IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA292/2023
[2024] NZCA 45

BETWEEN	HERMANUS THEODORUS KRIEL Applicant
AND	THE KING Respondent

CA364/2023

BETWEEN	LEONARD GUS NATTRASS-BERGQUIST Applicant
AND	THE KING Respondent

CA365/2023

BETWEEN	BEAUEN DANIEL GEORGE WALLACE-LORETZ Applicant
AND	THE KING Respondent

CA475/2023

BETWEEN	JOEL LO Applicant
AND	THE KING Respondent

CA482/2023

BETWEEN	HEATH ERIC MORRIS Applicant
AND	THE KING Respondent

Hearing:	22 November 2023
Court:	Courtney, Collins and Katz JJ
Counsel:	D J Matthews and S E M Payne for Applicant Kriel H G de Groot and T J Conder for Applicants Nattrass-Bergquist, Wallace-Loretz and Lo D M Kirby for Applicant Morris C A Brook and N J Wynne for Respondent
Judgment:	6 March 2024 at 10.30 am

JUDGMENT OF THE COURT

A **The applications to adduce further evidence brought by Mr Nattrass-Bergquist, Mr Wallace-Loretz and Mr Lo are granted.**

B **The applications for leave to appeal out of time by Mr Kriel, Mr Nattrass-Bergquist, Mr Wallace-Loretz and Mr Morris are dismissed.**

C **The application for leave to appeal out of time by Mr Lo is granted.**

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Five men, each convicted of murder, have applied for leave to appeal their sentences. Each application has been filed significantly beyond the 20-working-days time limit for filing a notice of appeal prescribed in s 248(2) of the Criminal Procedure Act 2011. The applications before us were filed between four to 13 years after the time for lodging any appeals against sentence had expired. We have jurisdiction to extend time to file appeals in these cases. Section 248(4)(a) of the Criminal Procedure Act provides that a first appeal court may, at any time, extend the time allowed for filing a notice of appeal or notice of application for leave to appeal.

[2] At the time of their offending the applicants ranged from 14 to 18 years of age. Their applications are based on the contention that in *Dickey v R*,[1] this Court changed the law relating to the sentencing of young persons convicted of murder, and that, if they were to be sentenced in accordance with *Dickey*, different sentences would now be imposed.

The applicants

Mr Kriel

[3] Mr Kriel was 14 years old when, in 2008, he murdered 15-year-old Ms Templeman.

[4] Mr Kriel was brought up by a supportive family. He did not suffer any social deprivation or psychological issues.

[5] The exact details of how Ms Templeman came to be murdered have never been determined as Mr Kriel has given four different accounts of what happened.

[6] Mr Kriel was convicted of murder following a trial in early 2010. He was sentenced in March 2010 by Asher J.[2]

[7] The sentencing of Mr Kriel proceeded on the following bases:[3]

(a) Mr Kriel knew Ms Templeman. They had attended the same school in Kerikeri until Ms Templeman moved with her parents to Auckland.

(b) Ms Templeman returned to Kerikeri over the weekend of 1 and 2 November 2008. She went back to Kerikeri to spend time with friends, including her boyfriend.

(c) On the Saturday afternoon, Ms Templeman met up with a group of friends. Mr Kriel was in the group that Ms Templeman met with.

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1 *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405.
2 *R v Kriel* HC Whangārei CRI-2008-027-2728, 23 March 2010 [Sentencing notes (*Kriel*)].
3 At [2]–[26].

(d) At about 6.30 pm, Ms Templeman left her friends and proceeded towards the New World supermarket where her boyfriend worked on a part-time basis. Mr Kriel accompanied Ms Templeman.

(e) When they reached a bridge which crosses the Wairoa Stream, Ms Templeman went down a track beside the stream with Mr Kriel.

(f) For reasons that have not been explained, Mr Kriel punched Ms Templeman at least twice in the head, rendering her unconscious. As Ms Templeman lay on the ground, Mr Kriel tried to strangle her. He then removed her clothes and dragged her into the stream where he left her face down in the water. Ms Templeman died from drowning.

(g) Mr Kriel returned to his home where he disposed of his bloody clothing. When questioned about what had happened to Ms Templeman, Mr Kriel lied. He said he had not seen her since they parted ways on their walk towards the supermarket.

(h) Six days later, in his third statement to the police, Mr Kriel accepted responsibility for Ms Templeman's death and said that she was still breathing when he dragged her into the stream.

[8] At trial, Mr Kriel claimed that Ms Templeman was already dead when he placed her in the stream and that, at most, his conduct constituted manslaughter. The jury and Asher J thought otherwise.

[9] Mr Kriel was sentenced on the basis that his conduct engaged s 104(1)(a) of the Sentencing Act 2002.[4] Later in this judgment we will set out the relevant provisions of the Sentencing Act that govern sentencing for murder. For present purposes it is sufficient to note that s 104 provides that, in certain types of particularly serious murder, the court must impose a sentence of life imprisonment with a minimum period of imprisonment (MPI) of 17 years that must be served before the defendant is eligible to be considered for parole. The MPI prescribed by s 104 can,

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4 At [42].

however, be reduced if the court is satisfied that such a MPI would be manifestly unjust.

[10] Asher J was satisfied that s 104 was engaged in this case because Mr Kriel murdered Ms Templeman in order to avoid detection, prosecution or conviction for the assaults he inflicted upon her when she was knocked unconscious.[5]

[11] The Judge also referred to other aggravating features of the murder of Ms Templeman:

(a) the murder was "brutal, cruel and callous" but not sufficiently egregious so as to engage s 104(e) of the Sentencing Act;[6] and

(b) Ms Templeman was vulnerable when she drowned, but not sufficiently vulnerable to satisfy the "particularly vulnerable" requirement of s 104(g) of the Sentencing Act.[7]

[12] Asher J reasoned that it would be manifestly unjust to sentence Mr Kriel to 17 years' imprisonment, primarily because of his age.[8] The end sentence was life imprisonment with an MPI of 11 and a half years.[9]

[13] Mr Kriel was granted parole in December 2022.

[14] Mr Kriel's application for leave to appeal was filed approximately 13 years after the expiration of the time limit to appeal his sentence.

[15] In his affidavit filed in support of his application for leave to appeal out of time, Mr Kriel explains that, although he has been granted parole, he will remain subject to recall for the rest of his life unless his sentence of life imprisonment is quashed by this Court. He says that the prospect of him being liable to recall for the rest of his life

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5 At [42]; and Sentencing Act 2002, s 104(1)(a).
6 Sentencing notes (*Kriel)*, above n 2, at [48]–[51].
7 At [52].
8 At [61]. The Judge also took into account lack of extensive premeditation, absence of a weapon, and acceptance of wrongdoing.
9 At [77].

causes him "significant fear". Mr Kriel filed his application for leave to appeal out of time after this Court delivered its judgment in *Dickey*. He explains he did not do so beforehand because "following [his] sentencing in 2010 [he] was not aware that there would be any prospect of successfully arguing against a sentence of life imprisonment at the time".

[16] Mr Kriel's trial counsel, Ms Cull KC, has also sworn an affidavit. She confirms that it was accepted by her at the time of Mr Kriel's sentencing "that there was a presumption of a sentence of life imprisonment and that no argument [could] be made to argue against the presumption".

Mr Nattrass-Bergquist and Mr Wallace-Loretz

[17] Mr Nattrass-Bergquist and Mr Wallace-Loretz were 17 years old when they murdered 54-year-old Mr Gillman-Harris in December 2014. Mr Nattrass-Bergquist and Mr Wallace-Loretz did not have good upbringings. As Mr de Groot submitted on their behalf, they had the disadvantage of living "unstructured lifestyles, revolving heavily around drugs and alcohol". Mr Nattrass-Bergquist was also likely to have been suffering from post-traumatic stress disorder at the time of the offending and, as we explain at [95], he was also likely to have been suffering from a condition called conduct disorder in the period leading up to the murder of Mr Gillman-Harris.

[18] Mr Nattrass-Bergquist provides an insight into his upbringing in his affidavit filed in support of his application for leave to appeal out of time. He says:

> 2.2 Some parts of my childhood I lived mainly with my mum, some of it was also shared with my dad. However, my dad was a heroin addict which meant that the parts of my life where I was in his care, I was not cared for very well. Sometimes he would leave me in the care of junkie friends of his. Other times it was a just general kind of neglect. I also witnessed a lot of drug use as these types of things were not hidden from me.

[19] Mr Nattrass-Bergquist also says that he was sexually abused by a friend of his father when he was about seven years old.

[20] Mr Wallace-Loretz says, in his affidavit filed in support of his application for leave to appeal out of time, that when he was a toddler his father tried to kill him and

his mother. He believes he spent three months in hospital with head injuries as a result of that incident. His father was a patched member of a gang and his mother suffered from methamphetamine addiction. Mr Wallace-Loretz was brought up for many years by an uncle whom Mr Wallace-Loretz says physically and mentally abused him. As we explain at [93] Mr Wallace-Loretz's dependence on methamphetamine and heavy use of alcohol were likely to have been factors in his offending.

[21] Mr Gillman-Harris had previously befriended the applicants and had sought to pay them to engage in consensual sexual activity with him.

[22] On the night of 26 December 2014, Mr Gillman-Harris picked up the applicants in his car. During the evening, the applicants exchanged texts in which they resolved to seriously injure Mr Gillman-Harris and rob him. They persuaded him to drive to a carpark where they had stored a baseball bat. Mr Wallace-Loretz retrieved the bat and concealed it in his clothing. The applicants then went with Mr Gillman-Harris to a Burger King outlet where they reached a deal to have sex with Mr Gillman-Harris for $400. Mr Gillman-Harris then drove the applicants to an ATM where he withdrew $400. Thereafter the group went to a motel. Mr Wallace-Loretz took the concealed bat into the motel room.

[23] Inside the motel room the applicants attacked Mr Gillman-Harris, striking him at least four times on the head with the bat.

[24] The applicants then took Mr Gillman-Harris' cash and his car. They drove from the motel and later abandoned Mr Gillman-Harris' vehicle.

[25] Mr Gillman-Harris died in hospital about five hours after he was attacked by the applicants.

[26] The applicants defended the murder charges brought against them by alleging they were defending themselves from unwanted sexual advances by Mr Gillman-Harris. The applicants now acknowledge that Mr Gillman-Harris did not attempt to impose himself on them, and that they planned and carried out the fatal attack on Mr Gillman-Harris.

[27] When sentencing the applicants, Toogood J accepted they did not set out to kill Mr Gillman-Harris. The Judge said:[10]

> [15] I am satisfied on the evidence that you did not intend to kill Mr Gillman-Harris and also that you did not, at the time of the attack, appreciate the risk that he might die from the blows that were struck. I have concluded that whoever struck Mr Gillman-Harris with the bat – whether just one of you or both of you – did so in something of a frenzy without giving any thought to the risk of death. I am sure, however, that you intended to cause Mr Gillman-Harris really serious harm in order to rob him and get away without being caught. That is the very thing that you had planned by your text messages.

[28] The Judge was also satisfied that s 104 of the Sentencing Act was engaged because the murder of Mr Gillman-Harris took place during an aggravated robbery.[11] The Judge concluded, however, that it would be manifestly unjust to sentence the applicants to life imprisonment with an MPI of 17 years:[12]

> [52] A starting point of 17 years is reserved for the most serious murders. A feature of this case which distinguishes it from other murders where a minimum period of 17 years' imprisonment or more has been imposed is that you did not intend to kill Mr Gillman-Harris or even turn your mind to the risk of his death. You were convicted of murder only because he died as a result of an attack in which you planned only to cause him really serious harm so you could rob him. Without in any way minimising the tragic and devastating consequences of your actions for Mr Gillman-Harris and his family, it is only because of the unusual way the law treats your offending that you are being sentenced for murder and not manslaughter.

[29] Toogood J adjusted the MPIs down from 17 years because the applicants had been found guilty under the "felony murder rule" in s 168 of the Crimes Act 1961, and because they were 17 years old at the time of the offending.[13]

[30] Mr Nattrass-Bergquist was sentenced to life imprisonment with an MPI of 10 years and nine months.[14] Mr Wallace-Loretz was sentenced to life imprisonment with an MPI of 11 years.[15] They unsuccessfully appealed their convictions to this

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10 *R v Nattrass-Bergquist* [2016] NZHC 1089 [Sentencing notes (*Nattrass-Bergquist* and *Wallace-Loretz)*].

11 At [51]; and Sentencing Act, s 104(1)(d).

12 Footnotes omitted.

13 Sentencing notes (*Nattrass-Bergquist* and *Wallace-Loretz*) at [52]–[53]. The Judge also took into account their "upbringings, the traumas [they had] suffered, and the lack of settled family lives".

14 At [61].

15 At [62].

Court,[16] but they did not, at the time, seek to challenge their sentences. The applications for leave to appeal against sentence by Mr Nattrass-Bergquist and Mr Wallace-Loretz were filed approximately seven years after the time to appeal their sentences had expired.

[31] Mr Nattrass-Bergquist explains that he has filed his application because he has "nothing to lose". His application is also predicated on the basis that had he been sentenced after this Court had delivered its judgment in *Dickey*, he would not have received a sentence of life imprisonment.

[32] Mr Gibson acted for Mr Nattrass-Bergquist at his trial. Mr Gibson has filed an affidavit saying that he did not consider that the circumstances of Mr Nattrass-Bergquist's offending "were sufficient to justify a departure from the presumption of life imprisonment in s 102 [of the] Sentencing Act". There was therefore no appeal against sentence.

[33] Mr Wallace-Loretz candidly states in his affidavit that he does not want to get his hopes up and that he also has "nothing to lose" by pursuing his current application.

[34] Mr Wallace-Loretz was represented at his trial by Mr Kovacevich and Ms Feyen. Mr Kovacevich explains that before sentencing, Mr Wallace-Loretz was told that the sentence would be life imprisonment with an MPI. He also says that, at the time of sentencing, he did not consider the presumption of life imprisonment in s 102 of the Sentencing Act could or would be displaced in Mr Wallace-Loretz's case.

Mr Lo

[35] In September 2012, Mr Lo, then aged 17, and Mr Adams, who was 15 years old, murdered Mr Tupe. Mr Lo, who is of Tongan descent, endured a lot of physical abuse at the hands of his father. The pre-sentence report describes Mr Lo as having been disciplined in a physically severe manner. "He related that the beatings [he received from his father] were severe and brutal and often unprovoked". As we explain at [98] and [99], there is evidence that Mr Lo suffered from post-traumatic

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16 *Nattrass-Bergquist v R* [2017] NZCA 552.

stress disorder, depression and manic episodes. His exposure to significant trauma also led to him suffering psychological challenges and associated personality and behavioural difficulties.

[36] The pre-sentence report records:

> Mr Lo is the unfortunate product of a lifestyle premised on aggressive behaviour and domineering values which have become entrenched by his affiliation with the Crypts gang, an association which has been cemented by his patched status. He indicated that his links with the gang began when he was between 12 and 13 years of age and that after he turned 14 his association became more pervasive. He confirmed that his father forced him to leave the family home when he was 15 years of age and that since then he had been largely independent of his immediate family. He indicated that he lived with an aunt for a brief period and that she remained the only tangible link he has with his family.

[37] The offending commenced when Mr Adams met Mr Tupe by chance at a bus stop. Mr Adams attacked Mr Tupe and then took the victim, who was in a groggy state, to two other locations. Mr Lo joined the assault at the third location. Mr Lo and Mr Adams engaged in a series of assaults upon Mr Tupe, which involved kicking and punching the victim and stomping on his head.

[38] Mr Lo defended the charge of murder laid against him by saying that he only inflicted a single blow. Fogarty J, the trial Judge, and the jury, did not accept this explanation.

[39] When sentencing Mr Lo, the Judge noted that there was evidence he had inflicted a number of blows and kicks to Mr Tupe. The Judge said it was "a prolonged assault against a totally innocent young man who gave no provocation whatsoever".[17]

[40] The Judge was satisfied that the prolonged nature of the assault by Mr Adams was so callous that it engaged s 104(e) of the Sentencing Act.[18] The Judge was also satisfied, however, that it would be manifestly unjust to sentence Mr Adams to life

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17 *R v Lo* [2014] NZHC 1117 [Sentencing notes (*Lo*)] at [2].
18 At [5].

imprisonment with an MPI of 17 years.[19] Mr Adams was sentenced to life imprisonment with an MPI of 14 years.[20]

[41] Mr Lo was sentenced to life imprisonment with an MPI of 12 years.[21] This sentence was reached after the Judge reasoned that Mr Lo was not as culpable as Mr Adams.[22] It appears the Judge did not think Mr Lo's offending engaged s 104 of the Sentencing Act when he said:

> [32] Your behaviour was also brutal, cruel and callous but you don't qualify for the highly brutal, cruel and callous in my judg[e]ment. The more culpable was Mr Adams. So, therefore, in my judg[e]ment justice requires your sentence to be less than Mr Adams'.

[42] The sentence imposed on Mr Lo was on the basis that his offending engaged s 103 of the Sentencing Act which we explain later in this judgment.[23] The Judge plainly took account of Mr Lo's age when determining the sentence.[24]

[43] Mr Lo never appealed his conviction or sentence. His application for leave to appeal his sentence was filed approximately nine years after the expiration of the time to appeal his sentence. Mr Lo states in his affidavit that he accepts full responsibility for his offending, that he is remorseful and that he did not mean to kill anybody. He explains that he entered prison as a 17-year-old, and after all these years he says he is "ready to engage the justice system again to see if [he] can get a different outcome". Mr Lo says, "[a]ll [he] want[s] is an end date, so [he has] a release date to work towards".

[44] Mr Lo was represented at his trial by Ms Finau Tu'ilotolava. She explains in an affidavit that she believes Mr Lo's conviction and sentence should have been appealed soon after he was sentenced. She says:

> [She] cannot offer any reasons why the appeal was not lodged beyond [her] belief that [Mr] Lo against his difficult upbringing and background simply did not understand or [believe] that anything positive will come out from challenging the decision.

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19 At [21]–[23].
20 At [23].
21 At [37].
22 At [31]–[32] and [36].
23 At [35].
24 At [31] and [36].

Mr Morris

[45] In June 2018, Mr Morris, who was 18 years old, met Mr Johnston at a restaurant and began socialising with him over social media following that meeting. Mr Johnston was 20 years old. Mr Morris had the advantage of a stable family background, and he had no previous convictions. Mr Morris also had psychological issues.

[46] Mr Morris and Mr Johnston arranged to meet at a party in late June 2018. Mr Morris, Mr Johnston and another friend left the party to go back to Mr Morris' place. During the course of the drive to Mr Morris' home, he asked his friend on a number of occasions if they should kill Mr Johnston and said words to the effect that "no one's [going to] miss [Mr Johnston]".

[47] The three young men went to sleep in a sleepout at Mr Morris' home. Mr Johnston slept in a sleeping bag on a mattress on the floor of the sleepout. While Mr Johnston slept, Mr Morris got a weapon, possibly a hammer, and struck Mr Johnston multiple times in the head causing his skull to fracture. Throughout this, the other friend continued to sleep. Mr Morris dragged Mr Johnston's body outside and left it in a paddock opposite his home. He attempted to conceal the body by covering it with soil and long grass.

[48] Mr Morris then returned to the sleepout and started to clean blood that was on the mattress. When his friend woke and asked what had happened, Mr Morris said he had gotten into an argument with Mr Johnston and that he had hit him in the mouth. Mr Morris said Mr Johnston had then left the property. He later told his father what had happened to Mr Johnston. Mr Morris then acknowledged to the police that he had killed Mr Johnston.

[49] Mr Morris is the only applicant before us who pleaded guilty to murder. He was sentenced by Dunningham J in April 2019.[25]

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[25] *R v Morris* [2019] NZHC 806 [Sentencing notes (*Morris*)].

[50] The Judge was satisfied s 104 of the Sentencing Act applied because of Mr Johnston's vulnerability, and the brutal and callous nature of the attack.[26] The Judge was also satisfied that a 17-year MPI would be manifestly unjust because of Mr Morris' age, guilty plea and his mental health issues.[27] The sentence imposed was life imprisonment with an MPI of 13 years and six months' imprisonment.[28]

[51] Mr Morris explains he is seeking leave to only challenge the length of the MPI imposed by the High Court. Mr Morris' application for leave to appeal was filed approximately four years after the time for him to appeal his sentence had expired.

[52] Mr Morris says in his affidavit filed in support of his application for leave to appeal that he was quite naïve and did not understand the legal processes at the time. He says:

> [He] was advised about an appeal at the time [his] sentence was passed. Other inmates in prison told [him] not to appeal because it would ruin [his] parole chances and cause [him] trouble in jail. They said it could extend [his] length of sentence.

[53] Mr Morris was represented in the High Court by Mr Rapley KC. He has filed an affidavit saying that Mr Morris pleaded guilty after receiving a sentence indication from Dunningham J. The sentence imposed was consistent with the sentence indication. Mr Rapley says that he wrote to Mr Morris and explained his view "that the sentence imposed was appropriate". He also stated that:

> [He] was of the opinion at the time, given the aggravating and mitigating features of the offending … and the case law, that the sentence imposed was within range and not manifestly excessive.

Relevant legislative provisions governing sentences for murder

[54] In addition to the purposes and principles of sentencing and the aggravating and mitigating factors set out in ss 7, 8 and 9 of the Sentencing Act, the following sections are engaged by the applications before us.

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26 At [23]; and Sentencing Act, ss 104(1)(e) and 104(1)(g).
27 Sentencing notes (*Morris*), above n 25, at [25].
28 At [29].

[55] Section 102(1) of the Sentencing Act 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.

[56] Section 103 of the Sentencing Act requires a defendant sentenced to life imprisonment for murder to 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.

[57] As foreshadowed, s 104 of the Sentencing Act is also highly relevant to the majority of the applications before us. The relevant portions of s 104(1) provide:

> (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
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> (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
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> …
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> (d) if the murder was committed in the course of another serious offence; or
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> (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
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> …
>
> (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or

…

[58] Counsel also emphasised s 25(h) of the New Zealand Bill of Rights Act 1990 (NZBORA). That section provides:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
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> …
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> (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
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> …

Dickey v R

[59] As we have explained at [2], the applications are predicated on the basis that, in *Dickey*, this Court changed the law governing the way young persons should be sentenced for murder. It is therefore necessary for us to explain *Dickey*.

[60] There were three appellants in *Dickey*. Ms Dickey and Mr Brown appealed their sentences following their convictions for the murder of Mr McAllister. Ms Dickey pleaded guilty to murder and Mr Brown was found guilty following a trial. The third appellant was Ms Epiha, who pleaded guilty to having murdered Ms Nathan.

[61] Mr McAllister was stabbed to death after having been lured to a stadium in Invercargill. A number of young people were involved in Mr McAllister's death. Ms Dickey, who was 16 years old at the time, was the youngest member of the group. Ms Dickey bore a grudge against Mr McAllister because she believed he had sexually assaulted her, when she was inebriated, several months before the events that led to Mr McAllister's death. Ms Dickey, together with Mr Brown and another offender, formed a plan to lure Mr McAllister to the stadium. On the night Mr McAllister died he went to the stadium where he was attacked by a group of six young people. The principal offender was Mr Whiting-Roff, who stabbed Mr McAllister 14 times. Mr McAllister was restrained by Ms Dickey while he was being stabbed and Mr Brown kicked Mr McAllister to the ground when he tried to escape.

[62] When sentencing Ms Dickey, Dunningham J observed that Ms Dickey effectively engaged in a form of "vigilante justice" that involved a "planned and calculated response" to Mr McAllister's alleged sexual assault against her.[29]

[63] The Judge adopted a notional MPI of 15 years from which she deducted:

(a) three years to reflect Ms Dickey's youth and her personal circumstances set out in a psychologist's report;[30]

(b) two and a half years to reflect the assistance that Ms Dickey had provided to the authorities, which resulted in another person being prosecuted and strengthened the Crown case against a number of co-defendants;[31] and

(c) one and a half years to reflect Ms Dickey's guilty plea.[32]

[64] The psychologist's report said:

> [Ms Dickey's] background of insecure attachment, [unstable living and school arrangements], 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.

[65] In what the Judge described as a "finely balanced" assessment she concluded that it would not be manifestly unjust to sentence Ms Dickey to life imprisonment with an MPI of 10 years.[33] That was the sentence that was ultimately imposed.[34]

[66] Mr Brown, who was 19 years old at the time of Mr McAllister's death, was also sentenced by Dunningham J.[35] The Judge proceeded on the basis Mr Brown had

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29 *R v Dickey* [2018] NZHC 1403 at [38]–[39].
30 At [44].
31 At [30] and [45].
32 At [45].
33 At [47].
34 At [48].
35 *R v Whiting-Roff* [2018] NZHC 3239.

formed a common intention with the other offenders to assault Mr McAllister knowing that a killing with murderous intent could ensue.[36] The Judge said:

> [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 [Mr Brown] actively encouraged [Mr Whiting-Roff] in that course.

[67] Dunningham J had before her reports about Mr Brown from Dr Eggleston, a clinical psychologist, and Dr Barry-Walsh, a forensic psychiatrist:[37]

> [30] … 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 abuse before he turned six.

[68] The Judge adopted a notional MPI of 13 years from which she deducted three years to reflect Mr Brown's youth, his remorse, his psychological difficulties and cognitive impairment.[38] This produced an end sentence of life imprisonment with an MPI of 10 years.[39]

[69] At the time she murdered Ms Nathan, Ms Epiha was 18 years old. She was in a relationship with a former boyfriend of Ms Nathan's although, at the time, Ms Epiha was not aware of the previous connection between her boyfriend and Ms Nathan. Ms Nathan went to a party at the address where Ms Epiha was living. At one point in the evening, 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. Ms Epiha went into the kitchen where she picked up a large knife and entered the lounge where Ms Nathan was standing. Ms Epiha ignored pleas from people to put down the knife. Ms Epiha stabbed Ms Nathan in the neck causing the blade to penetrate into her chest cavity. Ms Nathan collapsed and died at the scene.

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36 At [38].
37 *Dickey v R*, above n 1.
38 *R v Whiting-Roff,* above n 34, at [52].
39 At [52].

[70] Ms Epiha was sentenced by Nation J following sentence indications in which the Crown submitted that an MPI starting point of 11 years was appropriate in Ms Epiha's case.[40] Nation J adopted a starting point of 12 years from which he deducted two years to reflect Ms Epiha's guilty plea and personal circumstances that were set out in a psychologist's report.[41]

[71] The psychologist's report explained that Ms Epiha had a very disturbing upbringing. She had been born into a gang environment and she had started to use drugs and alcohol when she was six. By the time she was seven years old, Ms Epiha was in the care of Oranga Tamariki. The psychologist's report stated:

> 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 [a member of her family], 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 [the] shooting [of] 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. …
>
> 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.
>
> 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.

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40 *R v Epiha* [2019] NZHC 1075 at [27].
41 At [27].

[72] Like the other appellants, Ms Epiha was sentenced to life imprisonment with an MPI of 10 years pursuant to s 103(2) of the Sentencing Act.[42]

[73] The gravamen of the appeals in *Dickey* was that it was manifestly unjust to sentence the appellants to life imprisonment and that the appropriate outcome was one which involved finite sentences for each of the appellants.

[74] In allowing the appeals, this Court recognised the legislative policy that rendered life imprisonment the normal sentence for those convicted of murder. The Court also, however, had regard to expert evidence, which demonstrated the neurological underdevelopment of adolescents and young people which meant that it was no longer correct to say, as this Court had done in *R v Rapira*,[43] that youth carried little weight when determining whether or not a life sentence for murder would be manifestly unjust.[44]

[75] The neurological evidence concerning the cognitive and emotional immaturity of adolescents and young persons had previously been acknowledged by this Court in *Churchward v R*,[45] a case that engaged s 104 of the Sentencing Act and in which it was held that 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.[46] It was said that the neurological abilities of an adolescent "can lead to a reduction in culpability of young people as compared to adults".[47]

[76] In *Dickey*, we explained that generally, youth alone is not enough to establish manifest injustice.[48] Instead, when sentencing adolescents and young persons for murder, courts are required to assess the seriousness and culpability of the offending, and whether a young defendant had, through a combination of relevant mitigating factors and personal issues, demonstrated that a life sentence would be manifestly unjust.

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42 At [30].
43 *R v Rapira* [2003] 3 NZLR 794 (CA).
44 *Dickey v R*, above n 1, at [177], citing *R v Rapira,* above n 43, at [120].
45 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.
46 At [76]–[92].
47 At [81].
48 *Dickey v R*, above n 1, at [177].

[77] In re-sentencing each of the appellants in *Dickey* to finite terms of imprisonment we emphasised:

> [169] …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.
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> …
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> [249] … 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.

[78] In quashing the sentence of life imprisonment imposed on each of the appellants in *Dickey*, this Court imposed the following finite sentences with MPIs:

(a) Ms Dickey was sentenced to 15 years' imprisonment with an MPI of seven and a half years.[49]

(b) Mr Brown was sentenced to 12 years' imprisonment with an MPI of six years.[50]

(c) Ms Epiha was sentenced to 13 years' imprisonment with an MPI of seven years.[51]

Principles governing leave to appeal out of time

[79] In *R v Knight*,[52] a Full Bench of this Court granted the appellant an extension of time to appeal her conviction for benefit fraud. At the time, s 388(1) of the

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49 At [253].
50 At [254].
51 At [255].
52 *R v Knight* [1998] 1 NZLR 583 (CA), (1997) 15 CRNZ 332.

Crimes Act prescribed a 10-day time limit for a defendant to lodge an appeal.[53] The delay in Ms Knight applying for leave to appeal was approximately two years. Her application for leave to appeal was triggered by a decision of this Court in *Ruka v Department of Social Welfare*,[54] in which this Court restated the law governing living in a relationship in the nature of marriage. The effect of *Ruka* was that Ms Knight was entitled to receive a benefit from the Department of Social Welfare whereas, in order to have been convicted of benefit fraud, the jury must have accepted she was not entitled to the benefit in question.

[80] The Court in *Knight* set out the relevant principles for granting an extension of time to bring a criminal appeal. In doing so, the Court said:[55]

> … The touchstone is the interests of justice in the particular case. The discretion must be exercised in accordance with the policy underlying the legislative provisions. The feature which provides the reason for the time-limit for appealing set by s 388(1) is the interest of society in the final determination of litigation. That necessarily carries through as a powerful consideration in determining whether leave should be granted under s 388(2) to appeal out of time. The overall interests of justice in a particular case may call for balancing the wider interest of society in the finality of decisions against the interest of the individual applicant in having the conviction reviewed. Also relevant is "the respect which is traditionally shown for the liberty of the subject".

[81] Factors which the Court in *Knight* identified as being relevant to the assessment as to whether or not to grant an extension of time to appeal were:[56]

(a) the strength of the proposed appeal;

(b) the practicality of the remedy sought;

(c) the length of time and the reasons for the delay;

(d) the impact on others similarly affected and on the administration of justice ("the floodgates" consideration); and

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53 Crimes Act 1961, s 388(1) (1 January 1967 to 9 December 2001).
54 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).
55 *R v Knight*, above n 52, at 587, citing *R v Hawkins* [1997] 1 Cr App R 234 at 239.
56 *R v Knight,* above n 52, at 589.

(e) the absence of prejudice to the Crown.

[82] When commenting on applications for leave to appeal out of time based upon a restatement of the relevant law, the Court said:[57]

> Reflecting the policy underlying s 388, the starting point must be the principle that a conviction obtained according to law as it was then understood and applied should stand. Leave to appeal out of time on the ground that there has been a restatement of the applicable law should be granted only where special circumstances can be shown to justify a departure from the principle of finality.

[83] The principles we have set out at [79] to [81] correspond with the approach taken in England and Wales.[58] In *R v Jogee*, Lords Hughes and Toulson said:

> [100] The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as [previously] laid down …

[84] The same point was reiterated by the Court of Appeal for England and Wales in *R v Johnson*:[59]

> [18] … As the Supreme Court [in *Jogee*] stated … a long line of authority clearly establishes that if a person was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would otherwise be done. The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re-opened. It also takes into account the interests of the victim (or the victim's family), particularly in cases where death has resulted and closure is particularly important.

[85] For completeness, we record that in *R v Lee*,[60] a Full Bench of this Court said that:

> [106] The test to be applied to applications to extend time to appeal is a balancing one, with the aim being to ascertain where the interests of justice lie, both as regards the would-be appellant and society at large. All relevant factors must be taken into account …

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57 At 588–589.
58 *R v Mitchell* [1977] 1 WLR 753; and *R v Jogee* [2016] UKSC 8, [2017] AC 387.
59 *R v Johnson* [2016] EWCA Crim 1613, [2017] 4 All ER 769.
60 *R v Lee* [2006] 3 NZLR 42 (CA).

[86] The Court did not accept a submission by counsel for Mr Lee that a finding that an appeal is arguable will automatically lead to an extension of time being granted. Indeed, the Court pointed out that cases suggest there is not even a requirement for the Court in every case to consider the substantive merits of the appeal in detail.[61]

[87] This Court in *Mikus v R* acknowledged that extensions of time applications in the criminal jurisdiction will normally focus upon the reasons for the delay and the merits of the proposed appeal.[62]

Section 25(h) of the NZBORA

[88] Mr Kirby, counsel for Mr Morris, submitted that s 25(h) of the NZBORA provides a perpetual right to appeal. That submission was based in part upon *R v Taito,*[63] in which the Privy Council held that a system of dismissing criminal appeals on the papers without hearing from the appellants breached an appellant's right to an effective right of appeal contrary to s 25(h) of the NZBORA.[64]

[89] Mr Kirby also sought to rely on the Supreme Court judgment in *Petryszick v R*.[65] In that case the Supreme Court reinstated an appeal that had been struck out by the Court of Appeal after Mr Petryszick had failed to comply with timetables imposed pursuant to the Court of Appeal (Criminal) Rules 2001. Mr Petryszick consistently failed to file submissions when directed to do so. The Supreme Court held that:[66]

> The substance of such right [as conferred under s 383 of the Crimes Act and s 25(h) of the New Zealand Bill of Rights Act] cannot be eroded by subordinate legislation or the exercise of the inherent powers of the Court to control its procedure. Nor can it be undermined by the exercise of general powers under the rules.

[90] In our assessment, both *Taito* and *Petryszick* can be distinguished from the applications before us. In *Taito*, the appellants were never afforded the opportunity to

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61 At [106], citing *R v Wotten* [1961] NZLR 621 (CA) at 621 and *R v Ridout* [2002] BCL 1054 at [15].
62 *Mikus v R* [2011] NZCA 298 at [26] citing *R v Slavich* [2008] NZCA 116 at [14].
63 *R v Taito* [2002] UKPC 15, [2003] 3 NZLR 577.
64 At [13]–[20].
65 *Petryszick v R* [2010] NZSC 105, [2011] 1 NZLR 153.
66 At [30] and [32].

exercise their right of appeal. Here, the applicants had a right of appeal which was not denied by the State. It was the applicants who elected not to exercise their rights of appeal against the sentences imposed because the sentences were, at the time, consistent with prevailing sentencing principles and practices. Similarly, *Petryszick* is readily distinguished. Mr Petryszick did exercise his right of appeal, but failed to comply with administrative deadlines. The law governing the imposition of timetables in criminal appeals has now been addressed by s 338 of the Criminal Procedure Act.

[91] We also do not accept Mr Kirby's submission that the right of appeal exists in perpetuity. Reasonable time limits for criminal appeals have been recognised by the European Court of Human Rights.[67] A similar approach has been taken by the Court of Appeal of England and Wales when, in *R v Ballinger*,[68] the Court held there was nothing incompatible with the European Convention on Human Rights in putting time limits in place to commence criminal appeals, provided the time limits are not too short or too rigorously enforced.

Applications to adduce further evidence

[92] Mr Wallace-Loretz, Mr Nattrass-Bergquist and Mr Lo have applied for leave to adduce psychiatric reports prepared on each of them. We summarise those reports in the following paragraphs.

[93] Dr Lehany, a forensic psychiatrist diagnosed Mr Wallace-Loretz as fulfilling the criteria for substance use disorder and opines that Mr Wallace-Loretz's dependence on methamphetamine was a factor in his offending. Dr Lehany states:

> Mr Wallace-Loretz's experience of his youth and upbringing provided him with little opportunity to develop normal functioning as an adult, including supporting himself, gaining education, obtaining work, and broadly developing a prosocial life.

[94] Dr Lehany observes that Mr Wallace-Loretz now accepts responsibility for his actions, is remorseful and is engaging in a restorative justice programme with the victim's family.

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67 *Laaksonen v Finland* ECHR 36321/97, 17 September 1999 at [1].
68 *R v Ballinger* [2005] EWCA Crim 1060, [2005] 2 Cr App R 29 at [22].

[95] Dr Panckhurst completed a psychiatric report on Mr Nattrass-Bergquist. Dr Panckhurst says Mr Nattrass-Bergquist does not suffer a major mental disorder but that there is strong evidence Mr Nattrass-Bergquist had features of oppositional defiant disorder in his early adolescence. Features of this condition include frequent and persistent patterns of anger or irritable moods, argumentative or defiant behaviour, or vindictiveness. Dr Panckhurst also suggests Mr Nattrass-Bergquist presented with conduct disorder in the period leading up to the murder of Mr Gillman-Harris. Dr Panckhurst explains that conduct disorder is a neurodevelopment disorder that is often attributed in large part to genetic influences. Dr Panckhurst also concludes that Mr Nattrass-Bergquist meets the criteria for post-traumatic stress disorder as a result of him having been sexually abused at the age of seven.

[96] Dr Panckhurst reports that Mr Nattrass-Bergquist's offending was influenced by his cognitive immaturity and that at the time of the murder of Mr Gillman-Harris, Mr Nattrass-Bergquist was heavily influenced by his peers.

[97] When assessing Mr Nattrass-Bergquist's risks of future offending, Dr Panckhurst said:

> Mr Nattrass-Bergquist poses a low risk of serious future violence and a moderate risk of relapse into elements of his prior antisocial lifestyle that could be associated with aggression and fighting.

[98] Dr Lokesh prepared a report on Mr Lo. Dr Lokesh reports that Mr Lo does not have a significant mental disorder but that he nevertheless has developed several psychological deficits and associated personality and behavioural difficulties as a result of his exposure to trauma. Other factors that have impacted upon his poor social development are his "lack of parental role models, and using substance abuse as a maladaptive way of coping with unhealthy emotions to block out his negative experiences".

[99] Dr Lokesh suggests Mr Lo satisfies the criteria for post-traumatic stress disorder. In addition, Mr Lo suffers from periods of recurrent depressive episodes and periods of manic episodes. Dr Lokesh is concerned that "due to [Mr Lo's] long-term substance abuse, there appears to be some evidence of executive functioning deficits, mostly in [Mr Lo's] frontal lobes" which can explain his impulsive behaviour,

suggestibility and lack of abstract reasoning. As we understand Dr Lokesh's report, there is a low chance of Mr Lo committing another homicide but there is a moderate risk of him committing a violent offence.

[100] The criteria for allowing applications to adduce further evidence are well established. In *Lundy v R* the Privy Council stated:[69]

> The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[101] We are mindful that we are dealing with applications for leave to appeal sentences out of time. Issues concerning the safety of the convictions are not raised by the applications. Much of the information contained in the psychiatric reports is not fresh in the sense that it could have been obtained at the time the applicants were sentenced. Nevertheless, the reports are cogent in that they explain in considerable detail the psychiatric and psychological factors that may have influenced the offending by Mr Nattrass-Bergquist, Mr Wallace-Loretz and Mr Lo. We therefore think that it is in the interests of justice to admit the reports.

Analysis

[102] We shall consider each of the applications separately. Before doing so it is helpful to explain why the applications are predicated upon a misunderstanding of *Dickey*, particularly where it is argued that *Dickey* stands for the proposition that youth by itself can negate the presumption of life imprisonment for murder. This Court in *Dickey* explicitly stated that the judgment did not create an exception to life imprisonment for all youth murderers.[70]

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69 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].
70 *Dickey v R*, above n 1, at [169].

[103] In *Dickey*, we departed from what had been said in *Rapira* about the significance of youth when determining sentences for murder in the context of ss 102 and 103 of the Sentencing Act. *Dickey*, however, applied similar reasons which had found favour in *Churchward* in the context of s 104. In *Churchward*, this Court recognised that a defendant's age could influence an assessment as to whether or not it would be manifestly unjust to impose a 17-year MPI on an adolescent or young person convicted of murder.[71] *Churchward* recognised that the neurocognitive underdevelopment of adolescents and young persons can reduce their culpability as compared to adults.

[104] In *Dickey*, each of the appellants was able to identify a number of factors that reduced their culpability. Those factors included their age, their profound social disadvantages and, in the case of Mr Brown, significant cognitive limitations. It was the combination of those factors when assessed in the context of the offending, that enabled the Court to conclude life sentences were manifestly unjust in those cases. Age, by itself, was not determinative of the appeals.

[105] Four of the five factors identified in *Knight* as being relevant to the exercise of the discretion to extend time to appeal, are engaged to varying degrees by the applications before us. We accept Mr Kirby's submission that the "floodgates" consideration is not particularly relevant when determining the current applications because there is no evidence that if the applications were granted this Court would be inundated with similar applications.

Mr Kriel's application

[106] Not only was the sentence imposed on Mr Kriel consistent with the law governing the sentencing of adolescents for murder at the time, it also reflects current approaches to such sentences. The reasons for this can be succinctly stated:

(a) The murder of Ms Templeman involved what Asher J accurately described as "a wicked and callous" crime,[72] committed in order to

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71 *Churchward v R*, above n 45, at [76].
72 Sentencing notes (*Kriel*), above n 2, at [48].

avoid detection and prosecution for the assaults Mr Kriel inflicted to Ms Templeman's head. Unlike the appellants in the *Dickey* appeals, Mr Kriel's offending engaged s 104 of the Sentencing Act.

(b) Mr Kriel's very young age was the only mitigating factor in his case. Asher J provided a large discount (five years and six months) to reflect the fact that Mr Kriel was only 14 years old at the time he murdered Ms Templeman.

(c) Were Mr Kriel to be sentenced today, it is highly likely that he would receive the same sentence as that imposed by Asher J in 2010, having regard to the circumstances of the offending and Mr Kriel's personal circumstances.

(d) We are also concerned that the delay of 13 years in Mr Kriel's application for leave to appeal is an extremely long delay. If his application were granted, it would significantly undermine the principle of finality which is an important consideration in cases involving serious criminal offending.

(e) The Parole Board will, in due course, be able to consider any application to remove the parole conditions currently imposed upon Mr Kriel. He will always be at risk of recall, should he offend again. We do not however consider this factor undermines in any way our conclusion that the sentence imposed on Mr Kriel would be likely to be imposed if he were to be sentenced following this Court's judgment in *Dickey*.

[107] We are therefore satisfied that there is no merit to Mr Kriel's proposed appeal, and that the efficacy of the remedy sought and the very long delay in bringing the application weigh heavily against granting the application. It is ultimately not in the interests of justice for Mr Kriel to now challenge the sentence properly imposed in 2010.

Mr Nattrass-Bergquist and Mr Wallace-Loretz

[108] We are also satisfied that had they been sentenced after this Court's judgment in *Dickey*, Mr Nattrass-Bergquist and Mr Wallace-Loretz would be likely to receive the same sentences that were imposed upon them by Toogood J.

[109] Our reasons for this conclusion can be summarised in the following ways:

(a) Although they were convicted of murder because of the "felony murder rule", the applicants' offending nevertheless engaged s 104 of the Sentencing Act. On this basis alone, Mr Nattrass-Bergquist's and Mr Wallace-Loretz's cases are distinguishable from those of Ms Dickey and her fellow appellants.

(b) The offending by Mr Nattrass-Bergquist and Mr Wallace-Loretz was significantly more culpable than that of Ms Dickey who was considered to be the most culpable of the offenders in the appeal brought by her and her fellow appellants.

(c) Mr Nattrass-Bergquist and Mr Wallace-Loretz suffered significant social deprivation which also likely contributed to their offending. Their ages and disadvantaged upbringings were important mitigating factors. Nevertheless, we do not think that these considerations would lead to the quashing of the life sentences imposed by Toogood J when he sentenced the applicants.

(d) We are concerned that the seven-year delay between sentencing and the filing of the applications before us, significantly undermines the principle of finality. While Mr Nattrass-Bergquist and Mr Wallace-Loretz believe they have "nothing to lose" by bringing their applications, the Court must have regard to the importance to society of not re-opening serious criminal cases unless the interests of justice require us to do so.

[110] Because we are satisfied that the sentence imposed upon Mr Nattrass-Bergquist and Mr Wallace-Loretz would be imposed post-*Dickey*, we dismiss their application for leave to appeal out of time.

Mr Lo

[111] The Crown acknowledges Mr Lo's application is different from the other applications before us, although the Crown does not concede that there is merit to Mr Lo's application.

[112] In the case of Mr Lo:

(a) His offending did not trigger s 104 of the Sentencing Act and he was less culpable than Mr Adams, the principal offender.

(b) Mr Lo suffered significant social deprivation which likely contributed to his offending, such as the "abusive manner in which" Mr Lo was brought up, referred to in the pre-sentence report. The beatings he received were "severe and brutal and often unprovoked". This appears to have had a significant impact on his "inability to empathise with victims, which may give rise to psychopathic tendencies". The physical abuse meted out to Mr Lo by his father appears to have caused Mr Lo to spend much of his youth in the company of gang members and other anti-social associates.

(c) Mr Lo's age (17 years old at the time of the offending) was also a factor that probably contributed to his role in the murder of Mr Tupe. As we have previously observed, it is now well established that the neurological immaturity of youth is a factor that contributes to poor decision making, particularly at times of elevated stress. There is also a suggestion in the pre-sentence report that at the time of the offending Mr Lo was suffering the effects of methamphetamine withdrawal.

[113] Given the combination of these factors, Mr Lo's situation is more akin to the three appellants in *Dickey* than the other four applicants. We consider that it is possible

that, if Mr Lo was sentenced today post-*Dickey*, he may have received a finite sentence. Thus, unlike the other applicants, there is some merit to Mr Lo's proposed appeal.

[114] The one factor that weighs heavily against Mr Lo's application is the nine-year delay between his sentencing and the filing of his application for leave to appeal out of time. Allowing Mr Lo to pursue his appeal against sentence after this period of time conflicts in a profound manner with the principle of finality in the criminal justice system.

[115] Ultimately, although it is a finely balanced conclusion, we accept that the overall interests of justice merit allowing Mr Lo the opportunity for this Court to consider an appeal against the sentence imposed. In reaching this conclusion we are mindful of the fact that although friends and relatives of Mr Tupe will be concerned that Mr Lo is being afforded the opportunity to appeal his sentence, even if he is successful, Mr Lo is likely to be sentenced to a very long finite term of imprisonment.

[116] For these reasons, we allow Mr Lo's application for leave to appeal out of time.

Mr Morris

[117] The murder of Mr Johnston by Mr Morris clearly engaged s 104 of the Sentencing Act. As with Mr Kriel, Mr Nattrass-Bergquist and Mr Wallace-Loretz, Mr Morris' sentence was entirely consistent with the law governing the sentencing of young persons for murder when he was sentenced by Dunningham J in 2019. The sentence imposed also conforms with the principles that continue to govern the sentencing of young persons convicted of murder in cases that engage s 104 of the Sentencing Act.

[118] The only mitigating factors that justified the reduction in the MPI from 17 years to 13 years and six months imprisonment were Mr Morris' age, his guilty plea, his psychological issues, and his previous good record. Nothing said in *Dickey* would be likely to impact upon the sentence imposed on Mr Morris if he were to be sentenced today.

[119] We are therefore satisfied that there are no merits to Mr Morris' proposed appeal and that it is in the interests of justice for his application to be dismissed.

Result

[120] The applications to adduce further evidence brought by Mr Nattrass-Bergquist, Mr Wallace-Loretz and Mr Lo are granted.

[121] The applications for leave to appeal out of time by Mr Kriel, Mr Nattrass-Bergquist, Mr Wallace-Loretz and Mr Morris are dismissed.

[122] The application for leave to appeal out of time by Mr Lo is granted.

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