IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA262/2022
[2024] NZCA 266

	BETWEEN	SOUTHERN CHEYENNE THOMPSON Appellant
	AND	THE KING Respondent

Hearing:	4 October 2023
Court:	Katz, Palmer & Jagose JJ
Counsel:	S J Gray for Appellant A J Gordon for Respondent
Judgment:	25 June 2024 at 9.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] Comfort Jay Thompson died in Waikato Hospital at the age of 18 months. She had suffered an irreversible, non-survivable brain injury, caused by blunt force trauma. Her mother, Southern Thompson, pleaded guilty to Comfort's murder, as well as two charges of ill treatment of Comfort and one charge of injuring Comfort with intent to

injure her. Ms Thompson was sentenced by Lang J, in the Rotorua High Court, to life imprisonment with a minimum period of imprisonment (MPI) of 17 years.[1]

[2] Ms Thompson appealed her sentence on the ground that the MPI imposed was manifestly unjust considering her difficult personal background and her remorse. Her counsel, Ms Gray, submitted that if proper weight is given to these factors, the appropriate MPI would be in the vicinity of 14 years.

Background

[3] Comfort was born with a birth defect, gastroschisis, and remained in hospital for four months after her birth to receive treatment for her condition. Due to her birth defect, Comfort required extra care during the early stages of her life.

[4] On 23 July 2018, at about 9.45 am, Ms Thompson borrowed a phone from a neighbour and called Healthline, advising them that Comfort was unwell. Based on what Ms Thompson told them, Healthline advised that urgent medical care be sought and offered to call an ambulance, which Ms Thompson declined. Ms Thompson called an ambulance two hours later, at 11.44 am. When the ambulance arrived, Comfort was seriously unwell. She was taken to hospital and placed on life support but had sustained a brain injury that was not survivable. She died the following day. The medical experts were of the view that the fatal injuries were inflicted within the 48 hours prior to Ms Thompson calling an ambulance.

[5] A police investigation established that Comfort was subjected to ongoing neglect and physical abuse prior to her death, which the Judge summarised at sentencing, as follows:

> [4] The charges other than that of murder were laid as a result of a series of events that occurred from at least January 2018 until [Comfort's] death on 24 July 2018. During this period you ill-treated and physically abused [Comfort] in numerous different ways. You assaulted her by slapping and hitting her head, face and body. You would grab her with excessive force and scratch her with your fingers. You failed to change her dirty nappies and failed to keep her clean and warm. You also failed to provide her with enough food to ensure she was well nourished. In addition, you would keep her confined

1 *R v Thompson* [2022] NZHC 1038 [judgment under appeal].

> to her cot and a couch for extended periods. You would punish her if she endeavoured to leave these areas.
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> [5] This ill treatment occurred on a regular basis. At one stage she was seen by others to have two black eyes. Following her death she underwent a post-mortem examination. This revealed extensive soft tissue bruising to almost every part of her body. She also had extensive scratch marks all over her body, particularly on her neck and chest.
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> [6] [Comfort] was also found to have suffered from extreme nappy rash. This was so severe that large parts of her skin were peeling off parts of her buttocks. She also had deep-crusted fissure in the area where her nappy would sit. In addition, she had a large, and undoubtedly painful, ulcer under her chin. This was most likely caused by her dribbling and you failing to clean her up.
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> [7] At the time of her death [Comfort] weighed just eight kilograms and was plainly malnourished. Her weight placed her in the second percentile for her age and can only be explained by the fact that you did not feed her properly. In addition, as I have said, you would confine her to a cot for long periods and then to a small corner of a couch. If she endeavoured to move or get off the couch you would assault her.
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> [8] The assault that led to the charge of injuring with intent to injure resulted in [Comfort] receiving a torn frenulum, which is the thin membrane of skin in the centre of the top of the mouth. The assault that caused this injury is also likely to have resulted in the loss of one tooth and the loosening of another. It is likely that this assault occurred within two weeks prior to her death. You admitted you had assaulted her on the face and mouth, resulting in swollen lips and a bloody mouth.
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> [9] Charge 3, a charge of ill-treating [Comfort] by failing to seek medical care for her, relates to a healing fracture discovered on her left clavicle. The clavicle is the bone that connects the sternum, or breastplate, to the shoulder. The fracture was visible as a protrusion under the skin and would have been noticeable by you. It would also undoubtedly have caused [Comfort] considerable pain.

[6] The pathologist found that Comfort died of head injuries caused by blunt force trauma. She had suffered a number of impacts to her head that caused both a subdural and subarachnoid haemorrhage. She also had extensive retinal haemorrhaging, which is indicative of blunt force trauma to the head. In addition, Comfort was found to have extensive bruising in many locations on her scalp. Precisely how these injuries were caused is not known.

[7] Ms Thompson initially pleaded not guilty to the charges she faced, and her trial was set down for 9 February 2021. She absconded the week before trial and did not surrender until after the jury had been discharged. Ms Thompson subsequently entered

guilty pleas on the charges of ill-treatment on 30 July 2021. She pleaded guilty to the murder charge on 8 April 2022, a month before her second trial date.

The law

[8] Section 104 of the Sentencing Act 2002 (the Act) requires that an MPI of at least 17 years' imprisonment be imposed in certain circumstances, unless the court is satisfied that it would be manifestly unjust to do so. The relevant circumstances include where the deceased was particularly vulnerable because of their age, health or because of any other factor.[2] It was common ground at Ms Thompson's sentencing that Comfort was particularly vulnerable and that s 104 was engaged on (at least) that basis.

[9] In *Davis v R* this Court set out a three-step process for cases where s 104 is engaged. The Court must decide:[3]

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

(b) second, whether there is any applicable s 104 category; and

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

The first two steps need not be followed in that order. The sequence chosen may depend on the category and the circumstances.[4]

[10] This Court considered the meaning of "manifestly unjust" in *R v Williams*.[5] With reference to *R v Rapira*, which interpreted the term "manifestly unjust" in the context of s 102, this Court held that the injustice must be clearly demonstrated — by reference to the circumstances of the offending, the offender's personal circumstances,

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2 Sentencing Act 2002, s 104(1)(g).

3 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [25]. This approach is a clarification of the two-step approach articulated in *R v Williams* [2005] 2 NZLR 506, (2004) 21 CRNZ 352 (CA).

4 *Davis v R*, above n 3, at [25].

5 *R v Williams*, above n 3, at [55]–[68]; see also *Frost v R* [2023] NZCA 294 at [40].

and the sentencing purposes and principles articulated in ss 7, 8 and 9 of the Act — before the Court can exercise its discretion to impose a sentence below 17 years.[6] The Court further observed that:[7]

> [66] … [T]he specified minimum period may not be departed from lightly, as the Court is bound to give effect to the legislative policy of ensuring a 17-year minimum for the most serious murder cases. The reasons must withstand scrutiny. Marginal differences in personal circumstances or degrees of participation by co-offenders would not normally qualify. … [T]he presence of mitigating factors under s 9(2) which related to the personal circumstances of an offender would rarely displace the presumption. Powerful mitigating circumstances bearing on the offence are more likely to do so.
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> [67] We conclude that 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 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. …

Sentencing

[11] The Judge found that s 104 of the Act was engaged. Specifically, that s 104(1)(g) applied due to the vulnerability of the victim; and s 104(1)(e) was engaged because:[8]

> [T]he infliction of these types of physical violence on a victim of this age must engage concepts of both cruelty and callousness to some degree. That is particularly so when no effort is made to obtain medical assistance for the resulting injuries.

[12] As a result, the Judge was required to impose an MPI of at least 17 years' imprisonment, under s 103, unless he was satisfied that such a sentence would be manifestly unjust.[9]

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6 *R v Williams*, above n 3, at [55]–[56]; and *R v Rapira* [2003] 3 NZLR 794, (2003) 20 CRNZ 396 (CA) at [121].

7 *R v Williams*, above n 3.

8 Judgment under appeal, above n 1, at [18].

9 Sentencing Act, s 104(1).

[13] The Judge assessed the notional MPI that would be imposed in the absence of s 104 as being 16 years and three months' imprisonment, calculated as follows:[10]

(a) a starting MPI of 18 and a half years' imprisonment;[11]

(b) a reduction of nine months' imprisonment to reflect Ms Thompson's late guilty plea;[12]

(c) a reduction of 12 months' imprisonment was allowed in respect of personal factors;[13] and

(d) a reduction of six months' imprisonment was allowed for remorse, insight into the offending, and determination to rehabilitate.[14]

[14] The Judge then considered whether the imposition of a 17-year MPI would be manifestly unjust. He concluded that it would not be, and that Ms Thompson's offending fell squarely within the type of offending to which Parliament intended s 104 to apply.[15]

Did the Judge err in setting the notional MPI?

[15] The first issue on appeal is whether the Judge erred in his analysis of what the appropriate MPI would have been if s 104 had not been engaged.

Submissions on appeal

[16] No issue was taken with the Judge's starting MPI of 18 and a half years' imprisonment or the nine-month reduction for Ms Thompson's belated guilty plea. Rather, Ms Gray submitted that the Judge gave insufficient weight to Ms Thompson's personal circumstances and her remorse, which received discounts of 12 and six months respectively. Had those factors been adequately recognised, she

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10 Judgment under appeal, above n 1, at [33].
11 At [21].
12 At [26].
13 At [33].
14 At [33].
15 At [34].

submitted, an appropriate notional MPI would have been around 14 years' imprisonment.

[17] Ms Gray relied on two reports prepared for sentencing purposes which provided insight into Ms Thompson's personal background and circumstances:

(a) a psychological report prepared by Dr Ingalise Jensen which focused on Ms Thompson's mental state and psychological background; and

(b) a cultural report prepared by Shelley Turner of Cultural Reports NZ Ltd which focused on Ms Thompson's background, life experiences and upbringing.

[18] There is no suggestion that the Judge overlooked this material. On the contrary, he summarised it in some depth. He noted that Ms Thompson had grown up "in the face of adversity in a dysfunctional family environment and in circumstances of poverty and deprivation". In addition, she had witnessed physical violence between her parents and had suffered abuse at the hands of a family member when she was at primary school. These matters had resulted in Ms Thompson becoming involved with drugs and alcohol at an early stage of her life. The Judge also noted that Ms Thompson had a longstanding methamphetamine addiction and was also likely to have suffered from depression, as well as possible post-traumatic stress disorder as a result of violence and abuse.[16] Ms Thompson's family had led a nomadic existence and she had been expelled from school. Ms Thompson's lack of any structured education has impacted her employment opportunities and she had seldom held down a regular job "for any meaningful length of time". Her relationship with her partner (which has produced four children) has been a difficult one, marred by gang associations and violence.[17] The Judge further observed that:

> [30] Your living arrangements during the months leading up to [Comfort's] death were particularly abysmal. You were living with several other family members and their children in circumstances that can realistically be described as squalor. The house was overcrowded, and tensions were high between family members. Nobody was prepared to take responsibility for looking after the children. Consumption of methamphetamine and alcohol occurred at a

[16] At [28].
[17] At [29].

> great rate. I accept that all these factors are likely to have exacerbated the stress you were already under given that you had three young children to look after.

[19] Having outlined her background circumstances in some detail, the Judge observed that although it was "really no surprise" that Ms Thompson was before the Court, her background provided an explanation, but not an excuse, for the manner in which she had treated Comfort.[18]

[20] Ms Gray submitted that, despite acknowledging the adversity, dysfunction and deprivation experienced by Ms Thompson, the Judge had failed to give these factors appropriate weight when assessing the notional MPI. She submitted that Ms Thompson's deprived background is all part of her narrative and forms part of the background to the index offending. Ms Gray submitted that it was apparent, based on the information contained within the reports, that Ms Thompson was ill-equipped to deal with the stresses of life. Further, in the lead up to Comfort's death, Ms Thompson's life was characterised by instability and dysfunction. She was not supported by her partner and other adults living in the same household.

[21] Ms Gray referred to *R v Harrison-Taylor* in support of her submission that a greater discount should have been afforded for Ms Thompson's personal factors.[19] In that case the Judge imposed a 12-year MPI rather than the presumptive 17-year MPI, which Ms Gray submitted equated to a discount of about 30 per cent. Ms Gray acknowledged that Ms Thompson's offending was more serious given the earlier instances of abuse and neglect, and therefore submitted that a 20 per cent discount would be appropriate in this case, relative to *Harrison-Taylor*.

[22] In conclusion, Ms Gray submitted that the 18-month discount for personal circumstances given by the Judge (including personal background and remorse but excluding the guilty plea discount) was insufficient. She submitted that a more appropriate discount for those factors would have been in the vicinity of three years and nine months' imprisonment. Combined with the nine-month guilty plea discount

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18 At [32].

19 *R v Harrison-Taylor* HC Auckland CRI-2004-092-001510, 12 September 2005.

this would reduce the notional MPI from 18 years and six months' imprisonment to 14 years' imprisonment.

[23] Ms Gordon, for the Crown, supported the Judge's analysis. She submitted that the discounts were appropriate in the circumstances, and in line with other cases. Ms Gordon acknowledged that Ms Thompson had a disadvantaged personal background, and this had some nexus to the offending. The Crown, however, challenged the extent of that nexus. Ms Gordon noted that Ms Thompson's other two children appear to have been well cared for and showed no signs of injury or neglect when examined at the time of Comfort's death. Despite her deprived background, Ms Thompson was therefore able to exercise self-control and choice in her treatment of her other two children. Ms Gordon submitted that there is little or nothing in Ms Thompson's background to explain why Comfort was singled out for extreme abuse and neglect, over a sustained period. Nor did the reports establish that Ms Thompson had a mental illness that reduced or diminished her culpability.

[24] Finally, Ms Gordon referred to *R v Sio*, where an MPI was discounted by 12 months' imprisonment (from a starting point of 18 years and three months' imprisonment) to reflect the offender's socio-economic and cultural deprivation, and instability.[20] She submitted that that case provided a more apt comparator than *Harrison-Taylor*.

What would the MPI have been but for the application of s 104?

[25] Ms Gray's submissions appeared to assume that the Court's approach to applying discounts to the notional MPI in murder cases precisely mirrors the approach taken to applying sentence discounts more generally. If so, that assumption is incorrect. In the case of murder, the MPI is not the end sentence. The sentence is life imprisonment. The MPI is simply the minimum period of imprisonment that must be served before an offender can apply for parole. However, it is not possible to apply a percentage discount to a term of life imprisonment.[21] Nevertheless, even when a person is sentenced to a term of life imprisonment, the courts have recognised that it

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20 *R v Sio* [2021] NZHC 1709, subsequently upheld in *Sio v R* [2022] NZCA 337.
21 *Malik v R* [2015] NZCA 597 at [26].

will generally be appropriate to recognise mitigating factors (including guilty pleas) at sentencing in some way. This is done by adjusting the MPI.[22] An MPI, however, will inevitably be for a much shorter term than the actual sentence of life imprisonment. The MPI is not therefore treated as if it were the actual end sentence for the purpose of assessing appropriate discounts to the MPI in murder cases.

[26] Further, as this Court made clear in both *Frost v R* and *Webber v R*, the legislative policy mandated for murder means personal mitigating factors carry less weight in murder sentencing.[23] Section 103(2) of the Act signals Parliament's intention that the seriousness of the offending is to be the focus when setting an MPI for murder. This further reinforces that the MPI is not to be adjusted to take account of the personal factors of a defendant as though it were the determinate sentence.

[27] In our view, the 18-month discount to the notional MPI afforded for Ms Thompson's personal circumstances (including her deprived background and her remorse) was within the available range. *Harrison-Taylor* is not an appropriate comparator. Amongst other things, the Judge in that case did not adopt an orthodox application of the two-stage test set out in *Williams*.[24] The starting point that would apply but for s 104 is not identified and nor are the discounts clearly explained and articulated. That makes any direct comparison of discounts somewhat difficult. Further, and significantly, the offending in *Harrison-Taylor* was a one-off incident or "rage reaction" and there was no prior ongoing course of conduct.[25] The present circumstances are quite different.

[28] In order for a discount to be justified, there must be a "causative contribution" between the offender's background or personal circumstances and their offending.[26] Causative contribution captures contributory factors which help to explain why an offender came to offend.[27] In terms of explaining how such factors can contribute

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22 At [28].
23 *Frost v R*, above n 5, at [41]; and *Webber v R* [2021] NZCA 133 at [33].
24 *R v Williams*, above n 3, provided for the relevant methodology at the time of judgment.
25 *R v Harrison-Taylor*, above n 19, at [37] and [43].
26 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
27 At [109].

causatively to offending, the majority of the Supreme Court in *Berkland v R* stated that:[28]

> [A]ssessing culpability is not just a matter of establishing what the offender did. It must be assessed by reference to the offender too because punishment is premised on offender agency. An offender's background may affect the extent of that agency. The obvious examples are offender age and mental wellbeing or capacity, but deprivation in its various forms can also have an impact on culpability[.]

[29] If an offender's background or personal circumstances results in their agency (their ability to make free, autonomous decisions) being constrained or impaired in certain situations, and has causatively contributed to their offending, then their culpability will be commensurately reduced.

[30] As the Crown noted, however, Ms Thompson's other children did not show any signs of neglect or abuse. Comfort, however, (who was significantly more vulnerable than the other children due to her age and medical condition), was subjected to very serious neglect, mistreatment, and abuse for a period of at least five months. She would likely have been in very considerable pain in the days, weeks, and possibly months, leading up to her death. This is not a case of a "one off" angry outburst by a parent with poor coping skills, resulting in catastrophic and fatal consequences. Rather, Ms Thompson engaged in a sustained pattern of neglect and abuse, in relation to one of her children only, over an extended period, culminating in a final fatal assault. Such offending, by its very nature, suggests the exercise of a higher degree of agency than a homicide resulting from a one-off angry outburst by an offender with poor impulse control. Accordingly, while we accept (as did the Judge) that there is a causal nexus between Ms Thompson's background and the culpability of her offending, the linkage is not as strong as in some other cases. This must necessarily impact on the level of discount that is appropriate.

[31] In conclusion the Judge did not err in assessing 18 months as being the appropriate discount from the notional MPI to reflect Ms Thompson's personal background factors, including her remorse. The notional MPI was therefore correctly assessed as being 16 years and three months' imprisonment.

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[28] At [91] (footnote omitted).

Did the Judge err in finding that imposition of an MPI of 17 years' imprisonment would not be manifestly unjust?

[32] On the issue of manifest injustice, the Judge found that:

> [34] This brings me to the final stage in the sentencing process, which is to determine whether it would be manifestly unjust to require you to serve a minimum term of 17 years rather than 16 years three months as would have been the case but for s l 04. The difference between 16 years three months and 17 years is not particularly great in numerical terms. However, that is not the test. The test is whether, as a matter of overall impression, your offending is of a type to which Parliament intended s 104 to apply. Your offending involved the systematic physical abuse and neglect of a young child who was completely defenceless and reliant on you for protection. It culminated in her death by an assault or assaults. I consider this falls squarely within the type of offending to which Parliament intended s 104 to apply. I therefore do not consider it to be manifestly unjust to require you to spend 17 years in prison before being eligible to apply for parole.

[33] Although Ms Gray acknowledged that personal circumstances rarely displace the s 104 presumption, she submitted that the circumstances of this case warrant an exception. Ms Gray's submission that the imposition of a 17-year MPI is manifestly unjust, however, was predicated on this Court accepting her argument that the correct notional MPI was 14 years' imprisonment. In that event, she submitted, the imposition of a 17-year MPI would be grossly disproportionate, and manifestly unjust and that a 14 year MPI should be imposed instead.

[34] Given that we have rejected Ms Gray's submission that the notional MPI adopted by the Judge was excessive, it is not necessary for us to consider the issue of manifest injustice in any detail. Ms Gray appeared to accept that, if the appropriate notional MPI were 16 years and three months' imprisonment (as the Judge found), imposition of the statutory MPI of 17 years' imprisonment would not be manifestly unjust.

[35] As we have noted previously, the ultimate question is whether, as a matter of overall impression, the case falls outside the scope of the legislative policy that murders of the most serious nature must receive a minimum term of at least 17 years.[29] The injustice must be clear, as the use of "manifestly" requires.[30]

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29 *R v Williams*, above n 3, at [66].
30 *R v Rapira*, above n 6, at [121].

[36] Comfort was very vulnerable due to her age (18 months), her medical condition, and the "systematic physical abuse and neglect" that occurred in the months leading up to the murder.[31] The offending was serious and involved elements of cruelty and callousness. This is not a case where s 104 was engaged only peripherally or where Ms Thompson's culpability was at the lower end of the range of cases falling under s 104. As this Court observed in *R v Leuta*:[32]

> [80] Of course child homicides often occur in complex relational and domestic situations. They bear upon the offender frequently to evoke sympathy and mitigate the offending. They are to be taken into account for sentencing. But they should not cloud the essential fact that the violent, cruel and brutal treatment of a defenceless and vulnerable child, to whom there are duties of trust and responsibility, constitutes conduct of grave criminality and, where death ensues, the sentencing task is in respect of a very serious crime.

[37] It is not in dispute that Ms Thompson comes from a very disadvantaged background, and that there is some causal nexus between this and the offending. In the overall circumstances of this case, however, Ms Thompson's personal circumstances are not sufficient to displace the mandatory minimum period of 17 years' imprisonment. The Judge was correct to find that the imposition of the statutory MPI of 17 years' imprisonment was not manifestly unjust in all the circumstances.

Result

[38] The appeal is dismissed.

Solicitors:
Crown Solicitor, Rotorua for Respondent

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31 Judgment under appeal, above n 1, at [34].
32 *R v Leuta* [2002] 1 NZLR 215 (CA).