IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA393/2018
[2023] NZCA 2

BETWEEN	GEORGIA ROSE DICKEY Appellant
AND	THE KING Respondent

CA27/2019

BETWEEN	CHRISTOPHER JAMES BROWN Appellant
AND	THE KING Respondent

CA645/2020

BETWEEN	KATRINA ROMA EPIHA Appellant
AND	THE KING Respondent

Hearing:	26–27 July 2022
Court:	Miller, Collins and Simon France JJ
Counsel:	D J More and F C D More for Appellant in CA393/2018 F E Guy Kidd KC, L C Preston KC and K M Barker for Appellant in CA27/2019 H G de Groot and T J Conder for Appellant in CA645/2020 C A Brook, R K Thomson and T C Didsbury for Respondent in CA393/2018, CA27/2019 and CA645/2020
Judgment:	27 January 2023 at 10.00 am

JUDGMENT OF THE COURT

A **The applications for extensions of time are granted.**

B **The applications to adduce further evidence are granted.**

C **The appeals are allowed.**

D **In respect of *Dickey v R* CA393/2018, the sentence of life imprisonment and an MPI of 10 years is quashed and substituted with a sentence of 15 years' imprisonment and an MPI of seven and a half years.**

E **In respect of *Brown v R* CA27/2019, the sentence of life imprisonment and an MPI of 10 years is quashed and substituted with a sentence of 12 years' imprisonment and an MPI of six years.**

F **In respect of *Epiha v R* CA645/2020, the sentence of life imprisonment and an MPI of 10 years is quashed and substituted with a sentence of 13 years' imprisonment and an MPI of seven years.**

REASONS OF THE COURT

(Given by Collins J)

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Introduction

[1] The appellants were teenagers when they committed murder. They have been sentenced to life imprisonment and they are not eligible for parole until they complete a minimum period of imprisonment (MPI) of 10 years. The issue raised by each appeal is whether the sentences imposed are manifestly unjust.

[2] Section 102(1) of the Sentencing Act 2002 is pivotal. It contains a presumption in favour of life imprisonment for those convicted of murder:

> (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.

[3] Also central to the appeals is s 103 of the Sentencing Act, which requires a defendant sentenced to life imprisonment for murder be ordered to serve an MPI. Section 103(2) provides:

> (2) The minimum term of imprisonment ordered may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:
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> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
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> (b) denouncing the conduct in which the offender was involved:
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> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.

[4] Each appellant argues their circumstances, which include their age, social deprivation and psychological conditions, render their sentence manifestly unjust.

[5] The notices of appeal were filed out of time. Given the importance of the issues raised by the appeals, we grant extensions of time to file the notices of appeal.

[6] We have also received new evidence on appeal about the appellants' personal circumstances and about youth offenders and sentencing generally. The evidence is credible and cogent, and we grant leave for it to be adduced.

[7] We wish to state at the outset that this should not be taken as a guideline judgment. Counsel traversed sentencing policy for young offenders and supplied expert reports. A report was also filed by the Children's Commissioner. However, this judgment involves only three appeals, and we did not sit as a Full Court as we would usually do when setting sentencing guidelines. It is necessary to survey sentencing policy and practice to some extent, but we do not attempt to prescribe when it may be appropriate to find life imprisonment manifestly unjust for young people. Nor do we attempt to establish notional starting points for a determinate sentence when a young person is not sentenced to life imprisonment.

Two Murders: Three Appellants

The murder of Mr Jack McAllister[1]

[8] On 7 June 2017, Mr McAllister was stabbed to death after a group of young people had lured him to the ILT Stadium Southland (the Stadium). The events that led to Mr McAllister's death involved simmering disputes between Mr McAllister and members of the group who were responsible for his death.

[9] The principal offender was Mr Brayden Whiting-Roff, who was 20 years old and who pleaded guilty to having murdered Mr McAllister. Mr Whiting-Roff and Mr McAllister had been involved in a dispute about a month before Mr McAllister was killed. During the earlier dispute Mr Whiting-Roff threatened Mr McAllister with a knife. On 7 June 2017, Mr Whiting-Roff was told Mr McAllister had interfered with a child who was related to another offender, Mr Christopher Brown. There was in fact no evidence Mr McAllister committed any sexual offences against young children.

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[1] Mr McAllister is also known as Jade Fearn.

[10] Ms Georgia Dickey was the youngest member of the group who killed Mr McAllister. At the time she was 16 years old. Ms Dickey pleaded guilty to having been a party to Mr McAllister's murder. She believed Mr McAllister had committed a sexual offence against her in March 2017 when she was inebriated at Sandy Point Domain, which is located about seven kilometres from Invercargill.

[11] Mr Brown, who was 19 years old at the relevant time, was found guilty of having been a party to Mr McAllister's murder. As we have noted, on 7 June 2017, Mr Brown was led to believe Mr McAllister had sexually molested a young relative of Mr Brown. This rumour set in train the events that led to Mr McAllister's death.

[12] During the late afternoon of 7 June, Mr Brown posted a message on Facebook saying he wanted to find Mr McAllister. A number of derogatory comments were then posted on Facebook about Mr McAllister. Mr Whiting-Roff created a message about Mr McAllister in which he said, "Jack's a gonna".

[13] At about 8.00 pm Mr Brown, Ms Dickey and Ms Laura Scheepers, another member of the group, met and discussed carrying out an assault on Mr McAllister. Ms Scheepers, who at the time was 18 years old, would ultimately be found guilty of manslaughter in connection to the death of Mr McAllister.

[14] At about 10.00 pm Mr Whiting-Roff, Mr Brown and Ms Dickey met and discussed luring Mr McAllister to a place where he could be attacked. Mr Whiting-Roff showed those present a large hunting knife and said that he was going to kill Mr McAllister.

[15] Although she was not at the 10.00 pm meeting, Ms Scheepers was an integral part of the plan to lure Mr McAllister to the Stadium. She sent Mr McAllister a text message inviting him to meet her at the Stadium for a romantic encounter. Mr McAllister responded to Ms Scheepers' suggestion and went to the Stadium with his friend, Mr Braydon McKay.

[16] At about 11.00 pm a group comprising Mr Whiting-Roff, Mr Brown, Ms Dickey and three other young people (Ms Devon Sparrow, Mr David Wilson and

Ms Crystal Murray) arrived at the Stadium car park using a car owned by their friend Ms Natasha Ruffell. Ms Scheepers was at this stage sitting in the Stadium and sent a text message to the group telling them to enter the grounds. The group responded by splitting into two and entering the Stadium through separate entrances. Mr McKay alerted Mr McAllister that a group was advancing on him. Mr McAllister and Mr McKay attempted to run back to their vehicle. There they were confronted by Mr Whiting-Roff, Ms Dickey and Mr Brown. Mr Whiting-Roff produced the hunting knife and proceeded to stab and punch Mr McAllister.

[17] Mr McAllister attempted to escape. As he tried to run away, he was kicked by Mr Brown. Ms Dickey caught Mr McAllister and punched and restrained him. She also held Mr McAllister while Mr Whiting-Roff continued to stab the victim.

[18] Mr McAllister was stabbed 14 times. When the attack stopped Mr McKay managed to get Mr McAllister into their car and drive off.

[19] Mr McAllister was driven to a family member's home. He collapsed on the footpath outside the address to where he was taken. He was then transferred to hospital where he died from his wounds.

[20] Dunningham J sentenced Ms Dickey on 13 June 2018,[2] seven weeks before the trial of the co-defendants commenced in the High Court at Invercargill on 2 August 2018. Mr Whiting-Roff (who pleaded guilty just before trial), Mr Brown and Ms Scheepers were sentenced on 10 December 2018 following the trial of Mr Brown, Ms Scheepers, Ms Murray, Ms Ruffell and Mr Wilson.[3] The last three co-defendants were found not guilty. It is convenient to first briefly explain the sentence imposed on Mr Whiting-Roff.

Sentencing of Mr Whiting-Roff

[21] It was acknowledged on behalf of Mr Whiting-Roff that he should be sentenced to life imprisonment. The only issue was the term of the MPI. Dunningham J adopted a starting point of 15 and a half years for the MPI, saying this was appropriate because

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2 *R v Dickey* [2018] NZHC 1403 [*Dickey* sentencing notes].
3 *R v Whiting-Roff* [2018] NZHC 3239 [*Whiting-Roff*, *Brown* and *Scheepers* sentencing notes].

he was the principal offender who wielded the knife and inflicted the wounds that caused Mr McAllister's death.[4] A discount of two years was applied to reflect Mr Whiting-Roff's impaired mental functioning caused by him having Foetal Alcohol Spectrum Disorder (FASD).[5] The Judge was satisfied that FASD reduced Mr Whiting-Roff's "moral culpability" for the offending. Mr Whiting-Roff's guilty plea, shortly before trial, resulted in a further discount of 12 months' imprisonment.[6] This produced an end sentence of life imprisonment with an MPI of 12 years and six months.[7]

Sentencing of Ms Dickey

[22] Ms Dickey had no relevant previous convictions.

[23] The Judge assessed Ms Dickey's role in the death of Mr McAllister and concluded that a starting point of 15 years for the MPI was appropriate because Ms Dickey effectively engaged in a form of "vigilante justice" that involved a "planned and calculated response" to Mr McAllister's alleged sexual assault of Ms Dickey.[8]

[24] The Judge's focus on Ms Dickey's culpability concerned the way Ms Dickey held Mr McAllister while he was being stabbed by Mr Whiting-Roff. The Judge also noted that Ms Dickey "did say at one point, enough was enough and the attack stopped".[9]

[25] Dunningham J applied the following notional discounts to the MPI starting point of 15 years:

(a) Three years to reflect Ms Dickey's youth and her personal circumstances which were set out in a report from Dr Blackwell, a clinical psychologist. That report noted Ms Dickey had a significant

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4 At [30].
5 At [33].
6 At [34].
7 At [35].
8 *Dickey* sentencing notes, above n 2, at [38]–[39].
9 At [11]

history of drug and alcohol abuse and that she had a dysfunctional relationship with her family.[10]

(b) Two and a half years for Ms Dickey's willingness to assist the authorities and to be a witness for the Crown in the forthcoming trial of the other defendants. The Judge said Ms Dickey's assistance was "of real benefit to the Crown case".[11]

(c) One and a half years to reflect Ms Dickey's guilty plea that was entered well before trial.[12]

[26] Having reached a notional MPI of eight years, Dunningham J then assessed whether or not it would be manifestly unjust to impose the minimum 10-year MPI in s 103(2) of the Sentencing Act. The Judge said that assessment was "finely balanced". While acknowledging Ms Dickey had done a lot to make amends, the Judge did not consider Ms Dickey's circumstances met the high test of manifest injustice, particularly having regard to her culpability.[13]

[27] Accordingly, Dunningham J sentenced Ms Dickey to life imprisonment with an MPI of 10 years.[14]

Sentencing of Mr Brown

[28] Mr Brown had eight previous comparatively minor convictions for which he had received sentences of community work and he had also been disqualified from driving for six months.

[29] When sentencing Mr Brown, Dunningham J proceeded on the basis that he had formed a common intention with the other defendants to assault Mr McAllister knowing that death could ensue.[15] When examining Mr Brown's role in the murder

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10 At [44].
11 At [45].
12 At [45].
13 At [47].
14 At [48].
15 *Whiting-Roff*, *Brown* and *Scheepers* sentencing notes, above n 3, at [38].

of Mr McAllister, Dunningham J was satisfied he tried to "call Mr Whiting-Roff off towards the very end of the attack, as did Georgia Dickey, but by then … it was too late to undo what [Mr Brown] had been encouraging …".[16]

[30] The Court had before it reports about Mr Brown from Dr Eggleston, a clinical psychologist, and Dr Barry-Walsh, a forensic psychiatrist. The report from Dr Eggleston advised that Mr Brown had an IQ of 76, which placed him in the borderline range for intellectual disability. Dr Barry-Walsh explained Mr Brown had "profound" mental health issues. The information placed before Dunningham J also demonstrated Mr Brown had a disturbed upbringing. He had been placed in more than 50 foster homes and had been subject to sexual abuse before he turned six.

[31] Dunningham J considered whether the presumption of life imprisonment was displaced in Mr Brown's case. The Judge reasoned that:

> [51] … while [Mr Brown was] only involved peripherally in the physical attack, [he] played a significant part in organising all the parties to be present. [He was] also well aware that Mr Whiting-Roff had a hunting knife and [he] heard him say he was going to stab Mr McAllister and "take him out", and [the Judge considered Mr Brown] actively encouraged [Mr Whiting-Roff] in that course.

[32] The Judge said that Mr Brown's "cognitive impairments [were] not sufficient to justify … departing from the presumption in the Sentencing Act that a life sentence should be imposed".[17]

[33] Dunningham J acknowledged that the starting point for the MPI should not be the same level as that for Mr Whiting-Roff or Ms Dickey. Although Mr Brown had encouraged Mr Whiting-Roff, he had played only a limited role in the assault. The Judge considered a starting point of 13 years for the MPI would be appropriate. From that starting point the Judge deducted three years to reflect Mr Brown's youth, his remorse, his psychological difficulties and his cognitive impairment. This produced the sentence of life imprisonment with an MPI of 10 years.[18]

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16 At [40].
17 At [51].
18 At [52].

Sentencing of Ms Scheepers and Mr Sparrow

[34] For completeness, we note that Ms Scheepers, who was found guilty of manslaughter, was sentenced to 12 months' home detention.[19] Mr Sparrow pleaded guilty to being an accessory after the fact to murder. He was sentenced to nine months' supervision.[20]

The murder of Ms Alicia Nathan

[35] On the night of 5 August 2017, Ms Alicia Nathan went to a party at a home in Avonhead, Christchurch. Also at the party was Ms Katrina Epiha, who was aged 18. Ms Epiha was in a relationship with a former boyfriend of Ms Nathan.

[36] At about 11.45 pm Ms Nathan went upstairs where she and Ms Epiha became involved in an argument about the volume of the music that was being played. A few minutes later Ms Nathan went downstairs. She was followed by Ms Epiha, who continued to argue with Ms Nathan.

[37] Ms Epiha went into the kitchen where she grabbed a large knife and entered the lounge where Ms Nathan was standing. Ms Epiha attempted to conceal the knife behind her arm. Some people in the house, however, saw that Ms Epiha had the knife and told her to put it down. She ignored those pleas and lunged at Ms Nathan with the knife, stabbing her in the neck with sufficient force that the knife blade penetrated Ms Nathan's chest cavity. Ms Nathan collapsed to the couch. Ms Epiha told others around her that Ms Nathan would be alright. Unfortunately, however, Ms Nathan died at the scene.

[38] Ms Epiha was disarmed. She went outside and when doing so saw Ms Noema Paul, a friend of Ms Nathan, running away. Ms Epiha pursued Ms Paul and chased her around a car whilst threatening to kill her.

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19 At [72].
20 *R v Sparrow* [2018] NZHC 2987 at [21].

Sentencing of Ms Epiha

[39] Ms Epiha pleaded guilty to having murdered Ms Nathan and of having threatened to kill Ms Paul. She was sentenced by Nation J on 16 May 2019.[21] That sentence followed two sentence indications in which the Crown submitted an MPI starting point of 11 years was appropriate. The Crown accepted Ms Epiha had not intended to murder Ms Nathan but that she was guilty of murder because she meant to cause bodily injury to Ms Nathan and was reckless as to whether or not death ensued.[22] Nation J, however, adopted a starting point of 12 years for the MPI.[23]

[40] Ms Epiha had 10 comparatively minor previous convictions, mainly for dishonesty offences. The maximum sentence she had received was a period of supervision.

[41] From the MPI starting point of 12 years the Judge applied a discount of two years to reflect Ms Epiha's guilty plea and her personal circumstances that were canvassed in a psychological report prepared by Dr Monasterio.[24] The psychologist's report explained Ms Epiha had been born into a gang environment and that she had started using drugs and alcohol when she was six. By the time Ms Epiha was seven years old she was in the care of what is now Oranga Tamariki.[25]

[42] The deductions made from the initial starting point of 12 years for the MPI resulted in an end sentence of life imprisonment with an MPI of 10 years.[26]

Further information about the appellants

[43] The following additional information about each of the appellants has been sourced from reports that were available at the time of sentencing and further reports prepared for our consideration.

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21 *R v Epiha* [2019] NZHC 1075 [*Epiha* sentencing notes].
22 Crimes Act 1961, s 167(b).
23 *Epiha* sentencing notes, above n 21, at [27]
24 At [27].
25 At [17].
26 At [30].

Ms Dickey

[44] As we have noted, Dr Blackwell prepared a report about Ms Dickey before she was sentenced for the murder of Mr McAllister. Dr Blackwell provided us with a second report after Ms Dickey filed her notice of appeal.

[45] Ms Dickey's parents separated when she was approximately eight years old. Thereafter she lived with her mother until she was about 14 years old. Ms Dickey reported to her social worker that her mother had abused alcohol throughout Ms Dickey's childhood and that she was often exposed to domestic and gang violence. Ms Dickey's mother denies having offended against Ms Dickey other than smacking her. When Ms Dickey was interviewed by Dr Blackwell after her conviction, she insisted that her mother had abused her during her childhood, including by assaulting her.

[46] When she was about 14, Ms Dickey moved to her father's home. This arrangement lasted only about one year. Thereafter Ms Dickey became homeless. This in turn led to her abuse of drugs and alcohol. Ms Dickey left school without having attained any qualifications.

[47] Dr Blackwell suggested Ms Dickey's "background of insecure attachment", unstable living and school arrangements, and "her reported exposure to domestic violence, her reported history as a victim of family violence and her drug and alcohol abuse were collectively instrumental in her forming relationships with an antisocial group of older persons and conforming to their values".

[48] When speaking about the incident at Sandy Point Domain, Ms Dickey told Dr Blackwell that Mr McAllister had indecently assaulted her in the presence of others when she was intoxicated. Initially, Ms Dickey said she "didn't think much of it". However, two days before his death Mr McAllister visited Ms Dickey in her room in a boarding establishment where she and Mr McAllister were staying. This triggered Ms Dickey's feelings of fear and apprehension.

[49] As we have previously noted, Ms Dickey pleaded guilty to having been a party to Mr McAllister's murder. She did so after making admissions to the police the day

after Mr McAllister was murdered. Ms Dickey's co-operation led to the police charging an additional co-defendant with being involved in the death of Mr McAllister. The Crown acknowledges that without Ms Dickey's co-operation that co-defendant would not have been charged.

[50] Ms Dickey has focused on her rehabilitation since being imprisoned. Reports of her efforts are very encouraging. At the time of Dr Blackwell's second report, Ms Dickey was completing all three levels of NCEA and was hoping to pursue tertiary studies.

[51] Initially, Ms Dickey displayed little remorse for her role in Mr McAllister's death. That has, however, changed significantly. Ms Dickey fully comprehends and regrets the awfulness of her crime. An indication of Ms Dickey's remorse can be gleaned from the fact that without the knowledge of her lawyers, she withdrew her notice of appeal. She did so because she blamed herself for Mr McAllister's death and for Mr Brown's involvement. This Court subsequently granted an application by Ms Dickey to withdraw the notice of abandonment of her appeal against sentence.[27] That application was granted because of the importance of the issues raised by Ms Dickey's appeal.[28]

Mr Brown

[52] Mr Brown has a history of neglect and abandonment as a child.

[53] A report from Dr Barry-Walsh prepared before Mr Brown stood trial explained Mr Brown was first placed in foster care when he was three years old. His birth mother and at least one sibling were thought to have serious mental health issues.

[54] Between the ages of three and six, Mr Brown was placed in as many as 57 foster homes before he was finally put into a home that provided him with much needed stability.

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27 *Dickey v R* [2021] NZCA 600.
28 At [9].

[55] Notwithstanding the relatively stable living environment provided by his principal foster parents, Mr Brown did not do well at school. He was expelled from a primary school at the age of eight and was suspended several times at another primary school for anger issues. He was then expelled from high school for aggression at a time when he had failed to gain any qualifications. Mr Brown attended a farming course and thereafter gained employment on a rural property. That position ended after six months when Mr Brown became involved in a fight with his employer.

[56] Mr Brown abused alcohol and drugs, particularly methamphetamine, from about the time he turned 16.

[57] The first record of Mr Brown being seen by mental health services dates back to 2004 when he was six years old. He was referred to the Child and Adolescent Mental Health Services because of his aggressive and self-destructive behaviour. There were also concerns about him displaying inappropriate sexual traits. Mr Brown was referred again to mental health assessments on further occasions during his childhood.

[58] In 2016, when he was 18 years old, Mr Brown was seen by psychiatric services after he threatened to cut his own throat and stab himself. Further incidents of self-harm occurred later in 2016 when he cut his wrists. A few weeks later, he attempted to drink deodorant and lighter fluid.

[59] Dr Barry-Walsh said Mr Brown suffered "profound problems with his mental health" and that there was a continuity between his offending and the disturbed behaviour he first displayed as a child, which was likely caused by neglect and potential abuse and significant disruption with multiple carers. This pattern led on to Mr Brown's aggressive and suicidal behaviour when he became an adolescent.

[60] Following Mr Brown's conviction, Dr Barry-Walsh prepared a further report, in which he suggested that:

> … aspects of [Mr Brown's] personality functioning such as impairment in mood regulation, anger, impulsivity and unstable social relationships [were] potentially relevant factors [which] contribut[ed] to his offending.

> Mr Brown's history of recurrent suicidal crises … highlights his potential vulnerability.

[61] The neuropsychology assessment of Mr Brown that was conducted by Dr Eggleston led to the assessment Mr Brown had an overall IQ of 76, which places him in the lowest five per cent of the population. Dr Eggleston's assessment recorded that Mr Brown has "relative weakness in reasoning … learning difficulties with mathematics and reading".

[62] Dr Lambie, a clinical psychologist, assessed Mr Brown in December 2019 and prepared a report in February 2020. Dr Lambie said that after spending more than a year in prison, Mr Brown had been exposed to "antisocial peers". This exposure, said Dr Lambie, "has been harmful":

> … [Mr Brown] is fearful and hypervigilant, with good reason, both from his long-term history of chronically unsafe living circumstances and because he has already been bullied and picked on in the prison in which he is currently living. His already minimal relationships with family and foster parents are being further compromised. It was clear that he did not understand how long or serious his sentence was, and lacked the emotional maturity to comprehend this. He did not understand that he is ineligible for a rehabilitation programme, despite being keen to do one (the earliest will be in 8 years when parole-eligible). His already poor mental health, particularly his PTSD, are likely to worsen over years of incarceration in a largely hostile environment.

Ms Epiha

[63] Ms Epiha was assessed by Dr Monasterio before she pleaded guilty to having murdered Ms Nathan.

[64] Dr Monasterio said in his report Ms Epiha's parents "had a markedly dysfunctional and violent relationship". Ms Epiha's father was the president of a chapter of the Mongrel Mob and her mother was a drug addict.

[65] Dr Monasterio said:

> 2 All sources of information indicate that [Ms Epiha] had an unstable, chaotic and traumatic childhood and developmental history, at the very severe end of the spectrum. [Ms Epiha] reports that at no stage did she feel wanted or cared for. She describes an absence of boundaries for her behaviour from her earliest memory. Extensive and repeated violence and neglect are documented in psychological reports. [Ms Epiha] reports that she was frequently subjected to

> violence from her father, including being kicked to the face with loss of teeth, beaten with wooden instruments and having household items smashed over her head. She reports witnessing her father shooting her mother when she was five years old. She was allegedly raped by a partner of her mother at the age of seven.
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> 3 [Ms Epiha] reports that she was taken into CYFS [now Oranga Tamariki] care by the age of seven. She reports that she had constant changes of carers, including from family members and Government agencies from the age of five. She is recorded to have been frequently and seriously assaulted by an older sister between the ages of five and seven. …
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> 4 [Ms Epiha] describes markedly precocious abuse of alcohol and drugs from the age of six … in home environments where drug and alcohol use and significant violence in response to minor provocation or frustration was seemingly the norm.
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> 5 [Ms Epiha] describes disruptive behaviours from her earliest stage at school, progressing to rebelliousness, frequent fights with other children and multiple changes of schools. She reportedly left school at the age of 13 without any qualifications.

[66] Dr Monasterio also relied on a psychological report prepared by Dr Dean about Ms Epiha when she was 13 years old. We were provided with this report, which recorded that Ms Epiha had a well-established history of physical, psychological and sexual trauma and neglect which had commenced from early childhood. The psychological report noted Ms Epiha had a pattern of violent responses to minor provocation and that she had been the subject of multiple assault incidents from other adolescents.

[67] In Dr Monasterio's report, Ms Epiha described a pattern of impulsive, violent and unstable intimate relationships characterised by substance abuse and domestic violence. She experienced a traumatic relationship when she was 16 years old with a violent gang member who was 24 years older than her and who raped her on several occasions and perpetrated acts of severe violence upon her, including with weapons. She described an attack with a machete which required reconstructive surgery for severed tendons and extensive hand lacerations.

[68] In the months leading up to the murder of Ms Nathan, Ms Epiha moved to Christchurch where she had a brief period of employment in a fish company. Ms Epiha was arrested in relation to a police chase and released on remand in July 2017, shortly before the events that led to the death of Ms Nathan.

[69] Several weeks before Ms Nathan's death, Ms Epiha formed a relationship with a man. She moved into his flat. It was at this address that Ms Nathan was murdered. A subsequent report prepared by Ms Turner under s 27 of the Sentencing Act indicates that Ms Epiha's relationship with the man in question was possibly the first non-violent relationship in her life.

[70] Ms Epiha told Dr Monasterio that she did not know Ms Nathan had been in a relationship with Ms Epiha's boyfriend when Ms Nathan and her friend, Ms Paul, arrived at the party. Ms Epiha said that upon arriving at the party, Ms Nathan behaved aggressively towards Ms Epiha and made insulting comments. Ms Epiha reported that she and Ms Nathan argued in the living room area and that she acknowledged feeling extremely angry and disrespected by Ms Nathan. She claims that Ms Nathan followed her up the stairs of the property where she was staying with her boyfriend and aggressively pushed open the door. According to Ms Epiha, Ms Nathan then made offensive comments that were directed towards Ms Epiha.

[71] Ms Epiha reported that by this stage she was "very angry" and that she then has no recall of what took place.

[72] Dr Lokesh, a consultant forensic psychiatrist, prepared a report about Ms Epiha on the instructions of Mr de Groot, counsel for Ms Epiha in this Court.

[73] Dr Lokesh also confirmed Ms Epiha was the victim of significant sexual, emotional and physical abuse for most of her teenage years. She started using alcohol and drugs to release her emotions from the age of seven and this gradually escalated to cannabis and then methamphetamine abuse.

[74] Dr Lokesh explained that Ms Epiha displayed significant insecurities, including insecure attachments, and maladaptive mechanisms around emotional inhibition that could be attributed to her extremely dysfunctional background and an absence of positive role models in her life. Her ongoing rejection and abandonment, the significant abuse by her partners and her impaired developmental growth in a gang environment all fuelled and rekindled her traumatic experiences.

[75] As mentioned, we also received a comprehensive report completed pursuant to s 27 of the Sentencing Act by Ms Turner. That report substantially confirmed that:

> … [Ms Epiha] was born into brokenness. Her mother was an addict and her father in and out of prison. She was raised mostly by her maternal grandfather, but ended up in the State Care system from a young age. Although the only child born to her parents, [Ms Epiha] named 12 other siblings through her parents' various relationships with other men and women that gives rise to complex whānau dynamics.
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> … [Ms Epiha] was born into a Mongrel Mob whānau and is third generation. Her father is a life member of the Mongrel Mob. Her late maternal grandfather was the President of the Mongrel Mob Notorious. Her mother had two other partners who were patch[ed] members of the Mongrel Mob Aotearoa and Mongrel Mob New Zealand, and had children with them. [Ms Epiha] has two brothers who are members of the Mongrel Mob.
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> … [Ms Epiha's] first experience of sexual harm happened in the home by a family member … She was five years old at the time and believes she was raped.[29] Her perpetrator was a member of the Mongrel Mob at the time.
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> … [Ms Epiha] spoke of violence being the norm in State run facilities [where she was placed at the age of five]. She also spoke of being exposed to sexual harm as a young child, while in the care of the State.
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> … [Ms Epiha] grew up exposed to and experiencing family violence. Her own father was a significant perpetrator of violence on her and from a very young age. He continues to be extremely abusive towards her. …
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> … [Ms Epiha's] relationships with men were marred with extreme violence inflicted on her. Partner infidelity was central to relationship dysfunction that she experienced. The exception was her last relationship, with … the former partner of the victim of [Ms Epiha's] offending.

Characteristics of Young Offenders

[76] We will now turn to the question of neurological differences between young people and adults. We note that young persons aged 14 to 18 are generally described as adolescents. Persons aged 18 to 25 are often referred to as emerging or young adults. For convenience we will refer to both groups as young people.

[77] Dr Lambie provided two reports for our consideration. His reports were accepted by the Crown as authoritative. As we shall explain, much of the evidence

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[29] Dr Monasterio's report says Ms Epiha was seven years old when raped by a partner of her mother.

provided by Dr Lambie was before this Court when it decided *Churchward v R*.[30] In his reports, Dr Lambie explained:

(a) "Research from developmental and neuropsychology overwhelmingly concludes that adolescents and emerging adults … are different to adults".[31]

(b) "Young people have less self-control and are more impulsive than adults". As a consequence, young people are "less able to consider the impact of their behaviour and consider alternative courses of action".[32]

(c) "Even when young people's cognitive ability is similar to that of adults, they are less able to make the same mature decisions [as adults], and are more likely to engage in risky behaviour arising from that immaturity".[33]

(d) "Young people are more vulnerable to the influence of their peers, and lack the sense of autonomy that adults use to escape from these pressures". Young people "are particularly susceptible to peer influence and impulsivity when provoked or in stressful situations".[34]

[78] Dr Lambie also explained that neurological research establishes "that those areas of the brain related to higher-order executive functioning (such as impulse

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30 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

31 Citing amongst other papers, Elizabeth S Scott, Richard J Bonnie and Laurence Steinberg "Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy" (2016) 85 Fordham L Rev 641.

32 Citing Alexandra Cohen and others "When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts" (2016) 27 Psychological Science 549; and Laurence Steinberg "A behavioral scientist looks at the science of adolescent brain development" (2010) 72 Brain Cogn 160.

33 Citing Steinberg, above n 32.

34 Citing Ian Lambie and Isabel Randell "The impact of incarceration on juvenile offenders" (2013) 33 Clin Psychol Rev 448; and Elizabeth P Shulman, Kathryn C Monahan and Laurence Steinberg "Severe Violence During Adolescence and Early Adulthood and Its Relation to Anticipated Rewards and Costs" (2017) 88 Child Dev 16.

control, risk assessment and planning ability) are not fully developed until around the age of 25 years".[35]

[79] Dr Lambie cited research that confirms wide acknowledgment of the brain's biological "dual system". This bifurcation involves, on one hand, risky behaviour that increases from childhood and peaks in mid to late adolescence combined with, on the other hand, the slow development of self-regulation from adolescence through to adulthood.[36]

[80] In addition to their susceptibility to engaging in serious criminal offending, young people are more amenable to rehabilitation than adults. "[T]heir offending behaviour is less likely to be entrenched … and they are very likely to desist from offending as adults, especially with appropriate intervention".[37]

[81] Dr Lambie was asked to address a number of specific questions posed by Ms Guy Kidd KC, senior counsel for Mr Brown. Two of the questions Ms Guy Kidd asked Dr Lambie were:

(a) What impact do sentences of life imprisonment have on young people?

(b) How do factors such as diminished IQ, deprived social background and early experiences of sexual abuse impact on a young person who is sentenced to life imprisonment?

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35 Citing Elizabeth Cauffman and Laurence Steinberg "Emerging Findings from Research on Adolescent Development and Juvenile Justice" (2012) 7 Vict Offenders 428; and Laurence Steinberg "A social neuroscience perspective on adolescent risk-taking" (2008) 28 Dev Rev 78.

36 Citing Laurence Steinberg and others "Around the world, adolescence is a time of heightened sensation seeking and immature self-regulation" (2018) 21(2) Dev Sci; Gary Sweeten, Alex R Piquero and Laurence Steinberg "Age and the Explanation of Crime, Revisited" (2013) 42 J Youth Adolesc 921; and Laurence Steinberg "Adolescent brain science and juvenile justice policymaking" (2017) 23 Psychol Public Policy Law 410.

37 Terrie E Moffitt "Male antisocial behaviour in adolescence and beyond" (2018) 2 Nat Hum Behav 177.

[82] Dr Lambie's answers to these questions apply, in varying degrees, to all the appellants in this case. Dr Lambie explained:

> … the existing research shows that the longer a young person is incarcerated, the worse their psychological wellbeing is, the higher the risks of recidivism are and the less likely it is that they will ever achieve a productive adult future.

[83] In answering the second question, Dr Lambie explained:

> Young people with histories of disrupted early attachment and abuse are overrepresented in offender populations and also have high rates of mental health, social and behavioural problems that make incarceration particularly harmful. In addition, those with low/borderline IQ are at risk of peer-led antisocial behaviour, that contributes both to their offending and, once in prison, to their ongoing inability to comprehend consequences or effectively learn from their behaviour (or rehabilitation programmes). Also, they are at high risk of being targeted and bullied when incarcerated, being more vulnerable individuals who may struggle to protect themselves effectively, follow the rules or learn systems.

[84] As we remarked at [77], this Court previously reviewed the research on adolescent brain development in *Churchward v R*.[38] *Churchward* was also a sentence appeal by a young person convicted of murder, although it was not a case about s 102 of the Sentencing Act. The Court used the research on adolescent brain development when deciding that a young person should not be sentenced to an MPI of 17 years under s 104 of the Act, and s 102 was only briefly mentioned without reference to the research.[39]

[85] In *Churchward*, this Court accepted that there are significant neurological differences between young people and adults. The Court recognised that the abilities to plan, consider, control impulses and make wise judgments are the last parts of the brain to develop, and that young people's brains are built to take more risks. The Court also recognised that young people are more susceptible to negative influences, and that the social context in which they act could lead to inappropriate behaviour. The Court accepted that long sentences can have a particularly crushing effect on young people, but on the other hand, young people also have greater capacity for rehabilitation as their character has not yet fully formed.[40]

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38 *Churchward v R*, above n 30.
39 At [64]. We consider s 104 of the Sentencing Act 2002 and *Churchward* in further detail below.
40 At [50]–[55] and [77]–[91].

[86] It will be apparent from what was said in *Churchward* that much of the information supplied by Dr Lambie is not new.[41] The Crown acknowledged, however, that further research since *Churchward* has confirmed:

(a) Adolescent behaviour reflects the slow pace of the development of those parts of the brain that control higher-order executive functioning, such as impulse control, risk assessment and planning ability. Young people behave and react differently from adults due to biological rather than behavioural or personality factors. As Ms Brook for the Crown said, "[a]ll young people suffer from these cognitive deficits; and all will eventually develop fully to overcome them (assuming no cognitive impairment exists)".

(b) Neurological development may not be complete until the age of 25.

(c) Young persons who commit serious offences frequently exhibit other characteristics which also tend to mitigate culpability, notably intellectual deficits, mental illness and experiences of abuse or other childhood trauma.

(d) Young people are more receptive to treatment and therefore have better prospects of rehabilitation than adult offenders, who find it more difficult to alter entrenched behaviours.

[87] We will consider whether the research on adolescent brain development justifies greater weight being given to youth in murder sentencing when we discuss the assessment of manifest injustice later in this judgment. We will first review the sentencing of murder in New Zealand in more detail.

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[41] We observe that many of the papers cited in Dr Lambie's reports predate *Churchward*, which was decided in 2011.

Murder Sentencing in New Zealand

Historical Context

[88] In 1961, New Zealand abolished the death penalty for those convicted of murder. Prior to then, the ultimate decision as to whether or not a prisoner convicted of murder would be executed rested with the Executive Council. Those not sentenced to death were required to serve life imprisonment with an MPI set out in the Criminal Justice Act 1954. Decisions on granting parole to those who served an MPI also rested with the Governor-General in Council, or from 1960 onwards, the Governor-General acting on the recommendation of the Minister of Justice.[42]

[89] The length of an MPI that had to be served by those sentenced to life imprisonment for murder was amended on several occasions during the decades leading up to the passing of the Sentencing Act:

Table 1: Life Imprisonment and Duration of Non–Parole Periods

Act	Non-Parole Period
Criminal Justice Act 1954	5 years
Criminal Justice Amendment Act 1962	10 years
Criminal Justice Amendment Act 1975	7 years
Criminal Justice Act 1985	7 years
Criminal Justice Amendment Act (No 3) 1987	10 years

[90] Arguably the most notorious trial involving the conviction of adolescents for murder prior to 1961 involved Ms Parker and Ms Hulme. Ms Parker and Ms Hulme were sentenced on 28 August 1954 in the Supreme Court at Christchurch after having been convicted of murdering Ms Parker's mother. Ms Parker was 16 years old at the time, and her co-offender, Ms Hulme, was 15 years old. As both were under 18, the minimum age for execution, the sentence imposed was "detention during Her Majesty's pleasure". Ms Parker and Ms Hulme were detained for five years before

[42] See Criminal Justice Act 1954, s 34(2), which was amended on 27 October 1960 by the Criminal Justice Amendment Act 1960, s 9.

being released. Ms Hulme's release was unconditional, whereas Ms Parker was required to serve six months on parole before her release was also made unconditional.

Sentencing Act 2002

[91] The Sentencing Act evolved out of the Sentencing and Parole Reform Bill 2001, which was the Government's response to overwhelming public support for a referendum conducted in conjunction with the 1999 general election.[43] The referendum asked:

> Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?

[92] The explanatory note that accompanied the Bill said the following about the Government's intentions to change sentencing for murder:[44]

> Life imprisonment will be the maximum (rather than the mandatory) penalty for murder with a strong presumption in favour of its imposition in nearly every case. Finite sentences will be able to be imposed where there are particular circumstances that would make the sentence of life imprisonment manifestly unjust. The standard minimum non-parole period will remain at 10 years but there will be a standard non-parole period of 17 years as a starting point for the worst crimes of murder where one or more specified aggravating factors are present.

[93] The Sentencing Act put in place three tiers for the sentencing of those convicted of murder. We outline the framework here and return to the treatment of manifest injustice under these provisions at [144].

(a) Section 102 of the Sentencing Act

[94] As we have noted at [2], s 102 of the Sentencing Act mandates life imprisonment for murder unless such a sentence would be manifestly unjust.

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43 Sentencing and Parole Reform Bill 2001 (148-1).

44 Sentencing and Parole Reform Bill (explanatory note) at 3.

(b) Section 103(2) of the Sentencing Act

[95] We have set out s 103(2) at [3]. As we have previously explained, that section requires the court to impose a 10-year minimum MPI for those sentenced to life imprisonment for murder.

[96] Under the original s 103 of the Sentencing Act, the court was not required to impose an MPI. However, if the court did not impose an MPI, then a default MPI of 10 years would apply. This was significant, because s 25 of the Parole Act 2002 allowed early parole for offenders who were subject to a default MPI, but it did not allow early parole for offenders who were subject to a court-imposed MPI. In 2004, s 103 was amended so that the court was required to impose a 10-year minimum MPI.[45] As a result of this change, offenders sentenced to life imprisonment are now never eligible for early parole, and the imposition of an MPI for those convicted of murder has become inextricably linked to the presumption of life imprisonment for murder.

[97] Section 103(2) also establishes criteria under which the court may impose a longer MPI, extending to life without parole. The MPI must be sufficient to satisfy one or more of the factors listed in s 103(2)(a)–(d), namely, holding the offender accountable, denouncing the offender's conduct, deterring the commission of the same or similar offences and protecting the community from the offender.

[98] Under s 103(2A) a court may sentence an offender to life imprisonment without parole in circumstances where:

(i) the offender was 18 years of age or older at the time they committed the murder;[46] and

(ii) the court is satisfied no MPI would be sufficient to satisfy one or more of the factors listed in s 103(2)(a)–(b).

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45 Sentencing Amendment Act 2004, s 12.
46 Sentencing Act, s 103(2B).

Only one offender has been sentenced to life without parole under the Sentencing Act,[47] and no young person in New Zealand has ever received this sentence. It is worth noting, however, having regard to the argument before us about the characteristics of 18–25-year-olds, that the legislation technically envisages that someone who was 18–25 at the time of the murder may be sentenced to life without parole for a murder that sufficiently engages the purposes of accountability, denunciation, deterrence and community protection.

(c) Section 104 of the Sentencing Act

[99] Section 104(1) of the Sentencing Act requires a court to order an MPI of not less than 17 years in certain circumstances unless it would be "manifestly unjust to do so". The section lists characteristics of murders that attract an MPI of 17 years. Generally, those characteristics comprise aggravating features of the offending or characteristics of the victim. They are:

> (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
>
> (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
>
> (c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or
>
> (d) if the murder was committed in the course of another serious offence; or
>
> (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
>
> (ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or
>
> (f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or
>
> (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or
>
> (h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or

[47] *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15, which involved the murder of 51 people and the attempted murder of 49 people in a terrorist attack.

(i) in any other exceptional circumstances.

[100] Section 104 has affected the approach taken to MPIs in murder cases generally, resulting in a distribution of sentences between 10 and 17 years in cases which exhibit aggravating features such as brutality, cruelty or callousness but not to a sufficient degree to engage s 104.

Section 86E of the Sentencing Act

[101] Section 86E of the Sentencing Act was enacted as part of the suite of measures associated with the "three strikes sentencing regime". Section 86E was repealed, alongside the rest of that regime, with effect from 16 August 2022,[48] and it is unlikely that anyone who was a young person when they committed murder would qualify as a second or third strike offender. We mention s 86E because it helps to explain the approach taken to manifest injustice, which we address below.

[102] Under s 86E, an offender who was convicted of murder as a second or third strike offence had to be sentenced to life imprisonment, and had to serve their sentence without parole unless such a sentence would be manifestly unjust.[49] Where the murder was a third strike offence, the court was required to impose an MPI of not less than 20 years unless it would be manifestly unjust. If it would be manifestly unjust, then the court was required to impose an MPI of 10 years. Where the murder was a second strike offence, the court was also required to impose an MPI of 10 years.[50]

The register of sentencing purposes, principles and other factors

[103] When assessing manifest injustice generally, the court must have regard to the full register of sentencing purposes, principles and factors in the Sentencing Act, in particular, ss 7, 8 and 9.[51] We now set out the relevant provisions.

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48 See the Three Strikes Legislation Repeal Act 2022.
49 Sentencing Act, s 86E(1)–(2).
50 Section 86E(4).
51 *R v Rapira* [2003] 3 NZLR 794 (CA) at [121].

Section 7 of the Sentencing Act

[104] Section 7(1) of the Sentencing Act explains the purposes of sentencing an offender:

> (1) The purposes for which a court may sentence or otherwise deal with an offender are—
>
> (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
>
> (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
>
> (c) to provide for the interests of the victim of the offence; or
>
> (d) to provide reparation for harm done by the offending; or
>
> (e) to denounce the conduct in which the offender was involved; or
>
> (f) to deter the offender or other persons from committing the same or a similar offence; or
>
> (g) to protect the community from the offender; or
>
> (h) to assist in the offender's rehabilitation and reintegration; or
>
> (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

Section 8 of the Sentencing Act

[105] The principles of sentencing are explained in s 8 of the Sentencing Act:

> In sentencing or otherwise dealing with an offender the court—
>
> (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
>
> (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
>
> (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
>
> (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that

penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and

(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and

(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and

(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

(i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and

(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

Section 9 of the Sentencing Act

[106] Section 9 of the Sentencing Act sets out both aggravating and mitigating factors the court must take into account when sentencing an offender. The relevant aggravating factors in s 9(1) are:

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

…

(i) premeditation on the part of the offender and, if so, the level of premeditation involved:

(j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time;

…

[107] The relevant mitigating factors listed in s 9(2) of the Sentencing Act are:

> (2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:
>
> (a) the age of the offender:
>
> (b) whether and when the offender pleaded guilty:
>
> (c) the conduct of the victim:
>
> (d) that there was a limited involvement in the offence on the offender's part:
>
> (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
>
> (f) any remorse shown by the offender, or anything as described in section 10:
>
> …
>
> (g) any evidence of the offender's previous good character;
>
> …

Section 86 of the Sentencing Act

[108] Section 86 of the Sentencing Act covers the imposition of an MPI in relation to determinate sentences of imprisonment. An offender sentenced to a determinate sentence of more than two years' imprisonment may be subjected to an MPI to achieve the same purposes as those set out in s 103(2) of the Sentencing Act, namely, to hold the offender accountable, denounce the offender's conduct, deter the commission of the same or similar offending and to protect the community from the offender.

[109] An MPI imposed under s 86 of the Sentencing Act must not exceed the lesser of:[52]

> (a) two-thirds of the full term of the sentence; or
>
> (b) 10 years.

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[52] Sentencing Act, s 86(4).

[110] The provisions of the Sentencing Act may, in the context of sentencing a young person for murder, also engage the following provisions of the New Zealand Bill of Rights Act 1990 (the NZBORA):

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.
>
> …
>
> **25 Minimum standards of criminal procedure**
>
> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> …
>
> (i) the right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

[111] In *Taunoa v Attorney-General*[53] and in *Fitzgerald v R*,[54] the Supreme Court explained s 9 of the NZBORA imposes a high threshold. A defendant whose sentence offends s 9 of the NZBORA will invariably pass the manifest injustice test in ss 102–104 and 86E of the Sentencing Act. Conversely, a sentence that is manifestly unjust will not necessarily be cruel, degrading or disproportionately severe within the meaning of s 9 of the NZBORA. It cannot be said that a life sentence for young persons will always breach s 9 notwithstanding the statutory exception in cases of manifest injustice. As will become apparent, we need not decide whether the life sentences in the cases before us might breach s 9, and we accordingly refrain from doing so.

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53 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 492 at [79] and [91] per Elias CJ, [174]–[176] per Blanchard J, [288]–[289] per Tipping J, [339] per McGrath J and [382]–[383] per Henry J (expressing agreement with Tipping J).

54 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [79] per Winkelmann CJ, [161] per O'Regan and Arnold JJ and [240] per Glazebrook J.

International instruments

[112] It is well-established that courts will, where possible, interpret domestic legal provisions in a way that is consistent with New Zealand's international obligations under international instruments to which New Zealand is a party.[55]

[113] The United Nations Convention on the Rights of the Child (Children's Convention) is relevant to the questions before us.[56] Article 3(1) says:

> **Article 3**
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[114] The "best interests" principle has been incorporated into a number of New Zealand statutes.[57] Despite this, the Children's Commissioner suggested that this principle has "effectively been dismissed in contexts where children and young people charged with serious offences such as murder are brought to trial in an adult court".

[115] Articles 37 and 40(1) of the Children's Convention say:[58]

> **Article 37**
>
> States Parties shall ensure that:
>
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used *only as a measure of last resort and for the shortest appropriate period of time*;

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55 At [63] and [116] per Winkelmann CJ, citing *Ortmann v United States of America* [2020] NZSC 120, [2020] 1 NZLR 475 at [96].

56 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

57 See for example Care of Children Act 2004; Oranga Tamariki Act 1989; Adoption (Intercountry) Act 1997; Children's Commissioner Act 2003; Corrections Act 2004; and Family Court Act 1980.

58 Emphasis added.

> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and *in a manner which takes into account the needs of persons of his or her age*. …
>
> …
>
> **Article 40**
>
> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which *takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

[116] The Children's Commissioner considered that sentencing a child or young person to life imprisonment is inconsistent with the obligation to impose prison sentences as a last resort and for the shortest appropriate period of time, and to promote the child or young person's reintegration.

[117] While the Children's Convention expressly applies to children under 18,[59] the United Nations Committee on the Rights of the Child, a committee established to provide guidance on the application of the Children's Convention, has endorsed its application to young adults, saying:[60]

> The Committee commends States parties that allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This approach is in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties.

[118] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines on the

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59 Convention on the Rights of the Child, art 1.

60 United Nations Committee on the Rights of the Child *General comment No 24 (2019): on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at [32].

Prevention of Juvenile Delinquency (the Riyadh Guidelines) are also relevant.[61] Rule 17.1 of the Beijing Rules says:

> **17. Guiding principles in adjudication and disposition**
>
> 17.1 The disposition of the competent authority shall be guided by the following principles:
>
> (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
>
> (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
>
> …

[119] While the Beijing Rules are addressed at "juvenile offenders", r 3.3 says that "[e]fforts shall also be made to extend the principles embodied in the Rules to young adult offenders".

[120] Guideline 46 of the Riyadh Guidelines says:

> 46. The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance. …

[121] We were also referred to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, the United Nations Convention on the Rights of Persons with Disabilities and the United Nations Declaration on the Rights of Indigenous Peoples.[62]

[122] In *R v Rapira*, this Court also referred to the Children's Convention when considering an appeal against a sentence of life imprisonment by youth offenders convicted of murder. This Court explained that sentencing a young person to life imprisonment is not inconsistent with the Children's Convention, because the offender

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61 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* GA Res 40/33 (1985); and *United Nations Guidelines on the Prevention of Juvenile Delinquency* GA Res 45/112 (1990).

62 *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* GA Res 45/113 (1990); United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008); and *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

is eligible for parole at 10 years and, at the time *Rapira* was decided, could also apply for early parole.[63] The Court recognised that the Children's Convention does not prohibit the imposition of life imprisonment with parole, and as Ms Brook submitted, sentencing young people to life with parole is not uncommon in comparable jurisdictions who have signed the Convention.

[123] In conclusion, the international instruments do not prohibit life imprisonment with parole. We accept, however, that the international instruments may inform a court's assessment of manifest injustice.

Other jurisdictions

[124] We will finish our review of the legislative context by considering the sentencing of young people for murder in other jurisdictions and comparing the approach in those jurisdictions with New Zealand.

[125] Dr Nessa Lynch, who until recently was an Associate Professor of law at Victoria University of Wellington | Te Herenga Waka, is an authority on the way the criminal justice system applies to young persons. Dr Lynch provided us with a report on behalf of Mr Brown that traversed a number of issues, including the policies that impact on the sentencing of young persons convicted of murder in New Zealand and how cases similar to those before us are dealt with in a number of cognate jurisdictions. Dr Anna High, a senior lecturer at the University of Otago | Te Whare Wānanga o Otāgo, filed a report on behalf of Ms Dickey which was similar to that filed by Dr Lynch.

Australia

[126] The sentencing of young persons convicted of murder in Australia is governed by state and territory legislation. Dr Lynch examined legislation and cases from the Australian Capital Territory, Queensland, Victoria, New South Wales and South Australia.

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63 *R v Rapira*, above n 51, at [120] and [122].

[127] The Australian Capital Territory prohibits the imposition of life sentences for those aged less than 18 years.[64]

[128] In Queensland, the general penalty for murder is life imprisonment. However if a person under 18 years commits a "life offence", an offence that if committed by an adult would be punishable by life imprisonment, then they may be detained for a period of not more than 10 years, unless the offence involved violence against a person and the court considers the offence to be "particularly heinous", in which case the person may be detained for life.[65]

[129] In *R v SBU*, a 14-year-old boy who had been sentenced to life imprisonment for murder successfully appealed the sentence, which was quashed and substituted with a finite sentence of 12 years' imprisonment.[66]

[130] Victoria no longer has a mandatory sentence of life imprisonment for murder. In that state judges have the option to impose a fixed sentence for murder, although life imprisonment remains available as a discretionary maximum. Persons under the age of 18 who are convicted of murder in Victoria are usually sentenced to a fixed term with an MPI. In her report Dr Lynch identified eight cases from Victoria in which the defendants were aged under 18 and who were sentenced to finite terms of imprisonment for murder with MPIs that ranged from six to 15 years.

[131] Dr Lynch's research also shows that it is unusual for emerging adults to receive a life sentence for murder in Victoria. One exception was *Hicks v R*, in which the Court of Appeal of Victoria confirmed the sentence of life imprisonment with an MPI of 32 years imposed on a 19-year-old offender for the brutal murder of an infant during a burglary.[67]

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64 Crimes (Sentencing) Act 2005 (ACT), s 133G(4).
65 Youth Justice Act 1992 (Qld), s 176(3) and sch 4 definition of "life offence".
66 *R v SBU* [2011] QCA 203, [2012] 1 Qd R 250.
67 *Hicks v R* [2015] VSCA 14.

[132] In New South Wales, s 61(1) of the Crimes (Sentencing Procedure) Act 1999 (NSW) requires courts to impose life imprisonment for murder if the court is satisfied:

> … that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

[133] The standard MPI for murder (except where the victim was a child under 18 years of age) in New South Wales is 20 years but that term can be increased if specified aggravating features are established.[68]

[134] However, s 61(1) of the Act does not apply to an offender who was under 18 years of age at the time of the offending.[69]

[135] Dr Lynch's research shows that since the passing of the Crimes (Sentencing Procedure) Act in New South Wales, all sentences for murder that have been imposed on persons aged under 18 have been finite sentences with long MPIs. Emerging adults convicted of murder in New South Wales are rarely sentenced to life imprisonment. Most are sentenced to finite terms of imprisonment with MPIs ranging from 12 to 21 years.

[136] In South Australia life imprisonment is the mandatory sentence for all offenders convicted of murder.[70] The MPI for murder in that state is 20 years, but there is a discretion to vary this period.[71] Dr Lynch's research uncovered several instances in South Australia where the MPI was reduced, including to as little as six years for a 14-year-old who was convicted of murder.[72]

United Kingdom

[137] Life imprisonment is mandatory for those convicted of murder in England and Wales. The Criminal Justice Act 2003 (UK) introduced a series of minimum "starting points" for those convicted of murder in England and Wales.[73] This has now been

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68 Crimes (Sentencing Procedure) Act 1999 (NSW), s 54A and the Table to Division 1A.
69 Section 61(6).
70 Criminal Law Consolidation Act 1935 (SA), s 11.
71 Sentencing Act 2017 (SA), s 47(5)(b) and (e).
72 See *R v A* [2011] SASCFC 5, (2011) 109 SASR 197.
73 Criminal Justice Act 2003 (UK), sch 21.

carried over to the Sentencing Act 2020 (UK).[74] Until recently, the minimum statutory period for defendants aged under 18 when the offence was committed was 12 years' imprisonment.[75] Now, the starting point varies according to the age of the defendant when the murder was committed and the otherwise appropriate starting point had the defendant been convicted of the same murder as an adult. The starting points range from 8 years, for defendants who were 14 or under with the least serious offending, to 27 years, for 17-year-old defendants with the most serious offending.[76] Where the defendant is aged 18 to 20 years and commits a murder for which they would receive a whole of life sentence if they were aged 21 or over, then the start point is set at 30 years' imprisonment.[77]

[138] In 2022 Scotland introduced sentencing guidelines that apply to those aged less than 25 years. Those changes were the product of work completed by the Scottish Sentencing Council, which said:[78]

> The exercise of sentencing a young person is different from that of sentencing an older person, in particular because a young person will generally have a lower level of maturity, and a greater capacity for change and rehabilitation, than an older person.

[139] Key principles from the Scottish sentencing guideline for young people include:

(a) The best interests of the young person should be considered in every case.

(b) Particular regard should be had to the maturity of the young person and their rehabilitation prospects.

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74 Sentencing Act 2020 (UK), sch 21.
75 Schedule 21, cl 6.
76 Schedule 21, cl 5A, which was introduced by the Police, Crime, Sentencing and Courts Act 2022 (UK), s 127.
77 Schedule 21, cl 3(1).
78 Scottish Sentencing Council *Sentencing Young People: Sentencing Guideline* (26 January 2022) at [3] (footnote omitted).

(c) Culpability assessments must take account of the young person's intellectual and emotional maturity.

(d) Rehabilitation is the primary consideration.

Canada

[140] The sentencing of young persons for murder in Canada is regulated by federal legislation. Those aged under 18 who are convicted of murder are governed by the Youth Criminal Justice Act SC 2002 c 1, which provides:[79]

(a) a maximum sentence for first degree murder of 10 years to be served generally as a maximum of six years in continuous custody and then placement under conditional supervision in the community; and

(b) a maximum sentence for second degree murder of seven years to be served generally as a maximum of four years in continuous custody and then placement under supervision in the community.

[141] The Attorney-General for Canada may, however, apply for an order that a young person who was over the age of 14 at the time they committed the offence be sentenced on the basis of them being liable for an adult sentence.[80] Where a young person is sentenced as an adult, they may be sentenced to life imprisonment for murder. However, non-parole sentences are prescribed for young people convicted of murder such that a young person:[81]

(a) aged less than 16 at the time of the offence becomes eligible for parole after a maximum of seven years;

(b) aged 16 and 17 at the time they committed first degree murder becomes eligible after 10 years; and

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79 Youth Criminal Justice Act SC 2002 c 1, s 42(2)(q).
80 Section 64.
81 Criminal Code RSC 1985 c C-46, s 745.1.

(c) aged 16 or 17 at the time they committed second degree murder becomes eligible after seven years.

New Zealand compared

[142] Dr Lynch's research shows that young adults convicted of murder in the jurisdictions we have referred to are frequently sentenced to determinate terms of imprisonment rather than life imprisonment. This is of some relevance when gauging manifest injustice.

[143] However, this survey of other jurisdictions also shows the decision to exempt young people from life imprisonment is made through statutory exceptions. Those exceptions involve policy choices about the qualifying age, the length of the alternative sentence and the structures that ensure the young person's rehabilitation. In contrast, New Zealand has no such exception. We observe that s 18 of the Sentencing Act curtails the use of imprisonment for those under 18, but it excludes category 4 offences, including murder. That provision, combined with ss 102 and 103, contemplates that youth murderers will be sentenced to life imprisonment with an MPI of at least 10 years, subject only to the manifest injustice exception. Crown counsel acknowledged in argument before us that New Zealand is "out of step" among its usual comparator countries in not having a separate statutory sentencing regime for youth murderers.[82] However, the assessment of manifest injustice under s 102 must be undertaken consistently with the current statutory scheme and its legislative intention.

Manifest injustice

[144] We will now consider how manifest injustice has been interpreted under the Sentencing Act. As we will explain, the manifest injustice threshold in s 102 of the Sentencing Act has been applied more strictly than the corresponding test in ss 104 and 86E. To understand the reasons for those differences in approach, it is helpful to examine the leading New Zealand cases on those sections.

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[82] Arguably this is all the more striking because in other respects, as Dr Lynch explained, New Zealand legislation has adapted its care and protection framework to better recognise that young people may need care until the age of 21 and advice and assistance until 25.

Manifest injustice — s 102 of the Sentencing Act

[145] *Rapira* provided this Court with the first opportunity to consider the application of s 102 of the Sentencing Act to young persons convicted of murder.[83] That case concerned seven young persons whose ages ranged from 12 to 20 years. Their offending involved a planned attack and robbery of a pizza delivery driver, who died of injuries inflicted when he was assaulted with a baseball bat. Two of the offenders, Alexander Peihopa and Whatarangi Rawiri were convicted of murder and sentenced to life imprisonment with an MPI of 10 years. At the time of the murder, Mr Peihopa was 15 and Ms Rawiri was 17 years old.

[146] When concluding the sentences imposed on Mr Peihopa and Ms Rawiri were not manifestly unjust, this Court made the following observations:

(a) Whether or not a sentence of life imprisonment was manifestly unjust had to be assessed "on the basis of the circumstances of the offence and the offender". The test involved an "overall assessment" and, in order to be "manifestly" unjust, the injustice of a life sentence had to be "clear".[84]

(b) The assessment of manifest injustice is "undertaken against the register of sentencing purposes and principles identified in the Sentencing Act 2002 and in particular in the light of ss 7, 8 and 9".[85]

(c) "While youth is a factor properly to be taken into account in sentencing, it is part only of a wider public interest … Where the offending is grave, the scope to take account of youth may be greatly circumscribed".[86] "Youth of itself could not be a sufficient reason to make life imprisonment manifestly unjust if the offender had the necessary intent … or knowledge of consequences … to be guilty of murder, in the absence of a statutory direction to that effect".[87] .

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83 *R v Rapira*, above n 51.
84 At [121].
85 At [121].
86 At [122].
87 At [123].

(d) A finding that a sentence of life imprisonment is manifestly unjust is "likely to be reached in exceptional cases only".[88]

[147] The Court was influenced by the legislative history. It cited comments from the Minister of Justice who, during the passage of the legislation, said that s 102 retained "a strong presumption in favour of life imprisonment for murder". Exceptions would be confined to "a small number of cases". Examples suggested were situations involving "mercy killing, or where there is evidence of prolonged and severe abuse" of the offender.[89]

[148] The Court also attached weight to the then power of the Parole Board to grant early parole for those sentenced to life imprisonment for murder:[90]

> In the case of a young offender sentenced to life imprisonment, use of the power under s 25 for early consideration of parole may be appropriate where, through developing maturity and positive response to correction, the 10 year non-parole period ought to be reconsidered in the interests of justice.

This was an important consideration in the case of Ms Rawiri; she had been a party to the murder by Mr Peihopa, exhibited a number of mitigating factors and had immediately expressed remorse and done her best to make reparation.[91] It was because Ms Rawiri was a "full participant" who knew the victim was to be knocked unconscious that departure from the presumption could not be justified.[92]

[149] As we have noted at [96], soon after *Rapira* was decided, Parliament removed the possibility of persons sentenced to life imprisonment for murder applying for early parole.

[150] Subsequent decisions of this Court have affirmed that the presumption of life imprisonment for murder is strong. In *R v Smail* the Court held that the threshold is "high" with a "limited discretion" to depart from it where the offending is at "the

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88 At [121], citing (14 August 2001) 594 NZPD 10910.
89 At [121].
90 At [124].
91 At [110]
92 At [120].

lowest end of the range of culpability for murder".[93] In *R v Williams*, a s 104 case, the Court explained that:[94]

> In s 102, "manifestly unjust" is the criterion for displacement of the presumption that on conviction for murder an offender should be sentenced to life imprisonment. That presumption is 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. … it will rarely be clearly unjust to impose life imprisonment for the purposes of the residual discretion conferred by s 102.

[151] In *Hessell v R* this Court observed, when fixing the maximum discount for a guilty plea at 33 per cent, that it is almost inconceivable that a guilty plea, on its own, could establish manifest injustice under s 102, but it might do so in combination with other factors.[95]

[152] Overall, the presumption of life imprisonment has seldom been departed from. We have been referred to only 12 offenders in the last 20 years who have received determinate sentences for murder.[96] Most of those cases concerned "mercy killings" or involved defendants whose culpability had been significantly diminished through abuse, usually at the hands of the victim.

[153] We have also received statistics that show the presumption of life imprisonment has almost never been departed from for young persons.[97] Since the Sentencing Act was passed, 40 adolescents and 131 emerging adults have been convicted of murder and almost all have been sentenced to life imprisonment. One

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93 *R v Smail* [2007] 1 NZLR 411 (CA) at [14].

94 *R v Williams* [2005] 2 NZLR 506 (CA) at [57].

95 *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 at [63]. On appeal the Supreme Court altered this Court's structured methodology for quantifying the discount and capped it at 25 per cent, but did not comment on this point: see *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

96 *R v Nelson* [2012] NZHC 3570; *R v Simeon* [2021] NZHC 1371; *R v Innes* [2014] NZHC 2780 (Mr Innes' conviction was quashed in *Baker v R* [2015] NZCA 306); *R v McNaughton* [2012] NZHC 815 (upheld in *R v Cunnard* [2014] NZCA 138 but conviction quashed in *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467); *R v Law* (2002) 19 CRNZ 500 (HC); *R v Knox* [2016] NZHC 3136; *R v Lawrence* [2021] NZHC 2992; *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *R v Rihia* [2012] NZHC 2720; *R v Madams* [2017] NZHC 81; *R v Cole* [2017] NZHC 517; and *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

97 The Department of Corrections Research and Analysis Unit has provided us with records of all persons convicted of murder who committed the offence under the age of 25. The records from 2000 onwards are complete whereas the records before 2000 are incomplete. We have only counted offenders who committed the offence after the commencement of the Sentencing Act.

adolescent received a determinate sentence of 18 years.[98] One emerging adult received a determinate sentence of 14 years.[99]

[154] The case where an adolescent was not sentenced to life imprisonment was *R v Nelson*.[100] The defendant in that case was 13 years old when he shot the partner of his caregiver, apparently because he erroneously thought the victim was preventing him from seeing his mother. Heath J concluded it would be manifestly unjust to sentence the defendant to life imprisonment because he had a limited understanding of the crime of murder and because of the crushing effect a sentence of life imprisonment would have on a 13-year-old boy.[101]

Manifest injustice — s 104 of the Sentencing Act

[155] We referred to s 104 at [99] and now turn to the treatment of manifest injustice under that section.

[156] In *R v Williams* this Court considered two appeals by adult offenders that engaged the manifest injustice test in s 104 of the Sentencing Act.[102] Mr Williams and Mr Olson had each been sentenced to life imprisonment with MPIs of 15 years after they each pleaded guilty to murder. Mr Williams pleaded guilty to having murdered the six-year-old daughter of his partner. Mr Olson, who was a 62-year-old sickness beneficiary, pleaded guilty to having murdered a friend who had provided care and support for him. In both cases, the High Court concluded it would be manifestly unjust to sentence the offenders to life imprisonment with an MPI of 17 years or longer.

[157] The Solicitor-General appealed against the sentences imposed on Mr Williams and Mr Olson. When considering the appeals, this Court observed that, while the manifest injustice criterion in s 102 of the Sentencing Act "was likely to be satisfied only in a small number of cases which would usually involve special features," the

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98 *R v Nelson*, above n 96.
99 *R v Simeon*, above n 96.
100 *R v Nelson*, above n 96.
101 At [48]–[49].
102 *R v Williams*, above n 94.

legislative history indicates that the cases that satisfy the "manifestly unjust criterion [in s 104]" "will be exceptional but such cases need not be rare".[103]

[158] The Court held that the assessment of culpability when determining if s 104 of the Sentencing Act applies usually involves a two-step process. First, the court should assess the culpability of the offender compared to "the standard range of murders", meaning those that would attract an MPI of 10 years under s 103.[104] This was necessary because the relative culpability of the 10 qualifying criteria in s 104 varies from case to case.

[159] In cases where the first step did not suggest a sentence of 17 years or more is appropriate, the court must consider whether it would be manifestly unjust to impose an MPI of 17 years or more. The Court concluded that:[105]

> … a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term.

[160] This Court allowed the Solicitor-General's appeal against the sentence imposed on Mr Williams and substituted the 15-year MPI with one of 17 years.[106] The appeal against the sentence imposed on Mr Olson was dismissed.[107]

[161] In *Churchward v R*, this Court allowed an appeal that involved a 17-year-old offender who had been sentenced for the violent murder of a defenceless elderly man in a home invasion.[108] Ms Churchward suffered from mental health issues, including depression and symptoms of PTSD. Ms Churchward had been sentenced to life imprisonment with an MPI of 17 years.[109] A co-offender's conviction was quashed following their appeal to this Court.[110]

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103 At [57], [59] and [67].
104 At [52].
105 At [67].
106 At [85].
107 At [94].
108 *Churchward v R*, above n 30.
109 *R v Churchward* HC Tauranga CRI-2008-270-361, 18 December 2009.
110 *Te Wini v R* [2011] NZCA 405.

[162] The Court noted that:

(a) The age of an offender can be relevant when assessing whether or not a 17-year MPI is manifestly unjust because of the slow neurological development of adolescents. The neurological abilities of an adolescent "can lead to a reduction in culpability of young people as compared to adults".[111]

(b) The adverse effect of imprisonment on young people, which may be more pronounced than the effect of imprisonment on adults, is also a factor that may weigh in favour of concluding a 17-year MPI is manifestly unjust.[112]

(c) The rehabilitative prospects of a young offender may also render a 17-year MPI manifestly unjust for a young person.[113]

(d) Ms Churchward's mental health issues, her upbringing, her immaturity and her attachment to her co-offender "mean[t] that her culpability [was] lower than if she had been a mature adult".[114]

[163] The Court cited *Rapira* and acknowledged that "where the offending is grave, the scope to take account of youth may be greatly circumscribed". The principal reason given was that the factors leading young people to offend may point to public safety considerations. The Court also cited *Pouwhare v R*, in which it had been held that radical discounts may be given for youth even when offending is serious.[115]

[164] Ultimately, this Court concluded that the 17-year MPI imposed on Ms Churchward was manifestly unjust. The Court quashed the MPI and substituted an MPI of 13 years.[116]

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111 *Churchward v R*, above n 30, at [76] and [81].
112 At [86]–[87].
113 At [88]–[92].
114 At [100].
115 At [84], citing *R v Rapira*, above n 51, at [122]; and *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [96].
116 At [107] and [110].

[165] Since *Churchward*, no youth murderers under 18 have been sentenced to an MPI of 17 years or more. However, s 104 is still relevant to the assessment of manifest injustice for youth murderers. This Court explained in *Hamidzadeh v R* that, where one or more of the s 104(1) factors applies, it is less likely that a court will find a life sentence manifestly unjust under s 102.[117] Some of those factors — such as planning, extreme violence or victim vulnerability — may be present in youth offending. This Court recognised that in *Rapira* when observing that youth is not an unusual feature of offences of serious violence.[118]

Manifest injustice — third strike sentences

[166] We referred to s 86E at [101]. In *R v Harrison*, this Court dealt with offenders who had been convicted of murder as a stage-2 offence and so had to be sentenced to life without parole unless that would be manifestly unjust.[119] Because the index offence might be a "standard" murder and a wide range of offences qualified as previous "strike" offending, there was a real risk that the outcome would breach s 9 of the NZBORA. This Court reasoned that "manifestly unjust" must be interpreted in a manner that avoided that outcome.[120] This necessitated close analysis of the circumstances of the offending and the offender to establish whether the policy objectives of the strikes regime applied in the instant case. This was a more liberal approach than taken under ss 102 or 104, but it was justified by the "extreme outcomes" that would otherwise result were the same approach to be taken. That is, in contrast to all other murderers, an offender sentenced to a whole of life sentence for murder as their second or third strike would never have the opportunity to appear before the Parole Board.[121]

Manifest injustice: conclusions

[167] This brief survey demonstrates that the term "manifest injustice" has come to have a generally consistent meaning under the Act:

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117 *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [70].
118 *R v Rapira*, above n 51, at [120].
119 *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602.
120 At [101].
121 At [98]–[99].

(a) It requires that the instant case be "exceptional" in the sense that it justifies departure from legislative policy.

(b) It requires that the injustice be manifest, that is, clear.

(c) Each case must be assessed on its own merits, having regard to the full register of sentencing purposes, principles and factors, and qualifying cases need not be rare.

However, the weight to be attached to any given consideration may vary with the consequences otherwise to be visited on the offender, relative to the culpability of their offending and personal mitigating factors. This explains the narrow approach evident in cases decided under s 102.

[168] With the above in mind, we now proceed to set out our approach to assessing manifest injustice for youth murderers.

Assessment of Manifest Injustice for Youth Murderers

[169] At the outset, we emphasise that it is not open to us to create an exception to life imprisonment for all youth murderers. As we have explained, the Sentencing Act contemplates that young people convicted of murder will be sentenced to life imprisonment, unless manifest injustice is established. Creating a category exception for youth murderers would be inconsistent with the statutory scheme and could only be done by Parliament. The Children's Commissioner suggested and some of the appellants' counsel submitted we should create a special category for young persons. We must, however, not trespass upon Parliament's domain. As will be seen, our judgment does not have the effect of creating a special category for young persons convicted of murder.

[170] The present appeals do, however, give us the opportunity to revisit the approach to culpability and mitigating factors for young people who would otherwise be sentenced to life imprisonment under s 102. We turn to these considerations.

Youth and manifest injustice

[171] In this context, a finding of manifest injustice results in the offender not being sentenced to life imprisonment. That is the prescribed sentence for murder because society has always placed special value on human life and condemned those who take life deliberately or with reckless disregard. A life sentence is seen as "just deserts". This is a weighty consideration that must be taken into account when considering manifest injustice under s 102. The sentencing analysis will always begin with the gravity of the offending and culpability of the offender. As noted at [153], 40 adolescents and 131 emerging adults have been convicted of murder since the Sentencing Act was passed, and only one adolescent and one emerging adult have received determinate sentences. Several considerations, however, point to the need for a more flexible approach to the jurisdiction, having regard to developments since *Rapira*, which as we have explained remains the leading authority on s 102.

[172] First, it is necessary to recognise that the comparison which manifest injustice requires under s 102 is to all murders. When considering manifest injustice under s 104(1)(e), a court may be comparing the instant case with others characterised by high levels or brutality or callousness. Under s 102 the comparison is drawn with a much larger class. This is important because those under 18 commit only a small proportion of all murders. This point was not examined in *Rapira* (in which the Court appears also to have accepted that qualifying cases would be rare). We now know that between 2002 and 2019, 967 people were convicted of murder in New Zealand. As we have just noted, only 40 adolescents were convicted of murder during approximately the same timeframe.

[173] Second, it is necessary to recognise that *Rapira* predated the development of the structured sentencing methodology under which courts now take a broader approach to culpability of the individual offender and allow specific and potentially substantial discounts for personal mitigating factors.

[174] Third, *Rapira* was delivered in 2003, at a time when understanding of neurological development in adolescents and young people was less well understood than it is now. We have reviewed the research since *Rapira* at [76]–[86]. Although

this Court examined the issue in 2011 in *Churchward*, that was a s 104 case; *Rapira* remains the leading authority under s 102.

[175] There is no outer limit to the discount for youth in current sentencing practice but discounts of 10–30 per cent are common.[122] Discounts may also be given for, among other things, guilty pleas, mental health, addiction and cultural factors. As Ms Brook acknowledged, the advent of s 27 reports has had a substantial impact on sentencing. Youth offenders commonly present with more than one mitigating factor. It is always necessary to stand back and make an overall assessment when sentencing, and manifest injustice is assessed as a matter of overall impression.[123] Discounts overlap and there is a risk that some statutory purposes of sentencing can be lost sight of when they are treated separately and simply tallied up. But the point remains that some offenders present with a combination of personal mitigating factors which may collectively justify a sentence substantially less than that which would otherwise be imposed.

[176] Fourth, as already mentioned, the Court in *Rapira* put weight on the fact that an offender could apply for early parole.[124] As, however, an offender cannot now apply for early parole, they must serve an MPI of 10 years if sentenced to life imprisonment.

[177] For these reasons we think it is no longer correct to say, as the Court did in *Rapira*,[125] that youth can carry little weight when balanced against the public interest in denunciation and accountability. The seriousness and culpability of the offending remain centrally important. It also remains generally true to say that youth alone is not enough to establish manifest injustice. However, young persons may present with a combination of mitigating circumstances relevant to the offending and personal mitigating factors which together are capable of establishing manifest injustice. For these reasons, we accept the Crown's submission that when sentencing a young person for murder a court must always undertake a s 102 analysis, giving careful consideration to whether life imprisonment is manifestly unjust.

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122 See *Pouwhare v R*, above n 115, at [98].
123 *R v Williams*, above n 94, at [67].
124 *R v Rapira*, above n 51, at [124].
125 At [120].

The sources of manifest injustice

[178] When we asked Ms Guy Kidd what the source of manifest injustice is for a young person sentenced to life imprisonment for murder, she responded that it is the indefinite nature of the sentence, the 10-year MPI and the impact of lifetime parole. We examine each of these in turn.

[179] Before doing so, we emphasise that what matters is the harm done by these features of the sentence over and above that inherent in the counterfactual, which is a long term of imprisonment with a substantial MPI designed to mark the fact that a life was lost, without justification or excuse. There is no undoing the harm, and the surviving victims are likely to think a sentence falling short of life imprisonment is not proportionate to their loss. Further, each of the offences before us was characterised by the offenders' active participation and some serious aggravating features. Counsel for the appellants did not suggest that the combination of mitigating circumstances, powerful though they may be, could result in a short sentence of imprisonment, still less a community-based sentence.

[180] It follows that it is not possible to avoid some effects of long-term incarceration on adolescents and emerging adults. Dr Lambie referred for example to imprisonment undermining the developmental tasks of moving into adulthood, the risk of adolescents and emerging adults being victimised in prison, the impact of imprisonment on mental health, the development of detrimental coping strategies and negative effects on social relationships. Adjusting sentence length would, however, mitigate these effects.

The absence of a sentence expiry date

[181] Dr Lambie explained that young people may have difficulty understanding sentence length and may fail to adapt to life sentences, instead following a negative defensive process in which they suppress the reality of their sentences. We observe that a determinate sentence also carries an element of uncertainty, in that the offender cannot be sure of being released on parole before sentence end. It is also extremely unlikely that a young person sentenced to life imprisonment will actually serve that sentence in prison. As we have explained, most are paroled at or near the first

opportunity. But we accept that the indeterminacy of a life sentence is difficult for a young person to grasp and may be harmful in itself.

The 10-year MPI

[182] During the MPI the offender is obviously ineligible for parole. The evidence is that some rehabilitation services are available during that period, but other rehabilitation services may not be available until the offender is parole-eligible. Young adults undertake an assessment placement, which may result in them being detained in a youth unit, and they are given access to educational opportunities and rehabilitation programs. They may be placed in a self-care unit and may undertake work in the community.

[183] That said, generally speaking long sentences exacerbate the adverse effects of imprisonment and a 10-year MPI is a very long period, the longest that can be imposed under the Sentencing Act in connection with any determinate sentence.[126] The younger the offender at the time it was imposed, the more heavily it may weigh on them. The experience of imprisonment will also be harsher where they present with other characteristics, such as intellectual deficits or mental health, social or behavioural problems associated with abusive or disrupted upbringing.

Life parole

[184] Offenders who were under 25 when they committed their offences are rarely denied parole. Most are paroled soon after becoming eligible. But because a life sentence has no statutory release date,[127] they will be on parole for life unless the Parole Board discharges their release conditions. Section 56(1) of the Parole Act allows an offender to apply for discharge, and s 58 gives the Board jurisdiction to determine an application. The jurisdiction is unfettered, if exercised with effect six months or more after release, but of course it must be exercised for the statutory purposes, notably those of ensuring release conditions are no more onerous, and last no longer, than is consistent with community safety.[128]

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126 Sentencing Act, s 86(4).
127 Parole Act 2002, ss 32 and 86(3).
128 Section 7(2)(a). Victims must be notified and their views given due weight.

[185] Parole is not intended as a punishment; that objective is served by the period of detention under the sentence of imprisonment to which the offender remains subject. Parole exists to aid rehabilitation while protecting the community. But we accept the submission of Mr More that standard parole conditions are onerous and the offender may experience them as punitive, especially if they are more stringent, or endure longer, than is reasonably necessary to protect the public. Standard conditions require that offenders report to a probation officer as required, and may control where they live and work and with whom they associate. They must also undertake rehabilitation programmes as directed.

[186] It appears that the Parole Board has exercised its jurisdiction to discharge conditions in a very cautious manner when dealing with offenders on life parole. We received affidavit evidence of Dr Paul Wood and Dr Rawiri Waretini-Karena, both of whom committed murder at the age of 18 and were paroled shortly after serving 10 years. Both obtained doctorates and have made outstanding contributions to society. Despite their successful rehabilitation, both remained subject to release conditions for many years — 24, in Dr Waretini-Karena's case. Dr Waretini-Karena made four applications in 2003, 2007, 2017 and 2020, only succeeding in the 2020 application. Dr Wood was successful in his first application in 2020. We did not hear from the Parole Board regarding these two examples, but the evidence was filed by Crown counsel.

[187] In our view these two examples do not justify adopting an assumption that a youth offender who is paroled after serving a minimum period for murder will remain on parole conditions for life. We consider that we must address the present appeals in the expectation that the Board will exercise its jurisdiction to discharge conditions of parole for offenders who no longer pose a risk to public safety. If it does not do so, there is a remedy under the Parole Act itself.[129]

[188] That said, we accept that a young person who has served a minimum period of 10 years and is released on parole as an adult may well remain on standard parole conditions for some years. Those who were convicted of murder are likely to be

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[129] Under s 67 of the Parole Act, decisions of the Board are reviewed by the chairperson or a panel convenor. There is a further ability to seek judicial review.

classified initially as high risk when released on parole. Youth offenders may also be subject to parole for longer, given normal life expectancies, than a person convicted as an adult.

[189] Further, an offender sentenced to life imprisonment is at lifetime risk that they might be recalled to continue serving a sentence of imprisonment. Offenders whose conditions have been discharged remain at risk of recall should they commit an offence punishable by imprisonment, and those whose conditions have not been discharged may also be recalled for breach of conditions.[130]

[190] Evidence was adduced about when recall applications are made. In practice an application is not made unless a risk assessment indicates it is necessary having regard to the nature of the offending, any protective factors and any alternative means of managing risk. It does not appear from the information before us that offenders convicted of murder as young people are likely to be recalled, presumably because they have matured and made use of their rehabilitative potential, so the risk of recall is slight. But we accept that the risk always hangs over the offender, however long ago their offence and however complete their rehabilitation.

[191] Dr Anna High, who as we have noted, prepared a report for Ms Dickey, took up this point, characterising life parole as a form of permanent exclusion from free society. She suggested that it involves a loss of the dignity of belonging, enjoyed by other members of the community and precludes the full reintegration that ought to be the object of rehabilitation. She also argued that life parole is a disproportionate consequence of juvenile offending, having regard to the offender's lesser culpability and greater capacity for reform.

[192] We conclude that parole conditions and the risk of recall may contribute to injustice to the extent they endure when they are no longer needed to guide the offender's rehabilitation and protect the community. For some youth offenders the absence of any such risk will be apparent at sentencing.

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130 Section 61.

[193] We therefore accept that a life sentence may be manifestly unjust for some young offenders through a combination of the indeterminacy of the sentence, the length of the MPI and lifetime parole and where a determinate sentence of imprisonment is capable of responding to such injustice.

Assessing manifest injustice

[194] Because there is no determinate sentence that can be treated as equivalent to life imprisonment, it is not appropriate to assess manifest injustice by comparing life imprisonment to a notional determinate sentence and deciding whether the difference is sufficiently large to make life imprisonment manifestly unjust. In practice sentencing judges sometimes do engage in such calculations under s 104, which is permissible in that context because the sentencing analysis is confined to the MPI.[131] Under s 102 manifest injustice is not a matter of calculation. Rather, it should be assessed as a matter of overall impression.

[195] The assessment must begin with the gravity of the offending and culpability of the offender. Personal aggravating and mitigating factors should then be taken into account. As we have explained at [167], each case must be assessed on its own merits, having regard to the full register of sentencing principles, purposes and factors. We observe that manifest injustice is most likely to be found where the offender can point to both mitigating circumstances of the offending[132] and a combination of substantial personal mitigating factors.[133]

[196] The Court having decided that a sentence of life imprisonment would be manifestly unjust, it must then fix the type and duration of the determinate sentence that will be imposed instead.

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131 As we have explained at [159], in *R v Williams* the Court said that manifest injustice under s 104 should be calculated as a matter of overall impression: *R v Williams*, above n 94, at [67]. But sentencing judges now have the benefit of a large number of subsequent decisions which facilitate comparison.

132 Consistent with the authorities cited at [152] above.

133 Consistent with the approach taken, in connection with guilty plea discounts, in *Hessell v R*; see [151] above.

Setting the determinate sentence and minimum period

[197] Our review of cases where the presumption of life imprisonment has been departed from shows that there is no prescribed method for setting the determinate sentence.[134] As with all sentencing exercises, the assessment must be made having regard to all the circumstances of the offence and the offender, in light of the sentencing purposes, principles and factors that we have set out above.

[198] The starting point for the determinate sentence must reflect the value that the community places on human life and its assessment that murder is the most serious of crimes. The offender has caused (or contributed to) loss of life, acting with the intent necessary to be found guilty as a principal or party to murder, as the case may be.

[199] It will often be appropriate to cross-check the starting point against those for aggravated violent offending. In its guideline judgment in *R v Taueki*, the Court adopted a starting point for the most serious of this type of offending of nine to 14 years' imprisonment,[135] which reflects the fact the maximum sentence for wounding with intent to cause grievous bodily harm is 14 years' imprisonment.[136] We note that the starting point for determinate sentences for murder need not always be higher than the starting points in *Taueki* band three; it depends on the circumstances of the offence and nature of the offender's involvement.

[200] Although a determinate sentence is being imposed, legislative policy toward MPIs for murder remains relevant. Legislative policy toward murder sentencing is that the minimum period must satisfy the purposes of accountability, denunciation, deterrence and community protection.[137] When a determinate sentence is imposed, the minimum period is set under s 86, not s 103, but the same considerations apply.[138] They may well require a minimum period of more than the one-third that would otherwise be served under s 84(1) of the Parole Act.

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134 See n 96 above.
135 *R v Taueki* [2005] 3 NZLR 372 (CA) at [34].
136 Crimes Act, s 188(1).
137 Sentencing Act, s 103(2)
138 Section 86(2).

Individual Appeals

Ms Dickey

Is life imprisonment manifestly unjust?

[201] As we have noted at [26], when Dunningham J sentenced Ms Dickey, the Judge described the decision to sentence her to life imprisonment as opposed to a determinate sentence of imprisonment as "finely balanced".[139]

[202] Ms Dickey played a significant role in the murder of Mr McAllister. She participated in the plan to lure Mr McAllister to the Stadium because she wanted to exact revenge for the way he had previously mistreated her. The Crown accurately characterised her as the ringleader in a planned vigilante action. It is not a case in which any allowance could be made for perceived provocation. She did not stab Mr McAllister herself, but she did help Mr Whiting-Roff by restraining Mr McAllister initially while he was being stabbed. Towards the end of the attack, she made an effort to "call off" Mr Whiting-Roff. She was also instrumental in getting Mr Brown to participate in the attack upon Mr McAllister. Initially she showed no remorse.

[203] Ms Dickey's most relevant personal factors may be summarised in the following way:

(a) Her youth at the time of the offending. Inherent in this consideration is the evidence we have examined concerning the neurological immaturity of young persons. This factor is very relevant to Ms Dickey. Although she took a lead role, her offending was part of a group response to misconceived opinions about Mr McAllister. It is unlikely that she would have offended at all if separated from the peer group. It was a crime that reflected the poorly developed neurological capacity of adolescents.

(b) Partly because of her youth, she had significant potential for early and complete rehabilitation. It was apparent at sentencing, and has been

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139 *Dickey* sentencing notes, above n 2, at [47].

confirmed on appeal, that her rehabilitation would be complete long before the statutory MPI of 10 years would expire.

(c) She can point to a number of substantial mitigating features in addition to her youth. She accepted responsibility at an early juncture, pleaded guilty and provided valuable assistance to the authorities.

(d) As we have explained at [178]–[196], the length of the MPI that must be imposed under s 103, the impact of an indeterminate sentence of life imprisonment and the prospect of lifetime parole can have a disproportionate consequence on young offenders such as Ms Dickey. This consideration applies to all of the appellants whose cases we are considering.

[204] When we assess Ms Dickey's offending and her circumstances, we are satisfied a sentence of life imprisonment is manifestly unjust. What we have done is carefully evaluate Ms Dickey's role in the murder of Mr McAllister and her personal circumstances, as a matter of overall impression. We have concluded that life imprisonment would be manifestly excessive and that the purposes and principles of the Sentencing Act can, in Ms Dickey's case, be adequately achieved through the imposition of a determinate sentence.

Starting point

[205] In setting the appropriate starting point for a determinate sentence as an alternative to life imprisonment, we have assessed:

(a) Ms Dickey's significant role in the murder of Mr McAllister; and

(b) the factors we have traversed at [197]–[200].

Setting an appropriate starting point for a determinate sentence for Ms Dickey is not an easy task. The limited number of cases in which sentencing courts have imposed determinate sentences for murder do not provide guidance in setting a starting point for a determinate sentence for Ms Dickey. As we have noted at [152], most of those

cases concerned defendants who committed "mercy killings" or whose culpability was significantly diminished by having been abused, usually by the victim.

[206] Cases involving defendants sentenced for wounding with intent to cause grievous bodily harm provide a point of reference. It is to be stressed, however, that the maximum sentence for wounding with intent to cause grievous bodily harm is 14 years' imprisonment. For that reason, determinate sentences for murder will likely attract higher starting points than those which are adopted where the offending falls within band three of *Taueki*.[140]

[207] When we assess Ms Dickey's role in the brutal and calculated murder of Mr McAllister, we conclude the appropriate starting point for a determinate sentence in her case is one of 22 years' imprisonment.

Provisional deductions

[208] In calculating deductions that might be made to reflect Ms Dickey's circumstances, we have first applied orthodox sentencing principles. That exercise produces the following tentative deductions:

(a) A 30 per cent deduction to reflect her young age and prospects for rehabilitation. We have combined these two factors to reflect Dr Lambie's evidence that there are two distinct aspects to the characteristics of young offenders, namely their reduced culpability caused by their neurological immaturity and their greater prospects for rehabilitation.

(b) A 25 per cent deduction to reflect Ms Dickey's guilty plea.

(c) A further 10 per cent deduction to reflect Ms Dickey's assistance to the authorities.

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[140] *R v Taueki*, above n 145.

[209] This produces a provisional determinate sentence of slightly less than eight years' imprisonment.

Appropriate determinate sentence

[210] A determinate sentence of approximately eight years' imprisonment is not, however, a proportionate response to the seriousness of Ms Dickey's offending. The exercise we followed when trying to set an appropriate determinate sentence for Ms Dickey indicated that orthodox sentencing methodology does not apply readily to cases of this kind. It is necessary to stand back and decide what sentence is a proportionate response to Ms Dickey's offending and circumstances.

[211] When we undertake an evaluation of the appropriate sentence for Ms Dickey, we conclude that we must uplift the provisional sentence of eight years to one of 15 years' imprisonment.

MPI

[212] As explained at [200], careful attention must be paid to the MPI and the sentencing purposes listed in s 86(2) when imposing a determinate sentence for murder.

[213] In Ms Dickey's case, the standard parole eligibility date calculated under s 84(1) of the Parole Act would be five years, being one-third of the determinate sentence of 15 years' imprisonment.

[214] We are satisfied Ms Dickey should serve more than five years before she is eligible for parole in order to hold her appropriately accountable for the harm done by her offending and to denounce her conduct.[141]

[215] The MPI that we will impose on Ms Dickey is one of seven and a half years' imprisonment.

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[141] Sentencing Act, s 86(2)(a).

Mr Brown

Is life imprisonment manifestly unjust?

[216] Although Mr Brown participated in the attack on Mr McAllister, his role was "peripheral". He played a lesser role than Ms Dickey and was significantly less culpable than Mr Whiting-Roff. A meaningful distinction needs to be drawn between the roles played by those who were sentenced for the murder of Mr McAllister.

[217] Mr Brown's personal circumstances were more significant than Ms Dickey's and comprise his "profound" mental health issues, his cognitive impairment, his remorse, his youth, his social deprivation and the impact of prison on Mr Brown, which was explained in Dr Lambie's most recent report.

[218] When we evaluate Mr Brown's offending and his circumstances, we are satisfied that a sentence of life imprisonment is manifestly unjust. His is a clear case. In particular, the impact of an indeterminate sentence of life imprisonment is disproportionately severe in Mr Brown's case because of his cognitive limitations.

Starting point

[219] In setting the starting point for a determinate sentence as an alternative to life imprisonment, we have weighed Mr Brown's role in the murder of Mr McAllister and taken the same approach we followed when setting the starting point for Ms Dickey. This has led to us conclude that the appropriate starting point for the determinate sentence in Mr Brown's case is one of 18 years' imprisonment.

Provisional deductions

[220] When calculating the deductions from the starting point we have again had regard to the factors we have summarised at [217]. We will briefly elaborate on those considerations.

[221] As we have previously noted, Mr Brown has a history of mental health issues dating back to when he was about six years old. In the year leading up to the death of Mr McAllister, Mr Brown had made attempts to take his own life and was described

by Dr Barry-Walsh as having "profound problems with his mental health". Mr Brown's psychological impairment was also significant. His IQ of 76, while not meeting the test for intellectual disability, placed Mr Brown in the bottom five per centile of the population. This factor also diminished his culpability.

[222] Mr Brown had suffered significant social deprivation and displacement in his early years, having been sent to as many as 57 foster homes between the ages of three and six. This displacement contributed to Mr Brown's deeply entrenched anti-social behaviour, his expulsions from school and his consequent inability to gain meaningful education. A deduction of two years is warranted to reflect Mr Brown's history of profound social deprivation. We deduct 25 per cent from the starting point to reflect the other factors we have summarised at [221] to [222].

[223] At the time of the offending Mr Brown was 19 years old, and he was the oldest of the three appellants whose cases we are considering. Mr Brown was, however, a very immature young person whose mental age was less than his chronological age. We make a deduction of 20 per cent to reflect Mr Brown's age at the time of his offending and the factors that we have traversed that are linked to his age.

[224] We have also had regard to the report from Dr Lambie prepared in relation to Mr Brown a year after he had been sentenced to prison. We have quoted from part of that report at [62] in which Dr Lambie explains how damaging prison is for Mr Brown, who lacks the emotional maturity to understand the sentence that has been imposed.

[225] The sentence of life imprisonment has exacerbated Mr Brown's already fragile mental health and has triggered PTSD, which Dr Lambie believes is "likely to worsen over years of incarceration in a largely hostile environment".

[226] Mr Brown wishes to participate in a specific rehabilitation programme which, according to the material placed before us, he will not receive until he is close to being eligible for parole. As currently structured, the sentence imposed on Mr Brown undermines his ability to pursue programmes designed to assist his rehabilitation and accordingly fails to honour the emphasis on rehabilitation set out in ss 7(h) and 8(i) of the Sentencing Act.

[227] We have recognised the particular challenges faced by Mr Brown in serving a long sentence of imprisonment by deducting a further 10 per cent from the sentence that would otherwise be imposed.

Appropriate determinate sentence

[228] This produces a provisional determinate sentence of close to six years' imprisonment. Even though Mr Brown played only a peripheral role in the murder of Mr McAllister, a sentence of six years' imprisonment would be an inadequate response to his offending. We accordingly follow the same approach we took in relation to Ms Dickey and increase the provisional determinate sentence to one of 12 years' imprisonment.

MPI

[229] As with Ms Dickey, we consider it necessary to impose an MPI in Mr Brown's case to reflect the factors set out in s 86(2)(a) and (b) of the Sentencing Act, namely accountability and denunciation.

[230] The MPI will be six years' imprisonment. Thus, the sentence we impose on Mr Brown is 12 years' imprisonment with an MPI of six years.

Ms Epiha

[231] We follow the same approach to Ms Epiha's case as we have taken in relation to Ms Dickey and Mr Brown.

Is life imprisonment manifestly unjust?

[232] When the Crown submitted that the appropriate MPI starting point for Ms Epiha was 11 years, it did so on the basis that Ms Epiha did not intend to cause Ms Nathan's death, but that she was guilty of murder because she stabbed Ms Nathan with reckless disregard as to whether or not death would ensue. Unlike Ms Dickey and Mr Brown, however, Ms Epiha inflicted the fatal wound.

[233] When we weigh the circumstances of Ms Epiha, and in particular her age, her profound social and cultural deprivation, her psychological issues and the fact she accepted responsibility for her acts by pleading guilty, we are satisfied that a sentence of life imprisonment with an MPI of 10 years is manifestly unjust in her case. The impact of an indeterminate sentence of life imprisonment and lifetime parole, which we have summarised at [203(d)] also adds to the manifest injustice that is generated by the sentence imposed upon Ms Epiha in the High Court.

Starting point

[234] In assessing an appropriate starting point for a determinate sentence, we have borne in mind:

(a) Ms Epiha's offending constituted "reckless" murder.

(b) She inflicted the fatal stab wound.

(c) The factors we have referred at [198].

[235] After weighing these factors, we have concluded that the appropriate starting point for a determinate sentence in the case of Ms Epiha is 20 years' imprisonment.

Provisional deductions

[236] In calculating the deductions we make from the starting point we have again had regard to the considerations we referred to at [234]. We will now briefly elaborate upon those factors.

[237] The reports of the psychologists and psychiatrists who assessed Ms Epiha and the s 27 cultural report set out the profound trauma and deprivation suffered by Ms Epiha throughout her life. She has suffered extreme physical and psychological abuse. The observation in the s 27 report that Ms Epiha was "born into brokenness" succinctly conveys our concern that there is a clear connection between the social environment into which Ms Epiha was born and her subsequent violent offending.

[238] There is a subtle but important additional consideration that stems from Ms Epiha's violent and abusive upbringing, namely, the connection between her psychological impairment and the murder of Ms Nathan. This factor was not explored in any depth in the sentencing decision. There was, however, compelling evidence that Ms Epiha's offending was connected to her deep-seated psychological issues.

[239] Those issues were first identified in 2012 when Dr Dean noted:

> At times of distress, it is likely that [Ms Epiha's] underlying tendency towards impulsivity makes controlling her anger more difficult and results in angry outbursts. In addition, fear appraisals including hypervigil[a]nce to threat, and sensitivity to the opinion of others have contributed to significant anticipatory anxiety. [Ms Epiha] experiences significant anxiety around people she does not know, and is hypervigilant to cues of threat.

[240] Dr Monasterio explained in further depth Ms Epiha's psychological impairment. He said those issues included the following:

> [Ms Epiha] has seemingly had a lifelong history of chronic and severe trauma and modelling of violent behaviours from earliest childhood and a well-established history of violence in response to perceived and actual threats from others. [Ms Epiha] by her own admission has a low threshold for resorting to violence and is constantly vigilant for any actual or potential threats from others. She describes the world around her as a hostile and threatening place, and the need to utilise force for self-protection and to avoid repeating cycles of abuse and victimi[s]ation.

[241] Similarly, Dr Lokesh concluded that Ms Epiha's history of extreme abuse and violence played a "crucial role" in her offending.

[242] Ms Epiha's history of extreme social and cultural deprivation warrants a deduction of 25 per cent from the starting point.

[243] Ms Epiha's youth is also a factor that merits recognition in a determinate sentence. Her offending reflected the pattern of neurological immaturity and emotional impulsivity that is a characteristic of adolescents and young persons. Ms Epiha's very violent reaction to the way in which she believed she was disrespected by Ms Nathan mirrors the characteristics of the neurological immaturity of young offenders described by Dr Lambie. In particular, her impulsive reaction to what she perceived to be Ms Nathan's insulting behaviour was a product of her

inability to rationalise the consequences of her actions and control her impulses. This factor justifies a deduction of 25 per cent.

[244] Although Ms Epiha's plea of guilty was only entered after she received a second sentence indication, a guilty plea to a murder charge is an acknowledgment of guilt, and merits recognition in the form of a further deduction of 20 per cent from the determinate sentence that would otherwise be imposed.

[245] This produces a provisional sentence of six years' imprisonment.

Appropriate determinate sentence

[246] When imposing the sentence we have set for Ms Dickey we explained why we needed to increase the provisional determinate sentence to ensure the end sentence properly reflected the gravity of her offending. The same reasons apply when sentencing Ms Epiha. Ultimately, we must settle upon a determinate sentence that is a proportionate response to Ms Epiha's offending. In our assessment, that is achieved by imposing a determinate sentence of 13 years' imprisonment.

MPI

[247] For the reasons we have explained when setting the MPIs imposed in relation to Ms Dickey and Mr Brown, we also impose an MPI in relation to Ms Epiha. In her case the MPI will be seven years' imprisonment.

[248] We are satisfied the purpose and principles of the Sentencing Act are met by a sentence of 13 years' imprisonment with an MPI of seven years' imprisonment. When we cross-reference this sentence against the sentence imposed in the High Court, we are satisfied that life imprisonment, together with an MPI of 10 years was manifestly unjust in Ms Epiha's case.

[249] For the sake of completeness, we emphasise that the appeals we have determined have all involved cases in which the High Court imposed sentences of life imprisonment with an MPI of 10 years. Different considerations may be engaged

where sentences of life imprisonment and MPIs of greater than 10 years are imposed by the High Court.

Result

[250] The applications for extensions of time are granted.

[251] The applications to adduce further evidence are granted.

[252] The appeals are allowed.

[253] In respect of *Dickey v R* CA393/2018, the sentence of life imprisonment and an MPI of 10 years is quashed and substituted with a sentence of 15 years' imprisonment and an MPI of seven and a half years.

[254] In respect of *Brown v R* CA27/2019, the sentence of life imprisonment and an MPI of 10 years is quashed and substituted with a sentence of 12 years' imprisonment and an MPI of six years.

[255] In respect of *Epiha v R* CA645/2020, the sentence of life imprisonment and an MPI of 10 years is quashed and substituted with a sentence of 13 years' imprisonment and an MPI of seven years.

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