IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 141/2023
[2024] NZSC 73

BETWEEN	JOSEPH KARAITIANA WHEELER Applicant
AND	THE KING Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: D A Ewen and E T Blincoe for Applicant
M J Lillico and Z Zhang for Respondent

Judgment: 27 June 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Joseph Wheeler, stabbed and killed Richard Wallace, who owed him a small drug debt. He pleaded guilty to murder and was sentenced to life imprisonment with a minimum period of imprisonment (MPI) of 10 years.[1] His sentence appeal to the Court of Appeal was dismissed[2] and he now seeks leave to bring a further appeal to this Court. He seeks a determinate sentence rather than a life sentence. He argues that a life sentence is manifestly unjust because of the statutory requirement to impose an MPI of not less than 10 years when a life sentence is imposed.[3]

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1 *R v Wheeler* [2022] NZHC 2151 (Ellis J) [HC judgment] at [35].
2 *Wheeler v R* [2023] NZCA 563 (Mallon, Moore and Palmer JJ) [CA judgment] at [44].
3 Sentencing Act 2002, s 103.

High Court

[2] In the High Court, Ellis J adopted a starting point of life imprisonment with an MPI of 11 years.[4] The Judge reduced the MPI to the statutory minimum of 10 years on the basis of mitigating circumstances.[5] Ellis J accepted that had this been a case where the Court was to determine the appropriate *determinate* sentence, Mr Wheeler's personal circumstances would have warranted greater discounts than possible with the 10-year minimum.[6]

[3] The mitigating circumstances were, in essence, Mr Wheeler's life story. He claims he was conceived as a result of the rape of his biological mother and became a ward of the state, cycling through different foster families until he was adopted at two and a half years old. He reported being physically abused by his adoptive father. When he was nine, Mr Wheeler was placed in an institution then known as a "Boys' Home", where he says he was subjected to physical abuse. He matured into a life of polysubstance abuse and offending, including violent offending. He has also been admitted to hospital on multiple occasions, with mental health-related presentations. He has longstanding difficulties with managing his emotions, leading to periods of depressed mood as well as periods of intense rage.

[4] Mr Wheeler admitted he was in just such an enraged state when he killed Mr Wallace. He went to the police not long after the killing and admitted to his offending. The Courts below agreed that he was genuinely remorseful.[7]

Court of Appeal

[5] The Court of Appeal upheld Ellis J's sentencing decision.[8] In doing so it addressed two issues raised by Mr Wheeler.

[6] First, Mr Wheeler was sentenced prior to this Court's decision in *Van Hemert v R*.[9] Ellis J had adopted the approach then understood to apply—namely,

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4 HC judgment, above n 1, at [13].
5 At [34]–[35].
6 At [33].
7 At [9]; and CA judgment, above n 2, at [40].
8 CA judgment, above n 2, at [41].
9 *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412.

that the twin considerations in s 102(1) of the Sentencing Act 2002 ("the circumstances of the offence and the offender") must each independently satisfy the manifest injustice standard.[10] However, this Court unanimously rejected that approach in *Van Hemert*.[11] In Mr Wheeler's sentence appeal, the Court of Appeal considered his sentence on the basis of the approach set out in *Van Hemert*.[12]

[7] Second, Mr Wheeler argued that Ellis J was wrong to hold that the manifest injustice referred to in s 102 must be in the life sentence itself, rather than the MPI.[13] Instead, he argued that manifest injustice should be assessed by comparing the mandatory 10-year minimum with the MPI that would otherwise have been set (based on all relevant factors) had that mandatory minimum not applied. He argued that failing to take this approach meant that his sentence was disproportionately severe and an arbitrary detention in terms of the New Zealand Bill of Rights Act 1990.[14]

[8] The approach that the Court of Appeal (and Ellis J) took to this issue was more subtle than Mr Wheeler suggested in this Court. The Court of Appeal accepted that the mandatory minimum MPI "may be relevant to the overall assessment of whether a sentence of life imprisonment is manifestly unjust", but rejected the proposition that this would have made a difference in Mr Wheeler's case.[15] In the Court's view, the offending was brutal and while Mr Wheeler's background and mental health issues were compelling considerations, the "attack brings the need for community protection to the fore".[16] Further, the Court concluded that Mr Wheeler's offending history demonstrated a long-standing aggressive propensity. This suggested that he presented a continuing public safety risk that required careful management.[17] Relatedly, unlike the position of Mr Van Hemert, Mr Wheeler's personality and substance abuse disorders rendered his dysregulation chronic rather than acute.[18] Finally, while the Court accepted that Mr Wheeler showed genuine remorse, that was not enough to

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10 HC judgment, above n 1, at [29].
11 *Van Hemert*, above n 9, at [57] and [62] per Glazebrook, O'Regan, Ellen France and Kós JJ and [111] per Williams J.
12 CA judgment, above n 2, at [32].
13 At [33].
14 New Zealand Bill of Rights Act 1990, ss 9 and 22 respectively.
15 CA judgment, above n 2, at [36] and [41].
16 At [37].
17 At [38].
18 At [39].

provide it with sufficient confidence that he would be able to manage his own risks in the future.[19] For these reasons, the Court concluded that a life sentence with the mandatory MPI was not manifestly unjust in Mr Wheeler's case.[20]

The present application

[9] In applying for leave to appeal to this Court, Mr Wheeler reprised the arguments he advanced in the Court of Appeal. He also argued that the Courts below failed to consider three relevant factors: first, he is 55 years old and in poor health, so if he does not die in prison, he will have limited quality of life when released; second, he is, in any event, unlikely to be paroled because he lacks community support and a suitable release address; and finally, public safety concerns could be adequately mitigated by imposing an extended supervision order at the end of a determinate sentence.

[10] These additional matters were not raised in the Courts below. The usual problems associated with raising new grounds of appeal before this Court arise here—in particular, supporting evidence has not been tested and this Court does not have the benefit of the lower Courts' views.

[11] Leaving that issue to one side, and returning to the primary argument as to manifest injustice, there may well be an issue about whether the mandatory MPI could, alone, render a life sentence manifestly unjust, but this case does not raise that issue. Concurrent findings of fact in the Courts below are that the ongoing risk of violence presented by Mr Wheeler makes a determinate sentence inappropriate in his case. No question of principle arises. It follows that no matter of general or public importance arises, nor is there sufficient merit in the application to suggest there would be a risk of a substantial miscarriage of justice if leave were not granted.[21]

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19 At [40].
20 At [41].
21 Senior Courts Act 2016, s 74(2)(a) and (b).

Result

[12] The application for leave to appeal is dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent