IN THE COURT OF APPEAL OF NEW ZEALAND

CA691/2014
[2016] NZCA 381

BETWEEN	THE QUEEN Appellant
AND	SHANE PIERRE HARRISON Respondent

CA114/2015

BETWEEN	THE QUEEN Appellant
AND	JUSTIN VANCE TURNER Respondent

Hearing:	9–10 June 2016
Court:	Ellen France P, Randerson, Harrison, Stevens and Miller JJ
Counsel:	M D Downs and Y Moinfar for Appellant C W J Stevenson and S J Gill for Respondent Harrison N P Chisnall and L Freyer for Respondent Turner
Judgment:	10 August 2016 at 10.00 am

JUDGMENT OF THE COURT

A The appeal against sentence by the Solicitor-General in the case of Shane Pierre Harrison is dismissed.

B The appeal against sentence by the Solicitor-General in the case of Justin Vance Turner is allowed in part. The sentence of life imprisonment imposed in the High Court is confirmed but the minimum period of imprisonment of 15 years is set aside and a minimum period of imprisonment of 17 years is substituted.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] These two appeals by the Solicitor-General raise for the first time in this Court questions of the interpretation and application of the Sentencing and Parole Reform Act 2010. Coming into force in May 2010, this legislation amended the Sentencing Act 2002 (and Parole Act 2002) and enacted a suite of reforms to provide

additional consequences for repeated serious violent offending. The statutory purposes were said to be:[1]

(a) to deny parole to certain repeat offenders and to offenders guilty of the worst murders; and

(b) to impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

[2] The Sentencing and Parole Reform Act is known colloquially as the "three-strikes" legislation. It made significant changes to the Sentencing Act by adding new provisions addressing both types of serious violent offending identified in the statutory purposes. For example, in relation to sentencing an offender for any murder, it allowed the High Court to impose a sentence of life imprisonment without parole.[2] Such a sentence became an option for offenders, including first-time offenders, convicted of an offence within the category of "the worst murders".

[3] Here, both Mr Harrison's and Mr Turner's appeals engage the "repeat offenders" aspect of the legislation. Both appeals involve sentencing for a stage-2 offence of murder. Section 86E of the Sentencing Act provides that, if an offender is convicted of murder and that murder is a stage-2 (or stage-3) offence, the court must sentence the offender to life imprisonment and order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.

[4] In each of *R v Harrison*[3] and *R v Turner*[4] the sentencing Judge found it would be manifestly unjust to impose a sentence of imprisonment for life without parole. We were informed that stage-2 murder cases have recently arisen in three other instances in the High Court.[5] In each case, the sentencing Judge found it to be

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1 Sentencing and Parole Reform Act 2010, s 3.
2 Sentencing Act 2002, s 103(2A).
3 *R v Harrison* [2014] NZHC 2705 [Harrison sentencing decision].
4 *R v Turner* [2015] NZHC 189 [Turner sentencing decision].
5 *R v Kingi* [2016] NZHC 139; *R v Herkt* [2016] NZHC 284; and *R v Eruera* [2016] NZHC 532.

manifestly unjust to impose a sentence of life imprisonment without parole. Two are subject to an appeal to this Court.[6]

[5] The Solicitor-General appeals against the decisions in *Harrison* and *Turner* on the basis that the findings in each case that life imprisonment without parole would be manifestly unjust were in error and wrong in principle. Manifestly inadequate sentences resulted. In Mr Turner's case the Solicitor-General advanced an alternative argument. If the finding of manifest injustice under s 86E is upheld, the minimum period of imprisonment imposed was manifestly inadequate.

Mr Harrison's appeal

[6] Mr Harrison and his co-offender, Mr Pakai, were convicted of murder[7] and reckless discharge of a firearm[8] following a jury trial before Mallon J in the High Court at Wellington. The principal offender was Mr Pakai, while Mr Harrison was convicted as a secondary party. The facts of the offending are more fully set out in the judgment of this Court in the conviction appeal.[9] For present purposes, a summary drawn from Mallon J's sentencing decision will suffice.

Factual background

[7] Messrs Harrison and Pakai were both members of the Rogues Chapter of the Mongrel Mob operating in Wellington. On 22 August 2013 they went to a flat in Petone to visit a Mr EE, who was a member of the Petone Chapter of the gang. Although they had very little cash with them, it seems they were looking for methamphetamine. Mr EE was not home. His partner, Ms MN, was there alone. Messrs Harrison and Pakai entered the flat and stole various items of property, including Ms MN's cellphone. They then left in their car.

[8] Ms MN contacted Mr EE and told him what had happened. He was extremely angry and immediately contacted the two men via the stolen cellphone. Mr EE demanded that they return with it. He made a number of calls checking that

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6 The Solicitor-General has filed sentence appeals in respect of *R v Herkt*, above n 5, and *R v Eruera*, above n 5.
7 Crimes Act 1961, ss 167 and 66.
8 Arms Act 1983, s 53(3); and Crimes Act, s 66.
9 *Pakai v R* [2016] NZCA 343 at [4]–[14].

the pair were on their way. He also arranged for a number of gang associates to gather and await their return. Armed with a cricket bat, a Samurai sword, a knife and a machete, they were ready for a violent confrontation.

[9] Messrs Harrison and Pakai returned to the flat at speed. Mr Pakai had a modified rifle with him, and a large amount of ammunition. On the way to Mr EE's flat Mr Pakai shot twice at a bread delivery van that impeded their progress.

[10] Arriving in the vicinity of the flat, they parked their car and walked to an adjacent carpark. There they saw the assembled group from the Petone Chapter. Mr Harrison returned the cellphone. Some words were exchanged and Mr Harrison was struck heavily by one of the Petone group. Mr Pakai responded by firing six shots in the direction of the group as they fled the scene.

[11] Messrs Harrison and Pakai returned to their car. Sensing they were out of ammunition, Mr EE followed them and slashed the tyres of the car with a knife. His associates joined him and used their weapons to inflict considerable damage to the car. Alonsio Matalasi (who was not a member of the Mongrel Mob but was friends with some of the Petone group) was amongst them.

[12] Mr Pakai was stabbed in the shoulder and leg. Mr Harrison was struck behind his ear and cut across his hand resulting in serious injuries. Mr Pakai shot Mr Matalasi who was carrying a Samurai sword. Mr Matalasi died soon after, not far from the scene, after trying to call 111. Messrs Harrison and Pakai left in the damaged car, with Mr Harrison driving.

[13] The prosecution case was that Mr Harrison either directed Mr Pakai to fire the fatal shot or at least encouraged him to do so. Alternatively, the murder of Mr Matalasi was a probable consequence of the common intention to prosecute an unlawful purpose (the armed confrontation). Mr Pakai's defence was that he had no murderous intent and that his actions represented an attempt to defend both himself and Mr Harrison. Mr Harrison's defence was that he was not the aggressor, nor did he say or do anything to encourage the firing of the fatal shot.

[14] The jury convicted both men. The jury must have determined that either Mr Pakai was not acting in self-defence at all or that his use of force in self-defence was not reasonable, and that he was acting on Mr Harrison's instructions or with his encouragement.

Personal circumstances of Mr Harrison

[15] At the time of sentencing Mr Harrison was 44 years old. He had been a patched member of the Mongrel Mob for nearly 30 years. He had a long history of alcohol and drug use. Mallon J noted he had sustained multiple injuries (some serious) from what he described as "gang wars".[10] Prior to this offending he was said to have been making "some progress towards being a better father figure" as caregiver for his 11-year-old son. However, despite expressing plans to move towards a more "pro-social" life, Mr Harrison continued to deny responsibility for the offending. He was assessed in the pre-sentence report as having a high risk of re-offending. He has over 80 previous convictions including: manslaughter in 1987; wounding with intent to cause grievous bodily harm in 2005; various assaults in 1998, 2001, 2007 and 2011; and firearms offences in 1994 and 2005.

[16] In 2011, Mr Harrison was convicted of indecent assault. This involved pinching the bottom of a female police officer and then brushing his hand against her thighs and groin area as she stood in a carpark taking details from Mongrel Mob members. He was sentenced to 16 months' imprisonment. As this was a stage-1 offence, Mr Harrison received a first warning.

Mr Harrison's sentence

[17] Because Mr Harrison had been convicted of murder after receiving a first warning, s 86E of the Sentencing Act applied. Mallon J noted that the starting point was a presumption of life imprisonment without parole. The threshold of manifestly unjust was regarded as being "very high", although the Judge observed that Parliament had clearly accepted that in some instances life without parole "might be unfair".[11]

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10 Harrison sentencing decision, above n 3, at [24].
11 At [28].

[18] The Judge noted there was no definition of "manifestly unjust".[12] However, she considered that guidance on the meaning of that phrase could be drawn from cases that have considered the same expression in ss 102 and 104 of the Sentencing Act. She also noted the assessment needed to be made against the different legislative purpose to which s 86E is directed.

[19] Dealing with the circumstances of the index offence of murder, Mallon J concluded there was nothing exceptional about it and it was "neither the least nor worst offending of its kind".[13] As far as Mr Harrison's personal circumstances were concerned Mallon J considered that one feature stood out: the qualifying offence of indecent assault was relatively minor, both in terms of the type of offence and the facts of the particular offending.[14] The Judge observed that "[t]he bringing of the charge and the sentence passed were a stern response to what occurred",[15] adding:

> [30] If this sort of offending in and of itself could trigger a sentence of life imprisonment without parole when, but for that offending, you would otherwise be eligible to apply for parole after a number of years, that would be, in my view, an entirely disproportionate response.[16] It would be manifestly unjust and is the kind of unfair case that Parliament has recognised can arise in providing the Judge with the discretion.

[20] The Judge then considered whether there was "something else in [Mr Harrison's] circumstances to alter that conclusion".[17] She held there was not for the following reasons:

(a) While Mr Harrison had a significant criminal history, only two of his previous convictions pre-dating the three-strikes regime would now qualify as a "serious violent offence", and one of those was committed nearly 30 years ago.[18]

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12 At footnote 17.
13 At footnote 19.
14 At [29].
15 At footnote 22.
16 As is recognised in the Explanatory Note [of the Sentencing and Parole Reform Bill 2009 (17-1)] at 6: "These policies also have some risks for public confidence in the criminal justice system due to the potential for disproportionate outcomes."
17 Harrison sentencing decision, above n 3, at [31].
18 At [32].

(b) There were indications Mr Harrison wished to live a "pro-social" life.[19]

(c) By the time he would be eligible for parole, his risk of re-offending may have declined.[20]

(d) The victim's father did not want Mr Harrison to be imprisoned.[21]

[21] Having concluded it would be manifestly unjust to impose a sentence of life imprisonment without parole, Mallon J considered the appropriate minimum period of imprisonment under s 103 of the Sentencing Act.[22] She found Mr Harrison's culpability was broadly comparable to that of Mr Pakai who was sentenced to life imprisonment with a minimum period of 12 years and three months.[23] She therefore sentenced Mr Harrison to life imprisonment with a minimum period of imprisonment of 13 years.[24]

Mr Turner's appeal

[22] Mr Turner entered a guilty plea to one charge of murder in the High Court at Auckland, and was sentenced by Woolford J.

Factual background

[23] Mr Turner murdered the victim, Maqbool Hussain, on 22 March 2014. Both were homeless and they had met a few weeks earlier. Mr Hussain was living in a warehouse storage area in Balmoral, Auckland.

[24] At about 7.15 pm on 22 March 2014 a police patrol team visited Mr Hussain as part of a routine community operation. Mr Turner was present and helped the police put Mr Hussain to bed. Mr Turner left the area at the same time as the police officers. Between two to three hours later, Mr Turner returned. He was in the

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19 At [33].
20 At [33].
21 At [33].
22 As required by s 86E(4)(b) of the Sentencing Act.
23 Harrison sentencing decision, above n 3, at [20].
24 At [37]. On the charge of reckless discharge of a firearm, Mr Harrison was sentenced to 18 months' imprisonment (concurrent).

storage area for approximately an hour and a half. During this time he subjected Mr Hussain to a severe beating. He left the area dressed in a different top than the one he had arrived in. He returned some time later, removed Mr Hussain's pants and put them on, before leaving again.

[25] Two days later members of Mr Hussain's family arrived at the scene and found him dead. An autopsy report established that Mr Hussain had been subjected to punches, kicks and stomps to the neck and head area while lying on the ground.

[26] Mr Turner was arrested on 1 April 2014 and interviewed by police. He admitted to committing the murder and gave police officers the following account of the offending:

(a) He had developed feelings of hatred towards Mr Hussain because he was urinating in public, being sick in public and sleeping on the footpath.

(b) He visited Mr Hussain on the evening of the murder (prior to the police arriving) and found him intoxicated and asleep on a chair. Mr Turner asked him for money and cigarettes and Mr Hussain refused. Mr Turner then punched him, causing his nose to bleed.

(c) He returned later that night with the intention of killing Mr Hussain in order to get money or other items from him. He, Mr Turner, was as "sober as anything" and motivated by "just complete hatred, adrenalin and greed".

(d) He punched Mr Hussain in the face over a period of 20 to 30 minutes. He also tried to stab him with a nail file at one point but it broke in Mr Hussain's chest. He then dragged him off his bed, repeatedly stomping on his head on the concrete floor for about 30 minutes. Mr Hussain was apparently knocked out after the first stomp. Mr Turner described Mr Hussain's head "bouncing off the concrete".

Personal circumstances of Mr Turner

[27] Mr Turner was 29 years old at the time of sentencing. He had lived on the streets since the age of 15. As a child he was subjected to physical and sexual abuse and spent time in Child Youth and Family Services care and Youth Justice facilities. He had a history of drug and alcohol abuse and his previous attempts at rehabilitation had been unsuccessful. He had also suffered a number of head injuries from fighting, leading to suspected frontal lobe damage, although according to the pre-sentence report there are "no obvious deficiencies in his mental processes". Mr Turner is medicated for epilepsy, blood pressure and had previously been on anti-psychotic medication. At the time of the offending he was not taking this medication (prescribed in late 2013).

[28] Mr Turner's criminal history is extensive. He has 110 previous convictions. Among these are 22 previous convictions for assault (including assault with intent to injure, male assaults female and assaulting police officers) for which he received short terms of imprisonment. A number of his previous convictions are for non-compliance with court orders. In 2010 Mr Turner committed a stage-1 offence of wounding with intent to injure, for which he received a first warning.[25] It involved a serious assault on a former girlfriend, comprising extreme and prolonged violence that included attacks to her head. The victim suffered traumatic brain injuries and extensive facial injuries and her two front teeth were knocked out. She required life support, was hospitalised for 14 days and required ongoing rehabilitative treatment. Mr Turner pleaded guilty to that charge and was sentenced to imprisonment for three years and four months. While he was in prison, attempts to engage Mr Turner in rehabilitation met with limited success. He was released from prison on 15 January 2014, a little over two months before the stage-2 offending.

[29] The pre-sentence report concluded Mr Turner had displayed limited insight into his offending, despite expressing some regret about the victim's death and writing a letter of remorse to Mr Hussain's family and to the Court. The assessment

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[25] *R v Turner* DC Auckland CRI-2010-004-8578, 18 March 2011 at [10].

was that Mr Turner was had a high likelihood of re-offending and posed a high risk of harm to others.

[30] Earlier, two health assessors had found Mr Turner fit to stand trial. Prior to sentencing, an additional psychiatric report was obtained from Dr Ian Goodwin addressing the type and length of sentence that might be imposed.[26] Dr Goodwin's opinion was that Mr Turner did not have a psychotic illness, but instead suffered from a significant personality disorder complicated by significant substance abuse. Dr Goodwin noted that the personality disorder was "long-standing" and "need not" significantly influence the sentencing process. Dr Goodwin concluded: "I cannot describe Mr Turner's risk of future violence towards others as being other than extremely high."

Mr Turner's sentence

[31] Woolford J, like Mallon J, considered that the phrase "manifestly unjust" in s 86E should be considered in light of existing case law under ss 102 and 104 of the Sentencing Act, as well as the purposes of the Sentencing and Parole Reform Act.[27] In his view, the phrase did not have "one standard meaning" throughout the Sentencing Act.[28] Having regard to the legislative history of the Sentencing and Parole Reform Act, Woolford J concluded that the standard for "manifestly unjust" in s 86E was a "mid-way point" between the narrow discretion given under s 102 and the far wider one under s 104.[29]

[32] Relying on the legislative materials and parliamentary speeches, Woolford J considered that life imprisonment without parole under s 86E was intended to apply only to the "worst murders",[30] and to the "worst types of offenders who were beyond rehabilitation".[31] He concluded:[32]

> In considering whether a case creates manifest injustice, reference should be had to whether factors exist which push this into the "worst" categories of

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26 Pursuant to s 38(1)(c) of the Criminal Procedure (Mentally Impaired Persons) Act 2003.
27 Turner sentencing decision, above n 4, at [45].
28 At [47].
29 At [69].
30 At [56]–[57].
31 At [58].
32 At [71].

> offending, or whether there are mitigating or non-aggravating factors of sufficient collective weight that they justify not applying s 86E.

[33] In applying these principles to the facts the Judge found that:

(a) This case was "nowhere near the worst type of murder".[33] While there were aggravating factors of the offending, in total they were not severely aggravating, given the seriousness with which murder is already considered.[34]

(b) Mr Turner had pleaded guilty and had expressed remorse. This indicated a whole-of-life sentence would be manifestly unjust.[35]

(c) Although Mr Turner's track record with rehabilitation was not positive,[36] he had never had an opportunity to attempt rehabilitation in a meaningful way.[37]

(d) Weight needed to be given to Mr Turner's mental health needs,[38] as well as Mr Turner's troubled past.[39]

[34] Drawing these threads together Woolford J concluded:[40]

> This is a finely balanced case, in which Mr Turner is not an overly sympathetic candidate. However, he is not the worst type of murderer, nor does he have an established inability to rehabilitate. The combination of factors in his case, in particular his borderline psychosis, his limited ability to attempt rehabilitation prior to this point and clear demonstrations of remorse, put him into a category in which it would be manifestly unjust to sentence him to life imprisonment without parole.

[35] The Judge then considered the length of the minimum period of imprisonment. He agreed with counsel that the murder engaged s 104(1)(e) of the

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33 At [72] and [77].
34 At [75].
35 At [77].
36 At [79].
37 At [80].
38 At [81].
39 At [82].
40 At [83].

Sentencing Act (high level of brutality, cruelty, depravity or callousness),[41] as well as s 104(1)(g) (deceased was particularly vulnerable).[42] The Judge considered that, if s 104 was not triggered, the appropriate minimum period of imprisonment would be 15 years; he adopted a starting point of 17 years, reduced by two years to recognise Mr Turner's guilty plea, remorse and mental health issues.[43] Taking into account those personal mitigating factors, the Judge concluded it would be manifestly unjust to impose a 17-year minimum period.[44] Accordingly, he sentenced Mr Turner to life imprisonment with a minimum period of imprisonment of 15 years.[45]

The sentencing regime for murder and serious violent offending

Sections 102 and 103

[36] The general policy for murder sentencing is that the offender must be sentenced to imprisonment for life and be required to serve a minimum period of imprisonment of 10 years before becoming eligible for parole.[46] In 2002, an exception to the general requirement of life imprisonment on a conviction for murder was introduced. Under s 102(1) of the Sentencing Act, where a sentence of life imprisonment would be "manifestly unjust", given the circumstances of the offence and the offender, that sentence need not be imposed by the sentencing judge. As this Court held in *R v Williams*, the legislation "conferred an element of sentencing discretion covering cases of murder at the lowest end of the range of culpability of that offending".[47] In rare cases, relying on the manifestly unjust exception, a finite sentence as opposed to life imprisonment would be appropriate.[48]

[37] Therefore where life imprisonment is imposed a minimum term of imprisonment of not less than 10 years must be ordered. A longer minimum period may be set. A finite sentence will not be imposed unless the exception in s 102(1)

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41 At [90].
42 At [93].
43 At [101] and [114].
44 At [116].
45 At [117].
46 Sentencing Act, ss 102(1) and 103(1).
47 *R v Williams* [2005] 2 NZLR 506 (CA) at [30].
48 See for example *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775 discussing *R v O'Brien* (2003) 20 CRNZ 572 (CA) and *R v Mayes* [2004] 1 NZLR 71 (CA). See also the cases referred to below at footnote 81.

applies. Section 103(2) specifies that the applicable sentencing purposes are accountability, denunciation, deterrence and community protection:

> 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:
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> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.

Section 104

[38] Section 104 was enacted in 2002 as part of the then new Sentencing Act in response to widespread public concern about the inadequacy of sentences for murder, particularly those committed with a high level of brutality.[49] Therefore, in sentencing for murder where specified aggravating circumstances are present, s 104 requires the Judge to impose a minimum term of imprisonment of at least 17 years, unless that would be manifestly unjust. Such circumstances include a murder committed with a high level of brutality, cruelty, depravity or callousness, or where the deceased was particularly vulnerable because of his or her age, health, or any other factor.[50]

[39] The current approach to s 104 cases is set out in *R v Williams.*[51] This Court acknowledged that relative culpability of the 10 qualifying criteria in s 104 varies from case to case. Thus the applicable criterion or criteria may be of greater or less significance.[52] This led the Court to conclude that the manifestly unjust exception was such that the injustice must be "clearly demonstrated" before the sentencing discretion to go below 17 years could be exercised.[53] Each case must be considered on its merits. However the statutory minimum "may not be departed from lightly" in

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49 As discussed by this Court in *Desai v R* [2012] NZCA 534 at [52].
50 Sentencing Act, s 104(e) and (g).
51 *R v Williams*, above n 47.
52 At [51].
53 At [63].

order to ensure application of the legislative policy of ensuring a 17-year minimum for the most serious murder cases.[54] Departure from the minimum through the manifestly unjust exception need not be rare, but the circumstances must be "exceptional".[55]

[40] As to the meaning of manifestly unjust in this context this Court stated:[56]

> We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder. In that sense they will be exceptional but such cases need not be rare. As well, the conclusion may be reached only on the basis of clearly demonstrable factors that withstand objective scrutiny. Judges must guard against allowing discounts based on favourable subjective views of the case. The sentencing discretion of Judges is limited in that respect.

[41] The methodology for sentencing in murder cases where one or more s 104 aggravating factors are present involves a two-step process.[57] The first step is for the Court to consider the degree of culpability of the instant case in relation to that involved in standard cases. In so doing the Court would take into account in the normal way all pertinent aggravating factors including those set out in s 104, together with any mitigating factors. If the first step produces a minimum period of imprisonment of 17 years or more, the minimum term must reflect that assessment.

[42] Where the first step indicates a lesser minimum term being justified, the Court goes on to the second step and considers whether imposing a minimum term of 17 years' imprisonment would be manifestly unjust. If so, the minimum term must be reassessed to what the Court considers to be justified. This is not, however, a mandate to reduce a 17-year minimum term whenever the Court considers it appropriate to do. The manner in which step two operates was discussed by this Court in *Malik v R*:[58]

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54 At [66].
55 At [63].
56 At [67].
57 At [52].
58 *Malik v R* [2015] NZCA 597 at [32] (footnotes omitted).

> A lesser minimum period would be warranted where the judge decides as a matter of overall impression that the case falls outside the legislative policy that certain murders are sufficiently serious to warrant at least that minimum period. The full range of sentencing criteria in ss 7 to 9 of the Sentencing Act may inform that overall impression, but because the legislative policy in s 104 must be respected, powerful mitigating factors may be needed to displace the 17 year presumption. A guilty plea is not always entitled to significant weight, and the discount required for the plea may be less than it would have been but for s 104, which requires something more than the fact that a particular discount would have been given had the presumption not applied.

Preventive detention

[43] The sentencing options for a court in some cases of violent offending may include a sentence of preventive detention. The purpose of such a sentence is to protect the community from those who pose a significant and ongoing risk to the safety of members of the public.[59] Section 87 of the Sentencing Act applies if the person is convicted of a qualifying sexual or violent offence,[60] was over 18 years of age when the offence was committed, and the court is satisfied the person is likely to commit another qualifying sexual or violent offence if the person is released at the sentence expiry date.

[44] When considering whether to impose a sentence of preventive detention the Court must take into account the following factors:[61]

(a) any pattern of serious offending disclosed by the offender's history;

(b) the seriousness of the harm to the community caused by the offending;

(c) information indicating a tendency to commit serious offences in future;

(d) the absence of, or failure of, efforts by the offender to address the cause or causes of the offending; and

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59 Sentencing Act, s 87(1).
60 As defined in s 87(5) of the Sentencing Act.
61 Section 87(4).

(e) the principle that a lengthy determinate sentence is preferable if this provides adequate protection for society.

[45] If a court sentences an offender to preventive detention, it must also order that a minimum term of imprisonment be served, which must not be less than five years.[62] Under s 89(2), the minimum term imposed must be the longer of:

(a) the minimum period of imprisonment required to reflect the gravity of the offence; or

(b) the minimum period of imprisonment required for the purposes of the safety of the community in the light of the offender's age and the risk posed by the offender to that safety at the time of sentencing.

[46] A key feature of the sentence of preventive detention is that, because a minimum term of imprisonment must be imposed, the sentence will be reviewed by the Parole Board at the point where the minimum term expires.[63] The criterion for release is the safety of the community.[64] Preventive detention may be an appropriate sentence where the court would otherwise impose a finite sentence but where community protection is an important consideration. Of course, preventive detention is not a relevant consideration in the present cases, given that life sentences were imposed.

Scheme for additional consequences for repeat serious violent offending

[47] The Sentencing and Parole Reform Act added ss 86A to 86I to the Sentencing Act.[65] The statutory scheme applies to serious violent offences and provides for three stages of offending with a system of warnings of the consequences if further serious violent offences are committed. A helpful outline of the various

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62 Sentencing Act, s 89.
63 Parole Act 2002, s 21.
64 Parole Act, ss 7(1) and 28(2).
65 As noted, it also amended s 103 to include s 103(2A) providing for the possibility of a sentence of life imprisonment without parole for murder where a minimum term of imprisonment would be insufficient to satisfy the purposes of accountability, denunciation, deterrence or community protection.

consequences of the three-strikes regime on sentencing for murder is set out in a recent Law Commission report.[66]

[48] A serious violent offence means an offence against any of a total of 40 provisions of the Crimes Act 1961.[67] The list covers a wide spectrum of offending. It includes 16 sexual and 24 violent offences, ranging from the most serious, murder, to the least serious, discharging a firearm. It also includes offences such as attempted sexual offending with a dependent family member under 18 years and indecent assault.

[49] The three stages are defined terms, respectively a stage-1 offence, a stage-2 offence and a stage-3 offence. A stage-1 offence means a serious violent offence that was committed at a time when the offender had not been given a first warning and was aged 18 years or older. A stage-2 offence involves a serious violent offence committed at a time when the offender had a record of a first warning.[68] A stage-3 offence is one that is a serious violent offence and was committed at a time when the offender had a record of a final warning.[69]

[50] Section 86B provides that the judge must give the offender a warning of what will happen if another qualifying offence is committed. The warning is given in court and in writing. It specifies the consequences if the offender is convicted of any serious violent offence after a stage-1 offence. Section 86C provides that, where an offender is convicted of one or more stage-2 offences (other than murder), a final warning must be given and a record made of the fact of the warning.

[51] In cases other than murder, where an offender is convicted of a qualifying offence after having had a first warning, the sentence imposed for that stage-2 offence is a determinate sentence of imprisonment as set by a judge. Further, the court must order the offender serve the full term of the sentence without parole.[70] Where an offender is convicted of one or more stage-3 offences, the offender must

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66 Law Commission *Understanding family violence: Reforming the criminal law relating to homicide* (NZLC R139, 2016) at [11.73]–[11.84].
67 Sentencing Act, s 86A, definition of "serious violent offence".
68 But did not have a record of a final warning.
69 Sentencing Act, s 86A, definition of "record of final warning".
70 Section 86C(4).

be sentenced in the High Court and the judge must sentence the offender to the maximum term of imprisonment for each offence.[71] This is to be served without parole unless, given the circumstances of the offender and offending, that would be manifestly unjust.[72]

[52] Where murder is the stage-2 or stage-3 offence, s 86E applies. Because this provision is central to the present appeals, we set out the relevant parts of s 86E:

> …
>
> (2) If this section applies, the court must–
>
> (a) sentence the offender to imprisonment for life for that murder; and
>
> (b) order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.
>
> (3) If the court does not make an order under subsection (2)(b), the court must give written reasons for not doing so.
>
> (4) If the court does not make an order under subsection (2)(b), the court must,–
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> …
>
> (b) if that murder is a stage-2 offence, or if the court is satisfied that a minimum period of imprisonment of not less than 20 years under paragraph (a) would be manifestly unjust, order that the offender serve a minimum period of imprisonment in accordance with section 103.
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> …
>
> (6) If, in the case of a stage-2 offence, the court makes an order under subsection (4)(b) and the offender does not, at the time of sentencing, have a record of final warning, the court must–
>
> (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning; and
>
> (b) record that the offender has been warned in accordance with paragraph (a).
>
> …

[53] Because these appeals concern sentencing for a stage-2 murder offence, we have omitted s 86E(4)(a) which applies where murder is the stage-3 offence. For completeness, in such a case the court must, if a whole-of-life sentence is not

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71 Section 86D(2).
72 Section 86D(3).

imposed, impose a minimum period of imprisonment of not less than 20 years unless the court considers it would be manifestly unjust to do so.

[54] The sentencing of both Mr Harrison and Mr Turner engaged s 86E(2) and, because a finding of manifest injustice under s 86E(2)(b) was made, the fixing of a minimum period of imprisonment under s 86E(4). It was therefore necessary for the Court to determine the appropriate sentences in accordance with s 103 of the Sentencing Act. In Mr Turner's case, but not in Mr Harrison's, s 104 also applied.

[55] The statutory scheme provides in s 86F for the continuing effect of warnings. Section 86G sets out the consequences of cancellation of the record on later sentences. None of these provisions arise for consideration in the present appeals. Finally, we refer to s 86I. Because it is relevant to our analysis, we set out the section in full:

> **86I Sections 86B to 86E prevail over inconsistent provisions**
>
> A provision contained in sections 86B to 86E that is inconsistent with another provision of this Act or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

Submissions for Solicitor-General

[56] In support of the Solicitor-General's appeals, Mr Downs emphasised that under s 86E a sentence of life imprisonment without parole is mandatory, unless it would be manifestly unjust. He contended that, while the term "manifestly unjust" is not defined, the threshold of manifest injustice is likely to be reached in exceptional cases only, a view supported by the legislative history of s 86E, its text and the cases that have considered the equivalent expression in ss 102 and 104 of the Sentencing Act.

[57] Mr Downs identified key aspects of the legislative history that supported the proposition that disproportionate sentences were intended by s 86E. Thus, disproportionality alone will not render a sentence manifestly unjust. However, he qualified this submission by contending that the manifestly unjust exception was intended to operate as a legislative safety valve for those rare cases in which life imprisonment without parole would be plainly unjust. Parliament provided a judicial

discretion (albeit limited) to ensure s 86E will not result in "grossly disproportionate" sentencing responses in contravention of s 9 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). This response was appropriate, given the Supreme Court in *Taunoa v Attorney-General* had held that the standard of disproportionate severity in s 9 would be engaged by the length of a prison sentence only in extreme instances.[73] It would only capture treatment or punishment that is "grossly disproportionate to the circumstances".[74] An additional safeguard, counsel submitted, is s 41 of the Parole Act which allows an offender to be released on "compassionate" grounds.[75]

[58] Mr Downs emphasised that the whole-of-life sentence is not discretionary. The Judge *must* impose it unless it would be manifestly unjust to do so. The dictionary meaning of "manifestly" is clear or obvious to the mind or eye, demonstrably, or as having become apparent.[76] These various shades of meaning are consistent with the legislative history and connote an injustice that is clear or obvious, although it does not go so far as to require an injustice that is self-evident. Thus it is not sufficient for a judge to conclude a defendant would suffer injustice through application of the regime; that injustice must be clear. Other provisions of the Sentencing Act, namely ss 102 and 104, employ the same language. Mr Downs submitted that the application of the "manifestly unjust" exception in s 86E should follow a similar approach to that taken by the courts where the equivalent expression had been used in these sections.

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73 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [172]–[176].

74 At [176]. Counsel also cited *S v Dodo* 2001 (3) SA 382 (CC), where the South African Constitutional Court upheld a statutory provision that provided for mandatory life imprisonment unless the court was satisfied that there were substantial and compelling circumstances justifying the imposition of a lesser sentence. A critical factor was the residual discretion reserved by the statute that would enable a court not to impose a life sentence where such a sentence would be out of proportion to the circumstances of the individual offence or the individual offender. See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary* (2nd ed, LexisNexis, Wellington, 2015) at [10.14.7].

75 Section 41 provides that compassionate release may be granted on either of the following grounds: (a) the offender has given birth to a child; and (b) the offender is seriously ill and is unlikely to recover.

76 See Lesley Brown (ed) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 2002) at 1691.

[59] Mr Downs cited the summary of the principles applicable to the exercise of the discretion in s 102 given by this Court in *R v Rapira* where Elias CJ stated:[77]

> The test is that the sentence of life imprisonment is manifestly unjust. 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.

[60] Similarly, counsel cited *R v Smail* where this Court confirmed that under s 102 the presumption in favour of life imprisonment is "high" with a "limited discretion" to depart from it "where the offending is at the lowest end of the range of culpability for murder".[78] The presence of a mitigating personal factor will not of itself be sufficient to render life imprisonment manifestly unjust.[79] Where one or more of the factors in s 104(1) applies, it is less likely that the threshold under s 102 will be established.[80] Although there is no closed category in relation to s 102, there are only a few cases where there has been a departure from the presumptive sentence of life imprisonment.[81]

[61] Mr Downs submitted the cases demonstrate the need for very powerful mitigating features in relation to both the offence and the offender; personal mitigating features are by themselves insufficient. As this Court has observed:[82]

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77 *R v Rapira* [2003] 3 NZLR 794 (CA) at [121] cited with approval in *R v Mayes*, above n 48, at [27] and *R v Wihongi*, above n 48, at [70].

78 *R v Smail* [2007] 1 NZLR 411 (CA) at [14]. See also *R v Cunnard* [2014] NZCA 138 at [17]–[19].

79 *R v Rapira*, above n 77, at [123]. This Court considered that youth of itself could not automatically displace the statutory presumption. In *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 at [63] this Court said it was "almost inconceivable" that a guilty plea on its own would render life imprisonment manifestly unjust. This point was not addressed by the Supreme Court in *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

80 *Hamidzadeh v R* [2012] NZCA 550, [2013] 1 NZLR 369 at [70].

81 See *R v Wihongi*, above n 48 (where a severely impaired woman killed her partner following a lengthy history of abuse at the hands of the victim); *R v Law* (2002) 19 CRNZ 500 (HC) (where a 77-year-old man killed his dementia-afflicted wife as an act of mercy); *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011 (where a man suffering from a major psychiatric illness accompanied by psychotic illusions killed his elderly neighbour whom he believed was spying on him); *R v Cunnard*, above n 78 (where the offender was a secondary party who played a peripheral role in the killing); and *R v Nelson* [2012] NZHC 3570 (where a 13-year-old boy killed his caregiver).

82 *R v O'Brien*, above n 48, at [36] (emphasis added).

> There may be cases where the circumstances of a murder may not be so warranting [of] 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.

[62] Moreover, this Court in *Te Wini v R* rejected a submission that the s 102 jurisprudence was inclining to a more expansive approach to the presumption of life imprisonment.[83] The Court considered the jurisprudence "constrained".[84]

[63] Turning then to s 104, Mr Downs accepted that manifest injustice is more readily established under s 104, largely because the penalty or consequence involved is appreciably higher. However, it is not the judicial approach that differs, but rather that the difference in penalty affects the analysis. "Manifestly unjust" is still a high threshold, and Mr Downs submitted the approach in *Williams* stipulates that powerful mitigating circumstances bearing on the offence are more likely to displace the statutory presumption than the presence of mitigating personal factors.[85] A guilty plea will not always be entitled to significant weight in this assessment,[86] although it will likely assume greater importance than it would under s 102. Nor is remorse a factor that can "carry great weight".[87] Similarly, there is no automatic displacement of the 17-year minimum period on the basis of an offender's age alone.[88] Relying on these propositions as to the approach to the phrase manifestly unjust in ss 102 and 104, Mr Downs urged the Court to follow an analogous approach in relation to s 86E.

[64] Mr Downs further submitted that the statutory presumption under s 86E is that there should be a higher level of punishment, through the mechanism of a life sentence without parole, for repeat violent offenders. While a confined judicial discretion regarding manifest injustice reflects potentially competing principles, Parliament clearly expected the courts to respect the principle that murders

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83 *Te Wini v R* [2013] NZCA 201.

84 At [16].

85 *R v Williams*, above n 47, at [67] and [71].

86 At [72]–[73]. Thus a guilty plea will generally attract a discount of no more than one or two years in the s 104 context: *R v Baker* [2007] NZCA 277 at [27] citing *R v McSweeney* [2007] NZCA 147 at [10].

87 *R v Williams*, above n 47, at [79].

88 As to youth, see *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [76]. As to old age, see *R v Parish* (2003) 21 CRNZ 571 (CA) at [22] cited with approval in *R v Williams*, above n 47, at [92].

committed by repeat violent offenders should attract a sentence of life imprisonment without parole, irrespective of the offender's culpability. Nevertheless, counsel accepted an element of sentencing discretion endures.

[65] In summary, Mr Downs submitted that the following principles should inform a sentencing court's application of s 86E:

(a) The injustice must be clear. This is evident from the phrase "manifestly unjust" and the requirement for a judge to give written reasons for not imposing life without parole.[89]

(b) The standard is likely to be reached in exceptional cases only.

(c) A conclusion of manifest injustice must be reached on the basis of both the circumstances of the offence and those of the offender. The test is conjunctive.

(d) The manifestly unjust assessment must be undertaken in light of ss 7, 8 and 9 of the Sentencing Act.[90] The presence of mitigating personal factors under s 9(2) (including whether the offender pleaded guilty) will rarely displace the statutory presumption on its own.

[66] Thus, on the Solicitor-General's approach, the statutory consequence of a stage-2 or stage-3 murder conviction will apply in almost all qualifying cases and there is limited room to make allowances for circumstances of the stage-1 (or stage-2) offence, the index offence, or the offender.

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89 Sentencing Act, s 86E(3).

90 Albeit noting certain aspects, such as the parity principle (affirmed in s 8(e) of the Sentencing Act), will not generally be a relevant consideration. For example, the fact that an offender is subject to the three-strikes regime (and his or her co-offender is not) provides a legitimate basis to impose different sentences: see by analogy *R v Wikaira* CA166/93, 6 July 1993 at [4].

Background to the Sentencing and Parole Reform Act 2010

The legislative history

[67] The Sentencing and Parole Reform Bill 2009 (the Bill) was introduced to implement a policy of denying parole to the "worst repeat violent offenders" and those guilty of the worst murders.[91] In its original form, the repeat violent offender regime was to apply to offenders who received a sentence of five years' imprisonment (a qualifying sentence) for a serious violent offence.[92] Such a person would receive a first warning. A second qualifying sentence received a final warning and requirement to serve the sentence without parole.[93] A third qualifying offence received a sentence of life imprisonment with a 25-year non-parole period.[94] If an offender received a life sentence for murder following a first (or final) warning, the court was required to order the offender to serve the life sentence without parole unless that would be manifestly unjust. The possibility of a release mechanism after 30 years of a life without parole sentence was raised but evidently rejected by Cabinet.[95]

[68] A Regulatory Impact Statement (RIS) was prepared by the Ministry of Justice evaluating the objectives, alternatives, risks and costs of the proposed regime.[96] The key objectives of the policy were identified as increasing public confidence in the criminal justice system, contributing to "truth-in-sentencing" and enhancing public safety.[97] However, the RIS stated it was not possible to conclude with any certainty the extent to which these measures would improve public safety. It also referred to the increased potential for disproportionate sentencing outcomes, which might

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91 Cabinet Business Committee "No parole for worst repeat violent offenders and worst murder cases" (5 December 2008).

92 Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note).

93 Unless sentenced to preventive detention or life imprisonment for manslaughter, in which case the usual regime for non-parole periods would apply.

94 Unless that would be manifestly unjust, in which case the court would be required to impose a lower non-parole period.

95 Cabinet Business Committee "Final approval for introduction of Sentencing and Parole Reform Bill" (22 January 2009).

96 Ministry of Justice *Regulatory Impact Statement: Sentencing and Parole Reform Bill* (18 February 2009) [Ministry Regulatory Impact Statement].

97 At 2.

negatively impact public confidence in the justice system, and warned of the considerable potential for the regime to disproportionately affect Māori.[98]

[69] The Attorney-General prepared a report on the Bill as required by s 7 of the Bill of Rights Act. The report indicated some inconsistencies with the Bill of Rights Act but noted, in relation to a whole-life sentence for murder, "it is not necessarily contrary to human rights standards that a very serious offender may in fact remain in prison for the remainder of his or her life".[99] It is not entirely clear, however, whether the Attorney-General was referring to a whole-of-life sentence following a conviction for murder at both stage-2 and stage-3 or just stage-3.[100] We refer to the report in our analysis below at [112].

[70] The Bill was referred to the Law and Order Committee for consideration. The Select Committee heard extensive submissions. Major changes to the Bill were then proposed by Cabinet in December 2009 and the New Zealand Police replaced the Ministry of Justice as the lead advisory agency. Among other things, it recommended replacing the original threshold for each of the regime's stages (a qualifying sentence) with a conviction for a qualifying offence.[101]

[71] We are unable to discern any convincing justification for this in the legislative materials. A New Zealand Police Departmental Report that recommended Cabinet's proposed amendments notes 82 submitters thought the qualifying sentence requirement excluded too many offenders and advocated removing it on the basis it would enable the regime to be more effective more quickly.[102] The report also said increasing the scope of the regime was "consistent" with the Government's policy of

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98 At 9.

99 Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform* Bill (18 February 2009) at [21] [Attorney-General's report].

100 At [17.1] the report states that an offender convicted of murder as a second listed offence would receive a life sentence with a non-parole period of 25 years, which the Attorney-General concluded was disproportionate but not "grossly disproportionate". However, the report then goes on at [20] to discuss life sentences without parole for offenders convicted of murder "as their second or third listed offence", which the Attorney-General considered was "not necessarily contrary to human rights standards".

101 Sentencing and Parole Reform Bill 2009 (17-2) (select committee report) at 2–3. Cabinet also recommended replacing a mandatory life sentence at stage-3 (for offences other than murder) with the maximum sentence for that offence.

102 New Zealand Police *Sentencing and Parole Reform Bill: Departmental Report* (March 2010) at [137]–[140] [Departmental report].

targeting repeat serious offending.[103] A revised RIS was prepared by the New Zealand Police stating that the sentencing threshold restricted the application of the regime to the most serious offending, as a number of the listed offences could encompass conduct ranging from relatively minor to very serious.[104] The offered justification was that altering the "qualifying sentence" threshold would increase certainty about when an offender would be subject to the regime (upon conviction rather than post-sentencing) and would increase the deterrent or incapacitory impact due to more offenders being subject to the regime.[105]

[72] Cabinet's recommended amendments were considered by the Law and Order Committee, which recommended by majority that they be incorporated.[106] The Select Committee also recommended adding some offences to the list of "serious violent offences", bringing the total to 40. These amendments were all adopted and the Sentencing and Parole Reform Act was ultimately passed in its current form on 25 May 2010.

[73] The legislative history makes it plain that Parliament's intention was to limit judicial discretion and any departure from the mandatory nature of the regime would be rare and only in "exceptional cases where life without parole would be unjustifiably harsh".[107] In proposing the Bill, the Hon Simon Power MP, Minister of Justice, suggested the manifestly unjust provision be incorporated to capture the "very extraordinary case" such as an offender with intellectual or mental impairment, offending on the cusp of murder and manslaughter or where an offender has provided significant assistance to police.[108] It was also suggested that an early guilty plea would have some relevance in determining whether life imprisonment without parole is manifestly unjust.[109]

[74] A briefing paper by the Ministry of Justice to the Select Committee noted manifest injustice is a high threshold and, importantly, its application depends on its

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103 At [146].
104 New Zealand Police *Regulatory Impact Statement: Sentencing and Parole Reform Act* (16 December 2009) at 4 [Police Regulatory Impact Statement].
105 At 5–6.
106 Sentencing and Parole Reform Bill 2009 (17-2) (select committee report) at 3–10.
107 (18 February 2009) 652 NZPD 1421.
108 Cabinet Business Committee, above n 91, at [16].
109 Departmental report, above n 102, at [49].

context.[110] Drawing an analogy with ss 102 and 104 of the Sentencing Act, the paper observed the courts have been more willing to find manifest injustice under s 104 than under s 102, arguably because imposing a lower non-parole period is less of a departure from the statutory presumption than imposing a determinate sentence instead of life imprisonment. It was thought likely that case law on these provisions would be relevant to the court's determination of what circumstances make a sentence of life without parole manifestly unjust.[111]

Policy analysis and purpose

[75] The three-strikes regime was intended to apply to "those few who fail to heed the warnings and continue to offend regardless of the consequences", a "minority of offenders" who have demonstrated that they will not change.[112] In its original form, it was predicted that the full effect of the policy would be felt after 50 years, when an additional 132 prison beds would be needed. Some 70 of these beds would be for those sentenced to life imprisonment without parole following conviction for murder.[113] When the legislation underwent the aforementioned changes, this impact rose dramatically: it was predicted that 700 extra beds would be required 50 years post-implementation.[114]

[76] It appears that the rationale behind the three-strikes aspect of the Bill was that it would reduce violent crime, and thus improve public safety, through deterrence and incapacitation.[115] The notion was that those people who have a stage-1 warning would have to think "very, very hard" about committing a further serious violent offence and those who do not or cannot modify their behaviour will simply be locked away for the protection of society.[116] It was postulated that a harsh sentence imposed on a recidivist offender would also serve as a general deterrent to others.[117]

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110 Ministry of Justice *Sentencing and Parole Reform Bill: Initial Briefing* (22 April 2009) at [47].
111 At [50].
112 (4 May 2010) 662 NZPD 10674–10675.
113 Ministry Regulatory Impact Statement, above n 96, at 10.
114 Police Regulatory Impact Statement, above n 104 , at 7.
115 See (4 May 2010) 662 NZPD 10673–10675 and (25 May 2010) 663 NZPD 11236. See also the discussion of effectiveness in the Departmental Report, above n 102, at [10]–[25].
116 (4 May 2010) 662 NZPD 10683.
117 (25 May 2010) 663 NZPD 11236.

[77] This rationale stems from similar laws enacted in the United States, particularly California. Legislation from that state provided an express inspiration for the Sentencing and Parole Reform Bill.[118] There, three-strikes legislation was enacted in the 1990s as a means of combating rising crime rates following research which found that a small number of individuals are responsible for a disproportionately high percentage of violent crimes.[119] It was theorised that three-strikes laws can identify and prevent these individuals from committing offences, and this will significantly reduce the incidence of serious violent crime.[120] First, a three-strikes regime is thought to deter a repeat violent offender and others by making the consequences clear and visible; a simple message that a harsh punishment will be meted out to those who engage in repeated criminal behaviour.[121] Second, repeat offenders are incapacitated under three-strikes regimes by lengthy terms of imprisonment and are thereby prevented from committing further crimes.[122] This operates on a factual presumption that, by virtue only of their prior conviction(s), an individual will commit a further violent crime and thus must be incarcerated for the protection of society.

Our analysis of the 2010 legislation

Scope of the manifestly unjust exception

[78] The starting point is that the choice of what conduct should be criminalised and what maximum sentence should apply to it is Parliament's to make. In the present context it was, for example, open to Parliament to decide that a whole-of-life sentence (without parole) could apply in the case of the worst murders, as provided for in s 103(2A) of the Sentencing Act. However, Parliament has also prescribed in s 9 of the Bill of Rights Act that punishment comprising "disproportionately severe treatment or punishment" is prohibited. It is the task of the courts to interpret the

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118 See speech of David Garrett MP: (18 February 2009) 652 NZPD 1429. It must be noted, however, that the California legislation is far wider-reaching than the New Zealand regime, applying to inherently non-violent offences.

119 L Stolzenberg and S D'Alessio "'Three strikes and you're out': The impact of California's new mandatory sentencing law on serious crime rates" (1997) 43 Crime & Delinquency 457 at 458.

120 M Vitiello "Three strikes: Can we return to rationality?" (1997) 87 Journal of Criminal Law and Criminology 395 at 430–431; and T Marvell and C Moody "The lethal effects of three-strikes laws" (2001) 30 Journal of Legal Studies 89 at 89–90.

121 J Ardaiz "California's three strikes law: History, expectations, consequences" (2000) 32 McGeorge L Rev 1 at 4–5.

122 Stolzenberg and D'Alessio, above n 119, at 458.

legislative intention in the light of its text and purpose, having regard to the statutory context.[123] In some cases this may require the court to endeavour to reconcile any tensions arising from the wording. Here the court must seek to resolve the tension that exists between Parliament's right to determine a sentence for a particular offence and the constitutional right of citizens to be free from disproportionately severe punishment. Where the two cannot be reconciled, the Court must give effect to the legislation but may say that it has done so under s 4 of the Bill of Rights Act.

[79] The scope of s 9, particularly the phrase "disproportionately severe", was examined by the Supreme Court in *Taunoa v Attorney-General*.[124] Blanchard J said:[125]

> It is therefore apparent that "disproportionately severe", appearing in s 9 alongside torture, cruelty and conduct with degrading effect, is intended to capture treatment or punishment which is grossly disproportionate to the circumstances. Conduct so characterised can, in my view, when it occurs in New Zealand, be fairly called "inhuman" in the sense given to that term in the jurisprudence under art 7 of the ICCPR [International Covenant on Civil and Political Rights].

[80] Elias CJ viewed s 9 as embodying a "distinct" right.[126] When considered alongside s 23(5) (requiring everyone deprived of liberty to be "treated with humanity and with respect for the inherent dignity of the person"), these were not simply "different points of seriousness on a continuum" but were "distinct, though overlapping, rights".[127] *Taunoa* concerned the treatment of prisoners when in custody and so the focus of the Court's interest was on "inhuman treatment". As to that the Chief Justice stated:[128]

> There is no simple test for whether conditions amount to inhuman treatment. As the words used suggest, treatment which does not comply with s 9 must be seriously deficient. It must be "grossly disproportionate" rather than merely "excessive". So, the European Court of Human Rights has accepted that ill-treatment under art 3 must "attain a minimum level of severity". The assessment of severity is contextual.

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123 Interpretation Act 1999, s 5.
124 *Taunoa v Attorney-General*, above n 73.
125 At [176]. These conclusions were adopted by McGrath J at [340].
126 At [5].
127 Ibid.
128 At [91] (footnotes omitted).

[81] Tipping J also considered the question of disproportionately severe treatment or punishment. He agreed with Blanchard J that the phrase must take its colour from the context of s 9 as a whole.[129] In terms of the content of the test Tipping J concluded that disproportionately severe conduct would be:[130]

> … conduct which is so severe as to shock the national conscience. This test achieves purposes which must be deemed inherent in a concept which is linked with torture and other cruel and degrading treatment. First, it emphasises that the standard is well beyond punishment or treatment which is simply excessive, even if manifestly so. Second, it introduces the notion of the severity being such as to cause shock and thus abhorrence to properly informed citizens. Third, the reference to the national conscience brings into play the values and standards which New Zealanders share.

[82] There is a convenient summary of the views of the Supreme Court as to the test for breach of s 9 of Bill of Rights Act in *Vaihu v Attorney-General*.[131] This Court stated:[132]

> The Judges of the Supreme Court expressed differing views on the test for determining whether conduct breaches s 9, and none of those views commanded majority support. Elias CJ and Blanchard J favoured the test from Canada — conduct which outrages standards of decency. However in the case of Blanchard J, this definition gave content only to "disproportionately severe" treatment. Elias CJ considered that no test could be drawn to determine whether conduct was inhuman. Blanchard J appeared to adopt a general criterion of outrageousness and unacceptability of conduct for determining whether there is a breach of s 9. Tipping and Henry JJ preferred an arguably stricter test — conduct which shocks the national conscience — again, only with respect to the definition of "disproportionately severe". McGrath J preferred a criterion of overall harshness. What is clear from the judgments, however, is that the threshold for establishing a breach of s 9 is a high one.

[83] We assume that Parliament, in introducing the new sentencing regime for repeated serious violent offending, intended that any sentence imposed on an offender should not be grossly disproportionate to the circumstances of the offending and the offender contrary to s 9 of the Bill of Rights Act and the principles enunciated in *Taunoa*.[133] The fact the Attorney-General in his report under s 7 of the Bill of Rights Act did not indicate any inconsistency between s 86E and the Bill of

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129 At [286].
130 At [289].
131 *Vaihu v Attorney-General* [2007] NZCA 574, (2007) 8 HRNZ 403. The Supreme Court declined leave to appeal: *Vaihu v Attorney-General* [2008] NZSC 19.
132 At [36].
133 *Taunoa v Attorney-General*, above n 73.

Rights Act is relevant here. No doubt this is why Parliament provided that the mandatory sentence of life imprisonment without parole need not be applied where, in the judge's discretion, such a sentence would be manifestly unjust.[134] As we have noted, the phrase is not defined for the purposes of the new regime and therefore requires judicial interpretation.

[84] On the view we take of the present appeals, the question whether a whole-of-life sentence without the possibility of review breaches s 9 is not squarely before us. It should be reserved for another day.[135] For present purposes we will assume that a whole-of-life sentence is not a grossly disproportionate response to the very worst murders.

[85] As we have already observed, part of the Sentencing and Parole Reform Act included an amendment to s 103 of the Sentencing Act providing for a sentence of life without parole — even if the murder concerned is a stage-1 offence. Such a sentence may be imposed where the minimum period of imprisonment available will not be sufficient to satisfy the purposes of: (a) accountability; (b) denunciation; or (c) deterrence. Put another way, a life sentence (without review) might be necessary to satisfy these societal requirements. Examples mentioned in argument before us included terrorism, extraordinary sadism or cruelty, and murder of multiple victims. Section 103(2A) provides an appropriate mechanism to achieve these purposes through open judicial assessment unaffected by a presumption.

[86] These appeals, however, do not fall within the worst murder category but within the second of the statutory purposes: the class of "certain repeat offenders" and "persistent repeat offenders who continue to commit serious violent offences".[136] The statutory direction is to impose a whole-of-life sentence upon conviction for murder (even as a stage-2 offence), subject only to proof of conviction for a qualifying offence regardless of its actual severity or the sentence imposed. In argument Mr Downs conceded (we think rightly) that a whole-of-life sentence may be disproportionately severe under s 9 of the Bill of Rights Act if the index offence is considered in isolation. Parliament's rationale for the imposition of a heightened

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134 And why a manifestly unjust exception is also provided under s 86D(3) of the Sentencing Act.
135 See discussion below at [119]–[122].
136 Sentencing and Parole Reform Act, s 3.

penalty is the qualifying strike offence or offences. The choice of catchment or qualifying offence is thus of central importance to this regime.

[87] We consider that the breadth of offences within the statutory catchment for cases under the "persistent repeat offenders" regime elevates the risk of gross disproportionality. The qualifying offences within the definition of "serious violent offence" (discussed at [48] above) are extremely broad and include indecent assault, indecent act on a child, compelling an indecent act with an animal and discharging a firearm. Conviction for one qualifying offence may be the sole jurisdictional qualifier resulting in a whole-of-life sentence following a murder conviction when a 10-year minimum period (or determinate sentence) might otherwise have been appropriate. And as the RIS prepared by the police noted, a number of listed offences can encompass conduct that is "relatively minor".[137]

[88] Not only are the qualifying offences in s 86A of a wide variety, but there is also an infinite range of possible circumstances of offending within them. These features therefore give rise to a broad spectrum of criminal culpability. We consider that the risk that s 86E will produce arbitrary or wholly disproportionate outcomes is potentially high, with the consequence that the prospect of avoiding such an outcome may frequently arise. The manifestly unjust safeguard was intended to deal with:[138]

> … unforeseen circumstances that could damage the policy's credibility if one of the expectedly few cases where it was invoked seemed to be unjust and was described as such by the judiciary.

Significantly, this observation was made at the time the stage-1 qualifying offence involved a sentence of five years' imprisonment. We consider that the enlargement of the stage-1 qualifying catchment greatly increases the potential for injustice and damage to the policy's credibility.

[89] This is exemplified by the fact that neither Mr Harrison nor Mr Turner would have been caught under the initial version of the Bill. Specifically, in Mr Harrison's case, while he had a substantial criminal history his only stage-1 offence was an indecent assault involving minor conduct of its kind. Neither would any of the other

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137 As discussed at [71] above.

138 Cabinet Business Committee, above n 91, at [17].

three offenders sentenced under s 86E be caught by the regime as originally drafted.[139]

[90] We consider there may be a substantially larger number of murderers with a criminal history who end up subject to the regime than was anticipated, particularly as it changed dramatically during the legislative process. The Department of Corrections analysed data on offenders from the 10 years preceding the introduction of the Bill and noted that, on average, 6.6 offenders per year would be convicted of murder following a conviction for a serious violent offence.[140] However, on examining offenders sentenced for murder in 2009 and 2010,[141] we found that 16 offenders would have been caught by s 86E (assuming no deterrent effect). More importantly, this is almost one-third of the total number of those sentenced for murder in the two year timeframe. This effect appears to be far wider than the "few" or "minority of offenders" originally anticipated, in the departmental reports, to be subject to the three-strikes regime.

[91] Judicial concern over the inclusiveness of qualifying criteria in relation to minimum sentences is not new. The Supreme Court of Canada considered this issue in *Lloyd v R* in relation to a statutory minimum sentence of one year for trafficking or possession for the purposes of trafficking of a controlled drug.[142] Dealing with a constitutional challenge to the provision, McLachlin CJ said:[143]

> As this Court's decision in *R v Nur*[144] … illustrates, the reality is that mandatory minimum sentences for offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable because they will almost inevitably catch situations where the prescribed mandatory minimum would require an unconstitutional sentence. One solution is for such laws to narrow their reach, so that they catch only conduct that merits the mandatory minimum sentence. Another option to preserve the constitutionality of offences that case a wide net is to provide for residual judicial discretion to impose a fit and constitutional sentence in exceptional cases. This approach, widely adopted in other countries, provides a way of resolving the tension between Parliament's right to choose the appropriate range of sentences for an

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139 *R v Kingi*, above n 5; *R v Herkt*, above n 5; and *R v Eruera*, above n 5.
140 Departmental report, above n 102, at appendix one.
141 Who were over the age of 18 years at the time of committing the murder and therefore would be subject to the three-strikes regime.
142 *Lloyd v R* 2016 SCC 13.
143 At [3].
144 *R v Nur* 2015 SCC 15, [2015] 1 SCR 773 (footnote added).

offence, and the constitutional right to be free from cruel and unusual punishment.

[92] The breadth of the catchment is not, of course, the only reason why gross disproportionality may arise from s 86E. For example, an important consequence of the three-strikes regime is that the sentence involves punishment by incarceration for the whole of the offender's natural life. Mr Stevenson, for Mr Harrison, drew our attention to some of the literature describing such a sentence as "death by incarceration".[145] While this is not strictly accurate — death results from natural causes — it does emphasise that there will never be a review throughout the whole period of the sentence. How long such a sentence is to be is determined by the age of the offender and the expected length of his or her natural life. A sentencing judge can never accurately predict the actual length given the myriad of individual circumstances (such as health or mental ability) of the offender. Mr Downs emphasised the availability of release on compassionate grounds under s 41 of the Parole Act.[146] We do not see this mechanism as providing in any way for a meaningful review of a whole-of-life sentence, since its scope is seriously curtailed. It is only available in cases of pregnancy and imminent death.

[93] The average age of the 16 offenders who would have been subject to the three-strikes regime (had it been in effect in 2009–2010) was 38 years at the time of sentencing for murder. All offenders were male. According to Statistics New Zealand, life expectancy for a male is 79.5 years, albeit this varies by ethnicity: a Māori male's life expectancy is 73 years while a "non-Māori" male's is 80 years.[147] Thus, on average, an offender sentenced under the three-strikes regime may face an effective sentence of between 35 and 42 years in prison. This exceeds the longest ever non-parole period imposed for murder, 30 years.[148] While there is obviously no

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145 See Robert Johnson and Sonia Tabriz "Death by incarceration as cruel and unusual punishment when applied to juveniles: Extending *Roper* to life without parole, our other death penalty" (2009) 9 U Md LJ Race Religion Gender and Class 241; William W Berry "More different than life, less different than death" (2010) 71 Ohio St LJ 1109; and Robert Johnson and Sandra McGunigall-Smith "Life without parole, America's other death penalty" (2008) 88 The Prison Journal 328.

146 Mr Downs in argument referred to s 41 of the Parole Act as one of the five "safeguards" of the regime that prevents manifest injustice or a breach of the New Zealand Bill of Rights Act 1990 from arising.

147 Statistics New Zealand "New Zealand period life tables: 2012–14" (8 May 2015) <www.stats.govt.nz>.

148 *R v Bell* CA80/03, 7 August 2003.

certainty that a person sentenced to life imprisonment with parole will ever be released, the Department of Corrections in the Police Departmental Report estimated that stage-2 and stage-3 offenders would currently spend, on average, between 13 and 15 years in prison.[149] These figures provide further support for the existence of a risk of gross disproportionality arising from the three-strikes regime.

[94] Thus, given the breadth of cases caught by the qualifying requirements and the consequences arising from s 86E, the scope of the manifestly unjust discretion is critical. The discretion must be exercised by reference to the inherent risk of gross disproportionality arising from the application of s 86E. It is the means by which the courts can ensure punishment does not contravene s 9 of the Bill of Rights Act. Such an approach to the discretion is consistent with *Taunoa*.[150]

[95] We do not agree with Mr Downs' assumption that the inherent risk of wholly disproportionate sentencing outcomes is to be considered in relation to other stage-2 or (as the case may be) stage-3 offenders. Such an approach may apply under s 102 or s 104 where the eligible group is narrowly defined. The respective groups comprise either all murderers (s 102) or all who have acted with extreme brutality (to take one example from s 104). But under s 86E the eligible group relevantly comprises all murderers with one or more of a highly disparate range of previous qualifying offences. And significantly the consequence has no regard to either the qualifying or the index offences. Mr Downs' argument does not take into account that under s 86E one cannot know for what proportion of the eligible group, particularly on the second strike, a whole-of-life sentence might be justified on the grounds of accountability, denunciation and personal deterrence.

[96] Rather, the assessment of disproportionality in any given case may be informed by the full range of sentencing objectives and principles. We make four additional points. First, there may be cases for which the premise underpinning the deterrence rationale, that offenders understand and can respond to the warning, is wrong. Second, such offenders may not in fact pose a high risk of violent

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149 Departmental report, above n 102, at appendix one.

150 A similar approach was adopted by Whata J in *R v Eruera*, above n 5, at [65].

reoffending.[151] Third, the facts of the index offence may point to a lower level of culpability than normal, such as the case of a getaway driver. Fourth, the need for deterrence, denunciation and community protection may not necessarily be high. In each of these respects the assumptions underlying the legislation may or may not be correct in the individual case. The manifest injustice exception must be a means of recognising this, if sentencing outcomes are not to be grossly disproportionate. The inquiry in each case must therefore be intensely factual. The court is dealing with an offender whose individual circumstances may engage the statutory objectives of accountability, denunciation and deterrence to a greater or lesser degree.

[97] The research on whether three-strikes regimes actually work to reduce crime is equivocal at best.[152] The differences in the New Zealand legislation mean findings based on United States experience cannot be uncritically extrapolated.[153] Because of this, the Ministry of Justice RIS warned it was not possible to conclude to what extent public safety would be improved by the three-strikes regime.[154] As the New Zealand Police RIS notes, "[i]t is generally difficult to identify the extent to which a change in behaviour is due to incapacitation and deterrence as opposed to other factors".[155]

[98] We acknowledge that our proposed approach differs from that followed under ss 102 and 104 of the Sentencing Act despite the same language of "manifestly unjust" being employed. This is because the differences between ss 102, 104 and

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151 In the case of a person sentenced for murder the court will always appreciate that the life sentence is indeterminate and the offender will not be released unless the Parole Board believes it is safe to do so.

152 In fact, the majority of empirical research indicates there is no credible evidence that three-strikes legislation has significant impact on deterring or reducing crime: see T Kovandzic, J Sloan and L Vieraitis "Striking out" as crime reduction policy: The impact of "three strikes" laws on crime rates in US cities" (2004) 21 Justice Quarterly 201; M Tonry "The mostly unintended effects of mandatory penalties: Two centuries of consistent findings" (2009) 38 Crime and Justice 65; J Kelly and A Datta "Does three strikes really deter? A statistical analysis of its impact on crime rates in California" (2009) 5 College Teaching Methods and Styles Journal 29; R N Parker "Why California's "three strikes" fails as crime and economic policy, and what to do" (2012) 5 California Journal of Politics and Policy 206; and L Kazemian "Assessing the impact of a recidivist sentencing premium" in J V Roberts and A von Hirsch (eds) *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Hart Publishing, Oxford, 2014) 227 at 242–244.

153 W Brookbanks and R Ekins "The case against the "three strikes" sentencing regime" [2010] NZ L Rev 689 at 709.

154 Ministry Regulatory Impact Statement, above n 96, at 9.

155 Police Regulatory Impact Statement, above n 104, at 5.

86E are critical: ss 86A–86I provides for a regime that is vastly different to usual sentencing practice and entails far more extreme outcomes.

[99] Under s 102, the purpose of the exception in that context is to determine whether the court might impose a finite sentence as opposed to one of life imprisonment with a minimum term of imprisonment. In the case of the latter, the offender will have a review at the expiry of the minimum term, but will always be subject to recall to prison in the case of breach of conditions of parole.[156] With a finite sentence, parole eligibility is subject to the provisions of the Parole Act, but the offender must be released at the latest at the expiration of the finite term. Under s 104, if the manifestly unjust exception does not apply, an offender will serve a life sentence with a minimum period of 17 or more years' imprisonment. However, the offender will, after the expiry of the minimum period, be eligible for parole. Under s 86E, if the exception does not apply, a sentence of life without parole will apply. There will never be a review by the Parole Board, irrespective of any changes in the offender's circumstances.

[100] The other distinguishing feature of s 86E is that, unlike the defined aggravating circumstances in s 104(1)(a)–(i), the circumstances of both the stage-1 offence and the stage-2 offence will vary widely. The stage-2 murder need not be in the category of worst murders. A conviction as a secondary party with limited involvement will suffice. Given the nature of the qualifying circumstances in the 10 categories in s 104(1), no question of gross disproportionality is likely to arise.

[101] Therefore, the guidance that can be taken from the use of the phrase "manifestly unjust" in ss 102 and 104 is minimal. Despite statements of intent to the contrary in some of the legislative materials, the stark differences in the purposes, qualifying requirements and effects of the mandatory provisions do not support the application of a similar interpretative approach to s 86E. Although Parliament has employed the same phrase in ss 102(1), 104(1) and 86E(2)(b), the statutory context in which the phrase is used in each provision differs greatly. The exceptions do different work in each context. We can see no reason either in terms of policy or interpretation why the same approach to the manifestly unjust exception in ss 102

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156 Parole Act, ss 60 and 61.

and 104 should also apply to s 86E. Rather, we consider that the phrase manifestly unjust must be interpreted to make s 86E work as Parliament intended without contravening s 9 of the Bill of Rights Act.

Our approach to manifestly unjust in s 86E

[102] We agree with Mr Downs that the assessment of whether a whole-of-life sentence is manifestly unjust must be reached on the basis of a conjunctive examination of the circumstances of the offence and those of the offender.

[103] As to the circumstances of the relevant offence, be it a stage-2 or stage-3 murder, relative criminal culpability will be a principal factor in the inquiry. This will encompass a comparative analysis of both: (a) other cases of murder and the sentences imposed on those offenders;[157] and (b) what sentence would have been imposed but for s 86E. This aspect of the inquiry will be similar to part of the methodology used in a s 104 case, albeit not entirely the same as that espoused in *Williams*.[158]

[104] With respect to the circumstances of the offender, the inquiry will take into account the nature of the stage-1 offence and the sentence imposed. In the case of a stage-3 murder the court will also be required to examine the circumstances of, and the sentence imposed for, the stage-2 offence. The extent of the offender's culpability in the index offence of murder must be assessed. The fact that such offending has occurred at stage-2 will also inform the concept of persistence, as the scheme is directed at deterring "persistent repeat offenders".[159]

[105] We also agree with Mr Downs that the assessment of manifest injustice will take into account, and give appropriate weight to, the statutory purposes and principles of sentencing in ss 7, 8 and 9 of the Sentencing Act. These are subject to the overriding requirement of s 86I, set out above at [55], meaning some will be inapplicable or of lesser relevance, for example, parity. The same is true of the prospects of rehabilitation. The relative weight to be given to these principles and

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157 See concerns about disparity raised in Cabinet Business Committee, above n 91, at [12]–[14].

158 *R v Williams*, above n 47, at [52]–[54]. This is because, as discussed at [101] above, the purpose of the two inquiries differs.

159 (4 May 2010) 662 NZPD 10673.

purposes must also take into account the particular purposes of the scheme governing repeat violent offenders.

[106] Where we part company with the Solicitor-General's submissions is the proposition that the test for manifestly unjust is likely to be reached only in exceptional circumstances. If that approach were to be applied, we consider it would often give rise to grossly disproportionate sentences. The range and nature of the relevant factors surveyed above, as part of the statutory context, is broad and multi-layered. While Parliament mandated a presumption of life without parole once the qualifying conditions for such a sentence were met, the inclusion of an exception for manifest injustice requires that it be given an interpretation that makes the legislation work consistently with the Bill of Rights Act. We are driven to the conclusion that the test for circumstances that are manifestly unjust must be of sufficient breadth to ensure that any sentence imposed under s 86E is not grossly disproportionate. The test requires a principled approach.

[107] The question then is what "manifestly unjust" should actually mean as used in s 86E of the Sentencing Act. Drawing together the threads of the earlier discussion, we recognise the mandatory nature of the whole-of-life sentences to be imposed in cases to which s 86E applies. But, when the qualifying requirements are met, regard must be had to the need to comply with the overarching constitutional requirement that the sentence must not constitute disproportionately severe punishment. The assessment, as noted, is different to that undertaken in respect of the application of the manifestly unjust exception in ss 102 and 104 because of the fundamentally different statutory purposes, context and consequences.

[108] Therefore we consider that:

(a) The judicial approach to the scope of the manifestly unjust exception is intended to avoid wholly disproportionate, that is, grossly disproportionate, sentencing outcomes.

(b) The case for a finding of manifest injustice must be clear and convincing. This follows from the use of the word "manifestly". However such cases need not be rare or exceptional.

(c) The determination requires an assessment of the circumstances both of the offence and the offender:

(i) The fact that the case is a stage-2 murder as opposed to a stage-3 murder is relevant. This factor may inform the nature and extent of the recidivism involved.

(ii) The consequences of a whole-of-life sentence (without parole) are a relevant factor. Personal mitigating factors under s 9(2), including mental health, relative youth and a guilty plea, fall to be considered in the balance.

(d) The sentence that would have been imposed but for s 86E is relevant to this assessment. The sentencing judge will consider, and give weight to, the applicable purposes and principles of sentencing in ss 7, 8 and 9 of the Sentencing Act.

(e) Other relevant (non-exclusive) factors include:

(i) Whether an offender has any, or limited, ability to understand the relevance and importance of a first or final warning.

(ii) Whether the factual matrix of the qualifying offence or offences, or of the index offence, points to a higher or lower level of culpability.

(iii) Whether the offender is likely to re-offend such that there is a need for community protection.

(f) The inquiry into the applicability of the manifestly unjust exception is an intensely factual one.

[109] The methodology for sentencing under s 86E should begin with the recognition that the sentence for a stage-2 or stage-3 murder is presumed to be life imprisonment without parole. That is the starting point. The second step, as with determining a sentence under s 104, should then require the judge to consider actual culpability based on the facts of the case, as compared with other murder cases. In other words, what would be the appropriate sentence for this offence in terms of the standard application of ss 102, 103 and 104 of the Sentencing Act? As we have seen under s 103(2A) this may be a sentence of life imprisonment without parole. An example falling short of a whole-of-life sentence is *Robertson v R*.[160] The minimum period of imprisonment imposed was 24 years. This Court expressly noted that the judge must apply the legislative policy that there may be cases in which the sentencing purposes in s 103(2) require the sentence be served without parole and comparison with other cases is a secondary requirement.[161]

[110] The final step involves recognising the statutory presumption of a whole-of-life sentence under s 86E and determining whether the exception applies, approaching that task in the manner set out at [107] above. The overall question is whether it would be grossly disproportionate, given the circumstances of the offending and the offender, for the offender to be subject to a whole-of-life sentence. On this approach, some cases (possibly those close to the worst murders) will attract a whole-of-life sentence. Others will result, from the application of the manifestly unjust exception, in a sentence with a minimum period of imprisonment appropriate in all the circumstances.

[111] We consider such a methodology will best meet the tension between the sentence of life imprisonment without parole mandated by s 86E and the constitutional requirement under s 9 of the Bill of Rights Act to avoid disproportionately severe punishment.

A declaration of inconsistency?

[112] The Attorney-General's report on the Bill drew to the attention of the House of Representatives an apparent inconsistency between s 9 of the Bill of Rights Act

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160 *Robertson v R* [2016] NZCA 99.
161 At [80].

and the proposed s 86D. The proposed s 86D provided for a life sentence to be imposed for a third listed offence and, absent manifest injustice, a 25-year non-parole period. The Attorney-General's concerns about this provision related to the imposition of life sentences for offences other than murder because there was no rational basis for the resultant disparities between offenders and because he considered the regime might result in gross disproportionality in sentencing.

[113] The Attorney-General did not, however, consider the proposed s 86E relating to life without parole for murder at the second or third stage was necessarily inconsistent with the Bill of Rights.[162] The report observed that the imposition of life without parole had been "upheld in the United States Supreme Court" and that "[t]he most recent jurisprudence in the United Kingdom is not wholly opposed to the concept of life without parole".[163]

[114] Mr Chisnall, for Mr Turner, argued that the decision of the European Court of Human Rights in *Vinter v United Kingdom*, delivered subsequently to the Attorney-General's report, reflects a change from the jurisprudence relied on by the Attorney-General.[164] Both respondents submit we should make a declaration of inconsistency or give an indication of inconsistency relying on the approach taken in *R v Hansen*.[165] Their counsel emphasise the absence of any review mechanism where life without parole is imposed and say this is a breach of s 9. They also contend life without parole sentences become arbitrary and thus contrary to s 22 of the Bill of Rights Act at the point in time the sentence ceases to serve any penological purpose.[166] Absent a review mechanism, it is not possible to decide if, and when, that position has been reached.

[115] The European Court of Human Rights in *Vinter* was considering applications relating to the provisions in the Criminal Justice Act 2003 (UK) allowing for whole-of-life terms of imprisonment for murder. The regime in issue allowed the trial

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162 Although, as noted, there appears to be some confusion in the report over whether an offender would receive a whole-of-life sentence only at stage-3 or at both stage-2 and stage-3: see Attorney-General's report, above n 99, at [17.1] and [18].

163 At [22].

164 *Vinter v United Kingdom* (66069/09, 130/10 and 3896/10) Grand Chamber ECHR 9 July 2013.

165 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [253] per McGrath J.

166 Section 22 relevantly provides: "Everyone has the right not to be arbitrarily … detained".

judge to decide whether the seriousness of the offence was such that the defendant should not be eligible for early release and a whole-of-life order made. The Secretary of State had a discretion to release on compassionate grounds where the inmate was terminally ill or seriously incapacitated. The legislation also set out circumstances that made seriousness "exceptionally high" in which case a whole-of-life order was the appropriate starting point.[167]

[116] The Grand Chamber determined that art 3 of the European Convention on Human Rights (prohibition on, relevantly, inhuman or degrading treatment or punishment) required:[168]

> … reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

[117] The Grand Chamber did not consider it was appropriate to prescribe the form of review, executive or judicial, or the timing. The Grand Chamber noted:[169]

> … the comparative and international law materials before it show[ed] clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter … .

[118] To the extent *Vinter* sets out the principle that review is necessary where the penological purpose is public safety, it reiterates well-understood principles reflected, for example, in the preventive detention regime in the Sentencing Act to which we have earlier referred.[170] There is some force, however, in Mr Downs' submission that Parliament has rejected the underlying assumption in *Vinter* that, after a certain point, the only legitimate penological purpose is the protection of public safety and not, for example, punishment. We need not take this further for the reasons we now discuss.

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167 *Vinter v United Kingdom*, above n 164, at [12]. For example, a murder of two or more persons involving a substantial degree of premeditation or planning.

168 At [119].

169 At [120].

170 At [43]–[46] above.

[119] First, in order to make a declaration in this case we would first need to establish the Court's jurisdiction to do so in a criminal appeal. Mr Downs relies on this Court's earlier decisions, particularly *Belcher v Chief Executive of the Department of Corrections*, for the submission that there is no jurisdiction.[171] We have concluded we do not need to deal with this question. Our approach to the interpretation of manifest injustice is intended to ensure s 86E is interpreted sufficiently broadly to avoid inconsistency with the Bill of Rights Act altogether. There will also be an opportunity to consider the jurisdiction to make a formal declaration in the civil context in a forthcoming appeal.[172] There are advantages in dealing with the issue in that context rather than the present case where any declaration would be of limited utility.

[120] Secondly, our approach to interpretation means it is not necessary for us to undertake the analysis set out in *R v Hansen*.[173] We consider that there is a "credible rights-consistent" interpretation of s 86E which we have adopted consistently with the "interpretive preference" in s 6 of the Bill of Rights Act.[174]

[121] We agree, however, that if the narrower interpretation, largely equating the meaning of manifest injustice in s 86E with that in s 104 as advanced by the Crown, were to be adopted, that would raise issues of inconsistency with s 9.

[122] As the Supreme Court of Canada said in the excerpt from *Lloyd* cited above at [91], there are various ways of ensuring mandatory minimum sentences meet constitutional standards. The Supreme Court identified two possible methods. The first of these is to narrow the relevant catchment. The second is to provide "[r]esidual judicial discretion for exceptional cases".[175] McLachlin CJ specifically identified ss 86E, 102 and 103 of New Zealand's Sentencing Act as illustrative of the

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171 *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174. See also *Belcher v Chief Executive of the Department of Corrections* [2007] NZSC 54; *Manawatu v R* [2007] NZSC 13 at [6]; and *Exley v R* [2007] NZSC 104 at [2].

172 On an appeal from *Taylor v Attorney-General* [2015] NZHC 1706.

173 *R v Hansen*, above n 165, at [57] per Blanchard J, [92] per Tipping J and [192] per McGrath J.

174 *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 427 at [182].

175 *Lloyd v R*, above n 142, at [35]–[36] per McLachlin CJ.

second method.[176] But, that method would be ineffective if the discretion is not construed sufficiently broadly. If in a particular case the safeguard provided were not to operate to prevent gross disproportionality, that can be addressed at that time.

Application of s 86E to Mr Harrison's appeal

Solicitor-General's submissions

[123] Mr Downs submitted Mallon J erred in concluding a relative lack of severity in relation to Mr Harrison's stage-1 offence was sufficient by itself to displace the presumption of life imprisonment without parole. While the nature and severity of an offender's previous stage offence or offences is a relevant consideration (as part of the circumstances of the offender), this factor cannot be determinative of the inquiry under s 86E.

[124] Mr Downs further submitted the Judge erred by in effect reversing the presumption in favour of life imprisonment without parole. This occurred because, having concluded the manifestly unjust exception was established by the circumstances of the stage-1 offence alone, the Judge proceeded to consider whether there were any features of the offending or personal factors that "alter[ed] that conclusion".[177] She concluded there were none.[178] Mr Downs argued this approach overlooks the mandatory nature of s 86E. The correct application of s 86E required the Judge to identify any particular circumstances of the offence and/or the offender that would *displace* the statutory presumption of life imprisonment without parole, rather than justify its imposition.

[125] Mr Downs also submitted the analysis under s 86E of the offender's personal circumstances requires an assessment of the whole of those circumstances, including the criminal history. Mr Downs submitted that consideration of an offender's criminal history prior to their conviction for the stage-1 offence would not involve

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176 At [36]. McLachlin CJ noted that that the laws of other countries, including New Zealand, reveal a variety of approaches to residual judicial discretion, with the only requirement being that this discretion allow for a lesser sentence where the application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate.

177 Harrison sentencing decision, above n 3, at [31].

178 At [32].

any "improper retrospectivity" as suggested by Mallon J.[179] Rather, he submitted Mr Harrison's history is relevant as it is extensive and demonstrates a "propensity for violence and disregard for the safety of others", including:

(a) A conviction for manslaughter in 1987 resulting in a sentence of six years' imprisonment. Mr Harrison, then aged 17 years, was part of a group that assaulted the victim as part of a gang disciplinary process. The summary of facts records Mr Harrison repeatedly struck the victim with a piece of timber and stabbed him in the arms, legs and buttocks.

(b) A conviction for wounding with intent to cause grievous bodily harm in 2005 resulting in a sentence of four years' imprisonment. The summary of facts records a prolonged episode of violence in relation to Mr Harrison's ex-partner involving repeated punches to the victim's head and face, restraining her by jumping on her back and threatening to kill her with a knife.

(c) A conviction for assault in 2007 resulting in a sentence of three months' imprisonment. The offending occurred while Mr Harrison was in prison. Mr Harrison approached a prison officer and punched him with a closed fist to the mouth. He then delivered a second punch to the neck.

[126] Finally, Mr Downs submitted there was nothing exceptional about the circumstances of this stage-2 murder and Mr Harrison's personal circumstances to render a sentence of life imprisonment without parole manifestly unjust. The aggravating features of the offending are that it occurred in the context of gang violence for which a weapon was brought to the confrontation. As the senior patched member of the two men, the jury must have accepted that Mr Pakai had either acted on Mr Harrison's instructions or at his encouragement. Moreover, no compelling mitigating features exist in relation to the offending or Mr Harrison.

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179 At footnote 24.

Consequently, there is no manifest injustice in imposing the sentence mandated by s 86E.

Our evaluation

[127] We consider that, when the analysis of Mallon J is viewed as a whole, she did not overlook the mandatory nature of s 86E. It may have been preferable, when determining whether the exception applied, for the Judge to focus more specifically on the circumstances of the offending. What she said of the index offending was that "there is nothing about the offence itself which stands out one way or another. It is neither the least nor the worst offending of its kind".[180] However, the context for this observation had already been fully described earlier in her remarks by reference to the background to, and detail of, the culpability involved.[181]

[128] Nor do we consider that Mallon J erred by effectively reversing the presumption in favour of a whole-of-life sentence. She did not regard the nature of the stage-1 offence as determinative of the whole analysis. It is true the Judge initially focussed particularly on the relatively minor nature of the stage-1 offence, but that was an important consideration. As the Judge noted, indecent assault attracts the lowest of the maximum available penalties for a qualifying serious violent offence and the specific incident was properly characterised as being "at the lower end of that type of offending".[182]

[129] The Judge's observation that the fact that this stage-1 offence could trigger a whole-of-life sentence would be an "entirely disproportionate response" was a statement of the reality.[183] After all, this was a stage-2 murder offence occurring following a lower range stage-1 offence. Indeed, to have imposed a whole-of-life sentence in this case would have led to the very risk identified in the Ministry of Justice's RIS, namely, that there could be negative impact on "public confidence in the criminal justice system" due to the potential for disproportionate outcomes.[184]

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180 At footnote 19.
181 At [4]–[11].
182 At [29].
183 At [30].
184 Ministry Regulatory Impact Statement, above n 96, at 9.

[130] Finally, we do not see any merit in the criticism concerning the impact of Mr Harrison's pre-stage-1 convictions. We consider that where s 86E is engaged, earlier convictions may well operate as a personal aggravating factor. What impact they might have in a particular sentencing will turn on the facts of the case.

[131] Applying the approach described at [108]–[109] above, we have no doubt Mallon J was correct not to impose a sentence of life imprisonment without parole. We uphold her decision for the reasons we have already outlined. We make two further points. First, the sentence for this offending, but for s 86E, would have been a sentence of life imprisonment with a minimum period of 13 years.[185] Mr Downs did not seek to argue, if a whole-of-life sentence were not imposed, the minimum period of imprisonment fixed by the Judge was wrong. This provides a useful comparator to the possible s 86E sentence of life without parole. As Mr Harrison was aged 44 he could, should he live to the age of 75, have served over 30 years in prison.[186] This differential clearly raises issues of significant disproportionality.

[132] The last point is to reiterate a consideration noted by the Judge. The victim's father, Mr Matalasi Senior, had granted forgiveness and did not seek imprisonment or a whole-of-life sentence. Given that one justification for the three-strikes legislation is that it ensures victims' families do not have to worry about parole hearings or the offender's release,[187] it follows that the views of those affected may be a relevant consideration in the overall analysis.

[133] For the above reasons the Solicitor-General's appeal in respect of the sentence of Mr Harrison fails.

Application of s 86E to Mr Turner's appeal

Solicitor-General's submissions under s 86E

[134] In Mr Turner's case, Mr Downs submitted Woolford J erred in concluding s 86E is directed at the "worst murders" and those offenders who are "beyond

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185 Harrison sentencing decision, above n 3, at [35]–[36].
186 As discussed at [93] above, the average life expectancy for a Māori male is 73 years.
187 See Sentencing and Parole Reform Bill 2009 (17-1) (explanatory note) at 2.

rehabilitation".[188] He argued the legislative history shows that s 86E was not directed to the "worst kinds of murders" but rather to all murders that are committed as an offender's second or third stage offence. The legislative history also demonstrates that s 86E was not intended to be limited to only those offenders who were "beyond rehabilitation".

[135] Mr Downs further submitted that, in any event, Woolford J erred in his assessment of Mr Turner's rehabilitative prospects. While the Judge considered Mr Turner had not had an opportunity to attempt rehabilitation in a meaningful way, the correct position is that he has been unwilling to engage in treatment. This is apparent from the following:

(a) Mr Turner removed himself from Odyssey House on one occasion and was removed from another programme for consumption of hand sanitiser.

(b) A psychiatric report prepared while he was serving his sentence for his stage-1 offence noted that Mr Turner was unwilling to engage in treatment while he was in prison.

[136] Mr Downs also contended there was nothing about the circumstances of the murder or Mr Turner himself to displace the presumption of life without parole. While not in the category of "worst murders", the murder was brutal and Mr Turner's response to it was callous. This is illustrated by comments Mr Turner made in his interview with police, referred to at [26] above.

[137] Mr Downs further submitted the prolonged and brutal nature of the murder, and the vulnerability of the victim, constituted significant aggravating features of the culpability involved.[189] Moreover, the murder was committed while Mr Turner was on bail for breach of his release conditions (following his stage-1 offence). Prior to that offending Mr Turner had a number of convictions for violence.[190] Thus Mr Downs argued Mr Turner was the very kind of "persistent repeat offender"

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188 Turner sentencing decision, above n 4, at [68].
189 As the Judge found, and counsel accepted, this murder engaged s 104 of the Sentencing Act.
190 Referred to at [28] above.

Parliament had in mind when enacting s 86E, particularly having regard to the fact that:

(a) Mr Turner's violent offending has escalated in seriousness over time;

(b) the murder was committed just two months after he was released from prison for his stage-1 offence; and

(c) there are similarities between the circumstances of the murder and Mr Turner's stage-1 offence. Both featured extreme and prolonged violence, including stomping on the victim's head.

[138] Therefore, Mr Downs submitted that the circumstances of the offending mean powerful mitigating personal factors were required to displace the statutory presumption in s 86E. He argued none were present.

[139] Mr Downs accepted that in principle mental illness is capable of mitigating a sentence if the impairment is causative of the offending or renders less appropriate or more subjectively punitive a sentence of imprisonment.[191] However, there is no psychiatric evidence to support either finding in this case. In Dr Goodwin's opinion, Mr Turner did not present with any active symptoms of mental illness and his personality disorder "need not" significantly influence the sentencing process.[192]

[140] Mr Downs also submitted that, although Mr Turner pleaded guilty, the Crown case against him was very strong. Applying *Williams*, something more than the fact of a guilty plea was required in order to demonstrate manifest injustice under s 86E.[193] Moreover, the callous nature of the killing and Mr Turner's actions afterwards undermine any claim of genuine remorse. The letter of apology offered at sentencing needed to be balanced against the offender's actions in the wake of the offending.

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191 Citing *E (CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411 at [68].
192 Citing *Skilling v R* [2011] NZCA 462 on the issue of mental disorder and reduced culpability.
193 *R v Williams*, above n 47, at [72]–[73].

Alternative argument under s 104

[141] In the alternative, the Solicitor-General argued that Woolford J was wrong to conclude it would be manifestly unjust to impose a minimum period of imprisonment of at least 17 years in terms of s 104 of the Sentencing Act. In applying the two-step approach established by this Court in *Williams*, Woolford J considered the appropriate minimum (in the absence of the 17-year minimum in s 104) would be 15 years.[194] The Judge then concluded:[195]

> … taking into account the discounts that would have been received without the operation of s 104 in recognition of Mr Turner's … guilty plea, remorse and mental illnesses, I find it would be manifestly unjust to impose a 17 year MPI. I am of the view that a minimum period of imprisonment of 15 years is appropriate in its place.

[142] Mr Downs submitted this reasoning discloses an error. To establish manifest injustice in the context of s 104 requires something more than the mere fact that but for the section, the minimum period of imprisonment would be set below 17 years.[196] The statutory minimum must not be departed from lightly.[197] Mr Downs cited the approach of this Court in *Hamidzadeh v R* as exemplifying the correct application of the two-step approach.[198]

[143] Here the Judge was dealing with a particularly brutal murder, featuring two aggravating factors identified in s 104(1), namely, a murder "committed with a high level of brutality, cruelty, depravity, or callousness" and a "particularly vulnerable" victim. That being so, truly compelling mitigating factors were required to render the imposition of a 17-year minimum period manifestly unjust. None were present. The result is that Woolford J ought to have imposed a term of at least 17 years' imprisonment.

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194 Turner sentencing decision, above n 4, at [110]–[114].
195 At [116].
196 *R v Williams*, above n 47, at [54].
197 At [66].
198 *Hamidzadeh v R*, above n 80. The approach of this Court was endorsed by the Supreme Court in *Hamidzadeh v R* [2013] NZSC 33, [2013] 2 NZLR 137 at [6].

Our evaluation under s 86E

[144] We agree with Mr Downs that Woolford J erred in concluding s 86E was directed at the worst murders and offenders who are beyond rehabilitation. The Sentencing and Parole Reform Act created two life-without-parole schemes, one for those guilty of the "worst murders" (embodied in s 103(2A) of the Sentencing Act) and one for those guilty of murder following conviction for a serious violent offence (embodied in s 86E). Section 86E was drafted broadly to include within its reach offending by a class of persistent repeat offenders who continue to commit serious violent offences, regardless of the actual nature of those offences. Thus the presumption of life imprisonment without parole clearly applies to all offenders convicted of any murder as a stage-2 or stage-3 offence.

[145] We also agree that Woolford J erred in his assessment of Mr Turner's prospects of rehabilitation. But we do not see such an error as fundamental to the Judge's overall conclusion that the exception in s 86E should apply.

[146] Where we disagree with the Solicitor-General's submission is that the circumstances of this case were insufficient to displace the presumption of life imprisonment without parole. Applying the approach set out above at [108]–[109], we are satisfied that it would be manifestly unjust for Mr Turner to be given a whole-of-life sentence.

[147] It is true the circumstances of the index offending were brutal and callous. It is also the case that the offending took place while Mr Turner was on parole, having been released two months earlier having served part of his sentence for the stage-1 offence. Such offending, involving a sentence of three years and four months' imprisonment, was itself serious as described at [28] above.

[148] However, we consider it is the circumstances of the offender which displace the presumption in Mr Turner's case. Mr Turner was 29 years of age when sentenced and, as the Judge found, a whole-of-life sentence could have resulted in him spending approximately 50 years in prison, assuming a standard life

expectancy.[199] In addition to this, Mr Turner admitted his actions to police at the first opportunity and pleaded guilty at an early stage once mental health testing had been completed. Further, Mr Turner suffers a range of health and mental health disabilities.[200] A number of reports were complied by mental health professionals which indicate Mr Turner has a severe personality disorder, and his current clinician states he is being treated for schizophrenia. Mental health difficulties were specifically considered as a justification for introducing the manifestly unjust exception into s 86E.[201]

[149] These factors, taken together, lead us to conclude that it would be manifestly unjust to sentence Mr Turner to life imprisonment without parole. When compared with the sentence that would otherwise be appropriate for this particular offending and offender (discussed below at [150]–[158]), we are satisfied that a whole-of-life sentence without any possibility of review would be grossly disproportionate. On that basis we agree with the conclusions of Woolford J on s 86E, although for somewhat different reasons.

Our evaluation under s 104

[150] However, we agree with the Solicitor-General that Woolford J erred in his application of the two-step approach required by this Court in *Williams*.[202] In short, we consider that the starting point of 17 years adopted by the Judge was too low.[203] Second, the Judge erred in concluding that discounts for a guilty plea, remorse and mental illness were such as to make it manifestly unjust to impose a minimum period of imprisonment of 17 years.

[151] As to the starting point, this case engages two of the qualifying factors in s 104. The first is the fact that the murder was committed with a high level of brutality and callousness. The second was that the deceased was particularly

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199 Turner sentencing decision, above n 4, at [70].
200 Described by the Judge at [81]–[83].
201 Cabinet Business Committee, above n 91, at [16].
202 *R v Williams*, above n 47, at [52]–[54].
203 Turner sentencing decision, above n 4, at [101].

vulnerable, as the Judge found.[204] Mr Hussain was alone, had been drinking, was smaller than Mr Turner and could not fight back.

[152] While the Judge examined a range of cases cited to him where starting points of between 17 and 20 years were considered appropriate,[205] we are satisfied that the combination of circumstances of the killing, the callousness of Mr Turner's approach after the killing and the victim's vulnerability all combined to suggest a starting point in excess of 17 years was warranted. The Judge was also required to factor in the feature that the killing occurred within two months of Mr Turner's release on parole, as well as Mr Turner's record for violence. This raised the question of safety of the public, which needed to be weighed in the overall balance.[206] This feature derived from Mr Turner's mental health condition and his seriously antisocial behaviour towards others. While one can have some sympathy for Mr Turner, it seems that his negative social behaviour and approach to forming relationships with others is clearly influenced by his many years of living outside society and relying significantly on substance abuse. Taking all these factors into account we therefore consider a starting point for the minimum period of imprisonment of 18 years would have been appropriate.

[153] The question then is what impact any mitigating factors should have. There were no mitigating features of the offending. The only three personal mitigating features applicable to Mr Turner were the guilty plea, his mental health issues and the remorse he expressed in a letter to the Court.

[154] We agree with Mr Downs that remorse expressed long after the event must be viewed in light of the callous nature of the killing and Mr Turner's actions afterwards. This was not genuine remorse. Further, the guilty plea was made in the face of a very strong Crown case and accordingly, in any analysis under s 104, can weigh little in Mr Turner's favour.

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204 At [93].

205 Including decisions of this Court in *Skilling v R*, above n 192, and *R v Tuporo* [2008] NZCA 22.

206 See *Robertson v R*, above n 157, at [83]. In determining the applicability of both ss 86E and 104, the Judge did not refer to the factor of protecting the community from Mr Turner.

[155] That brings us to how these personal circumstances should be weighed in the context of a s 104 analysis. This Court in *Hamidzadeh v R* approached the question thus:[207]

> … As this Court observed in *Williams*, the presence of mitigating factors under s 9(2) relating to the personal circumstances of an offender would rarely displace the statutory presumption under s 104.
>
> The personal circumstances referred to by the Judge in this context were the kinds of factors often encountered in sentencing for a wide variety of offences. They were Mr Hamidzadeh's remorse; his previous good character; the fact that he could speak little English and had no family support in this country; and his health issues. In the latter respect, the pre-sentence report indicated that Mr Hamidzadeh was suffering from high blood pressure for which he had been prescribed medication. Mr Hamidzadeh reported that he suffered from a kidney complaint but otherwise was in reasonable health.
>
> While these factors may have justified some modest reduction in sentence in cases not involving s 104, we do not regard any of them singly or collectively as warranting any reduction on the grounds of manifest injustice in the context of s 104.

[156] Applying this approach to Mr Turner's case, we consider that the applicable personal mitigating factors (guilty plea and mental health issues), together with the fact that this is an appeal by the Solicitor-General,[208] would result in a modest reduction to the starting point. Assessing such mitigating factors a total reduction of one year's imprisonment would be appropriate. This would mean an end minimum period of 17 years' imprisonment, the same figure as is mandated by s 104 of the Sentencing Act.

[157] It follows from the above that the Judge was in error in finding that it would be manifestly unjust to impose a 17-year minimum. Even if the combination of the starting point and any applicable reductions for personal mitigating circumstances had resulted in a sentence of 15 years' imprisonment, we consider this would not in the circumstances have been sufficient to establish manifest injustice of the type required under s 104.

[158] We therefore conclude that the appropriate minimum period of imprisonment to be served by Mr Turner is 17 years. The outcome is that after the minimum period

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[207] *Hamidzadeh v R*, above n 80, at [86]–[88].

[208] *R v Wihapi* [1976] 1 NZLR 422 (CA) at 424 cited in *R v Donaldson* (1997) 14 CRNZ 537 at 549–550.

of imprisonment of 17 years has been served, a review of Mr Turner's circumstances will be carried out by the Parole Board. What progress he has made in terms of rehabilitation and his then mental health condition will be a matter for the Parole Board to consider at that time.

Result

[159] The appeal against sentence by the Solicitor-General in the case of Shane Pierre Harrison is dismissed.

[160] The appeal against sentence by the Solicitor-General in the case of Justin Vance Turner is allowed in part. The sentence of life imprisonment imposed on Mr Turner in the High Court is confirmed but the minimum period of imprisonment of 15 years is set aside and a minimum period of imprisonment of 17 years is substituted.

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