NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF DEFENDANT "M" REMAINS IN FORCE. SEE [2016] NZHC 2881.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA454/2019
[2021] NZCA 401

BETWEEN	SELAIMA FAKAOSILEA Appellant
AND	THE QUEEN Respondent

Hearing: 12 May 2021

Court: Miller, Venning and Peters JJ

Counsel: GNE Bradford and BCS Moyer for Appellant
JEL Carruthers for Respondent

Judgment: 24 August 2021 at 10.00 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed in part.

C The sentence imposed on the importation offending is quashed and a sentence of nine years, six months' imprisonment is substituted.

D The minimum period of imprisonment imposed on the importation offending is reduced from seven years to five years, four months.

E The sentence imposed on the organised criminal group offending remains and is to be served concurrently with the sentence imposed on the importation offending.

REASONS OF THE COURT

(Given by Peters J

[1] Following a jury trial before Gordon J in the High Court in June 2019, the appellant, Ms Selaima Fakaosilea, was convicted of importing a Class A controlled drug (methamphetamine) and participating in an organised criminal group.[1] She was sentenced to 12 years and six months' imprisonment with a minimum period of seven years.[2]

[2] Ms Fakaosilea now appeals against conviction and sentence.

[3] The appeal against conviction is brought on the ground that a miscarriage of justice has occurred.[3] The appeal against sentence is brought on the ground that it is manifestly excessive.[4]

Background

Organised criminal group offending

[4] As appears below, Ms Fakaosilea's importation offending was vastly more serious than her criminal group offending. However, the criminal group offending preceded the importation in time.

[5] The Crown case on the criminal group offending was that Ms Fakaosilea, together with several of her co-offenders on the importation charge, was a member of a group which committed various offences under the Misuse of Drugs Act 1975, including possession of methamphetamine for supply, supply of methamphetamine, and then the importation itself, which occurred in June 2016.

[6] In her sentencing notes, the Judge itemised the various acts that she was satisfied Ms Fakaosilea had undertaken by way of participation in the group, from

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1 Misuse of Drugs Act 1975, s 6(1)(a); and Crimes Act 1961, s 98A.
2 *R v Cullen* [2019] NZHC 2088.
3 Criminal Procedure Act 2011, s 232(2).
4 Section 250(2).

March 2016 onwards.[5] In short, the Judge was satisfied Ms Fakaosilea had collected and delivered large quantities of drugs and large sums of cash (by which we mean in the hundreds of thousands of dollars) on several occasions.

Importation

[7] The importation occurred on 12 June 2016 and comprised 501 kilograms of methamphetamine, the largest in New Zealand's history. Ms Fakaosilea was charged as a secondary party, and we list below the assistance the Judge was satisfied she gave.

[8] The methamphetamine was brought to New Zealand on a large "mother" ship, which entered New Zealand's territorial waters on or about 24 May 2016. Initially it was expected that some of those on board would themselves bring the drugs ashore in Northland, with the drugs to be uplifted and distributed from there. Several of Ms Fakaosilea's co-offenders were in Northland from 23 May 2016, in preparation for the arrival of the drugs.

[9] For some reason the original plan could not be implemented, and an alternative arrangement was decided upon. This alternative included two co-offenders, Mr Wan and Mr Tsai, being nominated by the ultimate masterminds, whoever they were, to venture out to sea to effect the uplift. Mr Wan was already in New Zealand, but Mr Tsai travelled from Hong Kong to Auckland for this purpose, arriving on or about 5 June 2016.

[10] Ms Fakaosilea's brother, Mr Ulakai Fakaosilea, who had returned to New Zealand from Australia only a few days prior, drove the two men to Northland. The Judge was satisfied, however, that Ms Fakaosilea had assisted in arranging Mr Tsai's entry to the country, had arranged the hire of the vehicle in which the men drove north, had given her brother instructions in connection with this trip and with jobs he was to undertake, and had continued to do so whilst he was in Northland.[6]

[11] To enable Mr Wan and Mr Tsai to travel out to the larger ship, a boat was purchased at a cost of at least $40,000. The Judge was satisfied Ms Fakaosilea was

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5 *R v Cullen*, above n 2, at [34].
6 At [33](a)–(d).

the person, code-named Blaze, who provided this cash.[7] The issue of whether Ms Fakaosilea was indeed Blaze was vigorously contested at trial and was important on sentencing.

[12] Several days later Ms Fakaosilea hired a second vehicle, being a campervan, and she, with another person, loaded it with toolboxes that had been bought to store the methamphetamine. A cousin of Ms Fakaosilea's drove the campervan with the toolboxes north on 12 June 2016. The Judge was satisfied this was done on Ms Fakaosilea's instructions, and that Ms Fakaosilea also instructed her cousin regarding delivery of the toolboxes, and told her to put her mobile phone on flight mode as she drove north and not to use it.[8]

[13] As it turned out, the boat was badly damaged shortly after it was launched. A second boat was then purchased on or about 11 June 2016. This was successfully launched and the methamphetamine brought ashore in the early hours of 12 June 2016.

[14] The Police apprehended most of the group, although not Ms Fakaosilea, over the next few days (Mr Tsai had already left the country), having stopped M, a co-offender, as he drove some 449 kilograms of the shipment north in a different campervan. The Police also recovered the balance, apparently buried in nearby sand dunes. M gave evidence for the Crown at trial.

Trial

[15] Ms Fakaosilea stood trial with Mr Stevie Cullen. He too was charged with the importation and the criminal group offending.

[16] The others charged on the importation were Messrs Wan, Tuilotolava, Iusitini, M, Fonua and Fakaosilea, and most were also charged with the criminal group offending. That said, for all bar Ms Fakaosilea, that latter offending seems to have consisted solely of the importation.

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7 At [33](b).
8 At [33](e)–(g).

[17] By the time of trial, all of the other co-offenders had pleaded guilty to, and been sentenced for, the offending with which they were charged.

[18] In addition to M, the Crown called numerous other witnesses at trial. These included the cousin who drove the campervan north loaded with the toolboxes, locals who had observed the "comings and goings" on the beach, those who had sold the boats, and representatives of several rental car companies.

[19] The Crown case against Mr Cullen was that he was fully involved in the importation and carried out numerous important tasks. Mr Cullen gave evidence, wholly implausible, to the effect that he was travelling in Northland in the course of a "spiritual journey", and had come across the group by chance.

[20] The Crown case against Ms Fakaosilea was that she was "embedded" in the criminal group involved in the importation. She was not in Northland in the early stages, or at all, because it was her practice to operate "at a distance". The Crown case was that she had to become more overtly involved when the original plan was abandoned.

[21] We said above that the Judge was satisfied Ms Fakaosilea was the person who provided or delivered the $40,000 to acquire the first boat. This largely derived from M's evidence, to the effect Mr Fonua had told him the cash used to acquire the first boat had been provided by Blaze, and that he understood from his co-offenders that Blaze was an attractive woman, in Auckland. This evidence was adduced pursuant to the co-conspirators rule.[9]

[22] Ms Fakaosilea did not give evidence at trial but called Mr Fakaosilea as a witness in her defence. The gist of Mr Fakaosilea's evidence was that he, not his sister, was Blaze, and that to the extent that she had done the things attributed to her, such as hiring vehicles, she had done so at his request and in ignorance that she was doing anything improper.

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[9] Evidence Act 2006, s 22A.

[23] Mr Fakaosilea was adamant that he was giving his sister instructions, and not the other way round. He flatly rejected the suggestion that he would ever take instructions from his sister. His evidence was that he had just returned from Australia; that he had agreed to help Mr Iusitini; that Mr Iusitini was giving him instructions on what he, Mr Fakaosilea, was required to do; that he ran into difficulty with some of these tasks having been out of the country for so long, and so enlisted Ms Fakaosilea's help, all the while giving her innocent explanations for what he required. Mr Fakaosilea also explained many of the communications between them as innocent texts and emails between siblings, for example in arranging a younger brother's 21st birthday party.

[24] Accordingly, on the case against Ms Fakaosilea on the importation charge, there was a significant factual issue as to whether she was Blaze, and also as to her state of knowledge at the time she gave the assistance she did. This latter issue was always going to be a difficult one for Ms Fakaosilea because the Crown was able to adduce propensity evidence of other serious drug offending she had committed after, but close in time to, the importation. We refer to this below, in the context of the Judge's sentencing of Ms Fakaosilea.

[25] As it turned out, the jury did not accept either Mr Cullen's or Ms Fakaosilea's defence and found both guilty of both charges.

Sentence

[26] For Ms Fakaosilea, the Judge adopted a starting point of 28 years' imprisonment on the importation charge[10] and uplifted it by one year for the criminal group offending.[11] The Judge then deducted four years for personal mitigating factors, giving a total of 25 years' imprisonment.[12]

[27] However, that was not the end of the matter because, at the time she was for sentence, Ms Fakaosilea was already serving a sentence of 14 years, six months'

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10 *R v Cullen*, above n 2, at [110].
11 At [115].
12 At [122]–[123].

imprisonment on charges of supplying methamphetamine and cocaine.[13] These charges arose from a different police investigation, Operation Virunga (Virunga offending), and were before the jury as propensity evidence at trial. Although Ms Fakaosilea had committed this offending after the offending before Gordon J, she pleaded guilty to these charges and was sentenced by Palmer J in December 2018, before she went to trial before Gordon J. Palmer J did not impose a minimum period of imprisonment (MPI), considering that it was unnecessary to impose a longer period of imprisonment than the statutory minimum non-parole period of four years, 10 months.[14]

[28] Gordon J arrived at her end sentence by first assessing the term of imprisonment required for both sets of offending. The Judge assessed this as 27 years (being 28 years on the importation charge, plus one year for the participation in an organised criminal group, plus two years for the Virunga offending and a discount of four years for mitigating features).[15]

[29] From this term of imprisonment, the Judge deducted Palmer J's 14 years, six months and imposed a cumulative sentence of 12 years, six months' imprisonment on the importation charge.[16]

[30] The Judge also imposed a sentence of seven years' imprisonment on the criminal group offending, concurrent on the importation sentence,[17] and an MPI of seven years on the importation charge, being 56 per cent.[18] One point raised in the appeal against sentence is that the effect of this MPI, coupled with the "at least one third" Ms Fakaosilea will be required to serve on the sentence imposed by Palmer J (four years, 10 months), breaches the statutory maximum of 10 years' imprisonment under s 86 of the Sentencing Act 2002.

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13 [Redacted].
14 At [31].
15 *R v Cullen*, above n 2, at [129].
16 At [130].
17 At [116].
18 At [135].

Appeal against conviction

[31] Ms Fakaosilea appeals against her convictions on three grounds:

(a) she could not have been a party to the importation as it ended before her first involvement on 5 June 2016;

(b) trial counsel, Ms Pecotic, erred in failing to call a witness who could have given evidence helpful to Ms Fakaosilea's defence; and

(c) the Virunga offending was wrongly admitted as propensity evidence.

Submission on importation

[32] Mr Bradford, counsel for Ms Fakaosilea on appeal, submits that Ms Fakaosilea could not have been a party to the importation. This was because the importation occurred and was complete when the large vessel carrying the methamphetamine entered New Zealand's territorial waters towards the end of May 2016, and before 5 June 2016, being the date on which Ms Fakaosilea rendered her first act of assistance.

[33] In support of this submission, Mr Bradford referred us to the following passage in this Court's decision in *R v Hancox*, a case in which it was necessary to determine when an importation of MDMA tablets had ended.[19] Richardson J said:

> ... importing is concerned with those acts designed to bring the goods from outside New Zealand to the point where they are available to the intended consignee. Any involvement on the part of the importer or anyone involved as a party up to that point would properly be viewed as facilitating the importation of the goods into New Zealand. After that point any dealings with a controlled drug would not constitute importing, but might amount to possession for supply or other illegal conduct under the Misuse of Drugs legislation.

[34] Mr Bradford submits that the methamphetamine was "available to the intended consignee" when the large vessel entered New Zealand's territorial waters and thus

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19 *R v Hancox* [1989] 3 NZLR 60 (CA) at 63.

"[a]fter that point any dealings with [the methamphetamine] would not constitute importing, but might amount to possession for supply …".

Discussion

[35] We do not accept this submission.

[36] In *Hancox*, Customs had located a parcel of MDMA tablets in a post office box. Ms Hancox subsequently opened the box and removed the parcel. She was charged with and convicted of "importing" the tablets "into New Zealand".

[37] The issue on appeal was whether the importation had ended before Ms Hancox removed the parcel. This Court found it had. Before the passage to which Mr Bradford referred us, Richardson J said:[20]

> "To import" involves active conduct; and the bringing of goods into the country or causing them to be brought into the country does not cease as the aircraft or vessel enters New Zealand territorial limits. Importing into New Zealand for the purposes of s 6(1)(a) is a process. It does not begin and end at a split second of time. The element of importing exists from the time the goods enter New Zealand until they reach their immediate destination … the process does not end so long as the goods remain in transit, that is until … the consignment is available to the consignee at its immediate destination.

[38] The "immediate destination" in *Hancox* was the post office box and thus the importation ended when the package was placed in the box, and before Ms Hancox uplifted it.

[39] Applying *Hancox*, in this case the process of importation of the methamphetamine commenced when the vessel entered New Zealand's territorial waters and ended when the methamphetamine was "available to the consignee at its immediate destination". The very earliest point in time at which that could have occurred was when Messrs Wan and Tsai uplifted the drugs and were returning to shore.

[40] However, the better analysis is that the methamphetamine did not reach its immediate destination until the boat came ashore at Ahipara, and possibly even after

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[20] At 62.

that. It is to be borne in mind that the drugs were removed from the boat, put in the campervan and driven away from the beach, no doubt for delivery to other parties. It was in the course of that delivery that M was stopped.

[41] Whatever the answer may be, the process of importation was not complete before 5 June 2016, and so we do not accept Mr Bradford's submission that the importation ended before then.

[42] For the sake of completeness, we record that Mr Bradford also submits Ms Pecotic erred in committing Ms Fakaosilea to an agreed statement of facts presented to the jury at trial, in which it was agreed that an importation had taken place on 12 June 2016. We are satisfied Ms Fakaosilea consented to the contents of the agreed statement and, given the view we take of *Hancox*, the concession was a proper one to make. That said, nothing turned on the point because we would not have held Ms Fakaosilea to the concession had there been anything in Mr Bradford's submission.

Counsel error

[43] Mr Bradford submits that Ms Pecotic erred in not calling evidence from Mr Malachi Tuilotolava, a co-defendant who had pleaded guilty to both charges and who had been sentenced by the time of trial. Mr Bradford submits Mr Tuilotolava was available as a witness for Ms Fakaosilea and that he could have given evidence favourable to her defence.

[44] To succeed on this ground, Mr Bradford must establish counsel's failure to call Mr Tuilotolava was an error in the sense it was not objectively reasonable at the time and, if an error in that sense, that there is a real risk it affected the outcome of the trial.[21]

[45] To put this submission in context, Mr Tuilotolava was one of the three co-offenders identified as the "leaders" of the group on the importation offending. The other two leaders were Mr Wan and Mr Iusitini. For much of the time, Mr Tuilotolava

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[21] *R v Scurrah* CA159/06, 12 September 2006 at [16]–[20].

was in Northland co-ordinating the group and, amongst other things, he and Mr Fonua were the two who effected the purchase of both boats.

Affidavit evidence

[46] The evidence on this ground of appeal is contained in affidavits from Mr Tuilotolava, Ms Fakaosilea, and Ms Pecotic. None of these deponents were called for cross-examination before us.

[47] From these affidavits, it is apparent that Ms Fakaosilea's and Ms Pecotic's understanding going into trial was that Mr Cullen was going to call Mr Tuilotolava to give evidence. However, it became apparent on or about 22 May 2019, when the trial was well advanced but before the Crown closed its case, that Mr Cullen had decided against this.

Mr Tuilotolava's evidence

[48] It was at that point that Mr Tuilotolava telephoned Ms Pecotic and said he would give evidence for Ms Fakaosilea. Ms Pecotic made notes of what Mr Tuilotolava would say if called as a witness. These notes are in the nature of bullet points but in his affidavit Mr Tuilotolava says he would have given evidence that he understood "Blaze" to be Mr Fakaosilea, not Ms Fakaosilea as the Crown contended; that Mr Iusitini had delivered the cash he and Mr Fonua used to purchase the first boat; that Ms Fakaosilea had no role to play in the importation and that at the time he did not know who she was; and that he did not even know Mr Fakaosilea's name until he received the police disclosure, deliberate decisions having been made to keep contact with those not closely involved to a bare minimum and anonymous. Mr Tuilotolava also states that Ms Pecotic told him it was too late to obtain a brief of evidence from him and for her to call him to give evidence for Ms Fakaosilea at trial.

Ms Pecotic's evidence

[49] Ms Pecotic's evidence is that her immediate concern was that, if Mr Tuilotolava gave evidence, it was inevitable that he would be asked whether

Mr Cullen was involved in the offending and Mr Tuilotolava would confirm that he was involved.

[50] Ms Pecotic thought that calling Mr Tuilotolava as a witness would require notice to counsel for Mr Cullen under s 39(2) of the Evidence Act 2006, that is that Ms Fakaosilea would be "offering" evidence that challenged Mr Cullen's veracity, and that she, Ms Pecotic, had left it too late to give this notice.

[51] As discussed below, there was no basis for this concern.

[52] Ms Pecotic's second concern was that, as things developed, it became apparent Mr Cullen was going to give evidence in his own defence.

[53] It is not entirely clear to us whether Mr Tuilotolava was willing to give evidence for Ms Fakaosilea if Mr Cullen continued to defend the charges. Mr Tuilotolava had previously advised Ms Pecotic that Mr Cullen would need to abandon his defence and plead guilty, as he did not wish to "nark" on Mr Cullen. Mr Tuilotolava does not say in his affidavit where he stood on giving evidence for Ms Fakaosilea given Mr Cullen was maintaining his defence. This is an important omission from his affidavit.

[54] Ms Pecotic's evidence is that, from her discussions with Mr Tuilotolava, she formed the impression that if called as a witness, Mr Tuilotolava might lie if questioned about Mr Cullen's involvement, as of course he would be. Ms Pecotic considered herself unable to call Mr Tuilotolava in those circumstances. Ms Pecotic also thought it would backfire on Ms Fakaosilea if the jury thought she had called a witness who was telling them untruths.

[55] Ms Pecotic states that in those circumstances she did not consider it in Ms Fakaosilea's best interests to call Mr Tuilotolava. She adds that Ms Fakaosilea's brother had said much of what it was proposed Mr Tuilotolava would say, being that Ms Fakaosilea knew nothing of the importation.

[56] Ms Pecotic says she informed Ms Fakaosilea of these matters, that Ms Fakaosilea accepted her advice not to call Mr Tuilotolava as a witness, and that Ms Fakaosilea gave written instructions to Ms Pecotic to that effect. That is correct. Ms Fakaosilea's signed instructions to Ms Pecotic referred to an inability to call Mr Tuilotolava because "it was too late for my lawyer to have him ready for my trial"; that if Mr Tuilotolava gave evidence he would not be able to "speak the truth" as he did not wish to implicate Mr Cullen, and that "it would all go badly and impact" on Ms Fakaosilea's case if Mr Tuilotolava tried to lie. Ms Fakaosilea also instructed that she did not wish to give evidence but that she wished her brother to be called as a witness, as he was.

Ms Fakaosilea's evidence

[57] Ms Fakaosilea's evidence is consistent with Ms Pecotic's. She states that she initially wished to have Mr Tuilotolava called but that her lawyer at the time (it is not clear whether that was Ms Pecotic) told her that she, the lawyer, could not speak to Mr Tuilotolava as Mr Cullen was calling him as a witness. That advice was incorrect if indeed it was given, there being no property in a witness. Ms Fakaosilea also says that she asked Ms Pecotic to speak to Mr Tuilotolava when it became clear that Mr Cullen was not going to call him, at which point Ms Pecotic advised that he could not be called as a witness for the reasons to which we have referred.

Discussion

[58] First, we accept it is possible Ms Fakaosilea would have been assisted had Mr Tuilotolava given evidence at trial consistent with his affidavit on appeal. Evidence that a male, whether Mr Iusitini or someone else, was the source of the cash used to acquire the first boat would have been exculpatory of Ms Fakaosilea on that factual issue and, of course, would have been relevant on sentencing if it came to that. That Mr Tuilotolava understood Blaze to be Mr Fakaosilea, and that Mr Tuilotolava did not know of Ms Fakaosilea having any involvement at all, may also have had an impact on the jury.

[59] Secondly, we do not consider there were grounds for Ms Pecotic's concern that s 39 of the Evidence Act would have been engaged had she called Mr Tuilotolava to give evidence.

[60] Section 39 applies if a defendant in a criminal proceeding seeks to offer evidence that challenges the veracity of a co-defendant. If such evidence is proposed to be offered, the trial Judge must first give leave, and notice of the contents of the proposed evidence must be given to all co-defendants, unless they or the Judge waive that requirement.

[61] Clearly, Mr Tuilotolava was going to be cross-examined, inter alia, on Mr Cullen's defence if he gave evidence. To the extent this evidence contradicted Mr Cullen's defence, it would have been evidence elicited by the prosecution, and not offered by defence counsel. Moreover, such evidence would not have constituted an attack on Mr Cullen's veracity, that is his disposition to refrain from lying.[22] Lastly, if Ms Pecotic considered s 39 an issue, she was bound to seek leave from the trial Judge and seek a waiver of the requirement for notice in the event of dispute.

[62] In short, if Ms Pecotic considered it in Ms Fakaosilea's best interests to call Mr Tuilotolava as a witness, then she was bound to advise Ms Fakaosilea accordingly and, assuming Ms Fakaosilea accepted the advice, Ms Pecotic was required to take such steps as she properly could to achieve that outcome.

[63] That said, Ms Pecotic's assessment that Mr Tuilotolava might seek to lie in the witness box was a fair one and likewise her assessment that Ms Fakaosilea would not be assisted if he did so. On the possibility that Mr Tuilotolava might seek to lie, Ms Pecotic's recollection is that he told her he had been "[w]racking his brains" on how he could answer questions regarding Mr Cullen, given the latter's refusal to abandon his defence and plead guilty. A lawyer must not adduce evidence knowing it to be false.[23] It is conceivable, just, that Ms Pecotic may not have infringed the letter of this rule had Mr Tuilotolava lied in answering the prosecutor's questions regarding Mr Cullen, but she would have infringed the spirit of that rule. Moreover, Ms Pecotic's

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22 Evidence Act, s 37(5).

23 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.10.

assessment that Ms Fakaosilea's position with the jury would not be enhanced by calling a witness who was seeking to mislead them was a reasonable one.

[64] In these circumstances, Ms Pecotic's advice to Ms Fakaosilea that Mr Tuilotolava should not be called as a witness was reasonable at the time, and Ms Fakaosilea accepted the advice. Accordingly, we do not accept Ms Pecotic's failure to call Mr Tuilotolava as a witness was an error by counsel in the required sense.

[65] Had we concluded Ms Pecotic had erred, it would have been necessary to decide whether there is a real risk the error affected the outcome of the trial. Mr Bradford did not make submissions to us on this point. The matters that would be necessary to take into account are that Mr Fakaosilea's evidence coincided with Mr Tuilotolava's evidence that Mr Fakaosilea was Blaze. The jury may have been more inclined to accept that evidence from Mr Tuilotolava, given that there was no obvious reason for him to be seeking to protect Ms Fakaosilea. On the other hand, Ms Fakaosilea's defence in large part rested on the jury accepting she did not know of the importation and, as we have said, that was always going to be a difficult issue for her. This is because of her organised criminal group offending, the propensity evidence and other evidence such as the loading of the toolboxes into the campervan and telling her cousin to put her cell phone in flight mode as she drove north and not to use it.

[66] Having regard to these matters, we are not persuaded that the necessary real risk would arise even if Ms Pecotic did err in failing to call Mr Tuilotolava.

[67] To conclude on this point, we are not persuaded counsel erred in the required sense in failing to call Mr Tuilotolava to give evidence and we are not persuaded the failure to do so created a real risk the outcome of the trial was affected.

Propensity evidence

[68] In a pre-trial ruling, Woolford J granted the Crown's application to adduce evidence of the Virunga offending as propensity evidence at the trial.[24] Woolford J accepted that the evidence tended to show Ms Fakaosilea had a particular state of mind, namely that she knew she was assisting in importing and distributing methamphetamine when she offended at that time.[25] At trial this evidence was put before the jury in the statement of agreed facts and in her summing up Gordon J directed the jury it was relevant only to mens rea on the two charges and nothing else.

[69] Mr Bradford submits Woolford J erred in his ruling, as only acts or omissions occurring prior to the alleged offending can constitute propensity evidence. Mr Bradford submits that, as the relevant provisions in the Evidence Act are silent on whether acts or omissions subsequent to those in issue may constitute propensity evidence, the provisions should be read consistently with the veracity rules in s 37 of the Evidence Act. Mr Bradford submits, correctly, that the veracity rules are concerned with evidence of a prior or existing lack of honesty or impartiality. Mr Bradford submits that existing authority from this Court, to the effect that an act or omission subsequent to the events in issue may constitute propensity evidence, has been wrongly decided.

[70] Alternatively, Mr Bradford submits that, at trial, the Crown relied on the propensity evidence to contradict Ms Fakaosilea's defence that she did not know of the importation, and thus the admissibility of the evidence ought to have been determined by reference to the veracity rules.

Discussion

[71] The definition of propensity evidence in s 40(1) of the Evidence Act does not restrict such evidence to acts or omissions preceding those in issue at trial. That subsequent acts or omissions may constitute propensity evidence is well-established and we do not propose to revisit the point.[26]

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24 *R v Fakaosilea* [2019] NZHC 810.
25 At [12] and [18].
26 *R v Mata* [2009] NZCA 254; *Solicitor-General v Rudd* [2009] NZCA 401; *S (CA514/08) v R* [2009] NZCA 622; *Narayan v R* [2013] NZCA 24; and *Watchhorn v R* [2014] NZCA 493.

[72] As to Mr Bradford's alternative submission, Ms Fakaosilea's offending in September and November 2016 was relied on as evidence relevant to a matter in issue, namely mens rea. It was not relied on as evidence solely or mainly relevant to Ms Fakaosilea's veracity, that is her disposition to refrain from lying and, accordingly, the veracity rules were not engaged.[27]

Conclusion on appeal against conviction

[73] We are not persuaded there was any miscarriage of justice and we dismiss the appeal against conviction.

Appeal against sentence

[74] Ms Fakaosilea contends her sentence is manifestly excessive on four grounds:

(a) The Judge's starting point of 28 years' imprisonment on the importation charge was too high, given Ms Fakaosilea's lesser role in the offending and her personal circumstances. This latter point as to personal circumstances would fall to be considered after the starting point but we need not discuss it because Mr Bradford did not pursue it in his oral submissions.

(b) The Judge did not treat her consistently with Mr Cullen, in that the Judge uplifted her sentence by one year for the criminal offending charge, but did not uplift Mr Cullen's.

(c) The Judge erred in ordering that the sentence be served cumulatively on the sentence for the Virunga offending, rather than concurrently.

(d) No MPI should have been imposed, alternatively the MPI the Judge imposed was not only excessive but also unlawful because Ms Fakaosilea's effective MPI is 11 years, 10 months' imprisonment — being the seven years imposed by Gordon J plus the

[27] Evidence Act, s 37(5).

four years and 10 months on the sentence for the Virunga offending — and thus exceeds the maximum permitted MPI of 10 years.

Preliminary points

[75] As we have said, all of Ms Fakaosilea's and Mr Cullen's co-offenders had been sentenced by the time of trial and under the then guideline judgment, *R v Fatu*.[28]

[76] Each Judge sentencing those other offenders had accepted the Crown submission that the quantity involved put the offending within the most serious of cases, requiring the imposition of the maximum penalty — life imprisonment on importation of a class A drug — unless circumstances relating to the offender rendered that inappropriate.[29] That said, in each case the Judge concerned did find the maximum penalty permitted inappropriate and adopted a finite starting point instead.

[77] Gordon J adopted the same approach. At the time of sentencing, this Court had not released its decision in *Zhang v R*, and thus the Judge applied *Fatu*.[30] The Judge also accepted that the preliminary starting point for Mr Cullen and Ms Fakaosilea should be life imprisonment, but that other considerations made that inappropriate.[31]

Role

[78] Given the date on which she lodged her appeal, Ms Fakaosilea is entitled to any benefit *Zhang* confers on her.[32]

[79] Although quantity remains "highly relevant to culpability" under *Zhang*, it is not the sole determinant.[33] As Mr Bradford submits, the role played by the offender must also be assessed when determining culpability. A more limited measure of engagement deserves a less severe sentence than a significant or leading role.[34]

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28 *R v Fatu* [2006] 2 NZLR 72 (CA).
29 Sentencing Act 2002, s 8(c).
30 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
31 *R v Cullen*, above n 2, at [62] and [107].
32 *Zhang v R*, above n 30, at [187]–[191].
33 At [104].
34 At [118].

Mr Bradford's submission is that the Judge's starting point of 28 years on the importation charge does not give sufficient recognition to Ms Fakaosilea's lesser role.

Co-offenders' roles

[80] To put this submission in context, it is necessary to refer to the roles the other offenders played and the starting points adopted for them.

[81] Messrs Wan, Iusitini and Tuilotolava were considered the leaders of the group and all received the highest starting points of 32 years' imprisonment.[35]

[82] Mr Wan was closely associated with the "masterminds", whom he met in Hong Kong. Only he and Mr Tsai were trusted to go out to sea to collect the drugs. Lang J was satisfied that Mr Wan played a particularly important role and this was further confirmed by the fact that he was removed from the scene immediately after the drugs were brought ashore.[36]

[83] Messrs Iusitini and Tuilotolava had both travelled to Thailand in advance of the operation. Once back in New Zealand, Mr Iusitini sent instructions to the group and received regular progress reports from them, but from a safe distance. Mr Tuilotolava received and relayed Mr Iusitini's instructions, thereby enabling the latter to avoid travelling to Northland. Mr Tuilotolava participated in almost every important event, including the purchase and launch of both boats, and the unloading of the drugs when they finally came ashore.

[84] M and Mr Fonua were each given starting points of 30 years' imprisonment.[37]

[85] M spent several weeks in Northland prior to the importation. He helped source equipment such as toolboxes and a vehicle, was present at the launch of both boats, and was entrusted with the campervan carrying 450 kilograms of methamphetamine.

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35 *R v Wan* [2017] NZHC 1255 at [36]; *R v Fakaosilea* [2018] NZHC 3362 at [57]; and *R v Tuilotolava* [2017] NZHC 2621 at [26].

36 *R v Wan*, above n 35, at [22]–[25].

37 *R v [M]* [2016] NZHC 2881 at [21]; and *R v Fonua* [2017] NZHC 1193 at [4].

[86] Mr Fonua accompanied Mr Tuilotolava to purchase both boats, driving the second one from Auckland to Northland. He also assisted in unloading the drugs when they were brought ashore and was generally trusted to carry out the instructions of Messrs Iusitini and Tuilotolava. Mr Fonua was not involved in planning or financing the operation and was not likely to have shared in the profits.

[87] Mr Cullen's starting point was also 30 years' imprisonment.[38] He purchased a vehicle for the purpose of the operation, booked accommodation, and recruited and acted as the point of contact with locals. He checked weather forecasts, tides, and the position of Navy patrol boats. He was present at the launch of both boats and when the drugs came ashore, and he was the "getaway" driver for Messrs Wan and Tsai. He was a "trusted lieutenant" who reported to Mr Tuilotolava.[39]

[88] Mr Fakaosilea's starting point was 29 years' imprisonment, slightly less than M and Mr Fonua as he was involved in fewer stages of the operation, having arrived in New Zealand only a few days before driving Messrs Wan and Tsai north.[40] He delivered phones to co-offenders, and was present when the drugs were unloaded. He too was a trusted member of the group and helped bury some of the drugs after they arrived on shore.

Four-year differential

[89] No submission has been made to us that a 32-year starting point for the leaders was excessive. Given that, we have approached Mr Bradford's submission by considering whether the four-year difference between that 32-year starting point and the 28-year starting point applied to Ms Fakaosilea sufficiently reflects her lesser role. The following matters are relevant.

[90] Ms Fakaosilea was involved for a shorter period than all others, about a week in total, and only when the original plan had been abandoned. There is no evidence that she had a role in planning the importation, she took relatively few practical steps to assist in the importation, she was not present when either boat was launched, or

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38 *R v Cullen*, above n 2, at [64].
39 At [55].
40 *R v Fakaosilea*, above n 35, at [41].

when the drugs were unloaded, and there is no evidence that she knew the quantity was as great as it was.

[91] That said, the steps Ms Fakaosilea took were important to the success of the importation. The acquisition of the first boat was made possible by her provision or delivery of a substantial sum of cash. Not only did she hire two vehicles, she gave instructions to others., first to her brother, and then to her cousin. She was not a mere functionary but trusted and astute. And although Ms Fakaosilea may not have known the precise quantity involved, it is apparent from her criminal group offending that she was no stranger to large quantities of cash and drugs. She would also have deduced from the number of toolboxes that a significant haul was expected.

[92] Taking all of these matters into account, Ms Fakaosilea's role would seem to fall somewhere between "lesser" and "significant" as described in *Zhang*.[41] A starting point well in excess of 20 years was inevitable, given the massive quantity involved.[42] That said, we are not satisfied that, under *Zhang*, a four-year differential is sufficient to reflect Ms Fakaosilea's lesser role. We consider a starting point of 25 years' imprisonment, but no more, was required to reflect the culpability inherent in Ms Fakaosilea's offending.

Uplift

[93] The answer to Mr Bradford's submission of a lack of parity between Mr Cullen and Ms Fakaosilea on the criminal group offending is that Mr Cullen's offending was confined to the importation, whereas Ms Fakaosilea's was not. To uplift Mr Cullen's starting point would have been "double counting".

[94] In fact, there is an argument that the Judge's uplift for the criminal group offending could have been higher than one year, although we do not propose to increase that uplift given that the sentence is already lengthy.

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41 *Zhang v R*, above n 30, at [115].
42 At [125].

End sentence

[95] The effect of a reduced starting point of 25 years on the importation charge brings the end sentence to 24 years, that is 25 years, plus one for the criminal group offending, plus two for the Virunga offending, less four for personal factors. Deducting the 14 years, six months imposed by Palmer J gives a cumulative sentence of nine years, six months' imprisonment.

Cumulative/concurrent

[96] Turning to Mr Bradford's submission that a concurrent sentence ought to have been imposed, first, it was common ground that the Judge's sentencing for the offending before her should be cumulative on the sentence imposed on the Virunga offending. Secondly, we do not consider the two sets of offending "connected" in the sense of s 84(2) of the Sentencing Act. The Virunga offending was committed several months after the criminal group and importation offending, and with a differently constituted group. The only difference Mr Bradford's submission might make in practice is in relation to the MPI, which we now address.

MPI

[97] Counsel are correct that, following Gordon J's sentencing, Ms Fakaosilea's effective MPI was 11 years, 10 months.[43]

[98] Mr Bradford submitted that s 86(4) of the Sentencing Act precludes the imposition of a MPI if doing so will increase the offender's overall non-parole period beyond 10 years. Mr Bradford did not cite any authority for this proposition and, to the extent Crown counsel did so, it does not appear to be on point.[44]

[99] Regardless, on our reading of s 86, Mr Bradford's submission cannot be correct. Section 86(1) permits the court, on sentencing, to impose an MPI "in relation to that particular sentence", and the maximum period provided for in s 86(4) is the

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43 Parole Act 2002, s 84(4).

44 Crown counsel cited *Briggs v R* [2020] NZCA 453 on this point but we do not consider this assists.

lesser of 10 years or two-thirds of the full term "of the sentence". That can only be a reference to the sentence just imposed.

[100] Next, Mr Bradford submitted that no MPI was required at all, given the already very long sentence. Moreover, as this Court said in *Zhang*, an MPI is not to be imposed as a matter of routine but only if the circumstances of the particular case require it.[45]

[101] We are satisfied that this is a case for a MPI. The offending was very serious and, as is apparent from the examples given in *Zhang*, offending of this nature will usually attract an MPI.[46] This importation was huge and, but for the Police intercepting the shipment, would have caused untold misery and earned enormous profits. General deterrence and denunciation require an MPI in such a case.

[102] We propose to retain Gordon J's 56 per cent, giving an MPI of five years, four months' imprisonment on the importation offending. For the sake of completeness, we record this brings Ms Fakaosilea's total non-parole period to 10 years, two months' imprisonment.

Result

[103] The appeal against conviction is dismissed.

[104] The appeal against sentence is allowed in part.

[105] We quash the sentence of 12 years, six months' imprisonment imposed on importation of methamphetamine offending and substitute a sentence of nine years, six months' imprisonment. This sentence is to be served cumulatively on the sentence of 14 years, six months' imprisonment imposed by Palmer J on 18 December 2018.

[106] The minimum period of imprisonment imposed on the importation charge is reduced from seven years to five years, four months.

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45 *Zhang v R*, above n 30, at [169].
46 At [171].

[107] The sentence imposed on the organised criminal group offending remains and is to be served concurrently with the sentence imposed in [105] above.

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