IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC38/2022**

BETWEEN	**KAINE VAN HEMERT**
	Appellant
AND	**THE KING**
	Respondent

RESPONDENT'S SUBMISSIONS

28 October 2022

Counsel for the respondent confirms that this document is suitable for publication

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Introduction

1. The appellant pleaded guilty to the frenzied, and fatal, stabbing of Bella Te Pania on 31 December 2019. In the appellant's own words, he "saw red" and "sliced and diced" Ms Te Pania, a sex worker, stabbing her at least 35 times.

2. He appeals against his resulting sentence, imposed following a successful Crown appeal,[1] of life imprisonment with a minimum period of 11 years, six months' imprisonment.[2]

3. The appellant argues that the Court of Appeal misapplied s 102 of the Sentencing Act 2002, and that a sentence of life imprisonment fails to appropriately engage with the extent to which he was affected by mental illness at the time he murdered Ms Te Pania.

4. The language of s 102 is clear and unambiguous, however, and was appropriately applied by the Court of Appeal in this case. Despite the Court's use of the word "precluded", the judgment in its entirety demonstrates that the circumstances of the offending and those of the appellant were all properly considered by the Court. Notwithstanding the nature and extent of the appellant's mental illness, the correct determination was reached. This was simply not a case which permitted the imposition of a sentence of less than life imprisonment.

The present appeal

5. The appellant was granted leave to appeal to this Court.[3] While in form his appeal is against the sentence of life imprisonment imposed on him by the High Court when he was re-sentenced, in substance his appeal is against the Court of Appeal's earlier decision quashing the first sentencing decision declining to impose a sentence of life imprisonment.[4][5]

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1 *Van Hemert v R* [2021] NZCA 261 ["Court of Appeal Decision"]: Supreme Court Case on Appeal **[SC COA] 34-50**.

2 *R v Van Hemert* [2021] NZHC 2877 ["Sentencing Decision"]: **SC COA 9-15**.

3 *Van Hemert v R* [2022] NZSC 94 ["Leave Decision"]: **SC COA 6-8**.

4 *R v Van Hemert* [2020] NZHC 3202 ["First Sentencing Decision"]: **SC COA 23-33**. A finite term of ten years' imprisonment was imposed with a minimum term of six years, eight months. This followed an earlier sentence indication: *R v Van Hemert* HC Christchurch CRI-2019-009-12005, 3 November 2020: Court of Appeal Case on Appeal **[CA COA] 60**.

6. The focus of this appeal is the Court of Appeal's interpretation, and application, of s 102 of the Sentencing Act. Two issues this Court has signalled particular interest in are:

   6.1 Whether the Court was correct to treat the circumstances of the offending (the brutality of the murder and Ms Te Pania's vulnerability) as having "precluded" a departure from the presumption of life imprisonment;[6] and

   6.2 The Court's assessment of the appellant's circumstances, including the extent to which his mental health contributed to the offending and whether his mental illness can or should be treated as distinct from other aspects of his behaviour, such as his heavy use of alcohol and drugs, and his anger over the relevant period.[7]

Suppression

7. There are no suppression orders in place.

Background

The offending

8. On Christmas day in 2019, the appellant learnt that his ex-partner had begun a new relationship. In the days that followed, he described feeling "escalating" acute anger.[8] He consumed heavy amounts of alcohol and cannabis from 26 December onwards, smoking and eating cannabis up until an hour before the murder some five days later.[9]

9. His behaviour caused his ex-partner and his brother to both reach out to the Mental Health Crisis Resolution team for help. The appellant was visited at his home on 30 December 2020 and was reportedly "presenting with acute psychotic symptoms".[10]

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5 Sentencing Decision: **SC COA 9-15**.

6 Leave Decision at [6]: **SC COA 8.**

7 Leave decision at [6]: **SC COA 8.**

8 Report of Senior Forensic Psychiatric Registrar, Dr Karen McDonnell, under supervision of Dr James Fould, Consultant Psychiatrist [Dr McDonnell's Report]. Report dated 19 May 2020 and prepared for the purposes on a s38 CPMIP assessment at [29]: **CA COA 29**.

9 Dr McDonnell's Report, at [30]-[31]; **CA COA 29**.

10 Court of Appeal Decision at [7]: **SC COA 36.**

10. The initial plan was for the appellant to be taken to Hillmorton Hospital later that day for assessment.[11] However, an appointment was ultimately made for him to be assessed, on a voluntary basis, at the hospital the following afternoon.[12] In the interim, a plan was made to settle him at home with medication.[13] He was prescribed anti-psychotic and anxiolytic medication and left in the care of his brother.

11. The appellant went to sleep after taking the prescribed medication. Later that evening his brother left the address. When the appellant awoke several hours later, he took four to five risperidone tablets together with a Red Bull.[14] As he later explained to Police, he then decided to go into town to have revenge sex, to "level the playing field" with his ex-partner.[15] He made the drive to the red-light district three times, aborting his first two trips to return home and consume more cannabis.

12. Ms Te Pania, aged 34 years old and mother to a two year old daughter, was working as a sex worker that night. On his third trip into the city, the appellant picked Ms Te Pania up and drove her to an unknown location. On the appellant's account, he had a disagreement with Ms Te Pania about the sexual services she would provide, and she presented a weapon. The appellant responded by pulling out a large fish-filleting knife (with a 20 cm blade) which he used in a sustained assault upon her. She suffered a multitude of stab wounds, including those to her thigh, jaw, abdomen, throat, hands, forearm, chest, and face.[16] Her throat was sliced open, almost completely severing her trachea. She was also hit repeatedly in the head with a weapon, most likely a rock.

13. The appellant told police he acted in self-defence after Ms Te Pania attacked him; and that he "sliced and diced her" and stabbed her

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11 Dr McDonnell's Report at [36]; **CA COA 30**; Sentencing Decision, at [9]; **SC COA 11**.

12 Dr McDonnell's Report at [37]; **CA COA 30**; Sentencing Decision, at [9]; **SC COA 11**.

13 Dr McDonnell's Report at [37]; **CA COA 30**.

14 Dr McDonnell's Report at [33]; **CA COA 29**.

15 Psychiatric assessment dated 12 October 2020 prepared by Consultant Psychiatrist Dr Mhairi Duff ["Dr Duff's Report"] at [5]: **CA COA 40**.

16 Crown Summary of Facts: **CA COA 13-14**.

numerous times.[17] He said he "murdered her" and that they both "saw red".[18]

14. After killing Ms Te Pania, the appellant attempted to cover her body in the front seat with clothes. He then drove around disposing of her purse and cell phones.[19] He later drove to a secure airport compound at about 6.45 am, prompting staff there to immediately call Police. Police found Ms Te Pania's body in the footwell of the car, and located two knives, an awl, and a blood-stained rock near the passenger seat.[20] A sledgehammer was also found in the back.

The appellant's mental health

15. Two psychiatric reports were obtained and were before the Court at the time of sentencing.[21] Both psychiatrists concluded that the appellant was likely suffering from a disease of the mind at the time of his offending. However, both also agreed that he was fit to plead and could not avail himself of a defence of insanity.

16. Beyond that, there were variances in the approach taken to the appellant's mental health issues and his diagnosis. There was also disagreement over the extent to which his mental illness contributed to Ms Te Pania's murder.

Dr Karen McDonnell's assessment[22]

17. Dr Karen McDonnell reported the following of the appellant:

    17.1 He "gets wound up easily" and has a "tendency to become easily frustrated by people".[23]

    17.2 His personality is "intense and unpredictable with highly changeable mood states dependent on social context and his use

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17 Sentencing Decision, at [14]; **SC COA 12**; Crown Summary of Facts; **CA COA 78**.

18 At [14]: **SC COA 12.**

19 At [14]: **SC COA 12.**

20 Crown Summary of Facts; **CA COA 13**.

21 Both were prepared pursuant to s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP).

22 Dr McDonnell's Report: **CA COA 27-42**.

23 Dr McDonnell's Report at [8] **CA COA 25**: citing his self-description.

of alcohol and drugs".[24]

17.3 He is "a jealous and obsessive partner".[25]

17.4 He has "long-standing problems with anger, poor frustration tolerance, unpredictable and unstable moods".[26]

18. Dr McDonnell considered the appellant exhibited evidence of Narcissistic and Antisocial Personality Traits, and both Alcohol and Cannabis Use Disorders (Severe).[27]

19. Dr McDonnell met with the appellant on three occasions and noted that he "presented without any evidence of a significant disturbance in his mental state during my three assessments".[28]

20. She described his four previous mental health episodes,[29] opining that these appeared to be "precipitated by acute psychological stress and/or alcohol and illicit drug use".[30]

21. Dr McDonnell placed reliance upon the appellant's presentation in the lead up to this offending, noting that "the severity of this mental state disturbance was beyond what would be wholly explained by alcohol and cannabis intoxication, and it suggests a mental disorder which has either been caused or exacerbated by substance abuse".[31]

22. In terms of the offending itself, Dr McDonnell emphasised that the appellant's symptoms appeared to have resolved "within the hours subsequent to" Ms Te Pania's murder. She referenced assessments immediately following the offending in which he "presented without significant disturbance of his mental state".[32] She considered this supportive of the theory that "alcohol and cannabis intoxication was a major factor in the mental state disturbance observed in the days prior"

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24 Dr McDonnell's Report at [8] **CA COA 25**: citing his ex-partner's description.

25 Dr McDonnell's Report at [11] **CA COA 26**: citing his self-description.

26 Dr McDonnell's Report at [71], **CA COA 35**.

27 Dr McDonnell's Report at [74]-[76], **CA COA 35-36**.

28 Dr McDonnell's Report at [70], **CA COA 35**.

29 1995, 1998, 2016, and index offending.

30 Dr McDonnell's Report at [72], **CA COA 35**.

31 Dr McDonnell's Report at [78], **CA COA 36**.

to the murder.[33] As she further characterised it: the appellant "gave no indication that his actions were driven by delusions or other psychotic symptoms".[34]

23. Dr McDonnell expressed difficulty in reaching a clear diagnosis for the appellant but suggested a current working diagnosis of "Brief Psychotic Disorder, or a Substance Induced Bipolar Disorder".[35] In her view a diagnosis of Bipolar Affective Disorder would require symptoms preceding the illicit substance use, or continuing for some time thereafter, or a relapse whilst abstaining from substances.[36]

Dr Mhairi Duff's assessment[37]

24. Dr Mhairi Duff noted that the appellant self-described as "quick tempered and an adrenaline junkie",[38] and that family members reported his "mood fluctuations".[39] She noted his "interpersonal conflicts" and adolescent conduct disorder.[40]

25. She reviewed the appellant's previous mental health episodes.

26. Dr Duff preferred a diagnosis of "bipolar affective disorder". She acknowledged that his presentation was atypical given that his episodes were "sudden, brief and responsive rapidly to treatment".[41]

27. She emphasised that clinicians (and the appellant himself)[42] had consistently ascribed his behaviour to "substance use despite there never having been confirmed toxicology results supporting this contention".

28. However, she acknowledged that during his periods of "mental unwellness", the appellant has a history of using alcohol and cannabis which "exacerbate his illness and contribute to deteriorations in his

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32 Dr McDonnell's Report at [80], **CA COA 37**.

33 Dr McDonnell's Report at [80], **CA COA 37**.

34 Dr McDonnell at [42] **CA COA 31**.

35 Dr McDonnell's Report at [73], **CA COA 35**.

36 Dr McDonnell's Report at [73], **CA COA 35**.

37 Dr Duff's Report: **CA COA 39-59**.

38 Dr Duff's Report at [33], **CA COA 46**, self-described.

39 Dr Duff's Report at [58], **CA COA 51**.

40 Dr Duff's Report at [59], **CA COA 51**.

41 Dr Duff's Report at [102], **CA COA 59**.

42 Dr Duff's Report at [42] **CA COA 47**; [58], **CA COA 51**.

behaviour".[43] She acknowledged the "relationship" between his mental illness "and his use of alcohol and cannabis and his risks to himself and others".[44]

29. Dr Duff considered there was clear evidence that the appellant was "severely mentally unwell" leading up to, and at the time of, the offending. She expressed her view that the appellant's "mental illness played a contributory role in the events that unfolded".[45] She considered that he "would have been more sensitive to perceived threats, that he was emotionally labile and that his judgement and insight were impaired". Together, she considered these issues likely "played a significant contributory role in the offending".[46]

The sentencing

30. Initially the appellant was sentenced to 10 years' imprisonment with a minimum period of six years and eight months' imprisonment.[47] In rebutting the presumption of life imprisonment, Doogue J, opined that Mr Van Hemert "would not have killed Ms Te Pania but for his illness, and for the poor response of the mental health assessors in this case".[48]

31. The Crown successfully appealed against Doogue J's decision not to impose a life sentence. The Court of Appeal accepted this was in error, quashed his original sentence and remitted his case to the High Court for a further sentence indication to be given.

32. Nation J duly indicated a sentence of life imprisonment with a minimum term of 11 ½ years. After taking time to consider his position, the appellant accepted this indication, confirmed his guilty plea, and was sentenced accordingly.

33. This sentence was arrived at after adoption of a 17-year starting point in accordance with s 104 of the Sentencing Act, which Nation J found was

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43 Dr Duff's Report at [2], **CA COA 39**.

44 Dr Duff's Report at [19], **CA COA 42**.

45 Dr Duff's Report at [101], **CA COA 59**.

46 Dr Duff's Report at [99], **CA COA 58**.

47 First Sentencing Decision: **SC COA 23-33.**

48 *R v Van Hemert* CRI-2019-009-12005, 3 November 2020 per Doogue J ["First Sentencing Indication"] (CA COA 60) at

engaged due to the brutality of Ms Te Pania's murder.[49] However, the Judge considered such a term would be manifestly unjust in the appellant's circumstances. Having regard to the appellant's plea and a "significant allowance for the way your mental illness significantly contributed to this murder",[50] he reduced the minimum term by five and a half years to 11 ½ years. This comprised a two-year deduction in recognition of his plea, and a 20 per cent reduction to reflect the appellant's mental health as a contributing factor.

34. It is against this resulting sentence that the appellant now appeals.

SUBSTANTIVE SUBMISSIONS

Did the circumstances of the offending "preclude" a finite sentence?

35. The presumption in favour of life imprisonment remains "a long-standing and strong one, reflecting the sanctity accorded to human life in our society and its associated abhorrence of the crime of murder".[51] It is displaced when the "circumstances of the offence and of the offender" render a sentence of life imprisonment manifestly unjust.[52] This test under s 102 is "stringent"[53] and is displaced only in "rare cases".[54]

36. When the Court of Appeal evaluated "the circumstances of the offence", it focussed upon the aggravating features, namely the brutality of Ms Te Pania's murder, and her vulnerability. It was in this context that the Court opined that these factors were "very serious aggravating features… that precluded the High Court from departing from the presumption of life imprisonment".[55]

37. The finding that a sentence less than life imprisonment was "precluded" was a reflection of the Court's conclusion that the presumption was not displaced in this case, rather than a discrete step in its reasoning. The

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[27]: **CA COA 66**.

49 Sentencing Act 2002, s 104(1)(e); Sentencing indication at [9].

50 Sentencing Indication at [24]: **SC COA 21.**

51 *R v Williams* [2005] 2 NZLR 506 (CA) at [57]: **Intervener, Te Matakahi's Authorities, Tab 1, p 16.**

52 Sentencing Act 2002, s 102.

53 *Williams* at [57]; *Te Wini v R* [2013] NZCA 201: **Appellant's Authorities, Tab 3.**

54 *R v Mayes* [2004] 1 NZLR 71 (CA) at [34] (**Appellant's Authorities, Tab 1, p 15**), confirmed in *Rameka v R* [2011] NZCA 75, (2011) 26 CRNZ 1 at [167]: **Respondent's Bundle of Authorities ("BOA"), Tab 1.**

55 Court of Appeal Decision at [47]: **SC COA 47.**

Court did not, and the Crown accepts could not, hold that the features of the offending can alone determine whether life imprisonment should be imposed. Put another way, it is accepted that "'and' does not mean 'or' and the circumstances of the offence cannot preclude a finite sentence without considering the offender's circumstances."[56] It is agreed that the Court needed to assess more than the appellant's killing of Ms Te Pania when determining whether life imprisonment would be a manifestly unjust outcome. The appellant's mental illness and his wider personal circumstances were also relevant to, and informative, of that inquiry. As the appellant states and the Crown accepts, "an assessment of one, however dispositive of the result it might seem, never precludes consideration of the other".[57]

38. However, the appellant puts too much weight on the Court's use of the word "precluded". It is clear from the judgment that the Court properly enquired into all necessary circumstances (being those of the offence and of the offender) before finding that the presumption was not here displaced. Contrary to the appellant's submission, the Court of Appeal did not "fail to follow the statutory command to consider both sets of circumstances".[58] This being so, the Court was not in error.

39. It is trite to note that if the Court of Appeal's comments regarding preclusion were taken in isolation, there would have been no utility in the Court progressing from its consideration of the circumstances of the offending to address the circumstances of the offender. Those personal circumstances would have been moot to the Court's determination. But the Court did proceed to consider the appellant's circumstances, and it did so in more than a "provisional" way.[59] It specifically considered his mental illness;[60] his ongoing risk to the community; and his remorse.

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56 Appellant's submissions at [4].

57 Appellant's submissions at [43].

58 Appellant's submissions at [44].

59 This being the criticism advanced by the appellant in his submissions at [44]. However, when this word is used in the Court of Appeal judgment at [51] it is in terms of what discounts should be applied from the starting point when Mr Van Hemert is re-sentenced in the High Court. It does not translate to an admission that the Court's consideration of the appellant's circumstances was "cursory", for example.

60 Contrary to the applicant's suggestion, the Court did address why the applicant's mental illness did not displace the presumption: (i) finding the High Court had mischaracterised the psychiatric evidence when it concluded the

Indeed, the Court engaged with all relevant circumstances, of both the offending and the offender, before concluding that "the circumstances of the offending, and Mr Van Hemert's circumstances were such that the presumption of life imprisonment for the murder of Ms Te Pania had to be applied".[61]

40. The Court's comments were effectively a re-articulation of what was said in *R v Smith.*[62] There the defendant strangled her 13-year-old granddaughter following an argument. Ms Smith was suffering severe emotional, physical, and mental exhaustion, largely as a result of carer burnout — she cared for her adult son who was severely disabled, as well as her three grandchildren who all had behavioural and psychological issues. Though the High Court had found the s 102 threshold reached, the Court of Appeal disagreed, allowing the Crown's appeal:

> If we were permitted to only focus upon Ms Smith's personal circumstances, we would have reached the same conclusion as the High Court Judge [that life imprisonment would be manifestly unjust]. Her circumstances justify considerable compassion and leniency. Unfortunately, however, we must also have regard to the circumstances of the offence. We cannot minimise the vulnerability of [the victim], the gross breach of trust, the fact that Ms Smith set out in a determined manner to kill [the victim] and did so, using a method of murder that would have been terrifying for [the victim].

41. The Court of Appeal's pronouncement in the appellant's case aligns with its expressions above. It recognises that a s 102 assessment requires consideration of more than just an offender's mitigating factors. Equally, it acknowledges that the greater the aggravating factors, the less likely that countervailing factors, however favourable they may be, will be sufficient to displace the presumption in favour of life imprisonment. There is nothing remarkable about this proposition. It is consistent with Parliament's characterisation of some murders as so repugnant that they attract an even heftier presumptive minimum term of imprisonment.[63]

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applicant's mental illness was the "sole motivation" for the murder; and (ii) expressly considering the many cases in which an offender's mental illness has been held not to render a sentence of life imprisonment manifestly unjust See Court of Appeal Decision, at [40]: **SC COA 45-46,** and [50]: **SC COA 50.**

61 Court of Appeal Decision at [54]: **SC COA 49.**

62 *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830 at [57]: **Appellant's Authorities, Tab 8, p 143.**

63 Sentencing Act 2002, s 104.

What each case requires is a qualitative assessment of aggravating and mitigating factors. It is the same point consistently articulated in cases focussing upon the application of s 102.[64]

42. There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment.[65] This is not such a case, particularly when the circumstances of the offence, which must be considered along with the circumstances of the offender, demonstrate such brutality against a vulnerable victim. The appellant also presents an ongoing risk to public safety.

The Court's assessment of the appellant's circumstances, including the extent to which his mental health contributed to the offending

43. The Court of Appeal judgment contains a discussion of the "circumstances of the offence" which primarily focuses upon the aggravating features of Ms Te Pania's murder.[66] Thereafter the Court discusses the appellant's circumstances, addressing his mental illness, his use of alcohol and drugs, his anger, and his remorse.[67]

44. Irrespective of when and how the Court of Appeal considered it,[68] it is indisputable that the appellant's mental health featured in the Court's decision and its assessment of his culpability.

45. As the appellant notes, the circumstances of the offence and those of the offender do not "imply two mutually exclusive concepts".[69] Some factors, such as mental health, can be relevant to both. The Crown takes no issue with this proposition. Indeed, it must be correct. There is no fixed point where mental health issues become a feature of an offender rather than of his or her offending or vice versa. Often those issues are a lens through

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64 *R v O'Brien* (2003) 20 CRNZ 572 at [36]: **BOA, Tab 2.**

65 Ibid

66 Court of Appeal Decision at [43]-[47]: **SC COA 46-47.**

67 Court of Appeal Decision at [48]-[53]: **SC COA 47-48.**

68 Leave Decision at [6]: **SC COA 8.**

69 Appellant submissions at [48].

which both must be viewed. For this reason, courts have approached different cases variably and have stressed the need for flexibility in approach:

45.1 "Mental health disorders falling short of a defence of insanity may be taken into account in the sentencing process at two points";[70]

45.2 The manner in which an offender's mental health is most appropriately considered at sentence will vary depending on the particular facts of a given case;[71]

45.3 "It is important not to place the analysis of the relevance of mental disorder in sentencing in a juristic straightjacket."[72]

46. An offender's mental state is a relevant consideration when culpability is assessed, and no suggestion is made that mental health should be omitted from consideration when a Court is considering the "circumstances of the offence" under s 102. As such, it is unnecessary to engage with the appellant's submissions addressing s 19 of the New Zealand Bill of Rights Act 1990.[73]

47. In the present case the Court addressed the appellant's mental health when considering his personal circumstances. This approach was available. Indeed, it was a necessary consideration given that his mental health was undeniably relevant to the Court's assessment of the risk the appellant posed to the community.[74] The Crown equally acknowledges that the Court could have addressed his mental health when considering the circumstances of his offending. Indeed, as previously accepted,[75] this

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70 *Shailer v R* [2017] NZCA 38, (2017) 28 CRNZ 522 at [44] (**Appellant's Authorities, Tab 13, p 281**). Similarly, the Full Court of Appeal recognised that addiction may potentially be considered at either stage of the sentencing process in *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [39], [126] and [137] (**Appellant's Authorities, Tab 19**).

71 In *E (CA689/2010) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [70] (**Appellant's Authorities, Tab 18, p 328**), the Court of Appeal explained the various ways in which mental illness may affect sentence. For example: a condition may reduce the moral culpability of the offending conduct; may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served; may moderate or eliminate as a sentencing consideration the need for specific or general deterrence; or may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.

72 *Shailer,* at [48]: **Appellant's Authorities, Tab 13, p 282**.

73 Appellant's submissions from [59].

74 See Court of Appeal Decision, at [52]: **SC COA 48.**

75 In leave submissions at [21] as cited in Appellant's submissions at [67].

may have been preferable in the present case, given the divergence between the parties as to the extent to which his mental illness diminished his culpability.

48. However, an appeal against sentence is against the outcome imposed; not against the way a judgment is worded or the reasoning along the way. Irrespective of its placement within the judgment, what was required was that the Court properly engage with the appellant's mental illness and the extent to which it influenced and impacted his actions and affected his culpability. It is evident that the Court did so. The Court accepted his illness played a "significant contributory role in his offending," but that it was not the "sole" motivator.[76] In reaching this view, the Court necessarily engaged with the content and conclusions of the psychiatric reports; with the appellant's medical history; and the interplay of other contributing factors such as his substance use, and his anger.

49. The fact the Court of Appeal discussed these topics under the heading "Mr Van Hemert's circumstances" does not mean the Court failed to consider their impact on the offence itself. Indeed, the Court's judgment dispels any such argument. It makes plain that the appellant's mental illness had dual relevance: first, to the question of culpability for the offending itself;[77] and secondly, to any ongoing community risk.[78] His mental illness was appropriately considered in s 102 terms: the Court assessed and addressed its impact on his offending and upon him as a person in order to determine whether a life sentence would be manifestly unjust.

50. Whether the appellant's mental health was judged as a circumstance of his offending, or of him as the offender, was of little moment. What was vital was that its impact was considered by the Court and given appropriate weight. It was.

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[76] Court of Appeal Decision at [50]: **SC COA 48**.

[77] Court of Appeal Decision at [49]-[51], discussing the role his mental health played "in his offending" [50]: **SC COA 48.**

[78] Court of Appeal Decision at [52]: **SC COA 48**.

51. The Court determined that the appellant was affected by mental illness which contributed to his actions that night but that was not the sole reason for Ms Te Pania's murder.[79] This was consistent with the expert evidence that had been advanced on the appellant's behalf. His culpability was thereby mitigated (the MPI was reduced to 11 ½ years years from a 17 year starting point), but not to the extent that the appellant now argues.

52. On appeal the appellant seeks to elevate the impact of his mental health upon his offending. He suggests it is why he crossed paths with Ms Te Pania, and how he came to behave in this frenzied and violent way which was "a product of paranoia, emotional lability, and extreme disinhibition."[80] The difficulty with this submission is that it ventures substantially further than the expert evidence. Dr Duff considered his mental health would have made him more sensitive to perceived threats, made him more emotionally labile and would have impaired his insight and judgment. Together these factors were "likely to have played a significant contributory role." But they were not ventured as the sole cause of his offending. Indeed, the appellant has previously said he was angry when the victim's offerings failed to meet his expectations, accepting that he acted out of anger, and "sliced and diced" Ms Te Pania. Further, to the extent the appellant argues that the causative force of his mental illness arises from his altered sensitivity to perceived threat, it is emphasised that this "self-defence narrative" was raised in relatively limited terms, with the appellant self-reporting that the victim "attempted to strike him with a weapon",[81] most likely being the small, pointed, handmade tool, an 'awl', which was recovered from his vehicle. Plainly, any perceived threat was clearly able to be readily met, falling significantly short of explaining the full force of the appellant's attack.

53. The attack on Ms Te Pania was undeniably "brutal and frenzied".[82] She

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79 Court of Appeal Decision at [50]: **SC COA 48.**

80 Appellant's submissions at [82].

81 Summary of Facts: **CA COA 13.**

82 Court of Appeal Decision at [43]: **SC COA 46**.

remained a vulnerable victim as a confluence of her occupation and her slight physique.[83] These factors remain aggravating notwithstanding the appellant's mental health, and his submissions to the contrary.[84] After all, Ms Te Pania's vulnerability exists irrespective of his mental health state, and the brutality of the attack remains undiminished given his sanity and the absence of any self-defence plea. Both factors were correctly identified and given weight by the Court.

54. It is important to recognise that the appellant was able to clearly describe events to both psychiatrists,[85] and ascribed himself with feelings of rage and anger[86] before he lost control and stabbed his victim multiple times. Equally, it was still correct to note he had previously exhibited some history of aggression and was affected by both alcohol and cannabis at the time of Ms Te Pania's murder. These were relevant factors for the Court to reference, and none were given undue weight. None would have been negated or had their relevance materially diminished by the Court evaluating the appellant's mental health at a different stage in its judgment.

55. When viewed in the aggregate, "the circumstances of the offending, and Mr Van Hemert's circumstances were such that the presumption of life imprisonment for the murder of Ms Te Pania had to be applied".[87] The impact of his mental illness, whenever and however considered, failed to render manifestly unjust the imposition of life imprisonment. Ultimately, as the Court of Appeal correctly concluded, this was simply not one of those cases where a sentence less than life imprisonment could be justified.

56. Mr Van Hemert's case is consistent with other comparable cases where, although the offenders were suffering from severe mental illnesses at the

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83 Court of Appeal Decision at [44]: **SC COA 47**.

84 Appellant's submissions at [79]-[83].

85 Dr McDonnell at [42], **CA COA 31**. Dr Duff at [6], **CA COA 40** and [55], **CA COA 50**.

86 Dr Duff's Report at [6], **CA COA 40**, and [93]: **CA COA 57**. Dr McDonnell describes him (at [42]) feeling "angry underneath" prior to picking Ms Te Pania up, although noting that Dr McDonnell does not address what the appellant told her about the murder.

87 Court of Appeal Decision at [54]: **SC COA 49**.

time of their offending, the presumption in favour of life imprisonment was not displaced.[88] While the appellant suggests resort to such other cases adds little, the Crown submits they show a consistency of approach. Examination of these cases illustrate the high threshold set by s 102. Mental illness does not serve as an automatic gateway to a lesser sentence. These cases demonstrate that even where there is a strong causative link between an offender's mental health and offending, the presumption is not easily displaced.

57. In *R v Morris,*[89] the offender had been admitted to an acute mental health unit, becoming increasingly angry and threatening towards others. She walked out of the unit, paranoidly believing the victim had laughed at her about the removal of her child. She left a note at one neighbour's house saying she had escaped from the inpatient unit and was going to kill the victim. She then stole a claw hammer, which she used to violently carry out the murder. The offender had been diagnosed with schizophrenia, as well as borderline personality disorder, and had sustained head injuries in a serious motor accident. She had been admitted to psychiatric hospitals on more than 40 occasions, and at the time of her offending was "receiving significant mental health support".[90] After pleading guilty, her mental state deteriorated to the point that she required ongoing inpatient psychiatric care. The Court accepted her "significant mental disorders… affected, to some extent, what [she] did when [she] killed" the victim, but also took into account the offender's tendency to react violently to stressful situations, or when provoked.[91] The Judge did "not accept that any provocation, whether I look at this as being what you may have thought [the victim's] actions may have been, or by considering the effect of your mental illness, is sufficient to displace the [s 102] presumption".[92] An order was also made for the offender's detention as a special patient.

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88 See for example *Te Wini v R* [2013] NZCA 201: **Appellant's Authorities, Tab 3**.

89 *R v Morris* [2012] NZHC 616: **Appellant's Authorities, Tab 2.**

90 At [15]: **Appellant's Authorities, Tab 2, p 20.**

91 At [37]: **Appellant's Authorities, Tab 2, p 24**.

92 At [38]: **Appellant's Authorities, Tab 2, p 25**.

58. In *R v Yad-Elohim*,[93] the offender went to the victim's apartment with a woman to buy drugs. She instructed the offender to wait outside, went inside and then ran off with his money. The offender became suspicious and knocked on the door. After briefly speaking to the victim, he grabbed him, dragged him into the stairwell and inflicted approximately 90 blows, over the course of seven minutes. It was accepted that the offender suffered from "a severe mental disorder" – chronic schizophrenia – which was exacerbated by him having smoked methamphetamine before the offending.[94] A week before the murder, the offender had been admitted to an acute mental health impatient unit (reporting urges to harm people.) He had been discharged three days before the murder, with medication he failed to take. He was in a psychotic state when he was arrested, admitted to the Mason Clinic and treated for severe schizophrenia for several months. His condition gradually stabilised with treatment to the point where he was fit to stand trial. The jury rejected the defence of insanity. The Crown and defence agreed that a departure from life imprisonment was not appropriate under s 102. The sentencing Judge agreed, emphasising that the gravity and severity of the offending, and the public interest in allowing the Parole Board, and Mental Health Services to determine when the offender was well enough to re-enter the community.

59. In *R v Brackenridge,*[95] the offender murdered his mother, while suffering from drug-induced schizophrenia.[96] They had an argument, which ended in him strangling her and then setting fire to her house, with her body in it. Around the time of the offending he said the "Sun God" had told him his mother was the devil. He said he had accomplished a mission by killing her. He was remanded in a psychiatric inpatient unit and was responsive to treatment. The jury rejected the insanity defence. The sentencing Judge noted the offender had a long history of drug use, his risk profile hinged on it, and he was at high risk of violence if psychotic.

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93 *R v Yad-Elohim* [2018] NZHC 2494: **Appellant's Authorities, Tab 4**.

94 At [5]: **Appellant's Authorities, Tab 4**, **p 50**.

95 *R v Brackenridge* [2019] NZHC 1627: **Appellant's Authorities, Tab 5**.

His Honour accepted that the offender's "mental disorder was – at least in part – causative of [the] offending",[97] and while falling short of insanity, mitigated culpability. It did not go so far, however, as to displace the presumption in s 102.

60. In *R v Mayes,*[98] the offender killed his ex-partner following a series of altercations between them, culminating in him frenziedly attacking her with a knife. He had cognitive and physical disabilities caused by a head injury, had been diagnosed with mania following severe head injuries, and took anti-psychotic medication. The Court held:[99]

> … although there is room for a humane appreciation of the tragic consequences for Mr Mayes of his grave head injury, it must be borne in mind that he was also influenced in his conduct on the night in question by alcohol which he had taken in breach of a bail condition… we think this is not one of the rare cases where the statutory presumption is displaced.

Distinguishing mental illness substance abuse and anger

61. This Court also queries whether the appellant's mental illness could or should be treated as distinct from other aspects of the appellant's behaviour, such as his heavy use of alcohol and drugs, and his anger over the relevant period. On the facts of this case they are discrete factors, and it was appropriate for the Court to recognise them as such. However, it would have been artificial for the Court to further delineate or apportion the extent to which each independently influenced the appellant's actions.

62. Primarily this is because it is difficult to determine where each circumstance bites. It is recognised that mental health issues and substance abuse often go hand-in-hand, and, in some cases, it can be inherently difficult to separate them. As Te Matakahi states, they can be "linked inextricably".[100] The views of Dr McDonnell and Dr Duff illustrate the problem. Dr McDonnell assessed the appellant as suffering from a

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96 He had stopped using methamphetamine several months prior, but his psychotic state persisted.

97 At [24]: **Appellant's Authorities, Tab 5, p 72**.

98 *R v Mayes* [2004] 1 NZLR 71; (2003) 20 CRNZ 690 (CA): **Appellant's Authorities, Tab 1**.

99 At [33]-[34]: **Appellant's Authorities, Tab 1, p 15.** This Court also took issue with the "Judge's inclination to read down the degree of risk of a future violent action to stressors or perceived provocation."

100 Te Matakahi – Defence Lawyers Association New Zealand Submissions at [28].

"mental disorder which has either been caused or exacerbated by substance use".[101] Dr Duff opined that "his background heavy use of cannabis and alcohol likely exacerbates his illness when relapses occur"[102] and referenced "the pattern of rapid onset associated with increased reliance on cannabis and alcohol".[103]

63. The appellant suffers from mental health issues which are exacerbated by his drug and alcohol use. Likewise, there seems to be some suggestion that his alcohol and drug use is aggravated by his mental health crises. On any view, the appellant's substance use and his mental health issues make for an unhappy combination. Clearly, both also impact upon his presentation of mood and behaviour. To distinguish between these circumstances and to seek to address each individually would require clarity and certainty that criminal process simply cannot provide. Each of these circumstances contributed to his offending. And they did so in overlapping and interlinked ways. Judges are not meant to be experts in psychiatry; it is enough - and also all that they can do – to take account of the expert evidence so far as it goes and look at the matter in the round.

64. So long as the Court identifies, as it did here, that when the appellant murdered Ms Te Pania, he did so affected by mental illness, by drug and alcohol intoxication,[104] and by rage, then the Court has not fallen into error. These three contributing factors were appropriately recognised by the Court of Appeal and by the sentencing Judge. So too their interplay. The Court of Appeal was correct in its assessment of "a close correlation between Mr Van Hemert's abuse of drugs and alcohol, which in turn triggers mental health relapses that on occasions involve acts of violence or aggression towards others".[105] The sentencing Judge similarly referenced his "tendency towards violence and serious aggression when you become manic through your bipolar illness. Those episodes have

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101 Dr McDonnell's Report at [78]: **CA COA 36.**

102 Dr Duff's Report at [58]: **CA COA 51.**

103 At [89]: **CA COA 56.**

104 And the legislative policy towards voluntary alcohol and drug consumption is of course made plain in s 9(3) Sentencing Act 2002.

105 Court of Appeal Decision at [52]: **SC COA 48**.

been aggravated and have become more intense through your tendency to indulge heavily in alcohol and illicit drug use at such times".[106] The thrust of this passage was that the appellant's case was not analogous to Mr Reid's where "but for" his mental illness, the murder would not have occurred.[107] Whilst in the grip of a major psychiatric illness, Mr Reid developed psychotic delusions about his 87 year old neighbour, which led to him confronting her and, when she denied spying on him, strangling her. Mr Reid's illness was at the time undiagnosed and untreated, and "had been growing over time."[108] He was "horrified" by his actions and confessed even when his neighbour was believed to have died of natural causes.[109] The sentencing Judge accepted that his actions were "entirely out of character" and "against [his] entire life's pattern".[110]

65. Much of the appellant's concern about the Court's reference to his substance use seems to stem from a view that this led the Court to erroneously discount the mitigating effect of his mental illness. The Crown does not consider that analysis is properly available given the terms of the judgment itself. The Court did not disregard the effect of the appellant's mental illness. On the contrary it accepted his illness played a significant contributory role in his offending.[111] The Court's reference to his substance use as another contributing factor did not serve to undercut or negate that acceptance in any way. Rather it was directed at demonstrating that his illness was not the "sole motivation" for his actions.[112] This observation is plainly accurate. It is equally unremarkable.[113]

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106 Sentencing Indication at [14]: **SC COA 19.**

107 *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011, at [12]: **BOA, Tab 3.**

108 *R v Reid* at [12].

109 *R v Reid* at [8].

110 *R v Reid* at [12].

111 Court of Appeal Decision at [50]: **SC COA 48.** See also the subsequent High Court Sentencing Decision at [17] recognising his illness as "a significant factor in your offending": **SC COA 12.**

112 Court of Appeal Decision at [49]: **SC COA 47.**

113 See for example in *Mayes v R,* above n 54, at [33] (**Appellant's Authorities, Tab 1, p 15**) where the Court of Appeal refers to the "grave head injury" suffered by Mr Mayes with long term effects upon him, it equally noted that he was "also influenced in his conduct on the night in question" by alcohol consumption (**Appellant's Authorities, Tab 1, p 15**.) Similarly the sentencing Judge in *R v Yad-Elohim* refers to the offender's intoxication and methamphetamine use (and his anger) when evaluating the extent to which his psychosis was causative of his offending: at [47] (**Appellant's Authorities, Tab 4, p 60.)**

66. In the appellant's case, unlike in Mr Reid's, the appellant's mental illness was a contributing factor, but it was not the only one. It contextualises but does not wholly explain his actions.

67. Irrespective of whether the Court addressed the appellant's mental illness separately from his heavy use of alcohol and drugs, and his feelings of anger over the relevant period, the same outcome would have been reached. All three factors influenced his offending. They were, as the Court termed it, "factors that contributed in varying degrees to Ms Te Pania's death."[114] His illness was a contributing factor however it was not the only one. Nor could it be said that his offending would not have occurred "but for" its hold.[115]

68. Te Matakahi posit that "a contributing cause may still be substantial even if it is not the main cause".[116] This is, within parameters, accepted. Certainly, a contributing cause may still be substantial even if it is not the sole cause. However, the more operative a cause is, the more weight it will necessarily attract in terms of sentence mitigation. The mitigating effect of mental health in the case of an offender who acts purely because of his mental ill-health (such as *Reid*) will be greater, for example, than an offender who acts, influenced to an extent by, but not solely because of, his mental health. The extent to which culpability is reduced will be reflected in due mitigation.

69. Mr Van Hemert's is not the case of an offender whose mental health issues stand alone as the cause of his offending. Nor could it be characterised a case where his voluntary consumption of drugs and alcohol explains his resort to violence. Rage alone does not explain his conduct. The appellant's case demonstrates an interplay between these three factors and was appropriately dealt with as such by both lower Courts.

70. Finally, appellant argues that his substance use was born of addiction that

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114 Court of Appeal Decision at [50]: **SC COA 48.**

115 Court of Appeal Decision at [52]: the Court not accepting that the offending was "totally out of character or entirely out of step" with Mr Van Hemert's "general life pattern." **SC COA 48**.

warranted a discrete reduction in his culpability separate from his mental health. But the appellant's addiction did not lead him to stab and batter Ms Te Pania. It is of course accepted that addiction is a mental health issue and both can be causative of offending in a way that reduces culpability.[117] This can be seen in the context of drug dealing offending where addiction to methamphetamine might provide a clear link to subsistence dealing.[118] However, when dealing with violent offending, the court requires proper evidence of a connection between drug use and the offending.[119] The appellant's drug and alcohol use exacerbated his mental health issues and was contributory to the offending in that way. But there are a number of events lying between his addiction and the offending in this case: his decision to level the "playing field," to visit a sex worker, to take weapons with him including the knife, to argue with the sex worker and his anger at her in the course of that argument.

71. The more obvious link with drugs and alcohol in this case is that the appellant was disinhibited because of intoxication. But that cannot be recognised as mitigatory because of the prohibition in s 9(3) of the Sentencing Act 2002. Section 9(3)'s prohibition of mitigation for "voluntary" consumption of alcohol and drugs cannot be avoided by pointing to addiction. That is because there is no basis to say that addiction meant that the appellant involuntarily consumed alcohol and cannabis leading up to the offending. It cannot be shown that smoking the cannabis was "not a product of the person's reason".[120] That is not the consequence of cannabis use disorder which is described in DSM 5 in terms of "a strong desire to use the drug"; "difficulties in controlling its use" and "having cravings" for the drug.

The position overall

72. A Court must consider the circumstances of both the offending and of the offender when determining whether a sentence of life imprisonment

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116 Te Matakahi – Defence Lawyers Association New Zealand Submissions at [30].

117 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [143]–[147]: **Appellant's Authorities, Tab 19, p 377-8**.

118 *Zhang* at [24]: **Appellant's Authorities, Tab 19, p 351**.

119 *Ekeroma v R* [2021] NZCA 250 at [31]: **BOA, Tab 4.**

120 *Cunliffe v Goodman* [1950] 2 KB 237 (CA) per Lord Asquith at 253: **BOA, Tab 5.**

would be manifestly unjust. All parties agree on this. This necessarily includes detailed consideration by the Court of an offender's mental health. All parties agree on this. Mental health can substantially mitigate culpability and can, albeit rarely, found a successful argument that life imprisonment should be displaced. All parties agree on this. Where parties diverge is the impact the appellant's mental health has on the present case. The appellant argues it operates to displace the s 102 presumption. The Crown maintains it falls substantially short of doing so on the evidence here. And further, there is no error of principle in the extent to which the Court put weight on that factor.

The sentence ultimately imposed

73. The sentence imposed by Nation J comprises a straightforward application of ss 104 and 102 of the Sentencing Act and is consistent with previous authorities on point.

74. Section 104 was appropriately engaged by the appellant's actions. Ms Te Pania's murder was committed with a high level of brutality. Two weapons were used: a fish filleting knife with a 20 cm blade, and a rock. During the attack, Ms Te Pania kicked out the front windscreen in her efforts to escape. She suffered:

    74.1 A large slash wound to the lower left thigh which penetrated deeply into the lateral quadricep muscle;

    74.2 A stellate stab wound to the right side of her face over the angle of her jaw;

    74.3 A stab wound to the central upper abdomen so deep that it exposed her small bowel;

    74.4 A 30 cm stab wound passing through the full thickness of the abdominal wall;

    74.5 A very large and deep slash wound to the left and centre throat which cut entirely through the sternomastoid on the left; virtually severing the trachea, the thyroid gland, and the right internal jugular vein;

74.6 10 cutting wounds to her left hand;

74.7 Six cutting wounds to her right hand;

74.8 Two cutting wounds to the back of her left forearm;

74.9 Seven stab wounds to the front of her chest which did not puncture her chest cavity;

74.10 A stab wound to the front of her upper left thigh;

74.11 12 small stab wounds to the front of her face;

74.12 11 blunt force injuries on the left upper forehead, left temple, left side and top of head.

75. In undeniably brutal circumstances, the mandated presumptive minimum period of imprisonment was 17 years.[121]

76. It was rightly accepted that this starting point would be manifestly unjust in the appellant's case. The operative factors in this were his mental health and his guilty plea. Both warranted a meaningful reduction, which was appropriately served by the Court's imposition of an 11 ½ year minimum term. The appellant's substance abuse should not be characterised as "involuntary" such to be regarded an independent mitigating factor. Nor should his anger be termed "interrelated difficulty coping" and act in further mitigation of his offending.[122] To the extent that both factors co-exist with his mental illness so to mitigate his culpability, they were appropriately addressed when the Court considered his mental health as a contributing factor.

77. The sentence arrived at achieves consistency with other sentencing decisions, accords with the operative sentencing purposes and principles, and gives effect to Parliament's intention in enacting ss 102-104 of the Sentencing Act.

78. A lesser sentence would fail in all three respects.

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121 Sentencing Act 2002, s 104(1)(e).

122 Te Matakahi – Defence Lawyers Association New Zealand Submissions at [81].

79. The appellant's case is not of the sort contemplated in *O'Brien* where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment.[123] The appellant's brutal murder of Ms Te Pania qualified under s 104 and, as in *Hamidzadeh v R*, was therefore most unlikely to rebut the s 102 presumption.[124] As against the brutality of the murder and Ms Te Pania's vulnerability, the appellant has a mental health problem that simply contributed to the offending. The appellant's sensitivity to perceived threats and poor judgment do not alone explain the dozens of stab wounds he inflicted on Ms Te Pania. It certainly does not demonstrate the "clear" injustice required[125] and rebut the strong presumption in favour of life imprisonment "reflecting the sanctity accorded to human life in our society and its associated abhorrence of the crime of murder".[126]

80. Public safety issues do not indicate otherwise. As Nation J recognised, the appellant poses a risk to community safety.[127] While his counsel postulates that the extent of risk cannot be accurately quantified,[128] it is apparent that his is a very different case from *Reid* for example, where the Court was satisfied that Mr Reid no longer posed any risk to himself or to others.[129] On the contrary, the constellation of factors present in the appellant's case heighten the risk he poses. He presents with "sudden onset" mental health deterioration, triggered by psychosocial stressors or life events such as relationship problems or losses.[130] During his acute episodes, he exhibits a "profound lack of insight".[131] He tends to increase

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123 *O'Brien* above n 64 at [35]: **BOA, Tab 2.**

124 *Hamidzadeh v R* [2013] 1 NZLR 369, (2012) 26 CRNZ 245 at [73] (**BOA, Tab 6)**. Leave to appeal to the Supreme Court declined *Hamidzadeh v R* [2013] 2 NZLR 137.

125 *R v Rapira* [2003] 3 NZLR 794, (2003) 20 CRNZ 396 at [121]: **Appellant's Authorities, Tab 6, p 111**.

126 *Williams* above n 51 at [57]: **Intervener, Te Matakahi's Authorities, Tab 1, p 16.**

127 Sentence Indication at [22], **SC COA 21**.

128 Appellant submissions from [88].

129 *R v Reid,* above n 107 at [12]: **BOA, Tab 3.**

130 Dr Duff's Report [42], **CA COA 48**; [58] **CA COA 51**.

131 Dr Duff's Report at [2], **CA COA 39**.

his reliance on substances, thereby "exacerbating his illness and contributing to deteriorations in his behaviour".[132] He exhibits poor judgment and limited insight during his acute episodes, and is irritable, argumentative and hostile.[133] He exhibits aggressive behaviour and mood volatility.[134]

81. As the Probation Officer summarised Mr Van Hemert, he "was unable to react to the warning signs or manage his emotions and prevent his offending after a deterioration to his mental health was triggered, he was also unable to correctly take the medication designed to regulate his conduct…Given the unpredictability surrounding a mental health episode of this proportion and the devastating amount of violence used, Mr Van Hemert is assessed as a high risk of harm to the community and high risk of reoffending.[135] His lacking remorse also assumes relevance in this context. As Nation J expressed it, "your lack of remorse is not to be regarded as an aggravating feature of the murder. It is relevant however to assessing the extent to which your personality, way of thinking, in combination with your bipolar illness, puts others at risk of harm."[136] The overriding consequence of all of these factors is that community protection and future risk mitigation also favoured the life sentence here imposed.

82. In arriving at this sentence the Court did not employ the novel approach suggested by Te Matakahi. The approach has not been raised in any case argued in the Court of Appeal either and so this Court does not have the benefit of their reasoning, but a basic objection to the method can be stated briefly. A comparison between the 10-year MPI floor for life imprisonment and the MPI that would otherwise be imposed does not give any useful yardstick for the manifest injustice test under s 102. That is because the s 102 test is directed at the question of what sentence is imposed – whether a life sentence or a finite one. It is not directed to

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132 Dr Duff's Report at [2], **CA COA 39**.

133 Dr Duff's Report at [89], **CA COA 57**.

134 Dr Duff's Report at [42] **CA COA 47**; [46] **CA COA 48**.

135 PAC Report at [17] **CA COA 17**.

what MPI should be imposed which is an ancillary order on the eventual sentence whether life or otherwise. It ought to be noted that life imprisonment itself is not contrary to human rights instruments. The European Court has confirmed that states may impose very long sentences on adult offenders for especially serious crimes. States "have a duty under the Convention to take measures for the protection of the public from violent crime", and "preventing a criminal from re-offending is one of the 'essential functions' of a prison sentence".[137]

Conclusion

83. The Court of Appeal correctly applied s 102 of the Sentencing Act. The appellant's sentence is appropriate and warrants no correction on appeal.

28 October 2022

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M Lillico/ E Hoskin
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The appellant.

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136 Sentence Indication at [21], **SC COA 20**.

137 *Vinter v United Kingdom* (2013) 3 ECHR 317 (Grand Chamber) at [108]: **BOA, Tab 7.** In *Vinter* the appellants were serving prison terms under "whole life orders": "… Contracting States must also remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see Kafkaris, cited above, § 97). This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case." At [106].