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

SC 110/2025
[2026] NZSC Trans 7

JESSICA MULFORD

Appellant

v

THE KING

Respondent

Hearing: 31 March 2026

Court: Ellen France J
Williams J
Kós J
Miller J
Cooke J

Counsel: N M Dutch and R E Webby for the Appellant
P D Marshall and N J Wynne for the Respondent

CRIMINAL APPEAL

MR DUTCH:

May it please your Honours, counsel's name is Dutch. I appear with Ms Webby for the appellant.

ELLEN FRANCE J:

5 Tēnā kōrua.

MR MARSHALL:

Tēnā koutou, e ngā Kaiwhakawā, ko Marshall māua ko Ms Wynne, e tū nei mō Karauna.

ELLEN FRANCE J:

10 Tēnā kōrua. Mr Dutch, just before you start, just two things, one of which you may well be – oh, yes, I see you are. We were going to ask you to address *G (SC 130/2024) v R* [2026] NZSC 19 but I see you have you got that on your outline and the only other issue we wanted to raise in advance was, at some point, if there is information on the record as to the child's placement with the
15 appellant and then partner before and after the first incident, if you could point us to that information.

MR DUTCH:

Placement, Ma'am?

ELLEN FRANCE J:

20 Yes.

MR DUTCH:

I think Ms Webby can probably address – probably best to address questions of that nature to her, Ma'am.

ELLEN FRANCE J:

25 Right, well, she can do that when it suits you, thanks.

MR DUTCH:

Yes, it's in terms of the outline of argument she's arguing, those points are noted there, but she's probably the best person to address the placement issues and the timeline of those matters, Ma'am.

5 **ELLEN FRANCE J:**

Thank you.

MR DUTCH:

So, I provided a summary of oral argument but that's really a guide to the topics I wanted to address. Most of those are in relation, in response to my learned
10 friend's submission for the Crown. I am not intending to speak in detail about anything at the start, I am happy to move through the question phase of the submissions at this stage, but that's really a structure for the Court to see who is going to be addressing what topics and I think the first point the Crown raised at 4.3 of their submissions is what is the appellant seeking in terms of the
15 appropriate sentence.

What we, it's slightly a complicated question since there is two ways of getting there, in my submission, but in brief summary is we're saying a four- to five-year start point, a 30% discount for youth and 10 to 15% for other factors which takes
20 you to around 40 to 45% discount.

So, that's if the sentencing is done in the conventional way of setting a start point for an adult offender, basically, and then discounting for youth. If the Court is interested in the arguments about agency and how that goes into calculating
25 the start point, the discount for youth I think would have to be less because you take in the youth into account in setting the starting point as opposed to the discount.

ELLEN FRANCE J:

Well, I think we are, that is something we're interested in hearing from counsel
30 on.

MR DUTCH:

Yes. So that's why what we're seeking is slightly more complicated than simply what I've just said, but that's if the conventional sentencing structure is followed, that's how I say it should've gone.

5 **KÓS J:**

Just repeat the elements, please?

MR DUTCH:

A four- to five-year start point, 30% for youth, and 10 to 15% for the other factors. So, a four- to five-year start point and 40 to 45% discount, because
10 there is obviously some crossover between various factors.

KÓS J:

Yes. So that's paragraph 106 of your submission?

MR DUTCH:

Yes.

15 **KÓS J:**

Thank you.

MR DUTCH:

However, if you adjust the start point for the agency point then there may be less discount for youth, in my submission, because there's – when the agency
20 comes from youth itself that would have to be recognised in the youth discount later in the process, whereas if the agency that reduces culpability comes from something other than youth, obviously the youth discount wouldn't be affected by the agency issue. So, if the youth discount, if the agency discount came from some sort of disability a defendant had or something completely different,
25 then youth would still be a full factor.

KÓS J:

Well, what – which argument are you making?

MR DUTCH:

Well, I'm making both, because you have the conventional way of doing sentencing which is to have the youth discount at the second stage. In my submission, with this type of, particularly with this type of offending which involves a caregiver or a parent who is of a very young age and the manslaughter of a child, the agency in terms of setting the start point is much more of a factor than with other types of offences. If you look at the pattern of how the Court sentenced these type of offences over the years, you find that where the caregiver is much older and much more experienced looking after children, they tend to attract higher starting points.

So, because you have a situation here where I say you can't cross-check with *R v Taueki* [2005] 3 NZLR 372 (CA) very easily, as you could in some cases, because you don't have the requisite, the same intents as you have in a GBH case, so you don't have the same mental elements in a manslaughter of this nature as you do in a GBH case, you also don't have a clear mechanism of injury or exactly what's occurred that's clear to the Court. So, it's difficult to cross-check this situation through *Taueki*, and so you have to go back to the cross-checking with other similar sentences for similar offending.

20 **ELLEN FRANCE J:**

So, why does the absence of a mechanism affect the ability to cross-check?

MR DUTCH:

Well, cross-checking with *Taueki* is problematic where you don't have – well, wounding with intent to cause grievous bodily harm requires an intent to cause grievous bodily harm, and in this case if there was all the elements of that were made out you wouldn't have a manslaughter conviction, because you have someone intentionally trying to cause grievous bodily harm to a child and the – so it's very hard to see how, in the way question trail was phrased and how this trial went, as to how you could have that pathway to this conviction by the jury.

MILLER J:

There's a different difficulty with *Taueki*. More recent – because it's the guide, well, it's here not for the methodology, but as a guideline judgment obviously, that's what you're talking about – more recent guideline judgments such as

5 *R v AM* (CA27/2009) [2010] NZCA 114; [2010] 2 NZLR 750 recognise that culpability factors that go to the offender's state of mind, for instance, if you look at *Taueki* probably because it was dealing with aggravated violence, the list of factors which go into the starting point is comprised exclusively of things that go to the actual offence itself, and that may just be the age of the judgment, or

10 as I say it may be because of the nature of the offending, but a *Taueki* starting point doesn't under, for aggravated violence that is, doesn't really take into account some of the factors that might now go into the starting point. So for that reason, too, there may be an issue about using it as a comparator.

1010

15 MR DUTCH:

Yes, I agree with that, Sir, and particularly in this case with the way the, what this is for sentencing for, this is not a – other cases it may be more useful which fit within similar parameters, because this case, in my submission, is not particularly useful and it's much – the appropriate way is to look at the

20 starting points taken in similar cases.

In terms in particular of this type of charge, what I'm submitting is my primary submission is that there is a situation of reduced agency here. We have a step-parent who has only just become an adult in the law, just over 18 years of

25 age, hasn't had the care of the child for the entire time the child has been alive, is not the parent of the child and doesn't have the experience or tools or other expertise in looking after other children. So, it's inherent in the nature of this charge that her position is different to older, more experienced parents or caregivers, and a number of the cases do involve older, more experienced

30 parents or caregivers that are similar in fact.

KÓS J:

Well, all the Crown comparators, *R v Broadhurst* [2008] NZCA 454, *R v Robinson* HC Rotorua CRI-2007-063-2028, 27 November 2009, *Ikamanu v R* [2013] NZCA 510 and *Woodcock v R* [2010] NZCA 489, none of
5 them involved youth discounts, so we can take it that they all involved adults.

MR DUTCH:

No. They all involved adults.

KÓS J:

And at least one of them was 38 years of age.

10 **MR DUTCH:**

Robinson was 38. Woodcock, I think, was 25 when he was sentenced. Some of them you have to go back to the High Court decision to work out what the age actually was, but Woodcock was 25 when he was sentenced. It's not entirely clear what age he was when the offence was committed, but it was
15 21 or 22, I think. Ikamanu was 29. Robinson was 38. And some of those you have to go back to the High Court decisions to check the age which I've –

KÓS J:

Do you know what age Broadhurst was?

MR DUTCH:

20 Broadhurst was 18.

KÓS J:

But Broadhurst was, the other factor, the other difficulty is that those Crown comparators tend to involve multiple assaults.

MR DUTCH:

25 They tend to involve multiple assaults. They tend to involve different scenarios in terms of – so, that's the difficulty, that you're setting this with a, all of them have different factual backgrounds and patterns. Broadhurst had the previous

assault or assaults. The number of them was somewhat unclear because of the way the trial went in that case, but it appears that the other assault was also committed as an adult, by my calculations, given the one that the sentencing Judge relied on in particular, because that was the same year as the fatal injury

5 and not long before. So, I'm assuming Broadhurst was 18 when that was committed as well, which hard to tell from looking at the case law the exact age, but it appears that Broadhurst would have been 18 from my, most likely, from my reading of Broadhurst at the previous injury that was really found at trial to be probably caused by Broadhurst. That was a trial where the previous injuries

10 were dealt with by propensity as opposed to by another charge, so it's a slightly different process. Then during the trial some of the previous injuries dropped off after Dr Kelly's evidence. So it's, again, it's a different, factually different scenario.

15 So, that's why I say if you look at, so if you start, say for example with *Robinson* which is different, but you start with a 38-year-old who's got a lot of experience with caring for children, and so do many of the other ones. This hasn't – the experience and age has to be relevant to the agency and to the starting point, and is probably a factor the Court's taken into account throughout looking at

20 these type of offences, the age and experience of the parent or caregiver throughout the cases, even if it's not called agency, but just looked at as a way of setting the starting point for manslaughter. But in this class of case, in my submission, that's a critical issue to look at in determining culpability.

KÓS J:

25 Is there any doubt that if this had occurred when she was 17 that she would, nonetheless, have been sentenced under the Sentencing Act 2002, given it's a category 4?

MR DUTCH:

30 She would have been sentenced under the Sentencing Act if she was 17, there's no doubt about that. It has to go up to the adult court and has to be sentenced in the High Court and that's where this issue of agency and culpability becomes particularly important with this type of charge, because you

could be dealing with a 14-year-old who's come up from the Youth Court on this charge and so that's why that factor should, in my submission, be dealt with as looking at agency in the start point, not simply in the youth discount, because if it had occurred a few months before when she was 17 you still would have had

5 her being sentenced in the High Court, if she'd been 16 still would have been the High Court, but because it's manslaughter the culpability, I say, you need to look at that in terms of age and also experience in looking after children. So, that's why it's a particularly important issue to do it that way as opposed to the traditional sentencing, what would an adult offender get, and then do a youth

10 discount from there, which doesn't arrive at the correct position for younger people who are charged with this particular type of offending.

WILLIAMS J:

What then do you do with youth at stage 2, if you're right?

MR DUTCH:

15 Well, if the agency, if the lack of agency was caused by youth –

WILLIAMS J:

Let's assume I accept that youth goes to culpability and that's a stage 1 issue. What then do you do with stage 2 in respect of youth?

MR DUTCH:

20 I think what, in respect of youth, you would have to give a lesser discount for youth, you couldn't, otherwise you'd be double counting.

WILLIAMS J:

Why would you give a discount at all?

MR DUTCH:

25 Well, you may not give a discount for youth in terms of – and that could be a wider proposition if the lesser culpability was caused by some other factor that would also be, could be reflected as second-stage discount, if the discount's given, if it's addressed as an agency factor, I don't think you can discount for it

again. I think that's probably the position, that it should either be dealt with at the agency point or at the second stage, but you can't –

WILLIAMS J:

So you're saying matters of – age-related matters that don't go to culpability
5 can be dealt with at stage 2?
1020

MR DUTCH:

Yes. If the age, if the offending is particularly age-related and so it goes to agency, but it would be stage 1 if it's offending that doesn't have that level of
10 culpability, for example, something much more simple, you'd do a youth discount stage 2.

KÓS J:

Well, there would be some youth factors that would not be culpability factors, such as rehabilitation, potential disproportionate effect of imprisonment on a
15 young person, would still be stage 2 factors, would they not?

MR DUTCH:

Yes, yes, they would be and that's why I premised it by other factors could reduce agency as well, which could also be dealt with at stage 2, which are imaginable, that could be other reasons a defendant has less agency and so
20 the agency issue here is particularly age and experience in looking after children which is where the double-counting risk is. The other factors like rehabilitation, the disproportionate effect of imprisonment on youths as opposed to adults, that's separate from the culpability issue.

COOKE J:

25 Does make the sentencing exercise more complicated but, of course, the case is more complicated.

MR DUTCH:

It does, but the difficulty, I think the difficulty with the overall way sentencing goes with – which goes right back to the *R v Mako* [2000] 2 NZLR 170 (CA), or goes back to *Taueki*, which has as its proposition of what an adult offender
 5 would have got, is unduly limiting on how you assess the proper starting point, because you're assessing a starting point based on what the starting point would be if I was offending, as an adult offender, which is not helpful when the defendant is not this adult outside of and the agency is lesser. That is the difficulty with the current system, you take this notional starting point that relates
 10 to quite a different offender to the one that is before the Court, potentially.

KÓS J:

It also creates the kind of intellectual abyss between sentencing youths and sentencing adults. Because it cannot be justifiable, because you have a completely different scale of sentencing for someone who is 17 years and
 15 11 months old and someone who is 18 years and one month old.

MR DUTCH:

Yes, Sir, it can't be and that's why so agency is a better way to assess it because another 18-year-old may have been looking after children for years and may be a much more experienced – or 17-year-old – and have a much
 20 different characteristics to this appellant. So, it's not simply a proposition that someone is 17 or 18 they magically change when they change age. It requires an assessment of this defendant's agency, or in the case of your Honour's example that defendant's agency, and that's the problem with looking at it, well, what would the adult offender who doesn't, as a starting point, as that's not what
 25 you have and while it makes it mathematically simpler to go, oh, the starting point is between four and five years for an adult offender, then we look at our discounts, the problem is the starting point you've used doesn't relate to the defendant you've got.

WILLIAMS J:

30 Maybe one way of thinking about this is the effect of the current approach, you would say, is to undercount, to underweight youth because youth factors are

put in at one stage only, collapsed into a single analysis that risks a separate assessment of culpability and other factors that properly belong in stage 2, ie, rehabilitative prospects, prison and, frankly, it's effect on rehabilitation prospects, as well as it's effect on the offender themselves, restorative justice processes and so forth.

MR DUTCH:

Yes, Sir, I think that's correct, because that's why, in my submission, it may be a more difficult process to assess culpability for the individual offender as opposed to the adult offender, but in manslaughter you have such a variety of circumstances and you don't have a clear guideline case like you do and there's no way to do a guideline case, so you have to do that assessment with this type of charge anyway. It's inherent in the sentencing for manslaughter that you're going to have to do a proper culpability assessment. You can't simply say what an adult offender would get, because you can't do what you've done in *AM*, where you can say here's sexual offending, it's in band 1, 2, or 3, or 4, but with manslaughter you – I can't imagine how you could do a decision, a guideline decision for manslaughter that would cover all the possible circumstances that could lead to a conviction and a sentencing process.

So I think that that may be the problem with the adult offending method, that some offences are more capable of guidelines than others and are easier to – drug offending, it's easier to assess the financial value of the drugs, for example, and the cases are much more similar with drug dealing to each other so you don't have this variety, but here you have to undertake that assessment anyway to get to the start point. So –

KÓS J:

Another way of putting Justice Williams' proposition is to say that the current approach to sentencing under-considers the question of culpability. After all, section 8(1)(a) is your entry point here and it requires the Court to: "... take into account the gravity of the offending in the particular case, including the degree of culpability of the offender." Now, that suggests that culpability is an initial or early consideration in a sentencing exercise, and the courts have flirted in cases

like *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 and *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 with mental health as being something that also requires a stage 1 consideration because it's about culpability, just as youth, impulsive youth behaviour also is.

5 MR DUTCH:

Yes, I think that's correct, you need to do the culpability assessment and it's more stark with this kind of charge where there isn't – the culpability range is much more significant than between other charge, potentially, but I think you need to do the culpability assessment as a start point with every charge and
 10 that was the way sentencing was done pre-Sentencing Act and pre the modern sentencing approach. So, the judge would assess culpability by looking at comparative, trying to pick similar cases which in the old approach, before we had starting points and uplifts and discounts and you had it structured like that, the Court did address culpability by trying to find similar offenders and then
 15 looking at what they got and then following down to do a sentencing because someone similar had received this sentence, so this is more or less serious and you go with that, which was the old approach, which started with really a culpability assessment by comparing this person to similar people.

ELLEN FRANCE J:

20 What do you say to the Crown submission that if you assess these sorts of personal factors at that first stage, you run the risk of sort of undermining transparency and consistency and so on, that you otherwise get from the current starting point analysis?

MR DUTCH:

25 Well, I think you actually have the opposite effect, because the problem with the current position, if you try and explain it to somebody who is not a lawyer and who doesn't – and isn't particularly good at mathematics, which you have a situation where you have a notional starting point based on a notional person who is not before the Court and then you have a discounting process and then
 30 people – there's no real transparency in that, because it's hard to understand as to how you start it at this point but then you take in 40% off for various factors

and that, I think, in my submission leads to less transparency and it makes the justice system hard to understand because the starting point doesn't relate to the sentence that people receive, in the mind of somebody who doesn't understand the calculations and that can't do percentages in their head.

5 **KÓS J:**

I suppose another answer is it's difficult in stage 1 to use a case like *Robinson* or *Ikamanu* as a comparator at all, given the fundamental difference between the offenders.

1030

10 **MR DUTCH:**

It is, and that's the difficulty, that's been the difficulty with this matter, is because a lot of the cases that have some similarities also have some significant differences, like *Robinson*.

ELLEN FRANCE J:

15 That may be just a question of getting the right comparator rather than suggesting necessarily a change in approach.

MR DUTCH:

I think that manslaughter does highlight this issue more than other offences. Other offences are easier to find a very, as I said, drug dealing is easy to find
 20 multiple people who've done basically exactly the same thing to earn money, and it's much easier in that type of offending to go, well, this person's got this role, he's on top of the organisation, this is what we think he earned, this is the weight, this is – and there lots of people who are exactly similar and don't have different culpability, who have gone into a commercial enterprise to deal drugs
 25 to make money so.

WILLIAMS J:

The transparency question is important obviously at sentencing, because public confidence depends on it. It seems to me the only real question is, does the

present approach under-weight culpability due to age because of it being corralled into stage 2?

MR DUTCH:

Yes, I say it does.

5 **WILLIAMS J:**

Well, that requires an assessment of the cases to see whether that appears to be being borne out. Are judges collapsing rehabilitation culpability and the impacts of prison to a single assessment at stage 2, and is that leading to the more fundamental point of the seriousness of the wrongdoing and the feat of
10 that particular person not being properly counted?

MR DUTCH:

I think this –

WILLIAMS J:

If it, sorry, if it is, then sentencing is clearly not transparent. If it isn't, then we
15 don't have a problem.

MR DUTCH:

Firstly, in this case as an example of where it has been collapsed because the discount for youth has been, for an 18-year-old who's just turned 18, and very close to 17 still, is quite limited, and that covers all the factors your Honour has
20 said as part of the youth discount or included in the 15% discount here, which has been lessened because of the seriousness of the offence, and the Crown submission is that it's within the range, another judge could've given more because it's discretionary on the same facts, but it's within the range. But what's happened here is you haven't given a lower starting point for agency
25 because of youth, and then you've only discounted 15% because the offending was serious, which is your culpability assessment. So you're not only using cases for – if you haven't done the culpability assessment, then you've reduced the youth discount as well for all those factors such as a younger person in prison, prospects of rehabilitation, and youth of the offender, all collapsed into

the 15% discount for someone who's just turned 18. I think this is a good example of where that hasn't, you haven't got the sufficient discount for youth and for those factors at the second stage. Everything's been collapsed into this 15% which is then effectively been squashed down lower because your
5 offending is serious.

COOKE J:

But wouldn't that be addressed that the discount could have been higher? Given your 45% discount, for example, would that not have done – reached a just outcome?

10 **MR DUTCH:**

That's why I started with saying the answer to the grounds question, what I was seeking isn't quite as straightforward, because for the appellant it's wrong both ways, through both ways of analysing the case, in my submission, and the 40 to 45% discount I've advocated for answers the question about, is there an
15 example where the youth discount is not being addressed properly at the second stage and being squashed, because that's what's happened here.

So, if the Court doesn't accept my primary point that agency should be a taking into account at the first stage in the culpability assessment, then you're left with
20 the situation where the youth discount here is manifestly inadequate and doesn't address all the factors because it's been squashed down because of the seriousness of the offence.

COOKE J:

Your best argument may be just it's more accurate, in terms of Sentencing Act
25 principles, to be done in two separate exercises, because some of these youth-related factors do go to the culpability of the offending and others, in terms of Sentencing Act principles, do relate to the personal or mitigating factors, such as rehabilitation and the crushing effect of imprisonment on youth. It's just more accurate to do it and where it fits.

MR DUTCH:

Yes, I think it is more accurate to do it that way and then that way when you get to a different defendant who is not a youth but prison would have a crushing impact for totally other reasons, I mean, the crushing impact is caused by youth,
 5 it can also be caused by old age, or ill health, or any other number of personal factors for someone else. So, I think that's a difficulty that we look at the youth discount and say crushing impact of prison, prospects of rehabilitation, and youth, and wrap it all up together, because for youth offenders those factors are usually the factors for someone of that age, but it's more correct to do it
 10 separately and separate out which ones go to culpability and which ones go to the second stage process.

KÓS J:

I mean, another way of addressing this as a matter of principle is to ask whether you can assess the gravity of the offending without regard to what you're calling
 15 the agency, which you might also, slightly differently, call matters of pure culpability, which would include youth, might or would include mental health issues.

MR DUTCH:

No, I agree with that, I'm calling it agency –

20 **KÓS J:**

And that's really whether the gravity of the offending is simply about the actual offending and the effect on the offender – so on the victim, or whether it includes aspects of the personality and responsibility of the offender.

MR DUTCH:

25 Well, it's, even under the, if you look at *Taueki*, even under that, some of the aggravating features are not relating to the effect on the offender. Sentencing isn't –

KÓS J:

Effect on the victim.

MR DUTCH:

– simply an exercise of this is the injury so this is the sentence, and it's quite a lot of factors in *Taueki* relate to vigilante activity, because the people committing the assault are gang members and it's to do with gang offending, things like

5 that don't relate to harm to the victim, they relate to the culpability of the offender.

So, a lot of the factors that are used in the guideline cases relate to the offender's personal culpability as opposed to the straight analysis of simply

10 consequences to the victim. It's just that some culpability factors are emphasised by those guideline judgments and some aren't, but a lot of those factors are personal culpability factors that don't relate to the actual physical harm or the – but they relate to why the culpability of the offender.

15 And then where this comes to probably general, more general importance, is with the Oranga Tamariki Act 1989, which my learned friend is going to address about *G v R*, but when people are off-ramped from the Youth Court for the Schedule 1A offences, such as aggravated robbery, or wounding with intent to cause grievous bodily harm, or matters like that, you have youths going up to

20 the adult court who then you're seeing starting point based on the culpability of an adult not of the youth who's being off-ramped.

1040

So, it's a wider than just this defendant committing an offence at 18. It does

25 cross over into younger people committing offences at a younger age as well, because they, when they commit seriousness offences, can be sent out of the Oranga Tamariki Act under that section and then we have starting points and a process of addressing sentencing them as adults who have committed the offence and then putting a discount in at the second stage, which runs the risk

30 that we've talked about.

That probably is a matter the Crown have submitted about that, which is in the section 18 part of my submissions, but I think it's probably relevant to go to that point now and change my order of my argument slightly, so that –

ELLEN FRANCE J:

This is your number 3?

MR DUTCH:

Yes. This is – but before I get into the section 18 point, the cross-over point
 5 really is and the Crown say at paragraph 57 of their submissions that: “Consider
 two young offenders of the same age convicted of the same aggravated
 robbery, but where one also commits a number of related offences during the
 incident such as using a stolen vehicle and striking members of the public with
 a weapon (as in *Matkovich v Police* [2021] NZHC 1660).” And they say: “On
 10 the appellant’s argument, both are likely to receive the same starting point,
 despite one’s offending being more serious.”

Now, that is said to lead to inconsistency, but the Oranga Tamariki Act
 specifically addresses that issue and that’s when a defendant is off-ramped out
 15 of the Youth Court you get to section 276AA of the Oranga Tamariki Act, which
 provides that where someone is charged with a Schedule 1A offence which is,
 say, aggravated robbery and then a lesser offence such as theft of a vehicle
 which isn’t Schedule 1A, then: “The prosecutor can seek a determination from
 the Youth Court that the ... non-Schedule 1A offence is [a related offence to]
 20 the Schedule 1A offence.

So, when there is a 17-year-old who commits an upliftable offence and one that
 is not upliftable and they’re related, which is the concern the Crown has in that
 paragraph, the Court makes a determination as to whether or not the offences
 25 are related and there is categories set out there as to how the Court can
 determine whether it is a related charge or not, by considering the: “... series of
 incidents ... the time at which they occurred ... the nature of the ... offending.”
 And then: “If the Youth Court determines ... [it’s] a related charge, the related
 charge must be transferred to the District Court or the High Court to be dealt
 30 with together.”

KÓS J:

Could you go up to 276AA please. That’s what we’re looking for, thank you.

MR DUTCH:

So that scenario, which is of concern is specifically addressed in the Oranga Tamariki jurisdiction as to how to deal with that situation, where some matters go up and some don't if they're related offending. So, you have a, you

5 really have a statutory override over underlying principles on that point, because the Parliament has clearly set out how to deal with that situation as to whether they go up or not.

WILLIAMS J:

And any ability to help us on how often this is triggered? Is this Ms Webby?

10 **MR DUTCH:**

Ms Webby can probably –

WILLIAMS J:

Your paddock?

MS WEBBY:

15 Sir, I'm a youth advocate, is probably the useful aspect to understand. So this, for example, the average time we see this is when you've got a young person that's charged with aggravated robbery, they've stolen a vehicle, either as a to get to the event or after the event, and so quite often –

WILLIAMS J:

20 So *Matkovich*?

MS WEBBY:

Correct. Or alternatively, I have another young person at the moment who is charged with injuring with intent to GBH and an aggravated robbery and those two have been put together because they relate to circumstances, so nine times

25 out of 10, with a young person that's being off-ramped, you will often get the related charges, because they're always in the same time –

WILLIAMS J:

They follow them?

MS WEBBY:

Yes, same event effectively.

5 **WILLIAMS J:**

Thank you.

MR DUTCH:

The relevance particularly of these sections to the section 18 argument is that these sections were inserted by the 2019 amendment in July 2019 to the
10 Oranga Tamariki Act, which is the same year as section 18 was relooked at by Parliament and the age changed, but the other parts of section 18 weren't amended at that point. So the law –

WILLIAMS J:

Sorry, it wasn't part of a single body of reforms?

15 **MR DUTCH:**

Well, it was. In 2019, you brought in, you increased the age for section 18 and you changed this at the same time.

WILLIAMS J:

Yes. Not just a coincidence. It was the same year. It was the single package
20 of reforms?

MR DUTCH:

Yes, it was part of.

WILLIAMS J:

Thank you.

MR DUTCH:

It's the same package, in my submission. This was the intention, how do we deal with increasing the age of the Youth Court jurisdiction? And Parliament decided to increase the age at which people remain in the Youth Court and then

5 these provisions have been brought into the Oranga Tamariki Act and the Sentencing Act amending it, both towards the same goal and same clear intentions, so my submission about section 18 really is Parliament, in 2019 when they looked at this, they were looking at changing the Youth Court, changing the age of people who stay in the Youth Court, and this was not an

10 accidental amendment to section 18 which produces idiotic consequences, or logical inconsistencies, but a clear policy when there was a decision to change the age of the Youth Court and put older people into the Youth Court who were going to be staying in the Youth Court, and catch older more serious offenders potentially, so this was all part of what Parliament intended in 2019.

15

The fact that section 18 has been amended since this shows a different direction, I think, in my submission, in terms of Parliament's view at the time that Ms Mulford, the appellant, committed these offences, this was the law and section 18 is there intentionally by Parliament to mean what it says, because

20 other Acts have been amended at the same time to provide ways to deal with the problems that may arise, like the *Matkovich* situation, about what do we do about things that aren't Schedule 1A where there's related offending? So this has been thought out, and this is what was intended.

KÓS J:

25 Well, that maybe so, but section 18 talks about imposing "a sentence of imprisonment in respect of the offence", and the Crown's argument is that this is simply orthodox assessment of the lead offence, the sentence of the lead offence, which is aggravated by the existence of another prior offence here. It's not a punishment for the strangulation. It's a punishment for the

30 manslaughter.

MR DUTCH:

Yes, except this case I think, this case has to be looked at in terms of the unusual way we've ended up with this charge, and the unusual procedure which the Crown have referred to several times with regard to the proposition that
 5 because the appellant, as they put it, lied to police when she was 17, this charge wasn't laid. But I think, and it's clear from the trial notes and the case on appeal, this had an unusual progress to have this charge laid at all, which is not – so, matters haven't progressed the way they normally would.

KÓS J:

10 I just don't see that as answering the point I've made to you. I mean, you still go back to what the Judge was doing, and the Judge was increasing the sentence for the manslaughter because there had been this prior act of violence against the same child.

MR DUTCH:

15 That's what the Judge was doing. I'm saying he was prohibited from doing that by section 18 and what I'm saying is that that was because of a deliberate, this hasn't arisen by accident to cause a conundrum, this was a deliberate decision by the prosecution to lay the charge at a late stage knowing that section 18 applied to that charge, because you have a situation where –

20 1050

WILLIAMS J:

Well, it was because of the second offence really. That was the trigger.

MR DUTCH:

Well, it's also because of when it was laid, because if it had been laid when she
 25 was 17, Ms Webby is going to address what would have happened if it had been, the police complete their investigation when she's 17 and Dr Lala has done the, the paediatrician has provided an opinion, detectives sent the file up to her, more senior police officers reviewed and decided whether or not to charge. So that's complete when she's 17, her whole investigation into the first
 30 injuring charge. There's a decision not to charge at that stage.

KÓS J:

Yes, mostly because she's told a lie about what happened.

MR DUTCH:

Well, that's not how the process has really gone, because she's effectively
 5 admitted, by telling a lie about what happened, she's admitted not looking after
 the child properly and neglecting it, really, because her lie is that she doesn't
 know how it happened or where the child was because she wasn't looking after
 it. So she's admitted a similar offence.

ELLEN FRANCE J:

10 I'm not sure how that answers the question which related to the wording of
 section 18. So it does say...

MR DUTCH:

Well, my submission, I'll come back to the point that I was making, but my
 submission is the wording means that someone cannot be sentenced to
 15 imprisonment for that offending, and when you uplift the starting point of that
 offending, they're serving longer in prison. So it's artificial to say –

KÓS J:

For the manslaughter.

MR DUTCH:

20 For the manslaughter.

KÓS J:

Well, how is that an imposition of a sentence of imprisonment in respect of the
 section 18 offence? It's not. It's in relation to the manslaughter offence.

MR DUTCH:

25 Because the – because she's been convicted of a section 18 offence which
 didn't need to be laid, so she's been convicted of a section 18 offence, and so

by uplifting start points she's effectively serving a sentence of imprisonment for the section 18 offence.

MILLER J:

5 Suppose that she had never been charged for the offence, the strangulation offence, but the Judge had before him a history of abuse which she'd committed against the child, could that be taken into account? History extending to when she was 17, could that be taken into account as an aggravating factor on the manslaughter?

MR DUTCH:

10 Well, I think that if she hadn't been charged, and that had been dealt with by way of propensity application, and the evidence had become admissible as propensity evidence in the trial, then section 18 wouldn't apply. So that's why I say this is an unusual situation because the charge was laid, and because of the way that – that's why I was coming back to start with the procedural history
15 to make my argument, because the procedural history is important for my argument.

If the charge hadn't been laid and you had instead found this evidence admissible as propensity, and it had been before the Court as propensity
20 evidence, it would be part of the – the section 18 wouldn't affect it at that point. So this is why I started my submissions with the timeline, because that's what makes this an unusual situation. So if she'd been charged when she was 17, it would have been dealt with in the Youth Court, which Ms Webby can address, but she's not charged with manslaughter until November the next year. So,
25 there's 11 months between this first incident when she's charged with murder. But the important point about that is if you go to the summary of facts and the charge, she was simply charged with murder in November. There was no mention of this in the summary of facts as an aggravating factor, and she wasn't charged with injuring with intent in November when the murder charge was laid.
30 Then when the Crown charge notice is filed, there's no injuring charge.

So, that's in the Court of Appeal casebook. Those original charges were simply murder. If we look at page 13, there's two charges of murder. That was an error, I think, that the same charge had been laid twice, but the injuring with intent doesn't turn up until, by my looking at the file, August the following year.

5 So once she's, it's not laid until she's 19 –

ELLEN FRANCE J:

So, sorry, what are you saying the significance of that timeline is?

MR DUTCH:

What I'm saying is significant is, is there's been a decision to add this charge
 10 nine months after she's charged with murder when matters are well down the track and she's turned 19, because if she was 18 the charge would have had to go through the Youth Court process. But because she's 19, it's laid when she's 19, but it's also laid by the Crown in the knowledge that section 18 exists and didn't have to be laid, because she couldn't receive a sentence of
 15 imprisonment for the injuring charge, she couldn't receive a meaningful sentence for the injuring charge which wasn't imprisonment if she's convicted of murder, because she'd receive life imprisonment probably.

WILLIAMS J:

Is it likely there would have been a section 276AB application?

20 **MR DUTCH:**

As I said, Ms Webby can address what would have happened if she'd been charged earlier, but because she was charged when she was 19...

WILLIAMS J:

Well, the point of the question is, would it have made a difference? Because
 25 can we assume it would've been dealt with under the OTA at all, given this following process in section 276AB.

MR DUTCH:

Well, that's, if it was found to be a related offence, then that would be a consideration for the prosecution of the Youth Court, and I'm not in a position to address about that aspect in terms other than to point to what the legislation

5 says. I think Ms Webby can probably answer your Honour's question.

COOKE J:

I wonder if that illustrates, though, that the better point is not that section 18 prohibits reference to what is seen to be an aggravating circumstance, which it may be regarded as unrealistic not to, because it is just part of the

10 circumstances of this offending, but that if you're going to look at the earlier incident, you've got to look at it in a more sophisticated way, including that because of what we know about young person offending, including the underlying philosophy of section 18, it's not simply an aggravating factor but uplifts the starting point, which dovetails back into your other argument.

15 Then you ask, well, on a more sophisticated analysis, does this illustrate this particular defendant or appellant was obviously not coping in the circumstances she was being placed in? And that affects the culpability analysis rather than simply saying, well, there was an earlier incident therefore we uplift. You have to look at it more holistically than that.

MR DUTCH:

I think you do, and particularly in this case where when she's 17 she's left alone with her partner's child at her mother-in-law's, or her partner's mother's address, and the injury occurs while she's left alone caring for the child and so it's a good example of her not coping with the situation. So, that offence occurs

25 exactly in that circumstance where she's at Ms Tarbuck's house, I think, from memory, and she's alone and there's injury to the child. So, it goes directly to the culpability point that I'm making, because it's quite a different kind of injury but it's the same situation where she's alone with the child and looking – caring for it, caring for it and failing to do that, and not being able to cope with that, so

30 I think it definitely needs to go into that assessment, as opposed to simply saying, well, this is not a one-off, this is prior, a prior instance so we go up, which is what the Court has really done in the High Court, effectively. That this

means that we go to a higher level of culpability in terms of the setting a starting point for manslaughter, whereas it should have fed into my submission about the culpability, and not necessarily simply gone up.

1100

5

So that's really what I wanted to highlight about section 18, other than what I put in my written submissions. I think I've set out everything else I want to say about section 18 in my written submissions really.

ELLEN FRANCE J:

10 Yes, thank you.

MR DUTCH:

So my primary submission is that, as I said, the agency and culpability should have had a lower starting point. If we get the Court not accepting that proposition, and are simply looking at the traditional analysis of discounts, this
15 is still relevant to the analysis of discounts other than the matters that go directly to culpability, because obviously the Crown have submitted about lack of causal nexus between the drug use, the other personal matters and difficulties and the like, the parenting skills and, for example, they submit that: "But there was little before the High Court to demonstrate that her youth, or lack of parenting skills,
20 amounted to anything more than 'a contributing factor to [her] offending."

Well, I think we have to be careful with this analysis of causal nexus connection to offending between these discount factors and an offence, because there's no factor which makes any offence inevitable. There is no factor that someone
25 has this issue in their background means that they cannot not commit an offence. There's always going to be a situation that every factor is only going to be a contributing factor to an offence, otherwise you'd be saying that someone had no choice but to commit an offence, which is clearly not the position. So the mitigating factors are all only going to contribute to the
30 offending. None of them is going to be a situation where someone is, because this has happened to them, or this is the issue, they're going to commit an offence, otherwise you'd – so that's taking the factors too narrowly, and the

factors, so the contributing factors are the matters that – that's what a causal nexus is, a contributing factor, in my submission. It's sort of if you don't, you can't have something more, because otherwise that would be going towards predetermination of someone's actions.

5 **ELLEN FRANCE J:**

I'm conscious of the time, Mr Dutch.

MR DUTCH:

Yes Ma'am. I think I've addressed about the 15% being a compressed discount for a number of factors. I think I've discussed that sufficiently, which is what I
10 was going to discuss there, and the same with the psychological difficulties. It's, I think we've covered that sufficiently, what I was intending to say orally about those matters Ma'am.

ELLEN FRANCE J:

Right, thank you.

15 **MR DUTCH:**

That basically everything's been squashed down to 15% because of the seriousness of the offence, which is the problem. That's all I intended to address about.

ELLEN FRANCE J:

20 Ms Webby, just checking how long you think you'll be?

MS WEBBY:

I wouldn't have thought any more than 15 minutes Ma'am.

ELLEN FRANCE J:

Thanks.

25 **MS WEBBY:**

In terms of addressing, first, your Honour's position about the child's placement before and after the first instance, Mr Berry's evidence is probably the most

informative in respect of that. Page 4, ultimately the child came to live with Mr Mulford – sorry, Ms Mulford and Mr Berry in August 2021. That was around the same time as COVID. Initially lived at his parent's place in Pongakawa, and then they moved to Ms Mulford's parent's place. The timing of exactly when that happened is unclear, but it was sometime preceding the first incident. In effect then what would happen is Ms Mulford would drive Mr Berry to work, and that's page 10 and 11 of the notes of evidence. So would drive from Papamoa where they were living at Ms Mulford's parents, to Ms Tarbuck's address, which was Mr Berry's mother's house, and they would stay there during the course of the day, because Mr Berry was working and there was only one car effectively between the couple. She would spend her time at the Tarbuck address and drive home. So that was at the time of that incident –

ELLEN FRANCE J:

The first one.

15 **MS WEBBY:**

Although living at Ms Mulford's parent's house, the incident took place at the Tarbuck residence Ma'am, and I hope that assists in terms of...

ELLEN FRANCE J:

Yes.

20 **MS WEBBY:**

Then what happened –

COOKE J:

Was that a placement or was that just an arrangement between them?

MS WEBBY:

25 It was an arrangement. There was no parenting orders or the like in place at the time. Then after the first incident happens there's discussion about a whānau hui, and that's at notes of evidence at 77 and 105. There was a whānau hui that was held to determine whereabouts the child would be placed.

Ultimately it was with Ms Mulford's mother, and as a result of being at Ms Mulford's mother's house the child was then enrolled in daycare, and that's at the Amrein notes at 202. It starts at 202 of the notes of evidence, and that confirms the placement at BestStart, and Ms Mulford's mother picking up and dropping off the child, and sometimes Ms Mulford being with them, because effectively Ms Mulford's mother was the supervisor per se.

ELLEN FRANCE J:

And was that for about a month? Do we know?

MS WEBBY:

10 Mr Berry's evidence indicates that there was ongoing involvement with Fleur, the social worker.

ELLEN FRANCE J:

Right.

MS WEBBY:

15 And there was ongoing concussion evidence. So, as I understand, that that transpired for a number of months, but again there's no exact timeframe in the notes of evidence that confirms that.

COOKE J:

But was that a placement again, or was it more informal or...

20 **MS WEBBY:**

Whānau hui, I think it would've been akin to a care and protection FGC, family group conference, but it wasn't given that label. So I think because there was involvement by social workers post the first incident, it has the hallmarks of that aspect, but I don't know that it was ever formally conveyed as being a care and protection family group conference. It was called a whānau hui.

ELLEN FRANCE J:

Thank you.

MS WEBBY:

If Ms Mulford had been charged with the first incident at the time, she was 17 years and 10 months. So, in 9 November 2021 that incident is supposed to have happened. There was an immediate investigation into that. There was

5 also Dr Lala who had done an investigation, from her perspective, in terms of what she saw. So, in my submission that there was sufficient time for there to have been an investigation and charge to be laid, and the evidence of the defence witness that was called confirms effectively what happened is that the investigation was done, it was transferred to her supervisor, the detective

10 transferred it to a supervisor, she never got the file back and she doesn't know, effectively, what happened to it post then.

But given that she was 17 years and 10 months, it likely would have ended up, in my submission, as an intention to charge family group conference, which is

15 under section 247(b) of the Oranga Tamariki Act.

ELLEN FRANCE J:

Section 247(b)?

1110

MS WEBBY:

20 I'll bring it up. So basically what happens is that there's discussion between the police and a youth justice coordinator about an intention to charge a young person pursuant to that section, and then it's likely that at that juncture a family group conference would've been convened because there would have been sufficient evidence, certainly from my analysis of it, to have warranted that

25 referral. As Mr Dutch has –

KÓS J:

Isn't this all a bit unreal though because – I mean it didn't happen in part because of her untruthful denial of what had occurred, so she can hardly deflect and then claim the benefit of delay.

MS WEBBY:

Well, it doesn't really matter what her response was to it, because you had – there was Dr Lala's evidence in terms of what she saw at the time, but even if with Ms Mulford lying, as Mr Dutch touched on earlier, the issue that there still
 5 was, was that she was away from the child, she wasn't adequately supervising the child, so that's why I've put in my speaking notes, possibly the ability of a negotiated charge. So, for example, if they had charged her based on Dr Lala's evidence, which was open to the police to do at the time, it could've been for a youth advocate to come back and say, well, actually, she doesn't accept that
 10 but what she does accept is she accepts that she was away from the child and wasn't adequately supervising the child, and it would be a failing to provide necessities, neglect type arrangement, because she wasn't anywhere near the child on her explanation.

15 So, in my submission, there was still the ability to have charged her and/or negotiated that charge as to what would effectively have fit the proof and fit Ms Mulford's submission in terms of that. So, that's really why I put "negotiated charge" there, because if I had been youth advocate at the time, that's really the position I would take based on what my client's advice to me would have
 20 been, and especially being Ms Mulford's position.

Then obviously family group conference looks at all the usual family group conference aspects. I say what would likely have happened, there would have been a parenting course that would've been likely directed for her, possibly an
 25 anger management course. Those two aspects would have been put in place as part of her plan, and then the assistance would have been provided by the Youth Court process.

So, arguably, even though there's this pending murder investigation which
 30 starts obviously after a number of months post that, you've still got her in a Youth Court process. There's potentially already a plan in place for her. She's working towards the plan and completion of that. I think your Honour Justice Williams asked, well, what would happen if, at that stage, if they had made an application to put matters up? But given that there was already a plan

in place, and she was potentially working through that plan at the point of that particular point, in my submission I don't think they could then have made the application to transfer up, because the plan would've already have been accepted, and there was already a process in place, and I think that would've

5 been an overwhelming factor in terms of, well, she's already accepted a particular charge, whatever that may have been, and as a result had ended up at that point.

ELLEN FRANCE J:

But that is dependent on her having accepted the negotiated charge?

10 **MS WEBBY:**

Correct, and by all accounts, I mean her video statement gives that account of neglect of the child by not being there, so certainly – and her ongoing instructions were that that was the case. So, that position wouldn't have been difficult to have been reached, in my submission. Obviously it would be a matter

15 for the police to agree with, but usually there's a level of cooperation in the Youth Court to come up with appropriate charges.

So, what, I guess, at the end of the day, how does that, has *G v R*, affect the position for Ms Mulford? Effectively, because of the way she has appeared

20 before the Court, she would've been an aged-out Youth Court person. It wouldn't have proceeded on one of the off-ramp charges that the Court has labelled. It wasn't a section 17(1)(a), although I acknowledge that there may have been the ability to make an application as a related charge. But in terms of related charge, it doesn't carry the same usual hallmarks of a related charge.

25 The reason for that is it hasn't happened at the same time, there is a disparity in terms of timing, and there could have been an argument made that it wasn't a related charge at the time, and certainly I probably would've probably made the argument that it wasn't a related charge.

30 I appreciate that the outcome for her was one of a conviction and discharge in the High Court but, in my submission, if it had been dealt with by completion of a successful plan, a section 282 would have been granted to her in the

Youth Court and, on that basis, I would've thought that even in the High Court she was simply discharged without conviction in respect of that, which would've been apparent if she had been sentenced in the Youth Court.

- 5 Ultimately, I just wanted to touch on one thing that Mr Dutch said in terms of the aged-out matters, and the agency point.

ELLEN FRANCE J:

Yes.

MS WEBBY:

- 10 Mainly for the fact that, as a youth advocate, we deal with a number of the aged-out cases and, nine times out of 10, from my experience anyway, it's always agg robbers. The reason that agency, I see, is important as a first stage analysis for that, is because you've got the specific provisions that are set out in *Mako* and *Taueki* that say these relate to adult offenders. You don't have an
15 adult offender in setting a starting point for a 17-year-old that's gone into a dairy. The 17-year-old is quite different and we know that because of the research that's come from *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 and *Dickey v R* [2023] NZCA 2, and the other cases, that youths are quite separate entities that we're dealing with.

20

- So, I know that the Court is concerned about consistency, well, what do we do about consistency if we're going to look at agency for youths? Well, I guess what will happen is there'll end up being a body of jurisprudence for youths that are charged with things, which is what the Youth Court reporting has started to
25 do in any event. So, we would just end up with a body of jurisprudence as to how we look at youths specifically and, in my submission, that the Court can put some boundaries around how that might look.

KÓS J:

- Well, I mean, it's not just going to be youths, is it? It's going to be anyone with
30 diminished agency.

MS WEBBY:

Correct.

KÓS J:

Whether they're youth or simply perhaps someone in their twenties with highly
5 impulsive behaviour, perhaps because of some sort of personality disorder.

MS WEBBY:

I guess again you would still get a body of mental health, and you'd get a body
of youth jurisprudence, the way we've got jurisprudence for any particular area,
for example, I mean –

10 **KÓS J:**

It might just be a more sophisticated analysis of what the gravity of the offending
is.

MS WEBBY:

Correct. Correct, which the Court allows in terms of the Sentencing Act in any
15 event. Unless there's any further questions of me –

WILLIAMS J:

Can I just clarify one point. You said, you were talking about aged-out
offenders, you said nine out of 10. I want to make sure you said nine out of 10
of them are agg robbers?

20 **MS WEBBY:**

That's by my experience, Sir.

WILLIAMS J:

But this is in respect specifically of the aged-out category?

MS WEBBY:

25 Yes, Sir.

WILLIAMS J:

I see.

MS WEBBY:

A lot of them are aggravated robbery cases.

5 **WILLIAMS J:**

Right.

MS WEBBY:

And they – that or by a, probably a smaller margin, there would be sex offending, which would be the other category of matters that would age out.

10 1120

ELLEN FRANCE J:

All right, no other questions? Thank you. Mr Marshall.

MR MARSHALL:

May it please the Court, the proposal for the Crown is that I will address the starting point and that will include the relevance of section 18 and the principles underpinning it and my learned friend Ms Wynne will address the impact of youth and other personal mitigating factors on sentence.

15

In terms of the starting point, I propose to address four topics: the first is how the Judge reached the starting point of seven years here; second, is section 18 and the policy underpinning it; the third topic is a wider look at sentencing principles as they applied here and as they inform, in our submission, the approach that the Judge took; and then I do finally want to make some brief comments just on the fairness argument around charging timing that your Honours have just heard.

20

25

In terms of the starting point, it's important in the Crown's submission to focus first and foremost on the gravity of the offending, what the appellant, Ms Mulford, did here and that's because the ultimate question for this Court is

whether the end sentence was a just one in all the circumstances, to use the language from *Moses* [2020] NZCA 296, [2020] 3 NZLR 583, or as the Court put it in *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509: “Consistency and a full evaluation of the circumstances must sit together ‘to achieve justice in the individual case’.” And fundamental to that is what actually occurred here.

Now, the Judge identified four aggravating circumstances of the offending and in our submission, when looked at together, it marked this out as very serious offending. The first is the serious violence. Now, there are two aspects to the seriousness of the violence here. The first is the extremity of the force used and that, in my submission, cannot be glossed over. It was described in evidence by the paediatricians as “massive, catastrophic, severe”. It inflicted injuries seen in children who are involved in very high-speed car accidents with speeds over 80 to 100 kilometres an hour. It tore the victim’s pancreas, an organ that’s very well-protected behind the ribcage, into two by compressing it against her spine. Inflicted a full-thickness laceration to her liver as well as a tear where the bowel entered her stomach. When she presented at hospital shortly after the attack, she was, as the attending paediatrician described, as close to death as any child he had seen. He remained and remains amazed to this day that they were able to re-establish, for a relatively short period, circulation for her. Indeed, her haemorrhaging, because of these injuries, was described in evidence as “absolutely massive” and “close to exsanguination.” So, it cannot be overstated, in my submission, the amount of force used and the seriousness of the injuries inflicted on this two-year-old child.

And I said there were two aspects to the seriousness of the violence. The first was the extremity of the force, the second is the positioning of the child and that, in my submission, is also important, because the evidence was that not only was massive force required, but the child had to have had her back against a hard surface when that was delivered. She couldn’t have been, the evidence was, on a mattress or a bed, even a mattress on the floor. She needed to either be flat against the floor or flat against the wall in order for the injuries, the compressive injuries, to have been caused. The evidence, and this is at 348 of

the notes of evidence, was that the most common action to cause these injuries would be stomping on a prone child on the floor.

KÓS J:

I don't want to diminish this, because this is terribly serious behaviour, but it
 5 seems to me this is a point both for and against you. I mean, given what we
 know of the character of the offender, it suggests that some extraordinary thing
 has gone badly wrong. This is not a person prone to violence, if we put aside
 for a moment the prior event. All the character statements talk about a person
 who is kind, thoughtful, cares deeply for animals. Something massively has
 10 gone wrong here, hasn't it, and the extremity of the violence tells you
 something, I think, in her favour, actually oddly enough.

MR MARSHALL:

I certainly don't accept that this extremity of violence counts in favour of her.
 I accept that something has gone significantly wrong here. I don't accept that
 15 there is not a history of violence. We have evidence of her hospitalising the
 child for a week through a strangulation that she then lied about.

The spontaneity, it appears, of the force used on this occasion and its extremity
 is a feature of the cases in here. Mr Ikamanu, for example, was frustrated at a
 20 child running around, not listening to him, grabbed the child by the wrist and
 swung the child against the wall, causing massive injuries. Some of the other
 cases, one, I think it was *Broadhurst*, with three open-handed slaps delivered
 to the infant's head.

KÓS J:

25 Yes, but *Broadhurst* had, there was a history there.

MR MARSHALL:

Yes, and I'll come to that. So perhaps before I come to the history, I did want
 to emphasise the extreme vulnerability, because that is really one of the
 hallmark features of the criminality in these cases. It is the infliction of serious

violence, in private, against a defenceless child who – and particularly a child whose body is particularly vulnerable to adult forces being inflicted on them.

As the Full Court noted in *R v Leuta* [2002] 1 NZLR 215 (CA), and this is a case that appears, your Honours may have seen in the authorities, often referred to, in 2002, they emphasised the Court and this was Justice Gault on behalf of himself the Chief Justice and Justices Blanchard and McGrath: “Violence inflicted upon a child is worse than that directed at another adult. Defencelessness and vulnerability are significant features, as is abuse of a position of power and responsibility. The fragility of young children, particularly infants, is frequently referred to, and too often overlooked. The lethal consequences of shaking and striking babies is often enough publicised. There can be little reduction in criminality these days for a claim that the danger was not realised.” This was, sorry, in 2001.

And in that quotation is a – there’s also a reference to the other aspect of the criminality here, and this is the third aspect the Judge identified, and that is the significant breach of trust. Plainly, Harlee-Rose, reliance on her caregivers was absolute, she needed them to provide all of her essential needs and violence from a caregiver towards a child, particularly inflicted in secret, out of sight of any other adult, involves a grave breach of trust, indeed. *Taueki* makes clear that this breach of trust is a separate aggravating factor to vulnerability, in and of itself.

So, that brings me to the fourth factor the Judge emphasised and I will touch on this briefly and then I’m conscious the morning adjournment is almost upon me, and that is the previous violence towards Harlee-Rose. I don’t understand it to be in dispute for my learned friends that a consistent theme of sentencing in this area is that weight, often significant weight, is accorded to any history of violence towards a child who is then later killed.

Broadhurst, which was an 18-year-old defendant, involved the killing of a two-year-old child as here and the Court emphasised that: “... [the] case cannot be described as having involved a ‘single brief loss of control’ ... [because there

has been] at least one significant event of substantial violence directed against a very young child.” Those comments are, in my submission, directly applicable here: 18-year-old appellant, a two-year-old victim, at least one incident of serious violence towards the child.

5 1130

Woodcock, as well, emphasises that but it is also present in *JB v R* [2024] NZCA 669, in *Robinson* where that case a seven and a half year starting point was distinguished from *Broadhurst* on the basis it was a one-off incident with no
10 history of previous violence, so too *Ikamanu*.

Prior violence is, in our submission, an important marker which helps inform the culpability of the offender. It demonstrates the fatal assault is not a one-off and it may also help understand the circumstances of the offending more broadly.
15 So, for example, here the attack on Harlee-Rose, the strangulation, occurred while the appellant was living with her mother. There is evidence that she received significant support from her mother during that period. So, while one might look at the later manslaughter when the couple were living independently in a different city in one light, it puts a different complexion on it that significant
20 violence occurred when the couple were living with family, were supported, and were not isolated, as one might otherwise have thought if looking only at the later manslaughter.

ELLEN FRANCE J:

All right, well, sorry, Mr Marshall, shall we take the morning adjournment?

25 **MR MARSHALL:**

Certainly, your Honour.

ELLEN FRANCE J:

Thank you.

30 **COURT ADJOURNS: 11.31 AM**

COURT RESUMES: 11.46 AM

MR MARSHALL:

I didn't propose to say anything more about the aggravating factors identified by the Judge, although before turning off, turning away from the seven-year
5 starting point, I did want to make the submission that it was correct, as the Court of Appeal did below, to stand back and consider whether in the round, as these assessments are generally made, in terms of starting points the seven-year figure selected was appropriate.

10 And I quoted *Leuta* at the beginning of my submissions and if I could just return to it, because the essential proposition that comes from it is at paragraph 80, where the Court recognised that: "Of course child homicides often occur in complex relational and domestic situations. They bear upon the offender frequently to evoke sympathy and mitigate the offending. They are to be taken
15 into account for sentencing. But they should not cloud the essential fact that the violent, cruel and brutal treatment of a defenceless and vulnerable child, to whom there are duties of trust and responsibility, constitutes conduct of grave criminality and, where death ensues, the sentencing task is in respect of a very serious crime."

20 **WILLIAMS J:**

What paragraph was that?

MR MARSHALL:

That's paragraph 80 of *Leuta*, and we realised it wasn't included in our bundle. We can provide copies to the Court if that would assist.

25 **ELLEN FRANCE J:**

Thank you.

MR MARSHALL:

The Court of Appeal in *Woodcock* similarly said: "The dominant sentencing principle is to denounce and deter the gratuitous and extreme physical abuse

of a baby by a parent or caregiver in a position of trust and responsibility.” And my learned friend will come to the importance of those sentencing principles later when talking about discounts and the extent to which a person’s personal circumstances can be brought to bear in the sentencing exercise, because

5 there are competing principles at play in these cases, undoubtedly. As this Court recognised in *Berkland*, “the more serious” offending, the more difficulty a court might have accommodating large discounts for personal circumstances given the other important sentencing goals in play.

10 A final point on starting point. Even if the previous violence against Harlee-Rose were put aside, we say a seven-year starting point still would have been available to the Judge, and this is seen at the cases cited at paragraph 35 of our written submissions, particularly *Robinson v R* [2011] NZCA 479 and *Woodcock*.

15

So *Robinson* was the killing of a 14-month-old foster child through “violently” shaking her. The appellant sought medical assistance promptly. There was no previous violence. This Court upheld a starting point of seven and a half years.

20 *Woodcock* was also a death caused by a single “fatal blow” delivered with “very considerable force”. As was discussed with my learned friend, Mr Woodcock was relatively young. Although he was 25 when he was sentenced, the offending occurred four and a half years earlier, so he would’ve been 20 or perhaps 21. There was other violence towards the baby in the period leading

25 up to that event, but the starting point for the manslaughter alone was 10 years and a two a half year uplift was imposed to that other offending.

1150

Again, this Court emphasised *Leuta*’s observation that this was grave, grave

30 criminal conduct and there is a helpful table annexing manslaughter sentences in this area as at that time annexed to the judgment and they revealed start –

KÓS J:

What year is *Woodcock*?

MR MARSHALL:

Woodcock was about 2000 and...

WILLIAMS J:

2010.

5 **MR MARSHALL:**

Ten, yes, 2010.

KÓS J:

I have to say, it would be helpful to have an update of that table. I just wonder if that's something we could ask counsel to do?

10 **MR MARSHALL:**

Yes, Sir, the parties have endeavoured to – I'm not aware of relevant cases that are before this Court, whether from my learned friend or in our submissions.

WILLIAMS J:

We have everything, do we?

15 **MR MARSHALL:**

Well, I would never guarantee that, Sir, but my learned friend has pointed to a number of High Court sentencing, first incident sentencing cases and I should correct myself earlier I said one of the cases I was relying on involved open-handed slaps to a baby's head. I realise that was *R v Wallis* [2023] NZHC

20 2029 which is one of my learned friends' authorities. *Woodcock*, by contrast, was a single fatal blow, as here.

So, *Robinson*, *Woodcock*, so *Woodcock* was a –

ELLEN FRANCE J:

25 Sorry, just going back to *Robinson*, she's 38, isn't she?

MR MARSHALL:

She is, yes.

ELLEN FRANCE J:

So you, are you coming to address...

MR MARSHALL:

The relevance of youth?

5 **ELLEN FRANCE J:**

Of youth.

MR MARSHALL:

Yes, yes, and our position is that that is a second step consideration. It was similarly appears to have been a spontaneous blow to the child without any
10 previous violence.

COOKE J:

So there's no room for it at all in the first, in the starting point?

MR MARSHALL:

There is room to consider the culpability, the precise conduct of the offender.
15 So, spontaneity, lack of foresight of consequences, has always been properly considered at stage 1. So, spontaneous offending as opposed to premeditated offending.

COOKE J:

But if that's the case, one wouldn't an offender who's put in the position of not
20 coping?

MR MARSHALL:

And that does seem to, yes, the circumstances of the offending assessed in the round. So, *JB* for example was a mother with a severely disabled older child who was calling out for help from the father of the child and received none and
25 that was factored in to the starting point. But in general, personal mitigating factors, features sort of intrinsic to the person, history of abuse, mental illness,

youth and rehabilitation, has always been considered at the second stage of the process.

So, a spontaneous assault from a 25-year-old should be able to be compared in terms of starting point with the spontaneous assault from an 18-year-old or a 38-year-old and that is the task that this Court has embarked on since your Honours, in *Leuta*, the Court observed that at that point consideration, comparison between these cases was difficult because the Court said: “Other recent cases to which we were referred to do not contain any assessment of criminality in the unlawful conduct separate from the circumstances of the offender. That is understandable because of the nature of the crime, but it does not facilitate comparisons where a starting point is sought.”

So, that the sentencing methodology since *Leuta* and concerns embodied here has been to attempt, as far as possible, to separate out personal mitigating factors and starting point, culpability, circumstances of the offence factors and that allows the comparison, at the starting point level, with the mitigating force that is appropriately given to other personal factors separated out at the second stage.

KÓS J:

So where does that – how does that deal with section 8(1)(a)’s injunction to look at gravity, including culpability?

MR MARSHALL:

Because in our submission, section 8(1)(a) is about the end sentence that is being imposed. The Sentencing Act was not enacted when the two-step methodology existed. There is not a separate principle in there that then refers to personal circumstances of the offender. It simply says that when sentencing, the sentence imposed should reflect the criminality of the offence including the culpability of the offender.

We accept that, but that's done, in our submission, through the two-stage process and it was the separate principle in section 8(1), consistency between

similarly placed offenders, that in part drove the *Taueki* structured approach to sentencing that then followed.

Then we can see between 18-year-olds who commit different types of offences
 5 that there is consistency in how that is being dealt with, or where there is
 inconsistency, where different discounts are given, these are explained, for
 example, because of the seriousness of the offending. Then we can see why
 one 18-year-old might get a 15% youth discount and one might get a 20% youth
 discount. But it is done, in our submission, transparently at the second stage
 10 rather than being melded, to a great deal, into the assessment at the first stage
 which tends to obscure rather than illuminate, we say.

ELLEN FRANCE J:

Well, if it is properly explained, why is it problematic?

MR MARSHALL:

15 It depends, your Honour, in my submission how it's properly explained. So in
JB, and my learned friend will come to this and I'm conscious I'm treading on
 her territory –

ELLEN FRANCE J:

Sorry.

20 **MR MARSHALL:**

But in *JB* the Court of Appeal built assessment of personal circumstances into
 the first stage, but it did so by a percentage discount. It's very difficult to see
 what is achieved through that, so I think, I don't have it off the top of my head
 my number, but it was maybe a 15% discount built into the starting point, but
 25 then there was no separate consideration, and my learned friend accepts this,
 at the second stage. So there can be transparency achieved there, but the
 question then is why build personal circumstances into the setting of the starting
 point rather than as personal mitigating features?

COOKE J:

What we've learnt in – explained in cases like *Dickey* and *Churchward*, which are after *Leuta*, aren't they?

MR MARSHALL:

5 Yes.

WILLIAMS J:

Yes.

COOKE J:

10 Is that the nature of a young person's brain, the biology, it gives rise to reduced culpability or the potential for reduced culpability factors no more, I wouldn't have thought, no different from spontaneity as a reduced culpability factor. So isn't it more accurate to apply the reduced culpability youth factors at stage 1 and the others, and the discount for personal mitigating circumstances?

MR MARSHALL:

15 It depends, in my submission, how the culpability plays out. So I accept *Churchward*, *Dickey*, and following cases note that a youth discount encapsulates a number of different policy goals. It reflects culpability in terms of intellectual functioning, foresight, but it also includes as this Court said in *G v R* last week a recognition that imprisonment might have a particularly grave
20 effect on a young person, and that young people in general have a greater capacity for rehabilitation.

So I accept – so there is an amalgam of values there and some I accept go to culpability, but the more helpful thing from a transparency perspective, in my
25 submission, is to look at the particular culpability. Was this spontaneous offending? Because it's one thing saying youths tend to commit spontaneous offences and lack foresight, but not every offence committed by youth will exhibit those characteristics.

COOKE J:

No.

MR MARSHALL:

5 So certainly not saying where that spontaneity is perhaps attributed to youth it shouldn't be considered in the circumstances of the offending, the point is that where youth is an amalgam as a personal mitigating factor is considered, it's more transparently considered at the second stage because of the different features that go into why discounts are given in this area.

ELLEN FRANCE J:

10 Sorry, Mr Marshall, are we taking you into Ms Wynne's territory? In which case, you carry on with your –

MR MARSHALL:

We'll endeavour not to overlap, your Honour. So that's the starting point. I finished by saying a seven-year starting point would have been available had
15 this been one-off offending.

The question, one of the questions for this Court, is whether section 18 required the Judge to in effect dispense with orthodox sentencing methodology in terms of the aggravating features and "blind" himself, was the term used in the
20 High Court in *R v Lama* [2025] NZHC 2059, "blind" himself to other relevant features of the offending. Our essential submission is the Court of Appeal was correct in the approach it took. It held that neither section 18 on its text, nor the policy underpinning it, required that sort of blinkered approach to sentencing.
1200

25

Our submissions go through in some detail the legislative history, and I don't propose to take the Court through that in any detail, other than to highlight what we've endeavoured to do at the end of that section, the key principles that stand out from it.

30

We've covered the legislative history because it demonstrates that my learned friend's submission, and to an extent the Court of Appeal's decision in *Díaz v R* [2021] NZCA 426, that section 18 is a policy, represents a policy that fundamentally alters ordinary sentencing methodology, does not find any support in the 40 years of materials that we've traversed. So when enacted in the Criminal Justice Act 1985, it was very clear from the materials that the goal was to prevent young people at the time of conviction being sent to prison because of the detrimental effect that prison has on young people and, as I said, this Court recognised in *G v R* that that holds true today as much as it did in 1985. Of course, as an Act it applied only to 14 and 15-year-olds, so that the age ceiling has gone up progressively over time.

WILLIAMS J:

Why then didn't it use the same trigger that section 2(2)(a) of the Oranga Tamariki Act does, refer to the date of charge?

15 **MR MARSHALL:**

Because why didn't it? Because the concern was a young person being put in adult prison. So it had no –

WILLIAMS J:

Well, yes, that's right, but it says "at the date of the alleged offence" not the date of charge.

MR MARSHALL:

It says at "the [date] of conviction", that's at section 8, Sir. The Criminal Justice Act was "the [date] of conviction" and that changed in section 18 to the date of the offence.

25 **WILLIAMS J:**

Right, and stayed that way until today.

MR MARSHALL:

It has, yes, in the Sentencing Act. When the Sentencing Act came in, section 18 modified the age, it listed it from 16 to 17.

WILLIAMS J:

- 5 Well, the drafters must have been aware at that point then, that there would be aged-out offenders for whom, you know, that'll come before the Courts long after they've committed the offences, and that they'd be caught by section 18.

MR MARSHALL:

Perhaps, perhaps, Sir –

10 **WILLIAMS J:**

Not perhaps. It's plain on the terms of it.

MR MARSHALL:

That was, yes.

WILLIAMS J:

- 15 A historical offending under the age of 18 would be caught by this, even if you were in court at 35 for it.

MR MARSHALL:

Yes, that was the effect, certainly, of the provision.

WILLIAMS J:

- 20 Well, that's inconsistent, my point is that's inconsistent with your proposition.

MR MARSHALL:

- Well, and the proposition is simply that there's no, other than the text of section 18, there's no legislative materials that suggest any consideration was given to the effect of 35-year-old, for example, offenders being given the benefit
25 of section 18.

WILLIAMS J:

But we do know that the drafters were aware of this problem, because it was changed following the name of that case that I can't remember, section 2(2)(d) or whatever it is, of the Oranga Tamariki Act was changed to the effect that it was, that it related to date of charge, not date of offence. This was a matter to which at least the technicians in the legislative process were very much aware.

MR MARSHALL:

The only technical explanation we have is a single passage in the Departmental Report which notes the change to 17, and to age at commission of offence rather than conviction, and the explanation given there is that it is to achieve consistency with what's now the Oranga Tamariki Act, and also the Human Rights Act 1993. Now –

WILLIAMS J:

So is this the *Departmental Report* at what date?

MR MARSHALL:

On the *Sentencing Bill 2001*, and this is discussed at our footnote 78 on page 15 of our submissions and, as we observed there, that it's difficult to see technically how the Human Rights Act was engaged at all. The Human Rights Act doesn't apply to criminal proceedings, even by analogy, and even if it did, the age in the Human Rights Act, as this Court said in *Make It 16*, is 16 not 17. So some – it's far from clear that the Human Rights Act really could have had anything to do with this change but there was also reference to the Oranga Tamariki Act, or the CYPF Act as it existed then, which did, jurisdiction attached as at the age of commission of offence.

25

But similarly, it appears no consideration was given to, as your Honour says, the aging out process, or the ability to transfer people to the adult courts for sentence.

ELLEN FRANCE J:

It says: "... raised to 17 ... to align it with the Human Rights Act and the CYPF ... " as it was.

MR MARSHALL:

- 5 Yes, that's the only sentence we've been able to find in the parliamentary and Hansard and any of the legislative materials even addressing this change.

WILLIAMS J:

It might have been to align it with UNROC.

MR MARSHALL:

- 10 Except UNCROC is 18 so...

WILLIAMS J:

Oh, is it?

MR MARSHALL:

Yes. Child under –

- 15 **WILLIAMS J:**

Maybe to get it *more* aligned with UNCROC.

MR MARSHALL:

- Yes, perhaps. Certainly, it certainly is not the Human Rights Act, which was 16 at the time. So there is a single sentence, and as Justice Heath observed in
 20 *R v C-W* [2007] NZCA 216, [2007] 3 NZLR 797, which was a case about whether the new section 18 was trumped by the section 17, I think it was, yes, section 17 which retains a discretion to sentence people to imprisonment even where the appropriate, where there's no – the Court reasonably believes that the appropriate sentence wouldn't be complied with. *C-W* is about whether
 25 section 18 trumps section 17. It didn't under the Criminal Justice Act, but on its text it appeared to under the Sentencing Act, and the Court makes the point in that judgment, the majority, that there's very little in the legislative history that

suggests any substantive policy change between the Criminal Justice Act and the Sentencing Act, at least in relation to section 18.

Now – and sorry, my point, Justice Heath noted that part of the relevant material
 5 before the Court was the fact that the Sentencing Act was, in part, Parliament's
 response to the 1999 citizens-initiated referendum on sentencing. So he
 dissented on this and said it would be surprising if Parliament intended to
 remove entirely the ability to sentence young offenders to prison when it was
 responding to a call for harsher sentences, to put it colloquially, for serious
 10 violent offenders. Part of the basis he dissented on, primarily though it was on
 the texture reading of the section.

Now, the authorities since section 18 came in have, consistently we accept,
 precluded uplifts for offending covered by section 18. But they haven't tended
 15 to draw the hard line that my learned friend asked this Court to draw, which is
 effectively ignoring anything that is covered by a section 18 offence.

So, in *Police v Moala* [2008] DCR 70 (HC) the High Court held that section 18
 offending could properly affect the discount given for rehabilitative prospects.
 20 So, a judge could have regard to that when deciding what that discount should
 be.

In *Pouwhare v R* (2010) 24 CRNZ 868 (CA), while it wasn't an issue, the
 aggravated robbery offence had been uplifted because it was committed on
 25 bail, while on bail for a section 18, while the appellant was on bail for a
 section 18 offence.

And then in *Matkovich*, most clearly, the High Court confirmed that relevant
 aggravating conduct, even if it involved section 18 offending, could form part of
 30 the circumstances of the non-section 18 offending.

COOKE J:

I wonder if the answer is that section 18 doesn't preclude you taking into
 account the prior conduct, but when doing so you have to bear in mind that

Parliament has precluded imprisonment for that conduct. So it's a relevant circumstance but one that its significance is mitigated, at least for the purposes of uplifting a sentence, by Parliament's response and, indeed, the Court's response to youth factors.

5 MR MARSHALL:

Yes, and it may be that that can be built in at the youth discount stage, perhaps. I mean, the difficulty with aggravating features is they're not, they're never treated as numerical uplifts on the – as I said at the beginning, they're assessed in the round. We do say here it doesn't appear to have had a significant effect
 10 on the sentence adopted, because the starting point, because the starting point would have been justifiable, even without regard to the earlier conduct.

What we say emerges from the legislative materials is a policy in section 18 and section 8 of keeping young offenders out of prison entirely, and that is
 15 originally described as the detrimental effects of imprisonment, and that policy is clear.

1210

What is absent from any of the materials is a policy of lowering or adjusting the
 20 approach to young offenders who are to be sentenced to imprisonment. To put it another way, it doesn't follow that because certain young offenders are to be kept out of – less serious young offenders are to be kept out of prison entirely, that the serious young offenders who have been – or here, of course, she's not a young offender, she was an adult when she was charged – the serious
 25 offenders who are being sent to prison should have their sentences reduced from what they otherwise would have been had section 18 not been engaged.

COOKE J:

Just going back to the point you made about the sentence being – the starting point being justified even without the previous conduct, the sentencing Judge
 30 does seem to have put some significance and I'm referring particularly to paragraph 29 of the sentencing notes, where he refers to the range from five years to seven years six months and then makes the comment that those

cases involved one-off incidents but here you you've got the prior strangulation. So for the Judge, it seems to have been important in the seven-year starting point, or...

WILLIAMS J:

5 He refers to it as a "pattern".

MR MARSHALL:

The Court of Appeal refers to it as a pattern.

WILLIAMS J:

Oh, not the sentencing Judge?

10 **MR MARSHALL:**

No, not the sentencing Judge.

COOKE J:

Yes, whereas the sentencing Judge says something similar in 29, I think he seems to be saying, well, these other cases involved five to seven and a half
15 years, but here we've got the earlier strangulation so I'm going to go to seven years.

MR MARSHALL:

Yes, I accept he does say that, but I guess the question on appeal is whether the sentence would have otherwise have been justified on the authorities.

20 **COOKE J:**

Okay but he does seem to have been taking, that's a significant factor in setting the starting point at seven years.

MR MARSHALL:

Yes, certainly it was a factor that his Honour placed weight on and as I have
25 said, that was consistent with, I mean, that is actually one of the hallmark features of sentencing in this area is that offenders who kill children where there

has been previous violence towards a child receive higher starting points than those who don't.

COOKE J:

Yes.

5 **MR MARSHALL:**

But so the submission is not that it wasn't a significant feature for the Judge, it's that it doesn't appear that the sentence would otherwise have been inappropriate if the Judge had put this out of his mind entirely.

KÓS J:

10 Which seems to be the effect of Mr Dutch's argument.

MR MARSHALL:

Yes.

KÓS J:

15 That effectively section 18 has the effect of excluding consideration of the prior offending.

MR MARSHALL:

Yes.

KÓS J:

Because I don't know how else it would be taken into account here?

20 **MR MARSHALL:**

It is, as I understand it, the argument and so our response to that is twofold: first, it finds no support in the text of section 18 and, second, it doesn't properly analyse, find any support in the history of section 18 or the legislative policy that is embodied in the Sentencing Act.

25 **WILLIAMS J:**

Can you explain to me why it doesn't find support in the text of section 18?

MR MARSHALL:

Because section 18 controls the sentence that's able to be imposed for a particular offence and manslaughter was not the offence that Ms Mulford was being sentenced for.

5 **WILLIAMS J:**

You mean the strangulation wasn't the offence she was being.

MR MARSHALL:

Well, she was convicted and discharged on the strangulation, yes.

WILLIAMS J:

10 Yes, she wasn't being sentenced for the strangulation, she was being sentenced, but okay.

MR MARSHALL:

Yes. So, my learned friends have to establish that section 18 applies beyond its delineated scope which is for category 3 offending with a maximum of under
15 14 years.

WILLIAMS J:

But if, so the Court of Appeal authorities to the extent that you cannot uplift, they're wrong, too?

MR MARSHALL:

20 So, that's represented in *Diaz* and a number of other decisions that followed *Diaz*. So, the first point on that is it's not necessary for the resolution of this case to decide whether they are correct or not. Our position was in *Diaz* and has been that it's a misreading of the principles underlying section 18.

WILLIAMS J:

25 But why doesn't section 18 simply mean you cannot impose a custodial sanction on a person for the offences carved out in section 18 if they were committed prior to them turning 18? That's pretty clear and that's what it says.

MR MARSHALL:

Yes.

WILLIAMS J:

So, if you're uplifting, if you're aggravating, can't do it. Why doesn't it say that?

5 **MR MARSHALL:**

Well, it doesn't say –

WILLIAMS J:

I mean, this doesn't seem to me to be the sort of provision that you should apply a technical analysis to, if we get to the spirit of the thing and its words go wider
10 than only if you're young. Because on your analysis, all those Court of Appeal authorities are wrong and either if they're right Mr Dutch has got to be right, too, because there's no real distinction between the two, in logic.

MR MARSHALL:

Well, there is. So, in our submission, the Court of Appeal was – the distinction
15 drawn by the Court of Appeal here between uplifting a lead sentence, which *Diaz* and following cases say is not available, is different to having regard to the full circumstances of an offence to assess an offender's culpability. So, uplifting is –

WILLIAMS J:

20 But what if the other offence, the other circumstance is an offence covered by section 18? Then you've got a problem.

MR MARSHALL:

Well, as here, so that –

WILLIAMS J:

25 Exactly. So but it's not just a circumstance, because that kind of defangs this thing, it is an offence described in section 18.

MR MARSHALL:

But as my learned friend accepts, if there's cases where this type of conduct is just led as propensity evidence and isn't represented by a charge at all.

WILLIAMS J:

- 5 Well, that gets you to conviction and there's nothing in section 18 stops that, but we're talking about sentence.

MR MARSHALL:

We're talking about sentence here on a non-section 18 offence. So, section 18 is not –

- 10 **WILLIAMS J:**

Yes, but section 18 says you cannot, you cannot incarcerate, by reference to offences described there.

MR MARSHALL:

You cannot.

- 15 **WILLIAMS J:**

If you are uplifting due to those aggravating features, aren't you on a plain English reading, not a technical reading, plain English reading, incarcerating for that purpose?

MR MARSHALL:

- 20 So I accept that uplifting is a more difficult situation, because uplifting is generally where a Court is attempting to impose a punishment that covers multiple offences and so the choices for the Court are to impose cumulative sentences to achieve an end result or to uplift the lead sentence so that it includes the criminality of the earlier offence.

WILLIAMS J:

But again, isn't that an overly technical approach? I mean, if the Judge starts at a higher starting point for that reason it is, in effect, has the same effect, as an uplift. Why draw your line in that way?

5 **MR MARSHALL:**

Well, it doesn't, in my submission. So we have cases –

WILLIAMS J:

Well, it does to the prisoner.

MR MARSHALL:

10 It doesn't have the same effect. So we have cases like – we have cases where, like *Ikamanu*, where he stomped on the child after he had thrown the child against the wall and a two and a half year uplift was given for that. So, there's a 10-year starting point and a two and a half – oh, sorry, I think it was an eight-year starting point. So and there's where uplifts are given they are
15 imposing punishment for that earlier offending and strangulation of a two-year-old child is undoubtedly serious offending. In my submission, if there had been – if the Judge was attempting to impose a sentence that reflected the criminality of that, then a much – then an uplift would have been selected, or a cumulative sentence would have been given.

20 **WILLIAMS J:**

But as far as the offender is concerned, whether you start with a higher starting point by reference to a "pattern" if you talk about the Court of Appeal, or by reference to paragraph 29, or whether you're uplifting, it has exactly the same effect: you spend longer in prison. Might be interesting for the lawyers to talk
25 about whether it's an uplift for aggravating offending or not, but that's really neither here nor there in terms of the substantive effect which section 18 is designed to deal with.

MR MARSHALL:

It has a qualitative difference, so I don't accept is a technical legal distinction that I'm drawing here. My submission is that an uplift will result in an significantly longer sentence. Where sentences are imposed that include a
 5 penalty for previous violence against the child, the uplifts tend to be in the region of years but, as I have indicated here, the starting point, when simply treated as an aggravating factor, the Court is not imposing a penalty for that earlier offending, it's simply taking it into account in assessing the criminality for the manslaughter and which is why it's not expressed as an uplift, because it's
 10 considered in the round.

COOKE J:

Can I ask you one question related to this. You've emphasised the words "particular offence" in section 18. There are other words, Parliament has used the words "in respect of" a particular offence, rather than for a particular offence.
 15 The words "in respect of" suggest a more open textured reference to the offending. Do you see the point I'm making? Do you want to comment on that?
 1220

MR MARSHALL:

I do see the point, and I suppose the response is that perhaps this deals more
 20 with the uplift scenario, which –

COOKE J:

That could be said to be "in respect of" the offence.

MR MARSHALL:

Perhaps, yes.

25 **COOKE J:**

Rather than for the offence, but you're increasing in respect of that, yes.

MR MARSHALL:

Because in the uplift scenario, as I said, the choice for the Court is generally to impose cumulative sentences, the second cumulative sentence might be adjusted for totality, or to impose a lead sentence and then a concurrent
5 sentence for the lesser offending. So, I accept in making that methodological decision that you might – an uplift is more easily to be classified as a sentence “in respect of”, because that’s its purpose, is to punish for that other offending.

COOKE J:

Yes.

10 **MR MARSHALL:**

But that’s not what was happening here, so...

COOKE J:

Well, it comes pretty close to what was happening here because the sentencing Judge at least referred to it as being an important aggravating factor
15 in setting seven years.

MR MARSHALL:

He did, and the Crown submission is that – the counterfactual, I suppose, is my learned friends’ submission, that the Judge was required to be entirely “blind” to that earlier, and we say that you would expect a much clearer wording in the
20 Act if that were the intention, that the ordinary sentencing principles and approach shouldn’t apply because of the age of the offender and the type of offending that occurred.

And *Lama* is a good example of this. So that was a kidnapping of a person
25 followed by extended, prolonged, horrific torture of that person and for the young person who was sentenced, the Judge said I have to “be blind” to all the violence, pouring boiling water over the naked man, beating him with weapons, I have to “be blind” to that when I’m sentencing you because that assault with a weapon, et cetera, was section 18 offending, so I’m only going to impose a
30 sentence on the kidnapping and I’m not going to even look at what the

kidnapping then led to. And we say that just cannot be what section 18 was designed to do.

Now, just – I'm conscious of time. I did want to touch very briefly on the 2025 amendments, not before this Court, but they do – so, in 2025, Parliament amended section 18 to carve out, really, the situation that we have here. So, the effect, we say, is where a person is being sentenced to imprisonment or is serving a sentence of imprisonment for offending that wasn't covered by section 18, the limitation in section 18 just doesn't apply.

That, we say, tends to confirm the principal concern underlying section 18, which is sending young people to prison, not preventing any sanction being imposed on the most serious young offenders, because that is the result here, and this Court emphasised in *G v R* the importance of consistency in sentencing. My learned friends' approach leads to a real risk of inconsistency.

So, if you consider two young offenders who commit the same aggravated robbery but one of them is responsible for stealing a vehicle and perhaps assaulting members of the public in association with the aggravated robbery, on my learned friends' approach both would have to receive precisely the same starting point, because the judge would have to ignore the vehicle conversion, would have to ignore the assaults. That was *Matkovich*. So you will end up in a situation where two dissimilar offenders end up being treated the same for sentencing purposes.

Or you have, as my learned friend also accepted, a person charged with manslaughter where the prior criminal conduct is encapsulated within a charge, he says the sentencing judge has to ignore that, compared with the offender where the prior conduct is not encapsulated within a charge but is led as propensity evidence, and the judge finds at sentencing beyond reasonable doubt that it occurred but a conviction is not imposed. My learned friend seems to accept in that situation the Court can have regard to that conduct.

It also results in inconsistency in my learned friend's hypothetical which is that Ms Mulford is dealt with in the Youth Court for the strangulation and then is later charged, after she's completed that process, with the manslaughter. Of course, in that situation, she will have received a response, a sentencing response to the strangulation. So, unusually, because they are put together, there is no ability to impose any sanction at all for the earlier strangulation, simply by feature of time, timing, and we say that is difficult to square with the purposes of sentencing in section 1, holding the offender accountable, denouncing the conduct, community protection.

10

There will be cases where community protection is validly involved to a significant extent because of section 18 offending, but if a judge is required to put those offences, *Moala* I think is a good example, an enormous spree of offending, 25 I think summary offences but only six purely indictable, cannot – it's inconsistent, in our submission, for the scheme of the Sentencing Act for that to be irrelevant when setting the sentence of the offender.

15

Finally, just a word on the approach in England and Wales under this, my third heading, which is – so we have looked and the only jurisdiction that appears to have grappled with the issue that is before this Court is England and Wales and we accept that the statutory frameworks are different and perhaps in important ways. For example, in England and Wales, detention or some form of custodial sentence is not prohibited, as I read the provisions, entirely; instead, there is a seriousness threshold as in section 18 that opens up effectively terms up to the maximum that an adult could receive.

20

25

But we say the principle that emerges, much as this Court said in *G v R* last week, is of general application and so in England and Wales the Courts have had no trouble confirming that even where for offending that is not – that is, I will say, section 18, the equivalent to section 18 offending, even where that occurs along with non-section 18 offending and the provision has changed over time, a Court should impose a sentence on the lead charge that incorporates the criminality of the lesser offending.

30

But perhaps the principle is put most clearly in *Mills v R* [1998] 2 Cr App R (S) 128 (EWCA) where the Court referred to an early authority that referred to the competing tensions here. The Court said: “On the one hand there exists the desirability of keeping youths under the age of 17 out of long terms of custody

5 ... On the other hand, it is necessary that serious offences committed by youths of this age should be met with sentences sufficiently substantial to provide both the appropriate punishment and also the necessary deterrent effect, and in certain cases to provide a measure of protection to the public. A balance has to be struck between these objectives.” And Lord Bingham for the Court in
10 *Mills* unreservedly endorsed that statement and that really, at the principle level, because in my submission what we’re dealing with is whether the sentencing principles here precluded the Judge from considering this conduct, it highlights that there are competing principles at stake in these sentencing exercises.

15 So, in *R v JC* [2004] EWCA Crim 1367, [2005] 1 Cr App R (S) 10, which was a later case to *Mills*, there was a very serious, brutal rape of a stranger on a street committed by a young person, two young people. Those young people had also committed quite serious, would have been charged as sexual violation in this country, quite serious sexual offending against younger girls but that was
20 caught by the section 18 equivalent. So, this Court quashed the sentences that had been imposed on that lesser offending but consider that the “overall justice of the case” required the lead sentence for rape to be uplifted and this was not on a Crown appeal, this was an appellant appeal, considered the justice of the case called out so strongly that they needed to uplift the rape sentence so that
25 it incorporated the criminality of that other section 18 offending.

And that reflects what the High Court observed in *Moala* in 2007. There, the District Court Judge, experienced District Court Judge, said any right-thinking member of the community would think that some sentencing response is
30 required for these 25 summary offences and there is a danger, in the Crown submission, in focusing too narrowly just on the section 18 and its prohibition, reading it broadly and ending up swallowing up other important sentencing principles and at risk of bringing the process, the sentencing process, into

conflict with public perceptions about what just, or judicial perceptions as well, of what a just outcome is required in these sorts of cases.

1230

5 Very quickly the appellant's fairness argument. Trial evidence is not clear why charges weren't filed. The obvious inference is it because Ms Mulford lied about what had occurred, deflected attention, attributed it to a fall. But even if she had been a Youth Court process – and it's difficult to see how that could have happened before she killed the child, particularly when it would, as my
10 learned friend accepted, depend on the police accepting, contrary to the medical evidence, that there had been a fall rather than strangulation – but even if it had been resolved in the Youth Court, Justice Campbell would have been in effectively the same position. He would've been sentencing her for a manslaughter with a proved prior incident of violence, serious violence, towards
15 the child.

So he would – and I suppose this comes back to your Honour Justice Cooke's question about uplifts versus aggravating features. There's no doubt, in my submission, that it's appropriate to regard as an aggravating circumstance prior
20 violence, whether it's been dealt with or not. We don't consider that double punishment. We consider it part of the culpability assessment at stage 1.

COOKE J:

I think my only follow-up point would be, or question would be, when assessing the aggravating feature, or the potentially aggravating feature of the earlier
25 conduct, the sentencing Judge should bear in mind that Parliament has said that there is – that it's conduct of such a person at that age is not so culpable and does not warrant imprisonment, so it has a much mitigated aggravating effect?

MR MARSHALL:

30 It may do, just as Youth Court notations have a lesser aggravating effect, I accept that. It all depends, I suppose, the submission, on the circumstances.

Now unless there are any questions about those topics, I will hand over to my learned friend.

ELLEN FRANCE J:

Anything further? Thank you, Mr Marshall.

5 **MS WYNNE:**

Yes, may it please the Court. I propose to deal with, first, why the Crown says that youth and other personal background factors should not be taken into account in setting the starting point, before turning to the specific discounts that were afforded in this case.

10

I do wish to just start with some submissions about general principles in terms of sentencing methodology, which this Court will be well aware of, but in my submission it bears reiterating.

15 Stage 1, of course, is designed to reflect the objective seriousness of the offending, and the offender's role in that offending, without having any regard to the personal circumstances of an offender.

20 The rationale, as the Court has referred to earlier this morning, in stage 1 being an objective assessment, is to ensure consistency in sentencing, transparency, and predictability of outcome. Now, of course these values are important tools for the courts and sentencing judges, but it is important, too, to the wider public interest and confidence in the justice system, that like cases are treated alike.

25 That is not, of course, to say that background isn't important. It is afforded weight in stage 2 of the sentencing process which allows for individualised justice to be achieved in specific cases.

30 In Ms Mulford's case, in particular, she says that her youth and psychological difficulties were an operative cause of her offending and as such should have impacted the starting point. In addressing this, I do want to make mainly two points in response: the first is that as a matter of general principle youth

and psychological difficulties don't typically get accounted for in stage 1 and, second, in Ms Mulford's case her youth and psychological difficulties amounted to causative contribution and were therefore appropriately accounted for under stage 2 by way of mitigation.

5

So the Crown's submission is that in respect of youth, orthodox sentencing methodology under *Taueki* applies; that is, it presupposes that the starting point is the appropriate sentence for an adult offender after a defended trial. At 18 years of age, of course, Ms Mulford was an adult and her youth and related lack of parenting skills was recognised by way of a discount at stage 2. That's not to say that youth could never be taken into account at stage 1. As this Court decided or held in *G v R*, youth could impact the starting point but it was clear that that was addressing aged-out offenders and because Ms Mulford was 18 at the time of the manslaughter she is not captured within that category.

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15 **ELLEN FRANCE J:**

But if the same sorts of factors apply as led to the approach in relation to *G*, so developmental stages not nearly as advanced as an adult and all of those other things that we now know the science shows us, why can't that apply at stage 1?

MS WYNNE:

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In the Crown's submission it would be problematic and complex, overly complex, to split off different youth characteristics or straddle them across stage 1 and stage 2. There's a risk, a real risk or danger of double-counting. So, for example, of course youth culpability is a characteristic of youth offending. That's one of the factors or the propositions identified first in *Churchward*. We also have, as your Honours have identified, the impact of imprisonment on young people, as well as young people having a greater capacity for rehabilitation.

25

I would question the practical utility of splitting off consideration of factor 1 under stage 1 of the sentencing process and then looking at factors 2 and 3 at the later stage. There's a risk of double-counting, because youth culpability might overlap with other mitigating circumstances of the offending at stage 1, such as

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having a limited involvement in the commission of an offence, and there is an inherent risk of double-counting at stage 2 if you were going to take into account youth characteristics that were in addition to and separate to a potential discount at stage 1.

5

One of the further advances in scientific research that was identified in *Dickey*, since *Churchward*, was that young offenders who commit serious offences tend to also exhibit or present with other characteristics, such as having a deprived upbringing, mental illness or deficits, so the risk of overlap, in the Crown's submission, is too great and it would, taking youth culpability into account at stage 1, would also be at the expense of consistency in sentencing.

10

KÓS J:

But what *Taueki* said, what the Court said in *Taueki* at paragraph 31, was they were trying to come up with considerations which contributed to or assessed "the seriousness of the conduct", and one of those for instance was premeditation. Not a particularly objective consideration necessarily, but why, if you're going to take into account premeditation, can't you take into account youth as mitigating the seriousness of the offending or criminality?

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MS WYNNE:

Well, as Mr Marshall explained earlier, factors such as spontaneity and impulsivity are often taken into account at stage 1, because it depends on not just the objective facts of the offending but also the offender's role in that offending and matters such as impulsivity, which is not just limited to youth as we can see from these child manslaughter cases committed at the hands of caregivers or parents, I think in all of them there was an element of impulsivity, in the sense that it wasn't premeditated or calculated, so that is not – impulsivity, spontaneity aren't characteristics that are necessarily limited to youth or young people.

25

COOKE J:

In this case, we've got a situation where the appellant was a or the primary caregiver of a child that wasn't hers, with her partner being the father with somebody else, and she was obviously not coping. Are those not factors that go to her culpability and therefore a starting point which, when you're comparing her case with other cases of parental manslaughter, you have to take into account in deciding, well, where does the level of culpability sit for this case?

MS WYNNE:

And Justice Campbell did consider that very factor. He said, in considering her mitigating circumstances, he acknowledged that her youth and personal background factors together meant that she was unable to cope in times of high stress and to parent and to keep up with the demands of bringing up a young child which was a situation that was essentially thrust upon her and those circumstances aren't lost on me, but the Crown's submission is that it has been taken into account as a youth discount at stage 2 and I don't under – it is difficult to grapple with the practical utility of separating out one characteristic of youth which tends to, or youth culpability into stage 1, when there is such a high risk of double-counting and an example of this can be gleaned from *JB v R* where the Court of Appeal determined that *JB's* mental disorder, which was reactive attachment disorder, could be taken into account at stage 1 and, as Mr Marshall explained earlier, that was by way of a 15% reduction to a starting point of five years, five and a half years. And it is unclear, really, when you look at the result of it, which I will get to in a moment, it is really unclear to what can be gained from labelling this as a stage 1 mental health reduction, because the result was a month's difference between the sentence that was imposed by the High Court and that sentence that was substituted by the Court of Appeal. So, essentially –

WILLIAMS J:

Well, the difference, the difference might be if there's a 15 – interesting they took a discount approach, but let's go with that – 15% discount for the mental disorder as an operative cause, therefore going to culpability, but at stage 2 taking account of prospects of rehabilitation and that would justify another

discount. It was the danger Mr Dutch was talking about is that by putting it all into the youth pot, you underweight those very different drivers, those very different mitigatory drivers. So rather than double-counting, you under-count.

MS WYNNE:

- 5 On the assumption that a sentencing Judge takes these principles into account and engages with the scientific neurological development in this area as articulated by the Court in *Churchward* and in *Dickey* and others including *G v R*, that the problem that your Honour has articulated wouldn't arise, in my submission, because those propositions arising out of *Churchward* are
10 well-known and indeed referred to by sentencing judges when sentencing young person to terms of imprisonment regularly.

KÓS J:

- You see, another way of looking at it is to say it's not really that helpful to compare *Broadhurst* and *Robinson* and all those cases and say the
15 starting points here are, can be compared because the underlying circumstances of criminality are so different in each. Fundamentally, the differences are the age and circumstance of the offender and, secondly, the presence of prior abuse of the child. Each of those considerations are easily capable of being explained in a sentencing decision and compared in a
20 sentencing table as going to the criminality, the seriousness and criminality, at the stage 1 level. So, it doesn't have to be such a simplistic approach of just looking at what happened on the day to the victim, I suggest.

MS WYNNE:

- And that reflects that sentencing as an evaluative exercise, where different
25 purposes and principles have to be considered and weighed by the sentencing judge. Youth is but one factor and, in the Crown submissions, the discounts were within the available range.

KÓS J:

- I mean, *Taueki* clearly gets up to, I can't count the alphabet up to M, but is that
30 about 13 or 14 points?

MS WYNNE:

I can't count either, Sir.

KÓS J:

About 13 or 14 points –

5 **WILLIAMS J:**

Fourteen.

KÓS J:

– that go to the seriousness of the offending, all of which have to be explained by a sentencing judge as a stage 1 consideration. Well, I'm not sure why youth
10 can't be another one. It seems to me you've got a very long list on the seriousness side in *Taueki*, and a very short list on the mitigating side at stage 1.

COOKE J:

Especially when you're dealing with a case like this one, which so starkly
15 illustrates why youth can be relevant to culpability. A young girl given effective custody, or primary care of a child that's not hers, in very difficult circumstances. It's hard not to see these as potent culpability factors. She's not coping, as is illustrated by the earlier violence, which isn't just a simple uplift factor, it goes to the tragedy of this whole case, really.

20 **MS WYNNE:**

Yes and youth considerations have to be thought of in the context of the extent to which that youth has actually manifested in the offending. The Crown's position is that can be appropriately accommodated in stage 2 and in Ms Mulford's specific case, and this is not in any way to diminish the clear
25 challenges that she had growing up in her upbringing and childhood, but the youth, the classic hallmarks of youth, weren't necessarily engaged to any significant degree and it's, in the context of a child manslaughter case, it's difficult to compare, because there aren't many cases where the caregiver was a young person, or at least aged 18, apart from *Broadhurst* for which he

received a 6% discount for his youth, but say in comparison to other cases where youth characteristics or attributes are more patently obvious, susceptibility to peer pressure, impulsivity, and risk-taking behaviour, in the Crown submission, those characteristics weren't engaged to any significant
 5 degree here and part of that is because Ms Mulford's culpability was necessarily coloured by the earlier infliction of violence.

1250

Because if we're talking about risk-taking, that involves an element of
 10 understanding the consequences of your actions, and the consequence of that earlier injuring charge was that Harlee-Rose was hospitalised for a week and that's why I refer to the sentencing Judge's sentencing notes where – or maybe it was the Court of Appeal, or perhaps both the lower courts, making a real point of distinction that had she support, had she made use of the support that was
 15 available to her, then obviously we would be in a different position in respect of the victim.

So, the Crown's position is that youth can and should be taken into account at stage 2.

20 **MILLER J:**

I wonder – your position seems to run contrary to the whole trend of sentencing guideline judgments since *Taueki* itself, which is that it doesn't, in the end, really matter whether some factors are characterised as personal considerations or circumstances of the offence, so long as they're not double-counted. So, cases
 25 like *AM* make that point. So, I wonder whether it makes sense for the Crown to pursue a reasonably rigid division, isn't your better position simply that the Judge had a discretion about where to put it and the only question that we need to be concerned about is whether the end sentence is manifestly excessive, because the allowance for youth wasn't large enough?

30 **MS WYNNE:**

Yes, so that is my ultimate submission and the point about judicial discretion, as well, is an important one, because putting youth potentially into stage 1 of

the sentencing process presupposes that a certain level of discount is mandated or available in any given case involving a young offender, without really engaging with how and the extent to which youth has actually manifested in any given case.

5

And in respect of Ms Mulford's psychological factors, those were properly considered at stage 2, as well. As your Honour Justice Kós referred to earlier, the case of *Orchard v R* in the Court of Appeal observed that it's very rare for personal background factors to be taken into account as a proper stage 1 consideration. In that case, it was in the context of mental disability and the Court said that it "must have altered the character and gravity of the offending". So this is most likely, in my submission, to arise in cases involving some sort of thought delusion or psychosis obviously short of legal insanity.

10

15 And in considering mental disorders, sentencing courts post-*Berkland*, or in light of *Berkland* should, first, assess the evidence of a defendant's mental disorder and then, second, consider its level of causative contribution to the offending. As this Court in *Berkland* said, if it is "operative or proximate" it will "be a potent sentencing factor". The point of whether that's at stage 1 or stage 2 wasn't argued and it isn't specified in the judgment but, given the Court's endorsement of the *Taueki* methodology, the Crown reads this as applying to stage 2 by way of discounts.

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In Ms Mulford's case, the Crown says that her background factors, including psychological difficulties, contextualised her offending. As Justice Campbell observed, those personal factors put her "on a path" to the offending.

25

COOKE J:

One of the other factors about whether it should be in 1 or 2 is precisely because there is said to be a range of discounts for youth and once it's stuck in a box that says a range, then you choose between certain percentage numbers. You're not actually focusing in on the level of culpability of the offending, but putting it in a range. It has a ceiling of whatever the ceiling was, 30%.

30

MS WYNNE:

In principle, there is no – or there is now, but in principle, there is no –

COOKE J:

Limit.

5 **MS WYNNE:**

Youth discounts are unbounded, or at least there no upper cap. In practice, the authorities reflect that discounts between 10 to 30% are common place. Because, of course, youth, discounts for youth are incredibly varied and so dependent on the context of the individual case. Discounts for youth are
10 premised on those three propositions that we've been discussing, in terms of the neurological development, neurological differences between young people and adults or executive functioning, greater capacity for rehabilitation and the disproportionate or impact that imprisonment can have on young people.

15 So, in considering all those matters under the heading of youth, a judge needs to consider also other relevant sentencing purposes and principles and in cases where the offending was particularly serious, as this one was, any discount, in fixing the discount, the sentencing Court has to be mindful that any end sentence is proportionate to the seriousness of the offending.

20

So, in this case, Justice Campbell was correct to consider that any discount he applied in respect of youth or psychological background factors had to be – he had to exercise some “restraint”, was his words, in light of section 9A, the specific aggravating factor in the Sentencing Act that reflects society's
25 abhorrence towards violence and the killing of children and young people.

As I mentioned, the ultimate submission is whether there was an error in the sentence imposed and whether a different sentence should be imposed and the Crown submissions to both those answers is, no, the end sentence of
30 five years and seven months' imprisonment was not manifestly excessive and, indeed, a proportionate response to Ms Mulford's offending.

If I can assist the Court any further, those are the submissions for the Crown.

ELLEN FRANCE J:

Anything further? Thank you, Ms Wynne. Mr Dutch, are you happy to carry on with your reply?

5 **MR DUTCH:**

Yes, I'm happy to carry on if that suits the Court, Ma'am, yes.

ELLEN FRANCE J:

Is that all right with everyone?

MR DUTCH:

10 Yes, I'm happy to carry on, Ma'am.

ELLEN FRANCE J:

Thank you.

MR DUTCH:

The first point I wanted to make in response is in regard to my learned friend's
15 really last submission, this is serious offending that you take into account at
stage 1 to set the culpability, because obviously manslaughter such as this is
serious offending, but you then effectively double-count that by reducing the
discount at stage 2 because it was serious offending. So, there is an issue with
you're going to set the culpability of other serious offending. You're then, what's
20 happened here, the youth discount has been – the stage 2 discounts have been
squashed down and moderated because of the serious offending which was
used to set the starting point, so is is a difficulty with that process, whereas if
the matters in the youth discount were split between culpability assessment and
the other ones that are proper mitigating factors, such as the difficulty of prison
25 at a certain age, you wouldn't have that double-counting issue. So obviously
difficulty of prison also arises to a degree for old people who don't get the youth
discount in culpability, for example.

1300

The second matter I want to mention was about *G v R*, and how the submission that that's for aged-out offenders and the principles are for aged-out offenders, but here you have someone offending at 18 and a few months. So, people
 5 don't magically change from 17 to 18, so the principles from *G v R* have to be relevant to someone who's just turned 18, such as here.

The other point I want, so turning to section 18, I want to make the point that that is, I think, in my submission, from the UNCROC obligations, that's when
 10 New Zealand lined itself up with where we should have been in terms of how to deal with 17- and 18-year-old offenders. Previously, we'd had 17-year-old offenders in the adult court which didn't really match with our international obligations and this amendment in 2019 to section 18 was part of a large number of amendments to ensure those obligations to the Oranga Tamariki Act,
 15 such as the ones I mentioned earlier, and to everything else.

So this was not – this is not a mistake by Parliament in 2019, it's part of a clear intention to meet the obligations and the principle of how to deal with children who commit offences, and young person who commit offences. So, section 18
 20 can't be looked at as a mistake or trying to read other jurisdictions into it. It's a deliberate decision by Parliament, it's been there for a long time, and it's part of a legislative reform of the particular area for people of around this age and how you deal with their offending.

25 The only other point I want to make in terms of how youth is engaged here, in my submission this is particularly a case where youth is engaged in the culpability and the circumstances. You have a defendant who got into an adult relationship when she was 15, that's at page 35 of the notes of evidence. The relationship then becomes a complicated adult arrangement, because after
 30 it starts there's a child with another person. So, now there's three young people involved in what would be a complicated situation for an adult, in an adult relationship, and the appellant is too young to be in this kind of situation, in this kind of relationship. It's a toxic relationship. It's complicated. They end up in Hamilton with no, or very limited, family support.

MILLER J:

What evidence is there that it was a toxic relationship? She does say that he treated her badly, but there didn't seem to be...

MR DUTCH:

5 There is, I think he gives some evidence of attitudes in his evidence, but –

ELLEN FRANCE J:

Mr Berry, you mean?

MR DUTCH:

10 Mr Berry gives, makes a number of concessions about matters that make the relationship complicated and toxic if it was an adult relationship, and you add to the fact she's 15. He's seeing other people to the extent there's a child that – so there's a lot of factors in how that relationship unfolded which are –

MILLER J:

I just wanted to know where I'd find it.

15 **MR DUTCH:**

It's in Mr Berry's evidence.

MILLER J:

Yes, thank you.

MR DUTCH:

20 And there's quite a lot in the cross-examination of Mr Berry. But the youth point is that she's too young to be in this situation, which would be complicated for an adult who's experienced and has the brain development and has dealt with relationships. This has become a very complicated situation for someone her age. So, youth is directly engaged in not just the care of the other person's
25 child, but the whole dynamic of the background. She's someone who's too young to be in a situation such as this, to put it simply.

I think, for your Honour's question, at page 38 onwards there is a discussion about the characteristics of the relationship.

WILLIAMS J:

Page 38 of the notes?

5 **MR DUTCH:**

Of the notes of evidence. It goes back to it a number of times. From page 38 onwards there's quite a lot of discussion for my proposition I've made.

10 So, they are the matters I wanted to say in response. I just want to check if there's anything else I need to address...

MILLER J:

How far is she through her sentence? When did she...

MR DUTCH:

15 She has a parole hearing coming up in June, so that'll be her first – 1st July will be her first parole hearing. She was on bail until trial.

ELLEN FRANCE J:

Oh, that's what I was going to say. When was she on bail to?

MILLER J:

She was on bail until sentencing.

20 **MR DUTCH:**

She was on bail until...

MS WEBBY:

25 She was on bail from the date of first appearance right through until she was found guilty of the manslaughter, and her first parole date has been set as the 1st of July.

ELLEN FRANCE J:

Thank you.

MR DUTCH:

5 She was bailed by the District Court on the charge before it came up to the
High Court.

ELLEN FRANCE J:

Right. Oh, right.

MR DUTCH:

On the murder charge.

10 **ELLEN FRANCE J:**

Thank you. Nothing further? Thank you, counsel, for your submissions. We'll
reserve our judgment and deliver it in due course. Thank you, we will retire.

MR DUTCH:

Thank you, Ma'am. As the Court pleases.

15 **COURT ADJOURNS: 1.06 PM**