IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA345/2018
[2019] NZCA 40

BETWEEN	DYLYN MITCHELL DAVIS Appellant
AND	THE QUEEN Respondent

Hearing:	29 November 2018
Court:	Miller, Cooper and Asher JJ
Counsel:	T Sutcliffe for Appellant C A Brook for Respondent
Judgment:	7 March 2019 at 12.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Davis is a dangerous man who committed a brutal murder. It has earned him the distinction of being the first person to appear for sentencing for murder as a stage-3 or "third-strike" offence.

[2] The High Court was obliged by s 86E of the Sentencing Act 2002 to sentence Mr Davis to life without parole unless that sentence was manifestly unjust in the

circumstances of offence and offender. Davison J found life without parole manifestly unjust, largely because Mr Davis is 26 and might serve more than 50 years.[1]

[3] That conclusion having been reached, s 86E next required the Judge to sentence Mr Davis to life with a minimum period of imprisonment (MPI) of 20 years unless that sentence, too, was manifestly unjust. The Judge held that but for this provision he would have imposed an MPI of 14 years.[2] Nonetheless he found that the statutory presumptive minimum of 20 years was not manifestly unjust.[3]

[4] Mr Davis appeals, saying that an MPI of 10 or 11 years sufficed in his case and further that the difference between 14 and 20 years is manifestly unjust.

[5] At sentencing the Crown sought life without parole, and it also argued that the murder was sufficiently brutal and callous to qualify in any event for a statutory MPI of not less than 17 years under s 104 of the Sentencing Act. On appeal, it does not say the Judge was wrong to find life without parole manifestly unjust, having regard to Mr Davis's age, and it accepts that the murder may have fallen just short of qualifying for a 17-year MPI under s 104. It says rather that an MPI of at least 17 years was warranted on the merits having regard to Mr Davis's circumstances and the policy of the three-strikes regime, and the difference between that period and 20 years — or indeed, between 14 and 20 years — is not so great as to cause manifest injustice in Mr Davis's case.

[6] The notice of appeal was filed one day out of time. The delay is explained and we grant the necessary extension of time.

The offence

[7] The victim, Aroha Kerehoma, was Mr Davis's partner of some five months. They lived in a garage at a property in Hamilton. On Saturday 3 February 2018, they spent the afternoon and evening drinking at home.

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1 *R v Davis* [2018] NZHC 1162 [sentencing notes] at [69].
2 At [54].
3 At [75].

[8] During the evening, she exchanged texts with her ex-partner, saying she did not feel safe with Mr Davis. At about midnight Mr Davis read the exchange of texts and became enraged. He beat Ms Kerehoma savagely, using his fists. The summary of facts recounts the following injuries:

> In respect of her head:
>
> (i) There were approximately 18 bruises on her face including her right eyebrow, right forehead, upper and lower right and left eyelids, the bridge of her nose, her left forehead, her upper and lower lips, her tongue, the right and left sides of her chin and her left ear;
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> (ii) Her nasal bone was fractured and showed overlying lacerations;
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> (iii) There was haemorrhaging in both eyes;
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> (iv) There were lacerations in the mucous membrane lining the inside of her mouth;
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> (v) There were abrasions on the ears and right and left upper neck;
>
> (vi) There were bruises on her scalp;
>
> (vii) There was left sided subdural haematoma;
>
> (viii) There was a subarachnoid haemorrhage;
>
> (ix) There was a fracture of the right temporal bone;
>
> (x) There were fractures of the base of the skull;
>
> (xi) There were bruises on the brain matter on both sides.
>
> In respect of her torso and extremities:
>
> (i) There were approximately 6 bruises on her torso on the right and left upper chest, left breast and left shoulder;
>
> (ii) There was a bruise on the fat pad of the mid abdomen;
>
> (iii) There were bruises and lacerations of the small bowel mesenteries which is the lining membrane of the abdominal cavity which encloses the intestine;
>
> (iv) There were bruises on the right and left arms and right leg and there were scratches on the left forearm and left third finger.

A CT scan revealed that:

(i) There was a displaced fracture of the nasal bones which had been driven back toward the skull cavity;

(ii) There were fractures of both orbital wall structures around the eyes;

(iii) There was air in the bowel, suggesting perforation.

Mr Davis is a tall man of athletic build. Ms Kerehoma was a slight woman. Her body bore no defensive injuries.

[9] Mr Davis changed his clothes and left the address and spent the night at a friend's place. He told another friend that he had killed Ms Kerehoma:

> I choked the bitch she had it coming … I made sure I finished the job. I was choking her out while she was gargling on her blood.

[10] At about 1.30 pm on 4 February Mr Davis returned to the address, finding Ms Kerehoma dead. He called an ambulance. A pathologist could not exclude the possibility that Ms Kerehoma would have survived had help been summoned immediately.

[11] Mr Davis tried to evade accountability, claiming that someone else must have attacked Ms Kerehoma while he was away. He admitted guilt after learning that the police knew he had boasted of killing her. At interview with the probation officer he expressed great disappointment in the friend who betrayed his trust.

Conviction history

[12] Since 2005 Mr Davis has accumulated some 39 convictions, 13 of them for violent offending. His history includes two convictions for male assaults female and six offences in which a weapon was used or carried. His offence history since 2010, when he was first sentenced to imprisonment, has been very busy during the relatively brief periods he has been out of prison.

[13] Both strike offences were serious. The first, in February 2014, was wounding with intent to injure. He attended a party uninvited and was asked to leave after damaging a table. As he left he shouted abuse, which led the occupant's partner to

confront him. He swung a knife at the man, inflicting a laceration 7 cm deep and 12 cm long.[4]

[14] The second-strike offence was an aggravated robbery committed in March 2015. It was an opportunistic crime. Mr Davis accosted the victim on a public walkway and pushed him, demanding property, then punched him in the face, breaking teeth, before producing a knife and forcing it against his throat with sufficient force to choke him. Two cellphones and some cigarettes were stolen.[5] When he killed Ms Kerehoma, Mr Davis was still subject to the sentence of 28 and a half months' imprisonment he received for the aggravated robbery.

Personal circumstances

[15] The High Court ordered a psychological report before sentencing. Mr Davis is of Welsh and Māori descent but has no interest in his heritage. His father was absent during his upbringing, which featured a good deal of conflict involving his mother. He was oppositional and disruptive at school, and sufficiently violent to lead him to alternative and residential education programmes. He was diagnosed with ADHD in 2000, but perhaps because that disorder can abate in adulthood he did not exhibit symptoms during the court-ordered assessment. He has previously attempted suicide, but he has no mood disorder or mental illness. He drinks heavily, and much of his offending has happened when under the influence of alcohol.

[16] Mr Davis does have a personality disorder with prominent antisocial features. One such feature is lack of empathy or remorse. So, for example, he was able dispassionately to recount the details of the offence in interview. He told the psychologist that he thinks of the crime every day and felt ill when he read the pathologist's report, but this was not interpreted as remorse; the memory does not trouble him and he does not experience shame or regret. He has been the subject of treatment in the past. It failed, seemingly because he has no interest in rehabilitation. He confirmed that in interview. Indeed, he said candidly that he ought to be imprisoned for life to keep society safe. His reoffending risk is very high.

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4 Sentencing notes, above n 1, at [22].
5 At [23].

The sentencing

[17] The Judge recorded that he followed the leading authority, this Court's judgment in *R v Harrison; R v Turner* (*Harrison*).[6] He recognised that s 86E applied, decided what MPI would be appropriate using a "standard application" of ss 102 to 104 of the Sentencing Act, and determined by reference to that MPI whether life without parole would be manifestly unjust.[7]

[18] The Crown submitted that s 104 of the Sentencing Act was engaged because the murder was cruel, depraved and callous. The Judge accepted that these qualities were present, but not to a sufficiently high level.[8] He concluded that an MPI of 13 years appropriately reflected Mr Davis's culpability.[9] He added two years to reflect Mr Davis's criminal history and high risk of harm to the community before deducting one year for an early guilty plea.[10] The result would have been an MPI of 14 years but for the three-strikes regime.

[19] The Judge rejected life without parole for the following reasons: this was not one of the worst murders, Mr Davis pleaded guilty at an early stage, the previous strike offences resulted in relatively low sentences for those offences, and at 26 years of age Mr Davis is still a young man. Life without parole could mean that Mr Davis would serve 50 years.[11] He added that Mr Davis has mental health difficulties, in the form of his childhood ADHD and oppositional defiant disorder, and noted that as an adult he was diagnosed with severe alcohol use disorder.[12] The Judge felt that there remains some possibility of rehabilitation, albeit limited since Mr Davis is not interested in changing his ways.[13]

[20] However, the Judge reasoned that an MPI of 20 years would not be manifestly unjust. He accepted that Mr Davis is a recidivist who presents a high risk of

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6 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 [*Harrison*].
7 Sentencing notes, above n 1, at [29]–[31].
8 At [43]─[46].
9 At [50].
10 At [51]─[52].
11 At [69].
12 At [67].
13 At [68] and[70].

reoffending and from whom the community must be protected.[14] The sentence should also send a message that violence against women will not be tolerated.[15]

The approach to sentencing under s 86E

[21] We begin with the legislation. Section 86E provides:

> **86E When murder is a stage-2 or stage-3 offence**
>
> (1) This section applies if—
>
> (a) an offender is convicted of murder; and
>
> (b) that murder is a stage-2 offence or a stage-3 offence.
>
> (2) If this section applies, the court must—
>
> (a) sentence the offender to imprisonment for life for that murder; and
>
> (b) order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.
>
> (3) If the court does not make an order under subsection (2)(b), the court must give written reasons for not doing so.
>
> (4) If the court does not make an order under subsection (2)(b), the court must,—
>
> (a) if that murder is a stage-3 offence, impose a minimum period of imprisonment of not less than 20 years unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so; and
>
> (b) if that murder is a stage-2 offence, or if the court is satisfied that a minimum period of imprisonment of not less than 20 years under paragraph (a) would be manifestly unjust, order that the offender serve a minimum period of imprisonment in accordance with section 103.
>
> (5) If, in the case of a stage-3 offence, the court imposes under subsection (4)(a) a minimum period of imprisonment of less than 20 years, the court must give written reasons for doing so.
>
> (6) If, in the case of a stage-2 offence, the court makes an order under subsection (4)(b) and the offender does not, at the time of sentencing, have a record of final warning, the court must—

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14 At [77].
15 At [78].

(a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning; and

(b) record that the offender has been warned in accordance with paragraph (a).

(7) It is not necessary for a Judge to use a particular form of words in giving the warning.

(8) On the entry of a record under subsection (6)(b), the offender has a record of final warning.

(9) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (6)(a).

[22] We next address briefly the leading cases on sentencing methodology for murder. The leading s 86E case, *Harrison*, concerned two offenders who had committed separate second-strike murders. The Court adopted a methodology founded on *R v Williams*,[16] which addressed sentencing under s 104, but adapted it for second and third-strike offending.[17] The methodology is traced to *R v Howse*, which addressed MPIs set under s 103.[18] It will be recalled that s 104 contains 9 categories that classify murders according to features of the offence or characteristics of the victim.[19] By contrast, s 86E classifies murders according to particular circumstances of the offender, namely previous strike convictions. Underpinning both provisions and also s 103, to which sentencing judges must always turn, is the proposition that an MPI for murder must be the minimum necessary for certain purposes: accountability, denunciation, deterrence (both general and specific), and community protection.

[23] In these leading decisions the Court has sought to follow evolving legislative policy for aggravated murders,[20] to reconcile that policy as best it can with the general sentencing principles in ss 7–9 of the Sentencing Act and the prohibition on disproportionately severe punishment in s 9 of the New Zealand Bill of Rights Act 1990, and to achieve reasonable consistency of outcome in sentencing practice.

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16 *R v Williams* [2005] 2 NZLR 506 (CA).

17 *Harrison*, above n 6, at [102]–[111].

18 *R v Howse* [2003] 3 NZLR 767 (CA).

19 A tenth category applies where the circumstances are otherwise exceptional.

20 As this Court noted in *Robertson v R* [2016] NZCA 99 at [81], it must be borne in mind that s 103(2A) of the Sentencing Act 2002 was enacted after *Williams*.

The Court has recognised that legislative policy in ss 103(2A) and 86E may require that some offenders serve life without parole.

[24] To these ends the Court has adopted a methodology under which the sentencing judge should consider the culpability of the instant case relative to "standard" murders that would attract an MPI of 10 years, inquiring how much more is needed to meet the relevant statutory purposes.[21] The inquiry incorporates all aggravating and mitigating factors of offence and offender. In *R v Williams* the Court prepared a "two-step" methodology:

> [52] … First, the Court would consider the degree of culpability of the instant case in relation to that involved in the standard range of murders — that is, apply the *Howse* approach. In the course of doing so, the Court would take into account in the normal way the pertinent aggravating factors set out in s 104 to the extent they were present, any other applicable aggravating factors, and all those in mitigation. As well, the sentencing Judge would have regard to the policy of s 104 that, in general, the presence of one or more s 104 factors establishes that the murder is sufficiently serious as to justify a minimum term of imprisonment of not less than 17 years. This element is necessary to ensure that effect is given to the legislative policy underlying s 104, which requires Courts at times to impose higher minimum terms of imprisonment than they might have done had s 104 not been enacted.
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> [53] The sentencing Judge would then decide what minimum term of imprisonment was justified in all the circumstances of the case, including those of the offender. As with cases determined solely under s 103, over time comparisons with other relevant sentences for murder will assist in determination of the appropriate minimum term in s 104 cases.
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> [54] Where the first step indicates that the appropriate minimum period of imprisonment is 17 years or more, the minimum term must reflect that assessment. In cases where [*the Court has found that a s 104 category applies but*] the first step points to a lesser minimum term being justified, the Court would go on to the second step and consider whether to impose a minimum term of 17 years' imprisonment would be manifestly unjust. If it is, the minimum term must be reassessed to what the Court considers to be justified. The Court may not, however, approach sentencing in s 104 cases on the basis that the 17-year minimum can be reduced whenever the Court considers that is appropriate. There is no warrant to interpret the provision merely as a guide to judicial discretion. The question of whether the outcome of the assessment would make a 17-year minimum term manifestly unjust must also be approached in a principled way.

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21 *R v Williams*, above n 16, at [49] and [52], following *R v Howse*, above n 18.

We have added the italicised words in [54] to make explicit the Court's assumption that by this point in the analysis the sentencing judge has found a s 104 category applicable, so that an MPI of 17 years must be imposed unless manifestly unjust.

[25] To summarise, when s 104 is invoked the sentencer must decide (a) what notional MPI would apply under s 103 and (b) whether a s 104 category applies. If s 104 applies but the notional MPI would be less than 17 years the judge must (c) address manifest injustice. We add that the first two steps need not be followed in that order. The sequence chosen may depend on the category and the circumstances. Some s 104 categories apply unambiguously — double murder, for example — while others, of which s 104(1)(e) is the leading example, require judgements of quality and degree.

[26] Under this three-step methodology other cases are used as a cross-check because the statutory purposes must assume primacy. In *Howse* the Court for this reason resisted an argument that the MPI of 28 years fixed under s 103 (s 104 had not been enacted when the crime was committed) was manifestly excessive when compared to other cases:

> [61] Counsel's reference to other cases leads us to examine the proper role of relativities in this area of sentencing. The primary focus of the sentencing Court should be to compare the culpability of the case in hand with the culpability inherent in cases which are within the range of offending which attracts the statutory norm of ten years. The primary question is how much more than the statutory norm the instant offending requires in order to achieve the necessary additional punishment, denunciation and deterrence.

[27] However, the Court in *Williams* did not insist that sentencing judges must always expressly reason their way through the suggested methodology. It recognised that judges would be assisted by direct comparison between the instant case and other qualifying s 104 cases.[22] At that time s 104 was new and the Court was concerned that should past cases form the primary point of reference the Legislature's objective of increasing MPIs in qualifying cases might not be served. Section 104 is no longer new. There is now a substantial body of cases and sentencing judges sometimes cite them without expressly using the three-step methodology. This is unobjectionable, provided the judge addressed the relevant sentencing purposes and principles and it

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22 *R v Williams*, above n 16, at [50]–[51].

can be seen that the sentence in a comparator case could have been arrived at consistently with *Howse* and *Williams*.

[28] This Court followed the *Howse* and *Williams* approach when examining the three-strikes regime in *Harrison*.[23] It held that s 86E methodology would be similar to that used in s 104 cases:

> [103] As to the circumstances of the relevant offence, be it a stage-2 or stage-3 murder, relative criminal culpability will be a principal factor in the inquiry. This will encompass a comparative analysis of both: (a) other cases of murder and the sentences imposed on those offenders; and (b) what sentence would have been imposed but for s 86E. This aspect of the inquiry will be similar to part of the methodology used in a s 104 case, albeit not entirely the same as that espoused in *Williams*.

[29] The Court explained that when considering the culpability of the instant offence of murder the sentencing judge must recognise that it was a stage 2 or 3 offence; that is so because the legislation aims at persistent repeat offenders:

> [104] With respect to the circumstances of the offender, the inquiry will take into account the nature of the stage-1 offence and the sentence imposed. In the case of a stage-3 murder the court will also be required to examine the circumstances of, and the sentence imposed for, the stage-2 offence. The extent of the offender's culpability in the index offence of murder must be assessed. The fact that such offending has occurred at stage-2 will also inform the concept of persistence, as the scheme is directed at deterring "persistent repeat offenders".

This is part of what the Court went on to characterise as the "standard" application of ss 102 to 104.[24]

[30] If the notional MPI is lower than the statutory presumptive minimum, the sentencer turns to manifest injustice, taking into account all circumstances of offence and offender and all applicable sentencing principles. In *Harrison* the Court explained that the content of "manifest injustice" may vary with the statutory context.[25] The term is used in s 102 (life imprisonment, which carries a statutory MPI of not less than 10 years, for murder), s 104 (MPI of not less than 17 years for qualifying murders), s 86D (maximum sentence without parole for third-strike

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23 *Harrison*, above n 6, at [103]–[104].
24 At [109].
25 At [98]–[101].

offences other than murder) and s 86E (life without parole for murder as a second or third strike). The Court held that under s 86E the assessment must take into account the prohibition on disproportionately severe punishment; and further, that while such cases must be exceptional they need not be rare.[26] It adopted the following approach to manifest injustice in s 86E cases:[27]

> (a) The judicial approach to the scope of the manifestly unjust exception is intended to avoid wholly disproportionate, that is, grossly disproportionate, sentencing outcomes.
>
> (b) The case for a finding of manifest injustice must be clear and convincing. This follows from the use of the word "manifestly". However such cases need not be rare or exceptional.
>
> (c) The determination requires an assessment of the circumstances both of the offence and the offender:
>
> (i) The fact that the case is a stage-2 murder as opposed to a stage-3 murder is relevant. This factor may inform the nature and extent of the recidivism involved.
>
> (ii) The consequences of a whole-of-life sentence (without parole) are a relevant factor. Personal mitigating factors under s 9(2), including mental health, relative youth and a guilty plea, fall to be considered in the balance.
>
> (d) The sentence that would have been imposed but for s 86E is relevant to this assessment. The sentencing judge will consider, and give weight to, the applicable purposes and principles of sentencing in ss 7, 8 and 9 of the Sentencing Act.
>
> (e) Other relevant (non-exclusive) factors include:
>
> (i) Whether an offender has any, or limited, ability to understand the relevance and importance of a first or final warning.
>
> (ii) Whether the factual matrix of the qualifying offence or offences, or of the index offence, points to a higher or lower level of culpability.
>
> (iii) Whether the offender is likely to re-offend such that there is a need for community protection.
>
> (f) The inquiry into the applicability of the manifestly unjust exception is an intensely factual one.

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26 At [106]–[107].
27 At [108].

[31] We can now summarise the s 86E sentencing methodology that emerges from the authorities. It begins with the presumption under s 86E(2) of life imprisonment without parole for a second or third-strike murder. There will be cases in which the presumption must be given effect.

[32] The judge should determine a notional MPI using a standard application of ss 102–104 of the Sentencing Act. The instant offence may be said to engage both ss 104 and 86E, as happened at first instance in this case, and if so the notional MPI will be used to gauge manifest injustice under both regimes since it reflects all relevant circumstances of offence and offender.

[33] Because the legislation calls for life without parole, a sentencing judge will ordinarily find it necessary to consider manifest injustice. The judge will likely deal with the presumptive minimum periods in descending order, starting with s 86E(2). The lower the notional MPI, and so the greater the likely differential between that period and life without parole in the offender's circumstances, the larger the scope for manifest injustice. All relevant aggravating and mitigating factors under ss 7–9 of the Sentencing Act must be considered, including those identified in *Harrison* at [108(e)]. We remark that some, such as the offender's capacity to understand and respond to a strike warning, may not arise in other sentencing settings.

[34] If life without parole is found to be manifestly unjust, the judge must impose an MPI of not less than 20 years under s 86E(4)(a) unless that too would be manifestly unjust. It will be necessary to consider manifest injustice under this provision where the notional MPI would be less than 20 years. Again, the greater any differential between the notional MPI and the presumptive minimum the more likely it is that an MPI of 20 years would cause manifest injustice.

[35] If an MPI of 20 years is found to be manifestly unjust and s 104 has been found inapplicable, the judge will impose such lesser minimum as is appropriate.

[36] If an MPI of 20 years would be manifestly unjust and s 104 applies, it may also be necessary to decide whether it would be manifestly unjust to impose the statutory

minimum of 17 years required by that section. That would happen where, as discussed at [24]–[26] above, the notional MPI is less than 17 years.

The notional MPI in this case

[37] As noted, Mr Sutcliffe, for Mr Davis, argued on appeal that an MPI of 10–11 years was warranted. He sought to argue by reference to other authorities that this was not an especially serious murder. He also argued that the difference between 14 and 20 years is very large, sufficient in itself to make the sentence manifestly unjust.

[38] We do not accept these submissions. In our view the sentence exhibits two significant difficulties. The first is that the 14-year MPI that the Judge would have imposed but for s 86E was materially too low.

[39] We begin with a starting point founded on the aggravating and mitigating features of the crime, before considering personal circumstances. Ms Kerehoma's murder was very brutal and it was made callous by the calculated way in which Mr Davis left her to die and went about creating his alibi. She was in her home and she was vulnerable. We need not decide whether s 104(1)(e) applied because the Crown did not ask us to do so on appeal. We are satisfied, however, that the combination of brutality and callousness called for a starting point of significantly more than 13 years.[28]

[40] The second difficulty is that the Judge assigned insufficient weight to Mr Davis's status as a persistent repeat offender. We have referred at [29] above to what the Court said about that in *Harrison*. Mr Davis's offence history is relevant and serious, including assaults on women and use of weapons, and his reoffending risk is

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[28] There are cases in which Judges have applied s 104(1)(e) to comparable offending. See for example *R v Fenton* HC Whangārei CRI-2006-088-3599, 28 February 2007; *R v Haerewa* HC Wellington CRI-2010-085-4794, 6 September 2011; *R v Wara* HC Hamilton CRI-2010-019-5681, 30 September 2011; *Lavemai v R* [2016] NZCA 363; *Harrison*, above n 6; *Akash v R* [2017] NZCA 122; *R v Te Hiko* [2017] NZHC 1260; and *R v Puna* [2018] NZHC 79. In some of these cases a 17-year MPI was found to be manifestly unjust in the offender's circumstances. There are others cases in which a starting point of fewer than 17 years was adopted. See for example *R v Ngeru* HC Wellington CRI-2008-085-5996, 11 December 2009; *R v Pirini* HC Whangārei CRI-2010-027-448, 22 April 2010; *R v Berry* HC Auckland CRI-2010-092-2165, 7 December 2010; *R v Callaghan* [2012] NZHC 596; *R v Eddy* [2014] NZHC 1543; *R v Hepana* [2014] NZHC 504; and *R v Akuhata* [2015] NZHC 1098.

very high and may remain so indefinitely. As Ms Brook submitted, it is immaterial that he did not use a weapon on this occasion. A weapon is an aggravating feature in assault cases because its use risks serious injury or death.[29] Here death was the intended result.

[41] We observe that the Judge ultimately found a 20-year MPI was not manifestly unjust given that Mr Davis is on his third strike and presents a very high risk of reoffending. For the same reasons, an allowance of materially more than two years for offending history and risk to the community was appropriate at the notional MPI stage of the sentencing analysis.

[42] The Judge was influenced by Mr Davis's psychological difficulties, which he listed as ADHD, oppositional defiant disorder and severe alcohol use disorder. Mental disability or illness often mitigate sentence, especially where they contribute to the crime,[30] but not in this case. As explained above, Mr Davis did not present with symptoms of ADHD as an adult and his dominant characteristic is a personality disorder with prominent antisocial features. The personality disorder does not diminish culpability. It points rather to an entrenched risk of reoffending, because personality disorders are difficult to treat. Alcohol use features in Mr Davis's offence history and in the instant offence, but while it is treatable and so suggests an avenue for rehabilitation it is not a mitigating factor.[31]

[43] The Judge also recognised that Mr Davis is not without potential for rehabilitation.[32] We agree. He did plead guilty, and he will have a very long time to mature and reflect on his attitude. His own opinion notwithstanding, a court should not lightly dismiss all hope of rehabilitation. But this crime was more fulfilment of promise than fall from grace, and there is no cause for optimism about his prospects.

[44] We accept that an allowance of one year is appropriate for the guilty plea. In our opinion a notional MPI of at least 17 years was nonetheless warranted, having regard to the circumstances of the offence and the offender and the policy of s 86E.

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29 *R v Taueki* [2005] 3 NZLR 372 (CA) at [31(d)].
30 For example, see *E (CA689/2010) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [86]–[88].
31 Sentencing Act, s 9(3).
32 Sentencing notes, above n 1, at [70].

Manifest injustice in this case

[45] We need not decide whether a six-year disparity between a notional MPI of 14 years and the 20-year presumptive MPI would be manifestly unjust. We express no view about it, other than to say that each case must depend on its own circumstances.

[46] The Court recognised in *Harrison* that there is significant scope for manifest injustice in s 86E cases.[33] Because it does not allow for the circumstances of either instant or prior offending, the three-strikes regime is capable of producing what might otherwise be disproportionately severe sentences. Its justification — reoffending after notice of consequences — assumes that the offender is or ought to be capable of understanding and responding to warnings. Sentencing judges may find it necessary to weigh these considerations alongside the need for community protection.

[47] None of this assists Mr Davis. It is not suggested that he failed to understand the strike warnings or was incapable of responding to them. The strike offences were serious in nature and in fact, the instant offence is highly culpable, and there exists a compelling need for community protection. It was for just such an offender and offence that Parliament enacted the three-strikes regime. The 20-year MPI required by s 86E(4)(a) does not occasion manifest injustice in this case.

Result

[48] The application for an extension of time to appeal is granted.

[49] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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33 At [108].