

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI 2020-004-9587
[2022] NZHC 2998**

THE KING

v

ELIZABETH BOLEA

Hearing: 16 November 2022

Appearances: B Kirkpatrick for the Crown
A Bailey for the defendant

Date: 16 November 2022

SENTENCING NOTES OF CAMPBELL J

Introduction

[1] Ms Bolea, in July this year you pleaded guilty to a charge of participating in an organised criminal group.¹ You have applied to be discharged without conviction. If I decline your application, I will be imposing a sentence on you today.

Offending

[2] I will start by outlining your offending. This outline is based on the summary of facts which you accepted when you pleaded guilty.

[3] You are in a relationship with Rhakim Mataia, a nominee of the Comancheros Motorcycle Club. At some time before 5 August 2020, you knew that Mr Mataia and others connected to the Comancheros were participating in an organised criminal group that shared the objective of obtaining material benefits from the possession and supply of methamphetamine.

[4] On 4 August 2020, you hired a rental car from Auckland Airport. You did so at Mr Mataia's direction. You and Mr Mataia then collected one of your co-offenders, Diamond Katoa, and drove to Christchurch. You were aware that there was some methamphetamine in the car for the purpose of supply, but you were not aware of the exact amount. A covert Police search conducted on the car found two plastic containers in the boot of the car. Together they contained at least 500 grams of methamphetamine.²

[5] You arrived in Christchurch on 5 August 2020. You went to Mr Mataia's family home. You stayed there while Mr Mataia and Mr Katoa went to a gang pad to supply the methamphetamine.

Discharge without conviction

[6] I now turn to your application for a discharge without conviction. The Sentencing Act 2002 requires me to determine that application in three stages. First,

¹ Crimes Act 1961, s 98A. Maximum penalty: 10 years' imprisonment.

² *R v Fakaosilea* [2022] NZHC 2984 at [63].

I must determine the gravity of your offending. Secondly, I must determine the direct and indirect consequences of a conviction. Thirdly, I must determine whether those consequences are out of all proportion to the gravity of your offending.³ If I am satisfied this test is met, I may discharge you without conviction.⁴

Gravity of offending

[7] As to the first stage, in determining the gravity of your offending I have to take into account the aggravating and mitigating factors relating both to the offending itself (that is, what you did) and to you personally (for example, your previous good character and your guilty plea).⁵

[8] As to the offending itself, there is a disagreement between the Crown and your counsel, Mr Bailey, as to the period of your offending. The Crown submits that you were offending for more than three months. Mr Bailey, by contrast, submits that your offending occurred only during the trip to Christchurch on 4 and 5 August 2020.

[9] Mr Bailey advances his submission in part on the basis of factual material from the Police disclosure, such as text messages between you and Mr Mataia. I put that material to one side when determining the extent of your offending. When someone pleads guilty on the basis of an agreed summary of facts, as you have, I have to assess their culpability on the basis of those agreed facts.⁶

[10] I am also entitled to draw inferences from the summary of facts.⁷ The Crown asks me to draw the inference that you knew, months earlier than 5 August 2020, that Mr Mataia was involved in the supply of methamphetamine. The Crown relies on your knowledge, from January 2020, that Mr Mataia had some involvement with the Comancheros; his text to you on 15 January 2020 that “What i make in 3months i make here in one fricken night!”; your knowledge that he flew to Christchurch in March 2020; and your purchase of scales on his behalf on 16 May 2020, when he

³ Sentencing Act 2002, s 107; and *Scott v R* [2019] NZCA 261 at [79].

⁴ Section 106.

⁵ *Rahim v R* [2018] NZCA 182 at [15].

⁶ *Pokai v R* [2014] NZCA 356 at [30].

⁷ *Pokai v R* [2014] NZCA 356 at [31].

asked you to buy the smallest scales and ensure that they could weigh in grams and ounces.

[11] From these facts, it is a reasonable inference that you knew, from mid-May 2020, that Mr Mataia was involved in a group that was dealing in some form of controlled drugs. But there is no basis on which I can infer that you knew, before 4 August 2020, that the group was possessing and supplying methamphetamine – and that was the basis on which you were charged.

[12] For that reason, I accept Mr Bailey's submission that your offending was limited to the period of the trip to Christchurch in early August 2020. I will therefore assess the gravity of your offending by reference to that trip.

[13] The aggravating features of your offending are that you knew that there was methamphetamine in the car, you knew that your conduct contributed to the supply of methamphetamine, and you knew that your conduct would benefit your partner. I have no doubt that you knew that the methamphetamine was in a commercial quantity. There would otherwise have been no point in transporting it from Auckland to Christchurch, and you knew the supply was being made by an organised group. It therefore does not much matter that you did not know the exact amount.

[14] Any supply of methamphetamine is serious. Methamphetamine is a terrible drug that causes harm to large parts of our community.

[15] There are also some mitigating features that lessen your culpability. You did not play a leadership role, but rather acted at the direction of Mr Mataia. Your participation was relatively brief, and there was no suggestion you received any direct personal benefit.

[16] I regard the gravity of your offending, just looking at the trip to Christchurch itself, as moderate.

[17] I also have to take into account, in assessing the gravity of your offending, that you have a degree of responsibility for the wider scale of the offending of the organised

criminal group.⁸ However, I consider that I can do so only in respect of the period from when you knew that the group was possessing and supplying methamphetamine. Much, but not all, of the group's offending occurred well before August 2020. The group's offending from August 2020 onwards does not change my assessment that your offending was moderate in gravity.

[18] I now turn to your personal circumstances. You have a number of personal mitigating factors in your favour:

- (a) You have no prior convictions.
- (b) I have been given references from your cousin, your mother-in-law, your employer and a work colleague. They all attest to your selflessness, your work ethic, and general good character.
- (c) I have a report from a psychologist, Dr Schnabel. He reports that your childhood was marred by the witnessing of domestic violence and that you have become susceptible to entering manipulative relationships. It is clear from the material that Mr Bailey has provided, and I am referring there to the text messages and so on, that Mr Mataia was manipulative and domineering, at least at that time. I consider that these matters impaired your decision-making function and therefore reduced your moral culpability for your actions.
- (d) You were only 22 years old at the time of the offending. You have good rehabilitation prospects. This is evident from your employment while you have been on bail.
- (e) Finally, you pleaded guilty. You did so on the first day of the scheduled jury trial. However, your plea was very soon after the Crown amended the charges against you.

⁸ *Paku v R* [2011] NZCA 269 at [12].

[19] Mr Bailey submitted that, taking account of those mitigating factors, the gravity of your offending should be assessed as low. I disagree. Your offending took place in the context of a commercial drug dealing operation. That operation involved serious offending. In the context of serious methamphetamine offending, I consider that the overall gravity of your offending was moderate to low.

Consequences of conviction

[20] I now come to the second stage, the direct and indirect consequences of a conviction. Mr Bailey said two consequences have a real and appreciable risk of occurring.

[21] First, he said that you will likely face deportation to Australia if convicted. You and Mr Mataia have a 20-month-old daughter. If you are deported, your daughter will go with you. You and she will then not be able to have any in-person contact with Mr Mataia, as he was himself deported from Australia a few years ago.

[22] You filed an affidavit from a Mr Hennessy, an immigration lawyer. Mr Hennessy deposed that if you are convicted you will almost certainly be sent a deportation liability notice. He said that if you were unsuccessful in appealing the notice, you would be separated from Mr Mataia permanently. He did not say anything about the prospects of such an appeal.

[23] Mr Bailey said that if your daughter were to grow up without her father, it would put her at a heightened risk of a poor quality of life into adulthood. He said that consequence would be out of all proportion to the gravity of your offending. He also submitted I should not be concerned that discharging you might encroach on the powers of the immigration authorities.⁹

[24] I do not accept that last particular submission. The Court of Appeal has recently, in a case called *Zhu v R*,¹⁰ addressed the risk of deportation that is said to arise as a consequence of conviction. The Court provided an account of the deportation

⁹ Relying on *R v Ranchhod* [2009] NZCA 340; *Phipps v Police* [2015] NZHC 614; and *Jeon v Police* [2014] NZHC 66.

¹⁰ *Zhu v R* [2021] NZCA 254.

process that was more detailed than that in Mr Hennessy’s affidavit. The Court said that a conviction of the sort that you face would give rise to a liability to deportation. But it is not inevitable that deportation would be the outcome. You would first have an opportunity to account for yourself and your family circumstances. Immigration authorities would consider the circumstances that are said to justify a discharge without conviction, including the gravity of the offending and your personal circumstances. The Court of Appeal said that if deportation were the outcome, that would be a consequence of your offending, rather than a consequence of the conviction.¹¹

[25] In summary, I accept that your liability to deportation would be a consequence of conviction. But deportation itself, if that occurred, would be a consequence of your offending, not of the conviction.

[26] The second consequence raised by Mr Bailey is that a conviction would prevent you from achieving your full potential — in particular, by prejudicing your long-term employment opportunities, creating a significant barrier to you achieving your full potential. He said you are on the cusp of becoming a productive member of society and that a conviction on the charge you face will be a black mark against your name when pursuing employment.¹²

[27] I accept that a conviction would have some consequences for your future employment. Adverse consequences for employment prospects are almost certain to follow conviction.¹³ However, I note that your current employer has, with full knowledge of your offending, recently offered you a full-time position.

Proportionality

[28] Finally, I have to consider whether the consequences of a conviction would be out of all proportion to the gravity of your offending.

¹¹ At [23]–[26].

¹² Relying on *Fraser v Police* [2014] NZHC 2437 at [11]–[16]; *Boonen v Police* HC Wellington CRI-2003-485-41, 14 October 2003 at [14]; *Wardley v Police* [2021] NZHC 2106 at [43]; *Gaunt v Police* [2017] NZCA 590 at [14]–[15]; and *J (CA32/2021) v R* [2021] NZCA 690 at [43].

¹³ *Albert v R* [2016] NZHC 102 at [26].

[29] “Out of all proportion” is a high threshold. It is not enough to show that the consequences outweigh the gravity of the offending.¹⁴

[30] In your case, Ms Bolea, I am not satisfied that the consequences would be out of all proportion. A conviction would have some consequences on your general career prospects, but that should normally yield to an employer’s right to know all relevant information in their hiring decisions.¹⁵ A conviction would expose you to liability to deportation, but I do not consider that to be out of all proportion to offending that was of moderate to low gravity. It may be that you will ultimately be deported, but that would be a consequence of your offending, and it would be a decision made by immigration decision-makers after consideration of all the circumstances, including the gravity of your offending and your personal and family circumstances.

[31] Accordingly, I decline to discharge you without conviction. I turn instead to determine your sentence in accordance with ordinary principles.

Approach to sentencing

[32] The Sentencing Act sets out the purposes and principles of sentencing. Here, relevant purposes include holding you accountable for the harm that your offending has done to the community, promoting in you a sense of responsibility for that harm, and deterring you and others from committing similar offending.¹⁶

[33] The principles include the need to consider the gravity of your offending and your degree of culpability, and the seriousness of the offence. I must also impose the least restrictive outcome that is appropriate in the circumstances.¹⁷

[34] Determining a sentence involves, in your case, three steps. First, I must determine a “starting point” for your sentence, which will be based on the seriousness of the offending to which you have pleaded guilty. Secondly, I must consider your

¹⁴ *Neeraj v Police* [2019] NZHC 263 at [24]; *Gililand v Police* [2019] NZHC 289 at [83]; and *R v Smyth* [2017] NZCA 530 at [11]–[12].

¹⁵ *R v Taulapapa* [2018] NZCA 414 at [42(a)].

¹⁶ Section 7(1).

¹⁷ Section 8.

personal circumstances, including the appropriate deduction for your guilty plea.¹⁸ Finally, if that produces a sentence of imprisonment of two years or less, I must consider whether to commute your sentence to one of home detention.

Starting point

[35] In terms of the starting point, this depends on matters that I have already addressed when considering the gravity of the offending itself. When doing that, I accepted that your offending was essentially limited to the trip to Christchurch in early August 2020. I consider that this puts your offending at a much lower level than the offenders in the cases to which the Crown referred me.¹⁹ In those cases, the offenders had knowingly participated in the criminal groups for periods of generally three or four months.

[36] In your case, allowing for the aggravating and mitigating features of your offending that I identified earlier, I consider an appropriate starting point, but I emphasise Ms Bolea, it's just the starting point, is **18 months' imprisonment**.

Personal circumstances

[37] Next, I am to assess your personal circumstances and any credits against the starting point that those circumstances require.

[38] As I said earlier, Mr Bailey contended for a wide range of personal mitigating factors that he said should reduce your sentence. The Crown accepted that allowances for your guilty plea and previous good character are available.

[39] I will first address your guilty plea. You entered your plea immediately after the Crown amended two charges of methamphetamine for supply and two charges of supplying methamphetamine to the present charge. I will give a credit of 20 per cent rather than the full guilty plea credit, acknowledging that you pleaded

¹⁸ *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [45]–[47].

¹⁹ The cases on which the Crown relied are *R v Richardson* [2021] NZHC 1160; *Powhiro v Police* [2018] NZHC 2293; *R v Green* [2016] NZHC 770; *R v Parao* [2016] NZHC 1106; and *R v Kney* [2020] NZHC 1949.

guilty at the start of the scheduled trial and the reduction of the charges benefitted you.²⁰

[40] I agree that some credit is warranted for your lack of previous convictions and your otherwise good character. The amount of that credit is a matter of impression for me.²¹ I allow a credit of 15 per cent.

[41] Mr Bailey contended that allowances should be made for your youth at the time of your offending and your upbringing. Both share the underlying premise that your decision-making abilities were impaired, thus diminishing your moral culpability. I accept that a modest allowance is warranted, noting that your age was at the upper range at which a credit for youth is available and that your upbringing was far from the worst that the courts see. I will allow 15 per cent for these factors.

[42] Mr Bailey also raised in mitigation the impact of sentencing on your young daughter. That factor would carry some weight if you were to be sentenced to a term of imprisonment. But that is not going to happen, so I decline to make any allowance for this factor.

[43] Finally, you spent two days in custody, and the early part of your time on ordinary bail was subject to a strict curfew, with six months on bail subject to a 5 pm to 8 am daily curfew. Credit can in some circumstances be given for time spent on ordinary bail.²² You were pregnant and then had a young child during the period that you were subject to a restrictive curfew. I consider some credit is available for these matters. I allow a further month.

End sentence and home detention

[44] Ms Bolea, with a starting point of 18 months' imprisonment and the credits to which I have just referred, that takes me to a sentence of **eight months' imprisonment.**

²⁰ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [62].

²¹ *R v Hockley* [2009] NZCA 74 at [30] and [32].

²² *Kreegher v R* [2021] NZCA 22 at [49].

[45] Because that sentence is less than two years, it is open to me to consider home detention as a sentencing option. I may impose a sentence of home detention only if I am satisfied that the purposes for which the sentence is being imposed cannot be achieved by any less restrictive sentence.²³ Mr Bailey contended that I could impose something less than home detention, such as simply convicting you and discharging you, or community detention. However, given the serious nature of the underlying methamphetamine offending, I consider that the principles of sentencing, in particular the deterrence principle, cannot be achieved by a sentence less than home detention.

[46] I will therefore commute your sentence of imprisonment to a sentence of home detention.

[47] Offenders who have been sentenced to short-term sentences are automatically released after serving half of their sentences.²⁴ Accordingly, home detention periods are commonly calculated by halving the end sentence of imprisonment that otherwise would have been imposed. I will follow that practice here.

Result

[48] Ms Bolea, please stand.

[49] I convict you on the charge of participation in an organised criminal group. On that charge, I sentence you to **four months' home detention**.

[50] You will serve that sentence at the address specified on page 3 of the PAC report dated 14 September 2022. You are to travel directly from Court to that address and await the arrival of the probation officer and a representative of the electronic monitoring company. You are to reside at that address for the duration of the sentence unless you have the prior written permission of the probation officer to change address.

[51] I also impose the recommended special conditions contained on page 4 of the PAC report.

²³ Sentencing Act, s 15A. See also *R v Vhavha* [2009] NZCA 588 at [31].

²⁴ Parole Act, s 86.

[52] Please stand down.

Campbell J