IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA718/2021
[2023] NZCA 294

BETWEEN	NATHAN GORDON FROST Appellant
AND	THE KING Respondent

Hearing: 9 February 2023 (Further submissions received 24 February 2023)

Court: Cooper P, Goddard and Clifford JJ

Counsel: P M Keegan for Appellant
M J Lillico for Respondent

Judgment: 12 July 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order that Mr Frost serve a minimum period of imprisonment of 20 years is set aside and substituted with an order that Mr Frost serve a minimum period of imprisonment of 18 years.

REASONS OF THE COURT

(Given by Clifford J)

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Introduction

[1] The appellant, Nathan Frost (Mr Frost), pleaded guilty on 15 July 2021 to the murder of his father, Stephen Frost (Mr Frost Snr), and his half-brother, Regan Frost-Lawn, at their home in the early hours of 18 January 2021. Mr Frost was sentenced by Ellis J in the High Court at New Plymouth on 17 September 2021 to life imprisonment, with a minimum period of imprisonment (MPI) of 20 years.[1]

[2] Mr Frost now appeals his sentence. He says the MPI imposed was too great; in all the circumstances, his MPI should be the presumptive MPI of 17 years called for by s 104 of the Sentencing Act 2002 (the Act).

Background

[3] From the age of five, following his parents' separation, Mr Frost lived with his mother, Lorena Frost, and his older brother Jayden, until his mother's death in 2016. Mr Frost was by then 16 years old. Mr Frost had a loving relationship with his mother throughout that time, but little if any contact with his father.

[4] After his mother's death Mr Frost and Jayden went to live with his father, his father's then partner Michelle Lawn, and their two children Regan and H.

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[1] *R v Frost* [2021] NZHC 2450.

[5] By January 2021, Jayden had moved out and Mr Frost Snr and Ms Lawn had separated. Mr Frost was living with his father and his two half siblings, Regan and H. Mr Frost was unemployed and drinking heavily. His relationship with his father and half siblings was not good: he reported contemplating killing them and he had obtained the weapons he intended to use; a large pipe wrench and a hunting knife.

[6] By the early hours of the morning of 18 January 2021, Mr Frost had, by his account, drunk close to a bottle of Jack Daniels. His father, hearing Mr Frost crying in his bedroom, came to his door and tried to enter. As he did so Mr Frost attacked his father with the pipe wrench, striking him multiple times to the head and jaw, and knocking him to the ground unconscious. Mr Frost continued to beat his father with the pipe wrench whilst he was on the floor. Mr Frost then took the hunting knife and stabbed his father numerous times. Mr Frost Snr died at the scene.

[7] During the attack on Mr Frost Snr, Regan heard the attack, and, upon seeing what was happening, called out to Mr Frost to stop. He also yelled out to warn H, who was in a sleep-out outside. After the attack, Mr Frost followed Regan into his bedroom. Mr Frost stabbed his half-brother numerous times with the hunting knife — puncturing his lungs, causing massive internal bleeding and deep lacerations to his head and face. He then stabbed him four times in the neck. Regan also died at the scene.

[8] After the attack on Regan, Mr Frost uplifted the keys to the sleep-out and went outside. However H had heard the attack and Regan's warning; leaving the sleep-out to hide nearby. From this position, she called the police.

[9] When the police arrived at the scene shortly thereafter, Mr Frost acknowledged he had killed two people. He subsequently declined to make any formal statement to the police.

[10] Mr Frost pleaded guilty to the two charges of murder he faced following the preparation of psychiatric reports indicating his fitness to plead and the absence of any basis for a defence of insanity.

The legislative context

[11] The provisions governing murder sentencing are set out in subpt 4 of the Act.

[12] Pursuant to s 102(1) of the Act, a person convicted of murder must be sentenced to life imprisonment unless to do so would be manifestly unjust. It was not suggested in Mr Frost's case that the application of the mandatory sentence of life imprisonment would be unjust.

[13] Pursuant to s 103(1) of the Act, where a court sentences an offender convicted of murder to life imprisonment it must either order that the offender serve a minimum period of imprisonment, set to achieve the purposes enumerated in s 103(2) or — where the court is satisfied that no minimum term of imprisonment would be sufficient to satisfy those purposes — order that the offender serve the sentence without parole.[2] It was not suggested a fixed MPI was insufficient in Mr Frost's case.

[14] The question therefore was the length of the MPI required. Section 103(2) provides that the MPI must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:[3]

> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.

[15] In determining the MPI, s 104 of the Act requires the court to impose an MPI of at least 17 years in a range of circumstances unless, again, to do so would be manifestly unjust. Those circumstances are:

> > (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any

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2 Sentencing Act 2002, s 103(2A). See for example, *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15.

3 Those purposes are a subset of the purposes found in s 7(1) of the Sentencing Act — namely in (a), (e), (f) and (g).

offence or in any other way to attempt to subvert the course of justice; or

(b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or

(c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or

(d) if the murder was committed in the course of another serious offence; or

(e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or

(ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or

(f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or

(g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or

(h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or

(i) in any other exceptional circumstances.

[16] It was accepted at Mr Frost's sentencing that s 104 was engaged.[4] The MPI for Mr Frost was accordingly determined in this context.

The challenged sentencing decision

[17] At sentencing, for Mr Frost, Mr Keegan recognised the s 104(e) factor of a high level of brutality was involved in Mr Frost's offending. Mr Keegan accepted a starting point MPI of 21 years would be warranted. But he submitted that with discounts for guilty pleas and personal features, that MPI should be reduced to 15 years. Finally, and given in particular Mr Frost's age (21 years at the date of the offending), imposing the 17-year minimum MPI called for by s 104 would be manifestly unjust. Hence, Mr Keegan submitted, Mr Frost's MPI should be 15 years.

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[4] Specifically s 104(b), (e) and (h) of the Sentencing Act.

[18] The Crown's position was that an MPI starting point in the region of 23 to 24 years was called for, with discounts for guilty pleas and for personal factors of between two and three years. That would result in an MPI of 20 to 21 years. In the Crown's submission, no issue of manifest injustice arose.

[19] The Judge reached her decision to impose an MPI of 20 years in the following way:

(a) She first observed that the average MPI starting point in instances of double murders seemed to be around 22 years.[5]

(b) She then identified two particularly aggravating factors of these murders.[6] First, the planning and premeditation involved — evidenced not only by Mr Frost having obtained the wrench and the hunting knife some time before committing the murders but also, by his own account to a psychiatrist, having contemplated those actions for quite some time.[7] Whilst, the Judge said, the actual murders were in the end impulsive, without that planning and that preparation in all likelihood they would not have happened.[8] Second, the murders were undoubtedly brutal and, in the case of Regan — who had the misfortune of having seen and having tried to stop Mr Frost murdering his father — particularly callous and cruel.[9] On that basis, the Judge arrived at an MPI starting point of 23 years.[10]

(c) The Judge then recognised the personal mitigating factors of Mr Frost's age, absence of previous convictions and guilty pleas at an early stage — albeit in the face of an overwhelming Crown case.[11] The Judge considered Mr Frost's "mental health issues" as identified in the psychiatric reports before the Court, but noted that "[a]ny recognition"

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5 *R v Frost,* above n 1, at [26].
6 At [27]–[30].
7 At [28]; applying s 104(1)(b).
8 At [28].
9 At [29].
10 At [30].
11 At [32].

of such issues were difficult because there was no “real diagnosis”.[12] As will be outlined later, reports prepared on Mr Frost were unable to identify any discernible psychiatric disorder. Instead, the Judge considered that it was “really the interplay between alcohol and [Mr Frost’s] mental distress that was the real and immediate cause” of the offending.[13] Taking all those matters into account the Judge concluded that a global discount of three years was all that could be allowed.[14]

(d) Finally, the Judge was satisfied that the resulting MPI of 20 years was not one that, in terms of s 104, could be described as manifestly unjust.[15]

Grounds of appeal

[20] Mr Keegan advanced Mr Frost’s appeal on three grounds. He said:

(a) the MPI starting point of 23 years was too high;

(b) the Judge had been wrong to refer to and place weight on the Crown’s submissions that, but for H’s actions in hiding from Mr Frost, Mr Frost would have murdered her as well; and

(c) the global discount of three years for Mr Frost’s guilty plea and his personal mitigating factors was insufficient.

[21] That third submission was based in particular on the proposition that we should review the current approach, as taken by the Judge, to guilty pleas in murder cases. The methodology proposed, which will be returned to later, would provide a greater discount in response to Mr Frost’s guilty plea.

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12 At [32].
13 At [32].
14 At [33].
15 At [34].

[22] By the time we heard this appeal the decision of this Court in *Dickey v R*, addressing the significance of youth in murder sentencing, had been released to the parties, but not publicly.[16] The Court arranged for that decision to be circulated to counsel on 7 February 2023, just before our hearing on 9 February. Defence counsel initially sought an adjournment. We were able to proceed with the appeal as scheduled, with the agreement of all counsel, on the basis that oral submissions were to be made at the hearing and written submissions were to be filed subsequently in relation to the discount given for youth.

[23] In the hearing, Mr Keegan, for Mr Frost, conceded that the application of the mandatory 17-year MPI would not, in Mr Frost's case, be unjust. But he submitted that the MPI imposed should be 17 years, not the 20 years imposed by the High Court. In his further submissions regarding youth sentencing, Mr Keegan argued the approach taken in *Dickey* provided further support for the proposition that a greater discount for personal factors should have been allowed in Mr Frost's case. *Dickey,* accordingly supported his proposed MPI of 17 years.

[24] We address the submissions of the parties, including those made in writing after the hearing, in the analysis which follows.

Murder sentencing in New Zealand

The general approach to MPIs for murder

[25] Until 1993 MPIs for murder were set by the Criminal Justice Acts of 1954 and 1985.[17] The statutory MPI for murder varied over time. By 1987 that period was 10 years.[18]

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16 *Dickey v R* [2023] NZCA 2, [2023] NZLR 405.

17 Capital punishment was the primary sentence for murder until the enactment of s 172 of the Crimes Act 1961 and the repeal by s 2 of the Crimes Act 1961 of the Crimes Act 1908, except during the period between 1941 and 1950 when capital punishment was abolished by s 2 of the Crimes Amendment Act 1941, and later reintroduced by s 2 of the Capital Punishment Act 1950.

18 The non-parole period for offenders sentenced to life imprisonment for murder varied between five to 10 years over this period. Under s 33(2)(c) of the Criminal Justice Act 1954, parole was available after five years for an offender serving a life sentence. This was amended by s 26(1) of the Criminal Justice Amendment Act 1962 to 10 years and again by s 15(2) of the Criminal Justice Amendment Act 1975 to seven years. The seven-year non-parole period was retained in s 93(1)(b) of the Criminal Justice Act 1985. Section 9 of the Criminal Justice Amendment Act 1987 finally fixed the non-parole period to 10 years for offenders serving a sentence of life imprisonment.

[26] In 1993 control over MPIs was given to the courts.[19] The court could order an MPI of more than 10 years where it was "satisfied that the circumstances of the offence [were] so exceptional that a minimum period of imprisonment of more than 10 years" was justified.[20]

[27] That threshold was lowered in 1999 and became whether the circumstances of the offence were "sufficiently serious to justify a minimum period of imprisonment of more than 10 years".[21] This standard was initially retained following the introduction of the Sentencing Act in 2002. Section 103 originally provided that the court could increase an MPI beyond the 10-year minimum if the circumstances of the offence were "sufficiently serious to justify doing so".[22] This was amended in 2004 to reflect the current statutory wording — an MPI must be the minimum "necessary" to satisfy the identified statutory factors.[23]

[28] The general approach to the applicability of ss 103 and 104 was first explained by this Court in *R v Howse*,[24] a case concerning only s 103, and in *R v Williams,*[25] involving s 104. It has since been clarified a number of times including in *Robertson v R,*[26] and recently in *Davis v R*.[27]

[29] *Howse* held the focus of the s 103 inquiry was how much more than the minimum 10 years was required.[28] It required the court to compare the culpability of the offending in the case before it with what it described as the standard cases of murder that would attract the statutory norm of an MPI of 10 years.[29] It was also necessary to retain reasonable relativity between cases.[30] The proper approach was to

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19 Criminal Justice Amendment Act 1993, s 39(1), amending s 80 of the Criminal Justice Act 1985.
20 Criminal Justice Act 1985, s 80(2).
21 Criminal Justice Amendment Act (No 2) 1999, s 2, amending the Criminal Justice Act 1985, s 80(2).
22 Sentencing Act, s 103(3).
23 Sentencing Amendment Act 2004, s 12, amending the Sentencing Act 2002, s 103.
24 *R v Howse* [2003] 3 NZLR 767 (CA). As noted at [57] of the judgment, the Sentencing Act was not in force at the time of Mr Howse's offending. Pursuant to the transitional provisions in s 154, Mr Howse was sentenced under the Sentencing Act. However, s 154(3) provided that s 104 did not apply in Mr Howe's case.
25 *R v Williams* [2005] 2 NZLR 506 (CA).
26 *Robertson v R* [2016] NZCA 99.
27 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43.
28 *R v Howse,* above n 24, at [61].
29 At [61].
30 At [63].

apply the primary comparison between the instant offence and the minimum 10 year period as the first step, and then to use relevant individual comparators as a check.[31]

[30] The *Howse* methodology continued to be applied despite the subsequent amendment of s 103.[32]

[31] In *Williams* this Court suggested a modified two-stage approach, based on *Howse*, should be followed where s 104 applied.[33] First, the court would, applying the *Howse* approach, consider "the degree of culpability of the instant case in relation to that involved in the standard range of murders" and how much more than the MPI of 10 years is needed to meet the relevant statutory purposes.[34] Where that first step indicated an MPI of 17 years or more, that would be the MPI imposed.[35] But where the first step pointed to a lesser MPI, the second step would be to consider whether it would be unjust to apply the 17-year minimum required by s 104.[36] If not, then the MPI would be 17 years.[37]

[32] As may be apparent, and as this Court later clarified in *Davis*, that first step in fact itself requires the finding that s 104 does apply and then the application of the comparator methodology.[38] Given that s 104 has been found to apply, to then compare the instant case to the *standard* cases of murders could be regarded as somewhat anomalous.

[33] However, that approach would appear to have been a pragmatic response to the reality that, as Parliament intended, the role of s 104 was to increase MPIs for certain serious murders.[39] Thus, initially at least, murders of a similarly serious nature would, because such cases were not governed by s 104, be likely to have attracted MPIs less than the new, 17-year minimum. As such, the comparator method, requiring a comparison between the instant offending and the standard range of murders so as to

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31 At [64].
32 See for example *R v Williams,* above n 25, at [32]; and *Brown v R* [2011] NZCA 95 at [7(a)].
33 *R v Williams,* above n 25, at [52]–[54].
34 At [49] and [52].
35 At [54].
36 At [54].
37 See *R v Gottermeyer* [2014] NZCA 205 at [75].
38 *Davis v R,* above n 27, at [24]–[25].
39 See *R v Gottermeyer*, above n 37, at [75]. See also Sentencing and Parole Reform Bill 2001 (148–2) (select committee report) at 8.

assess how much more than the 10 year minimum MPI was needed, was intended to reflect the legislative policy that the culpability of the most serious murders attracted greater non-parole periods.[40] Reflecting that, the Court in *Williams* went on to recognise that over time, comparisons based not on the standard range of murders but on the subset of murder cases where s 104 was applicable, would assist in the application of the comparator methodology.[41] Moreover, and as later emphasised in *Davis,* the Court in *Williams* did not insist that the suggested two-step approach was a rigid formula to be blindly adhered to.[42]

[34] More recently in *Davis,* the Court suggested a three-step approach to the assessment of a determinate MPI where s 104 is engaged. The sentencing judge must decide:[43]

(a) First, what notional MPI is called for under s 103(2)?

(b) Second, does a s 104 category apply?

(c) Third, if s 104 applies, but the notional MPI called for by the s 103 methodology is less than 17 years, would the imposition of a 17-year MPI be manifestly unjust?

[35] But the first two steps need not be followed in that order. Rather:[44]

> The sequence chosen may depend on the category and the circumstances. Some s 104 categories apply unambiguously — double murder, for example — while others, of which s 104(1)(e) [(high level of brutality)] is the leading example, require judgments of quality and degree.

[36] Nor would it always be necessary to apply that three-step methodology. Section 104 was no longer new and, as *Williams* had anticipated, there was now a substantial body of s 104 cases which judges may rely on.[45] That is, application of the

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40 *R v Williams,* above n 25, at [49].
41 At [50]–[51] and [53].
42 *Davis v R,* above n 27, at [27].
43 At [25].
44 At [25]. See also *R v Williams,* above n 25, at [51] in which the Court recognised that “the relative culpability of the s 104 factors vary hugely”.
45 At [27].

comparator methodology could answer both the question of whether s 104 applied and that of the appropriate MPI. That approach, as the Court made clear in *Davis,* was unobjectionable, so long as the judge addressed the relevant sentencing purposes and principles at the sentence and the reference comparator case or cases were consistent with *Howse* and *Williams*.[46]

Providing for mitigating features

[37] The issue of principle raised by this appeal involves the question as to how and to what extent credit is to be given for guilty pleas and other personal mitigating factors when determining an MPI to which s 104 applies.

[38] The setting of MPIs under both ss 103 and 104 raise those questions in a particular context. Where, in the ordinary course, a court sets an MPI under s 86 of the Act, a finite sentence will already have been determined: all the ss 7, 8 and 9 purposes, principles and factors will have been considered. That is not the case under ss 103 and 104, as the presumptively mandated — indeterminate — sentence is life imprisonment.

[39] As regards the position under s 103, since *Howse* there has been a general recognition of the significance of other sentencing factors to the s 103 assessment.[47] *Adams on Criminal Law* summarises:[48]

> Although the primary focus in fixing the minimum term is on the circumstances of the offence and not the offender (see *R v Brown* [2002] 3 NZLR 670; (2002) 19 CRNZ 534 (CA)), the principles in s 8 and the aggravating and mitigating factors in s 9 should be taken into account to the extent that they are relevant to the purposes in subs (2): *R v Walsh* (2005) 21 CRNZ 946 (CA).

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[46] At [27].
[47] See for example *R v Williams,* above n 25, at [65].
[48] See Simon France (ed) *Adams on Criminal Law — Sentencing* (online ed, Thomson Reuters) at [SA103.03].

[40] These questions were considered at some length by this Court in *Williams* in the context of s 104.[49] The following principles were identified:

(a) Section 104 reflects a statutory presumption that there should be a higher level of punishment through the mechanism of a longer MPI if specified aggravating circumstances are present in a particular murder.[50]

(b) The legislation retained a limited judicial discretion to depart from the statutory minimum term, that discretion being applicable only in cases which meet the criterion of manifest injustice.[51]

(c) Defining the scope of the combined discretion raised a tension between competing principles. Ultimately the court must do its best to make the legislation work.[52]

(d) The basic principles underlying successive sentencing regimes, largely codified in ss 7, 8 and 9 of the Act, remained applicable:

> [65] … That reflects the important principle that the punishment should fit the crime, which is fundamental to the administration of justice. There is no indication that Parliament intended a more radical restriction on the sentencing discretion of Judges that excluded consideration of those important principles.

(e) The minimum 17-year period was not to be departed from lightly.[53] The presence of mitigating factors relating to personal circumstances would rarely misplace the presumption:

> [67] … [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

49 *R v Williams,* above n 25.
50 At [58].
51 At [62].
52 At [64].
53 At [66].

> 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.
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> [68] Beyond that, what level of disparity amounts to manifest injustice remains a matter of sound sentencing judgment that is not capable of precise determination. …

[41] More generally, it has been recognised by this Court that the policy behind the legislative provisions for murder mean the discounts for personal mitigating factors have played "a lesser role" in murder sentencing.[54] This is because s 103(2) signals Parliament's intention that the seriousness of the offending is to be a sentencing court's focus when setting an MPI for murder.[55]

The issue of guilty pleas

[42] The Court in *Williams* was also called upon to determine whether a guilty plea could properly be treated as significant in making a 17-year minimum term manifestly unjust.[56] Consistently with its general approach, the Court confirmed the relevance of a guilty plea to the s 104 assessment, and noted there could be qualifying circumstances in which a guilty plea could give rise to a manifest injustice under that provision.[57] But the Court went on:

> [73] The discount required for a guilty plea may, however, often be less than in an ordinary case where the statute establishes no presumption that the sentence will be at a particular level. The reason is that departures from the 17-year minimum are only to occur in cases of clear injustice. While the Act requires that a plea of guilty be taken into account, as a mitigating factor, s 104 requires something more than the fact that a particular discount would have been given but for the section to establish a clear injustice. It follows that if a minimum term of 17 years would include a real element of discount for a guilty plea, it would normally be appropriate to impose that term.

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54 *Webber v R* [2021] NZCA 133 at [33]. See also *Hohua v R* [2019] NZCA 533 at [44].
55 *Webber v R,* above n 54, at [33].
56 *R v Williams,* above n 25, at [69]–[74].
57 At [72].

[43] Following *Williams,* a settled pattern emerged in which discounts for guilty pleas in the range of one to two years were provided.[58]

[44] The role of a guilty plea in sentencing generally was considered by this Court in *R v Hessell* (*Hessell* (CA)).[59] Despite the established principle, as recognised in s 9(2)(b) of the Act, that guilty pleas ought to be recognised at sentencing, there was no appellate guidance as to the extent of the discount to be provided.[60] In *Hessell* (CA), this Court issued a guideline judgment establishing a sliding scale of fixed discounts for finite sentences: 33 per cent, 20 per cent and 10 per cent, depending on when the plea was entered.

[45] That approach was overturned by the Supreme Court in *Hessell v R* (*Hessell* (SC)).[61] The Supreme Court preferred a less structured approach to the determination of a guilty plea discount, in which the sentencing judge had a discretion to take into account all relevant circumstances, including the strength of the prosecution case, as well as the timing of the plea.[62] The Supreme Court also considered the maximum allowable discount should be 25 per cent, and not the 33 per cent contemplated by the Court of Appeal.[63] The Supreme Court described the policy rationale for an allowance for guilty pleas: providing an incentive to plead guilty where appropriate, the efficient administration of justice, and benefits to those who would otherwise have to participate in the, often challenging, trial process.[64]

[46] But, in a part of its discussion not commented on by the Supreme Court, this Court had addressed the specific question of discounts for guilty pleas in murder sentencing.[65] The Court of Appeal judgment noted what it termed the "special difficulties" in dealing with guilty pleas in murder cases, including as regards the interpretation of s 104.[66] It was clearly desirable to recognise a guilty plea when

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58 *R v Hessell* [2009] NZCA 450, [2010] 2 NZLR 298 [*Hessell* (CA)] at [70]; and *R v McSweeney* [2007] NZCA 147 at [10].
59 *Hessell* (CA), above n 58.
60 France, *Adams on Criminal Law — Sentencing*, above n 48, at [SA9.18]; and see the discussion in *Hessell* (CA), above n 58, at [1]–[6].
61 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell* (SC)].
62 At [74].
63 At [75].
64 At [45]–[46].
65 *Hessell* (CA), above n 58, at [63]–[73].
66 At [63].

setting an MPI, as recognised in *Williams*.[67] But how that was to be done would very much depend on the facts of the particular case.

[47] That said, the Court accepted:

(a) A guilty plea could not, in itself, reduce the 10-year minimum MPI under s 102.[68] This was "almost inconceivable", although "potentially a guilty plea, when combined with other factors, could render life imprisonment manifestly unjust."[69] The Court noted, however, that "[t]his guideline does not purport to speak to that unusual circumstance."[70]

(b) Nor could the standard guideline be applied in an unmodified form in murder cases.[71] It would severely undermine the s 104 policy if an offender could reduce the 17-year MPI to 11 years simply by pleading guilty.

(c) But, the Court said, it was arguable some of the discounts that had been given — which, as noted, tended to be in the range of one to two years — had been too light.[72]

[48] The Court then canvassed a number of approaches to guilty pleas for murders. It discussed a proposal by counsel assisting, Mr Boldt, for a modified form of guidance. This is the modified discount methodology (MDM) contended for by Mr Keegan in this case.

[49] The Court explained:

> [71] Mr Boldt did suggest another option: a modified form of the guideline. He suggested that the first 10 years of the MPI should be treated as a statutory minimum which must remain unaffected by any other factor, including the defendant's plea. The guideline could then be applied to the "discretionary"

67 At [68].
68 At [69].
69 At [63].
70 At [63].
71 At [70].
72 At [70].

> component of the MPI – that is, anything above 10 years – in the usual way. Under this formula, a 13-year MPI would be reduced to 12 years if the defendant pleaded guilty at the first reasonable opportunity. A standard 17 year MPI would fall by two years and four months – to 14 years eight months – if the offender chose to plead guilty at the first reasonable opportunity. It would be "manifestly unjust", in s 104 terms, were such an offender not to be given credit for his or her early guilty plea. This is certainly worth consideration.

[50] The Court did not however go further. It decided the matter should be left to the Court's discretion, accepting a recommendation to that effect made by the Law Commission:[73]

> It is desirable to recognise a guilty plea when setting a minimum period of imprisonment in conjunction with a life sentence for murder or with preventive detention. Where murder is concerned, for example, a policy of not recognising a plea provides little incentive for offenders to plead guilty and may therefore result in delays in disposing of murder cases and an increase in trauma, stress, and inconvenience for the families of murder victims. While [the] guideline may help to determine the appropriate reduction as applied to a minimum period of imprisonment, the amount of reduction is at the judge's discretion.

[51] The Court regretted it would not be more definitive, noted again the difficulties involved, and concluded "this part of the guideline should be regarded as unfinished business".[74]

[52] Since *Hessell* (CA), judges have been tasked with setting discounts for guilty pleas in murder sentencings in the exercise of their discretion. Despite this Court's comments in *Hessell* (CA), the typical discount provided for a guilty plea of one to two years has not materially increased.[75] This is perhaps due to the Supreme Court's consideration that, on policy grounds, the 33 per cent cap on guilty plea discounts for finite sentences, proposed by this Court, was too high.[76]

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73 At [67]. *Hessell* (CA), above n 58, was quoting from draft sentencing guidelines prepared by the Law Commission's Sentencing Establishment Unit in anticipation of the establishment of the Sentencing Council which was provided for, but ultimately not established, under the Sentencing Council Act 2007. The draft guidelines quoted were ultimately not published. See [5] and [7]–[8] of *Hessell* (CA) and *Hessell* (SC), above n 61, at [59], n 53.

74 At [73].

75 This conclusion aligns with the tables prepared by Mr Lillico which showed that a large majority of cases, including those after *Hessell* (CA), above n 58, have provided discounts in this range. See also *Malik v R* [2015] NZCA 597 at [22] referring, without comment, to the assessment in *R v Malik* [2015] NZHC 466.

76 *Hessell* (SC), above n 61, at [48]–[49] and [75].

[53] Furthermore, since *Hessell* (CA)*,* this Court in *Malik v R* rejected a proposal that the full *Hessell* (SC) 25 per cent discount be applied to the total MPI in murder sentencing.[77]

[54] The MDM approach, as discussed in *Hessell* (CA), has been applied in a handful of cases since that judgment.[78] It appears in many of these cases, where a discount was applied to the discretionary period, the application of the MDM was proposed, or accepted, by the Crown.

[55] In *R v Boyes-Warren,* the offender pleaded guilty shortly before trial to the murder of a taxi driver.[79] In the High Court, French J adopted a starting point MPI of 17 years.[80] After finding that 17 years was manifestly unjust on the basis of the appellant's age and a guilty plea, a discount of about 20 per cent of the discretionary component of the MPI was adopted.[81] Accordingly, an MPI of 15 and a half years was the end sentence.[82]

[56] Mr Boyes-Warren appealed.[83] He criticised the approach taken — arguing that a greater discount should have been provided. In particular, that discount should have been against the full term, and not the discretionary component of the MPI above 10 years. This Court noted that, against the background of this Court's decision in *Hessell* (CA), the Judge could not be criticised for the approach taken.[84] The real question was, "whether, however it was reached, the ultimate sentence was manifestly excessive."[85]

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77 *Malik v R*, above n 75, at [35]–[37].

78 See for example *R v Ogle* HC Wellington CRI-2009-091-2763, 16 October 2009; *R v Somerville* HC Christchurch CRI-2009-009-14005, 29 January 2010; *R v Terewa* HC Rotorua CRI-2009-087-2744, 19 February 2010; and *R v Flewellen* HC Christchurch CRI-2008-042-2328, 29 April 2010.

79 *R v Boyes-Warren* HC Christchurch CRI-2008-009-19959, 10 March 2010.

80 At [52].

81 At [54].

82 At [55].

83 *Boyes-Warren v R* [2010] NZCA 395.

84 At [19].

85 At [19].

[57] There has, however, not been a case before this Court since *Hessell* (CA) in which the MDM has been proposed and considered. We return to consider the MDM below.

[58] Mr Frost's appeal must be considered in light of the development of the law in this domain described above. It must also be considered in light of s 250 of the Criminal Procedure Act 2011. That is, we must allow the appeal if satisfied that there was an error in the sentence imposed on conviction and that a different sentence should be imposed, and not otherwise.

Analysis

Overview

[59] We address the issues raised in the following order:

(a) Was the MPI starting point of 23 years set by the Judge in error for being too high?

(b) Was the Judge's reference to the possibility that Mr Frost was fortunate not to also be facing the charge of murdering H an error, being a reference to an irrelevant consideration, calling for an adjustment to the MPI?

(c) Should the approach in murder sentencing to discounts from MPI starting points for guilty pleas be revised?

(d) In any event, did the High Court err by failing to give sufficient credit to Mr Frost for the mitigating considerations of his guilty pleas and his personal factors?

The starting point MPI

[60] In characterising the Judge's 23-year MPI starting point as too high, Mr Keegan noted the Judge had not identified a particular comparator and, for his part, relied on *Malik v R*[86] and *R v Maheno*,[87] both double murders in the family context.

[61] We first observe that the concept of an MPI "starting point" does not feature in the methodologies described in *Howse*,[88] *Williams*,[89] *Davis,*[90] or *Hessell* (CA).[91] Its use is, however, a very common feature of murder sentencing. That can be seen as a result of the recognition of:

(a) the relevance of the factors found in ss 7 to 9 of the Sentencing Act for the assessments to be made under ss 103 and 104;

(b) the role of the increased level of MPIs required by ss 103 and 104 as representing an increase in punishment relative to that called for by the "standard" murder, much as the length of determinate sentences increases with the seriousness of the circumstances of the offence and offender, and hence with the culpability of the offender; and

(c) the general sentencing methodology now applicable in New Zealand of:

(i) determining the sentencing starting point;

(ii) assessing the aggravating and mitigating factors; and

(iii) tailoring the sentence to the individual case.[92]

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86 *Malik v R,* above n 75.
87 *R v Maheno* [2013] NZHC 2430.
88 *R v Howse,* above n 24.
89 *R v Williams,* above n 25.
90 *Davis v R,* above n 27.
91 *Hessell* (CA), above n 58.
92 France *Adams on Criminal Law — Sentencing,* above n 48, at [SAB2]–[SAB4].

[62] The approach adopted by Ellis J is entirely consistent with that overall approach.

[63] There was criticism by Mr Keegan of a failure by the Judge to identify one or more specific comparator cases, reflecting that element of the methodologies already described. At the same time, we note, as is always the case, the issue is not the use of a given methodology, or a particular step in a methodology, but whether there is, in terms of s 250 of the Criminal Procedure Act, an error in the sentence imposed.[93]

[64] However, the Judge did, in fact, identify comparative cases. She said:[94]

> [26] The fact that you murdered two people is sufficient to engage the statutory presumption that there will be an MPI of 17 years or more.[95] And as Mr Keegan referred to me in his written submissions there was a sentencing over 10 years ago where the Judge observed that for double murders arising out of the same sequence of events, the MPI starting points ranged from 18 and a half years to 25 years.[96] Counsel have also referred me to several sentencings for double murder since then.[97] Overall, the average MPI starting point in such cases seems to be around 22 years.

[65] In *Malik,* a father murdered his wife and 18 year old daughter.[98] The murder occurred because the father could not accept his wife's decision to leave him. He took a large kitchen knife and went to his wife's room in the early hours of the morning where he stabbed her 31 times. He then went to his daughter's room, who realised what was happening and tried to flee. He overcame her and stabbed her 25 times. On appeal this Court found the 21-year starting point MPI fixed by the sentencing Judge was unexceptional, commenting "[i]ndeed, it could have been higher."[99]

[66] *Maheno* involved the murder of the offender's uncle, who the offender regarded as a brother, and the uncle's wife.[100] The three had lived together with the offender's grandmother. Their relationship had broken down following the death of

93 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
94 *R v Frost,* above n 1.
95 Sentencing Act, s 104(l)(h).
96 *R v Somerville*, above n 78.
97 *R v Maheno,* above n 87: 21 years; *Dawood v R* [2013] NZCA 381: 19 years (second victim stabbed but did not die); *R v Tarapata* [2015] NZHC 1594: 20 years; and *Malik v R*, above n 86: 21 years.
98 *Malik v R,* above n 86.
99 At [39].
100 *R v Maheno,* above n 87.

the grandmother. After an argument, the offender shot the uncle as he pleaded for his life. The first shot did not kill the uncle. There was then a fight between the offender and the uncle's partner which resulted in the offender shooting the partner as she tried to escape. She fell to the ground and was shot again. The offender returned to the house and shot the uncle again, killing him. The Judge identified an MPI starting point of 21 years also.[101]

[67] In *R v Ogle*, another brutal and callous double murder in a domestic context, an MPI starting point of 23 years was adopted by the High Court.[102]

[68] Here, as the Judge recognised, not only was this a double murder, but both murders were brutal and involved great cruelty and callousness. Mr Frost Snr had gone to his son's bedroom, hearing him in distress. The attack was vicious and unexpected. It involved repeated blows. The attack on Regan was just as serious. Moreover, Regan quite clearly knew what was happening: he was able to warn his sister but could not himself escape Mr Frost's violence. Both Mr Frost Snr and Regan were vulnerable given the place and the time of their deaths — at home in the middle of the night. Regan was particularly so, being Mr Frost's younger half-brother. There was also a material degree of premeditation, in our view accurately assessed by the Judge.

[69] In these circumstances we are not persuaded the Judge erred in setting the MPI starting point at 23 years.

An irrelevant consideration?

[70] For Mr Frost, the submission is that the Judge improperly took account of what she described as Mr Frost's good fortune in that he was not also facing sentencing for the murder of his half-sister, H. That was an irrelevant consideration. Absent a charge of attempt, Mr Frost could not be punished for what he may have intended to do, but never did. The Judge had therefore been wrong to take account of that consideration, resulting in a material error in the sentence she imposed.

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101 At [29].
102 *R v Ogle,* above n 78, at [61].

[71] We do not see the Judge's observation as reflecting any such error. Rather, we regard the challenged remark as a comment made in passing, and one which reflected the realities of the situation. As noted, the statement of facts to which Mr Frost pleaded guilty recorded that after he had killed Regan he uplifted the set of keys to the sleepout where H was staying that evening. He went outside and went to the sleepout. H had, however, left the sleepout and hidden nearby. H was lucky to survive, and so was Mr Frost not to have been responsible for her death. But there is no indication those matters contributed directly, or as aggravating factors, to the Judge's assessment of Mr Frost's culpability.

Should there be a change to the approach to determining guilty plea discounts for MPIs in murder sentencings?

[72] As noted, Mr Keegan, for Mr Frost, proposed this Court adopt the "modified discount methodology" or MDM suggested by counsel assisting, Mr Boldt, in *Hessell* (CA) when calculating the discount to be provided for guilty pleas in setting an MPI for murder.

[73] That proposal involves applying the standard guilty plea percentage discount to that part of the MPI "starting point" in excess of 10 years in the first instance. That is, the first 10 years are treated as a statutory minimum, and discounts are only applied to the difference between the MPI starting point and the 10-year minimum. This discount would be capped at 25 per cent, following the Supreme Court's guidance in *Hessell* (SC). Under this approach, if the maximum discount is provided, a 30-year MPI starting point would be reduced by five years to an MPI of 25 years. A 14-year MPI starting point would be reduced to 13 years.

[74] Mr Keegan submitted, if, where s 104 was applicable, the MDM would reduce the MPI below 17 years, the question would be whether imposition of a 17-year MPI would be manifestly unjust. If not, the "discount" would be reduced and a 17-year MPI would be imposed. In other words, the "manifestly unjust" assessment of the application of s 104 would be undertaken after the effect of a "full" discount had been made apparent.

[75] Mr Keegan argued the MDM would help avoid what he described as insufficient, ambiguous and disparately applied discounts currently being adopted in this area. It was submitted the MDM recognises the more limited credit in cases of murder underlying the legislative policy in s 104 and balances this against the consideration in s 9(2)(b) of the Sentencing Act requiring credit for plea.

[76] For the Crown, Mr Lillico argued that the current approach was well established, had been confirmed on a number of occasions since first being outlined in *Williams* and, in fact, was as capable as the MDM approach favoured by Mr Keegan of giving mitigatory effect to guilty pleas. Mr Lillico provided the Court with a number of helpful tables which, he said, illustrated that proposition. Taken overall Mr Lillico supported the conclusion this Court reached in *Boyes-Warren v R* that "the real question … is whether, however it was reached, the ultimate sentence was manifestly excessive".[103]

[77] Before considering the merits of the two methodologies, it is first necessary to compare them.

[78] The existing discretionary approach, as noted, provides a discount of about one to two years for a guilty plea. The discount of about one to two years is generally constant no matter the MPI starting point. That is, as the MPI starting point increases, the discount for a guilty plea remains about the same. So, a 30-year MPI starting point will be discounted by about two years to 28 years. A 15-year MPI starting point will receive, in general, about the same discount to 13 years.

[79] Under the MDM, the discount for pleading guilty increases with the MPI starting point. If the full 25 per cent discount is provided, a 30-year MPI starting point would result in a five year discount, reducing the sentence to 25 years. In contradistinction, an 11-year MPI starting point would provide only a three-month discount, resulting in an end MPI of 10 years and nine months.

[80] As is apparent from the above analysis, an effect of the MDM, when compared to the current approach, is that more serious murders will receive greater discounts

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[103] *Boyes-Warren v R*, above n 83, at [19].

for a guilty plea and the less serious murders will receive lesser discounts. The convergence point between the discounts provided under the two approaches is about 18 years — at that point, under both methods, a two-year discount would be initially given, albeit prior to any consideration of manifest injustice. Below about an 18-year MPI starting point, the MDM provides a lesser discount, and the existing approach a greater one, and vice versa.

[81] We are satisfied that the MDM is not a superior approach to allocating discounts for guilty pleas in murder sentencing, for four reasons.

[82] First, under the MDM, the discount for sentences with MPI starting points approaching the 10 year statutory floor would be negligible. An MPI starting point of 12 years would be discounted by a maximum of six months. This is undesirable. It would reduce the incentive to plead guilty, and so undercut the well recognised policy considerations pointing towards, where possible, a real benefit from a guilty plea.[104] Discounts of merely a matter of months will generally not preserve that incentive at a desirable level. We do recognise that in some cases the discount in reality will be limited by the effect of the statutory floors of 10 and 17 years under ss 103 and 104 respectively. Nonetheless, as noted in *Williams,* the court must do its best to make the legislation work.[105]

[83] Second, the discounts available for the more serious murders, of up to, in some cases five years, under the MDM would be excessive. It would undermine the legislative policy and the relativity between sentences if such credit were given. The general approach called for by s 104 requires recognition of the lesser significance of guilty pleas in this context. The statutory emphasis is on the culpability of the offending rather than the offender for murder sentencing.[106] This effect could worsen if the MDM were applied alongside other discounts. There is also a further risk that the MDM would lead to an increased clumping of sentences around the 17-year mark as discounts reduce the MPI to that point. This would undermine the need, as

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104 *Hessell* (SC), above n 61, at [45]–[46].

105 *R v Williams,* above n 25, at [64].

106 France, *Adams on Criminal Law — Sentencing*, above n 48, at [SA103.03] referring to *R v Brown* [2002] 3 NZLR 670 (CA). See also *Webber v R,* above n 54, at [33]; and *Hohua v R,* above n 54, at [44].

identified in *Howse,* to preserve reasonable relativities between sentences to reflect the comparative culpability of the offending.[107]

[84] Third, in coming to this conclusion, the reasons for calculating a notional percentage discount for a guilty plea when imposing a finite sentence cannot be applied uncritically in this context. Several reasons for such discounts are given in *Moses*:[108]

> [T]he discount is justified in substantial part by systemic and social considerations distinct from the offender's personal circumstances; the discount must be transparent, which aids predictability; and the calculation allows others including the offender and the victim to identify the sentence that would have been imposed but for the plea.

[85] Similar considerations could be invoked to support identifying a percentage discount as a step in guilty pleas for MPIs. But the fundamental point is that an MPI starting point is not the functional equivalent of a finite sentence. Percentage discounts for guilty pleas appropriate in one context are not automatically appropriate in the other. In particular, to start the manifest injustice analysis under s 104 by identifying the finite sentence guilty plea discount risks obscuring that analysis. As this Court observed in *Malik*:[109]

> [I]t is not appropriate to treat the starting point used when calculating a minimum period under s 104 as the direct analytical equivalent of the starting point used when setting a determinate sentence.

[86] As emphasised by Mr Lillico, the discretionary method is working well and is well-established. It can, and does, provide predictability and consistency, while also preserving the discretion of the sentencing judge to set an MPI according to the statutory policy. This is on all fours with the Supreme Court's support of a discretionary approach in *Hessell* (SC) — it ensures that the discount provided, within a range, can be tailored to the circumstances of the case.[110] As is always the case with sentencing, there is a need to stand back and ensure that the end sentence reached is in proportion with the offending.[111] This remains the case for the setting of an MPI.

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107 *R v Howse,* above n 24, at [63].
108 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [47] (footnote omitted).
109 *Malik*, above n 75, at [37].
110 *Hessell* (SC), above n 61, at [74]–[77].
111 *Hessell* (SC), above n 61, at [77]; and *Dickey v R,* above n 16, at [175] citing *R v Williams*, above n 25, at [67].

The discretionary approach — in particular given the unique legislative regime for murder sentencing — is best able to facilitate this assessment.

[87] Fourth, the availability of sentencing indications prior to trial should further assuage any concerns as to the predictability of discounts under the current approach. A discount indication which, in most cases, will be implemented at sentencing, can be known ahead of trial.

[88] For completeness, we reject the proposition by Mr Keegan that greater discounts for guilty pleas are required. An appropriate balance has been struck by the existing authorities, within the legislative context of ss 103 and 104. Furthermore, Mr Keegan's proposed approach would only increase the discounts for more serious offenders, but not those with comparatively less culpability.

[89] We consider judges may continue to adopt the approach which, taking into account all relevant circumstances, they consider best enables them to apply the Act as the legislature intended.

The discounts here

[90] Ellis J allowed discounts in the round of three years. She did not identify what part of that overall discount was a response to Mr Frost's guilty plea, and what part responded to the balance of his personal mitigating factors. Given the different factors which apply to a guilty plea discount, and discounts for personal mitigating factors we consider it is preferable for a judge to separately identify those components. We consider each component separately below.

Mr Frost's guilty pleas

[91] We begin by considering the appropriate discount for Mr Frost's guilty pleas.

[92] The case against Mr Frost was, psychological forensic issues aside, overwhelming. The events took place on 18 January 2021. Mr Frost was remanded in custody and was interviewed in prison on 4 February and 22 March 2021.

[93] A court-directed psychiatric report prepared by Dr Gordon Lehany on 6 April 2021 concluded, on the basis of the information then available, that the grounds for a defence of insanity did not appear likely and Mr Frost was fit to stand trial. A second psychiatric report dated 28 April 2021 was prepared by Dr Peter Dean, based on an interview with Mr Frost when he was remanded to the Henry Rongomau Bennett Centre mental health facility at Waikato Hospital. Dr Dean concluded Mr Frost was fit to stand trial and found no evidence to support a defence of insanity. A third psychiatric report, the second by Dr Lehany, was prepared at Mr Keegan's request. Dr Lehany again opined it was unlikely Mr Frost had a defence of insanity available to him.

[94] So the psychiatric assessments on fitness and sanity were consistent from the outset, albeit — as we discuss below — those assessments also identified issues of objective abnormalities and possible psychosis. Mr Frost pleaded guilty on 15 July 2021 and was sentenced on 17 September 2021.

[95] We consider a two-year discount from the MPI starting point of 23 years would, in the context of s 104, be appropriate recognition of Mr Frost's guilty pleas. The policy factors which inform s 104 — reflecting an overall response to serious murder offending — necessarily limit the credit given to guilty pleas in other contexts, and particularly when finite sentences are being determined under the Act.

Mr Frost's personal mitigating circumstances

[96] The focus of Mr Keegan's argument for Mr Frost, in his initial written submissions and at hearing, was on the contribution of Mr Frost's mental health to the offending. Following the release of this Court's decision in *Dickey,* Mr Keegan in his later submissions emphasised the role of youth in the offending.[112] In any event, as was recognised by Mr Keegan, in offending involving young people such factors typically overlap. That was evidently the case here. The Court in *Dickey* said:[113]

> Youth offenders commonly present with more than one mitigating factor. It is always necessary to stand back and make an overall assessment when sentencing, and manifest injustice is assessed as a matter of overall

[112] *Dickey v R,* above n 16.
[113] At [175].

> impression. Discounts overlap and there is a risk that some statutory purposes of sentencing can be lost sight of when they are treated separately and simply tallied up. But the point remains that some offenders present with a combination of personal mitigating factors which may collectively justify a sentence substantially less than that which would otherwise be imposed.

[97] In his submissions, Mr Keegan emphasised the evidence from Dr Lehany — outlined below — and background information contained in the s 27 report, provided a causative context for Mr Frost's trauma, mental health decline, alcohol addiction and ultimately, offending. He argued that *Dickey* represented a shift in the law relating to the relevance of youth in murder sentencing. It was, he said, no longer correct to consider that the public interest in denunciation and accountability outweighed youth, as had previously been held in the case of *R v Rapira*.[114] He submitted that *Dickey* provided ample confirmation that, at 21 years of age, Mr Frost was properly to be considered as an "emerging or young adult", displaying characteristics typical of youth offenders, in particular his inability to control his impulses and his lack of forethought for the consequences of his offending. Furthermore, the tragic death of Mr Frost's mother, witnessed by him, when he was 16 years old, would have impacted on his personality development in a manner which was then exacerbated by the ordinary neurological challenges present in young adults. These contributed towards Mr Frost's mental health decline, and ultimately the offending. Mr Keegan described this as "the perfect storm for this troubled young man that had a direct and causative link to his loss of control and his killing of two family members".

[98] For the Crown, Mr Lillico's submission was that the 13 per cent global discount awarded by Ellis J included the youth dimension, and was in line with similar cases. Global discounts on MPIs including (relative) youth were, furthermore, often modest in relation to murder. That will be the case where, on the facts of the offence as here, youth was not a powerful mitigating factor. Mr Lillico further emphasised the lack of a formal psychiatric illness in Mr Frost, and submitted that mental health was not a strong factor in the offending.

[99] In *Dickey,* this Court surveyed research in relation to the characteristics of youth offending.[115] The context was the potential significance of youth in the s 102

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114 *R v Rapira* [2003] 3 NZLR 794 (CA).
115 *Dickey v R,* above n 16, at [76]–[87].

assessment of whether — in the case of murder — an indeterminate life sentence would be manifestly unjust. We acknowledge that different context. The presumption in favour of a life sentence in s 102 may be harder to displace than the presumption in favour of an MPI of at least 17 years in s 104.[116] That that does not, in our view, reduce the relevance of the significance of youth in a s 104 assessment of the analysis and conclusions in *Dickey*. The Court noted that much of the research was already reviewed in *Churchward*, and was not new.[117] It said:[118]

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

[100] At the same time the Court recognised new research since *Churchward*:[119]

> The Crown acknowledged, however, that further research since *Churchward* has confirmed:
>
> (a) Adolescent behaviour reflects the slow pace of the development of those parts of the brain that control higher-order executive functioning, such as impulse control, risk assessment and planning ability. Young people behave and react differently from adults due to biological rather than behavioural or personality factors. As Ms Brook for the Crown said, "[a]ll young people suffer from these cognitive deficits; and all will eventually develop fully to overcome them (assuming no cognitive impairment exists)".
>
> (b) Neurological development may not be complete until the age of 25.
>
> (c) Young persons who commit serious offences frequently exhibit other characteristics which also tend to mitigate culpability, notably intellectual deficits, mental illness and experiences of abuse or other childhood trauma.
>
> (d) Young people are more receptive to treatment and therefore have better prospects of rehabilitation than adult offenders, who find it more difficult to alter entrenched behaviours.

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116 See *Dickey v R,* above n 16, at [144]; *R v Williams*, above n 25, at [57].
117 *Dickey v R,* above n 16, at [86] referring to *Churchward v R* [2011] NZCA 531; (2011) 25 CRNZ 446.
118 Footnote omitted.
119 At [86].

[101] The Court considered the significance of the sentence in the context of the Act, including ss 7, 8 and 9;[120] ss 9 and 25 of the New Zealand Bill of Rights Act 1990;[121] and various international instruments, the United Nations Convention on the Rights of the Child in particular.[122] Finally the Court considered the approach in other jurisdictions, namely Australia, the United Kingdom and Canada.[123]

[102] Overall, the Court concluded, in the context of an assessment of manifest injustice under s 102:[124]

> [177] ... [W]e think it is no longer correct to say, as the Court did in *Rapira*, that youth can carry little weight when balanced against the public interest in denunciation and accountability. The seriousness and culpability of the offending remain centrally important. It also remains generally true to say that youth alone is not enough to establish manifest injustice. However, young persons may present with a combination of mitigating circumstances relevant to the offending and personal mitigating factors which together are capable of establishing manifest injustice. …

[103] It is first necessary to recognise the different statutory context in this case. In *Williams,* the Court observed that while the establishment of manifest injustice under s 102 — allowing a substitution of life imprisonment by a finite sentence — was likely to be reached "in very exceptional circumstances only", the legislative history of the "manifestly unjust criterion" in s 104 "will be exceptional but such cases need not be rare".[125] A court will accordingly be more willing to recognise manifest injustice for youth and other factors when considering manifest injustice under s 104.

[104] Furthermore, in our view a personal factor, such as youth, going as it does to the core issue of culpability, or moral responsibility, has more capacity to affect the s 104 assessment of manifest injustice than a guilty plea, which does not reflect those important considerations.

[105] Aged 21 at the time of his offending, with no previous convictions, Mr Frost was in 2021, in the terminology adopted in *Dickey*, an "emerging or young adult", as

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120 At [103]–[107].
121 At [110]–[111].
122 At [112]–[123].
123 At [124]–[143].
124 Footnote omitted.
125 *R v Williams,* above n 25, at [57], [59] and [67].

opposed to an adolescent.[126] The reports prepared on Mr Frost do not explicitly focus on the significance of his youth, but characteristics consistent with the traits of young people seen as mitigating culpability are evident. They also demonstrate a complex, albeit not precisely diagnosed, pattern of mental health issues in Mr Frost's background:

(a) The first report summarised Mr Frost's presentation as unusual and complex. The most striking features of his presentation were his affective abnormalities, apparent in a lack of empathy and lack of guilt or remorse. There were two possible explanations. The first that these traits were essentially aspects of his personality, and as such were lifelong and unlikely to respond to treatment. The second was the possibility Mr Frost was developing a psychiatric illness, "largely prodromal, or with delusional beliefs".

(b) In the second report Dr Dean opined:

> Mr Frost has shown evidence of affective dysregulation, intermittent self-harm and chronic suicidal ideation. This has been complicated by homicidal fantasies. He is socially isolated, has not had meaningful intimate relationships and has an erratic employment history. It would appear his psychosocial functioning deteriorated around the time of his mother's death when he was aged 16.

(c) In the third, and final, report Dr Lehany again expressed concern as to aspects of Mr Frost's presentation which, combined with expressions of odd persecutory ideas, raised the question of a possible underlying psychotic illness. But it had not been possible to explore that further. Dr Lehany remained of the view Mr Frost was fit to stand trial and that the defence of insanity was not available to him. Overall, the Doctor commented:

> What does appear clear is that at the time of the alleged offences Mr Frost was in an extremely agitated and distressed state, however caused. He was distressed by issues arising from the death of his mother at the age of 16, and with his feelings about the relationship between his mother and his

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126 *Dickey v R,* above n 16, at [76].

> father. This, combined with significant ongoing alcohol abuse, and a degree of abnormality in his thinking as noted above with elements of persecutory ideation and ideas of reference, were factors in his actions at the time of the alleged offences.

[106] The s 27 report prepared for the Court concurrently described Mr Frost's troubled background, including his heavy alcohol use, mental health issues and poor relationships.

[107] The reports all comment on the significance for Mr Frost of the death of his mother when he was 16 years old and how, as objectively shown by subsequent events, that affected him. Dr Dean's comments, set out above at [105(b)], crystalise those aspects of Mr Frost most clearly. They suggest Mr Frost may have travelled a lesser distance to adulthood than other 21 year olds. He was ill-equipped to manage the emotions he was experiencing, or to fully understand the consequences of his conduct.

[108] It is difficult for us to avoid the conclusion that Mr Frost's immaturity, being part of and compounded by his life experiences since the death of his mother at 16, is a material mitigating factor in his culpability, and moral responsibility, for his actions. This naturally overlaps with Mr Frost's mental health. The lack of any previous convictions is also a relevant factor for Mr Frost.

[109] In the circumstances we would recognise a discount of three years from the MPI starting point set by the Judge to reflect Mr Frost's personal mitigating circumstances.

[110] That results in a total reduction of five years from the MPI starting point of 23 years.

[111] On that basis, we allow Mr Frost's appeal and substitute an MPI of 18 years in place of the 20-year MPI set by the High Court. In these circumstances, no question of manifest injustice under s 104 arises.

Result

[112] The appeal is allowed.

[113] The order that Mr Frost serve a minimum period of imprisonment of 20 years is set aside and substituted with an order that Mr Frost serve a minimum period of imprisonment of 18 years.

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