IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA805/2023
[2024] NZCA 597

BETWEEN	JIMEL DESMA TIANA BURNS-WONG-TUNG Appellant
AND	THE KING Respondent

CA7/2024

BETWEEN	TAGO KEPA HEMOPO Appellant
AND	THE KING Respondent

Hearing:	27 June 2024
Court:	Ellis, van Bohemen and Hinton JJ
Counsel:	R M Mansfield KC and H C Stuart for Ms Burns-Wong-Tung S T L Teppett for Mr Hemopo Z R Johnston and O A Boivin for Respondent
Judgment:	15 November 2024 at 4.00 pm

JUDGMENT OF THE COURT

The appeals are dismissed.

REASONS OF THE COURT

(Given by Hinton J)

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[1] On 8 September 2023, after a four-and-a-half-week jury trial, Jimel Burns-Wong-Tung was convicted of the murder of Rangiwhero Ngaronoa.[1] She was sentenced by Muir J on 14 December 2023 to life imprisonment with a minimum period of imprisonment (MPI) of 15 years.[2]

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1 Crimes Act 1961, s 167 (maximum penalty of life imprisonment).
2 *R v Burns-Wong-Tung* [2023] NZHC 350 at [55].

[2] At that same trial, Tago Hemopo was convicted of conspiring to injure with intent to injure.[3] He was sentenced to two years' imprisonment.[4]

[3] Ms Burns-Wong-Tung appeals against both her conviction and sentence. Mr Hemopo appeals against his conviction.

Grounds of appeal

[4] Ms Burns-Wong-Tung and Mr Hemopo together advance two grounds of appeal against their convictions:

(a) the evidence of Robert and Ford Stevens (the Stevens brothers) resulted in an unfair trial; and

(b) an unredacted version of Robert Stevens' police statement, produced as Crown Exhibit 10 at trial, which contained prejudicial material was erroneously presented to the jury.

[5] Ms Burns-Wong-Tung advances a further ground of appeal against her conviction. She alleges that the prosecutor's cross-examination of her, in relation to CCTV evidence, led to an unfair trial.

[6] As to sentence, Ms Burns-Wong-Tung submits that:

(a) the Judge erred in finding s 104(1)(e) and (g) of the Sentencing Act 2002 applied;

(b) the notional starting point MPI of 16 years was excessive, and no more than 11 years was justified; and

(c) the one-year discount allowed for her youth and personal circumstances was insufficient.

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3 Crimes Act, s 189(2) and 310 (maximum penalty of five years' imprisonment).

4 *R v Hemopo* [2023] NZHC 1613 at [41]. Mr Hemopo was also convicted on a charge of driving while disqualified and sentenced concurrently to three months' imprisonment and was further disqualified from driving for 18 months.

Relevant legal principles

[7] Under s 232(2)(c) of the Criminal Procedure Act 2011, this Court must allow an appeal against conviction if it is satisfied that a miscarriage of justice has occurred for any reason. Section 232(4) defines a miscarriage of justice as:

> … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
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> (b) has resulted in an unfair trial or a trial that was a nullity.

[8] A real risk the outcome was affected arises if there is a reasonable possibility another verdict would have been reached,[5] while an assessment of whether a trial is "unfair" requires an overall assessment of the trial.[6] Under s 232(4)(b), it is only when a departure from good practice is "so gross, or so persistent, or so prejudicial, or so irremediable" that a trial will be deemed unfair and a conviction quashed as unsafe.[7] If the Court finds that any error or irregularity rendered the trial unfair, the appeal must be allowed irrespective of whether the outcome of the trial was affected.[8]

[9] The sentence appeal is brought under s 244 of the Criminal Procedure Act. This Court must allow the appeal if satisfied that, for any reason, there is an error in the sentence imposed on conviction and that a different sentence should be imposed.[9] For the Court to intervene, the sentence must be shown to be wrong in principle or manifestly excessive.[10] Ordinarily, the Court will not intervene where an end sentence is within a range that can be properly justified by accepted sentencing principles.[11]

The offending

[10] The deceased was alleged to have accused a young relative of Ms Burns-Wong-Tung of being sexually inappropriate with a toddler. In retaliation,

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5 *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [48]; and *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [67].
6 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78].
7 At [78], citing *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28]; and *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [36].
8 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [37].
9 Criminal Procedure Act 2011, s 250(2).
10 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30]–[35].
11 At [36].

Ms Burns-Wong-Tung arranged for the deceased to be brought to her for a "hiding". The plan was for the deceased to be interrogated and assaulted, with the assistance of Mr Hemopo — her partner with whom she lived — and other family members.

[11] On 21 November 2021, Mr Hemopo drove himself, Ms Burns-Wong-Tung, and the Stevens brothers in a Honda Accord to Myna Place, a small cul-de-sac in Auckland. They arrived shortly after 12.30 pm. The Stevens brothers are cousins of Mr Hemopo.

[12] Ms Burns-Wong-Tung was captured on CCTV exiting the Honda and retrieving an item from the boot. At trial, the Crown alleged this item was a knife.

[13] At around 12.39 pm, the deceased arrived at Myna Place sitting in the back seat of a Ford Escape SUV driven by his uncle, Thomas Ngapera. Another uncle of the deceased, Rocky Ngapera, was sitting in the front passenger seat. Thomas Ngapera spoke to the occupants of the Honda.

[14] Ms Burns-Wong-Tung approached the SUV. CCTV showed her transferring an item from one hand to the other as she walked towards the vehicle. She appeared to speak through the rear door. The door opened and she attacked the deceased. One witness described seeing arms making "piston like" movements and hearing sounds like a "pig squealing". Another reported "shriekish" screams. The attack lasted for around 15 seconds.

[15] After the attack, the deceased's uncles drove him to an emergency clinic. He was then transported to Middlemore Hospital by ambulance. He died at 2.27 pm.

[16] The deceased had eight stab wounds. Two were causative of death: a wound to his back which penetrated his pleural cavity into the lung and a 13 cm wound to his chest. There were six other wounds to his scalp, arm, and foot. The mechanism of death was blood loss principally caused by the stab wounds to his back and chest.

[17] Later the same day, Ms Burns-Wong-Tung was seen on CCTV at a laundromat with the Stevens brothers. She had a knife. The Crown case was that this was very likely the murder weapon.

[18] Ms Burns-Wong-Tung and Mr Hemopo were arrested (separately) approximately two weeks after the attack.

Evidence of the Stevens brothers

[19] Although neither of the Stevens brothers had been charged, Robert Stevens made a voluntary appearance at the Manukau Police Station on 6 December 2021 and took responsibility for the attack. Later the same day, Robert acknowledged he was being untruthful and gave a statement in which he said Ms Burns-Wong-Tung committed the murder. The statement was taken by police on 6 December 2021, typed up on 8 December 2021, but not signed by Robert until 25 July 2022. The delay in signing was the result of police having difficulty in locating him. He was eventually found after being taken into custody at the Taupō Police Station for other matters.

[20] Ford Stevens also made statements to the police. These were taken and signed on 20 and 22 December 2022.

[21] Both of the Stevens brothers' statements aligned with what could be seen on the CCTV footage. Both brothers described seeing Ms Burns-Wong-Tung with a knife. Robert said Ms Burns-Wong-Tung stabbed the deceased with a knife. Ford said he saw her punching him. Both brothers described seeing blood. Robert said that it was Ms Burns-Wong-Tung's idea to give the deceased a "hiding". Ford said that on the way to Myna Place, Ms Burns-Wong-Tung said they were going to "smash someone".

The trial

[22] The trial began before Muir J on 7 August 2023. The Crown case was that Ms Burns-Wong-Tung used a knife to kill the deceased intentionally, or alternatively that she injured him knowing her actions were likely to cause death and she consciously ran that risk.

[23] Both the Stevens brothers were called as Crown witnesses. Both failed to answer their summons. On 14 August 2023, the trial Judge issued warrants for their arrest. They were both arrested: Robert on 16 August and Ford on 17 August. They were detained and gave evidence on oath.

[24] We summarise the evolution of the Stevens brothers' evidence at trial below.

Robert Stevens' evidence

[25] After his arrest pursuant to the bench warrant, Robert Stevens told a Detective Constable that he wanted to give evidence via CCTV because it would be safer. He said he was concerned that his cousin's (Mr Hemopo's) family would be in the courtroom and that his brother was going to hate him because he gave a statement.

[26] On 18 August, Robert's counsel advised the Judge in chambers that Robert was unlikely to say anything in evidence. However, the Crown position, which the Judge accepted, was that this was far from a certainty.

[27] Robert was called by the Crown to give evidence at around 11.45 am on 18 August.

[28] In evidence-in-chief, Robert claimed he could not remember where he was or who he was with on 21 November 2021. He admitted that he had provided the police with a signed statement and agreed that his memory might be refreshed by reference to that statement. The Judge made a *Hannigan v R* ruling accordingly and Robert was shown his statement.[12]

[29] The prosecutor then asked Robert whether he remembered where he was on 21 November 2021. He answered: "No". The prosecutor guided him to the relevant paragraph in his written statement which indicated that at some stage on 21 November he was at the appellants' house. He was again asked where he was. Robert answered: "I think I was at my mum's house".

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[12] *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612.

[30] The prosecutor then asked Robert: "Do you recall seeing [Ford Stevens, Mr Hemopo] and [Ms Burns-Wong-Tung] that day?". He said: "No". He also answered "No" to the prosecutor's questions as to whether he recalled "speaking to either [Ms Burns-Wong-Tung or Mr Hemopo]" or "going to their address" that day.

[31] Because these answers conflicted with his police statement, the Crown applied for Robert to be declared a hostile witness. Mr Mansfield KC, counsel for Ms Burns-Wong-Tung, opposed on the basis that the point was "not yet reached" where a hostility ruling was appropriate.[13] Trial counsel for Mr Hemopo, Mr Dufty, acknowledged the definition of hostile witness was satisfied but proposed an incremental approach whereby cross-examination at that stage be limited to any preliminary facts.

[32] The Judge granted the application on the terms suggested by Mr Dufty. That is, cross-examination was limited to the events up until the point when the Honda driven by Mr Hemopo arrived at Myna Place.[14] The Judge noted that Mr Mansfield had reserved the point about whether Robert was appropriately considered a "witness" for the purposes of s 4 of the Evidence Act 2006. The Judge observed that, in light of this Court's comments in *Kerr v R*,[15] and the fact Robert had been sworn in and answered several questions, Robert appeared to be a witness for s 4 purposes.[16]

[33] The prosecutor proceeded to cross-examine Robert. Robert acknowledged that he was at the address of Ms Burns-Wong-Tung and Mr Hemopo on the morning of 21 November 2021. He acknowledged that there was an accusation that Ms Burns-Wong-Tung's young relative inappropriately touched a toddler. He also said that he, Ms Burns-Wong-Tung, and Mr Hemopo said they needed to give the person making those allegations "a hiding". The prosecutor then asked, "who raised this idea of giving this guy a hiding". Robert answered: "Me" and "Me. That's my answer."

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13 *R v Burns-Wong-Tung* HC Auckland CRI-2021-092-9236, 18 August 2023 (Ruling (No 10)), at [11].
14 At [16].
15 *Kerr v R* [2017] NZCA 498 at [24]–[28].
16 Ruling (No 10), above n 13, at [17].

[34] The prosecutor then sought a general declaration of hostility based on Robert's "blatantly inconsistent statements". At 3.30 pm, the Judge declined.[17] He agreed with Mr Dufty that the ruling was premature and that other parts of the narrative, including that the relevant parties went in a car to Myna Place, should be developed before any general declaration of hostility was made. He invited the prosecutor to continue with Robert's evidence, with permission to cross-examine as necessary up until the point the Honda arrived at Myna Place.[18]

[35] Examination resumed at 3.44 pm. Robert answered questions about the lead up to Mr Hemopo's arrival on Myna Place with: "No" or "No, I'm not too sure". These answers were inconsistent with his police statement.

[36] At this point, the Crown sought an order that Robert be declared generally hostile. Mr Mansfield did not oppose but said he was also not in a position to consent. Mr Dufty acknowledged he could not realistically oppose. At 3.50 pm, the Judge granted the Crown's application.[19] Robert was declared hostile and was cross-examined by the prosecutor on his full statement. He answered "No" to almost every question.

[37] At 4.46 pm, the Judge adjourned until Monday 21 August.

[38] Mr Mansfield began cross-examination of Robert on 21 August 2023. He asked Robert whether he was using methamphetamine in November 2021. The Judge warned Robert about self-incrimination, but Robert nonetheless answered that he would smoke methamphetamine and cannabis every day in November 2021. He claimed he was "super high" and too intoxicated to remember what happened on the day before and the day of the offending.

[39] Following the morning tea adjournment, the Crown reported in chambers that a detective constable in the Auckland cells overheard Ms Burns-Wong-Tung yelling out instructions to Robert to the effect of "say you were there but you didn't see anything". The Judge warned Ms Burns-Wong-Tung that, if that was true, it had the

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17 *R v Burns-Wong-Tung* HC Auckland CRI-2021-092-9236, 18 August 2023 (Ruling (No 11)).
18 At [6]–[7].
19 *R v Burns-Wong-Tung* HC Auckland CRI-2021-092-9236, 18 August 2023 (Ruling (No 12)).

potential to seriously undermine the integrity of the trial and there could be very serious consequences if it happened again.

[40] At 12.30 pm, Mr Mansfield continued cross-examination. He showed Robert CCTV footage of Myna Place on 21 November 2021. Robert accepted that he was a person in the footage but said "I was there but I couldn't see nothing". In cross-examination by Mr Dufty, Robert confirmed that he was there as backup in case something went wrong. He repeated that he "didn't see nothing". He also said he heard Mr Hemopo say to a female that had exited the Honda (who Robert did not identify as Ms Burns-Wong-Tung) "stop that's enough get back in the car".

[41] After a brief re-examination by the prosecutor, Robert was excused.

[42] The Crown sought for Robert's police statement to be adduced as evidence. The Judge suggested a redaction to remove the reference to murder from the statement: "[Mr Hemopo] told us not to say anything about what happened because it was a murder."

[43] Mr Mansfield agreed to the production of Robert's statement, redacted as suggested by the Judge, on the basis that the defence reserved the right to argue that Robert was not a witness, and to advance any resulting application to abort the trial.

Ford Stevens' evidence

[44] Ford Stevens did not cooperate with the police in the lead up to the trial. Upon his arrest pursuant to the bench warrant, he was clearly under the influence of methamphetamine. He was called by the Crown at approximately 4 pm on 21 August 2023.

[45] At first, Ford answered basic questions about himself and his family. When asked whether he knew Ms Burns-Wong-Tung, he described her as his "beautiful cousin". When questioned about details in his police statement, such as the trip to Ms Burns-Wong-Tung's address and the vehicle in which they drove, his only response was: "No."

[46] At 4.10 pm, the Judge granted the Crown's *Hannigan* application. Neither defence counsel wished to be heard.

[47] Ford remained uncooperative. At 4.40 pm, he was declared hostile.[20] Trial counsel for Mr Hemopo again suggested an incremental approach, where cross-examination be limited to the point of arrival in Myna Place "with the hope the witness might be persuaded to develop a narrative".[21] The Judge agreed. Mr Mansfield indicated that if Ford continued to be uncooperative, he was happy for the Judge to lift the limitation on cross-examination without the need to hear further from counsel. Mr Mansfield did however reserve his position as to whether Ford was appropriately considered a witness at all.

[48] Ford's police statement was put to him by the prosecutor. Ford claimed that he did not sign the statement and that it was "Police's words not mine". He proceeded to respond to the prosecutor's questions about the statement: "No", "I don't know", and "I don't remember".

[49] Examination resumed on 22 August 2023. At 11.31 am, the Crown applied for orders removing the limitation on the previous hostility ruling. Mr Dufty acknowledged the threshold for general hostility had been met. Mr Mansfield did not wish to be heard further. The Judge granted the Crown's application and ordered accordingly.[22]

[50] Ford continued to answer the prosecutor's questions about his statement: "No" and "I don't remember". He maintained that the statement was not his words. When asked about his earlier comment that he saw Ms Burns-Wong-Tung with a knife and blood, he said: "I didn't see anything". The prosecutor put to Ford a series of CCTV stills, initialled and signed by him. He denied having signed or written anything on the photographs. However, he provided brief answers to some questions and identified certain people captured in the CCTV.

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20 *R v Burns-Wong-Tung* HC Auckland CRI-2021-092-9236, 21 August 2023 (Ruling (No 13)).
21 At [8].
22 *R v Burns-Wong-Tung* HC Auckland CRI-2021-092-9236, 22 August 2023 (Ruling (No 14)).

[51] In cross-examination by Mr Mansfield, Ford answered questions about his methamphetamine use.[23] When Mr Mansfield asked about Ford's methamphetamine use in November 2021, Ford said he was "high as a kite", using methamphetamine daily, and could not remember the events of the month. Ford engaged with Mr Mansfield's questions about the CCTV stills. He admitted that he remembered being in the car that was shown in the CCTV and that the CCTV showed him getting out of the Honda. Mr Mansfield then asked Ford whether he saw Ms Burns-Wong-Tung punch the deceased as is recorded in his statement. Ford responded: "No." When Mr Mansfield asked Ford to clarify whether he "didn't see it" or "didn't remember it", Ford responded: "No I didn't see it and no I can't remember". He also denied seeing a knife.

[52] Ford was briefly cross-examined by Mr Dufty. He maintained that he could not remember the events of 21 November because he was high on methamphetamine. In re-examination by the Crown, Ford said he could not remember making his statement in December 2021 for the same reason.

[53] While giving evidence, Ford rubbed his chin along the microphone and made exaggerated facial expressions. He was also warned twice by the Judge not to gesture or communicate with the public gallery while giving evidence.

[54] The Crown indicated that Ford's statement would be produced as written evidence. Mr Mansfield noted his position was the same as that in respect of Robert. He had no objection to the statement being produced but reserved his position that Ford was not a witness and that the trial should be aborted.

Applications during the trial that the Stevens brothers were not witnesses and to abort the trial

[55] On 24 August 2023, following completion of the Crown case, Mr Mansfield applied for orders determining that the Stevens brothers were not witnesses because they were unable to be cross-examined "in substance" and for the trial to therefore be aborted. He submitted that the Crown knew from the outset that the Stevens brothers

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[23] The Judge had again given a warning against self-incrimination.

would be hostile. He also sought that a mistrial be ordered on the basis that Ford's "antics" were prejudicial to Ms Burns-Wong-Tung and that any prejudice could not adequately be addressed in a summing up.

[56] Trial counsel for Mr Hemopo did not support Ms Burns-Wong-Tung's application for an order that the brothers were not witnesses. He acknowledged that he obtained useful exculpatory statements in cross-examination of Robert. He did however support the application to abort the trial on the basis of Ford's conduct. He submitted that having regard to Ford's familial relationship with the defendants, this behaviour would inevitably involve prejudice to them.

[57] In a results ruling dated 24 August 2023, the Judge declined both the "non-witness" and "prejudicial antics" applications.[24] He issued his reasons on 11 September, after the trial was complete.[25]

[58] The Judge referred to the comments of the Supreme Court majority in *Morgan v R*, as well as the obiter observations made by Elias CJ in dissent.[26] He also considered this Court's decisions in *Kerr v R* and *Tangiora v R*.[27]

[59] The Judge did not agree that the Crown knew the brothers would be hostile. Both witnesses had, like the witnesses in *Kerr*, previously cooperated with police by providing voluntary statements. By the time of the trial, Robert indicated he wanted to give evidence via CCTV and although Ford was generally uncooperative with police at the time of his arrest, he was high on methamphetamine and the Crown could not have anticipated how he would react.[28]

[60] The Judge also rejected the proposition that the brothers were not able to be cross-examined. Both witnesses voluntarily took the oath and answered some questions before being declared hostile. The Judge considered the issue was whether

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24 *R v Burns-Wong-Tung* HC Auckland CRI-2021-092-9236, 24 August 2023 (Ruling (No 15)).

25 *R v Burns-Wong-Tung* HC Auckland CRI-2021-092-9236, 11 September 2023) (Reasons for Ruling (No 15)).

26 At [19]–[20], citing *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [11] per Elias CJ and [43]–[44] per Wilson J.

27 Reasons for Ruling (No 15), above n 25, at [22]–[27], citing *Kerr v R*, above n 15; and *Tangiora v R* [2019] NZCA 115.

28 Reasons for Ruling (No 15), above n 25, at [31]–[33].

the witnesses *could* be cross-examined, not whether cross-examination generated answers favourable to the defence. Both brothers were cross-examined by defence counsel.[29] Although the Judge considered that "helpfulness" to any party was not determinative, he observed that some of the brothers' answers were indeed favourable to the defence.[30]

[61] The Judge then considered whether the brothers' written statements should be excluded under s 8 of the Evidence Act.[31] He accepted that the statements were prejudicial to Ms Burns-Wong-Tung. However, he held that the prejudice was not unfair or illegitimate. The statements were reliable and were able to be cross-examined on in two material respects: the claim by both witnesses that they had issues with their memory due to excessive methamphetamine consumption and their oral evidence that, at the critical phase of the offending, they were unable to see what occurred.

[62] Nor did the Judge consider that admission of the statements was unfairly prejudicial to Mr Hemopo. He noted that Mr Dufty indeed relied substantially on those statements in his closing.[32]

[63] The Judge also disagreed that Ford's behaviour resulted in irremediable prejudice. He considered the matter well able to be addressed in his summing up.[33]

Judge's directions to the jury

[64] The application to abort was declined and the trial continued. The Judge gave his summing up on 6 September 2023.

[65] The Judge gave the following instructions regarding the evidence of the Stevens brothers.

> [78] Now, it is for you and you alone to decide what evidence you consider credible and reliable and what you don't and (if you do) what weight you place

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29 At [35].
30 At [35] and [47]–[48].
31 At [49]–[58].
32 At [50].
33 At [62].

on it. I've already told you that. With the written statement you will want to assess Robert Stevens' claim that he was super high on the 21st (albeit not when he gave the statement), whether that fits with everything else you have heard and seen and whether you think that might have affected the accuracy of his recall when he came to give his statement (a reliability issue). You will also have to assess the credibility of what he has said at various times, including in the witness box.

[79] It is open to you to either accept the written statement and reject the oral evidence, accept the oral evidence and reject the written statement, accept parts of one and parts of the other, or conclude that the evidence is all so inconsistent that you reject it all completely.

[80] And, of course, we see the same sorts of issues but perhaps even more vividly, with Ford Stevens because although the Crown also produces a written statement from him, he says he never signed it (claiming the police did so at 562), although later acknowledging that on the last page of the photos which are exhibit D, he initialled and wrote his name Ford (564). So, before you even take into account the written statement at all, you must be satisfied he gave it and acknowledged it as true by signing it.

[81] Then, if you get to that point, you have a ve1y similar exercise to undertake in assessing how reliable you think that statement to be, having regard to his claims (and those of Ms Burns-Wong-Tung) that he is a long-term abuser of methamphetamine, but also the police evidence about how he presented when the statement was taken. And then you have to assess the credibility and reliability of his answers in the witness box, where he essentially said he was as "high as a kite" on 21 November 2021, remembered nothing of it and denied or said he couldn't remember everything said in his statement.

[82] So, again, your options are to accept the written statement and reject the oral evidence, accept the oral evidence and reject the written statement, accept parts of one and parts of the other (noting, however, that with this particular evidence the two were essentially poles apart) or conclude that the evidence is all so inconsistent that you reject it all completely.

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[85] … there was one witness in particular whose demeanour was sufficiently unusual as to warrant special mention by me - Ford Stevens. I am sure that, just as I did, you observed some rather odd behaviour from him…

[86] What you make of that unusual demeanour is for you. But there is one thing I must reinforce. We know Ford Stevens to have familial relationships with both defendants. He calls Mr Hemopo his brother and he referred to Ms Burns-Wong-Tung as his "beautiful cousin". There seemed to also be one or two people in the public gallery who he particularly enjoyed playing to when he had a chance. However, whatever you make of his evidence and his demeanour, what is absolutely crucial is that you don't in any way ever hold it against the defendants. I wouldn't if I was trying the facts and because you are the ones doing so in this case, you must not either.

…

[66] The Judge asked counsel whether there were any issues arising from the summing up. Mr Mansfield raised two. Both were minor and addressed by supplementary directions to the jury. Neither is relevant to this appeal.

Appeals against conviction

[67] As set out above, the conviction appeal is advanced on three grounds. The appellants submit that unfairness resulted from:

(a) the evidence of the Stevens brothers;

(b) an unredacted version of Robert's statement being erroneously included in the jury book as Crown Exhibit 10;

(c) the prosecutor's cross-examination of Ms Burns-Wong-Tung in respect of the CCTV evidence.

Evidence of the Stevens brothers

[68] The appellants make various criticisms of the brothers' evidence. They submit that the way in which their evidence unfolded resulted in a miscarriage of justice. Ultimately the argument comes down to three points, which overlap:

(a) The Judge erred in finding that the Stevens brothers were witnesses as defined by s 4 of the Evidence Act.

(b) The police statements should have been excluded under s 8 of the Evidence Act.

(c) The Judge's directions to the jury on the statements were insufficient and resulted in unremedied prejudice.

[69] The appellants say that, as a consequence, the Judge should have aborted the trial.

The Stevens brothers as witnesses

[70] Mr Teppett, counsel for Mr Hemopo, submits that whether a person is a witness must be a substantive enquiry. Mr Mansfield similarly submits that whether a person is a witness requires an assessment of whether both parties were able to present their case as a matter of substance. He relies on the dissenting opinion of Elias CJ in *Morgan*, where she questions whether the maker of a statement is a witness for the purposes of the Evidence Act:[34]

> … in circumstances where the witness refused to answer questions about the statement and no effective cross-examination of [the witness] by the defence was possible to test it…

[71] The appellants also submit that the Crown should have known from the outset that the brothers would be hostile and that this required the Judge to question them in the absence of the jury to make such an assessment, as was done in *Morgan*.

[72] We agree with the Crown and the trial Judge that both brothers were witnesses for the purposes of the Evidence Act.

[73] A "witness" is defined as a "person who gives evidence and is able to be cross-examined in a proceeding".[35] The test is not substantive. It does not require that cross-examination be effective. As noted by the majority of the Supreme Court in *Morgan*, the fact that cross-examination by the defence was "difficult and unrewarding" does not mean that the person was not *able* to be cross-examined.[36] Both brothers were plainly able to be cross-examined.

[74] We do not accept the appellants' submission that the Crown should have known the brothers would be hostile from the outset. It is only where a witness is known to be intractably hostile that the Crown should not call that witness.[37] We agree with the trial Judge's approach on this point. The fact that Mr Dufty suggested an incremental approach to cross-examination for both brothers supports the conclusion that it was

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34 *Morgan v R*, above n 26, at [11].
35 Evidence Act 2006, s 4.
36 *Morgan v R*, above n 26, at [44].
37 At [38], [40] and [43], referring to *R v O'Brien* [2001] 2 NZLR 145 (CA) at [21]; and *R v Vagaia* [2008] 2 NZLR 516 (HC) at [8].

not apparent the brothers would be entirely hostile. We note here that Mr Mansfield also initially objected to a hostility ruling regarding Robert on the basis that the point of hostility had not yet been reached.

[75] Although neither of the brothers were particularly forthcoming under cross-examination by prosecution or defence, this was not a case where they simply answered "no comment".[38] Nor was it a case where there was no effective cross-examination.[39] Both brothers did give some answers of substance, including answers favourable to the defence.

[76] Robert even told the prosecutor that it was his idea to give the deceased a "hiding", told Mr Mansfield that he was "super high" at the time of the offending, and agreed with Mr Mansfield that he was unable to see what was going on in the vehicle when the assault occurred. In cross-examination by Mr Dufty, Robert further said that he was "back up" and that eventually he heard Mr Hemopo say, "stop that's enough get back in the car". This was relied on by counsel in closing.

[77] Ford also gave answers favourable to the defence. He said his statement contained the words of the police, not his, and that he was "high as a kite". He accepted that he was shown in the CCTV footage but said he could not remember what happened on 21 November 2021 or when police spoke to him, because he was high on methamphetamine.

[78] These points suffice to differentiate the brothers' evidence in this case from the evidence that gave rise to the minority's concerns in *Morgan*. The point made by the Chief Justice in *Morgan* arose in the context of her conclusion that the relevant evidence was of no probative value.[40] Propositions put to the witness in cross-examination were not adopted by the witness, who answered that he could not remember, in response to every question.[41] As we have already explained, defence counsel in this case were able to test the Stevens brothers' statements in cross-examination and both brothers provided evidence of probative value.

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38 Compare *Tangiora v R*, above n 27.
39 Compare *Morgan v R*, above n 26, at [11].
40 At [9].
41 At [8]–[9].

[79] The difficulties experienced by counsel — both prosecution and defence — in getting answers from the witnesses was a matter going to the weight that could properly be placed on their evidence. Indeed, Mr Mansfield submitted to the jury in closing that the brothers' evidence could not be relied upon. This process was not unfair.

Admission of the police statements

[80] The appellants submit that the Stevens brothers' police statements should have been excluded under s 8 of the Evidence Act. They say the statements were unreliable. They highlight the fact that both brothers said they could not remember making the statements, the passage of time between the attack and the statements, and the fact that neither brother made any statements on oath consistent with their written statement. They also suggest the brothers had a motive to lie to avoid charges being laid against them.

[81] For the reasons set out below, we consider the Judge was correct to admit the police statements into evidence.

[82] A previous statement of a hostile witness is admissible as evidence of the truth of its contents, even if not adopted by the witness.[42] The only requirement is that set out in s 8 of the Evidence Act. That is, the probative value of the evidence must be outweighed by the risk the evidence will have an "unfairly prejudicial effect on the proceeding".[43] As noted by the majority in *Morgan*, Parliament's policy that such statements are admissible as proof of their contents should not be undermined by too ready a resort to s 8.[44]

[83] The Stevens brothers' statements had high probative value. Both brothers were present for discussions prior to the meeting at Myna Place. Both brothers were also present at Myna Place and can be seen in the CCTV footage. They gave descriptions of what they heard and saw.

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42 At [40]–[42].
43 Evidence Act, s 8.
44 *Morgan v R*, above n 26, at [41].

[84] We agree with the trial Judge that the statements were not so unreliable that they should not have gone before the jury. In fact, the surrounding circumstances suggested the contrary. The statements were signed in the presence of the police, attesting to the truth of their contents. Neither brother was observed as being under the influence of methamphetamine by the officers who took their statements. Critically, the statements aligned with other evidence at trial, including the CCTV footage. Neither of the brothers had seen that footage before giving their statements. Importantly, defence counsel had the opportunity to cross-examine the officers who took the statements. In closing, Mr Mansfield highlighted the dates of the statements (Robert's being 15 days after the victim's death and Ford's being one month after). Reliability issues were squarely before the jury.

[85] The appellants' submission on appeal that the Stevens brothers may have had a motive to give false statements lacks an evidential basis. It was not directly put to the Stevens brothers at trial (other than a question to Robert as to him not having been charged by police) nor to the officers who took the statements (other than a denied suggestion that Robert may have had a bail advantage by signing the statement).

[86] The probative value of the statements exceeded the risk that their admission would have an unfairly prejudicial effect on the proceeding.

Judge's directions to the jury as to the Stevens brothers' evidence

[87] The appellants submit that the Judge's directions to the jury were insufficient. They say that the Judge said nothing about issues of unfairness to the appellants arising out of the Stevens brothers' evidence and the inability to cross-examine, and that this resulted in a miscarriage of justice.

[88] Mr Mansfield submits that the jury should have been advised to exercise "extreme caution". Mr Teppett suggests that a direction such as that in *Tangiora* was required.[45] In that case, the trial Judge said:[46]

> Because of the position that [the witnesses] took at this trial, the account they gave to the police in those statements has not been tested. *It has not been*

[45] *Tangiora v R*, above n 27.
[46] At [28] (emphasis added).

> *tested by cross-examination and that is a factor that you need to have regard to when you come to assess what is said in the statements and what weight you give to it.* … But it is important that you have not been placed in a position where you yourselves have seen their account tested and their responses to it and Mr Edward has suggested that the statements are unreliable and you should treat what is said with caution because of that very fact.

[89] In our view, the Judge's directions here adequately dealt with any prejudice arising from the hostile witnesses.

[90] There is no authority to support Mr Mansfield's submission that the jury should have been told to exercise "extreme caution". Indeed, the Supreme Court held in *Morgan* that a direction that the jury treat the evidence with "a good deal of caution" was "unduly favourable to the defence".[47] That was in circumstances where the witness was giving evidence of a "cellmate confession" and the need for a warning was more acute.[48]

[91] As to Mr Teppett's submission that a direction like that in *Tangiora* was required, we disagree. In *Tangiora*, particular caution was required because the earlier statements of the hostile witnesses were the only direct evidence against the defendant.[49] Further, because the witnesses in *Tangiora* answered almost every question in cross-examination with "no comment", there was no engagement with the evidence and no opportunity to challenge the statements. Here, the Stevens brothers' evidence was able to be tested and challenged. Defence counsel obtained favourable responses to questions posed in cross-examination. And as just noted, their written statements were supported by other evidence at trial. In these circumstances, it would have been inappropriate to give a warning like that in *Tangiora*.

[92] Although not expressed as such, the appellants appear to submit that a direction under s 122 of the Evidence Act was required. Section 122 provides that the Judge may give such a direction when they are of the opinion that the evidence (here, the evidence in the brothers' written statements) is unreliable.

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47 *Morgan v R*, above n 26, at [31] and [44].

48 See the discussion about the risks of illegitimate prejudice from cellmate confessions in *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382 at [74]–[86].

49 *Tangiora v R*, above n 27.

[93] In our view, no such direction was required. Any issues with the Stevens brothers' reliability were plain for the jury to see. This Court has said previously that when the issue of reliability is plainly apparent, a s 122 direction would not be of material assistance to a jury.[50] It will be for the trial judge to make the appropriate call, "immersed as he or she is in the dynamics of the trial".[51] Issues with the Stevens brothers' reliability were well ventilated at trial. In the circumstances of this case, it was entirely understandable that the Judge did not give a s 122 direction. This was not a case where the jury needed further assistance, explanation, or direction.

[94] As to any prejudice arising from the witness stand conduct of Ford Stevens, we consider the Judge's directions to the jury dealt with this issue more than adequately. As set out above, the Judge unequivocally said to the jury that "what is absolutely crucial is that you don't in any way ever hold [Ford's unusual conduct] against the defendants". This direction sufficiently alleviated any issues arising from that conduct.

Application to abort

[95] Given our conclusions on the issues above it is clear we do not accept there was any error in the Judge's decision not to abort the trial. The Stevens brothers were plainly hostile. Their statements were put before the jury in accordance with orthodox principles. Defence counsel were able to cross-examine them on their evidence. The Judge gave appropriate directions to the jury. There was no basis to conclude the trial was unfair.

Exhibit 10

[96] As set out above, the Judge directed that Robert's statement be redacted to remove his reference to murder in the following statement: "Tago [Mr Hemopo] told us not to say anything about what happened *because it was a murder*."[52] However, it seems to be generally accepted that although the jury received the redacted version,

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50 *B (CA58/16) v R* [2016] NZCA 432 at [61]; and *Toa v R* [2024] NZCA 295 at [43].
51 *B (CA58/16) v R*, above n 50, at [61].
52 Emphasis added.

the unredacted version of Exhibit 10 was, somehow, still included in the jury book. Mr Mansfield submits this created "obvious and extreme" prejudice.

[97] We disagree.

[98] In our view, it is unlikely that the jury read the exhibit version of the statement. They had each been given individual copies of the redacted statement prior to deliberation and that statement was not mentioned in closing remarks or relied upon by the Crown. The jury would have had no reason to check that document in the exhibit book.

[99] Further, the redaction had been made at the instigation of the Judge during the trial. The Crown submitted that, on that basis, the redacted content cannot have been of concern to defence counsel and the redaction was therefore made out of caution only. Mr Mansfield advised us at the hearing that redaction was not sought because the issue had been identified by the trial Judge. We are nonetheless left with the impression that the redaction was made out of caution. That the deceased's death was a culpable homicide was obvious. Elsewhere in Robert Stevens' statement, he said that "[Ms Burns-Wong-Tung] started stabbing him with a kitchen knife", "she took it [too] far", and "there was enough blood for someone to lose their life". In light of these comments, the comment that "it was a murder" would create little additional prejudice beyond that which we have already considered to be permissible in terms of s 8 of the Evidence Act.

[100] In these circumstances, even if the jury did read the statement, it is unlikely to have resulted in a real risk that the outcome of the trial was affected, nor was the error so gross or pervasive that it rendered the trial unfair.

Cross-examination of defendant on CCTV evidence

[101] This ground of appeal was advanced on behalf of only Ms Burns-Wong-Tung.

[102] Mr Mansfield accepts that the Crown case was that Ms Burns-Wong-Tung obtained the knife from the Honda, that she could be seen moving an item from one hand to the other on CCTV, and that she then took the knife to the SUV. However, he

says that the prosecutor did not assert that the knife was visible in the CCTV footage in opening. Rather, he says this was raised belatedly in cross-examination of Ms Burns-Wong-Tung. The defence accordingly had insufficient time to prepare Ms Burns-Wong-Tung and instruct a defence expert as to whether a knife could be seen. Mr Mansfield submits that this created "serious unfairness and prejudice" to the proceeding, that amounted to a miscarriage of justice.

[103] We disagree. It was clear throughout the trial that the Crown case was both that Ms Burns-Wong-Tung used a knife to attack the deceased *and* that the CCTV showed Ms Burns-Wong-Tung taking a knife out of the boot of the car and appearing to swap hands with the knife as she approached the SUV. In opening, the prosecutor said:[53]

> [67] The footage, and I'm not going to go through all of it, ladies and gentlemen, right now, but the footage shows us Ms Burns-Wong-Tung having arrived at that address, getting out of the vehicle very shortly thereafter and walking to the boot of the vehicle, opening the boot and taking possession of an item from the boot. … what *we can see happening* is Ms Burns-Wong-Tung reaching into the back of the boot, taking an item from the boot at that stage. That is the knife that is being retrieved from the boot in the leadup to the attack on Rangiwhero who was about to be driven to the address.
>
> …
>
> [77] A short time after that, *we see Ms Burns-Wong-Tung* get out of the black Honda Accord from the front passenger's seat and she's holding a large knife in her hand as she gets out of the vehicle. She gets out and she walks toward the silver Ford Escape where Mr Ngaronoa is in the back seat and we see her, you will see her as she approaches the silver Ford Escape. As she approaches Mr Ngaronoa, *she appears to swap hands with the knife*. We will just play that briefly for you now, just setting the scene of what takes place.
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> [78] You can see her getting out now. You'll see this again tomorrow and watch the change - there - the changing of the hands as she approaches Rangiwhero armed, the Crown say, with a large knife…

[104] In evidence, Ms Burns-Wong-Tung accepted that the CCTV footage showed her exchanging an item between her hands as she approached the vehicle, but said it was a cell phone. She denied the presence of a knife. In cross-examination, the prosecutor put the Crown case to her, that the CCTV showed her holding the blade of a knife. Ms Burns-Wong-Tung disagreed.

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[53] Emphasis added.

[105] That exchange was not unfair. The prosecutor was required to put the Crown case to Ms Burns-Wong-Tung.[54] The Crown case was clearly foreshadowed in opening. It was not problematic for the prosecutor to explore what could or could not be seen on the CCTV. As the Judge directed in his summing up, what could or could not be seen was a matter for the jury.

[106] To the extent there was any surprise that the Crown asserted the knife could be seen on CCTV, Ms Burns-Wong-Tung was permitted to, and did, call expert evidence in support of her version of events. The Crown called expert evidence in response. Neither expert concluded the CCTV showed Ms Burns-Wong-Tung holding a knife. The defence expert said that what the Crown asserted was a knife, in fact, was not an object but a light effect. The Crown expert was firm that the defence expert was incorrect because the colour of the pixels on the CCTV footage meant that there was an object of some kind reflecting light back to the camera. He could not, however, comment on what the object was or its size. The result was that Mr Mansfield was able to submit to the jury that the Crown view that the CCTV showed Ms Burns-Wong-Tung holding a knife was not supported by the expert evidence. Whether that was accepted or not was a matter for the jury.

[107] Finally, we note that while Mr Mansfield submits that more notice of the Crown position would have enabled the defence case to be put more effectively, he has not sought to adduce fresh evidence to demonstrate that point.

[108] The prosecutor's cross-examination of Ms Burns-Wong-Tung on the CCTV evidence did not result in a miscarriage of justice.

Conclusion on appeals against conviction

[109] We are not satisfied that the grounds of appeal, individually or in combination, created a real risk the outcome of the trial was affected or resulted in an unfair trial. The appeals against conviction are therefore dismissed.

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[54] Evidence Act, s 92.

Appeal against sentence

[110] The Judge sentenced Ms Burns-Wong-Tung on the basis that the murder was reckless, not intentional. He sentenced her to life imprisonment with a 15-year MPI.

[111] The Judge considered that s 104(1)(e) and (g) of the Sentencing Act applied.[55] The offending involved a high level of brutality, cruelty, depravity, or callousness, and the deceased was particularly vulnerable due to being effectively captive in a confined space. However, the Judge found that the 17-year MPI required by s 104 was manifestly unjust.[56] He adopted a notional MPI of 16 years and allowed a one-year discount to account for Ms Burns-Wong-Tung's youth and personal circumstances.

[112] Mr Mansfield submits the sentence was manifestly excessive. He challenges the MPI, discount for youth and personal circumstances, and the Judge's finding that s 104(1)(e) and (g) applied. However, because of the Judge's conclusion that a 17-year MPI would be manifestly unjust, Mr Mansfield did not focus on the latter point on appeal.

Notional MPI

[113] Mr Mansfield submits the appropriate MPI is 11 years. He does not accept that, as he put it, the death was premeditated. He also says that the "hiding" was in response to an allegation that the appellant's young relative had sexually interfered with a toddler and in "that context, and in that community, the proposed hiding was a normalised response". Mr Mansfield submits that the Judge overstated the brutality of the assault by describing it as prolonged when in fact it lasted only about 15 seconds. Further, although there were eight wounds, only two were from stabbing, the other six were merely "incised" wounds.

[114] In our view, the Judge was correct to find that the offending was premeditated. In this context, premeditation refers to the deliberate nature of the offending that caused the death, not the result being a death . The evidence clearly established that Ms Burns-Wong-Tung set out to give the deceased a "hiding". Further, we do not

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55 *R v Burns-Wong-Tung*, above n 2, at [33]–[36].
56 At [52].

accept, nor consider it relevant, that the hiding was a "normalised response". There was no evidence to support such a submission and vigilante activity, whether "normalised" or not, is to be firmly denounced.

[115] Although not focussed on in submissions, we also agree with the Judge that s 104(1)(e) and (g) was engaged. The attack was not "prolonged", but it was clearly brutal, with eight wounds inflicted in 15 seconds. The purported differentiation as to whether the wounds were "stab" or "incised" wounds is merely semantic — all were inflicted by stabbing action with a knife. Further, the deceased was extremely vulnerable. He was captive in the back of a vehicle with no means of escape. All of this was planned by Ms Burns-Wong-Tung.

[116] Mr Mansfield submitted Ms Burns-Wong-Tung's offending was similar to *R v [K]*,[57] where a starting point MPI of 12 years was adopted, and *Fraser v R* where this Court upheld an MPI of 11 years.[58] As both *R v [K]* and *Fraser* were intentional murders, and this was reckless, Mr Mansfield submits a lower MPI is justified. Again, we disagree.

[117] *R v [K]* involved a fatal stabbing in an altercation between rival gangs. However, Mr K's offending was not premeditated and the victim was not considered vulnerable. Section 104 was not engaged.

[118] Similarly, s 104 was not engaged in *Fraser*. Although the offending in *Fraser* was premeditated, it lacked the level of premeditation present in this case, where Ms Burns-Wong-Tung devised a plan for the deceased to be brought to her for a "hiding". In our view, this is a significant distinguishing factor.

[119] We consider this case more similar to *Webber v R*, where this Court upheld a starting point MPI of 15 years.[59]

[120] Mr Webber was the "enforcer" for a gang. He arranged for a man owing a debt to the gang to be brought to him. He stabbed the victim 14 times. The principal issue

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57 *R v [K]* [2019] NZHC 1021.
58 *Fraser v R* [2010] NZCA 313.
59 *Webber v R* [2021] NZCA 133.

at sentencing was whether it would be manifestly unjust to subject Mr Webber (who was subject to a third strike under the since repealed three strikes law) to an MPI of 20 years.

[121] Having concluded that a 20-year MPI would be manifestly unjust, the sentencing Judge considered the question of the appropriate MPI in the usual way. He considered the aggravating factors of the offending to be: the gang context, use of a lethal weapon, vulnerability of the deceased, and premeditation. The Judge distinguished *R v [K]* on the basis that Mr Webber's offending involved the additional aggravating factor of "vigilante justice according to gang rules".[60] Importantly, the sentencing Judge and counsel were agreed in that case that s 104 did not apply.

[122] Ms Burns-Wong-Tung's offending involved all the aggravating factors present in Webber. As emphasised above, however, the deceased in this case was particularly vulnerable. He was captive in the back seat of a vehicle and had no means of escape. Section 104 was engaged. It was not in *Webber*. In our view, this additional factor justifies an MPI of one year more than the 15 years adopted by the Judge in *Webber*. We also note that Ms Burns-Wong-Tung not only carried out the attack but appeared to have the ability to influence others to participate. That is a further point of distinction from *Webber*.[61]

[123] The starting point MPI of 16 years was available to the Judge. There was no error in this regard.

Discount for youth

[124] The Judge allowed a discount of one year for Ms Burns-Wong-Tung's youth and personal circumstances (approximately 6 per cent). Mr Mansfield submits that a discount of 20 to 30 per cent would have been appropriate. He relied on this Court's decision in *Dickey v R* which he says recognised that discounts of up to 20 per cent can be available for young adults convicted of murder.[62]

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60 At [19], quoting *R v Webber* [2020] NZHC 1758 at [53].

61 See *Waho v R* [2020] NZCA 526 at [4] and [21], affirming *R v Waho* [2020] NZHC 112 at [7] and [10].

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

[125] We agree with the Crown that the discount allowed for Ms Burns-Wong-Tung's youth and personal circumstances was appropriate. This Court's decision in *Dickey* is not authority for the proposition that discounts of 20 per cent are available for young adults convicted of murder. Rather, that case held that youth alone is not enough to establish manifest injustice under s 102 of the Sentencing Act but that young persons may present with a combination of factors which together can demonstrate manifest injustice. Although this Court observed that discounts for youth of 10 to 30 per cent were common,[63] this was in reference to sentencing practice generally. With regard to discounts to MPIs for murder, it is well-established that discounts for personal circumstances range from one to two years.[64] Where the offending is grave, the scope to take account of youth may be greatly circumscribed.

[126] At 23 years old, Ms Burns-Wong-Tung was approaching the limit at which youth is a relevant factor. More importantly, her offending was premeditated and so did not exhibit many of the impulsive characteristics of youth offending that justify higher discounts.[65] We can discern no error in the discount allowed by the Judge and we think it was appropriate.

Conclusion

[127] The sentence imposed was within the available range. It was not manifestly excessive. Ms Burns-Wong-Tung's appeal against sentence is dismissed.

Result

[128] The appeals are dismissed.

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63 At [175].
64 *Purutanga v R* [2023] NZCA 442 at [28], citing *Frost v R* [2023] NZCA 294 at [43] and [89].
65 See *Dickey v R*, above n 62, at [85].