IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA758/2018
[2020] NZCA 179

BETWEEN	SAINEY MARONG Appellant
AND	THE QUEEN Respondent

Hearing:	22 April 2020
Court:	Brown, Gilbert and Dobson JJ
Counsel:	C M Ruane for Appellant P A Currie and S J Mallett for Respondent
Judgment:	22 May 2020 at 12.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal out of time is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Dobson J)

[1] On 23 February 2018, after a trial in the High Court at Christchurch, the appellant (Mr Marong) was found guilty of the murder of a Christchurch sex worker, Renee Duckmanton. On 20 April 2018, the trial Judge, Mander J, sentenced Mr Marong to life imprisonment and imposed a minimum period of imprisonment (MPI) of 18 years.[1]

[1] *R v Marong* [2018] NZHC 748.

[2] Initially, Mr Marong pursued an appeal against his conviction. He represented himself in that appeal, which was dismissed on 28 November 2018.[2]

[3] The present appeal against sentence was filed on 10 December 2018, almost seven months out of time. Mr Marong has deposed in an affidavit that he was confused about the procedure that applied to such appeals, and was having difficulty obtaining legal representation.

[4] Leave to bring the sentence appeal out of time is not opposed by the Crown. Given some of the points raised in criticism of the sentencing Judge's application of s 104 of the Sentencing Act 2002 (the Act), we consider it is in the interests of justice to grant leave for the appeal to be brought out of time, and accordingly so order.

The circumstances of the offending

[5] On the evening of 14 May 2016, CCTV footage shows Mr Marong picking up Ms Duckmanton from a central Christchurch street where she was working as a sex worker. He drove her to the outskirts of Christchurch. Over an hour after he had picked her up, Ms Duckmanton's mobile phone was disconnected from the telecommunications network. The Judge's analysis of the facts reflected a belief that, around that time, Mr Marong murdered Ms Duckmanton in the back of his car by strangling her.

[6] Mr Marong left Ms Duckmanton's body in the boot of his car until the following day, when he disposed of her semi-naked body on the side of a rural Canterbury road. He doused the body with petrol and set her on fire. A post-mortem established that intercourse had occurred. There was an issue as to whether intercourse occurred before or after the victim died, but in the absence of proof on the point, the Judge put it to one side.

[7] Police investigations into internet searches undertaken by Mr Marong over a substantial period prior to the murder revealed various enquiries about matters such as how to kill a person with bare hands, the use of chloroform to stupefy a victim,

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2 *Marong v R* [2018] NZCA 531.

disposal of bodies by fire, and also about the circumstances of previous murders of sex workers in Christchurch.

[8] Whilst on remand in custody prior to trial, Mr Marong made comments to prison officers to the effect that the killing was like "hunting in the wild" and, presumably speaking of sex workers, "they're slaves and she met the criteria". He also acknowledged that the victim had not deserved her murder and that she was innocent.

[9] At trial, Mr Marong claimed that he and Ms Duckmanton had consensual sex in his car, following which she asked to be taken back to Christchurch but he wanted to proceed with his original intention of taking her to a friend's house. He claimed to have become agitated, and impulsively responded by compressing her neck to silence her. He claimed he did not know what he was doing. The Judge rejected that explanation, observing that he was sure the jury had also rejected it.[3]

The analysis on sentencing

[10] Mander J dismissed any prospect that imposing a sentence of life imprisonment would be manifestly unjust. His analysis instead focused on whether the criteria in s 104 of the Act applied, so as to require an MPI of 17 years or more. That section provides:

> **104 Imposition of minimum period of imprisonment of 17 years or more**
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> (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
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> (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
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> (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or

[3] *R v Marong*, above n 1, at [6].

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

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

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

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

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

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

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

(i) in any other exceptional circumstances.

(2) This section does not apply to an offender in respect of whom an order under section 86E(2)(b) or (4)(a) or 103(2A) is made.

[11] On the prospect of the murder having involved calculated or lengthy planning,[4] the Judge cited the diverse internet searches Mr Marong had made in the weeks and months leading up to the murder, which the Judge saw as being consistent with the features of the killing. This included internet searches for:

(a) sex workers in Christchurch and information regarding previous murders of Christchurch prostitutes;

(b) information on chemicals used by kidnappers, including information about chloroform and where to get it; and

(c) information on "how to kidnap a girl".

In addition, he had accessed sites on how to kill with bare hands and dozens of pornographic videos depicting necrophilia.

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4 Sentencing Act 2002, s 104(1)(b).

[12] All of this led the Judge to conclude that Mr Marong had been fixated with the idea of abducting and killing a Christchurch prostitute. Mr Marong had admitted to following a Christchurch sex worker on an earlier occasion in pursuit of a stated desire to kill one.

[13] The Judge acknowledged steps taken to conceal the offending, including using two vehicles, lying to associates so that they would unwittingly provide him with assistance, the burning of the victim's body and the cleaning of the vehicle in which her body had been stored. Although potentially reflective of planning, the Judge accepted that these steps might equally have been taken in reaction to the death after he had killed the victim, so were discounted in his assessment of the extent of premeditation.

[14] The Judge was left unsure as to whether the evidence of Mr Marong's activities prior to the murder qualified as calculated or lengthy planning. However, the Judge considered it unnecessary to make a definitive finding on the presence of that feature, because he considered the circumstances of the murder were of an exceptional nature.[5]

[15] The Judge found that the murder had been committed with a high level of brutality, cruelty, depravity or callousness.[6] He acknowledged that death by strangulation had been achieved without a weapon and without there being evidence of a prolonged attack. However, the Judge still considered it to be a particularly callous and cruel murder. It was cold-blooded, with the choice of strangulation as the mode of killing likely being a premeditated one, consistent with a depraved motivation to kill a sex worker. Ms Duckmanton had been targeted by virtue of her occupation. The Judge cited Mr Marong's treatment of the body in leaving her in the boot of his car until the following evening, then dumping her and setting her semi-naked body on fire, as evidencing a cruel disregard for the victim that was consistent with, and elevated, the callousness of the circumstances of the murder itself.

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5 Section 104(1)(i).
6 Section 104(1)(e).

[16] As to the vulnerability of the victim,[7] the Judge noted that she weighed 48 kilograms and measured approximately 150 centimetres in height. She suffered from cerebral palsy, which limited the movement down the left side of her body. When added to her inherently vulnerable predicament as a young woman working alone at night on the street as a sex worker, these physical limitations were assessed by the Judge as rendering her even more vulnerable.

[17] On the other exceptional circumstances contemplated in s 104(1)(i), the Judge observed:[8]

> [24] Whatever reservations there may be regarding aspects of the particular statutory circumstances listed in the Act, any one of which by itself may trigger the presumptive imposition of a minimum period of imprisonment of at least 17 years, I consider the combined circumstances of your offending are exceptional and fall well inside the scope of the legislative policy that attracts such a minimum term.

[18] The Judge then continued:

> [25] It is an inescapable conclusion that your murder of Ms Duckmanton was the manifestation of an apparent depraved need to target a sex worker for the purpose of killing that woman to meet some sexual ambition. It cannot be established whether you succeeded in that regard, however, it is apparent this was your motivation. On this night, you carried through with a crime that you had been contemplating for some time, at least to the point of committing a coldblooded killing. The calculated nature of the offending and the insight obtained from your subsequent disclosures demonstrate the callous disregard you had for your victim.
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> [26] Your subsequent actions after the murder show you were devoid of any empathy for Ms Duckmanton. …

[19] On the basis of this reasoning, the Judge was satisfied that s 104 was engaged. After reflecting on Mr Marong's personal circumstances and finding there were no mitigating factors, the Judge determined an MPI of 18 years was justified.

Arguments on appeal

[20] In his written submissions in support of the appeal, Mr Ruane submitted that the Judge had erred in finding any of the s 104 features to be present. He argued that

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7 Section 104(1)(g).
8 *R v Marong*, above n 1.

the extent of features such as callousness and depravity, and the vulnerability of the victim, had been overstated and that the circumstances up until the death of the victim did not take this beyond the seriousness of "ordinary" murders. Mr Ruane submitted that the Judge had wrongly attributed relevance to steps taken by Mr Marong after the victim was dead in considering whether s 104(1) features were present. Further, that the Judge had double-counted conduct that ought only to have been taken into account in considering whether one feature was present.

[21] In oral argument, Mr Ruane was inclined to concede that at least one of the s 104 features was present, so that the mandatory requirement for an MPI of 17 years was triggered. However, he maintained his criticism that the Judge's approach to assessing the presence of s 104 features was wrong or inappropriate. He further maintained that the Judge had not provided reasoning for increasing the MPI from 17 to 18 years. The outcome contended for was a reduction in the MPI to 17 years.

[22] The written submissions for the Crown emphasised that it is the correctness of the end sentence that must be the ultimate determinant in such an appeal. Criticisms of steps in the Judge's reasoning cannot avail an appellant unless they lead to the wrong result.

[23] On the presence of s 104(1) features, it was submitted for the Crown that calculated or lengthy planning did not have to be sophisticated, but rather there had to be planning to a heightened degree. It was submitted that the diverse range of internet searches undertaken by Mr Marong, and his acknowledged trailing of another sex worker on an earlier occasion in pursuit of his desire to kill a sex worker, satisfied the requirements for that feature. They amounted to active research on how to kidnap, how to kill and how to avoid detection, in circumstances where the murder was carried out in a manner consistent with the preparatory research.

[24] As to whether the murder was committed with a high level of brutality, cruelty, depravity or callousness, the Crown cited previous decisions of this Court confirming that an assessment of whether this feature is present can take into account the

offender's conduct after the death of the victim.[9] The Crown submitted that the murder was indeed committed in a callous manner, which was aggravated by leaving the victim's body in the boot of a car for a day, dumping it on the side of a rural road semi-naked and dousing it with petrol in an attempt to avoid detection. Added to this were Mr Marong's comments to prison officers about the killing whilst he was on remand. The Crown submitted that his course of conduct before, during and after the murder qualified as a high level of callousness.

[25] As to the level of the victim's vulnerability, the Crown submitted she was particularly vulnerable by virtue of her occupation and physical limitations caused by her cerebral palsy. At the hearing, Mr Mallett, who presented submissions for the Crown, conceded that Mr Marong may not have been aware of the victim's cerebral palsy during the encounter. Nonetheless, the Crown maintained its submission that her occupation as a sex worker required her to trust customers. In this case, agreeing to get into Mr Marong's car and travel a distance with him, when added to her very slight stature, meant she presented as a particularly vulnerable victim.

[26] The Crown submitted that the Judge's analysis of the extent to which s 104(1) features were present amply justified the increase of one year above the mandatory 17 year MPI.

Analysis

[27] We have concerns with two aspects of the Judge's analysis on sentencing. First, the Judge's comments at [24] of the sentencing notes (quoted at [17] above) suggest that individual features of an offender's conduct that are inadequate to make out the presence of one of the features specified in s 104(1) may nonetheless be cumulatively assessed to constitute the residual feature of "exceptional circumstances" specified in s 104(1)(i). If the Judge intended to adopt such an analysis, then we consider it would be in error.

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[9] *R v Frost* [2008] NZCA 406 at [40]; and *Akash v R* [2017] NZCA 122 at [21]. The Crown also submitted the approach here was consistent with other High Court analyses of s 104 in *R v Korewha* [2015] NZHC 308; *R v Davies* [2017] NZHC 729; and *R v Carroll* [2017] NZHC 2691.

[28] The consequences of the s 104 threshold being met are grave. With the limited exception of cases where it would be manifestly unjust to do so, the mandatory consequence is that an offender will be sentenced to an MPI of not less than 17 years. Parliament has defined the relevant features so that the threshold is triggered either in specifically defined circumstances such as the killing of a constable,[10] where the murder is part of a terrorist act,[11] or where the offender's conduct of an aggravating type is present to a high level. That is, a clear margin above the extent to which such features are likely to ordinarily arise in the course of a murder. The planning must be calculated or lengthy, the brutality, cruelty, depravity or callousness must be to a high level, or the victim must be particularly vulnerable. Whilst some aspects of the offender's conduct may qualify as behaviour going to more than one of the features, the level to which such features are present must be measured individually. For instance, a moderate level of planning could not be transformed into a high level of planning by a finding that it reflected a callous attitude by the offender.

[29] Equally, the other exceptional circumstances in s 104(1)(i) cannot be made out by the presence of low or moderate levels of other aggravating conduct not present at a sufficient level to trigger one or more of the previously specified features of the offending.

[30] Turning to the analysis of whether any of the s 104(1) features were present here, we are satisfied that Mr Marong's planning qualifies as calculated or lengthy. As this Court observed in *Kaur v R*, planning is not required to be competent or sophisticated to qualify as planning for the purposes of s 104(1)(b), but must be present to a heightened degree, either because of the period of time or because of the degree of thought that has gone into it.[12] The scope and extent of internet searches on matters relevant to how Mr Marong could kill a Christchurch sex worker and then attempt to avoid detection qualify as both calculated and lengthy planning. Among other relevant topics, he had researched in some detail:

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10 Sentencing Act, s 104(1)(f).
11 Section 104(1)(ea).
12 *Kaur v R* [2017] NZCA 465 at [49].

(a) how killing without use of a weapon could occur;

(b) how to stupefy a victim;

(c) internet articles about the circumstances of previous killings of Christchurch sex workers;

(d) the capabilities of CCTV footage; and

(e) the ability to monitor the location of cell phones from transmission towers.

[31] Accordingly, planning was present to a heightened degree.

[32] As to the level of callousness, Mr Ruane submitted that the wording of s 104(1)(e) required this assessment to stop at the point the murder was committed. The wording of subs (1)(e) arguably supports that interpretation. However, we adopt the approach to this assessment reflected in earlier appeal decisions cited by the Crown. In *Frost*, the offender helping himself to food from the refrigerator of the just-murdered victim was included in the assessment of the level of callousness of the murder.[13] In *Akash*, the offender's dumping of the victim's body on a roadside was included in the assessment of the relative level of callousness that was present in the offending.[14]

[33] Here, the evidence includes research and planning before the event, and closely linked conduct in disposing of the body to attempt to avoid detection. Accordingly, the sequence of events constitutes a course of conduct, and an assessment of the level of callousness can appropriately extend to the offender's conduct and statements after the killing. Dumping a young woman's semi-naked body on the roadside, dousing it with petrol and setting it alight, when seen in light of the manifestly callous comments made to prison officers, reflects Mr Marong's state of mind in carrying out the killing. We are satisfied that the s 104(1)(e) feature was also present in this case.

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13 *R v Frost*, above n 9.
14 *Akash v R*, above n 9.

[34] As to the level of vulnerability of the victim,[15] Mr Ruane submitted that any extent of increased vulnerability on account of her cerebral palsy could not be counted against Mr Marong in the absence of evidence that he was aware of it. The Crown's written submissions analysed the extent of the victim's vulnerability objectively, without regard to any extent that her impairments would not have been apparent to Mr Marong at the time of the killing.

[35] This Court appears not to have considered whether the assessment of the extent of a murder victim's vulnerability is to be undertaken objectively, reflecting all relevant circumstances of the victim, or more narrowly by reference only to the aspects of vulnerability that were apparent to the offender. The wording of s 104(1)(g) suggests an overall assessment of vulnerability. The wording in this provision may be contrasted with the terms of s 9(1)(g) of the Act where potential aggravating features of the victims of crimes more generally addresses vulnerability with the residual prospect of other factors that could be relevant to vulnerability being confined to those "known to the offender". The absence of that qualification in s 104(1)(g) might suggest that such limitation does not apply.

[36] On the other hand, there is some force in Mr Ruane's point that the features listed in s 104(1) of the Act are to enable an assessment of the level of a murderer's culpability and, given the consequences, culpability should not be increased by circumstances not known to the murderer at the time.

[37] This point of interpretation was not fully argued before us. A determination on it should await an appeal in which it is. Accordingly, our cautious approach is to exclude Ms Duckmanton's cerebral palsy condition in the assessment of the extent of her vulnerability.

[38] Ms Duckmanton was more vulnerable than other sex workers on the street in Christchurch because of her very small physical stature. In agreeing to get into Mr Marong's car and leave the street where she was working, she was necessarily trusting that he would comply with whatever terms had been discussed for consensual sexual activity between them. She assumed the risk that she could trust him to that

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15 Sentencing Act, s 104(1)(g).

extent, but that does not lessen the vulnerability of the predicament she found herself in shortly thereafter. We consider the combination of the inherent vulnerability of her predicament, when added to her unusually small physical stature, did render her a particularly vulnerable victim.

[39] It follows that the Judge was clearly justified in finding that s 104(1) applied. We acknowledge that by the end of argument, Mr Ruane had conceded that point.

[40] The second aspect of the sentencing analysis that is of concern is the absence of explicit reasoning as to whether an MPI of more than 17 years was required.

[41] There is some merit in the submission for the Crown that the extent of the Judge's analysis of facts going to the s 104(1) features contained sufficient detail to make out the need for an increase above the mandatory 17 year MPI. However, we consider the analysis is incomplete without reasoning identifying why, once s 104(1) applies, the mandatory MPI of 17 years was inadequate and the one year increase was justified.

[42] Although not essential, it is an exercise likely to be better informed by reference to the circumstances of other similar sentencings. The Crown submissions on appeal did not include reference to any comparable sentencings, but rather contended that once the Court confirmed that s 104(1) applied, an 18 year MPI could not be characterised as manifestly excessive.

[43] Section 104 applies when any one of the features in subs (1) is found to be present. Here, we have found that three of the features were present, leading to the consideration of whether the statutory MPI of 17 years is adequate. We agree with the sentencing Judge that the extent to which the s 104(1) features were present warrants an uplift.

[44] In *R v Baker*, this Court held that the presence of three respects in which s 104 was engaged indicated that a higher starting point MPI than 17 years was appropriate.[16] Since that appeal, this Court has also upheld MPIs of 19 years in

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16 *R v Baker* [2007] NZCA 277 at [23].

a number of appeals involving murders of former partners where more than one s 104(1) feature was present.[17]

Result

[45] The assessment of the appropriate MPI requires consideration of all the individual circumstances, including the extent to which s 104(1) features were present. We are satisfied that the extent to which Mr Marong undertook planning for the murder, the callousness of the way he went about it including his conduct after the killing, and the particular vulnerability of his small and defenceless victim, justified an additional year beyond the 17 year MPI set by s 104. We are not persuaded that the Judge erred in setting that level of MPI.

[46] The appeal is dismissed.

Solicitors:
Crown Solicitor, Christchurch for Respondent

[17] *Singh v R* [2019] NZCA 436, which included a review of numerous potentially comparable sentencings at [19]–[26].