IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA430/2018
[2019] NZCA 528

BETWEEN	SILAPEA MOMOISEA Appellant
AND	THE QUEEN Respondent

Hearing: 11 September 2019

Court: Courtney, Duffy and Wylie JJ

Counsel: R J Stevens and R T Nye-Wood for Appellant
A J Ewing for Respondent

Judgment: 1 November 2019 at 11 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Duffy J)

[1] Silapea Momoisea took a large carving knife to the place where her former partner was living with his newly wedded wife. Ms Momoisea hid in the darkened room and when he entered with his wife Ms Momoisea stabbed him seven times and his wife twice. She managed to escape and survive the attack, but he did not. He died at the scene.

[2] Ms Momoisea was charged with the murder of her former partner and attempted murder of his wife. She pleaded guilty and following conviction on the murder charge she was sentenced to life imprisonment with a minimum period of imprisonment (MPI) of 14 and a half years.[1]

[3] She now appeals against the length of the MPI. She also seeks leave for an extension of time for filing the appeal as it was filed one day out of time. There was no opposition to the extension being granted and we are satisfied we should do so.

Relevant facts

[4] Ms Momoisea is a 44-year-old Samoan woman and the mother of five children from a previous marriage. She had been in an intimate relationship with the deceased victim for approximately four years. They worshipped in the same church. He had an earlier relationship with a woman in Samoa with whom he had a daughter. Sometime during the course of his relationship with Ms Momoisea, the deceased returned to Samoa for a visit. He reconnected with the mother of his daughter and they married. He returned to New Zealand and later his wife and daughter came to New Zealand to join him. This led to him ending his relationship with Ms Momoisea.

[5] Ms Momoisea took the ending of her relationship with the deceased badly. On the weekend of the 24 June 2017, she told her daughters the relationship had ended and why. She was upset and told her daughter she would kill the deceased because he had hurt her and if he did not die she would kill herself. Her family did not take the threats seriously.

[6] On the morning of 26 June 2017, together with her daughter and grandchildren, Ms Momoisea left home taking a large knife with her. She and her daughter took the children to school and then Ms Momoisea went on alone to the deceased's address, but he was not home. She went to the town centre where she encountered the wife of her pastor to whom she told her plans. The pastor's wife told her husband and other associates of the deceased. Not one of them took the threats seriously.

---

1 *R v Momoisea* [2018] NZHC 1577 [Sentencing notes] at [59]–[60].

[7] Ms Momoisea returned home. Her son was present, he opened her bag and found the knife. He told her to think of her grandchildren and not to hurt the deceased. However, at approximately 4 pm, Ms Momoisea returned to the deceased's home with a large kitchen knife concealed this time under her clothing. Once there, she encountered an associate of the deceased who told her to leave but she refused to do so, saying she would leave once she had finished her cigarette.

[8] The associate then left but Ms Momoisea remained. For two hours she texted the associate saying she would wait for the deceased until 10 pm. She sat in the garage with the lights turned off. Around 6.50 pm, the deceased and his wife returned to their home. Ms Momoisea saw them and positioned herself inside the garage in such a way that as the deceased entered, she lunged at him with the knife stabbing him once in the chest. They came apart and Ms Momoisea turned to attack the wife who received two stab wounds to her upper chest. She ran away to get help. Ms Momoisea turned back to the deceased, stabbed him again, he fell to the floor and she continued to stab him. He tried to stand, but was unable to right himself. Ms Momoisea dropped the knife, took the deceased's cell phone and left the property on foot.

[9] As she walked along the streets she discarded bloodstained clothing. At about 7.02 pm she telephoned her family and they came to collect her. She went to an address where she showered, relayed her actions to her daughter and explained that she had been in such pain but now the deceased was dead all her pain was gone. Ms Momoisea then went to another address where other items of her clothing were destroyed. Later that evening the Police contacted her by telephone and she surrendered to them shortly thereafter.

[10] The deceased received seven stab wounds to his chest, back and upper arms. The fatal wound penetrated his heart and liver. The other victim received two wounds to her upper chest, one of which pierced her heart and required emergency corrective open-heart surgery to replace the mitral valve.

[11] Ms Momoisea made full admissions to the Police at an interview. She said she had felt very angry and wanted to kill the deceased because he had been using her and

taking her money. She also said that her intention had been to do the same to the deceased's wife once she had finished with him.

[12] She had no previous convictions.

Grounds of appeal

[13] Section 102(1) of the Sentencing Act 2002 (the Act) required Ms Momoisea to be sentenced to life imprisonment, unless the Court was satisfied that sentence would be manifestly unjust, which it was not.[2] The nature of her offending triggered s 104 of the Act which requires the court to impose an MPI of at least 17 years unless, again, it was satisfied that it would be manifestly unjust to do so. The application of s 104 is not disputed, which is understandable since the murder involved Ms Momoisea's unlawful presence in her former partner's dwelling place and the attempted murder of another person, who was fortunate to survive her injuries.[3]

[14] Whilst the reduction of the statutory minimum to 14 and a half years shows the Judge was satisfied it would be manifestly unjust to impose a higher MPI, Ms Momoisea contends the Judge erred in his assessment and should have imposed a lower MPI. The alleged errors are said to be due to the Judge giving insufficient credit for mitigating personal factors and for the guilty plea. Those personal mitigating factors are said to be the circumstances leading to the offending, the cultural factors and sanctions, and the difficulties Ms Momoisea will face while serving a sentence of imprisonment.

Approach to appeal

[15] Section 105 of the Act provides that for the purposes of pt 6 of the Criminal Procedure Act 2011, an MPI is a sentence. An offender's right to appeal a sentence is found in s 244 of the Criminal Procedure Act, which is in pt 6 of that Act. It flows from this that an appeal against the imposition of an MPI is an appeal against sentence, and as such is treated as a general sentence appeal. Accordingly, the appropriate approach on appeal is found in s 250 of the Criminal Procedure Act, which provides

---

2 At [20].
3 Sentencing Act 2002, s 104(1)(c) and (d).

that the court must allow the appeal if satisfied that there is an error in sentence and a different sentence should be imposed.[4]

Discussion

[16] Once the offending is seen to fall within the scope of s 104, the sentencing judge is required to impose an MPI that is not less than 17 years providing that sentence is not manifestly unjust.[5] In *R v Williams* this Court found that the MPI that is imposed must be justified having regard to all the circumstances of the case.[6] This was to be done by following a two-stage process, first requiring the sentencing judge to identify the appropriate term of the MPI bearing in mind that the legislative policy for murders which qualify under s 104 must generally be met with a minimum term of 17 years imprisonment.[7] Once the appropriate minimum term is identified, the sentencing judge then moves to the second stage of the process and considers whether imposing the benchmark MPI would be manifestly unjust.[8] This assessment requires the sentencing judge to have regard to what he or she considers to be a just outcome. This may involve consideration of similar cases, an assessment of the relevant aggravating and mitigating factors, personal circumstances and the principles and purposes of sentencing.[9]

[17] In *Williams* this Court found that an MPI of 17 years:[10]

> …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.

[18] In sentencing Ms Momoisea, Downs J followed the two-stage approach set out in *Williams*.[11] The fact an MPI lower than 17 years was imposed shows that Downs J

---

4 Criminal Procedure Act 2011, s 250(2).
5 Sentencing Act, s 104(1).
6 *R v Williams* [2005] 2 NZLR 506 (CA) at [52]–[53].
7 At [52] and [76]; approved in *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [90].
8 At [54].
9 At [55]–[57].
10 At [67].
11 Sentencing notes, above n 1, at [28]–[34].

adopted a benchmark MPI of 17 years and then considered departure from that benchmark was warranted.

[19] We consider the Judge's methodology and the considerations that he took into account led to an appropriate outcome. First, we consider that given the circumstances of this offending it would have been open to the Judge to adopt a higher benchmark than he did. It is settled that where more than one aggravating feature is engaged under s 104(1), a starting point exceeding the 17 year minimum may be appropriate.[12] The nature of the deliberate attack, which only by chance resulted in one death, could have attracted a benchmark of twelve to eighteen months higher than that chosen by the Judge.[13] As to the reductions we are satisfied the Judge paid sufficient regard to personal mitigating factors and the guilty plea.

Provocation

[20] Ms Momoisea contends that the circumstances leading to the offending show she was provoked and that the Judge, relying on *Hamidzadeh v R*, set the threshold for recognition of provocation too high.[14] We disagree.

[21] *Hamidzadeh* was an appeal against a life sentence for murder in circumstances where, one hour after listening to a recording that revealed his wife having sexual intercourse with another man who lived in the same apartment as the couple, Mr Hamidzadeh fatally stabbed the man, who was then asleep, wounding him multiple times.

[22] Mr Hamidzadeh contended first that he came within the exceptional circumstances provision of s 102 and therefore he should not have received a sentence of life imprisonment; and secondly that if a life sentence was appropriate, then he should not have received the 17 year MPI imposed by s 104.[15] This Court rejected both arguments and in doing so identified relevant considerations that can generally assist in determining whether provocation should reduce culpability for sentencing

---

12 *R v Baker* [2007] NZCA 277 at [23].
13 See for example *Thurgood v R* [2012] NZCA 23 at [24]–[26]; *R v Smith* [2013] NZHC 2782 at [23]; and *R v McLean* [2017] NZHC 3183 at [25].
14 Sentencing notes, above n 1, at [42]; citing *Hamidzadeh v R*, above n 7.
15 *Hamidzadeh v R*, above n 7, at [33]–[35].

purposes. These considerations include: loss of control; the nature, duration and gravity of the provocation; the timing of the response; whether the response was proportionate to the provocation; whether the provocation was an operative cause of the offender's response; and whether the offending occurred through fear rather than anger.[16] *Hamidzadeh* recognised that matters relevant to the offender might include mental or intellectual impairment or having previously suffered physical or sexual abuse.[17] Recognition was also given to the need for general deterrence in cases of domestic violence which result in death.[18]

[23] Much of what was said about provocation in *Hamidzadeh* related to the circumstances when provocation may displace the statutory preference in s 102 for life sentences for murder, however, the Court recognised that the same considerations may also influence the assessment under s 104 as well.[19]

[24] *Hamidzadeh* involved sentence appeals by both Mr Hamidzadeh and the Solicitor-General. Mr Hamidzadeh had been sentenced to life imprisonment with an MPI of 12 years and six months.[20] This was arrived at through receiving a two-year reduction to allow for provocation, a one-year reduction to allow for personal factors and an 18-month reduction for his guilty plea.[21] This Court dismissed Mr Hamidzadeh's appeal and allowed the appeal of the Solicitor-General; the reductions for provocation and personal circumstances were found to be wrong.[22] The reduction for the guilty plea was not challenged by either party and this Court agreed that it was appropriate.[23] Accordingly, the MPI was increased to 15 years and six months.[24]

[25] When the circumstances of Mr Hamidzadeh's offending are compared with those of Ms Momoisea, we see no basis for making any allowance for provocation. Here there was less reason for attributing the culpable conduct to a loss of control

---

16 At [60]–[63].
17 At [63].
18 At [67].
19 At [73].
20 At [32].
21 At [31]–[32].
22 At [85]–[86] and [92].
23 At [89].
24 At [91].

than was the case in *Hamidzadeh*. Ms Momoisea had far more time than Mr Hamidzadeh did to think about the consequences of her actions. She told others of her plans to kill the deceased two days before they were carried out. Whilst some did not take her threat seriously others, such as her son, warned her against taking such action and the man who was present when she first arrived at the deceased's home told her to leave. Had she listened to the advice of those persons the incident would not have happened.

[26] Both *Hamidzadeh* and the present case involved violent armed attacks on a vulnerable victim. In *Hamidzadeh* the victim was sleeping, whereas here the deceased entered a dark room and was immediately attacked by someone who had been there for some time and whose vision would therefore have been adjusted to the poor visibility. He would have been taken by surprise and would have had little opportunity, if any, to defend himself.

[27] We affirm the view expressed in *Hamidzadeh* that an angry and emotional response to the end of a relationship might be understandable, but this does not justify the use of violence, especially with fatal consequences.[25]

[28] Ms Momoisea also relied on the decisions of this Court in *R v Suluape* and *R v Fate* which involved in the first case a Samoan woman and in the second case a woman from Nanumea, which is one of the islands of the Tuvalu Group, killing their respective partners, each of whom had been unfaithful.[26] Ms Momoisea tried to draw an analogy between the circumstances of her offending and those in the other cases. However, this cannot be done. In those cases, both appellants stood trial for murder, were acquitted of that charge by a jury and found guilty of manslaughter because the defence of provocation was then available to them. The impact of provocation on their culpability, and the sentencing regime that was applicable to them, was quite different from present law.

[29] It follows that we find the Judge was right not to reduce the MPI for provocation.

---

25 At [68].

26 *R v Suluape* (2002) 19 CRNZ 492 (CA); and *R v Fate* (1998) 16 CRNZ 88 (CA).

Other personal circumstances

[30] Regarding Ms Momoisea's personal circumstances, the Judge made allowance for Ms Momoisea's prior good character and the cultural dimensions which had engaged the Samoan traditional cultural response of ifoga and banishment.[27] Ms Momoisea contends she should have received a greater allowance. She also contends that the difficulty she will experience in serving a sentence of imprisonment given English is her second language is another personal factor that should have been allowed for. We reject these arguments.

[31] As in *Hamidzadeh*, we consider that previous good character and language difficulties provide no basis for a reduction in the MPI.[28] We accept that the impact of the Samoan tradition of banishment from her village in Samoa will adversely impact on Ms Momoisea and the effect of the banishment extending to her children and grandchildren will cause her to suffer for having brought this on her family. But in this regard, we consider sufficient allowance was made for those factors in the reduction given by the Judge. As for the cultural custom of ifoga, where members of Ms Momoisea's extended family have paid compensation to the family of the deceased, we see this as a penalty which they have assumed rather than one borne by Ms Momoisea. Accordingly, we consider ifoga required no greater recognition than was given by the Judge.

[32] There was no argument that Ms Momoisea should have received an allowance for remorse. The evidence plainly shows she has no remorse of the kind that would warrant recognition.

[33] It follows that we find the reductions given for personal circumstances were appropriate.

Guilty plea allowance

[34] We now turn to the guilty plea allowance. In *Williams*, this Court maintained the difference in sentencing methodology for life sentences for murder and finite

---

27 Sentencing notes, above n 1, at [56].
28 *Hamidzadeh v R*, above n 7, at [87]–[88].

sentences.[29] Then in *Hessell v R*, the Supreme Court delivered judgment on the approach to be taken to reductions for guilty pleas in finite sentences.[30] In general, an early guilty plea under the *Hessell* rule will attract up to a 25 per cent reduction in sentence.[31] This approach has remained confined to finite sentencing. The Supreme Court in *Hessell* did not address the impact of a guilty plea on MPIs or sentences for murder.

[35] Following *Hessell*, the approach to guilty plea deductions in murder sentencings was revisited by this Court in *Malik v R*, which approved the general position in *R v Williams* and *R v McSweeney* that deductions in s 104 cases are more limited than in 'ordinary' sentencings, and therefore, the full 25 per cent deduction available under *Hessell* is not to be followed.[32]

[36] In *Malik*, this Court gave two reasons for why the deduction in *Hessell* is not applicable to s 104 cases.[33] First, the *Hessell* deduction applies to finite sentences which fix a maximum term of imprisonment after considering all relevant sentencing factors.[34] After one third of that sentence is served the offender will be eligible for parole. In contrast, an MPI increases the time that must be served before becoming eligible for parole, and the statutory criteria to which the judge has regard are much narrower.[35] Secondly, *Hessell* and *Williams* recognise the legislative policy in s 104 is intended to limit the credit that may be given for mitigating factors, including guilty pleas, when applying the manifest injustice step.[36] If the full *Hessell* discount were to be applied, the legislative policy would require the starting point of MPIs to be revisited and increased.

---

29 The judgment in *Williams* was given on two appeals by the Solicitor-General which raised questions concerning the application of the Sentencing Act to sentencing for murder: see *R v Williams*, above n 6, at [1].
30 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
31 At [73]–[77].
32 *Malik v R* [2015] NZCA 597 at [35]–[36]. *R v Williams*, above n 6; and *R v McSweeney* [2007] NZCA 147 at [8]–[11].
33 *Malik v R*, above n 32, at [35].
34 At [35].
35 At [36].
36 At [37].

[37] To date, *Malik* has been cited with approval by this Court on five occasions.[37] We see no need to adopt a contrary approach. Ms Momoisea has not advanced any arguments that would persuade us to do otherwise.

[38] The 18-month deduction applied by Downs J is consistent with the reasoning in *Malik* and the cases which follow its approach. Moreover, we are satisfied that when the overall sentence is viewed in its entirety there is nothing manifestly unjust about the MPI imposed in this case.

[39] It follows that the appeal is dismissed.

Result

[40] The application for an extension of time to appeal is granted.

[41] The appeal is dismissed.

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Law Office, Wellington for Respondent

---

[37] *Akash v R* [2017] NZCA 122 at [15]; *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [76]; *Cummings v R* [2016] NZCA 509 at [96]*; R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [42]; and *Lackner v R* [2016] NZCA 29 at [7].