imposing a life sentence, that is, the reason why s 102 is made out, then you're immediately starting with a lower kind of starting point. It's not a life-for-life situation, it is a starting point based on the fact that this is not a murder or not one in which the circumstances would justify a life sentence.

MR STEVENSON KC:

Yes.

KÓS J:

So you stop looking for the kind of equivalences that you have in drug cases. You are saying this is a murder, the circumstances of which require a more – what's the word I'm looking for – kinder is the wrong word but, you know, a more lenient, that's the word I'm looking for, a more lenient sentence. So you're not talking about those sort of numbers anyway to start with.

MR STEVENSON KC:

No, so…

WINKELMANN CJ:

I mean, because they're on a continuum with people who are mercy killings, et cetera, and there the starting points are home detention or, you know, two years or something like that.

MR STEVENSON KC:

Indeed. It's difficult to see the need for the change which, for some reason, has become the prevailing approach.

COOKE J:

I mean, the main point is that we're only in this territory because there are circumstances that take you, of the particular case, and once you're in a case that's peculiar because of its circumstances, having a global starting point is

not very helpful. You've just got to find a sentence that's appropriate to those circumstances.

MR STEVENSON KC:

Yes, the *Taueki* don't be pigeonholed nuanced assessment of culpability-individualised sentencings.

KÓS J:

Well, *Taueki* has actually been the problem here, because *Taueki* has been treated by the sentencing judges as if it requires you to simply add up the number of aggravating factors.

MR STEVENSON KC:

That's right.

KÓS J:

In *Orchard*, we made it extremely clear that what you need to look at is not so much the number of factors, but actually how each case compares to the examples that are given in guideline judgments like *Taueki*.

MR STEVENSON KC:

Yes, yes.

WINKELMANN CJ:

And *Taueki* has been misread anyway, hasn't it?

KÓS J:

It had.

WINKELMANN CJ:

Yes.

MR STEVENSON KC:

And the irony of having pressed judges who are to follow to not be pigeonholed and approach the sentencing exercise in an arithmetical way. That, of course,

is what we've seen and the Court of Appeal grappled with that, as well, in a roundabout sort of way in *Zhang*, yes.

In a point today, the question of substantial injustice arose and where on the continuum we make that assessment. For example, do we look at the applicants' cases now and say, well, is it really a substantial injustice if life imprisonment ought not to have been imposed for them to be "just" on life on parole with some of the attendant conditions? I think the Court will, I hope, recall our general position on this, which is that is oversimplified and if life imprisonment ought not to have been imposed and that, as things stand now in a post-*Dickey* world, that was in error, then the fact of being wrongly sentenced to life imprisonment is a substantial injustice, or can be in of itself, we say.

The profound nature of that sentence and the situation in which we say it had been wrongly imposed, and I won't go back through *Rapira* and the High Court sentencing and so forth, but for what it's worth, our position, I think as I outlined yesterday, is we saw it in a somewhat more straightforward way than has sometimes been suggested in the course of argument. That *Rapira* did constrain the consideration of youth, it actually did that and it was certainly understood in that way. It was precisely why youth was constrained as a consideration for Ms Te Wini by Justice Woolford. He consciously articulated it in that way and for those reasons the Court of Appeal said nothing had gone wrong so far as youth was concerned.

In terms of the leave situation, I think respectfully your Honour the Chief Justice summarised the position, so far as we are concerned, accurately, by saying or suggesting that counsel may not have been wrong to have thought that *Rapira* was a bar. But can I just say something more about that, just in case it's not clear.

At paragraph 84.2 of their submissions, the Crown said as to Ms Te Wini's position: "It can be inferred, though, that she was aware of the ability to seek leave to bring a second appeal … ." And just to put that in some context, I'd like to bring up an example of the evidence that was before the Court in *Kriel*,

because a lot of counsel swore affidavits and the theme was the same. It was the perceived *Rapira* bar.

And here we have at paragraph 16 before the Court: "Mr Kriel's trial counsel, Ms Cull KC, has also sworn an affidavit. She confirms that it was accepted by her at the time of Mr Kriel's sentencing 'that there was a presumption of a sentence of life imprisonment and that no argument could be made to argue against the presumption'."

And so there was some discussion between counsel, myself, and my learned friend for the Crown regarding this position for Ms Te Wini and it was in agreement and on that basis I would stay in as counsel, having been her counsel, of course, for some time, that the Court can proceed on the inference that she was aware of the ability to seek leave to bring a second appeal. Like all of those other would-be appellants who didn't seek to take their cases further, they considered at the time, as your Honour I think Justice Kós put it, they were running into a super authority, I think your Honour suggested.

WINKELMANN CJ:
Yes.

MR STEVENSON KC:
Now, of course, when *Rapira* was decided, that the Court of Appeal was the final court for New Zealand. The decision was given by Chief Justice Elias and sitting with her Honour on that Bench was Justice McGrath.

By the time of Ms Te Wini's potential application to seek leave to the Supreme Court post the Court of Appeal in 2013, I think it was, the Chief Justice was Justice McGrath and sitting with her was – I beg your pardon, was Justice Elias and sitting with her was Justice McGrath. So, therein was the roadblock, so to speak.

CAMPBELL J:

In the Court of Appeal, the Court records you as submitting: "That the jurisprudence around the application of s 102 'is developing' and 'that the courts appear to be taking an expansive approach' to the circumstances justifying a departure from the s 102 presumption." And you relied on *McNaughton* and *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775.

MR STEVENSON KC:

Yes.

CAMPBELL J:

So, doesn't that suggest that, at the time, counsel for Ms Te Wini, you, thought that there was not a roadblock in the way?

MR STEVENSON KC:

Well, my proposition was that the law was developing and *McNaughton* was quite a significant recent case. However, that didn't reply to the youth consideration and that was the problem.

WINKELMANN CJ:

Which is not about youth, it's about s 102.

MR STEVENSON KC:

Yes, yes. But a consideration –

WINKELMANN CJ:

And s 104.

MR STEVENSON KC:

– of youth, yes.

WINKELMANN CJ:

Was outside that.

MR STEVENSON KC:

Yes. Now, just by way of update, if the Court pleases –

WINKELMANN CJ:

Well, what does *Wihongi* say?

MR STEVENSON KC:

I beg your pardon.

WINKELMANN CJ:

What does *Wihongi* say?

MR STEVENSON KC:

Wihongi spoke to, as Justice Wild I think it was, as the High Court judge in that case put it "victimhood". Ms Wihongi, was a long –

WINKELMANN CJ:

Oh, yes.

MR STEVENSON KC:

Yes, that one.

KÓS J:

It wasn't a youth case.

WINKELMANN CJ:

So it wasn't youth either. So only *Rapira* was the youth case there?

MR STEVENSON KC:

Yes. Just in terms of parole issues, we've just sought some information overnight and I'm certainly not proposing to sort of relitigate any of these things. But I think this is a good example of the point I was making yesterday that the prospect of somebody like Ms Te Wini getting brought back before the Parole Board if she remains on this sentence for the rest of her natural life for the consideration or imposition of new conditions is a real one. She's been

given variable notice of a potential proposal to impose a new condition that would exclude her from the Auckland CBD.

Now, I don't need to, as I have said, get into the details of that, but the point is, this is an example of how potentially life on parole never, never goes away. And connected to that point, my learned friend at one point said if there are no conditions for somebody like Ms Te Wini in the future, then she can be reintegrated. There would be no prohibition or roadblock, so to speak.
1435

In my submission, that misunderstands the psychological impact of being under the supervision or the potential supervision of the state for the rest of one's life. The sentence remains there.

WINKELMANN CJ:
Well, it is the actual supervision. It is actually a matter of fact, the actual supervision is, because they can enquire of you.

MR STEVENSON KC:
Yes.

WINKELMANN CJ:
Require of you.

MR STEVENSON KC:
Yes. And so Ms Te Wini's current conditions, we received this information through today, are still most of the standard conditions and it includes the regular reporting to a probation officer and so forth.

WILLIAMS J:
What do you mean "still most of the standard conditions"?

MR STEVENSON KC:
So I think about three have been set aside. We can file –

WILLIAMS J:

We need that accurately.

MR STEVENSON KC:

Yes and I think the best way to do that would be to provide what we got from corrections this morning, that's –

WINKELMANN CJ:

Right, if you just confer with Ms Johnston about that.

MR STEVENSON KC:

Yes.

COOKE J:

It would probably be helpful to have it for Ms Churchward, as well, what her actual conditions are.

WILLIAMS J:

Definitely.

MR STEVENSON KC:

Yes, yes.

In terms of a submission or a discussion that was had around the materialities of s 168, no murderous intent in the case of Ms Te Wini, your Honours may recall in our submissions we cited the Supreme Court of the United States which described cases dealing with felony murder and youths as "twice-reduced moral culpability", and that is, in my submission, a neat summary of the position and largely inarguable. There is a difference, a significant difference, for somebody who is not only young but who also did not have murderous intent.

In terms of some discussion around culpability, my learned friend said that this was not a situation of hot cognition, if I understood that submission correctly.

WINKELMANN CJ:

She did say that.

MR STEVENSON KC:

Yes. Well, the first thing is I took the Court to Dr Myers' report yesterday and it's available, of course, to read again, but she specifically opines that there was an element of hot cognition in the circumstances of this offending tied up in general youth, peer pressure, and other background factors. So the Crown's at no point filed or attempted to take issue with that evidence which is before the Court.

However, in my submission, the analysis in that way that this was a piece of offending which involved some sort of staged components, as things played out, and therefore doesn't really sit with impetuous youthful behaviour for which we would normally recognise culpability as reduced, in my submission that sort of an approach misconstrues our understandings about executive functioning limitations for young people in general.

It's the overall – and this is the importance of the developments in MRI imaging some decades ago which eventually made its way before the courts, the American courts when they rolled back the death penalty and life without parole for young people. In part that was founded upon what was coming out at the time from MRI imaging, which demonstrated not only are young people just not experientially mature, they don't have developed prefrontal cortexes, and so that was enormously significant and that is why there's just a consensus now, based in that science, significantly, that young people as a group do not have the capacity for mature executive functioning, which includes things like the contemplation of consequences and essentially thinking through behaviour.

WINKELMANN CJ:

Can I – may I ask you?

MR STEVENSON KC:

Yes.

WINKELMANN CJ:

So we've had a range of decisions and we had Justice Johnstone in *D and P* writing for the Court and finding that there wasn't a sentence – a case of offending where a life imprisonment sentence was manifestly unjust. What would you say is the kind of category of offence by young people where life imprisonment would not be manifestly unjust?

MR STEVENSON KC:

Well, what I would say about this generally is it's always important to contemplate what we might be getting wrong at the moment and, you know, this case is a good example, isn't it, because, of course, *Rapira* seemed abundantly correct at the time. But not so far down the track we have the Court of Appeal saying that common law took a wrong turn at that point.

So what are we getting wrong at the moment? I would say that this sort of attempted distinction whereby sometimes youth would essentially be set aside in some of the more grave cases is dangerous territory. I can't think of many examples where youth wouldn't be significantly operative.

Your Honour the Chief Justice, gave, or conjured the example yesterday of –

WINKELMANN CJ:

Richie Rich. Yes, Richie Rich concocting a vast and premediated scheme.

MR STEVENSON KC:

Yes. But that sort of an example also reveals other aspects of the limited executive functioning, the irrationality of it, the poor planning, the lack of developed empathy, all of those things. So, different but that example, too, although at first blush doesn't get a youth consideration, in my submission, would. So, I'm not being very helpful but I would be reluctant to give an example.

WINKELMANN CJ:

You don't have to.

KÓS J:

I mean, one might have been, for instance, the Parker-Hulme murders and yet at that stage I think the sentences, in practical terms, were about four or five years.

MR STEVENSON KC:

I'm sorry, your Honour, I don't recall that case.

KÓS J:

Well, it's –

WINKELMANN CJ:

It's in someone's submissions.

MR STEVENSON KC:

Is that the –

KÓS J:

That's the one that the Peter Jackson film *Heavenly Creatives* is about.

WINKELMANN CJ:

No, it's in someone's judgment.

MR STEVENSON KC:

Right, I beg your pardon.

KÓS J:

It's in *Dickey.* It's in *Dickey*.

MR STEVENSON KC:

Yes, yes.

KÓS J:

Right.

WINKELMANN CJ:

Yes.

KÓS J:

So that was a premeditated murder, considerable forethought, victim lured to a park, attacked with a brick in a stocking and yet, at the end of the day, a very lenient approach was taken. That was the early 1950s.

WINKELMANN CJ:

Written about – and it was written about in her – she wrote about it in her diary before it was done.

MR STEVENSON KC:

Yes.

WINKELMANN CJ:

So quite long for a meditation.

MR STEVENSON KC:

So that was before its time, in that respect.

WINKELMANN CJ:

I think it's referred to in *Dickey*.

MR STEVENSON KC:

Yes, I think it is. As I said yesterday before the Court of Appeal in *Dickey* the Court had the evidence of two academics, one from Otago and another one, Dr Lynch I think it was, which, as I said yesterday, revealed that New Zealand, at least in terms of our statutory framework, is largely out of step with cognate jurisdictions so far as youth is concerned. There is generally a prohibition on life imprisonment for young people.

WILLIAMS J:

That's probably an overstatement, isn't it?

MR STEVENSON KC:

Well, in terms of outcome, it would be. But in terms of a starting point, I think that's generally right.

KÓS J:

Well, it is in Australia.

MR STEVENSON KC:

Yes.

WILLIAMS J:

Well, it's right in some Australian states.

MR STEVENSON KC:

I mean in the UK until recently, the starting point for a 14-year-old could be no more than eight years, from memory. That's changed in the last couple of years.

WILLIAMS J:

Yes.

MR STEVENSON KC:

But I think it's still not life. In any event, those were the things, if the Court pleases, I just wanted to respond to.

WILLIAMS J:

Something that's been on my mind is the relationship between the Parole Board and the sentencing decision in life sentences and the standard in whatever the section is in the Parole Act.

MR STEVENSON KC:

To have conditions set aside?

WILLIAMS J:

Well, yes, to – well, the reasons for the imposition of special conditions, in that case. I haven't had time to look at the rest of the Act.

COOKE J:

Section 7.

WILLIAMS J:

So a special condition can't be imposed unless designed to reduce risk, facilitate or promote rehabilitation, provide for reasonable concerns of victims or comply. That's an ESO.

1445

So, why can you not go to the Parole Board and say we don't need these conditions anymore because the risk of reoffending has got to a point now where you are breaching her rights and she is rehabilitated and reintegrated and you're stopping that and that the reasonable concerns of the victims have played out because it's now however many years and the victims' concerns, while important, can't be a lifetime veto on a person getting on with their life and if so, why come here?

MR STEVENSON KC:

I think the answer is that you can do that. But I'm not an authoritative voice on –

WILLIAMS J:

Okay, is that Mr de Groot, is it?

MR STEVENSON KC:

Yes.

WILLIAMS J:

Is that what was going on there?

MR STEVENSON KC:

Yes. I think the answer, in short, is you're highly unlikely to be successful and the experience has borne that out.

WILLIAMS J:

Until you are, because remember, a decade and a half ago, that was what now Justice Cull said about the circumstances in *Kriel* two decades ago. So, until someone breaks the glass, no one does.

MR STEVENSON KC:

Yes, indeed.

COOKE J:

And to make it more pointed, s 7(2)(a) says that release conditions cannot be: "... more onerous, or last longer, than is consistent with the safety of the community ... ".

MR STEVENSON KC:

Yes.

KÓS J:

Which is exactly what we dealt with in *Grinder*.

MR STEVENSON KC:

I will let Mr Conder pick that up.

WINKELMANN CJ:

So, is Mr Conder going to be speaking? Thank you, Mr Stevenson. I think you had said you had finished, but we were making you – thanks.

MR STEVENSON KC:

Yes, if the Court pleases, thank you.

MR CONDER:

Thank you, your Honours. I will be coming to the question of parole. It will be the last of the three points that I cover though.

What I want to do is, firstly, just speak very briefly on the discussion that's been happening this afternoon about *Messervy*, then talk about the stigma point and then I will talk about parole in a little bit more detail.

In terms of *Messervy*, the position –

WINKELMANN CJ:

Now, Mr Conder, can you just make sure you speak a bit more slowly.

MR CONDER:

I will do my best.

WINKELMANN CJ:

We've just had the discussion that you say – every sentence seems you have about two important concepts in it, but you speak quite quickly. I feel free to say that because I'm a person who speaks quickly myself.

MR CONDER:

Thank you, your Honour. I will –

WINKELMANN CJ:

And so if you could slow down a little we would all be greatly assisted.

MR CONDER:

I will try.

WILLIAMS J:

Just in case one of those two propositions is relevant.

MR CONDER:

Unlikely, but I will do my best to find out.

WILLIAMS J:
Well done.

KÓS J:
I think it was meant as a compliment, Mr Conder.

WINKELMANN CJ:
Yes, well, not necessarily.

MR CONDER:
In terms of *Messervy* we largely adopt the comments that were made by Justice Campbell before lunch and Justice Kós afterwards. These artificially high starting points really only seem to exist because of the necessity of taking youth into account as a culpability factor and as a residual factor in the discounts, therefore, we need to start so high in order to come down by the amount that we think youth justifies and land at what seems to be the true gravity of the decision-making which is the end point that can be seen in an almost inductive synthesis sense to be the correct one.

The answer to that, in our submission, is precisely what has been suggested. The starting points under s 102 need to reflect that the s 102 decision has already been made. They need to reflect the culpability of the particular case viewed through the lens of youth. That is not to say that there would be no youth discount from that point forward, but it would not reflect the culpability aspects of youth.

Youth can be relevant for sentencing in at least three ways. It can reduce the culpability of the offender for the offence and that is naturally something that forms part of the starting point and should be part of the post-s 102 starting point.

Youth may nevertheless remain relevant because it means an offender is more likely to have good prospects of rehabilitation. It may also mean that the sentence being passed on them will be more harsh than it would be for an adult

offender. Those two factors may still warrant a discrete discount after a starting point that takes into account youth culpability as set. I think that's an open question.

I think that, against that background, there is room for starting points that are closer to the range that is used in drug cases in that band of 25 years to 35 years perhaps, from which realistic discounts arrive at, as I say, the inductive synthesis of what both under Justice Johnstone's approach and the *Dickey* approach appears to have been the real driver, the end points that felt fair.

COOKE J:

Another way of possibly looking at it is that the MPI for a standard murder is 10 years, so you take an MPI of being half or a third of the sentence, so that's 20 to 30 years.

MR CONDER:

You could look at a typical life sentence being a 30-year starting point, yes, and then adjust down from there. I can't take a firm position on that but I accept that there's some inherent logic to that as being the natural crossover point. When I come to talk about life parole, that's probably the one thing that raises some questions about that.

KÓS J:

It's just talking about a typical murder is irrelevant in the context of a case that's been propelled through s 102.

MR CONDER:

I think the starting points need to be set on their own terms and that's one way of achieving it, and if one were to take the implied starting points that are in the *Messervy* table and then deduct most or all of the youth discounts that are separately specified you land on numbers between 25 and 35 years, which is in the bucket that I think just carries that natural sense that it feels like it aligns with other things we do in the same area. That's what I intended to say about starting points.

Talking briefly about the stigma, there has been discussion throughout the hearing about whether there is a difference between the stigma that attaches to a life sentence and the stigma that attaches to a murder conviction. It is inherent in what s 102 does that there is a difference between a life sentence and a murder conviction.

Part of the purpose behind s 102, and this is where the discussions particularly around the *Albury-Thomson* case come in, is that it was intended that moving forward murder would capture a wider range of offending but would be capable of treating offences like that one fairly. And similarly the Law Commission when talking about provocation talked about the fact that s 102 provided this alternative pathway for cases to have something that reflected the fact that it met the ingredients of murder, there was murderous intent, but that nevertheless it shouldn't be treated as murder in the conventional sense. So s 102 in the way that it was set out and what it achieves distinguishes between those two things in an important way.

WILLIAMS J:

Where do you – are you just referring to the list of possible candidates for s 102 treatment in the Minister of Justice's or the Attorney's speech in the House, or have you got something more substantive in mind?

MR CONDER:

No, so specifically that is the list that's in the Select Committee report, but more importantly Minister Goff in introducing the Bill and speaking at the third reading pointed to *Albury-Thomson* as sort of the example behind why s 102 is as it is, and he talks about it as being a case that realistically was murder although it was convicted as manslaughter, and he proposes s 102 as being the answer where people should be convicted of the offence that they committed but nevertheless sentenced to the sentence that's fair.

And as I say, the Law Commission on provocation took a similar position. I don't have the precise reference to hand but their report on provocation talks about it in those same terms.

KÓS J:

Because there is such a kind of random element to this. A jury may take a lenient view and simply convict of manslaughter and not require to give any reasons to justify that.

MR CONDER:

No, that's correct, Sir. And I think there is also a difficulty here, and this is getting a little off-topic, but if one looks at the sentences that are imposed for mercy killing manslaughters or battered victim manslaughters and compares them to factually-identical murder cases there is a real step up in terms of sentence that attaches to the word "murder". Whether that's justified is probably an open question, but that is the reality of what has happened because juries have the freedom to impose a verdict that they see as being fair. I think part of the purpose of s 102 is hopefully to move away from that to the point where the jury would feel they could convict of murder and know that the sentence would be fair. I can't comment on whether that's been achieved.

But what I can comment on is to say the final way in which the stigma can be seen, if one looks at any newspaper on the day of a murder sentencing the headline invariably will declare that so and so has been sentenced to life imprisonment for murder. It's the breaking news despite the fact that it is the default sentence. It does have a real meaning attached to it and one that, in my submission, carries stigma. That is a factor of relevance.

1455

I now want to talk about the parole component. In doing that, I begin by saying the Court in *Dickey* was helpfully provided with a substantial amount of evidence about the way that parole was administered and the way that these conditions are experienced. Perhaps it's regrettable that we have not put that evidence forward here, but what we do have in the *Dickey* decision is a series

of conclusions that have been drawn from that evidence that, in my submission, the Court can place some weight on.

I point to – and this is in the *Dickey* decision beginning at paragraph 185 – the Court accepted Mr More's submission that: "... standard parole conditions are onerous and the offender may experience them as punitive," went on to describe those standard conditions which: "… require that offenders report to a probation officer as required, and may control where they live and work and with whom they associate. They must also undertake rehabilitation programmes as directed." The Court recognised that the jurisdiction to discharge conditions has been undertaken in a very cautious manner. I accept the point that was made in questioning earlier that there may be an opportunity for a sea change in terms of the Parole Board's perspective; however, the fact that a Court has already determined, in setting a life sentence, that the default position should be that standard conditions remain for life, that may be a difficult task.

WILLIAMS J:
Perhaps they haven't really confronted the circumstances where "life" is a very long time because of the age at time of offending.

MR CONDER:
Yes, your Honour, but that is a factor that will have always been seen by the sentencing court and the sentencing –

WINKELMANN CJ:
These two were 18. These two men were 18 when they were…

MR CONDER:
Yes, they were, and the sentencing Court had made the decision in each of these cases that a life sentence was appropriate despite the fact that those conditions would pertain for a very long time, and the Parole Board may say, you know, we need some change in circumstances, we need something more

to satisfy us that it is now unjust in a way it wasn't unjust when the sentencing court was seized of it. I think it would be a challenging application.

But in any event, what the Court has said at paragraph 188, I think can't be taken away from. The reality is for those who are on life sentences they will be subject to these release conditions for an extended period of time, and for young people who do not have the standard conditions set aside it could be a very, very long time indeed.

There are also issues – and here I would turn to the final Parole decision that is present in the case of Ms Te Wini who has had some conditions imposed for life, and one of those in particular I would submit illustrates an important point. This is the condition around taking medication. It's discussed at paragraph 6 of that final decision. The Parole Board are quite clear there. They cannot "force her to take medication", it can be a condition but she can always withdraw her consent. However, the very last sentence, if she were prescribed it and she then withdrew her consent and: "… refused to take it, then that would be [a matter] of concern to the Board, [who] would need to reconsider her situation in the community." So for the balance of her life, even if she had her –

WILLIAMS J:

Is this the last Parole Board decision?

MR CONDER:

This is the most recent Parole Board decision, notwithstanding my friend's comments that there may be material additional since then, but this is a lifelong condition that has been set with the warning that if she were to cease taking medication, if she were to exercise her right to withdraw consent to treatment, then the question of her placement in the community would need to be reconsidered. That will follow her for the rest of her life.

WILLIAMS J:

That would be an interesting judicial review case.

MR CONDER:

It would be, your Honour, but I also think it places perhaps a burden on these life parolees if they are expected in order to exercise any of their rights to have to come before the High Court to say that they deserve them. And that really brings me to what I am going to say is the most pernicious component of this –

KÓS J:

Well, before –

WINKELMANN CJ:

That's an interesting condition actually, because in fact – oh, sorry, Stephen.

MR CONDER:

Sorry, I'll go back to the condition, we can discuss it, and then I'll move on.

WINKELMANN CJ:

Because there wasn't – there's no evidence that – well, there's no finding in any of the sentencing decisions that there was a mental health component in her offending.

MR CONDER:

No, you're correct, it's not discussed in any of those decisions and so the Parole Board has made its own independent assessment that she now needs to be in lifelong mental health treatment for purposes of community safety.

And this is the other issue, is the difference between a life parolee and someone who is not, is that for the rest of their life the question of community safety becomes this overarching concern. Conditions can be placed on them in a way that they can't be placed on other people who might be dangerous, because of this principle of community protection that will continue to apply to them.

And when one looks at the standard conditions, the conditions that are likely to pertain for the longest period of time, indeed, for most defendants I would say will be lifelong. There is a condition to report, but then there are conditions that

allow a probation officer to object to, amongst other things, where this person chooses to live, how this person chooses to work, where this person chooses to go and with whom this person chooses to associate. For the rest of their life they have a probation officer sitting over their shoulder who gets to second-guess whether they are making good decisions for themselves.

KÓS J:

Well, in some ways this seems to me a very strong argument against you. Let's assume that this condition meets s 7(2)(a)'s criteria, in that case it must be necessary and if it's necessary, then that's a very good reason why Ms Te Wini should be subject to a life sentence and subject to that condition. If it's not necessary, then it should be reviewed out either by application of the Board or by judicial review to the High Court. But if it is a necessary condition meeting s 7(2)(a), it seems to me a point in favour of her status as a life prisoner.

CAMPBELL J:

That particular condition seems to have some history, looking at the other reports.

MR CONDER:

Certainly it does, your Honour, I accept that.

CAMPBELL J:

It doesn't just come out of the blue in that particular report.

KÓS J:

Hang on, my point first then, Justice Campbell.

MR CONDER:

I'm not going to step away from your question, your Honour. I accept that in one sense that says that the advantage to the community of a life sentence is the ability to continue supervising these people in situations where that is necessary. I accept that what we are proposing here removes from the

Parole Board the ability to impose conditions that may be viewed as beneficial for community protection. That is a –

KÓS J:
Or possibly for her.

MR CONDER:
Potentially. It is a necessary consequence of this that we return defendants on determinative sentences back to their natural state where their poor decisions become their own and where we accept that every person in society carries with them certain risks. But we are not all subject to a supervisor who decides whether those are undue risks to the community, because we recognise that a person's liberty is that important.

The really pernicious issue, in my submission, here is that because of literally a childish decision we continue to treat these people as children for the balance of their life.

WINKELMANN CJ:
Well, I mean, that's probably a gross mischaracterisation on several levels because it's not a childish – it's a childish decision with horrific ramifications.

MR CONDER:
It is, I accept.

WINKELMANN CJ:
And we're not treating these people as children when the conditions are lawfully imposed and I think your complaints might be that arguably, some of these conditions aren't lawfully imposed. When they're lawfully imposed, they are imposed for the reasons in s 7, I think it is. So, I think you're going backwards here, Mr Conder.

MR CONDER:

I take that comment, your Honour and perhaps I will abandon it shortly, but I will give it one last push. What I'm saying here –

KÓS J:

I like a fight, keep going.

MR CONDER:

Thank you, your Honour. What I'm saying here is that we are deciding that this is a category of people who we get the opportunity as society to say we decide how we are going to protect ourselves from you in a way we don't with others.

WINKELMANN CJ:

And some of those others are dangerous people.

MR CONDER:

Yes, this is the core thing. Anyone else on a determinate sentence reaches the end of their sentence and society has to accept that they may go on to do risky things to themselves and others. That is a risk.

KÓS J:

Such as every person convicted of manslaughter with almost no exceptions.

MR CONDER:

Precisely, your Honour. So we have categories like this of people who are high risk and in those circumstances it is exceptional to make them subject to these sorts of restrictions. What is critical here is these are people who find themselves in this situation because of decisions that they made as young people, through impaired decision-making, and then we are taking away from them the opportunity to ever be an adult, free to make those decisions for themselves without this kind of supervision. That's the comparison that I'm making in terms of childhood.

I accept that the circumstances are such here that it may be appropriate in some of these cases. But the Court should be careful about that, because the effect of it is to say that these are people who deserve supervision forever because of a decision that they made when they were a child and that, really, is the submission that I'm trying to make here.

Life parole is not irrelevant. Even if there are processes to have these conditions removed, that creates an onus on these people and it still requires them to satisfy society that they are safe in a way that others are not required to. In my submission, that can be too onerous for some young people. That's a factor to be considered here.

1505

KÓS J:

It does, however, seem to beg the argument that steps should be taken to remove the conditions primarily.

MR CONDER:

That may well be the case, your Honour, but I fall back to what I said earlier. Some of these things can be clear at the time of sentencing to the sentencing court and it is appropriate, where that is the case, for the Court to exercise its own discretion to say this far and no further. The fact that there might be other solutions and those are solutions that would leave the risk of recall still present, so there is still something overhanging the person for the rest of their live.

KÓS J:

Sure.

MR CONDER:

But where the Court can see that it is going to become unjust, I would say it is not an answer to that to say that there are other means by which we could later fix this injustice.

WILLIAMS J:

That's true in the context of a sentencing. A Court must not abandon its duty to arrive at a just sentence in all the circumstances, but that's not where we're at here because of the delay.

MR CONDER:

Yes, your Honour. Then it becomes a slightly different question which is, is the cumulative effect of all of these things that these appellants should not have been subjected to such that there remains a substantial injustice? And we say that yes, it does.

The stigma, the effect of, as my friend has said, the categorical sentence of life imprisonment, or the unique sentence of life imprisonment, the effect of recall, the effect of conditions, all of these are things that create a substantial injustice if they were wrongly imposed at the outset, which we say they were.

COOKE J:

So one of the things that could be said is, one of the things about the application is it's requiring us to go back in time to resentence rather than dealing with her circumstances now. For example, the medication condition, we don't really know what's behind that, but obviously the Parole Board does have that in mind.

MR CONDER:

Yes and I'm not wanting this Court to take that into account directly and say because of this medication condition, therefore, we've now crossed a line into something that's inappropriate. It's simply illustrative of the way in which these parole conditions are used and the restrictions that they can create, the impact that they can have. So I give that as a concrete example but to talk about the general concept of what these conditions are doing. I agree, it's not appropriate for this Court to line by line go through the conditions and decide whether that's a fair burden 20 years on. That's not the task of this Court. But –

WINKELMANN CJ:

I mean, it's not a controversial proposition, when you look at the case law in New Zealand let alone anywhere else, that a sentence of life imprisonment is a heavy burden for anybody to carry.

MR CONDER:

Yes.

WINKELMANN CJ:

Especially for the entirety of their adult life, effectively.

MR CONDER:

And these are all just parts of that same conclusion. That's the submission at the end of the day.

WINKELMANN CJ:

Yes.

WILLIAMS J:

But the difficulty, one of the difficulties that we confront, are we have in these two appellants an internationally published poet and an individual whose release last year was a finely balanced call because of non-compliances leading right up really to the date of release almost. When these are not apples and apples, is it better for the risk mitigator operating currently to deal with this than the risk mitigator operating prospectively in those circumstances?

MR CONDER:

Your Honour, if we reach the point of asking that question then, in my submission, we've already reached a conclusion that it is appropriate to have a supervisor over these people for the rest of their lives and that is a core question here, in my submission. Whether it is fair to subject them to that forward-looking assessment all the time is one of the things that is a part of asking the question, is a life sentence fair here?

You can look at *Van Hemert*, I suppose, as the example where on a culpability basis alone a life sentence would be too much. But in the view of the sentencing court and the appellate courts, there was a risk such –

WILLIAMS J:

Not the majority in the appellate.

WINKELMANN CJ:

Is there something wrong in your analysis, though, because you've sort of shifted the argument, which seems to be against your interests, to life imprisonment now being a risk mitigation strategy, whereas, in fact, Parliament's intention is really it's a massive – it's a deterrence and an incredibly –

MR CONDER:

Yes.

WINKELMANN CJ:

– it's a sign of stern punishment. It's not a risk management thing. It's not – it does not tie to a risk threshold like preventive detention. It's a harsh response to deter people from going around killing others in certain defined circumstances.

KÓS J:

I'm not sure it divides as easily as that.

WINKELMANN CJ:

I'm not saying it divides completely but you're shifting the focus onto the supervisory aspect, which I'm not sure is helping your argument.

MR CONDER:

Your question there, I think, framed what I was trying to say to his Honour just before in much more eloquent terms. I agree that the focus here should not be on the supervisory element. This is just one small piece of the puzzle where

we say that the cumulative impact, the overall picture of a life sentence becomes a substantial injustice to these applicants.

Within that, it is my submission that these are onerous conditions and that that goes too far, but the core submission is not that we need to look at it in a supervisory fashion. I think that that is begging the question, in a sense, it says, well, isn't the life sentence now useful and shouldn't we keep it for that purpose? We're saying the life sentence never should've been imposed and in those circumstances these are just negative impacts that the Court can consider.

I'm not suggesting that we need to win the argument on whether these are good conditions or whether there is community safety concerns that are relevant here, because if we get to that point we've already gone too far by concluding that the life sentence in a sense was appropriate. What I am saying is these are burdens that form part of the very large deterrent sentence that was unfair.

WINKELMANN CJ:
Right. Thank you, Mr Conder. Is there anything else?

MR CONDER:
No, I think that that is all I intended to say on parole and some things more.

WINKELMANN CJ:
Right, yes.

MR CONDER:
In that case, those are my submissions.

WINKELMANN CJ:
Right, thank you. So that's all counsels' submissions. I'm not missing anybody am I? No. Well, thank you, counsel, for your excellent submissions. We will reserve our decision.

COURT ADJOURNS: 3.12 PM