ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF C AND M PURSUANT TO S 202(2)(a) CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA472/2022
[2023] NZCA 588

BETWEEN	ADRIAN REGINALD GEORGE PHILLIPS Appellant
AND	THE KING Respondent

Hearing:	7 November 2023
Court:	Collins, Brewer and Muir JJ
Counsel:	R M Mansfield KC and H C Stuart for Appellant Z R Johnston for Respondent
Judgment:	23 November 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Order prohibiting publication of names, addresses, occupations or identifying particulars of C and M pursuant to s 202(2)(a) Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Phillips appeals part of the sentence imposed upon him by Harland J following his conviction for having murdered Mr Williams. The sentence imposed was life imprisonment with a condition Mr Phillips serve a minimum period of imprisonment (MPI) of 14 years before he is eligible for parole.[1] There are two grounds of appeal:

(a) That the Judge erred when she concluded the 17-year MPI set out in s 104(1)(g) of the Sentencing Act 2002 was engaged because Mr Williams was "particularly vulnerable" at the time he was killed.

(b) That the 14-year MPI was manifestly excessive.

Background

[2] In the early evening of 5 August 2020, Mr Williams was driving on a remote road on the Coromandel Peninsula. He was planning to meet with his former partner and the mother of their child in Thames. Mr Phillips knew Mr Williams was going to be driving on the road in question and decided to vent a grudge he harboured against Mr Williams.

[3] Mr Phillips drove on the same road as Mr Williams but in the opposite direction. When Mr Phillips drove past Mr Williams, Mr Phillips did a U-turn and chased after Mr Williams' car. Mr Phillips rammed the rear of Mr Williams' car, causing it to spin around and go backwards down a bank. Mr Phillips, who was not licensed to have a firearm, had a pump action shotgun in his vehicle.

[4] Mr Williams' car did not travel far. The front of his vehicle was close to the road. This incident caused minor injuries to Mr Williams, who got out of his vehicle. As soon as he did so, Mr Phillips shot Mr Williams in his left shoulder and left thigh.

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1 *R v Phillips* [2022] NZHC 2037 [Sentencing notes] at [94].

Mr Williams managed to struggle up to the road. When he got there Mr Phillips killed him by shooting him in the head. The barrel of the gun was between one and two metres from Mr Williams when the fatal shot was fired.

[5] An ESR scientist explained at the trial that Mr Williams was crouching sideways when he was shot in the shoulder and thigh and that the wounds to Mr Williams' shoulder and thigh would have caused him a high degree of pain. A forensic pathologist gave evidence that Mr Williams' pain would have been somewhere between 8–10 on a scale of 1–10, with 10 being the highest level of pain.

[6] The grudge that Mr Phillips bore against Mr Williams stemmed from an incident earlier that year which involved Mr Williams, Mr Phillips, and two others. Mr Williams had separated from his partner, C, and Mr Phillips had been assisting C to remove her belongings from Mr Williams' home when a physical altercation occurred. Mr Phillips knew C through his partner, M. Following that incident, Mr Phillips developed an "unhealthy grudge" against Mr Williams.

[7] On 3 August 2020, Mr Phillips learned that there was a possibility Mr Williams and C would reconcile. This "reignited" Mr Phillips' ill-will towards Mr Williams. He sent a text to C's mother saying that Mr Williams and his father would be sorry when he was "done with them".

[8] Mr Phillips suffered from psychological issues, which appear to relate to serious burns he suffered in 2018 when he was 18 years old. One consequence of Mr Phillips' psychological difficulties was that he became hypervigilant of perceived threats.

[9] Following the shooting of Mr Williams, Mr Phillips told M what he had done. She contacted the police shortly after. Mr Phillips acknowledged to the police that he had shot Mr Williams and told the police he thought Mr Williams had a knife. In fact, Mr Williams had a pocketknife in a small bag that was found underneath his body.

[10] At trial, Mr Phillips endeavoured to persuade the jury that he was acting in self-defence, a proposition which was rejected by the jury and Harland J.

Sentencing Act 2002 s 104(1)(g)

[11] Section 104(1)(g) of the Sentencing Act 2002 provides that the court must impose an MPI of at least 17 years "if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor" unless it would be manifestly unjust to do so.

Sentencing decision

[12] In concluding that s 104(1)(g) was engaged, Harland J explained to Mr Phillips:

> [42] As the Crown say, Mr Williams was taken unawares, and unable to defend himself against the deadly weapon you used. He was vulnerable. But this is true of many, if not most victims of murder. However, the distinguishing factor in this case is that Mr Williams was driven off the road by you in the dark on a remote stretch of road. This resulted in his car ending up down a relatively steep bank in the bush before he was shot by you from the top of the bank as he was trying to ascend it. [H]e would have been shocked, if not traumatised, by the accident only to be faced by you up the bank armed with a shotgun. I consider that in combination, these facts meet the high threshold required for particular vulnerability.

[13] Having concluded that s 104(1)(g) was in play, the Judge said that she would:[2]

> [33] … then determine the MPI that would ordinarily apply to [Mr Phillips'] offending by considering similar cases, [his] personal circumstances, and any aggravating or mitigating factors, particularly those listed in s 104.

This approach to the application of s 104 reflected the judgment of this Court in *R v Williams*.[3] As we shall explain, the approach suggested in *Williams* has recently been refined by this Court in *Davis v R*.[4]

[14] The Judge examined four cases that had been referred to by counsel,[5] and said after taking into account those cases, she concluded Mr Phillips' "offending would justify an [MPI] of 14 years".[6] In doing so the Judge appears to have focused only

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2 Citing *R v Williams* [2005] 2 NZLR 506 (CA) at [52].
3 At [52].
4 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43.
5 Sentencing notes, above n 1, at [44]–[65] citing *R v Winders* [2016] NZHC 2964; *Skinner v R* [2011] NZCA 655; *R v Hall* [2017] NZHC 410; and *R v Garson* [2020] NZHC 3259.
6 Sentencing notes, above n 1, at [65].

upon Mr Phillips' offending and other cases when setting the notional MPI. This approach was not consistent with what this Court said in *Williams*.

[15] The Judge then proceeded to determine that it would be manifestly unjust to impose the 17-year MPI set out in s 104 of the Sentencing Act. Five factors influenced this part of the Judge's decision:

(a) Mr Phillips' age. He was 23 at the time of the offending.[7]

(b) His previous good character. He had no previous convictions.[8]

(c) His mental health. Medical specialists could not agree on Mr Phillips' diagnosis. Dr Cavney said Mr Phillips suffered from PTSD at the time of the offending. Mr Seal, a psychologist, thought Mr Phillips suffered from severe depression and anxiety. It was accepted by Harland J that Mr Phillips' mental health issues contributed to his offending.[9]

(d) His remorse. The Judge accepted Mr Phillips' immediate co-operation with the police and a letter he wrote to the Court exhibited genuine remorse.[10]

(e) The particular hardship that will be caused to Mr Phillips by a term of imprisonment. This arose from the fact his parents have hearing issues and cannot communicate with him by telephone and that they had been unable to visit him in prison when COVID-19 restrictions curtailed prison visits.[11]

[16] After taking these matters into account, the Judge reduced the MPI of 17 years to one of 14 years.[12] Mr Phillips was also sentenced to a concurrent term of six months' imprisonment in relation to his unlawful possession of a firearm.[13]

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7 At [72]–[74].
8 At [75]–[77].
9 At [78]–[88].
10 At [89]–[90].
11 At [91]–[92].
12 At [93].
13 At [95]–[96].

Grounds of appeal

Section 104(1)(g) of the Sentencing Act was not engaged

[17] Ms Stuart argued the first ground of appeal for Mr Phillips. She submitted that Harland J had erred when she concluded that Mr Williams was particularly vulnerable when he was shot dead. It was submitted that although Mr Williams was shot dead from comparatively close-range after having earlier been shot in his shoulder and thigh, it was artificial to dissect the three shots. Ms Stuart submitted that all three shots were part of the same transaction and that accordingly, there was nothing particularly vulnerable about Mr Williams at the time he was murdered.

The 14-year MPI was manifestly excessive

[18] Mr Mansfield KC argued the second ground of appeal which focused upon the 14-year MPI. Mr Mansfield submitted that once Harland J had determined that a notional MPI of 14 years was appropriate, and that a deduction of three years' imprisonment was required to reflect Mr Phillips' personal circumstances, it was incumbent upon the Judge to deduct the three years' imprisonment from the 14-year notional MPI. The failure to do so resulted in an end sentence that was manifestly excessive. Mr Mansfield contended that an end sentence of life imprisonment with an MPI of 11 years was the appropriate end sentence in this case.

Analysis

Was s 104(1)(g) of the Sentencing Act engaged?

[19] We accept that the threshold in s 104(1)(g) of the Sentencing Act is high and that most cases will involve victims who are particularly vulnerable because of their age or health. Section 104(1)(g) is, however, not restricted to cases such as infants, the sick, or persons with disabilities. The words "or because of any other factor" can engage a wide range of circumstances. The assessment of the degree of a victim's vulnerability involves an objective evaluation of the victim and their surrounding circumstances at the time of the offending.

[20] Thus, for example, in *R v Garson*, Gordon J found that two visitors to New Zealand sleeping in a campervan in an isolated area were sufficiently vulnerable to engage s 104(1)(g).[14] This Court in *K (CA106/2020) v R* has also held s 104(1)(g) applies where an otherwise healthy victim is intoxicated, in a hotel room, naked and in the arms of a comparative stranger with his hands around her throat.[15]

[21] We are not saying that Mr Phillips' case is the same as *Garson* or *K*. There are obvious differences between all three cases. The facts of each case must be objectively assessed against the language used in s 104(1)(g) of the Sentencing Act.

[22] In undertaking that assessment, we do not think it appropriate to treat the three shots inflicted to Mr Williams as being a "single transaction". Mr Williams was seriously injured by two shotgun blasts. The wounds to Mr Williams' shoulder and thigh would have caused him considerable pain and would have prevented him escaping or defending himself. He, nevertheless, managed to reach the roadside where he faced Mr Phillips who was pointing a shotgun at him from relatively close-range. The fatal shot fired by Mr Phillips was a particularly gratuitous act of violence inflicted upon a profoundly vulnerable victim.

[23] Even if the three shots are treated as being part of the same transaction, we think the overall circumstances rendered Mr Williams particularly vulnerable. He had been driven off the road in a remote area. It was dark (notwithstanding the headlights of Mr Williams' vehicle may have illuminated Mr Phillips). Mr Williams was taken unawares. As Harland J observed, he would have been in a state of shock, if not traumatised by the accident. He was then seriously wounded by two painful and debilitating gunshots before he could ascend to the road where he faced Mr Phillips with a shotgun pointed at his head. In these circumstances, the combined effect of all relevant factors also leads to the conclusion Mr Williams was a particularly vulnerable victim.

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14 *R v Garson,* above n 5, at [43].
15 *K (CA106/2020) v R* [2020] NZCA 656 at [162]–[163].

Was the 14-year MPI manifestly excessive?

[24] In relation to the second ground of appeal, we accept that Harland J set the notional 14-year MPI without referring to Mr Phillips' personal circumstances, in contrast to the approach set out in *Williams*. This Court has said, however, on numerous occasions, that it is the end sentence that must be manifestly unjust in order for there to be a successful sentence appeal. The methodology employed by the sentencing judge is not in itself determinative of the ultimate issue.[16]

[25] Once it is accepted that s 104 was engaged, the adjustment to reflect the manifest injustice of a 17-year MPI needs to take into account the circumstances of the offender. As we have explained at [15], Harland J went to considerable lengths to consider Mr Phillips' circumstances when setting the 14-year MPI. The three years that Harland J deducted to reflect Mr Phillips' personal circumstances could only come off the 17-year MPI set out in s 104 of the Sentencing Act. The approach urged by Mr Mansfield has the effect of ignoring Harland J's finding that this case came within s 104.

[26] The approach taken by Harland J in this case can be contrasted with that which might have been taken under s 103(2) of the Sentencing Act had s 104 not been engaged. Section 103 requires a sentencing judge to focus upon the following purposes of sentencing:

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

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[16] See for example *R v MacCulloch* [2005] 2 NZLR 665 (CA) at [50]; *Ripia v R* [2011] NZCA 101 at [15]; *Mita v R* [2012] NZCA 137 at [28]; *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36]; and *Taylor v R* [2020] NZCA 584 at [24].

[27] In *Davis*, this Court explained that one approach may be for a sentencing judge to decide:[17]

(a) first, what notional MPI is called for under s 103(2);

(b) whether s 104 applies; and

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

[28] This Court in *Frost v R* noted the observation made in *Davis*, however, that the first two steps need not be followed in that order. Rather:[18]

> 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.

[29] This was a case in which s 104 was clearly engaged. It was therefore not necessary to set a notional MPI under s 103(2).

[30] Had s 104 not applied, then Harland J may well have adopted a starting point of 14 years for the MPI under s 103(2) and then adjusted the sentence downwards to reflect Mr Phillips' personal circumstances. As we have stressed however, such an approach would only have been available if s 104(1)(g) did not clearly apply.

[31] Regardless of the methodology adopted by Harland J we consider the end result of life imprisonment with an MPI of 14 years, was well within the range reasonably available in this case. We have already emphasised the brutality of this murder when concluding that Mr Williams was particularly vulnerable. Even giving full allowance for Mr Phillips' personal circumstances, which we have summarised at [15], a 14-year MPI was an entirely appropriate end result.

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17 *Davis v R*, above n 4, at [25].
18 *Frost v R* [2023] NZCA 294 at [35], citing *Davis v R*, above n 4, at [25].

[32] Accordingly, the end sentence was not manifestly excessive.

Result

[33] The appeal is dismissed.

[34] We make an order prohibiting publication of names, addresses, occupations or identifying particulars of C and M pursuant to s 202(2)(a) Criminal Procedure Act 2011.

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