IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA441/2016
[2023] NZCA 53

BETWEEN	JIAXIN TU Appellant
AND	THE KING Respondent

Hearing:	17 August 2022 with supplementary submissions on 19 and 26 September 2022 and 7 and 9 February 2023
Court:	Katz, Wylie and Palmer JJ
Counsel:	R M Mansfield KC and B M Gloyn for the Appellant J E L Carruthers for the Respondent
Judgment:	13 March 2023 at 11:00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] In 2016, Mr Jiaxin Tu, now aged 43, was convicted of murder and sentenced to life imprisonment with a minimum period of imprisonment (MPI) of 12 years.[1] On 30 October 2019, this Court dismissed his appeal against conviction.[2] Mr Tu now

1 *R v Tu* [2016] NZHC 1780 (Whata J).
2 *Tu v R* [2019] NZCA 632.

appeals his sentence on the ground that his mental disorders, including his autism spectrum disorder (ASD), make the presumption of life imprisonment manifestly unjust. He appeals the imposed MPI on the same ground.

[2] We consider the High Court squarely and carefully addressed whether life imprisonment of Mr Tu would be manifestly unjust because of his mental health disorders, including his ASD. The Judge fairly considered the clinical consensus was that Mr Tu was affected by his mental health disorders at the time of his offending. Mr Tu knew what he was doing was wrong and still chose to kill, so his mental health did not absolve him of culpability. His risk to others was relevant to sentencing. His mental health, including his ASD, was insufficient to displace the presumption of life imprisonment for murder. The High Court's imposition of an MPI of 12 years is consistent with the relevant case law and is appropriate. We dismiss the appeal.

What happened?

Mr Tu

[3] In 2000, at the age of 20, Mr Tu emigrated from China to New Zealand with his family. He attended the Manukau Institute of Technology for seven years studying English before enrolling in a computing and business diploma and eventually completing a degree in business network engineering in 2006. He was unable to find permanent employment after graduating.

[4] Mr Mansfield KC, for Mr Tu, submits that he has had a long tendency to become obsessed with various women in his life. Around 2010 to 2011, 12-year-old C and her family moved to the house next door to Mr Tu and so began his "unhealthy interest" in her.[3] His fixation continued through to the date of his offending. He has been described by psychological report-writers as having a highly dysfunctional, intermittent, and intimate relationship with her during this time.

[5] Mr Tu has a complex history of severe mental illness. Drawing on the psychological and psychiatric reports before the Court, it seems that Mr Tu's first

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[3] *Tu v R* HC Wellington CRI-2015-004-6670, 31 May 2016 (Opening to jury of Whata J) at [39].

interaction with psychiatric services was in 2007 at the age of 27. He was admitted to mental health services under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act) following assaults on his mother and girlfriend, sleeping and defecating around the home, and expressing delusions that he was God and the creator of the universe. He was diagnosed as suffering from "psychosis not otherwise specified". From 2008 to 2014, he received treatment and assessments in New Zealand and Australia at various times, including admission to New Zealand mental health inpatient services in 2014. In 2014, Mr Tu's ability to cope in the community began to deteriorate and this continued to worsen in 2015, with anxiety and chronic grandiose beliefs. He breached a trespass order in relation to C and his behaviour was described as a risk to himself and others. Records suggest he showed signs of improvement through to the beginning of June after which his mental health declined.

[6] It was around this time that Mr Tu first met Mr Hawe-Wilson. At trial, there was evidence that, on 19 June 2015, Mr Tu had gone to see C while she was with Mr Hawe-Wilson and some other friends. C and Mr Hawe-Wilson had asked him to bring them alcohol and cannabis. At some point, Mr Hawe-Wilson tipped a can of alcohol over Mr Tu's head, punched him and kicked him in the head, and then kicked him out of the address. Mr Tu did not fight back. A similar incident occurred on 30 June 2015, immediately preceding the offending at issue here.

The offending

[7] There is no dispute as to the facts of the offending. This Court summarised them in relation to the conviction appeal as follows:

> [3] At the time of the offending on 1 July 2015 Mr Tu was staying at a flat together with Mr Hawe-Wilson and two women. One of the women, C, was in a relationship with Mr Hawe-Wilson. She was 17 at the time, Mr Tu being 36. Mr Tu became obsessed with C. That created tension between the two men. The tension escalated to violence. Two weeks prior to the killing Mr Hawe-Wilson had assaulted Mr Tu.
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> [4] About two days prior to killing Mr Tu came up with a plan to get Mr Hawe-Wilson to leave the flat. He said he would pay Mr Hawe-Wilson $2,000 if he would leave Auckland. Although he had no intention of leaving, on the evening before the killing Mr Hawe-Wilson demanded money from Mr Tu. They argued and Mr Hawe-Wilson again punched Mr Tu.

> [5] After that incident, at about 1.30 am, Mr Tu left the address and walked around the Panmure area on his own. He came across a police patrol car. He told them he had been assaulted. Police had an alert on their National Intelligence Application system for Mr Tu. Consistent with the advice on the alert Mr Tu was told to report to the nearest police station the next day with a family member.
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> [6] When Mr Tu returned to the flat the others were all asleep. Mr Hawe-Wilson and C were in bed in the bedroom. The second woman was asleep in the lounge. Mr Tu took a hammer from inside the address, went into the bedroom and struck the back of Mr Hawe-Wilson's head a number of times. The blows caused massive trauma and killed him. C did not wake up during the incident.
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> [7] Mr Tu then left the bedroom and went into the lounge where he sat for a couple of hours smoking cigarettes. He then went back into the bedroom and climbed into bed between C and the deceased. C said she woke up to find Mr Tu pulling her pants down. She punched and kicked him and told him to get out. She called to Mr Hawe-Wilson for help. It was then she realised he was dead.
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> [8] When spoken to Mr Tu said he killed Mr Hawe-Wilson because he had no choice, "it was him or me". He was admitted to the Mason Clinic displaying clear symptoms of psychosis.
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> …
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> [10] Mr Tu was initially unfit to plead and so unfit to stand trial. However, he responded to treatment at the Mason Clinic. On 3 December 2015 Brewer J, after considering reports from Drs Joseph and Goodwin, concluded that, while Mr Tu was mentally impaired, he was fit to stand trial and ruled accordingly.[4]

Mental health evidence at trial

[8] At trial, Mr Tu argued the defence of insanity applied. During the trial, Whata J heard argument about the availability of the defence of insanity.[5] He considered three expert assessments regarding Mr Tu's fitness to stand trial, from Dr Neena Joseph and Dr Ian Goodwin. He considered reports by Dr Russell Wyness, for Mr Tu, and Dr Peter Dean, for the Crown, on whether Mr Tu was insane for the purposes of the defence. He heard evidence from Professor Graham Mellsop, Ms Tanya Breen, Dr Dean, and Dr Wyness as to whether ASD qualifies as a "disease of the mind" or "natural imbecility". Whata J concluded that ASD in and of itself does not qualify as a "disease of the mind" but acute forms of autism, requiring a case-by-case assessment,

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4 *R v Tu* [2015] NZHC 3045.

5 *R v Tu* HC Auckland CRI-2015-004-6670, 7 June 2016 (Ruling No 3 of Whata J).

may qualify.[6] So whether a defence of autistic insane self-defence (sans psychosis) was available to Mr Tu would need to be examined. The jury heard evidence from 30 witnesses including:

(a) Dr Wyness, concluding that, at the time of the offending, Mr Tu was in such a condition of mind as to render him irresponsible for the act he committed.

(b) Dr Dean, concluding that, at the time of the offending, Mr Tu was aware of the nature and quality of his actions and was capable of knowing their moral wrongfulness.

[9] The jury considered and rejected this defence and found Mr Tu guilty of murder.

High Court sentence

[10] On 2 August 2016, Whata J sentenced Mr Tu.[7] Before sentence, Dr Mhairi Duff assessed Mr Tu. In her report of 29 July 2016, she considered there was clear evidence Mr Tu suffered from major mental illness and noted his schizoaffective disorder diagnosis. While there was no indication of psychopathy, he showed a profound lack of insight into his problems and the mechanisms by which he ended up in his present situation. Dr Duff considered there was evidence of a strong association between Mr Tu's mental health issues and the offending, which could:

> …be considered by the court in support of a contention that a life sentence would be manifestly unjust and consideration of a finite sentence, which would facilitate eventual end of sentence planning with more certainty, might be considered a possible acceptable alternative.

[11] Relevantly, the Judge stated:[8]

> [7] Mr Tu, you are a 36 year old male, well educated and from a stable family environment. But you are unwell. You have been diagnosed with serious mental health disorders, including schizo-affective disorder and Autism Spectrum Disorder (ASD). Over a decade or so the symptoms of your mental

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6 At [97].

7 *R v Tu*, above n 1.

8 Footnotes omitted.

> health disorders have displayed themselves through highly abnormal behaviour; self delusion/ideation (including perceiving yourself as God), grandiose and entitled attitudes, anxiety, hallucinations, lack of empathy and obsessions with young pretty women, including most significantly (and tragically), [C].
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> [8] You have been receiving treatment for your mental health disorders for some time, involving, among other things, periods of hospitalisation, ongoing medication and counselling. In the period leading up to Shane's murder, the notes of your treatment indicate an escalation in erratic and entitled behaviour, coinciding with a number of destabilising factors, including the breakdown in your relationship with your parents, your removal from the family home and substance abuse. It appears the full cause of this behaviour was not diagnosed, there being no recognition at the time of your ASD-like symptoms.
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> [9] There is expert dispute as to the extent of the effect of your mental health disorders on your actions at the time you struck Shane. But the clinical consensus is that you were affected by them. In short, your ability to act with any form of genuine empathy was significantly affected by your distorted perception of Shane's behaviour, self delusion, lack of insight, your obsession with [C] and inflexible or concrete thinking about the relative reasonableness of the options available to you (for example, running away vs. killing Shane). While you knew what you were doing was wrong, these mental health factors plainly contributed to your fatal and subsequent actions, including, perversely, joining Shane and [C] in bed following the murder and a lack of insight into the gravity of your actions.

[12] The Judge noted that Mr Tu's most recent mental health assessment provided an unclear picture of the ongoing risk he presented.[9] The Judge noted that the offending included aggravating factors of pre-meditation, striking the victim when he was asleep and defenceless, striking him in the head knowing that would cause his death and with the clear intention of killing him, and with significant and chilling harm that continued to terrify members of the victim's whānau.[10] The Judge stated:

> [19] I accept that your mental health disorders are significant mitigating factors in terms of the offending, as I will explain shortly when dealing with s 104 and the minimum period of sentence. This is a complex case where the bright line drawn in the legislation between sanity and insanity for the purposes of culpability and sentencing is both antiquated and inapposite. As your Counsel submits, it may be that your mental health disorders and associated risk factors will not be properly addressed while in prison with the consequence that you may be incarcerated for an inordinate period or, alternatively, released to the public still very unwell. But I must balance these factors and risks against the clear policy of the Sentencing Act that life imprisonment must be imposed unless manifestly unjust to do so. This reflects a strong legislative direction to among other things denounce and deter acts of murder. Now, I should be clear about this; your mental health disorders do not absolve you of culpability under our law. The evidence is tolerably clear that

[9] *R v Tu*, above n 1, at [10].
[10] At [18].

> you were aware that killing was wrong, but that you had wrongly reasoned that you were justified in your actions. In short, while your ability to make decisions was plainly affected by your condition, you chose to kill Shane. A very clear message of denunciation and deterrence is therefore still warranted, as it was in a number of similar cases.[11]
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> [20] I am also not persuaded that the complexities of your mental health will not be taken into account by those responsible for your care in prison or when you come up for parole. Notably, your mental health has improved considerably in a stable prison environment and this suggests to me that some care has been taken to accommodate your special needs. While the latest assessor expresses concern about how your treatment might unfold in prison, there is an element of speculation about all of this. Recent publicity about a proposed mental health package for offending is also a reason for hope.
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> [21] For completeness, I record that Mr Tomlinson relies on the approach taken by Brewer J in *R* v *Reid*[12] where a sentence for life imprisonment was not imposed for the murder of an elderly woman. But I am unable to adopt Brewer J's approach in that case, in the present case. I see that there are some similarities with your offending. Mr Reid suffered from major psychiatric illness. At trial, the jury rejected his insanity defence and found him guilty of murder. But there are also significant differences between your culpability and Mr Reid's culpability. Brewer J found that Mr Reid did not visit the victim with the intention to kill her. It was the victim's denials of his delusions that triggered the murderous act. By contrast, your actions were, in fact, the opposite. You returned to the flat intending to kill Mr Hawe-Wi1son.
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> [22] Accordingly, while there remains a legitimate concern that your mental health disorders may not receive the treatment you need while in prison with potentially disproportionate consequences for you, I am not satisfied that this risk is such that it would be manifestly unjust to sentence you to life imprisonment.

[13] The Judge considered that Mr Hawe-Wilson was particularly susceptible to attack by a flatmate, and therefore vulnerable, which the Judge considered to be an aggravating factor.[13] However, the Judge stated:

> [24] However, Mr Tu, your mental health disorders are a decisive factor militating against the full application of s 104 to you. Your actions were not the product of callous design or disregard. You were not acting with the usual even-handed understanding and foresight of a mentally well person. You were disproportionately anxious about Shane's threat to you and simply did not empathise with your victim because of your mental illness, particularly your ASD. Against this background, it would be wrong to describe your actions as a cold and calculated murder of a vulnerable victim. Subjectively assessed, therefore, your culpability is at the lower end of the spectrum. In those circumstances, I consider that it would be manifestly unjust to impose a 17 year minimum non-parole period.

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11 *R v O'Brien* (2003) 20 CRNZ 572 (CA); *R v Mayes* (2003) 20 CRNZ 690 (CA); *R v Gottermeyer* [2014] NZCA 205.

12 *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

13 *R v Tu*, above n 1, at [23].

[14] The Crown submitted a 14-year MPI should be imposed and Mr Tu's counsel submitted 12 years or less was available. The Judge adopted an MPI of 12 years:

> [28] For my part, the evaluation must be fact-specific in the light of the four purposes specified at s 103, namely: accountability, denunciation, deterrence and protecting the community. Your mental illness bears on each of these factors. In short, while you do not meet the threshold for insanity, the cause of your offending is closely linked to your mental illness, your ASD and your inability at the time to properly weigh the risks to you, evaluate your options and empathise with your victim.
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> [29] It is also relevant that your actions occurred at a time where you were cut adrift from your normal support structures and particularly susceptible to your underlying mental frailties. Significantly, all of the mental health assessments consider that you should be subject to ongoing medical treatment (though, as I have said, treatment of your most acute conditions appears to have been achieved). They also say that, with the right support structures, the risks you present to society should be able to be managed. Conversely, the risk factors associated with long-term imprisonment that I have already mentioned, must be taken into account. All of this supports a shorter minimum period of imprisonment.
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> [30] There is one further factor that I am bound to consider. The Court of Appeal in *E(CA689/10)* v *R*[14] observed that discounts for mental health between 12 per cent and 30 per cent have been approved. While this is not a tariff, discounts exceeding 30 per cent for mental health issues alone would need to be exceptional.
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> [31] Overall, when I take into account both the public interest (including the risks you present), the effects on the family, the facts of the offending and your personal circumstances (including the significant mental health disorders affecting your conduct and the potential for a disproportionate effect on you), I consider that a 30 per cent discount is warranted. This results in an end sentence of life imprisonment with a minimum non-parole period of 12 years. For completeness, I have considered a number of sentences where a lesser minimum sentence has been imposed in arguably similar circumstances.[15] But those cases invariably involved additional discounts for guilty pleas and expressions of remorse.
>
> [32] On this last aspect you have been assessed as lacking insight still into your actions. I accept that this is another manifestation of your illness. But, nevertheless, the absence of remorse means that it cannot be taken into account as an additional mitigating factor.

The conviction appeal

[15] After sentencing, for Mr Tu, Dr Justin Barry-Walsh completed a number of psychiatric reports, dated 5 April 2017, 16 February 2018, 31 July 2018, 28 January

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14 *E(CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [71].

15 *R v Morris* [2012] NZHC 616; *R v Tai* HC Tauranga CRI-2010-070-5571, 16 September 2011; *R v Mataki* [2016] NZHC 600.

2018. Dr Dean disagreed and considered that Dr Barry-Walsh's opinion was not significantly different from that of Dr Wyness, which had been rejected by the jury.

[16] The Court of Appeal upheld the conviction on appeal, stating, relevantly:[16]

> [31] The essence of Mr Tu's appeal on this issue is that Mr Tu should have been permitted to present his defence of insanity to the Court on the basis of autism alone rather than in conjunction with his schizophrenia and on the basis that his autism effectively made it an "on-off" decision for Mr Tu, either he had to kill Mr Hawe-Wilson or Mr Hawe-Wilson would kill him. The argument for Mr Tu is that that would have enhanced his case that he was not morally responsible for his action.
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> [32] The submission ignores that all the medical evidence (including ultimately that of Dr Wyness) was that Mr Tu also suffered from psychosis in the form of delusions and disordered thinking, symptoms of schizophrenia, which on Dr Wyness' evidence, were operative at the time of the offending. It is not possible to isolate Mr Tu's autism and the effect of that from his psychosis when determining the influences operating on him at the time of the killing.
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> [33] We agree with the Crown submission that it is inconceivable Mr Tu would not have also made use of his longstanding and accepted psychosis especially given the prosecutor accepted it amounted to a disease of the mind. Trial counsel would have been failing in his duty if he had not relied on that evidence as well as Dr Wyness' reliance on autism.

[17] The Court dismissed Mr Tu's application for the further psychiatric reports from Dr Barry-Walsh to be admitted, on the basis they were not fresh and did not impact on the safety of the conviction.[17]

Further reports

[18] For this appeal against sentence, Mr Tu seeks to file further reports by Dr Barry-Walsh. Mr Mansfield explains that he considered he should obtain updating reports to provide a picture of Mr Tu's current status. Dr Barry-Walsh confirms his opinion that Mr Tu was insane at the time of the offending. He considers Mr Tu's prospects of recovery would be greater if he returned to the community from hospital. Mr Carruthers submits that Dr Barry-Walsh's reports, prepared five to six years after the trial by a psychiatrist not involved in the trial, are generally irrelevant to the correctness of a sentence in the light of the information available at the time.

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[16] *Tu v R,* above n 2.
[17] At [36].

[19] Like the Court of Appeal dealing with the conviction appeal, neither these reports, nor the earlier reports of Dr Barry-Walsh regarding Mr Tu's mental health at the time of his offending change our view of the issues with which we have to deal. However, there is some updating value in his relatively recent opinions about Mr Tu's current mental health status and the treatment required. We admit his opinions as evidence only to that extent. In summary:

(a) In a report of 9 November 2021, Dr Barry-Walsh concludes Mr Tu would likely need active treatment for several years, including oversight from psychiatric services and medication. Given Mr Tu's complex clinical presentation, Dr Barry-Walsh considers prison would not be the best outcome and "his prospects of recovery and maintaining a stable, offence free lifestyle in the community would be greater if his return to the community occurred from hospital".

(b) In a report of 20 June 2022, Dr Barry-Walsh notes the discharge panel at the Mason Clinic considered a letter written by Mr Tu's treating psychiatrist which indicated that Mr Tu had engaged poorly with rehabilitative efforts and displayed limited insight. He concurred with the panel's recommendation that addressing Mr Tu's rehabilitative and treatment needs can only be achieved through rehospitalisation, prior to return to the community, with a transition through the forensic psychiatric inpatient unit. However, the panel concluded Mr Tu should be discharged and returned to custody, acknowledging "[i]t is likely he will return to the Mason Clinic at some point in future to continue with the rehabilitative journey". From his interview with Mr Tu on 7 April 2022, Dr Barry-Walsh noted "evidence of grandiosity and naïveté".

Law of life imprisonment for murder

The Act

[20] The Act provides for sentencing for murder in ss 102 to 104, relevantly:

> **102 Presumption in favour of life imprisonment for murder**
>
> (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.
>
> (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.
>
> **103 Imposition of minimum period of imprisonment or imprisonment without parole if life imprisonment imposed for murder**
>
> (1) If a court sentences an offender convicted of murder to imprisonment for life, it must—
>
> (a) order that the offender serve a minimum period of imprisonment under that sentence; or
>
> …
>
> (2) The minimum term of imprisonment ordered may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:
>
> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
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> (b) denouncing the conduct in which the offender was involved:
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> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.
>
> **104 Imposition of minimum period of imprisonment of 17 years or more**
>
> (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

(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

(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 in any other exceptional circumstances.

[21] The effect of these provisions is that:

(a) An offender convicted of murder must be sentenced to life imprisonment unless that is manifestly unjust.

(b) If they are sentenced to life imprisonment, they must serve an MPI of at least 10 years.

(c) For particularly serious murders, they must serve an MPI of 17 years unless that is manifestly unjust.

[22] The purposes and principles of sentencing, set out in ss 7, 8 and 9 of the Act, are relevant to each of those decisions.

Case law

[23] In *E (CA689/2010) v R*, this Court explained generally:[18]

> [68] A mental disorder falling short of exculpating insanity may be capable of mitigating a sentence either because: if causative of the offending, it moderates the culpability;[19] it renders less appropriate or more subjectively punitive a sentence of imprisonment;[20] or because of a combination of those reasons.[21] The moderation of culpability follows from the principle that any general criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend.[22]
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> [69] All relevant considerations must, however, be taken into account in the sentencing process. Mental illness or mental impairment may affect the risk of a repetition of offending. This in turn may direct attention to issues of personal deterrence or public protection.[23]
>
> … The Court said [in *R v Verdins*] that impaired mental functioning, whether temporary or permanent, is relevant to sentencing in at least the following six ways:[24]
>
> (a) The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
>
> (b) The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

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18 *E (CA689/2010),* above n 14.

19 Section 8(a) of the Sentencing Act 2002 provides that a court in sentencing must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender. Section 9(2)(e) provides that in sentencing the court must take into account, as a mitigating factor, that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding. The mental impairment must, however, be causative of the offending: *R v M* [2008] NZCA 148 at [33].

20 Section 8(h) of the Sentencing Act 2002 provides that a court in sentencing must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe. For a discussion of this principle see *R v Verschaffelt* [2002] 3 NZLR 772 (CA) at [22]–[25].

21 *R v Nilsson* CA552/99, 27 July 2000 at [10] and *R v Rys* [2007] NZCA 360 at [45]. For a discussion of the difficulties involved in sentencing those with mental disorders see Warren Brookbanks "The Sentencing and Disposition of Mentally Disordered Offenders" in Warren Brookbanks and Alexander Simpson (eds) *Psychiatry and the Law* (Lexis Nexis, Wellington, 2007) at 197; Ian Freckelton "Sentencing Offenders with Impaired Mental Functioning" (2007) 14(2) Psychiatry, Psychology and Law 359; and Michelle Edgely "Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency" (2009) 16(2) Psychiatry, Psychology and Law 240.

22 *R v Tuia* CA312/02, 27 November 2002 at [15].

23 *R v Wright* [2001] 3 NZLR 22 (CA) at [22]; and see also *R v Taueki* [2005] 3 NZLR 372 (CA) at [45].

24 *R v Verdins, Buckley and Vo* [2007] VSCA 102, (2007) 16 VR 269 at [32].

(c) Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.

(d) Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

(e) The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.

(f) Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

[24] This Court has made observations about the manifestly unjust exception to the imposition of life imprisonment for murder in s 102:

(a) In 2003, in *R v Rapira*:[25]

> That conclusion has to be made on the basis of the circumstances of the offence and the offender. It is an overall assessment. The injustice must be clear, as the use of "manifestly" requires. The assessment of manifest injustice falls to be undertaken against the register of sentencing purposes and principles identified in the Sentencing Act 2002 and in particular in the light of ss 7, 8 and 9. It is a conclusion likely to be reached in exceptional cases only, as the legislative history of s 102 suggests was the expectation.

(b) Also in 2003, in *R v O'Brien*:[26]

> There may be cases where the circumstances of a murder may not be so warranting denunciation and the mental or intellectual impairment of the offender may be so mitigating of moral culpability that, absent issues of future risk to public safety, it would be manifestly unjust to impose a sentence of life imprisonment.

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[25] *R v Rapira* [2003] 3 NZLR 794 at [121].

[26] *R v O'Brien* (2003) 20 CRNZ 572 (CA) at [36].

(c) In 2005, in *R v Williams*:[27]

> [57] It does not follow, however, that the meaning conveyed by [manifestly unjust] in the context of s 104 is the same in all other respects (compare *R v Offen* [2001] 2 All ER 154). In particular, the comment that the threshold was likely to be reached in very exceptional circumstances only, such as mercy killings, reflects the particular context and history of s 102. In s 102, "manifestly unjust" is the criterion for displacement of the presumption that on conviction for murder an offender should be sentenced to life imprisonment. That presumption is a long-standing and strong one, reflecting the sanctity accorded to human life in our society and its associated abhorrence of the crime of murder. This context indicates that it will rarely be clearly unjust to impose life imprisonment for the purposes of the residual discretion conferred by s 102. This Court's judgment in *Rapira* observed that the criterion was likely to be satisfied only in a small number of cases which would usually involve special features, giving as examples mercy killings and cases of prolonged and severe abuse of the offender by the victim.

[25] In *R v Williams*, this Court applied its observations in *Rapira* to the manifestly unjust exception to a 17-year MPI for a highly brutal, cruel or callous murder in s 104.[28] We note three cases making use of that exception, due to offenders' personal circumstances, including mental health: *R v Gottermeyer*; *DD (CA595/2014) v R*; and *R v Savage*.[29]

[26] To date, however, as Mr Mansfield submits, the Courts have rarely been persuaded that offenders suffering from mental health illnesses should entirely avoid a sentence of life imprisonment for murder, under s 102. This may partly reflect (or it may be reflected in) a current difference in the threshold of "manifest injustice" for the purposes of s 102 as compared to s 104. While both sections require something exceptional to justify a departure from the statutory presumption, this Court has observed that in respect of the 17-year MPI under s 104, a departure need not be rare.[30] In contrast, in relation to the imposition of life imprisonment at all, it has said "it will rarely be clearly unjust to impose life imprisonment for the purposes of the residual discretion conferred by s 102".[31]

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27 *R v Williams* [2005] 2 NZLR 506 (CA).
28 At [57]–[68].
29 *R v Gottermeyer* [2013] NZHC 2599; and see *R v Gottermeyer*, above n 11; *DD (CA595/2014) v R* [2015] NZCA 304; and *R v Savage* [2020] NZHC 2553.
30 *R v Williams,* above n 27, at [55]–[57], citing *R v Rapira,* above n 25, at [121].
31 At [57].

[27] There are examples of offenders being sentenced to life imprisonment despite clearly suffering from serious mental illness at the time of offending.[32] A number of these cases feature particularly aggravated offending. The relatively uncommon cases where the Court has held that life imprisonment is manifestly unjust for murder have involved "mercy" killings,[33] a response to family violence,[34] remoteness from the offending,[35] age,[36] or as Mr Mansfield submits, severe mental health issues having a causative effect on the offending, no risk to the community and the potential for rehabilitation. We note, in particular, the cases of

(a) In 2008, in *R v Reid*, the offender, in the grip of a "major psychiatric illness" major depression and psychotic delusions, strangled to death an 84 year woman he believed was spying on him.[37] Brewer J held that, but for his mental illness, the offender would not have committed the acts he did.[38] The offending was entirely out of character and Brewer J held the presumption of life imprisonment was displaced, instead sentencing Mr Reid to 10 years' imprisonment.[39]

(b) In 2011, in *R v Wihongi*, Ms Wihongi stabbed her ex-partner with a knife after an afternoon of drinking, an argument about money and his demanding sex from her.[40] This Court accepted that her significant cognitive impairments and post-traumatic stress disorder, resulting from her childhood and background, played a part in her offending. It held that her brain injury would not, of itself, justify a departure from the presumption of life imprisonment.[41] But in conjunction with her history of abuse at the hands of the deceased, and her low risk of future

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32 *R v Mayes* [2004] 1 NZLR 71 (CA); *R v Morris* [2012] NZHC 616; *Te Wini v R* [2013] NZCA 201; *R v Yad-Elohim* [2018] NZHC 2494; and *R v Brackenridge* [2019] NZHC 1627, cited in *R v Van Hemert* [2021] NZCA 261 [*Van Hemert* CA] at [40].

33 *R v Law* (2022) 19 CRNZ 500; *R v Knox* [2016] NZHC 3136.

34 *R v Rihia* [2012] NZHC 2720.

35 *R v Cunnard* [2014] NZCA 138; *R v Innes and Baker* [2014] NZHC 2780; and *R v Madams* [2017] NZHC 81.

36 *R v Nelson* [2012] NZHC 3570.

37 *R v Reid*, above n 12, at [5]–[6].

38 At [12].

39 At [13].

40 *R v Wihongi* [2011] NZCA 592, [2012] NZLR 775.

41 At [81].

harm,[42] the presumption of a life sentence was displaced,[43] and a sentence of 12 years' imprisonment was imposed.[44]

(c) In 2017, in *R v Cole*, Mr Cole fatally shot his son who had complained about the division of inheritance, who he believed had issues with alcohol and methamphetamine, and who assaulted and threatened to kill him and his children.[45] Cull J considered Mr Cole's bipolar affective disorder, paranoid schizophrenia, and chronic relapse into manic-depressive illness had impaired his ability to act rationally.[46] She ruled that life imprisonment would be manifestly unjust and imposed a finite sentence of 12 years' imprisonment with an MPI of six years.[47]

[28] A common thread of significantly diminished culpability runs through these cases as well as in cases where the Court has considered a departure from s 102 justified, as mentioned above. On the other hand, three more recent decisions of this Court go the other way:

(a) In 2020, in *R v Thompson*, this Court held an offender's mental condition of suffering from a delusional disorder, which was related to carrying out his threat to shoot his neighbour, was relevant to his sentencing.[48] In combination with his age, early guilty plea and "mild to moderate depressive illness", Dobson J in the High Court held that meant a 17-year MPI was manifestly unjust and imposed an MPI of 13 years and two months.[49] Mr Thompson appealed the imposition of life imprisonment on the grounds that his situation was "on all fours" with the High Court sentencing decision in *R v Reid*.[50] The Court of Appeal found a greater discount to the MPI was warranted in light of

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42 *R v Wihongi* above n 40, at [50].
43 At [94].
44 At [98].
45 *R v Cole* [2017] NZHC 517 at [6]–[13]
46 At [17].
47 At [72].
48 *Thompson v R* [2020] NZCA 355.
49 *R v Thompson* [2019] NZHC 72 at [31].
50 At [34], citing *R v Reid*, above n 12.

Mr Thompson's delusional disorder and substituted an MPI of 12 years and four months.[51] However, it upheld the life sentence, distinguishing Mr Thompson's case from *R v Reid*, including on the basis that Mr Reid was no longer a risk to others.[52]

(b) In 2021, in *R v Van Hemert*, the offender had, upon learning that his former partner had entered a new relationship, spiralled into an acute psychotic episode and engaged, stabbed and beat to death a sex worker.[53] Psychiatric opinion was that he had a disease of the mind but knew what he was doing was wrong.[54] The Court of Appeal observed a compelling case needs to be established before an offender can be considered eligible for a sentence less than life imprisonment for murder.[55] The Court must be satisfied the circumstances of both the murder and the offender, including the ongoing risk they pose, displace the presumption.[56] The Supreme Court has granted leave to appeal.[57]

(c) Also in 2021, in *R v Smith*, the offender was a grandmother who had devoted her life to caring for her children and grandchildren with significant behavioural and development issues, developed serious anxiety and depression, and strangled to death her 13-year-old granddaughter after a display of ingratitude.[58] She pleaded guilty, posed no ongoing risk and was profoundly remorseful. Cooke J held the s 102 threshold was met and sentenced her to 12 years' imprisonment.[59] This Court upheld the appeal by the Solicitor-General, quashed the sentence imposed in the High Court and imposed a

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51 *Thompson v R*, above n 48, at [55].
52 At [49].
53 *Van Hemert* CA, above n 32 (footnotes omitted).
54 At [17].
55 At [36].
56 At [37] and [41].
57 *R v Van Hemert* [2022] NZSC 94.
58 *R v Smith* [2019] NZHC 1910 at [4]–[8].
59 At [39] and [43].

sentence of life imprisonment with an MPI of 10 years.[60] This Court reaffirmed the observations made in *Van Hemert*.[61]

Issue 1: Is life imprisonment manifestly unjust?

Submissions

[29] Mr Mansfield, for Mr Tu, submits:

(a) A sentence of life imprisonment is manifestly unjust. Mr Tu's mental illness alone should have displaced the presumption of life imprisonment. It is indisputable Mr Tu suffered from a disease of the mind. The aggravated nature of Mr Tu's offending and his risk of reoffending are the result of the nature of his illness. Academic research findings about the relationship between ASD and the criminal justice system are helpful to understanding that Mr Tu suffers from an acute mental illness and how causative that was to the fact, and the nature, of the offending.[62] It impacted on the way in which Mr Tu perceived Mr Hawe-Wilson's provocation and Mr Tu's belief that Mr Hawe-Wilson would kill him. Mr Tu's psychotic illness and ASD did not allow him to rationalise the provocation or his response to it.

(b) Looking at vulnerability and brutality without considering the extent of culpability due to mental illness weights the decision against the mentally ill. The reality that ongoing poor or acute mental health may increase an offender's risk of offending is only a matter for the

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60 *R v Smith* [2021] NZCA 318 at [59]–[61], citing the four key elements reaffirmed in *Van Hemert* CA, above n 32.

61 *Van Hemert* CA, above n 32, at [42].

62 Colleen Berryessa "Judiciary views on criminal behaviour and intention of offenders with high-functioning autism" (2014) 5 J Intellectual Disab and Offend Behav 97 at 97; William Frizzell and others "Homicidal Ideation and Individuals on the Autism Spectrum" (2019) 64 J Forensic Sci 1259 at 1261; Debbie Kincaid and others "What is the prevalence of autism spectrum disorder and ASD traits in psychosis? A systematic review" (2017) 250 Psychiatry Res 99 at 103; Jason Carbone and others "Homicidal Ideation and Forensic Psychopathology: Evidence From the 2016 Nationwide Emergency Department Sample (NEDS)" (2020) 65 J Forensic Sci 154 at 156; Owen Sullivan "Autism spectrum disorder and criminal responsibility: historical perspectives, clinical challenges and broader considerations within the criminal justice system" (2018) 35 Irish Journal of Psychological Medicine 333 at 336; Matthew Lerner and others "Emerging perspectives on adolescents and young adults with high-functioning autism spectrum disorders, violence, and criminal law" (2012) 40 Journal of the American Academy of Psychiatry and the Law 177 at 183.

Parole Board. The authorities to the contrary are not correct. A finite sentence of 10 years' imprisonment was required, having regard to the case law.

(c) A life sentence does not address Mr Tu's real rehabilitative needs which should be addressed through medical treatment. Mr Tu's risk of reoffending and of harming others is intrinsically linked to the treatment he is able to receive. He risks being indefinitely imprisoned under a sentence of life imprisonment as he will continue to be assessed as posing a future risk by the Parole Board unless treated, for the same reason that his criminal culpability should be assessed as low. He will not be further admitted to the Mason Clinic unless his mental health deteriorates to the point of being acute, so his sentence will become a life sentence even though he requires treatment.

[30] Mr Carruthers, for the Crown, submits it was common ground among all experts that Mr Tu's offending was influenced by his mental health and ASD. Those opinions have to be filtered through the jury's verdict. Even if mental health was a significant contributing factor to the offending, there is no basis to depart from the presumption in favour of life imprisonment here. The sentencing framework for murder weighs against a finite sentence because of the need to denounce murder and to hold accountable, and protect the public from, those who commit it. That is so even when the offending is influenced by major mental illness.[63] While reduced by his mental health , Mr Tu's culpability was by no means erased. He bludgeoned Mr Hawe-Wilson to death as he slept in a pre-meditated and brutal display of violence which he knew to be wrong. While mental health issues might reduce culpability, they might also signal an ongoing and unacceptable risk to the public if they cannot be brought under control. The expert reports, including that of Dr Barry-Walsh, indicate that is so here. Mr Tu still requires extensive treatment which should be administered in the context of a sentence of life imprisonment.

[63] *Van Hemert* CA, above n 32, at [37]–[38].

Life imprisonment

[31] We have sympathy for Mr Mansfield's general caution about the effect of approaching sentencing of those with acute mental illness in the same way as those without. And courts must be careful about identifying aspects of offending as aggravating if they derive solely from an offender's mental illness. But we do not accept Mr Mansfield's submission that Mr Tu's mental health, as a sole consideration, should have displaced the presumption of life imprisonment. While Mr Tu clearly suffered from schizophrenia and ASD which contributed to some extent to the offending, it did not moderate his culpability completely or, we consider, sufficiently to mean life imprisonment would be manifestly unjust. As Mr Mansfield acknowledged, the jury must have found that Mr Tu could appreciate the moral wrongfulness of his actions.

[32] Whether life imprisonment for Mr Tu would be manifestly unjust because of his mental health was squarely addressed by the Judge who gave careful consideration throughout the trial and in his sentencing to Mr Tu's mental state. The Judge fairly considered that the "clinical consensus" before him is that Mr Tu was affected by his mental health at the time of his offending. He said that "[w]hile you knew what you were doing was wrong, these mental health factors plainly contributed to your fatal and subsequent actions".[64] He accepted the mental health disorders were significant mitigating factors in terms of sentencing and for the purposes of s 104. He also said, we consider accurately:

(a) This is a complex case where the distinction between sanity and insanity as it currently stands for the purposes of culpability and sentencing is "antiquated and inapposite".[65]

(b) The strong legislative direction in the Act to denounce and deter acts of murder was still warranted in this case.[66]

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64 *R v Tu*, above n 1, at [9].
65 At [19].
66 At [19].

(c) Mr Tu was aware that killing was wrong and still chose to kill, and as a result his mental health disorders did not absolve him of culpability.[67]

(d) It is not clear the criminal justice system would fail to account for the complexities of Mr Tu's mental health when caring for him in prison or in considering his suitability for parole — his mental health had appeared to improve considerably while in a stable prison environment.

(e) This case can be distinguished from *R v Reid* for the culpability of the offenders. In particular: [68]

> Brewer J found that Mr Reid did not visit the victim with the intention to kill her. It was the victim's denials of his delusions that triggered the murderous act. By contrast, your actions were, in fact, the opposite. You returned to the flat intending to kill Mr Hawe-Wilson.

[33] We consider that Whata J's reasoning in applying s 102 is robust. It was an overall assessment made on the basis of the circumstances of the offence and the offender. The distinction with *R v Reid*, which was consistent with the distinctions later drawn by this Court in *R v Thompson*, was fairly made. In addition, as in *Thompson*, Mr Tu does represent an ongoing risk to others.

[34] Mr Mansfield submits that the better risk analysis is of the risk posed by an offender who receives proper treatment in the community. He acknowledges the current authorities are not consistent with that submission. We do not accept his submission that the Judge placed undue weight on the risk of re-offending or that that factor cannot displace the presumption in favour of life imprisonment. In practice there is usually a complex interplay between mental health and environmental triggers. The Judge's concern about the risk of re-offending was not misplaced. Whether or not that derives from the nature of his mental health, it is a relevant consideration in sentencing.

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67 *R v Tu*, above n 1, at [19].

68 At [21], citing *R v Reid*, above n 12.

[35] As Mr Mansfield submits, and as is required by s 7 of the Act, the risk Mr Tu poses to others is relevant to the purposes of sentencing of personal deterrence and public protection. Under the current authorities, it is also relevant to the decision about whether to impose life imprisonment under s 102.

[36] The reports about Mr Tu's mental state, until Dr Jeremy Skipworth's recent report prepared for another purpose (as canvassed below), indicate that there continued to be significant risks in that regard. Mr Mansfield submits, on the basis of Dr Skipworth's report, that Mr Tu does not pose an ongoing risk of harm to himself or others, therefore, future risk can no longer be a relevant factor in assessing the sentence on appeal. But Dr Skipworth's recent report of Mr Tu's risk of harm within his current custodial environment does not discredit the previous observations about risk by Dr Duffy and Dr Barry-Walsh. Crucially, Dr Skipworth's opinion, that Mr Tu "in his current environment is not posing a serious risk either to himself or to others for any reason", is premised on Mr Tu being in prison.[69]

[37] We are not persuaded that means a sentence of life imprisonment was not available to the sentencing Judge. As the Crown submits, the positive mental health changes Mr Tu has experienced during his sentence are matters for the Parole Board to consider, not for the sentence appeal.

[38] The injustice of life imprisonment for Mr Tu was not clear or manifest, given these factors and the Judge's conclusions about culpability. Those conclusions were based on the evidence and fairly open to him. This is not one of the rare or compelling cases in which the criterion of manifest injustice is satisfied for the purposes of s 102, however it is characterised in relation to the similar criterion in s 104.

Issue 2: Is a 17-year MPI manifestly unjust?

Submissions

[39] Mr Mansfield submits, as the Crown agreed at sentencing, s 104 of the Act should not have been engaged. While the deceased was vulnerable, Mr Tu's mental

[69] Jeremy Skipworth *Psychiatric report: Jiaxin Tu* (10 December 2022) at [42].

disorders meant he could not appreciate that Mr Hawe-Wilson was vulnerable, so he could not gain the same level of advantage over him and Mr Tu's culpability was not increased. Whether or not s 104 was properly engaged, the starting point should have been an MPI of 15 years, yielding an MPI of about 10 years after a 30 per cent discount for Mr Tu's mental illness.

[40] Mr Carruthers submits the ultimate issue of what MPI should be imposed is best tested in comparison with broadly similar cases. The MPI of 12 years imposed by Whata J here is not out of step with the MPIs imposed in *Smith, Thompson*, and *Gottermeyer*.[70]

MPI

[41] In considering the application of s 104 here, we again cannot fault the reasoning of the Judge. We consider he was correct to identify Mr Hawe-Wilson as vulnerable. Mr Mansfield accepts that was so. It is not clear to us that the evidence supports the proposition that Mr Tu's mental state means he could not appreciate Mr Hawe-Wilson was vulnerable. There is nothing to indicate that Mr Tu thought Mr Hawe-Wilson was able to fight back when he was asleep. But, even if he did, it is the objective vulnerability of Mr Hawe-Wilson being asleep at the time of the attack, that is relevant to the general deterrence and protection of the community purposes of sentencing under s 7 of the Act, and the interests of the victims of the offending.

[42] The Judge was also correct to identify that Mr Tu's mental health disorders were "a decisive factor militating against the full application of s 104".[71] We have no doubt that it would have been manifestly unjust to impose upon Mr Tu a 17-year MPI. We consider the 12-year MPI, which was what Mr Tu's counsel submits would be appropriate, is consistent with the relevant case law and is appropriate.

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70 *R v Smith,* above n 60; *R v Thompson,* above n 48; and *R v Gottermeyer*, above n 11.
71 *R v Tu*, above n 1, at [24].

Issue 3: Should a hybrid sentence and detention be imposed?

Submissions

[43] Mr Mansfield submits a "hybrid" order under s 34(1)(a)(i) of the CPMIP Act, directing that Mr Tu be detained in a hospital as a special patient in conjunction with a finite term of imprisonment, is both required and appropriate. Such an order could extend beyond the grant of parole and so allow him to remain in the Mason Clinic being treated, rather than in custody without appropriate treatment. Beyond that, the Court must have the confidence to rely on those responsible under the MHCAT Act to take whatever steps are required to protect Mr Tu and/or the community, depending on his treatment and the management of his mental health.

[44] Mr Carruthers submits it is doubtful a hybrid sentence would add anything. On at least one occasion Mr Tu has been transferred to a hospital for psychiatric care. The Court should leave in place the current sentence, which is appropriate and consistent with broadly comparable cases, and have faith in Corrections to meet its statutory obligations. In doing so, as seems to be the plan, Corrections could seek to have Mr Tu detained as a special patient close to the time his mandatory minimum term of imprisonment expires, in order to increase his chances of being released into the community from a hospital rather than from prison. The utility of such an approach in relation to a finite sentence was acknowledged by this Court in *Tuli v R*.[72]

Hybrid sentence and detention

[45] We carefully considered Mr Mansfield's submission that we should impose a hybrid order for sentence and detention of Mr Tu as a special patient under s 34(1)(a)(i) of the CPMIP Act. In general, where there is evidence that such an option would be in the interests of the rehabilitation of the offender, and consistent with the interests of the public in terms of the risk of re-offending, that may be consistent with the purposes and principles of sentencing once they are all carefully assessed.

[46] We considered that option might have been available here. Accordingly, under s 38 of the CPMIP Act, we ordered a report by a psychiatrist as to whether Mr Tu

[72] *Tuli v R* [2013] NZCA 624 at [22]–[24].

should be a special patient while he is serving the sentence of imprisonment. Dr Skipworth prepared the report, meeting with Mr Tu, speaking to his treating psychiatrist, and reviewing Mr Tu's psychiatric history. Dr Skipworth states that Mr Tu has been clinically stable since his return from the Mason Clinic in 2020, receiving in-prison treatment that has been clinically managed by the Mason Clinic's forensic prison team. Mr Tu currently shows no overt psychotic symptoms and has been compliant with his medication. He told Dr Skipworth he did not want to go back to the Mason Clinic. Dr Skipworth says, "Mr Tu has an intermittently recurring psychotic disorder which meets statutory criteria for mental disorder when he is acutely unwell, and in stages of recovery when he remains psychotic".[73] But his opinion is that "Mr Tu is not currently 'mentally disordered'" and does not currently require compulsory treatment".[74] He considers a hybrid sentence is not supported by the available information. If Mr Tu relapses, he can be readmitted to the Mason Clinic under compulsory status under s 45 of the MHA, as he was from July 2018 to May 2020.

[47] With the benefit of Dr Skipworth's report, Mr Mansfield does not pursue a hybrid sentence. Mr Carruthers reiterates the Crown's submission that Mr Tu's needs can be met under a conventional sentence. We accept that is so. A hybrid sentence does not appear to be Mr Tu's will and preference. We do not order it.

Result

[48] The application to adduce further evidence is granted.

[49] The appeal is dismissed.

Solicitors
Crown Law, Wellington, for Respondent

[73] Skipworth, above n 69, at [19].
[74] At [21].