

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA173/2024
[2025] NZCA 146**

BETWEEN	JOHN MICHAEL JAYMAIN WHAREKURA Applicant
AND	THE KING Respondent

Hearing: 31 March 2025

Court: Campbell, Dunningham and Harvey JJ

Counsel: A S Bloem and K A J Russell for Applicant
E J Hoskin for Respondent

Judgment: 8 May 2025 at 11.00 am

JUDGMENT OF THE COURT

- A The application to adduce fresh evidence is granted.**
- B The application for an extension of time to appeal is declined.**
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REASONS OF THE COURT

(Given by Campbell J)

[1] Mr Wharekura stabbed Tanya Burr to death on the evening of 15 September 2002. In May 2003, he pleaded guilty to her murder. In August 2003, he was sentenced to life imprisonment with a minimum period of imprisonment of 14 years.

[2] Mr Wharekura applies for an extension of time — of more than 20 years — to appeal against his murder conviction. He says that subsequent psychiatric

investigations show that he was likely insane when he killed Ms Burr. The Crown opposes Mr Wharekura's application for an extension of time.

Background

The offending

[3] Mr Wharekura did not know Ms Burr. She lived in the same block of flats as one of Mr Wharekura's friends. Mr Wharekura went to see his friend on the evening of 15 September 2002. His friend, who lived at flat 8, was not home. Mr Wharekura knocked on the door of Ms Burr's flat and asked if she knew if anyone lived at flat 8. She said she did not know. Mr Wharekura left and waited a short time outside flat 8. A short time later, he went back to Ms Burr's flat and asked her for a pen and paper so that he could leave a note. When Ms Burr returned with pen and paper, Mr Wharekura attacked her with a knife that he was carrying, stabbing her repeatedly. He left her for dead on the floor. He threw the knife in the kitchen sink and proceeded to rummage through the flat. He stole her keys, wallet, cigarettes and camera. He attempted to lock the flat and drove off in Ms Burr's car.

[4] Mr Wharekura drove to his girlfriend's home. When asked where he got the car from, he said to his girlfriend: "I stabbed a chick. But that's not the worst part, I killed her." He then left for Wellington in the car. It ran out of petrol, and he hitchhiked the rest of the way. In Wellington, he organised a room in a hostel and sold the camera. On 17 September, two days after he killed Ms Burr, Mr Wharekura was found by a police patrol. He told the police officers that he knew they were looking for him and turned himself in. He was interviewed by a police detective and admitted that he killed Ms Burr. He was then arrested and charged.

[5] Mr Wharekura was 16 years old at the time.

Psychiatric assessments, guilty plea and sentencing in 2002–2003

[6] The Youth Court ordered, under s 121 of the Criminal Justice Act 1985, a psychiatric assessment of Mr Wharekura to assist the court in determining whether he was unfit to stand trial and whether he was insane at the material time. Dr Majeed was

engaged to carry out the assessment. He interviewed Mr Wharekura twice, on 3 December 2002 and 19 February 2003. He completed a report on 20 February 2003.

[7] Dr Majeed reported that at both interviews Mr Wharekura's speech was coherent and he displayed no signs or symptoms of psychosis. Mr Wharekura gave Dr Majeed an account of his movements during the day of the killing which matched the account he gave in his interview by the detective. He told him that at the time of the offence he was angry with his stepfather and had urges to kill him. He said that Ms Burr was the same height as his stepfather and, when he saw her, he snapped. At that point in the interview Mr Wharekura broke into tears and displayed a significant degree of remorse.

[8] Dr Majeed concluded that Mr Wharekura did not suffer from a mental illness. In his opinion, he was fit to plead and stand trial and did not qualify for the defence of insanity.

[9] Mr Wharekura was represented by experienced counsel, Mr Edwards. Unsurprisingly, Mr Edwards was of the view that the ultimate course of the proceeding would be determined by the results of psychiatric assessments.¹ Mr Edwards instructed another psychiatrist, Dr Simpson, to examine Mr Wharekura and report on fitness to plead and the availability of a defence of insanity. Dr Simpson interviewed Mr Wharekura on 19 May 2003 and produced a report two days later.

[10] Dr Simpson reported that Mr Wharekura's speech was normal in speed, flow and content. He found no evidence of psychotic features in the form of hallucinations and delusions, and no evidence of formal thought disorder. Dr Simpson said that Mr Wharekura's description of events was consistent with that in the police summary of facts, his statements to the police detective and his girlfriend's witness statement. There was no evidence that he was experiencing psychotic symptoms at the material time.

¹ This is recorded in Mr Edwards' sentencing submissions on behalf of Mr Wharekura.

[11] Dr Simpson concluded that Mr Wharekura was not suffering from any form of major mental illness at the material time. He was fit to plead and there was no psychiatric defence available to the murder charge.

[12] Mr Edwards considered that Dr Simpson's report effectively negated any possible defence. Mr Wharekura pleaded guilty on 26 May 2003, the date his trial was scheduled to start.

[13] A pre-sentence report was ordered. The report writer spoke to Mr Wharekura and his mother. Mr Wharekura gave the report writer a detailed account of the events leading up to his offending. Of the offending itself, Mr Wharekura is reported to have said that he recalled Ms Burr answering the door and saying, "oh it's you again". He could not recall anything else, except that he saw his arm swing and then looked down at the floor to see Ms Burr bleeding. He said that on the day of the offending he had no place to stay and was feeling very negative about life. However, he was not able to recall his specific thoughts and emotions just prior to and during the stabbing. The report writer observed that Mr Wharekura exhibited detachment about past events, avoided eye contact and presented as a depressed individual with little hope or aspiration.

[14] Neazor J sentenced Mr Wharekura on 22 August 2003.² One of the topics the Judge addressed was Mr Wharekura's reason for carrying a knife on the evening he killed Ms Burr. The Judge noted that what Mr Wharekura said to police about that topic was confusing. The Judge was not satisfied beyond reasonable doubt that Mr Wharekura had a deliberate plan to kill Ms Burr or to stab her so he could steal her car.³ The Judge said he did not know what caused Mr Wharekura to attack Ms Burr.⁴

[15] The Judge sentenced Mr Wharekura to life imprisonment with a minimum period of imprisonment of 14 years.⁵

² *R v Wharekura* HC Rotorua CRI-2002-463-836409, 22 August 2003.

³ At [14].

⁴ At [15].

⁵ At [26].

Subsequent events

[16] The following events, to the extent that they chart Mr Wharekura's psychiatric history, are largely taken from a 27 November 2024 report prepared by Dr Joseph, a forensic psychiatrist engaged by Mr Wharekura for the purposes of his application for an extension of time to appeal.

[17] In May 2008, about six years after the index offence, Mr Wharekura first came to the attention of prison mental health services. At assessments by a mental health nurse, he presented with no symptoms of psychosis. He was assessed again in October 2008 by a psychiatrist and found to be acutely psychotic. Among other things, he was uncommunicative, appeared to be responding to non-apparent stimuli and appeared to be grossly thought disordered. He was admitted to the Mason Clinic, Auckland's forensic psychiatry inpatient facility. He was discharged from the Clinic in December 2008, by which time he had been diagnosed with probable paranoid schizophrenia.

[18] By August 2009, the prison psychiatrist noted that Mr Wharekura had an established diagnosis of paranoid schizophrenia and his psychotic symptoms included auditory hallucinations. Antipsychotic medications eventually settled his presentation, although he continued to experience auditory hallucinations.

[19] In December 2012, Mr Wharekura was again admitted to the Mason Clinic for acute treatment of psychosis. He reported loud auditory hallucinations and experiencing intermittent thoughts of aggression towards others. He remained at the Clinic until February 2013. Back at prison, he continued to receive medication, though doses and treatments varied according to his condition. Mr Wharekura reported that his psychotic symptoms resolved in early 2015.

[20] On 29 September 2016, Mr Wharekura's treating psychiatrist, Dr Lokesh, provided a clinical update to the Parole Board in anticipation of Mr Wharekura appearing before the Board. Dr Lokesh said that Mr Wharekura's first contact with mental health services was in 2008, when he had a florid psychotic presentation. Dr Lokesh said a robust combination of medication had led to a substantial improvement in Mr Wharekura's mental state. Dr Lokesh said that, were the Board to

indicate that Mr Wharekura had satisfactorily completed the programmed components of his sentence plan, he would likely be transferred to the Mason Clinic to engage in mental health focussed rehabilitation and community reintegration. Dr Lokesh made that suggestion “within the context that Mr Wharekura was probably unwell to some extent at the time of the index offence in 2002”.

[21] Mr Wharekura appeared before the Parole Board on 6 October 2016. The Board said that the information before it was clear that Mr Wharekura was, at the time of the index offence, “suffering an undiagnosed psychotic illness”. The Board endorsed a release plan for Mr Wharekura to engage in rehabilitation and reintegration programmes at the Mason Clinic. The Board recorded that, in its view, Mr Wharekura’s crime occurred “because of his untreated psychotic illness at that time”. The Board declined parole.

[22] In February 2017, Mr Wharekura was admitted to the Mason Clinic for mental health rehabilitation. He participated in various groups and programmes at the Clinic. By September 2017, he was on escorted community leave. Mr Wharekura, however, decided to return to prison following a few sessions of psychological therapy. He described the emergence of guilty feelings and anger towards himself following exploration into his index offence. He was subsequently returned to prison in either late 2017 or early 2018. By that time, Mr Wharekura’s psychosis had been in remission for at least two years, and he was able to give a good account of his index offence, demonstrate remorse and reflect on what had happened.

[23] In September 2018, Mr Wharekura was released on parole to his grandfather’s residence. His care was transferred to Community Mental Health Services. He became active at a local church, played sport and obtained a job in May 2019. He later moved into his own residence.

[24] Mr Wharekura quit his job in October 2019. Around this time, there were concerns about his mental health, and he was recalled to prison in December 2019. At that time, he did not present with any overt symptoms of psychosis.

[25] In August 2021, following a serious incident in prison, Mr Wharekura was charged with wounding with intent to cause grievous bodily harm. In September 2022, he was found not guilty of that charge by reason of insanity. On disposition in December 2023, Mr Wharekura was ordered to be admitted to the Mason Clinic as a special patient pursuant to s 24(2)(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

Mr Wharekura's application for an extension of time

[26] Mr Wharekura applies to adduce fresh evidence in support of his application for an extension of time. That evidence is the November 2024 psychiatric report prepared by Dr Joseph. In that report, Dr Joseph details Mr Wharekura's extensive mental health history and opines that it was more likely than not that he was insane at the time he killed Ms Burr.

[27] Mrs Bloem, for Mr Wharekura, acknowledges the lengthy delay in filing the notice of appeal. She submits the delay is explainable by Mr Wharekura's mental health issues, his young age at the time of the offence and his lack of understanding about his legal options. She says Dr Joseph's report demonstrates that there is merit to the proposed appeal.

[28] The Crown opposes Mr Wharekura's application to admit Dr Joseph's report and opposes his application for an extension of time to appeal.

[29] Two issues arise for determination:

- (a) Should we grant the application to adduce Dr Joseph's report?
- (b) Should an extension of time to appeal be granted?

Should we grant the application to adduce Dr Joseph's report?

[30] Ms Hoskin, for the Crown, submits that Dr Joseph's report does not meet the fresh evidence requirements of credibility, freshness and cogency.⁶

⁶ Referring to *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [119]–[120].

[31] We disagree. Dr Joseph’s report and opinion rely largely on events that have occurred since Mr Wharekura pleaded guilty. The evidence is fresh in that sense. It is also credible, given Dr Joseph’s qualifications and experience. We acknowledge the submissions made by Ms Hoskin calling into question the cogency of Dr Joseph’s opinion. However, we prefer to deal with those submissions when addressing the merits of the proposed appeal.

[32] We therefore grant the application to adduce Dr Joseph’s report for the purposes of determining the application for an extension of time.

Should an extension of time to appeal be granted?

[33] Mr Wharekura’s application for an extension of time falls to be determined under s 388(2) of the Crimes Act 1961, being the applicable statutory provision in force at the time of his conviction. The relevant principles mirror those applied under the equivalent provisions of the Criminal Procedure Act 2011.

[34] As this Court explained in *R v Knight*, the touchstone for whether to grant an extension of time is the interests of justice in the particular case.⁷ The discretion must be exercised in accordance with the policy underlying s 388. The reason for the time limit in s 388 is the interest of society in the final determination of litigation. This is a powerful consideration in determining whether to grant an extension of time to appeal.⁸ The interests of justice may call for balancing the wider interest of society in the finality of decisions against the interest of the applicant in having their conviction reviewed.⁹

[35] The *Knight* test was affirmed as “manifestly ... correct” by this Court sitting as a full court in *R v Lee*.¹⁰ The Full Court said that relevant factors in the balancing test include the wider interests of society in the finality of decisions, the strength of the proposed appeal, whether the liberty of the subject is involved, the practical utility

⁷ *R v Knight* [1998] 1 NZLR 583 (CA) at 587.

⁸ At 587.

⁹ At 587.

¹⁰ *R v Lee* [2006] 3 NZLR 42 (CA) at [102].

of any remedy sought, the extent of the impact on others affected and on the administration of justice, and any prejudice to the Crown.¹¹

[36] The Court in *Lee* also said that a long delay is a major factor weighing against leave being granted and, if unexplained, will usually be decisive.¹² As this Court explained in *Dempsey v R*, that is because the longer the delay, “the more likely it is that the public interest, and that of other participants, in finality will outweigh the merits of the appeal”.¹³

Mr Wharekura’s delay

[37] Mr Wharekura was sentenced on 22 August 2003. He filed his notice of appeal on 28 March 2024. His delay is very long: more than 20 years.

[38] With a delay of this length, the public interest in the finality of decisions weighs heavily against granting an extension of time. So too does the consideration that Ms Burr’s family were entitled to believe that the case was long ago at an end.

Mr Wharekura’s explanation for his delay

[39] Mr Wharekura made an affidavit to explain his delay. He says that he was very young when he started hearing voices and that the only person he told was his mother, who told him that the voices were part of his Māori culture. The voices continued throughout his teenage years and, after he killed Ms Burr, he was instructed (by the voices) not to speak about them. He says it was only when he was diagnosed with schizophrenia that he started talking about the voices.

[40] Mr Wharekura says he did not know that his mental health was relevant to his conviction for murder and that he had not previously received legal advice on the issue. He also did not know until recently that appealing his conviction was an option. He says that in 2022, when psychiatric reports were ordered in relation to the wounding with intent charge, he was asked to speak again about what had happened when he

¹¹ At [99].

¹² At [115].

¹³ *Dempsey v R* [2023] NZCA 461 at [13].

killed Ms Burr. Mrs Bloem questioned him about whether the issue of insanity had been explored at the time of the murder. But he was reluctant at that time to talk about an appeal and was advised to wait until the court case relating to the wounding charge was over. He says that once he was moved to the Mason Clinic in December 2023, they discussed obtaining the records in relation to the murder charge, which took some time.

[41] We do not accept that Mr Wharekura’s account provides an adequate explanation for his very long delay in bringing an appeal. We will assume for the moment that Mr Wharekura heard voices from a young age, that after killing Ms Burr he was instructed by the voices not to speak about the voices, and that he first spoke about the voices at the time of his diagnosis of paranoid schizophrenia in 2008–2009. Those circumstances, combined with his then mental health issues, may have explained a delay in appealing until, say, early 2015. But by that time Mr Wharekura’s psychotic symptoms had resolved. And in September 2016, his psychiatrist was reporting a substantial improvement in his mental state. Concerns about Mr Wharekura’s mental health were not raised again until late 2019, by which time he had spent more than a year in the community on parole. In the intervening period, there were clear signals to Mr Wharekura that an insanity defence should be explored, with the Parole Board even saying in October 2016 that, in its view, his crime occurred because of his untreated psychotic illness. Mr Wharekura’s affidavit does not explain why he did not advance an appeal during this period.

[42] Even if we assume to Mr Wharekura’s benefit that a delay through to 2015 is explained, there is still a significant delay after 2015 which is unexplained. That will usually be decisive.

Strength of the proposed appeal

[43] Mr Wharekura pleaded guilty. In *R v Le Page*, this Court said that it is only in “exceptional circumstances” that a court will allow an appeal against conviction entered as a result of a guilty plea.¹⁴ Mr Wharekura’s circumstances do not fit easily

¹⁴ *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].

within the generally recognised categories of exceptional circumstances.¹⁵ He was represented by Mr Edwards, an experienced trial counsel. Although Mr Edwards has died and his file has apparently been destroyed (matters to which we return), it appears from his sentencing submissions that he considered fitness to plead and insanity to be the key issues in the proceeding. After receipt of the Court-ordered psychiatric report, Mr Edwards engaged Dr Simpson to provide a second report. Mr Edwards considered Dr Simpson's report negated any possible defence. Mr Edwards almost certainly would have advised Mr Wharekura on these issues and obtained instructions from him. Mr Wharekura's guilty plea was, given the two reports (and his prior admissions), unsurprising. His case is very different from those where trial counsel has not examined the possibility of an insanity defence.

[44] Mrs Bloem submits that the circumstances are exceptional because Mr Wharekura's decision to plead guilty was vitiated by his mental illness at the time. She points to Mr Wharekura reporting to Dr Joseph that the voices in his head were telling him he should go to prison (and therefore he should plead guilty) and not to speak to others about the voices. She says his mental illness was causing him to conceal that illness and to plead guilty regardless of the outcome of the psychiatric assessments. Mrs Bloem relies on the decision of the Court of Appeal of England and Wales in *R v Erskine*, and the cases discussed in that decision.¹⁶ In *Erskine*, the appellant's appeal against his conviction for murder was allowed on the grounds that there was "unequivocal contemporaneous evidence" that his mental responsibility for his actions at the time of the killing was substantially impaired and his mental illness "irremediably flawed" the decision not to run a defence of diminished responsibility.¹⁷ The Court of Appeal observed that "[t]here was nothing his legal advisers could do about it, and in reality nothing he could do about it himself".¹⁸ One of the decisions referred to was *R v Borthwick*, of which the Court said there was "clear and undisputed evidence, unknown at trial, which demonstrated diminished responsibility".¹⁹ In *Borthwick*, the Court observed, the decision not to advance

¹⁵ As to which, see [16]–[19]; and *Merrilees v R* [2009] NZCA 59.

¹⁶ *R v Erskine* [2009] EWCA Crim 1425, [2010] 1 WLR 183.

¹⁷ At [95].

¹⁸ At [95].

¹⁹ At [47], discussing *R v Borthwick* [1998] Crim LR 274 (CA).

the defence (of diminished responsibility) at trial “was itself consequent on the mental illness of the defendant”.²⁰

[45] We consider that Mr Wharekura’s circumstances are a long way from those of the appellants in *Erskine* and *Borthwick*. On the proposed appeal there would not be “unequivocal contemporaneous evidence” that Mr Wharekura was insane when he killed Ms Burr or that he had a mental illness which impaired his decision to plead guilty. To the contrary, the contemporaneous evidence points the other way. These issues would therefore be hotly disputed were there an appeal.

[46] In addition to Mr Wharekura having to overcome his guilty plea, the underlying merits of his insanity defence appear weak. The contemporary evidence is inconsistent with Mr Wharekura being insane at the time of the killing. It is true that the murder was irrational and senseless. Many murders are. But Mr Wharekura’s actions on the evening otherwise appear rational. After killing Ms Burr, he stole items that were useful to him. Police obtained statements from seven people who interacted with Mr Wharekura that evening, including five who saw him after the incident. None described Mr Wharekura as exhibiting any unusual behaviour. Mr Wharekura was interviewed by a police detective just two days after the killing. The detective described Mr Wharekura as “calm and relaxed”. In the interview, Mr Wharekura gave a detailed and coherent account of his actions. The transcript of that interview does not give any hint that, as is now claimed, Mr Wharekura was answering questions at the direction of voices in his head.

[47] That contemporary evidence contrasts starkly with Dr Joseph’s opinion that Mr Wharekura’s psychotic symptoms “likely resulted in marked distortions of reality at the time of the index offending” and that his psychosis “appears to have been so severe at this time that he is likely to have been grossly impaired in his ability to think and act rationally”.

[48] Mr Wharekura was interviewed by Dr Majeed twice, the first time about eleven weeks after the offending. Mr Wharekura gave him an account of his movements that was consistent with the account he gave to police. Dr Majeed reported no signs or

²⁰ *R v Erskine*, above n 16, at [47].

symptoms of psychosis and concluded that Mr Wharekura did not suffer from a mental illness. Mr Wharekura gave another consistent account of his actions when interviewed by Dr Simpson in May 2003. Dr Simpson saw no evidence of psychosis and reached the same conclusion on insanity as Dr Majeed.

[49] The contemporaneous evidence, including reports from psychiatrists who were asked to opine on fitness and insanity, presents a formidable hurdle for Mr Wharekura to overcome on his proposed appeal. We acknowledge that Dr Joseph has prepared a very detailed report and has drawn on information that was not available to Drs Majeed and Simpson, such as Mr Wharekura's subsequent psychiatric history. However, a substantial source of information on which Dr Joseph has relied is Mr Wharekura's self-reported account, many years after the event, that voices were instructing him to kill and that he felt justified in killing Ms Burr. There are serious issues as to the reliability of Mr Wharekura's account. His reporting of voices is inconsistent, as we have noted, with contemporaneous evidence. His explanation that he felt justified in killing Ms Burr is inconsistent with his displays of remorse at the time: to his girlfriend very soon after the event, and when interviewed by Dr Majeed.

[50] Overall, we consider that the merits of the proposed appeal are not strong.

Prejudice to the Crown

[51] The Crown would be prejudiced by the delay were Mr Wharekura granted an extension of time to appeal. Mr Wharekura's trial counsel died in 2019 and his case file has been destroyed. As a result, evidence of his observations of Mr Wharekura, their communications, the advice he provided, and the instructions he received is now unavailable.

Conclusion

[52] We accept that Mr Wharekura's liberty is involved and there would be practical utility in an appeal. However, that is the only factor which points towards extending time. The other factors weigh very heavily against an extension, which we decline to grant.

Result

[53] The application to adduce fresh evidence is granted.

[54] The application for an extension of time to appeal is declined.

Solicitors:

Bloem Law, Auckland for Applicant

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