IN THE COURT OF APPEAL OF NEW ZEALAND

CA496/05

THE QUEEN

v

DEMIS PETER CHEYNNE PAUL

Hearing: 21 June 2006

Court: William Young P, Wild and Heath JJ

Counsel: G P Mason for Appellant
F E Guy Kidd and K E Salmond for Crown

Judgment: 1 August 2006

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(given by Wild J)

Introduction

[1] This is an appeal against a sentence imposed by Gendall J in the High Court at Palmerston North on 28 November 2005. The jury had found the appellant guilty of murdering a 14 month old child at Palmerston North on 22 December 2004.

[2] Gendall J sentenced the appellant to life imprisonment. There cannot, of course, be any challenge to that. Finding that s 104 of the Sentencing Act 2002 applied, and that neither the circumstances of the crime, nor those of the appellant as the offender who committed it, took the case outside s 104, Gendall J imposed a minimum period of imprisonment of 17 years.

[3] The nub of the appeal is that Gendall J erred in that the circumstances of both the crime and the appellant made a minimum non-parole period of 17 years manifestly unjust. The appellant's submission on appeal was that a minimum period of imprisonment of 15 years or less was appropriate.

The offence

[4] We draw the facts from Gendall J's remarks on sentence.

[5] The appellant was living with a woman and her two children at a residential address in Palmerston North. On 22 December 2004 the woman's sister and her sister's child Caleb were guests in the house. That evening, the two women went out Christmas shopping, leaving the three children in the appellant's care. Mereana, the youngest of the three children, was sick, intermittent pain causing her to cry.

[6] After Mereana had been crying for some minutes the appellant lost his temper and punched Mereana. The punch hit her in the stomach as she was lying on her bed, the force travelling up through her body.

[7] The impact of the blow forced Mereana's internal organs against her spine, completely rupturing her bowel and tearing her mesentery artery, causing extensive haemorrhage and blood loss from which she died within a short period.

[8] In evidence at the appellant's trial, the pathologist likened the injuries caused by the blow to those seen in the victims of aircraft or motor accidents who had been subjected to acute deceleration. The force of the punch was described by the medical witnesses as "massive".

[9] Realising that he had badly injured Mereana, the appellant carried her, limp, across the road to neighbours to get help, but she was dead upon arrival by ambulance at the hospital.

[10] The appellant told the neighbours, the ambulance officers and the two women (his partner and her sister) that the injury had been caused by Caleb jumping up and down on Mereana. Caleb was two years and eight months old. The appellant said he had come into Mereana's room to see this happening. He persisted in that lie for some ten months until, in a further statement he made to the Police six days before his trial, he admitted that he had struck Mereana causing her death. This lie caused extreme and prolonged distress to the family, particularly to Caleb's mother, who thought her child had killed Mereana.

The offender

[11] In sentencing the appellant, Gendall J described his personal circumstances and background as sad, and commented that that is not unusual for violent criminal offenders. He observed that the appellant could not call in aid a blameless life. He noted that the appellant had 21 previous convictions, including 11 for burglary, some for theft and receiving, one for possession of an offensive weapon and another for wilfully damaging property by fire or explosives so as to endanger life (i.e. arson). Gendall J mentioned that the appellant had been sentenced to prison sentences for 13 offences, the longest sentences being two years and three months in December 2000 and July 2003. He noted also that the appellant was on home detention when he murdered Mereana.

[12] Mr Mason added further detail about the appellant's personal circumstances. He was 24 when he committed this crime. He had been sexually assaulted by his father when he was about eight. By the time his father was sentenced to a lengthy term of imprisonment two years later (in 1992), the appellant was already displaying behavioural difficulties. He was abandoned by his mother when he was 13: she dropped him off saying that she would pick him up later in the day, but never returned and he had not seen her since. In 1998 his mother was convicted of murder. His father had only been out of prison for about a year when, in 1999, he was

sentenced to another lengthy term of imprisonment. The appellant was the victim of regular and serious violence at the home where his mother had left him. A neighbour subsequently said he had, in that home, been "treated like a slave". The pre-sentence report presented to Gendall J described the appellant as socially immature and lacking basic parenting skills. He has nine children, all to different mothers. It appeared that he made no connection between the violence he had suffered and his own anger and violence.

Gendall J's sentencing remarks

[13] Having outlined the facts, Gendall J commented adversely on the effects of the appellant's violent outburst on the mothers of both Mereana and Caleb, the latter because of the appellant's lie. He described the case as "a dreadful killing of a defenceless infant – just a baby – who was lying helpless in her bed". He pointed out that the appellant had killed the baby of a woman who had offered him her home so that he could apply for home detention.

[14] Finding that there was nothing in the circumstances of the crime or the appellant's background or personal circumstances that enabled him to conclude that a sentence of life imprisonment would be manifestly unjust, Gendall J sentenced the appellant to life imprisonment. As already indicated, there is no challenge to that.

[15] Gendall J then held that s 104 Sentencing Act 2002 applied to the appellant because of Mereana's age and vulnerability. He commented that the provisions of s 104 "remove to a large extent a (sentencing) Judge's discretion".

[16] Next, he referred to the two-step approach suggested by this Court in *R v Williams* [2005] 2 NZLR 506, and to the need for a principled approach in applying the section, which was not to be interpreted as a guide to judicial discretion.

[17] Gendall J said that the appellant needed to demonstrate why a minimum period of imprisonment of 17 years would be so disproportionate to the circumstances of the offence and of the offender, as to be manifestly unjust. He referred specifically to [67] of *Williams*, including it in his sentencing remarks.

Gendall J then listed the factors which counsel for the appellant had urged would make it manifestly unjust to impose a minimum period of imprisonment of 17 years upon the appellant. Those relating to the offence were:

a) The vulnerability of Mereana was the only aggravating feature;

b) The appellant's violence was momentary, not prolonged;

c) Having struck Mereana, the appellant then panicked; and

d) This was not a frenzied or planned attack.

[18] The factors relating to the appellant's personal circumstances were his age, remorse and poor upbringing as a teenager.

[19] Gendall J noted the appellant's submission that these circumstances distinguished the case from *Williams*, *R v Mackness* HC HAM T023921 14 April 2003 (affirmed see CA160/03 24 November 2003) and *R v Harrison-Taylor* HC AK CRI 2004-092-001510 12 September 2005, all referred to by the Crown.

[20] Aggravating factors relied on by the Crown were then listed: the appellant's problem with anger, the fact that he murdered Mereana while on home detention and the fact that he had laid the blame on Caleb until a week before his trial. Gendall J noted that the first was acknowledged by the appellant, and he held that the latter two were aggravating features of the offending.

[21] The Judge then summarised the appellant's previous record, before turning back to *Williams*, and including [52] and [54] of that judgment in his sentencing remarks.

[22] Gendall J then concluded that the appellant's crime and personal circumstances did not fall outside the scope of the policy that Parliament had laid down in s 104, that the murder of vulnerable children was to attract a minimum period of 17 years imprisonment. He observed that he could not find powerful mitigating circumstances bearing on the crime or the appellant's personal circumstances displacing the s 104 presumption. He concluded:

> Regrettably yours is not an unusual or exceptional case and accordingly, I cannot conclude that manifest injustice would arise from the imposition of the 17 year minimum non-parole period that Parliament has required. So, you are sentenced to life imprisonment and pursuant to ss 103 and 104 of the Sentencing Act 2002 you are directed to serve a minimum period of imprisonment of 17 years.

The argument on appeal and consideration of it

[23] The scheme of Mr Mason's submissions followed the two-step approach suggested by this Court, at [52]-[54] in *Williams*, for Judges sentencing in s 104 cases. The first step is for the Judge to consider the aggravating and mitigating factors of the case and to assess the offender's degree of culpability against that in "the standard range of murders". If that assessment leads the Judge to conclude that a minimum term of less than 17 years would be appropriate, then the Judge needs to move to step two. That involves deciding whether, despite the step one assessment, it would be "manifestly unjust" to impose a minimum term of 17 years imprisonment.

[24] Addressing the first step, Mr Mason submitted that Gendall J had given several relevant factors inadequate or no weight and, conversely, had given weight to irrelevant factors. He then drew comparisons with the sentences imposed in what he submitted were comparable murder cases. That led Mr Mason to submit that Gendall J needed to depart downwards from the 17 year minimum period of imprisonment stipulated in s 104, if he was to avoid the manifest injustice Mr Mason submitted was the result of the sentencing exercise here.

[25] Mr Mason pointed to Gendall J fixing upon a minimum period of 15 years imprisonment "but for Parliament passing s 104". He submitted that inclusion of the relevant factors Gendall J failed to factor in adequately, or at all, and exclusion of the irrelevant ones the Judge took into account, would further reduce that minimum to 12-13 years, certainly not beyond 13-14 years.

[26] Turning to *Williams* step two, Mr Mason submitted that Gendall J had not considered whether the significant increase from the 15 year minimum he had identified to the 17 year minimum he had imposed led to a manifest injustice in and

of itself. Largely by comparison with the cases of Messrs Olsen and Williams (both dealt with in *Williams*) Mr Mason then submitted that the 17 year minimum Gendall J had imposed was manifestly unjust.

[27] As a preliminary comment, we acknowledge the difficulties inherent in each of the two steps suggested in *Williams*. Step one requires a sentencing Judge to benchmark the case against the "standard range of murders", a concept elusive at best. Gendall J commented on this difficulty, querying whether there could ever be a "standard range".

[28] It is difficult for a sentencing Judge to ignore, in fixing the 'notional' sentence required by *Williams* step one, the 17 years 'road marker' indicated by s 104. Indeed, and increasingly, the Judges who imposed the sentences in the "standard range of murders" will have experienced the same difficulty. The fact that s 104 is being applied in an unexpectedly large percentage of murders has already been commented upon extra-judicially by William Young P in his paper "Judicial implementation of legislative policy: Ruminations on the impact of the Sentencing Act 2002 on sentencing practice and prison musters", particularly in the following passages:

> [12] Here are the details of the non-parole periods imposed on offenders convicted of murder during the period 1995-2004: [1]

Non-parole period	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
10 years	23	26	31	24	20	21	14	16	10	11
>10 to 12 years	1	0	0	0	0	0	1	1	1	1
>12 to 14 years	2	3	3	0	2	5	4	4	5	2
>14 to 16 years	2	0	1	0	0	2	0	2	1	1
> 16 to 18 years	0	0	2	0	1	1	0	4	2	4
> 18 to 20 years	0	0	0	0	0	0	0	0	0	3
> 20 years	0	0	0	0	0	0	0	0	2	2
TOTAL	28	29	37	24	23	29	19	27	21	24
Overall average (years)	10.7	10.3	10.8	10.0	10.5	11.2	10.8	12.0	13.5	14.0

> [13] In considering these figures it is important to recognise that many offenders sentenced in 2003 (and perhaps some who were sentenced in 2004) were not subject to the s 104 regime. My impression of practice is that s 104 is having the effect of increasing the number of cases in which minimum terms are imposed and increasing the lengths of such minimum terms. I suspect that rather more cases are being held to be within s 104 than was anticipated.

> [14] The operation of the new regime has not been entirely smooth. The cases which have caused the greatest problems for the courts have involved young offenders[2] and those where the offender has pleaded guilty[3]. The ways in which the courts have addressed these (and indeed other) problems lie outside the scope of this paper. What the relevant cases have thrown up is the tightly prescribed nature of the discretions to deviate from the 17 year minimum in cases to which s 104 applies and to impose a sentence less than life (under s 102) in other cases. The courts may only do so if a manifest injustice test is satisfied. This necessarily produces a lumpy distribution of sentences and is thus not consistent with a seamless gradation of sentencing response to offender culpability. To put this in concrete terms, there are likely to be far more minimum terms of 17 years than of 16 years.
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> [1] Figures supplied by the Ministry of Justice to the Court of Appeal.
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> [2] See for instances *R v Slade* [2005] 2 NZLR 526 and *R v Green* CA461/04 2 June 2005.
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> [3] See *R v Williams* [2005] 2 NZLR 506 and *R v Walsh* (2005) 21 CRNZ 946.
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> The Hon Justice William Young "Judicial implementation of legislative policy: Ruminations on the impact of the Sentencing Act 2002 on sentencing practice and prison musters" Legislation Advisory Committee Seminar Paper, 3 April 2006.

[29] Step two requires the sentencing Judge to consider whether the imposition of a minimum period of 17 years imprisonment would be "manifestly unjust". But against what standard is that manifest injustice to be assessed? This Court attempted to provide sentencing Judges with guidance in *Williams* at [67]-[68], but commented that "what level of disparity [between the sentencing Judge's answer to *Williams* step one, and 17 years] amounts to manifest injustice remains a matter of sound sentencing judgment that is not capable of precise determination".

[30] Any departure downwards from the 17 years minimum term of imprisonment stipulated in s 104 must be to avoid the "manifest injustice" that would otherwise result.

[31] In terms of relevant factors which he submitted had been given no or insufficient weight, Mr Mason referred first to the appellant's upbringing, categorising it as "appalling". Mr Mason argued that the particular relevance of this was that it explained the appellant's anger, and his inability to deal with that anger. Mr Mason contended that the offenders' personal circumstances were what reduced the minimum period imposed in *R v Li* CA140/00 27 June 2000 to 14 years and that in *R v Harrison-Taylor* to 12 years. He contended that personal circumstances seem to have become more important, despite this Court's observation in *Williams* at [66] that they would rarely displace the 17 year minimum presumption in s 104.

[32] We do not accept that Gendall J placed insufficient weight on the appellant's personal circumstances. He noted the appellant's "poor upbringing as a teenager" as one of the factors advanced by the appellant's counsel as making the 17 year minimum period manifestly unjust, but commented:

> [17] Your personal circumstances and background are sad but that is not unusual for violent criminal offenders …

[33] Gendall J's approach was consistent with that indicated by this Court in *Williams* at [66], which in turn refers to *R v Parrish* CA295/03 12 December 2003.

[34] The next factor Mr Mason suggested had not adequately been factored in was the brief and unpremeditated nature of the violence here. Mr Mason reinforced this submission by drawing comparisons with *Li* and *Harrison-Taylor*. Again, we do not accept Gendall J overlooked this point. In sentencing the appellant, he expressly recorded counsel's submission that the appellant's actions "were momentary without prolonged violence where (the appellant) acted under stress through poor parenting skills and lost (his) temper". Gendall J referred to *Harrison-Taylor*, as one of several cases the Crown had sought to distinguish for sentencing purposes.

[35] Nor do we accept that Gendall J overlooked the next two factors referred to by Mr Mason, which can conveniently be dealt with together. These were that this was a section 167(b) Crimes Act 1961 case: there was no intention to kill. The appellant had accepted responsibility for the unlawful killing, although Mr Mason accepted not so as to get the benefit of a plea of guilty, because of course he defended the murder charge. Both these matters were dealt with by Gendall J who remarked:

> [6] You pleaded not guilty but acknowledged killing by a wrongful act. But the jury found you to be guilty of murder, accepting the Crown's case that it had proved you had the necessary intent when killing by an unlawful act. That is, you meant to cause bodily injury known by you to be likely to cause death and you were reckless whether death ensued or not.

[36] Mr Mason argued that Gendall J had wrongly factored two matters in to the sentencing exercise. The first was the appellant's persistence in lying about his involvement in Mereana's death, and blaming Caleb, until a few days short of his trial. Although we do not accept that this was irrelevant, we do think it is more

correctly treated as indicating a lack of remorse. For the ten months the appellant persisted in his lie that Caleb had killed Mereana, he disabled himself from expressing genuine remorse for what *he* had done. In sentencing the appellant, Gendall J accepted that he was remorseful. In our view, that remorse can only have dated from the point, six days before his trial, when the appellant accepted that he had killed Mereana. We agree with Gendall J's assessment that that remorse was insufficient to displace the s 104 presumption of a 17 year minimum.

[37] The second factor claimed to be irrelevant was the appellant's previous convictions, Mr Mason submitted, because they were not for violence. We think Gendall J was alive to that. His reference to the appellant's dishonesty offending has some relevance here, because of the lie persisted in by the appellant. Gendall J's reference to the convictions for possession of an offensive weapon and for arson which endangered life have greater relevance.

[38] The second part of Mr Mason's submissions on step one of *Williams*, was to draw comparisons with the cases we have mentioned. We assume Mr Mason was advancing these as cases in "the standard range of murders". We largely agree with Ms Guy Kidd's submission that these comparisons are misguided, because they serve only to demonstrate that the cases Mr Mason referred to differ significantly in terms of their facts, and contain mitigating factors not present here. This bears out our comment about the elusiveness of "the standard range of murders". It suffices to refer to *Harrison-Taylor*. Ms Harrison-Taylor murdered her eight month old son. The little boy's head had been struck with moderately severe force, probably against the side of his cot. He had then been suffocated with two hands held around his neck from behind. Bruising to his nostrils was consistent either with his face being pressed into the bedding or being pinched. The sentencing Judge, Ellen France J, had no clear view as to whether this was an intentional or reckless killing.

[39] Although Ms Harrison-Taylor did not call an ambulance until about four hours after her son died, and lied to the ambulance officers and subsequently to the Police about what had happened, the Judge did not think this was callous, commenting;

> I think you did realise the enormity of what you had done but could not face up to it.

[40] Ellen France J lowered the minimum period of imprisonment to 12 years. While she was satisfied that infanticide was properly rejected, she accepted that there was "a unique combination of circumstances … such that overall a 17 year term would be manifestly unjust". That combination appears to have been the psychiatric evidence that Ms Harrison-Taylor had a personality disorder, making her both more vulnerable to stress and less able to cope with stressful situations, the fact that she suffered from exhaustion and chronic pain, and the assessment that she was at low risk of re-offending.

[41] The consideration called for by *Williams* step one led Gendall J to a 15 year minimum period of imprisonment. Counsel disagreed as to whether the Judge reached that 15 years on the basis of s 104 considerations or on the basis that it had not been enacted. Although the Judge's sentencing remarks rather suggest it was the latter, we are in no doubt that he was correctly undertaking *Williams* step one. Step one was outlined by this Court at [52] in *Williams*, to which Gendall J specifically referred. In that paragraph, this Court made it clear that step one included consideration of the pertinent aggravating features set out in s 104 and the policy of s 104 that, in general, the presence of one or more s 104 factors establishes that the murder is sufficiently serious to justify a minimum 17 year period of imprisonment. The Court added:

> This element is necessary to ensure that effect is given to the legislative policy underlying s 104, which requires Courts at times to impose higher minimum terms of imprisonment than they might have done had s 104 not been enacted.

[42] Having arrived at 15 years, Gendall J needed to proceed to step two. And he did just that:

> [18] … But I have had to go on to consider whether such a term of 17 years minimum non-parole would be manifestly unjust. The Court of Appeal in *R v Williams* (supra) said this at [54]:
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> > "In cases where the first step points to a lesser minimum term than justified, the Court would go on to the second step and consider whether to impose a minimum term of 17 years' imprisonment

> would be manifestly unjust. If it is, the minimum term must be reassessed to what the Court considers to be justified."

[43] Mr Mason did not so much challenge Gendall J's approach to *Williams* step two, as submit that 17 year minimum imposed here was anomalous when compared with the 15 years imposed on Mr Olsen and the 17 years imposed on Mr Williams. In considering the sentence imposed on Mr Olsen, this Court had commented that the 15 years appealed against by the Crown was the appropriate minimum, and that it would be manifestly unjust to impose the 17 year minimum. Mr Mason submitted that it was anomalous that Mr Olsen got the 15 year minimum appropriate, but the appellant here a 17 year minimum, when Gendall J had assessed his culpability at the 15 year minimum level. He contended that this anomaly was compounded by the fact that the appellant got the same 17 year minimum as Mr Williams, whose level of culpability was undoubtedly much higher.

[44] Although this Court held that Mr Olsen's case came within s 104 "by a narrow margin", it was only because of the brutality and callousness shown, although even they were "at the lower end of the band of culpability created by s 104(2)". This immediately distinguishes it from the present case, which is squarely within s 104. We agree with Gendall J that the qualifying factor of the vulnerability of Mereana was central to the appellant's crime, and with his factoring in of that at *Williams* step two. We note the appellant concedes the centrality point. The importance of this was emphasised at [68] in *Williams*, when the Court observed:

> It may be helpful, however, to indicate that when the qualifying factor has only peripheral significance in the case the statutory minimum term may be manifestly unjust …

[45] A further distinction between this case and that of Mr Olsen is the allowance this Court considered was appropriate for "the impact of a very lengthy minimum term of imprisonment on a person who was 62 years old at sentencing".

[46] Whilst it is correct that the appellant and Mr Williams were both sentenced to a minimum period of imprisonment of 17 years, the comparison bears analysis. The much greater culpability of Mr Williams' offending is reflected in this Court's comment that a sentencing start point of 20 years, prior to considering mitigating

features, would have been appropriate. Mr Williams' guilty plea, which this Court treated as "prompt", justified a discount reducing the sentence to 17 years. The Court held there was nothing manifestly unjust in imposing that sentence, which the Court also viewed as the minimum possible sentence, bearing in mind that it was a Solicitor-General appeal.

[47] We do not accept that Gendall J erred in his approach to *Williams* step two. He reminded himself of the policy that Parliament had laid down in s 104. He expressly put to one side subjective sympathies, something this Court at [67] in *Williams* said sentencing Judges must guard against. As we have mentioned, and importantly, he noted that the qualifying factor of the vulnerability of Mereana was central to the appellant's crime. He could not find powerful mitigating circumstances bearing upon the crime, or within the appellant's personal circumstances, sufficient to displace the s 104 presumption. He observed that this was not an unusual or exceptional case. The result was that Gendall J was constrained to direct that the appellant serve a minimum period of imprisonment of 17 years. We see no error in any of that.

[48] Mr Mason had a final, general, submission on *Williams* step two. He submitted that in any case where the appropriate minimum period of imprisonment, apart from the statutory 17 year presumption, is 15 years or less, there will be a manifest injustice in imposing a 17 year minimum. We agree with Ms Guy Kidd's submission for the Crown that that is wrong. If it were correct, it would mean that a 15 year minimum term arrived at by *Williams* step one, could never be increased to 17 years by *Williams* step two. As Ms Guy Kidd submitted, that would undermine Parliament's intention in enacting s 104.

Result

[49] The appeal is dismissed.

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