HIGH COURT ORDER DATED 5 NOVEMBER 2020 PROHIBITING PUBLICATION OF APPELLANT'S SURVIVING CHILD'S NAME AND IDENTIFYING PARTICULARS REMAINS IN FORCE.

HIGH COURT ORDER DATED 28 OCTOBER 2020 PROHIBITING PUBLICATION AND IDENTIFYING PARTICULARS OF PERSONS IDENTIFIED AT [3] OF THAT RULING REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA77/2021
[2024] NZCA 64

BETWEEN	AARON GEORGE IZETT Appellant
AND	THE KING Respondent

Hearing:	13 February 2024
Court:	Wylie, Fitzgerald and Edwards JJ
Counsel:	R M Mansfield KC for the Appellant Z R Johnston for the Respondent
Judgment:	19 March 2024 at 11 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] In November 2020, the appellant, Aaron Izett, was found guilty by a jury of the murder of his two-year-old daughter, Nevaeh, between 20 and 21 March 2019.[1] He was also found guilty of assaulting the step-grandfather of his then-partner,[2] and of injuring with intent to injure as a result of biting a police constable.[3] Mr Izett was sentenced in relation to the murder by the trial Judge, Gordon J, on 3 February 2021 to life imprisonment with a minimum term of imprisonment of 17 years.[4] The Judge directed that the sentences in respect of the lesser charges were to be served concurrently.[5]

[2] Mr Izett appeals his sentence in relation to the murder charge on the ground that it is manifestly excessive. He says that the murder was committed whilst he was under the influence of methamphetamine. He argues that his consumption of the methamphetamine was addiction-driven and, as a result, involuntary. Accordingly, he claims that his consumption of the drug did not fall within s 9(3) of the Sentencing Act 2002 (the Act), which the Judge considered precluded her from taking into account by way of mitigation that he was affected by the consumption of drugs at the time of the offending, because she considered the consumption was voluntary. He asserts that his addiction is akin to a mental health disorder and that he should have been treated similarly to those defendants whose offending can be attributed to deep-seated mental health issues.

[3] The Crown supports the sentence imposed by the Judge. It says that there is no evidential foundation for the assertion that Mr Izett's drug consumption at or about the time of the offending was involuntary as a result of his addiction. It submits that even a compelling addiction does not render drug use involuntary and that the voluntary consumption of methamphetamine cannot be a mitigating factor in sentencing because of s 9(3) of the Act. It further argues that s 104 of the Act applied in any event, with the result being that a minimum sentence below 17 years'

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1 Crimes Act 1961, s 167 (maximum penalty of life imprisonment: s 172(1)).
2 Section 196 (maximum penalty of one year's imprisonment).
3 Section 189(2) (maximum penalty of five years' imprisonment).
4 *R v Izett* [2021] NZHC 70 [sentencing notes] at [78].
5 At [79]. On the charge of assault, Mr Izett was sentenced to three months' imprisonment and on the charge of injuring with intent to injure, he was sentenced to three years' imprisonment.

imprisonment was only available if imposing a 17-year minimum sentence was manifestly unjust. It says there is no manifest injustice in this case.

The offending

[4] The following summary is taken largely from the Judge's sentencing notes.

[5] Mr Izett lived with his partner and their infant daughter. On the evening of 17 March 2019, his partner, who was heavily pregnant, went into labour. In the early hours of 18 March 2019, his partner was transported to Tauranga Hospital Birthing Unit to give birth, leaving Nevaeh at home with Mr Izett.

[6] A few days later, on the afternoon of 20 March 2019, his partner's step-grandfather and his wife visited the home. They were intending to take Mr Izett and Nevaeh to see the partner and the new baby. Mr Izett became argumentative and aggressive. He punched the grandfather in the face and arm. The grandparents left the address without Mr Izett and Nevaeh. They went to see the partner in hospital. On route they called the police due to their concern about Nevaeh in light of Mr Izett's erratic behaviour.

[7] From late afternoon on 20 March 2019 until the following morning at around 8.30 am, Nevaeh remained in Mr Izett's care. During this time, he inflicted serious injuries on her. The precise details of the violence Mr Izett applied to Nevaeh are not known. The Crown pathologist at trial, Dr Rexson Tse, gave evidence that multiple external injuries had been inflicted on parts of Nevaeh's body, including her head, and that she also had internal injuries. Dr Tse's evidence was that there had been a minimum of eight to 10 (and possibly up to 20) separate blows to Nevaeh's head. There were also injuries to Nevaeh's neck, torso, limbs and buttocks. The evidence suggested that two different implements had been used to inflict the injuries to Nevaeh's buttocks.

[8] After inflicting these injuries on Nevaeh, Mr Izett took her to an estuary adjacent to the property. Dr Tse's evidence was that Nevaeh, although likely unconscious, would still have been alive at the time. After putting Nevaeh in the estuary near a pole he had erected some months earlier, Mr Izett weighed her down

with two large and heavy rocks. The rocks caused further internal injuries to Nevaeh. Ultimately, Nevaeh drowned.

[9] Shortly after 10.45 am on 21 March 2019, the police attended the property after they were contacted by members of the community concerned by Mr Izett's erratic behaviour. Mr Izett was seen naked running around his property and the neighbourhood. Police officers attempted to engage with him, but he did not cooperate. Even the use of a taser was insufficient to bring him under control. He then waded into the estuary. The police officers initially remained on the shore. As the tide receded, one of the officers noticed that a foot was visible near the pole. As the tide receded further, the rocks on Nevaeh's body became visible and her body could be seen below the surface. Nevaeh's body was retrieved by the police and she was pronounced dead.

[10] Mr Izett had gone onto an island in the estuary and had hidden in some scrub. After finding Nevaeh's body, the police decided to pursue Mr Izett. When officers arrived on the island, Mr Izett was found lying on the ground. Efforts were made to restrain him, but he did not comply with police requests. He was holding an object in his right hand, which the officers thought was a weapon. One officer attempted to remove the object from Mr Izett's hand. The officer managed to get one of his hands on the object, but Mr Izett leaned forward and bit the officer on the wrist. The officer required subsequent medical attention as a result of the injury inflicted. Mr Izett was finally, and with much difficulty, restrained by the police at 1.55 pm. He was then arrested.

The High Court sentencing

[11] The Judge recorded that Mr Izett's trial counsel accepted that the Court had to impose a sentence of life imprisonment in relation to the murder.[6] The Judge noted that she was required to decide how long Mr Izett had to remain in prison before he became eligible to be released on parole.[7]

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6 At [3].
7 At [3].

[12] The Judge recorded the facts, much as set out above. She noted that, at trial, Mr Izett had accepted that he had committed the acts the subject of each of the three charges and that what was in issue was whether or not the Crown could prove the necessary intent.[8] The Judge noted that Mr Izett had relied on the defence of insanity for each charge, but that defence had been rejected by the jury.[9] She proceeded on the basis that Mr Izett had understood the quality of his acts and knew that they were morally wrong.[10] She also proceeded on the basis that Mr Izett's defence of insanity had failed at the first step, namely that he was not suffering from a disease of the mind;[11] rather, the jury had accepted that Mr Izett experienced a transitory mental condition or state, caused by the effect of drugs which he took voluntarily.[12]

[13] The Judge referred to the victim impact statements and to Mr Izett's personal circumstances, both as disclosed in the pre-sentence report and in a cultural report provided to the Court under s 27 of the Act.[13] She also discussed psychiatric evidence from Dr Peter Dean, a psychiatrist called by the Crown, and by Dr Justin Barry-Walsh, a psychiatrist called by Mr Izett. The Judge noted that it was Dr Dean's evidence that Mr Izett did not have a drug-induced psychosis; rather, he had experienced a drug delirium which caused psychotic-like symptoms.[14] The Judge recorded that Dr Barry-Walsh agreed that he had never diagnosed Mr Izett with schizophrenia.[15] The Judge considered that this evidence supported her conclusions about Mr Izett's mental state at the time of offending (noted in the preceding paragraph).[16]

[14] The Judge set out her approach to sentencing, noting that it had been accepted that there were no grounds on which she should exercise the manifest injustice exception to a sentence of life imprisonment for the murder.[17] It was submitted by the Crown that there were two aspects of Mr Izett's offending which engaged s 104 of the Act — first, Nevaeh's vulnerability due to her age and, secondly, that the offending

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8 At [22].
9 At [22].
10 At [23].
11 At [23].
12 At [25].
13 At [26]–[36].
14 At [37].
15 At [38].
16 At [39].
17 At [40], referring to s 102(1) of the Sentencing Act 2002.

was committed with a high degree of brutality and cruelty. The Judge observed that she first had to determine the appropriate minimum term, taking into account the aggravating and mitigating factors of Mr Izett's offending and any factors personal to him.[18]

[15] The Judge set out the competing submissions for the Crown and for Mr Izett.[19] The Crown had submitted that a minimum term of 20 years' imprisonment was appropriate. Counsel for Mr Izett had submitted that a minimum term of imprisonment of 18 years would reflect the aggravating features of Mr Izett's offending. The Judge analysed the reports and other material which had been put before her. She identified a number of aggravating features in Mr Izett's offending — the use of actual violence, the extent of the harm caused, the cruelty involved, the abuse of trust and Nevaeh's vulnerability.[20] The Judge discussed comparable cases. She concluded that a minimum term of imprisonment of 17 years was appropriate for the murder, and she adopted an uplift of 12 months' imprisonment for Mr Izett's other offending.[21]

[16] The Judge then turned to consider whether any adjustment to this minimum term of 18 years' imprisonment was required to take into account Mr Izett's personal circumstances. She accepted that there was causal connection between Mr Izett's background and his offending.[22] She noted that from about the age of 12, Mr Izett's upbringing had been destabilized by whānau dysfunction and violence, that Mr Izett became homeless and that he descended into drug addiction. She accepted that the violence and harshness of Mr Izett's life, driven by drug addiction, was connected to the offending which led to Nevaeh's death and that a discount to the minimum term was therefore required.[23]

[17] The Judge, however, considered that the discount had to be circumscribed, for three reasons:[24]

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18 At [42]–[43].
19 At [44]–[46].
20 At [47].
21 At [56].
22 At [60].
23 At [60].
24 At [61]–[64].

(a) Care had to be taken in considering Mr Izett's disconnect from his Māori cultural traditions. While the Judge accepted that Mr Izett's relationship with those traditions was disrupted when he spent time in Australia, she did not consider that to say Mr Izett was "disconnected" accurately described his relationship with his Māori heritage.[25]

(b) The medical evidence established that the symptoms which led to the offending were a product of the drugs he had consumed. Mr Izett was also under stress in the months before the offending, however, she said:

> [63] … [I]t was [his] drug use, not a mental condition, that was the driver in [his] offending. I cannot take account of such drug use as a mitigating factor due to s 9(3) of the Act. So any discount I give will not extend to the state of [his] mental health at the time of the offending.

(c) While a defendant's personal circumstances can be relevant in determining a sentence, where a person is for sentence for murder, particularly a grave and callous murder, the discretion available to the court to reduce an otherwise appropriate sentence on account of such considerations is constrained.[26]

The Judge was nevertheless prepared to give Mr Izett's personal circumstances some weight, noting that his drug use stemmed from his background.[27]

[18] The Judge further considered that any discount for remorse had to be limited, noting that Mr Izett's statements of remorse to the pre-sentence report writer were ambivalent.[28] The author of the s 27 report had noted that Mr Izett said he was remorseful, but also recorded his efforts to transfer responsibility for his offending to his drug addiction or mental health issues. The Judge also referred to a letter she had received from Mr Izett and noted his repeated efforts to deflect responsibility for his offending by reference to his mental health.[29] She recorded that his focus was the effect of the offending on him and that he did not recognise the role of his drug

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25 At [62].
26 At [64], citing *Hohua v R* [2019] NZCA 533 at [44]. See also s 104(1)(e) of the Sentencing Act.
27 At [65].
28 At [66] and [68].
29 At [67].

consumption in the offending.[30] The Judge also noted counsel's submission that Mr Izett took steps to shorten the proceedings and accepted there should be a very modest discount for this consideration.[31]

[19] Taking all these various mitigating factors into account, the Judge allowed Mr Izett an overall discount of 12 months. As a result, the final minimum term became one of 17 years' imprisonment.[32]

[20] The Judge then turned briefly to the application of s 104 of the Act. She noted that it was accepted that the section was engaged and that as a result, the Court had to impose a minimum term of imprisonment of not less than 17 years, unless that would be manifestly unjust.[33]

[21] The Judge recorded that she had already determined that Mr Izett should serve a minimum term of imprisonment of 17 years, without having resort to s 104 and that it was therefore not necessary for her to deal with the manifest injustice exception. She did not accept submissions advanced on Mr Izett's behalf that his deprived background and his compromised mental health brought him within the manifest injustice exception. She noted that in other cases, where the mental health of a defendant had meant that a minimum term of imprisonment was manifestly unjust, it had been due to a long history of mental illness which contributed to the offending. The Judge recorded that did not arise in Mr Izett's case and that it would not justify the exception. She recorded that were it necessary for her to do so, she would have found that it was not manifestly unjust for Mr Izett to be required to serve a minimum term of 17 years' imprisonment.[34]

The appeal

[22] Mr Izett's notice of appeal was initially against both conviction and sentence, but the conviction appeal was subsequently abandoned. As is noted above, the

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30 At [67].
31 At [69].
32 At [71].
33 At [74].
34 At [75]–[76].

sentence appeal asserted that the imposition of a minimum term of 17 years' imprisonment by the Judge was manifestly excessive.

[23] The sentence appeal is brought pursuant to s 244 of the Criminal Procedure Act 2011.[35] The Court must allow the appeal if it is satisfied that, for any reason, there is an error in the sentence imposed on conviction and that a different sentence should be imposed.[36] The court must dismiss the appeal in any other case.[37] This Court does not start afresh, nor simply substitute its own opinion for that of the original sentencer. Rather, it must be shown that there was an error, whether intrinsically or as a result of additional material submitted on appeal. If there is an error of the requisite character, the Court must then form its own view of the appropriate sentence.[38]

Submissions

For Mr Izett

[24] Mr Mansfield KC, appearing for Mr Izett, referred to the various reports prepared by psychiatrists. He noted that Mr Izett has a history of drug addiction that began when he was living on the streets of Melbourne as a teenager. He referred to the s 27 report, which noted that Mr Izett was introduced to methamphetamine some time after he was deported back to New Zealand in 2004. He did manage an extended period of abstinence but, in about 2014, he relapsed following a relationship breakdown. Mr Mansfield noted that, at the time of the offending, Mr Izett was using methamphetamine and other substances regularly. Mr Mansfield acknowledged that the evidence of the psychiatrists called at trial provided little support for the proposition that Mr Izett had a disease of mind at the time of the offending, but submitted that they had no doubt that Mr Izett was, at time of the offending, deeply affected by methamphetamine.

[25] It was Mr Mansfield's further submission that an offender whose offending is attributable in large part to addiction-driven intoxication should, for sentencing

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35 See Sentencing Act, s 105.
36 Criminal Procedure Act 2011, s 250(2).
37 Section 250(3).
38 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30], citing *R v Shipton* [2007] 2 NZLR 218 (CA) at [140].

purposes, be treated in the same way as an offender whose offending is attributable in large part to mental health issues. He submitted that the full role of the addiction should be acknowledged, from the causative role it played in the offending to the impact it had on the offender's state of mind at the time.

[26] Mr Mansfield referred to case law discussing drug addiction both in this Court and in the Supreme Court and submitted that there is a close analogy between offending committed by an offender in the throes of psychosis or delirium traceable to drug addiction and an offender who offends in the throes of mental illness. He argued that s 9(3) of the Act does not apply in such circumstances and that it is facile to suggest that offenders, who are addicted to methamphetamine, consume it voluntarily. He submitted that the force of their addiction compels them to consume the drug and that neither their consumption of the drug, nor their offending when under its influence, represent a fully willed choice.

[27] Mr Mansfield did not submit that Mr Izett's sentence should have been less than life imprisonment. He accepted that such a sentence was appropriate. He also accepted in his oral submissions that s 104 of the Act was engaged. He argued that given Mr Izett's addiction, it was manifestly unjust to impose a minimum term of imprisonment of 17 years. Rather, he argued that the minimum term should have been in the region of 14 years' imprisonment.

For the Crown

[28] Ms Johnston, for the Crown, argued that the evidential basis for Mr Mansfield's submission is not strong. She submitted that the evidence at trial did not establish that Mr Izett's drug consumption was involuntary as a result of his addiction. Rather, Mr Izett gave evidence at trial that, a day prior to the offending, he was in effect kidnapped by gang members who made him get into a car and forced him to consume a liquid — he called it "pong water" — that contained methamphetamine.

[29] Ms Johnston submitted that because the evidence did not establish that Mr Izett's drug consumption was involuntary, s 9(3) was in play and that it precluded drug consumption from being a mitigating factor on sentencing. She argued that the subsection puts in place a clear statutory prohibition on taking into account by way of

mitigation the fact that an offender was, at the time he or she committed the offence, affected by the voluntary consumption or use of any drug. She put to us that this prohibition applied in Mr Izett's case, because the evidence at trial established no more than that the symptoms leading to the offending were a product of his drug consumption.

[30] Ms Johnston submitted that the s 9(3) prohibition cannot be avoided by simply pointing to a background of addiction. While she acknowledged the strong pull of addiction and its capacity to overwhelm an individual's otherwise pro-social tendencies, she argued that a discount for offending that occurs while someone is under the influence of an intoxicant is prohibited by s 9(3). She acknowledged that addiction might cause an individual to make poor decisions and/or to act impulsively, but suggested that such decisions are nevertheless conscious and not involuntary. She pointed to the evidence and suggested that the Court does not have sufficient information about the strength of Mr Izett's addiction or his capacity to resist.

[31] In any event, Ms Johnston submitted that s 104 of the Act applied to Mr Izett's offending and that there are no compelling circumstances to justify a departure from the statutory minimum of 17 years imposed by that section.

Analysis

Relevant law

[32] Section 9 of the Act appears in pt 1, which deals with the purposes and principles of sentencing. Section 9(1) sets out various aggravating factors a court must take into account to the extent that they are applicable when sentencing; s 9(2) sets out various mitigating factors a court must likewise take into account to the extent that they are applicable. Relevantly, s 9(2)(e) requires that a court take into account that the defendant has, or had at the time the offence was committed, diminished intellectual capacity or understanding. Clearly, diminished intellectual capacity can be a mitigating circumstance and this Court has recognised that the use of methamphetamine can be causative of mental health issues.[39] Where there is mental

[39] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [152].

impairment which is exacerbated by substance abuse, s 9(3) may have no "work to do",[40] because the substance abuse was not directly causative of the offending; rather it was a contributing factor.[41]

[33] Section 9(3) reads as follows:

> (3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

Section 9(3) is in mandatory terms. As can be seen, the subsection makes it clear that the fact that a defendant was affected by the voluntary consumption of alcohol or a drug at the time of committing the offence cannot be taken into account as a mitigating factor. The courts have taken this legislative direction a step further; the fact that an offender was affected by alcohol or drugs will not normally justify an uplift to the starting point either.[42]

[34] Section 9(3) was considered by this Court in *R v Wihongi.*[43] The appellant in that case, Ms Wihongi, was a battered woman with significant cognitive impairment, vulnerable mental health and a history of alcohol abuse. She stabbed her partner to death and was ultimately found guilty of murder. The sentencing Judge disregarded Ms Wihongi's intoxication at the time of the offending, but did take into account her underlying alcoholism as one of a number of material impairments affecting her culpability.[44] An eight year determinate sentence was imposed.[45] The Crown appealed this sentence. This Court allowed the appeal, quashed the sentenced imposed in the High Court and substituted a sentence of 12 years' imprisonment.[46] O'Regan P, delivering the judgment of the Court, stated as follows:

> [54] We accept that the legislative intention of s 9(3) is to prevent the Court from taking into account alcohol consumption as a factor indicating a lower

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40 *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at [70] per Glazebrook, O'Regan, Ellen France and Kós JJ.
41 At [24]–[26] and [70] per Glazebrook, O'Regan, Ellen France and Kós JJ.
42 *R v Finau* (2003) 20 CRNZ 333 (CA) at [16].
43 *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775 [*R v Wihongi* (CA)].
44 *R v Wihongi* HC Napier CRI-2009-041-2096, 30 August 2010 at [44].
45 At [46].
46 *R v Wihongi* (CA), above n 43, at [98].

> level of culpability. It is notable that s 9(3) is an exception to s 9(2)(e), which requires the Court to take into account as a mitigating factor "that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding". Thus, it is clear that the intention of the legislature is that, where the level of intellectual impairment at the time of the offending is affected by alcohol, the Court cannot take that into account. In our view this prevents the Court from taking into account alcohol consumption even where the consumption of the alcohol reflects an underlying alcohol abuse impairment or a compulsive consumption of alcohol. …
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> [55] However, it has to be recognised in the present case that two different factors were at play: the underlying mental impairment of Ms Wihongi, and her consumption of alcohol, which is linked to that mental impairment. The fact that consumption of alcohol cannot be taken into account does not diminish the significance of Ms Wihongi's diminished intellectual capacity under s 9(2)(e).

[35] *Wihongi* was discussed by this Court in *Zhang v R.*[47] The Court in *Zhang* did not see *Wihongi* as authority for the proposition that a pre-existing state of addiction contributing to index offending may not be considered as a mitigating consideration.[48] Rather, the Court in *Zhang* accepted that a pre-existing state of addiction that impairs a defendant's decision-making and contributes to offending can be a mitigating consideration.[49] The Court observed that the pull of addiction to methamphetamine can lead to strong pro-social tendencies being overwhelmed by dependence and addiction, and the prioritisation of the narcotic over other needs.[50] The Court went on to comment that in some cases, there may be "no material difference between the mitigating impact of the addiction presented and a serious mental health disorder".[51]

[36] In *Berkland v R*, the Supreme Court emphasised the importance of an offender's background to sentencing.[52] The Court confirmed that where it can be established that background was an operative or proximate cause of the offending, it is likely to be a potent sentencing factor, and that proximate afflictions such as addiction or mental illness can be examples of such operative or proximate causes.[53]

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47 *Zhang v R*, above n 39, at [143].
48 At [144].
49 At [144]–[149].
50 At [145].
51 At [149].
52 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [89]–[94] per Winkelmann CJ, William Young, Glazebrook and Williams JJ and [201] per Ellen France J.
53 At [16(c)] and [108] per Winkelmann CJ, William Young, Glazebrook and Williams JJ and [202] per Ellen France J.

The Court held that it is sufficient if a defendant's mitigating background factor made a causative contribution to the offending.[54]

[37] Any causative contribution must be established on the balance of probabilities.[55] Although independent evidence of causal connection is likely to be more cogent than self-reporting, self-reporting should not be excluded from consideration.[56] Whether the causal connection is proved to the required standard must be determined after a consideration of all the circumstances of the case.[57]

[38] The majority in *Berkland* emphasised that the relevance of a defendant's background can be reduced where the offending is particularly serious.[58] Sentencing purposes and principles such as deterrence, denunciation and community protection will usually be more powerfully engaged in such cases.[59] The majority explained that more serious and carefully orchestrated offending will often involve greater rational choice, including an assessment of the risks of detection and therefore increased agency.[60] In such cases, other sentencing goals can become more important than the contribution of background.[61]

[39] Against this background we turn to consider the materials available to the Judge at sentencing relevant to Mr Izett's consumption of methamphetamine, its effects on his mental state, his addiction and its likely effects. We record that no further materials have been made available to us.

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54 At [109] per Winkelmann CJ, William Young, Glazebrook and Williams JJ and [202] and [205]–[206] per Ellen France J. The majority explained that that a background factor will have contributed causatively if it "help[s] to explain in some rational way why the offender has come to offend" and considered this standard was not "unduly rigorous": see at [16(c)] and [109]–[110]. Ellen France J declined to adopt that definition of causative connection, expressing concern with "an unduly loose link" between the background factor and the offending: see at [207]–[208].

55 See *Zhang v R*, above n 39, at [148]. The Court stated that the offender bears the onus of proof, to the civil standard, to establish the extent and effect of addiction. This reflects s 24(2)(d) of the Sentencing Act, which provides that the offender must prove, on the balance of probabilities, the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence.

56 *Berkland v R*, above n 52, at [129] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

57 At [129] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

58 At [94] and [111] per Winkelmann CJ, William Young, Glazebrook and Williams JJ. See also [209]–[210] per Ellen France J, in which she explains that the gravity of the offending may temper the extent of a discount.

59 At [94] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

60 At [16(c)] and [111] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

61 At [16(c)], [94] and [111] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

Relevant materials available to the Judge at sentencing

The Tauranga episode

[40] At trial, an agreed statement of facts was presented to the jury, which recorded that Mr Izett had been arrested in Tauranga during the evening of 4 February 2019 for disorderly behaviour. The arresting officer thought Mr Izett might be mentally disordered and he invoked the relevant provisions in the Mental Health (Compulsory Assessment and Treatment) Act 1992. When Mr Izett was processed at the Tauranga Police Station, a small quantity of methamphetamine and a glass pipe was found in his backpack. His behaviour whilst in custody was "erratic" and at times bizarre. The police considered that he was under the influence of drugs and/or alcohol.

[41] Over the course of the evening, Mr Izett's condition deteriorated and he was assessed by a doctor. It was ultimately determined that it was unsafe for Mr Izett to remain at the police station. He was sedated and transferred to Tauranga Hospital. He was there assessed by a member of the mental health crisis team. Mr Izett was described as elevated, with disordered thoughts and rapid speech. He was diagnosed as having had a drug induced psychotic episode. Residual thought disorder was also diagnosed. Mr Izett was prescribed lorazepam, an anti-anxiety and sedating agent. He was discharged with a diagnosis of acute methamphetamine intoxication.

Blood sample

[42] Following Mr Izett's arrest in relation to Nevaeh's death on 21 March 2019, a blood sample was taken from him. It was subsequently sent to ESR for analysis by a forensic scientist, Dr Helen Poulson. A urine sample was also taken.

[43] Dr Poulson was called by the Crown to give evidence at trial. She confirmed that no alcohol was detected in Mr Izett's blood, but that there was a trace of alcohol, at a very low level, in his urine. The blood and urine were also analysed for a range of drugs. This analysis extended to the presence of both methamphetamine and tetrahydrocannabinol (THC), the active constituent in cannabis. Four medicinal drugs were detected. Methamphetamine was also detected. It was detected at the level of 0.05 milligrams per litre (mg/L). It was Dr Poulson's evidence that blood

methamphetamine concentrations associated with the recreational use of methamphetamine are generally in the range of 0.01 up to 2.5 mg/L. The level detected in Mr Izett's blood was described as being at the lower end of the recreational range. It was acknowledged however that it is not possible to relate levels of drugs found in blood to a particular level of impairment or intoxication. Dr Poulson also gave evidence that THC was detected in Mr Izett's blood, at a level of approximately 0.3 micrograms per litre. Dr Poulson explained that this level "could have occurred anywhere from two hours after smoking but it could also have been present from smoking cannabis over 12 hours before that".

Psychiatric reports

[44] Mr Izett was assessed by a consultant forensic psychiatrist, Dr David Brunskill, in early April 2019. In a report dated 12 April 2019, Dr Brunskill recorded that Mr Izett had stated that leading up to his arrest, he had been heavily "drugged up" — Mr Izett estimated that he had used "10 x 100 bags" over six days and that he had used methamphetamine which was not "locally baked" and was probably of a higher purity. Dr Brunskill considered that it was highly likely that Mr Izett's mental state and behaviour at the time of his arrest on 21 March 2019 was influenced by his intoxication from methamphetamine and cannabis, but also that there were related mental health challenges (which included psychotic aspects). He did not however consider that Mr Izett was mentally disordered or mentally impaired.

[45] In a report also dated 12 April 2019, Dr Dean recorded that Mr Izett had advised him that he had used methamphetamine in the period around the time of his baby's birth (on 18 March 2019) and that he had described "binge using" to celebrate. Mr Izett told Dr Dean that he had used up to half a gram of methamphetamine over a period of three days, followed by a further half a gram for the next three days. Mr Izett also acknowledged using methamphetamine over the previous two years in a binge pattern.

[46] Dr Dean considered that Mr Izett presented with symptoms consistent with methamphetamine induced delirium, which were exacerbated by his other physical health conditions. He noted that Mr Izett's symptoms had resolved without medication

and that this was inconsistent with a diagnosis of psychosis or mental illness. He considered that the symptoms were attributed to the direct effects of substance abuse, rather than mental illness. He recorded that at the time of his assessment, Mr Izett was not presenting with mental impairment; rather Mr Izett's condition was "wholly" caused by his use of methamphetamine. Dr Dean noted that because of Mr Izett's previous experience of methamphetamine delirium, Mr Izett was aware of the potential consequences of his ongoing methamphetamine use.

[47] According to a psychiatric report prepared by Dr Shailesh Kumar, dated 13 October 2020, Mr Izett became addicted to drugs at the age of 16 years. He used cocaine for a few years from the age of 19 and he then became addicted to methamphetamine at the age of 24. He went on to experiment with synthetic cannabis and magic mushrooms. Mr Izett told Dr Kumar that, in the two or three years prior to his incarceration, he was using up to "one to two points" of methamphetamine twice a week, along with "five cones" of synthetic cannabis every six months and a "tinny" of cannabis five days a week. Mr Izett also reported using LSD off and on and drinking in binges. Dr Kumar commented that Mr Izett presented as having used drugs consistently over the previous two to three years.

[48] Mr Izett also told Dr Kumar that shortly before Nevaeh's death, he had been given a drink from a methamphetamine utensil which he believed was spiked with extremely concentrated methamphetamine. Mr Izett said further that he had used methamphetamine before his partner was taken to hospital to have the baby (in the earlier hours of the morning of 18 March 2019).

[49] Dr Barry-Walsh was retained by Mr Izett's trial counsel. In a report dated 2 August 2020, Dr Barry-Walsh noted that Mr Izett had described his heavy and sustained use of substances, that he began using methamphetamine after he returned to New Zealand in 2004, and that he was using substantial amounts of methamphetamine, probably in increasing quantities, in the period leading up to the offending. Mr Izett told Dr Barry-Walsh that he could binge on the drug for several days. He also described using cannabis and alcohol. Mr Izett also described to Dr Barry-Walsh his significant use of cannabis and methamphetamine in the days leading up to the offending, although he had difficulty quantifying this. He told

Dr Barry-Walsh that he had had a period of abstinence from methamphetamine for some eight years, through to 2014, but that he began using the drug again after a relationship break up. He told Dr Barry-Walsh that he accepted that he had an addiction and that his addiction had persisted up until his arrest in late 2019.

[50] Dr Barry-Walsh considered that Mr Izett has a polysubstance dependence disorder, with more recent dependence on cannabis and methamphetamine. He considered that Mr Izett had suffered from psychotic symptoms and that he had experienced a disturbance. He was of the opinion that Mr Izett was in a highly abnormal mental state at the time of the offending and that the most significant causative factors in the development of his psychotic symptoms were his use of methamphetamine and cannabis.

[51] In a further report dated 22 September 2020, Dr Barry-Walsh referred to the toxicology results noted above and stated that it was difficult to extrapolate back to calculate what Mr Izett's blood concentration of methamphetamine was at the time of the offending.

[52] In evidence given at trial, Dr Barry-Walsh expressed the view that given the way Mr Izett presented on 21 March 2019, there was "a good chance that he would have been impaired in his ability to reason about what he was doing …".

[53] Dr Dean differed from Dr Barry-Walsh in his diagnosis of Mr Izett's condition at the time of the offending. In a report dated 7 October 2020, Dr Dean did not dispute that Mr Izett was affected by methamphetamine when he killed Nevaeh. It was his opinion however that Mr Izett was suffering the effects of an acute delirium associated with methamphetamine intoxication, methamphetamine withdrawal and the physical complications of his condition. He doubted that Mr Izett had a drug-induced psychotic disorder.

[54] Notably, Dr Dean commented that Mr Izett chose to use methamphetamine despite being aware of the effects it had on him in February 2020, when he ended up being treated in the emergency department at Tauranga Hospital, and notwithstanding observations his family and associates had made about his behaviour when he was on

the drug. Dr Dean acknowledged that Mr Izett had been unable to provide a coherent explanation of the events leading to his arrest and commented that this likely reflected Mr Izett's intoxicated and "withdrawing" state. Dr Dean nevertheless expressed the view that intoxicated people can still form an intent, albeit that it may be different from their usual intent in a sober or abstinent state.

[55] Dr Dean was not cross-examined in relation to this view at trial.

[56] In his evidence at trial, Dr Dean said that Mr Izett's delirium came from his use of methamphetamine and the effects of coming off the drug. He did not consider that Mr Izett had a disease of the mind over the period 18 to 21 March 2019.

Mr Izett's evidence at trial/his letter

[57] Mr Izett gave evidence at his trial. He confirmed that he sometimes took methamphetamine. He said that he could consume the drug about three times a week, but that in some weeks he did not consume methamphetamine at all. He also said that he took cannabis, but that the amount he took varied. He said that it could be from a "tinny to a 50 bag, to half an ounce".

[58] Mr Izett said that he did smoke methamphetamine in the week leading up to the 18 March 2019, on "one and a half" occasions. He said that the last time that he took methamphetamine prior to Nevaeh's death was on 17 March 2019, before his partner went into hospital to have the baby. He denied "topping up" with any methamphetamine of his own thereafter.

[59] Mr Izett gave evidence that, on 18 March 2019, he received a text from some associates, who asked him to meet them by a hill. He said that he met the associates at the bottom of the hill, that they told him to jump into a car and that they then drove him up to the top of the hill. He said they were "patched gang members". They started asking Mr Izett lots of questions about one of his other associates and about money he owed for drugs that they had supplied to him. He said that they stopped at the top of the hill and that the people then produced "a smoking implement" called a "pong" used for smoking methamphetamine. He said that they handed him a liquid to drink and that he believed that the liquid had come from the inside of the pong. He said that

the liquid was quite sweet initially, that it then became sour and bitter, and that it had an immediate effect on him. It affected his vision and he didn't feel himself. He was told to get out of the car. He started to walk home but he was picked up by some members of his whānau. They transported him home.

[60] Both in his evidence in chief and under cross-examination, Mr Izett was adamant that he did not consume methamphetamine after 17 March 2019. When his various assertions regarding the extent of his drug use that he had made to some of the consulting psychiatrists were put to him, he said that he had lied to the consultants.

[61] Mr Izett sent a letter to the Judge for his sentencing. He there said that he was unwell, that he could not understand "the [complexity] of reality, the diminished abnormality [corrupted his] perception". He said that he had no control of his mind as he "couldn't control the voice that was talking to [him]". There are no references to his drug consumption or addiction in the letter, although he did say that he was suffering from post-traumatic stress, psychosis, delusions and hallucinations.

The partner's and the neighbours' evidence

[62] The partner said that she commenced her relationship with Mr Izett in March 2014 and that at the time he was using drugs — methamphetamine and cannabis. She also said that he drank alcohol. She said that initially, when Mr Izett started taking methamphetamine, he was "fine" and that the effect was not as bad as it became later in their relationship. She said that when he was using the drug, he would talk a lot and that on occasion he would not sleep for a couple of days. She said that at the time she went into labour, Mr Izett had not slept for two nights and that she assumed that he had consumed some methamphetamine. She explained how she had the baby and then went on to say that she managed to speak to Mr Izett to tell him about the baby on 19 March 2019. She said that when she spoke to him, he was very talkative.

[63] At or about the time of Nevaeh's death, Mr Izett's neighbours noticed him behaving in bizarre ways. By way of example, late at night on 20 March 2019, Mr Izett was heard repeatedly blowing a whistle. The following morning he was seen running naked through the neighbourhood. At times he was ranting and raving. At

one stage he was observed carrying kamokamo (or pumpkins), one of which he smashed onto a car bonnet whilst screaming at the driver.

Mr Izett's arrest

[64] When the police arrived on the morning of 21 March 2019, Mr Izett was naked, armed with a pitchfork and blowing his whistle. At one point he doused himself with petrol. As already noted, it took a team of officers to restrain him. Medical staff had to sedate him with two doses of ketamine, before taking him to hospital. Mr Izett was neither stable nor clear-headed at the time.

The Provision of Advice to Court Report and the s 27 Report

[65] In a Provision of Advice to Courts Report, dated 5 January 2021, it was noted that Mr Izett deflected every question relating to the offending. He asserted that he did not remember the offending and that he was, at that time, in a "'psychotic state' due to his drug addiction". The report writer noted as follows:

> Of concern is that prior to his index offending, [Mr Izett] was admitted to Tauranga Hospital in February 2019, suffering from methamphetamine toxicity, so he would have been well aware of the impacts of his high drug usage, at the time of his offending.

The report writer recorded that Mr Izett had stated that, for three months prior to his remand in custody, he had consumed cannabis and methamphetamine on a daily basis, as well as reporting the weekly use of hallucinogens and synthetic cannabis. Nevertheless, Mr Izett did not believe that he has an issue with drugs, although he did state that he became addicted to methamphetamine at the age of 24 and that he has experienced the "full range of drugs available to him".

[66] A report was prepared under s 27 of the Act. It is dated 28 January 2021 and was written by Shelley Turner, a director of Specialist Reports Ltd. The report expressly recorded that it was based on self-reporting by Mr Izett and that Ms Turner had limited opportunity to check the information that had been provided by him. Reference was made to Mr Izett's life on the streets and his early uptake of alcohol and drugs. The comment was made that Mr Izett's methamphetamine addiction was directly linked to his offending. The comment was also made that Mr Izett's wellbeing

was significantly diminished at the time of his offending. Ms Turner quoted Mr Izett as follows:

> [At the time of the offending] I had been awake for five days, puffing the whole time and drinking and smoking weed as well. Feeling the effects of your brain starting to shut down, again where you've got lack of substance, nutrition, h2O, even in a sober state you start to hallucinate. Like being in a [desert]. With methamphetamines, it takes that substance out of your body a lot faster than if you were sober.

It was noted that Mr Izett placed a lot of emphasis on his diminished mental wellbeing at the time of his offending. It was also noted that Mr Izett admitted that he needed treatment for his addiction. Ms Turner expressed the view that Mr Izett was very much in the throes of methamphetamine addiction at the time of his offending and that the impact of his addiction was such that Mr Izett was in a state of diminished wellbeing.

Our assessment

[67] There can be little doubt that Mr Izett was in an unstable mental state at the time of the offending, that the offending occurred whilst he was under the influence of methamphetamine and cannabis, and that his use of those drugs either contributed to or caused him to be in the state he was in at the time of the offending.

[68] The Judge sentenced Mr Izett on the basis that he was in a transitory mental condition or state caused by the effects of the drugs he had taken.[62] She also proceeded on the basis that Mr Izett's consumption of those drugs was voluntary.[63]

[69] As noted, Mr Izett gave evidence at his trial to the effect that he had been kidnapped by gang members and forced to consume methamphetamine by drinking the liquid from a methamphetamine "pong". The Judge rejected this evidence. Again, to accept it would have been inconsistent with the jury's verdict. The Judge had directed the jurors that, if they accepted that Mr Izett had acted with the necessary intent because of an intoxicated state forced on him, then he would be entitled to an acquittal. In finding him guilty, the Judge noted, the jury must have rejected Mr Izett's evidence on this issue. The Judge considered that the jury was right to do so and that

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62 Sentencing notes, above n 4, at [25].
63 At [25].

it was fanciful for Mr Izett to suggest that he was forced to consume methamphetamine by gang members who he said he was indebted to for drug purchases.[64]

[70] We agree with the Judge's analysis. In our view, Mr Izett's explanation for his consumption of whatever quantities of methamphetamine it was that he took was fatuous.

[71] The thesis advanced by Mr Mansfield — namely that Mr Izett's offending was attributable in large part to his addiction-driven intoxication, and that because of his addiction, his consumption of methamphetamine was involuntary and thus not caught by s 9(3) of the Sentencing Act — has no foundation in the available materials.

[72] There was little or no material available to the Judge about the impact of addiction on decision-making, either generally or specifically in relation to Mr Izett. While it was Dr Barry-Walsh's view that there was a good chance that Mr Izett would have been impaired in his ability to reason about what he was doing at the time of the offending, there is nothing to suggest that Mr Izett's decision to take methamphetamine prior to Nevaeh's death (whenever it may have been made) was involuntary because of his addiction.

[73] As this Court made clear in *Wihongi*, where a defendant had diminished intellectual capacity or understanding at the time of the offending which would otherwise be a mitigating factor under s 9(2)(e), s 9(3) prevents the court from taking into account the effect of the voluntary consumption of alcohol or drugs on the defendant's intellectual capacity of understanding, even where the consumption of the alcohol or drug reflects an underlying alcohol or drug abuse impairment or a compulsive consumption of alcohol or drugs.[65] We do not read either *Zhang* or *Berkland* as detracting from this observation. The scope of s 9(3) was not considered in this context in either of those cases and the issues they dealt with were very different to the issues raised in the present case.[66]

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64 At [15].

65 *Wihongi v R* (CA), above n 43, at [54].

66 The Court in *Zhang v R*, above n 39, at [143]–[144] explained that s 9(3) does not preclude consideration of addiction as a personal mitigating factor. The Court however did not consider the scope of s 9(3) more generally.

[74] Like Ms Johnston, we accept that addiction can have a strong pull; it may be that it can overwhelm voluntary choice. Nevertheless, there was no material before the Judge, nor is there any material before us on appeal, which enables us to reach any conclusions about why Mr Izett consumed methamphetamine shortly before or about the time of Nevaeh's death. The available materials do not establish that Mr Izett's drug consumption was involuntary as a result of his addiction. This assertion was not made at trial or at sentencing and Mr Izett did not offer any psychological or psychiatric evidence to support the assertion now made that his consumption of methamphetamine was not the product of his own free choice. The Judge simply did not have before her any information about the strength or power of Mr Izett's addiction, the effects his addiction may have had on him, or his capacity to resist it. Nor do we. We accordingly reject the contention that the drug consumption was involuntary due to Mr Izett's addiction.

[75] The Judge did, however, allow Mr Izett a discount for his personal circumstances. She expressly recognised Mr Izett's difficult upbringing and his subsequent drug use and its connection to his offending.[67] This was appropriate; Mr Izett's life-long abuse of drugs clearly helped to explain the circumstances which led to his offending.[68]

[76] But, as noted above, the Judge considered that the level of discount had to be circumscribed. As the Judge emphasised, background factors in murder sentencing may have lesser weight.[69] One of the factors leading to the modest level of discount allowed — one year — was the fact that the Judge considered that it was Mr Izett's drug use rather than mental illness which drove his offending and that the effects of drug use on a person's mental state is not a mitigating factor given s 9(3).[70] Given the jury's verdict and the available materials no other course was open to the Judge. We do not consider that she erred in this regard. We consider the discount reached for

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67 Sentencing notes, above n 4, at [60] and [65].

68 *Berkland v R*, above n 52, at [16(c)], [109] and [121] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

69 Sentencing notes, above n 4, at [64]–[65]. See also *Webber v R* [2021] NZCA 133 at [33]; *Hohua v R* [2019] NZCA 533 at [44]; and *Frost v R* [2023] NZCA 294 at [39]–[41].

70 At [63].

Mr Izett's personal circumstances, given the context of such serious offending, was within the range available to the Judge.

[77] Finally, and in any event, we agree with Ms Johnston's submission that s 104 of the Act applied. Nevaeh was murdered with a high degree of brutality and cruelty. She was two years old and highly vulnerable. Mr Mansfield accepted that s 104(1) was engaged. So did the Judge. She did not deal with the section in any depth because she had already concluded that Mr Izett should be ordered to serve a minimum term of 17 years' imprisonment without having to resort to s 104. She did, however, record that were it necessary for her to consider s 104, she would have found that it was not manifestly unjust for Mr Izett to be required to serve a 17-year minimum term of imprisonment.[71]

[78] The scope for sentence reductions where s 104 applies is constrained. This Court has rejected the contention that the 17-year period can be reduced whenever a judge considers it appropriate and has held that a departure from the presumptive term must be approached in a principled way.[72] This Court in *R v Williams* said as follows:

> [67] We conclude that 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. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.

Personal factors, which might justify a modest reduction in cases not involving s 104, will not necessarily warrant any reduction on the grounds of manifest injustice in the context of s 104.[73]

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71 At [72]–[76].
72 *R v Williams* [2005] 2 NZLR 506 (CA) at [54].
73 *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [86]–[88].

[79] We accept that there is case law where courts have found that a 17 year minimum term is manifestly unjust, where, for example, the defendant has long-standing mental health issues. Such issues can go to culpability.[74] But we do not consider that Mr Izett's use of methamphetamine and the mental health issues his consumption of the drug caused, amount to compelling circumstances requiring a departure under the manifestly unjust exception from the statutory minimum of 17 years' imprisonment imposed by s 104(1). We agree with the Judge's analysis in this regard.

Result

[80] The appeal is dismissed.

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[74] *R v Savage* [2020] NZHC 2553 at [67]–[80]; *R v Gottermeyer* [2014] NZCA 205 at [86]; and *Tu v R* [2023] NZCA 53 at [42].