IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA505/2021
[2022] NZCA 128

BETWEEN	KENNY LESLIE MCMILLAN Appellant
AND	THE QUEEN Respondent

CA572/2021

BETWEEN	ROBERT JASON TAUI Appellant
AND	THE QUEEN Respondent

CA604/2021

BETWEEN	THE QUEEN Appellant
AND	JASON BRENDON PHILIP Respondent

Hearing:	23 February 2022 (further material received 24 February 2022)
Court:	Dobson, Brewer and Edwards JJ
Counsel:	J J Rhodes for Appellant in CA505/2021 G J Burston, T G Bain and A G McCluskey for Respondent in CA505/2021 and CA572/2021 and Appellant in CA604/2021 T M Cooper for Appellant in CA572/2021 PVC Paino for Respondent in CA604/2021
Judgment:	11 April 2022 at 1.00 pm

JUDGMENT OF THE COURT

CA505/2021 McMillan v R

A The appeal against sentence in dismissed.

CA572/2021 Taui v R

B The application for an extension of time to appeal is granted.

C The appeal in dismissed.

CA604/2021 R v Philip

D The appeal is allowed.

E The sentence of home detention imposed in the High Court is quashed.

F A sentence of two years and 11 months' imprisonment is substituted.

G The sentence of imprisonment is to take effect from 3:00 pm on Tuesday 12 April 2022. The current sentence of home detention is to continue in effect until that time.

H Mr Philip must surrender himself to the Prison Director at Manawatu Prison at 3:00 pm on Tuesday 12 April 2022 to commence his sentence of imprisonment.

REASONS OF THE COURT

(Given by Dobson J)

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[1] These three appeals were heard together because the appellants in the first two appeals and the respondent in the third appeal were all charged in relation to methamphetamine dealing as a result of the same police operation. Messrs McMillan and Taui appeal against their sentences of, respectively, 18 years' imprisonment with a minimum period of imprisonment (MPI) of seven years and two months,[1] and 11 years' imprisonment.[2] The Solicitor-General has appealed in Mr Philip's case on the ground that a sentence of 12 months home detention was manifestly inadequate.[3]

MCMILLAN v R CA505/2021

Introduction

[2] Mr McMillan was convicted of two specific charges of supplying methamphetamine and two representative charges of doing so plus four charges of possession of methamphetamine and a further charge of failing to carry out obligations in relation to a computer search.[4] He pleaded guilty to all bar the two most serious charges of which a jury subsequently found him guilty. Those two charges related to his purchases of methamphetamine from Auckland.

[3] After his trial the differences as to the quantity of methamphetamine involved in the offending were addressed at a disputed facts hearing on the one of two representative charges in respect of which quantity was contested. The Judge ruled

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1 *R v McMillan* [2021] NZHC 2118 [McMillan sentencing notes].
2 *R v Taui* [2021] NZHC 2123 [Taui sentencing notes].
3 *R v Philip* [2021] NZHC 2393 [Philip sentencing notes].
4 Misuse of Drugs Act 1975, s 6(1)(f) and (2)(a); s 6(1)(c) and (2)(a); and Search and Surveillance Act 2012, s 178.

that at least seven kilograms of methamphetamine had been supplied.[5] A further 3.37 kilograms was involved in the other charges where quantity was not disputed so Gwyn J sentenced Mr McMillan on the basis that 10.37 kilograms had been supplied.[6]

[4] The Judge adopted a starting point of 17 years' imprisonment reflecting that quantity and Mr McMillan's leading role in the Wellington operation.[7] The Judge uplifted the starting point by one year to reflect previous convictions and was not prepared to afford a discount for late guilty pleas for some of the charges, or for Mr McMillan's personal circumstances.[8] The end sentence was accordingly 18 years' imprisonment. An MPI of seven years and two months, amounting to 40 per cent of the end sentence, was also imposed.[9]

[5] Mr McMillan appealed his sentence on five grounds, namely:

(a) the quantity of methamphetamine was overstated because the Judge had erred in making the relevant findings at the disputed facts hearing;

(b) the starting point adopted was excessive by comparison with co-defendants;

(c) the 12-month uplift for previous convictions was excessive;

(d) insufficient credit was given for factors raised in a report provided under s 27 of the Sentencing Act 2002; and

(e) the imposition of a minimum non-parole period was not warranted.

The finding on the quantity of methamphetamine:

[6] By the time of the disputed facts hearing, differences were narrowed to only challenge the quantity of methamphetamine involved in charge 7. That was a

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5 *R v McMillan* [2021] NZHC 1993 [McMillan disputed facts hearing] at [57].
6 At [13] and [67].
7 McMillan sentencing notes, above n 1, at [30].
8 At [32]–[38].
9 At [39]–[44].

representative charge that Mr McMillan had, between 1 December 2018 and 9 March 2019, together with other defendants, supplied methamphetamine to third persons. The Crown contended that the supply of 14 kilograms during that period could be made out, which equated to two kilograms on each of seven deliveries of methamphetamine from a wholesale supplier in Auckland. In contrast, Mr McMillan contended that the quantity was three kilograms on the basis that he was only involved in three of the seven deliveries in the relevant period, involving one kilogram on each occasion. The Judge's determination was that Mr McMillan was involved in all seven consignments, of at least one kilogram each.[10]

[7] The Wellington-based police operation resulting in the charges against Mr McMillan and his co-defendants had been run in tandem with an operation in Auckland that focused on the wholesale supply of methamphetamine by a Mr James and his co-offenders. Mr James was the source of the majority of methamphetamine delivered by co-defendants to Mr McMillan in Wellington, until near the end of his relevant criminal activity when Mr McMillan was forced to obtain methamphetamine from an alternative source.

[8] One of those involved with Mr James in Auckland (X) had agreed to give evidence for the Crown at the trial of the remaining Auckland defendants. A witness statement prepared for X was put before the Judge at the disputed facts hearing. The Crown did not oppose the Judge having the statement notwithstanding the submission that it was inadmissible hearsay.[11] The Judge was disinclined to place reliance on X's witness statement as evidence distancing Mr McMillan from the consignments of methamphetamine.[12] In addition, Mr McMillan gave evidence and was cross-examined at the disputed facts hearing. The Judge rejected Mr McMillan's evidence as not being credible.[13]

[9] On appeal, Mr McMillan has challenged the Judge's findings as to the quantity of methamphetamine on the grounds:

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10 McMillan disputed facts hearing, above n 5, at [53].
11 At [35].
12 At [36].
13 At [38]–[48].

(a) first, that there was insufficient evidence to draw inferences beyond a reasonable doubt that Mr McMillan was responsible for all of the seven trips by his associates to transport methamphetamine from Auckland to Wellington, and that all of those seven trips were undertaken under his direction and with his knowledge; and

(b) second, the complete rejection of X's witness statement was inadequately justified.

[10] Mr McMillan denied any involvement in four of the trips to Auckland that occurred on 15–16 January, then on three dates in February 2019. He had been out of New Zealand between 5 and 21 January 2019. X's statement did not implicate Mr McMillan in any of those trips and in his own evidence Mr McMillan said that they were undertaken without his involvement. Given that evidence and the Judge's acceptance of the lack of other evidence of direct involvement by Mr McMillan in the four trips in question, Mr Rhodes, counsel for Mr McMillan, submitted that there was insufficient other evidence to justify the inferences that Mr McMillan was involved in transporting methamphetamine on those trips.

[11] Mr Rhodes submitted that the Judge provided inadequate grounds for her blanket rejection of Mr McMillan's evidence on the basis that she found him not credible.

[12] The Judge set out a number of reasons why she found Mr McMillan not to be credible.[14] In cross-examination Mr McMillan was questioned about the content of two affidavits he had sworn in support of an appeal against the District Court's refusal to grant him bail. Mr McMillan acknowledged that he had lied in two statements he made in his affidavits that involved attempts to downplay his participation in the relevant offending.

[13] In oral submissions, Mr Burston, counsel for the Crown, sought to supplement the evidence of pervasive lying by Mr McMillan with references to a post-sentencing charge brought against him for attempting to pervert the course of justice.

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[14] At [38]–[47].

Recorded conversations relevant to that further charge would indicate, on the Crown's view, that Mr McMillan practices deception with those preparing reports about him. We find it neither necessary nor appropriate to have regard to those additional matters in considering the present challenge to the Judge's findings in her disputed facts judgment.

[14] In addition to the general adverse observations on Mr McMillan's credibility, the Judge found much of the evidence that he had given at the hearing to be untrue. The Judge rejected Mr McMillan's attempts to minimise the extent of his purchases and, for example, the reasons he had advanced for the demand for methamphetamine in Wellington allegedly dropping in January and February 2019.[15] The Judge was well-placed to apply logic and common sense in light of her observations of all of the evidence at Mr McMillan's trial.

[15] A key component in the transporting of methamphetamine from Auckland to Wellington was the use of two cars, first a Nissan Tiida and secondly a Mitsubishi Lancer, both of which had secret compartments built into them sufficient to hide consignments of up to two kilograms of methamphetamine. The hidden compartments were only able to be opened by use of a closely guarded combination of electronic directions. The evidence at Mr McMillan's trial was that these vehicles had been supplied to Mr McMillan by Mr James, the Auckland supplier, for the purpose of transporting methamphetamine.[16]

[16] At the disputed facts hearing, Mr McMillan stated that associates of his had control of these two vehicles on the occasions when there was no evidence of his direct involvement. Mr McMillan claimed that associates must have used the vehicles for their own purposes on the remaining trips where he denied involvement. The Judge rejected that claim on the basis of evidence at his trial that he had retained close control over the vehicles even when associates had some personal use of them.[17]

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15 At [43].
16 At [45] and [52].
17 At [44].

[17] Having considered all the criticisms raised by Mr Rhodes, we are satisfied that the adverse credibility findings were clearly available to the Judge and were amply justified. We do not accept that an overall credibility finding adverse to Mr McMillan led to any blanket rejection of all elements of his evidence seeking to distance himself from the disputed consignments. The Judge did go on to consider each consignment and acknowledged the lack of evidence of direct involvement by Mr McMillan in the period when he was out of New Zealand. The Judge found that the same modus operandi applied on each occasion, with there being no plausible alternative explanation for taking the modified vehicles to Auckland. There was evidence of communications from Mr McMillan to associates in New Zealand whilst he was out of the country on matters other than on the methamphetamine operation and there was also evidence that he used covert means of communicating about his dealings in methamphetamine.

[18] Given the evidence that the adapted courier vehicles were under Mr McMillan's control throughout, and the absence of any evidence that the associates who carried out the transporting of the methamphetamine undertook any dealing activity on their own behalves, it was a safe and justified inference that the trips occurred at his direction. The vehicles had been supplied by Mr James to Mr McMillan and there was a personal relationship between them, but not between Mr James and Mr McMillan's co-defendants.

[19] Mr Rhodes advanced an additional submission that the evidence did not justify the finding that each of the trips in question was undertaken to transport methamphetamine from Auckland to Wellington. He argued that the evidence could not exclude prospects of those involved (Mr Philip and his partner, Ms Hayman) had travelled to Auckland for other purposes, such as to carry cash to pay for previous consignments or related to the purchase of vehicles from Mr James or businesses that he was associated with. In this regard Mr Rhodes relied on X's statement that one of the disputed trips was only to drop off cash.

[20] There was evidence of packages containing cash being carried into Mr James's premises that were too large to have fitted in the secret compartments in the vehicles. It was therefore not necessary to use the modified vehicles on trips where

methamphetamine was not to be transported back to Wellington. We agree that the Judge was entitled to disregard X's statement that one of the disputed visits by associates of Mr McMillan to Mr James's Auckland premises was only to drop off cash. We are further satisfied with the Judge's references to evidence at Mr McMillan's trial and the focus given to those trips in the disputed facts hearing justified the Judge's finding that methamphetamine had been transported back to Wellington on each occasion.

[21] As to the rejection of X's witness statement the Judge recognised it was hearsay and found it of very little value because the Court had not heard from him, there had been no opportunity for cross-examination,[18] and the statement was prepared for the purposes of the Auckland proceedings. That evidence did not focus on the quantities of methamphetamine that Mr James had sold to Mr McMillan. The absence of evidence in X's statement that implicated Mr McMillan from X's perspective did not mean that Mr McMillan had not in fact been involved.[19]

[22] We agree with the Judge that X's statement cannot avail Mr McMillan for the purposes of distancing him from the four trips where there was no evidence of his direct involvement. X's statement was not prepared for the purpose of providing, and nor does it address, a credibly informed recollection of the extent of involvement by Mr McMillan in directing those trips to occur. X would be motivated to downplay both his own involvement and more generally the scale of Mr James' Auckland operation. The Judge was entitled to reject X's recollection that the 15–16 January 2019 trip was only to drop off cash, given that it was untested and potentially unreliable given the context in which it was made. X's statement acknowledged that he was not aware of every time that methamphetamine was uplifted from Mr James' premises.

[23] Having disputed the finding of involvement by Mr McMillan in each of the seven trips, Mr Rhodes did not separately challenge the Judge's finding on the quantities of methamphetamine involved.

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18 X was in witness protection at the time.
19 McMillan disputed facts hearing, above n 5, at [36].

[24] The direct evidence of the intercepted trip in March 2019 was that two kilograms of methamphetamine was being carried in the secret compartment in the Nissan Tiida. On that, and on X's statement, the Judge observed that there was a possible inference that the same quantity had been transported on the earlier trips.[20] However, the Judge concluded that the Crown had not proved that quantity on each occasion beyond reasonable doubt. Mr Philip and Ms Hayman had pleaded guilty to carrying one kilogram per trip on those occasions and the Judge adopted the same quantity in her disputed facts judgment. That cautious approach cannot be criticised.

[25] We accordingly reject the challenge to the quantity of the methamphetamine on which Mr McMillan was sentenced, as determined in the judgment following the disputed facts hearing.

The starting point

[26] The Judge placed Mr McMillan's sentencing in band 5 of those provided in the guideline judgment in *Zhang*.[21] That band applies to methamphetamine offending involving more than two kilograms, with the starting points between 10 years and life imprisonment depending on the quantity of methamphetamine and the nature of the role played by an offender.[22] Counsel representing Mr McMillan at sentencing contended for a 10-year starting point whereas the Crown contended for 18 years' imprisonment.

[27] The Judge characterised Mr McMillan as having a leading role in a sophisticated operation involving the buying and selling methamphetamine in commercial quantities. Mr McMillan directed the involvement of a number of others, used covert communications and amassed substantial assets consistently with earning very extensive profits. Some assets were obscured by being in the ownership of associates. Mr McMillan had close links to Mr James, the original source of most of the methamphetamine.[23]

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20 At [56].
21 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [125].
22 At [123].
23 McMillan sentencing notes, above n 1, at [25].

[28] The Judge was mindful of the starting points adopted at the sentencings of Mr McMillan's co-offenders, but because none of them had a role comparable to his, the Judge did not undertake any measured relativity.[24]

[29] Of the sentencings considered as comparable, the case of *Thompson v R* was treated as the most similar.[25] In that appeal this Court upheld a starting point of 18 years' imprisonment where Mr Thompson had been a principal offender in an extensive and very sophisticated distribution network established by him. He supervised others over a 10-month period and was attributed with involvement in dealing 6.8 kilograms of methamphetamine.

[30] Mr Rhodes criticised the 17-year starting point adopted for Mr McMillan as excessive on two grounds. First, relativity with the appeal of *Thompson* was inappropriate because that appellant had accepted the 18-year starting point in an appeal that was confined to the imposition of an MPI. Mr Rhodes instead urged comparison with the appeal in *Fangupo*, and other sentencings that were referred to in that appeal.[26] The Judge had referred to the *Fangupo* judgment in her sentencing analysis.[27] Mr Fangupo was sentenced for importing 20 kilograms of methamphetamine and for other offending. The starting point in that case was reduced by this Court from 19 to 17 years.[28] That judgment reviewed four other methamphetamine sentence appeals in which offenders were found guilty of involvement with larger quantities than Mr McMillan but lower starting points were applied.[29] Those cases were:

(a) *Zhang*: 17.9 kilograms, starting point of 15 years;[30]

(b) *Pai*: 22.6 kilograms, starting point of 15 years;[31]

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24 At [26].
25 *Thompson v R* in *Zhang v R*, above n 21, at [265]–[281] .
26 *Fangupo v R* [2020] NZCA 484.
27 McMillan sentencing notes, above n 1, at [27] and [29].
28 *Fangupo v R*, above n 26, at [50].
29 At [45]–[48].
30 *Zhang v R*, above n 21, at [257].
31 *Pai v R* [2020] NZCA 146 at [52] and [56].

(c) *Wan*: 19.1 kilograms, starting point of 15 years;[32] and

(d) *Berkland*: 15 kilograms plus, starting point 16.5 years.[33]

[31] Of those four cases, each of *Zhang*, *Pai* and *Wan* involved offenders whose roles were described as being at the "lower end of significant" in terms of the levels of roles spelt out in *Zhang*. In *Berkland* the offender was characterised as a trusted deputy to the main offender and at "the upper end of significant".[34] In *Fangupo*, the offender was characterised as having a "moderately leading role".[35] The participation of all those offenders is distinguishable from Mr McMillan who was in charge of the Wellington operation. An additional measure of culpability has to be recognised where the offender was at the top in organising and controlling a sophisticated commercial operation on the scale involved here. The relativity with these comparators was clearly open to the Judge.

[32] The second ground for Mr McMillan's challenge to the starting point was that it lacked relativity with the much lower starting points for his co-offenders, the next longest being 11 years shorter than that nominated for Mr McMillan. The submission on that extent of difference in starting points overlooks that of Mr Taui where the starting point was 12 years' imprisonment, presumably on the basis that he had not been sentenced when Mr McMillan was.

[33] On this ground, the threshold for intervention is a high one. An unjustifiable extent of disparity has to be present to an extent that a reasonably minded observer would be led to believe that something had gone wrong with the administration of justice.[36]

[34] As this Court observed recently in *Berkland*, overly lenient treatment of one offender is not necessarily a ground for interfering with the sentences of a co-offender

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32 *Wan v R* [2020] NZCA 328 at [21]–[25].
33 *Berkland v R* [2020] NZCA 150 at [56].
34 At [50] and [56].
35 *Fangupo v R*, above n 28, at [42].
36 *R v Hay* [2015] NZCA 329, [2015] NZAR 1426 at [56], citing *R v Lawson* [1982] 2 NZLR 219 (CA) at 223 as the leading authority on disparity between co-offenders' sentences. See also *Macfarlane v R* [2012] NZCA 317 at [24].

which is otherwise appropriate.[37] The differences in the roles of Mr McMillan on the one hand, and the co-offenders who had been sentenced before him were significant. Ms Hayman and Mr Philip were attributed with starting points of six years for relatively trusted roles in transporting six kilograms of methamphetamine from Auckland on a number of trips under Mr McMillan's direction.[38] Mr Minns attracted a starting point of four years and six months for transporting a two-kilogram consignment from Auckland halfway to Wellington and for his part in accompanying Ms Hayman and Mr Philip on an earlier trip.[39] Mr Stone, a low-level associate who accompanied Mr McMillan on numerous aspects of the latter's activities (for example driving to covert car parks and with Mr McMillan to the airport) was attributed with a starting point of three years and six months.[40] Mr Paulo, a functionary who was sentenced as a party to Mr McMillan's offending carried out limited tasks at the latter's direction and was attributed with a starting point of three years.[41]

[35] The disparity with Mr McMillan's co-offenders may appear greater because for all except Mr Minns, mitigating factors resulted in sentences of home detention. Mr Minns was sentenced to two years' imprisonment which had already been served by the time he was sentenced.[42]

[36] We address Mr Philip's sentence in considering the Crown appeal against it below. As for the other co-offenders who had been sentenced at the time, we do not accept that there is any concerning extent of disparity in the starting points adopted. The point not fully acknowledged in submissions for Mr McMillan is the significantly greater culpability that attaches to the leading and controlling participant in a sophisticated commercial methamphetamine dealing operation. We see the gulf between Mr McMillan and the lesser roles played by the co-defendants as generally not out of proportion to the extent of differences between the starting points nominated for each of them.

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37 *Berkland v R*, above n 33, at [67].
38 *R v Hayman* [2021] NZHC 642 at [38]; and *R v Philip* [2021] NZHC 2393 at [41].
39 *R v Minns* [2021] NZHC 638 at [37].
40 *R v Stone* [2021] NZHC 636 at [32].
41 *R v Paulo* [2020] NZHC 1797 at [24].
42 *R v Minns*, above n 39, at [49].

[37] Mr Taui was sentenced after Mr McMillan. We consider his appeal below. He enjoyed a measure of independence as a lower-level dealer. He was dealing to feed a habit and although there was no evidence of his mode of on-selling the drug, he was sentenced on the basis of possession of 1.524 kilograms received from Mr McMillan.[43] That placed him in band 4 of *Zhang* with a starting point of 12 years imprisonment.[44] The difference of five years between that starting point and the 17 years chosen for Mr McMillan was well within the range that can be expected given the differences in the roles and the quantities of methamphetamine attributed to each of them.

[38] Accordingly, we do not accept that the starting point adopted can be challenged on the ground of disparity with sentences for co-offenders.

Uplift

[39] After setting the starting point, the Judge considered whether an uplift was warranted for previous convictions. She dealt with it in the following terms:[45]

> [33] Given the repetitive nature of this type of offending throughout your history, in particular your pattern of re-offending shortly after release from prison in 2005 and 2015, I consider an uplift is warranted. I impose an uplift of one year (just over 5 per cent) to reflect your previous convictions.

[40] Mr Rhodes submitted the earlier convictions were too long ago and were not connected to the current charges. Because all the offending was drug-related, it was submitted that drug addiction issues were a partial explanation, lessening the justification for any uplift.

[41] We consider that the pattern of serious drug offending reflected in the convictions was appropriately characterised by the Judge and can find no fault in her imposing an uplift of one year.

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43 Taui sentencing notes, above n 2, at [5].
44 At [21] and [31].
45 McMillan sentencing notes, above n 1.

Mitigating factors

[42] Mr McMillan had pleaded guilty to seven of the nine charges he faced on the opening day of the trial. The two remaining charges were the most serious, and he was convicted on both at the conclusion of the jury trial. The subsequent disputed facts hearing to determine the quantity of methamphetamine involved resulted in the rejection of his evidence on the basis that it was not credible. The Judge's view of the discount for guilty pleas that had been entered was as follows:[46]

> [36] Your pleas were at the very last moment and did not shorten the trial time required. They did little to facilitate the administration of justice. Nor did they demonstrate an acceptance of responsibility for the magnitude and seriousness of your offending. I do not consider a discount for your guilty pleas is warranted.

[43] The approach on this consideration was clearly open to the Judge and we do not consider it leads to any error in constructing an appropriate final sentence.

[44] Written submissions for Mr McMillan had complained that all the other co-defendants had received recognition for personal mitigating factors when no discount was allowed in his case. The Judge was criticised for having inadequate regard to a s 27 report and other supporting material placed before the Court.

[45] The Judge noted the reports of "some instability in [Mr McMillan's] childhood" and self-reporting of recurring problems with drug addiction. The Judge concluded that there was no strong evidence of the extent of childhood struggles, nor of a causal connection between them and the current offending. There was accordingly no discount given for personal mitigating factors.[47]

[46] The s 27 report stated that Mr McMillan's father was a heavy drinker, occasionally violent, and frequently absent in his occupation as a merchant seaman. Mr McMillan's mother often left in sole charge of three children, was stressed and also had alcoholic tendencies. He was sent to a boarding school where he experienced bullying and violence with an unspecified suggestion of sexual abuse. The report

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46 McMillan sentencing notes, above n 1.
47 At [37]–[38].

writers acknowledged that their assessment of his background depended largely on Mr McMillan's self-reporting.

[47] The writer of the Provision of Advice to Courts (PAC) report was wary of the genuineness of what Mr McMillan told her in their interview, assessing him as having a "sense of entitlement through believing he could influence the outcome of his sentencing while being interviewed".

[48] Three further reports were also before the courts. First, an alcohol and other drug report prepared in September 2019 confirmed Mr McMillan fitted the criteria for admission to a residential drug rehabilitation programme. The positive tone of the report reflected the attitude conveyed by Mr McMillan to its writer. Secondly, a November 2020 Alcohol, Drug Assessment and Counselling (ADAC) report by Mr Roger Brooking which confirmed that Mr McMillan meets the DSM-IV criteria for polysubstance dependence, but also observed that he has managed long periods of abstinence.[48] The third of the reports was prepared in April 2021 by Mr Robert Nawalowalo, which recommended that Mr McMillan be offered engagement in a drug treatment unit whilst in prison but that the flight risk he represented would preclude prospects of any courses outside prison.

[49] The Judge was also presented with letters of support from Mr McMillan's parents and from a friend who considered he was in a position to help Mr McMillan break his perceived methamphetamine addiction.

[50] The Judge was entitled to reject such materials that could have had a mitigating influence on the final sentence. We agree that there was no material causal link between the difficulties in his upbringing and the pattern of serious methamphetamine dealing.[49] The offending went far beyond the lower level that would be required to maintain a habit and the perceived lack of genuine appreciation in his self-reporting justified a level of scepticism about the extent, if any, to which an addiction to methamphetamine had driven his large scale dealing in the drug. The more

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48 The Diagnostic and Statistical Manual of Mental Disorders is a diagnostic system for psychiatric disorders.

49 *Zhang v R*, above n 21, at [147] and [159].

sophisticated the conduct of a leading offender in methamphetamine dealing, the more compelling the personal mitigating circumstances will need to be, to warrant a discount for them.

[51] Two further points raised in written submissions on the appeal are noted. First, it was submitted that an MPI was not required. In oral argument Mr Rhodes qualified that by acknowledging that an MPI of 40 per cent of the end sentence could not be challenged but that, if the sentence appeal was upheld, any MPI should be proportionately reduced. That point does not arise.

[52] Second, a report from those managing the drug treatment unit at Rimutaka Prison dated 18 February 2022 was filed shortly before the hearing. It addressed what was described as Mr McMillan's successful completion of a 12-week programme in the unit. Mr Rhodes acknowledged it could not assist in making out any error in the sentencing as it related solely to conduct since that occurred. However, if this Court embarked on a resentencing, Mr Rhodes submitted that its positive content ought to be taken into account in the interests of justice. Again, the point does not arise so it is unnecessary to consider the admissibility of that report.

[53] Standing back, in light of all submissions on the sentencing analysis, we are satisfied that it was well within range.

Result

[54] Mr McMillan's appeal against sentence is dismissed.

TAUI v R CA572/2021

Introduction

[55] Mr Taui was sentenced to nine years and one month's imprisonment for his offending.[50] He appealed against that sentence on two main grounds, first, that the quantity of methamphetamine attributed to his offending after a disputed facts hearing had not been proven beyond reasonable doubt and was overstated, and that his role in

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50 Taui sentencing notes, above n 2, at [56].

the Wellington methamphetamine dealing operation was overstated. His second ground was that insufficient weight had been given to personal mitigating circumstances.

[56] Mr Taui's appeal was filed six working days out of time. There had been a change of counsel and disruption with COVID-19 lockdowns. The Crown does not oppose leave and we accordingly grant the required leave for the appeal to be commenced out of time.

[57] Mr Taui faced four charges of possession of methamphetamine for supply,[51] three relating to specific instances and the fourth brought as a representative charge covering an alleged pattern of behaviour between 1 March 2019 and 2 May 2019. In addition Mr Taui was charged with possession of cannabis for supply[52] and two charges of unlawful possession, one each respectively of a firearm[53] and of ammunition.[54]

[58] Mr Taui pleaded guilty shortly before trial but then sought a disputed facts hearing on the quantity of methamphetamine alleged to have been involved in his offending. The Crown alleged he had possession of at least 1.5 kilograms.[55]

The disputed facts hearing

[59] It was agreed that the Judge could take into account evidence from Mr McMillan's five-week trial over which the Judge had recently presided, for the purposes of the disputed facts hearing.

[60] Relevant context was also available from the summary of facts. Mr McMillan had leased, through an associate's business, two spaces in a private car park in Gilmer Terrace in central Wellington. Only those leasing spaces could access the car park, with entry controlled by individual access cards. Mr McMillan had provided Mr Taui with an access card for entry into the car park. The pattern was for them to

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51 Misuse of Drugs Act 1975, s 6(1)(f) and (2)(a).
52 Section 6(1)(f) and (2)(c).
53 Arms Act 1983, s 50(1)(a).
54 Section 45(1).
55 *R v Taui* [2021] NZHC 594 [Taui disputed facts hearing] at [10].

visit the car park for short periods, usually sequentially but on one occasion at the same time. The Crown case was that the only purpose for these visits was for Mr McMillan to leave packages of methamphetamine to be uplifted by Mr Taui and for Mr Taui to leave money to be uplifted by Mr McMillan. There was one occasion on which Mr Taui left methamphetamine to be uplifted by or on behalf of Mr McMillan.

[61] The Judge separated the police observation of Messrs McMillan and Taui's activities covered by the representative charge into three categories. The first category covered activity in April 2019 when the police had been able to install covert CCTV recorders within the Gilmer Terrace car park and another nearby car park on Kumutoto Lane. They were able to observe the exchanges of packages but were not able to ascertain the contents of those uplifted by Mr Taui. One of the four instances of this activity included a meeting between the two at the Kumutoto Lane car park where Mr Taui took a package from Mr McMillan.[56]

[62] The second category of police observations related to a period before the covert CCTV recorders were installed. During that period in March 2019 the observations were of vehicles associated with Mr Taui or Mr McMillan, or Mr McMillan on foot, going into the Gilmer Terrace car park for short periods. This occurred on seven occasions.[57]

[63] Third, there was a separate occasion on which the police intercepted a package of cash left at the Gilmer Terrace car park by Mr Taui for Mr McMillan. The package was assessed as containing between $22,000 and $27,000 which the Crown contended would buy about four ounces of methamphetamine. Later the same day Mr Taui was observed visiting Mr McMillan's flat near to the car park.[58]

[64] In addition to these three categories of observation, on 8, 12 and 14 April 2019 the police intercepted packages between them being left by Mr McMillan and uplifted by Mr Taui. The police were able to ascertain their contents as methamphetamine and

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56 At [36].
57 At [37].
58 At [38].

their weight. These three transactions led to specific charges of possession for supply, with one charge relating to each of the three occasions.

[65] On the first occasion the Judge accepted the Crown projection from weighing four out of six packages that Mr Taui had taken possession of 160 grams.[59] On the second occasion a heat-sealed package containing a number of smaller sealable bags was inspected and weighed at 306 grams. A spectrographic analysis (without opening the package) confirmed the presence of methamphetamine. The Judge accepted the Crown analysis that this package would have contained 280 grams of methamphetamine.[60] On the third occasion the package left by Mr McMillan was found to contain three smaller sealed bags with a total weight of 86.4 grams. The contents of that consignment were also confirmed to be methamphetamine. The Judge accepted the package would have contained 84 grams of methamphetamine.[61]

[66] The Crown case was that there was sufficient evidence of a pattern to establish that Messrs McMillan and Taui went to the car park only to exchange methamphetamine for money so that the quantity should reflect a dealing on each of the 12 occasions covered by the representative charge. The Judge accepted beyond reasonable doubt that methamphetamine dealing had occurred on each of the 12 occasions.[62]

[67] On appeal Ms Cooper, counsel for Mr Taui, challenged that finding on a variation of the grounds that were argued at the disputed facts hearing. Ms Cooper submitted that other explanations for a number of the visits to the car park could not be discounted:

(a) Before the CCTV recorders were installed there could not be a positive identification of Mr Taui as the driver of one of the four cars the Crown case linked him to.

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59 At [26].
60 At [30].
61 At [34].
62 At [44].

(b) Nor could the prospect that he had entered the car park and not picked up anything, or alternatively had been dealing in cannabis or something other than methamphetamine, be discounted. Arguably, the evidence did not disclose a discernible pattern and the inferences drawn depended on guesswork and speculation.

[68] Ms Cooper pointed to evidence of some occasions on which Mr Taui visited the car park without either leaving or taking away anything. However, the CCTV evidence shows that the occasions on which that occurred were followed in the same day or the following day by a visit where a package was uplifted.[63] There is also one occasion on 21 April 2019 which records Mr Taui entering the Gilmer Terrace car park and checking the usual hiding place but does not remove or leave anything. However, later on this same day Messrs Taui and McMillan meet in person at the Kumutoto Lane car park where Mr McMillan passes Mr Taui a package.[64]

[69] We are satisfied that a consistent pattern of behaviour was made out. There is no suggestion that the April 2019 dealings between them (when observed by covert CCTV) differed from the relatively frequent sequence of the same type of visits that preceded those occasions. Evidence at Mr McMillan's trial established that he used covert communications so the absence of evidence of arrangements for dead letter drops is explicable.

[70] We agree that the Crown did establish beyond reasonable doubt that methamphetamine was uplifted by Mr Taui on each of the 12 occasions covered by the representative charge.

[71] As to the quantity of methamphetamine, the Crown averaged the weights established from the intercepted packages and invited the Court to infer that the average of those three consignments, amounting to 175 grams, could be extrapolated over the 12 occasions where unascertained quantities were involved. That would equate to Mr Taui taking possession of two kilograms of methamphetamine.

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63 For example, the visits at 17:34, then 18:43 on 2 April 2019.

64 This Kumutoto Lane activity was one of the four occasions captured by CCTV referred to above at [60].

Alternatively, if the smallest of those three intercepted consignments was treated as a minimum applying to all 12 occasions then the smallest quantity would be one kilogram.

[72] Both approaches were criticised by Ms Cooper as involving guesswork, which ought not to have been accepted. However, it was accepted in submissions from Mr Taui that the dealing was on a commercial scale.

[73] The Judge found that Mr Taui had purchased one kilogram on the 12 occasions covered by representative charge. The Judge treated that finding as a conservative one given the evidence of some dealings in larger amounts.[65]

[74] We agree essentially for the reasons given by the Judge. Mr McMillan was a wholesale dealer, the evidence at his trial establishing that he did not deal in quantities less than ounces. The payment by Mr Taui that was intercepted of between $22,000 and $27,000 reflected a scale of dealing in ounces. Each of the intercepted packages totalled weights consistent with dealings in ounces.

Role

[75] The Judge found that Mr Taui played a significant role in terms of the characteristics of different categories of role as outlined in *Zhang*. She recognised that Mr Taui displayed some features of a leading role, namely the commercial scale of his purchases and the expectation of significant financial gain. The absence of involvement in other parts of Mr McMillan's larger operation reduced the importance of his role.[66]

[76] This categorisation was challenged on appeal. Ms Cooper submitted that Mr Taui had only a lesser role or one on the cusp of lesser and significant roles as defined in *Zhang*. She submitted that he was not found with any methamphetamine when arrested, with only $5,000 in cash, and apart from four ageing motor vehicles, was without any substantial assets. The paraphernalia of scales and packaging found when he was arrested were consistent with an addicted user. There was no evidence

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65 Taui disputed facts hearing, above n 55, at [46].
66 Taui sentencing notes, above n 2, at [27].

of his on-sale to other users so, on Ms Cooper's analysis, he should be seen as a courier in the role of an employee and associate of Mr McMillan.

[77] These arguments could have been made with more force if Ms Cooper had made out her prior submission that the quantity of methamphetamine attributed to Mr Taui had been overstated. Had the quantity been substantially smaller, then his involvement may have been consistent with frequent use and modest sales. However, submissions for Mr Taui did accept that he had been dealing on a commercial scale. The Judge's findings on quantities involved in Mr Taui's dealing, with which we agree, puts the scale of it well beyond minor street level dealing to sustain an addiction. The absence of evidence of Mr Taui handing methamphetamine over to customers is not sufficient to rebut the strong inference that it was occurring.

[78] Similarly, absence of identified assets attributable to dealing profits does not cast doubt on the proposition that dealing on the scale involved would indeed have produced substantial profits. Mr Taui was on notice that the police were seeking him before his arrest so the extent of cash he was carrying should not be equated with cases where apprehension of dealers takes them by surprise.

[79] Unlike Mr McMillan's other co-defendants, all of whom were subordinates acting under his instructions, Mr Taui was relatively independent. Whilst he was dependent on Mr McMillan for supply he was distinct from the rest of the activities, taking ounce quantities and turning them into cash. A payment between $22,000 and $27,000 is indicative of ounce dealings. Given the frequency and quantity of packages handled, Mr Taui's position in the chain from manufacturer to consumer constitutes a significant role in terms of the *Zhang* criteria.[67]

The starting point

[80] At sentencing the Crown invited comparison with a number of recent judgments of this Court on sentences for methamphetamine dealers.[68] Of those, the Judge considered the case of *Wellington v R* to be the most similar. That offender had

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[67] *Zhang v R*, above n 21, at [126].

[68] *Moheebi v R* [2020] NZCA 343; *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583; *Miller v R* [2020] NZCA 131; *Wellington v R* [2020] NZCA 277; and *Martin v R* [2020] NZCA 318.

run a distribution network in Christchurch, receiving large quantities of methamphetamine for on-supply. A starting point of 12 years' imprisonment was upheld by this Court and the Judge adopted that for Mr Taui. [69]

[81] Mr Taui has appealed against the starting point on the grounds that the Judge had attributed possession for supply of a quantity that was not made out and had overstated Mr Taui's role in Mr McMillan's methamphetamine dealing operations. We have rejected those two arguments.

[82] In addition, Ms Cooper submitted that there was a lack of parity with co-offenders, five of whom were attributed starting points between three and six years' imprisonment for their parts in dealing in larger quantities (between two and six kilograms of methamphetamine).[70] It was submitted that Mr Taui's role was in many ways indistinguishable from those co-defendants.

[83] There were material differences between the roles played by Mr Taui and Mr McMillan's other co-defendants. The evidence at the latter's trial suggested that he had varying levels of trust in some of those co-defendants, leading to their doing his bidding more loosely supervised. In particular Mr Philip and Ms Hayman made numerous trips to Auckland in vehicles supplied by Mr McMillan with secret compartments, to swap large sums of money for large quantities of methamphetamine. Messrs Stone and Paulo were drivers and ran errands for Mr McMillan. None of them had an independent role in taking ounce quantities of methamphetamine out of Mr McMillan's control and turning it into cash.

[84] We acknowledge a potentially concerning gap between the 12-year starting point for Mr Taui and six years for Mr Philip. The Crown's appeal against Mr Philip's sentence is addressed below. As noted above at [33]–[34] an overly lenient sentence for one co-defendant does not necessarily afford a ground for revisiting another co-defendant's sentence that is otherwise within range — the threshold for intervention is a high one requiring the disparity to be present to such an extent that a reasonably

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69 Taui sentencing notes, above n 2, at [30]–[31].
70 See summary of starting points at [34] above.

minded observer would be led to believe that something had gone wrong with the administration of justice.

[85] We are satisfied that the relativity of the starting points adopted does not give rise to a concern that something significant has gone wrong in the sentencing process. We do not accept that an error can be made out on the ground that Mr Taui's sentence lacks parity or proportionality with those imposed on co-defendants.

Uplifts

[86] The Judge imposed an uplift of six months for the firearm and ammunition convictions. No issue was taken with that on behalf of Mr Taui. The Crown submitted that it was line with similar cases attracting uplifts of 12 to 18 months.[71] In the event that the end sentence was of concern, the Crown submitted that a margin should be allowed for leniency on the modest extent of this uplift.

[87] The Judge also imposed an uplift of one year for Mr Taui's extensive previous convictions. The one-year uplift amounted to eight per cent of the sentence on that point. Mr Taui does not take issue with an eight per cent uplift submitting that the same percentage should apply to the substantially lower starting point contended for on appeal.

Mitigating factors

[88] Mr Taui pleaded guilty shortly before trial. The Judge allowed a 15 per cent discount for the guilty pleas which amounted to one year, and 11 months.[72] No issue was taken about the extent of that discount.

[89] As to Mr Taui's personal circumstances, at sentencing the Judge had a PAC report that recorded an unfortunate and difficult upbringing, a pattern of offending influenced by addiction and a moderately positive projection of his rehabilitative prospects notwithstanding an assessment that he was at a high risk of

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71 See *To'a v R* [2020] NZCA 187 at [19]; *Joyce v R* [2020] NZCA 124 at [24]; and *Mills v R* [2016] NZCA 245 at [18].

72 Taui sentencing notes, above n 2, at [44].

reoffending. The Judge also had a detailed report prepared under s 27 of the Sentencing Act. The Judge fairly summed up the materials in the following terms:[73]

> … you have been dependent on drugs for most of your adult life, following a difficult upbringing. The intergenerational history of both social and economic deprivation diminished your opportunities and shaped the choices you made.

[90] Mr Taui's sister characterised him in an interview for the purposes of a s 27 report as institutionalised and Ms Cooper's summation was that his moral culpability was lower because he was a slave to methamphetamine.

[91] The Judge acknowledged a link between Mr Taui's background and addiction issues, and the present offending. On the basis of letters from him and his sister, the Judge expressed hope for a change of attitude and positive rehabilitation. The Judge allowed a global discount of 20 per cent for Mr Taui's personal mitigating circumstances.[74]

[92] Ms Cooper challenged this as inadequate given the extent of Mr Taui's personal mitigating circumstances and a lack of parity with 30 per cent discounts allowed for co-defendants where their circumstances were arguably similar.

[93] The Crown opposed any greater discount, treating 20 per cent as generous. As a sentencing prospect, Mr Taui had had bail revoked, some doubt was cast on the pro-social values of a course he claimed credit for and the offending had occurred while he was on parole.

[94] Assessments of discounts for personal circumstances are idiosyncratic, focusing individually on all the circumstances of every offender who offers such matters in mitigation. All of a range of matters are to be weighed against the circumstances of the individual's offending. Attempting relativity with discounts afforded to co-offenders in this case is not of assistance in arriving at the appropriate discount. There was a greater degree of commerciality in Mr Taui's offending and the

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73 At [45].
74 At [47]–[49].

more that feature is present, the less deprivation and adverse upbringing can be weighed in favour of a discount for personal circumstances.[75]

[95] The extent of discount given was well within the range that was available to the Judge. We would not be minded to vary that component to the sentencing analysis.

Was the sentence manifestly excessive?

[96] Addressing each criticism of the sentencing individually does not alter the ultimate question, namely whether the end sentence was manifestly excessive. We are satisfied that it was not. Mr Taui had a measure of autonomy and independence within a commercial methamphetamine dealing operation of some scale and sophistication. He was responsible for the sale of a quantity which was within band 4 of *Zhang*.[76] He presented as a dealer with a number of previous serious drug convictions. The outcome was consistent with other sentences approved by this Court.[77]

Result

[97] The application for an extension of time to appeal is granted.

[98] Mr Taui's appeal against sentence is dismissed.

R v PHILIP CA604/2021

Introduction

[99] The Crown has appealed the sentence of one year's home detention imposed on Mr Philip as being manifestly inadequate.

[100] Mr Philip was charged with undertaking five trips to carry a quantity of at least six kilograms of methamphetamine from Auckland to Wellington for Mr McMillan. On a number of occasions he also carried significant amounts of cash to

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75 *Zhang v R*, above n 21, at [130]–[136]; citing *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [12]–[15].

76 *Zhang v R*, above n 21, at [125].

77 *Smith v R* [2020] NZCA 221 at [21]; *Hall v R* [2020] NZCA 183 at [39]; and *Wellington v R*, above n 68.

Mr McMillan's Auckland supplier, Mr James, to pay for methamphetamine supplied. Mr Philip was accompanied every time by his partner Ms Hayman and on two trips by Mr Minns who took part at their instigation.

[101] Mr Philip was charged with five counts of possession of methamphetamine for supply[78] as well as two charges of possession of cannabis.[79]

[102] Mr Philip sought and was given a sentence indication on 1 February 2021 on the basis of an agreed statement of facts and submissions from counsel.[80] In her sentencing indication Gwyn J indicated the starting point of eight years' imprisonment would be adopted and that his maximum end sentence would be six years and two months' imprisonment. The Judge identified a possibility of further discounts if additional information about his personal circumstances warranted that.

[103] Mr Philip pleaded guilty one week after receiving the sentence indication and one day before his trial was scheduled to begin in the High Court at Wellington.[81]

[104] Mr Philip's sentencing was delayed, at least in part to allow him to undertake a rehabilitative course at Kahukura whilst on electronically monitored bail (EM bail). By the time he was sentenced on 13 September 2021[82] the Judge had presided over Mr McMillan's five-week trial and had indicated to counsel the prospect that further information available since providing the sentence indication could warrant a reconsideration of the sentence.[83]

[105] At sentencing the Judge held that new information justified a recharacterisation of Mr Philip's offending. She downgraded its relative seriousness so that the starting point adopted was the same as that used for Ms Hayman who by then had been sentenced.[84] In addition, personal circumstances entitled Mr Philip to greater

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78 Misuse of Drugs Act 1975, s 6(1)(f) and (2)(a); and Crimes Act 1961, s 66.
79 Misuse of Drugs Act 1975, s 7(1)(a) and (2).
80 *R v Philip* [2021] NZHC 42 [Philip sentence indication].
81 The timing of his pleas was complicated by the transfer to Wellington of some charges that had been scheduled for a much later trial date in the Auckland District Court and the complexity of the material he had to consider.
82 Philip sentencing notes, above n 3.
83 See [126]–[131] below on the sequence of minutes and memoranda foreshadowing that conclusion.
84 Philip sentencing notes, above n 3, at [42]–[44].

discounts than had been contemplated earlier.[85] The Judge reduced the starting point from eight to six years' imprisonment and allowed a total of some 67 per cent of discounts to arrive at a sentence of two years' imprisonment that was then transformed into a sentence of one year's home detention.[86]

[106] The Solicitor-General has appealed the sentence under s 246 of the Criminal Procedure Act 2011 (the CPA) on the basis that it was manifestly inadequate and wrong in principle. The grounds advanced were that the Judge erred in varying the factual basis on which the offending was assessed from the description of it in the agreed statement of facts. Arguably the Judge ought not to have relied on a different perception of the offending by relying on the evidence at Mr McMillan's trial. That contributed to a starting point that was manifestly too low and out of line with appellate authority. The inadequacy in the sentence was arguably exacerbated by over-generous discounts.

Altering the factual basis for the starting point

[107] At the sentence indication hearing the Crown contended for a starting point of 14 years' imprisonment and Mr Paino, on behalf of Mr Philip, contended for a starting point of nine years.[87] Mr Paino conceded that Mr Philip's role was greater than that of Ms Hayman and that the offending came at the lower end of "significant" in terms of the categories of role described in *Zhang*.[88]

[108] In the sentence indication decision the Judge was mindful of the need to consider parity with Ms Hayman who had by then accepted a sentence indication on the basis of a starting point of six years' imprisonment. The Judge observed both that she could not determine either to be the leader between them[89] and that given Ms Hayman's somewhat different circumstances, Mr Philip may have taken a more leading role.[90] The Judge saw Ms Hayman as motivated by her addiction, whereas Mr Philip was not. He was significantly older than she was and was a patched gang

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85 At [2]–[3] and [55]–[58].
86 At [66]–[71].
87 Philip sentence indication, above n 80, at [8]–[9].
88 At [19].
89 At [21].
90 At [23].

member.[91] These differences were relied on to set a two-year higher starting point of eight years.[92]

[109] At sentencing, the Judge drew on evidence at Mr McMillan's trial on the involvement of his co-offenders including Mr Philip and Ms Hayman. On the basis of that evidence and other material not available at the sentence indication the Judge found that Mr Philip:[93]

(a) performed a limited function under direction;

(b) was motivated primarily by his addiction;

(c) received limited or no financial gain;

(d) was paid in drugs to feed his addiction or cash significantly disproportionate to the quantity of drugs or risk that had been involved; and

(e) had no influence over those above him in the chain.

[110] Against those factors the Judge found that Mr Philip had not played a significant role in Mr McMillan's operation, citing the Crown's submission in closing to the jury in the McMillan trial that Mr Philip was "a mule and hired muscle". In addition the Judge held that Mr Philip's gang connections were largely irrelevant to the offending and that none of his prior convictions were for supplying methamphetamine.[94] The Judge concluded that neither Mr Philip or Ms Hayman was the leader as between the two of them and that they had not accumulated money or assets as a result of their offending.[95]

[111] On these grounds the Judge found that, instead of a starting point two years longer that had been adopted in the sentencing indication, Mr Philip should be given

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91 At [22].
92 At [23].
93 Philip sentencing notes, above n 3, at [37].
94 At [35].
95 At [36].

the same starting point that had been used for Ms Hayman, namely six years' imprisonment.

[112] The first ground of the Solicitor-General's appeal was that it was not open to the Judge to alter the factual basis for sentencing from the facts that had been agreed between the Crown and the defendant for the purposes of a sentence indication that had been accepted. Proof of the facts to be applied in sentencing is addressed in s 24 of the Sentencing Act in the following terms:

> **24 Proof of facts**
>
> (1) In determining a sentence or other disposition of the case, a court—
>
> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
>
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
>
> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—
>
> (a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case:
>
> (b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:
>
> (c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false:
>
> (d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:
>
> (e) either party may cross-examine any witness called by the other party.
>
> (3) For the purposes of this section,—

> **aggravating fact** means any fact that—
>
> (a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and
>
> (b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case
>
> **mitigating fact** means any fact that—
>
> (a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and
>
> (b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

[113] The Crown position is that this section precludes the prospect of a judge relying on materially different facts from those agreed for inclusion in a summary of facts that has been relied upon in a sentencing indication that is subsequently accepted.

[114] Mr Burston, for the Crown, submitted that this procedural error led the Judge to make a substantive error in adopting a starting point that was lower than was available. Arguably, the only inferences available from the agreed summary of facts required the Judge to attribute to Mr Philip a more important role in the methamphetamine dealing than the lesser role classified by the Judge, inconsistently with the classification of the offending in the sentencing indication.

[115] In opposing the appeal, Mr Paino submitted that it was open to the Judge to update and, where justified, vary the Judge's assessment of the facts where she had further information available that warranted doing so. Mr Paino submitted that it would be unjust if the sentencing process did not allow for that in cases where it arose because otherwise it would force a judge to sentence on a factual basis that the judge found to be incorrect. Mr Paino submitted that s 116 of the CPA allowed new factual information to be taken into account after a sentence indication had been accepted if the circumstances in s 116(2) arise. That section provides, as relevant:

> **116 Effect of sentence indication**
>
> …

(2) The sentence indication is binding on the judicial officer that gave it unless—

(a) information becomes available to the court after the sentence indication was given but before sentencing; and

(b) the judicial officer is satisfied that the information materially affects the basis on which it was given.

…

[116] The content of summaries of fact is routinely negotiated between prosecutors and defence counsel. Prosecutors may be prepared to omit aggravating circumstances where evidence of them could reasonably be challenged at trial. Defendants may agree to the inclusion of facts that would otherwise be disputed at trial in return, for example, for agreement that other charges would be withdrawn. Where a summary of facts is agreed for the purposes of seeking a sentence indication, neither party is bound to its content if the sentence indication is not subsequently accepted. If however a sentence indication is accepted then the summary of facts constitutes the description of offending on which the defendant has pleaded guilty. Except in circumstances contemplated by s 116(2), the judicial officer is bound to the assessment of those circumstances in her or his sentence indication when the sentencing ensues.

[117] Mr Burston relied on this Court's decision in *R v R* to support his submission that the Judge could not revisit facts material to the relative seriousness of the offending inconsistently with the agreed summary of facts.[96]

[118] The appeal in *R v R* arose out of a sentencing of one of five co-defendants for home invasion. R had pleaded guilty on the morning of her trial on the basis of a summary of facts that applied to her and three of her co-defendants. The fifth defendant (P) went to trial and was convicted. At R's sentencing the Judge who had presided at P's trial noted that the evidence that had emerged at P's trial indicated that the activities of R were far more serious than had been set out in the agreed summary of facts. Nonetheless, the Judge expressly recorded that he put those matters to one side and proceeded to sentence R on the basis of the agreed summary of facts.

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96 *R (CA628/2018) v R* [2019] NZCA 135 at [33].

[119] In pursuing a sentence appeal, R sought to rely on evidence from P's trial to put her involvement in a different light. This Court observed:

> [33] R is not entitled to undermine the summary of facts in this way. Where counsel have reached agreement regarding the factual summary on which a guilty plea is to be entered, sentencing should proceed on the basis of that summary. Any appeal against sentence must similarly be decided having regard to the facts contained in the summary.
>
> [34] We also note the following:
>
> (a) R could have sought a disputed facts hearing under s 24 of the Sentencing Act if she disagreed with aspects of her involvement as recorded in the summary of facts. She did not do so.
>
> (b) The evidence adduced in P's trial is unlikely to have given an accurate picture of R's role. The Crown was not required in the course of P's trial to adduce evidence to prove its case against R. What emerged regarding R is likely to have been a partial picture only, tailored to suit P's circumstances.
>
> (c) The inability to depart from an agreed summary of facts at sentencing and on appeal, has advantages for offenders as well as for the Crown. It precludes the Crown inviting the Court to increase the sentence based on evidence that emerges later.
>
> [35] In our judgment, R cannot have recourse to the notes of evidence from P's trial either to undermine the summary of facts she accepted when she entered her pleas or to bolster her proposed appeal against sentence. The appeal has to be decided having regard to the summary of facts which she accepted at the time.
>
> [36] Here the Judge did depart from the agreed summary of facts in three respects:
>
> (a) he observed in his sentencing notes that R was not involved in the initial discussions;
>
> (b) he recorded that it was B who took the victim to the ATM machine and forced her to withdraw money; and
>
> (c) he noted that the victim was subject to further humiliation by way of having to strip, squat down and cough, and he commented that "[t]hose sorts of things are absent from the summary of facts …".
>
> Each of these observations was in R's favour and served to reduce her culpability. Had the Judge sentenced R by reference to other factors not recorded in the agreed summary of facts, which increased her culpability, then she could properly have been heard to complain, but that is not the case.
>
> (Footnotes omitted).

[120] In *R v R* no sentence indication had been given so the limited opportunity to revisit relevant information that is provided by s 116(2) did not apply. *R v R* is an example of both sides being held to the description of the offending in the summary of facts so that it was not open to R to seek to resile from the commitment made in pleading guilty on the terms of that agreed summary, when the sentence was appealed.

[121] However, the terms of s 116(2) free the sentencing judge from that constraint in certain circumstances. If the judge is acquainted with fresh information that comes within s 116(2), then subject to following an adequate process that is fair to both sides, a sentence may be imposed that is inconsistent with the sentence indication.

[122] In cases where a judge is minded to increase a sentence in reliance on further information becoming available since giving a sentence indication that has been accepted, there is clearly an obligation to give adequate opportunity to counsel to consider the issue, and the defendant has to be given an opportunity to withdraw the guilty pleas.[97] That obligation arises even if the end sentence is not increased, but the judge proposes to alter the way the sentence is constructed.[98]

[123] Considerable care is obviously required if a judge is minded to depart from the facts both parties have formally committed to for reasons including those in paragraph [34](a) and (b) of *R v R* quoted at [119] above. As with the situation contemplated in [34](b) of that judgment, here the Crown had no concern to establish the extent of Mr Philip's involvement at Mr McMillan's trial. The tangential interest in his offending was to rebut Mr McMillan's attempts to downplay the extent of his own involvement by attempting to maximise the parts played by his co-defendants, including Mr Philip. That is not necessarily a reliable lens through which to recast the agreed facts on which Mr Philip's sentence indication had previously been given. It is likely to be relatively unusual, if not exceptional, for the trial of a co-defendant to be a reliable source of further information coming within s 116(2).

[124] In response to questions, Mr Burston submitted in general terms that the evidence would have been different had Mr Philip gone to trial. Subsequent to the

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97 *Herlund v R* [2021] NZCA 71 at [37].
98 *Williams v R* [2021] NZCA 54, (2021) 29 CRNZ 783 at [15]–[17].

hearing he filed a memorandum providing different witness lists prepared first, whilst Mr Philip remained a defendant and secondly, after entry of his guilty pleas. We accept that there would have been differences in the evidence, but it is neither possible nor necessary to make a determination of their extent.

[125] However, as a matter of procedure, s 116(2) of the CPA recognises the prospect of a judge taking further information into account in the circumstances that arose here. Accordingly, the Crown's first ground of appeal that the Judge committed procedural error by assuming the power to do so cannot be made out.

[126] An issue does arise as to whether the Judge gave adequate notice to the parties of the prospect of changing the factual basis for sentencing, and whether an adequate opportunity was afforded to both parties to dissuade or encourage her from doing so. If the Judge's intention was to rely on more aggravating factors, then the defendant has to be afforded an opportunity to vacate the guilty pleas. Where the opposite prospect arises and the judge proposes to treat the facts as less serious than when assessed for the sentence indication, the prosecution must be given an adequate opportunity to refute the grounds for such a change. That opportunity should reflect the onus on the prosecution to prove facts under s 24 of the Sentencing Act. In some circumstances it will be sufficient for counsel to be given the opportunity to make submissions on relevant factual matters. In others, the Crown could seek a disputed facts hearing. The judge would need to indicate the likely change in facts and the weight likely to be attached to it, as provided in s 24(2)(a) of the Sentencing Act.

[127] The adequacy of the opportunity given to the Crown to address a change to the material facts was raised during oral argument and we gave leave for Mr Burston to file a memorandum attaching the relevant sequence of minutes and memoranda that addressed the point.

[128] The process was somewhat protracted. A minute issued by the Judge on 19 March 2021 raised the prospect that a change in the facts relating to a co-defendant's offending might impact on the facts material to the offending by others of the co-defendants.[99] The Crown responded to that minute in a memorandum of

[99] *R v Stone* HC Wellington CRI-2019-085-1094, 19 March 2021.

23 March 2021 submitting that there was no basis for a change to the starting point nominated at the sentence indication for Mr Philip which was described as "already generous".

[129] On 30 March 2021 the Judge issued a further minute stating that the Court and the Crown now had a better understanding of the methamphetamine dealing operation with more information being available. The minute required updated submissions to be filed in light of a better understanding of the role of each of the parties as the case had progressed.[100]

[130] Further submissions on behalf of the Crown were filed in the High Court on 9 April 2021 submitting that even if the Judge determined Mr Philip had a lesser role in terms of the *Zhang* categories, the starting point could not go below the bottom of band 5. Those submissions included a response to observations by the Judge about comparison with the offending by Ms Hayman.

[131] On 15 April 2021 the Judge issued a further minute seeking an indication of a potential home detention address for Mr Philip.[101] The Crown's initial rejoinder was that home detention was not appropriate.

[132] Further supplementary submissions were filed on behalf of the Crown on 5 May 2021 addressing the mitigating circumstances that had been raised in the s 27 report filed on behalf of Mr Philip. The Crown opposed the submission that had by then been made on behalf of Mr Philip that he ought to be given the same starting point as Ms Hayman of six years' imprisonment. Those Crown submissions reviewed the aspects of Mr Philip's involvement that were treated as taking him beyond a lesser role, emphasising that he was a trusted lieutenant of Mr McMillan and had direct dealings with Mr James, the Auckland supplier. The point was also made that uplifts and discounts ought to be applied proportionately to the levels of seriousness of the offending. They also made reference to the statutory presumption in favour of imprisonment for such convictions.

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100 *R v Philip* HC Wellington CRI-2019-085-1094, 30 March 2021.
101 *R v Philip* HC Wellington CRI-2019-085-1094, 15 April 2021.

[133] Thereafter the sentencing was adjourned and on 8 September 2021 the Crown filed a further memorandum casting doubt on the value of the Kahukura course that Mr Philip had undertaken. That memorandum pointed out that three instances of cannabis consumption constituted a breach of the terms of Mr Philip's bail and submitted that a sentence short of imprisonment was not available.

[134] Neither of the Judge's 30 March or 15 April 2021 minutes provided the specificity that would be required under s 24(2)(a) of the Sentencing Act to give notice that the Judge was minded to differ from the position in the agreed statement of facts, or the weight that the Court was likely to give such disputed facts. For instance, the Judge could have put counsel on notice that she now considered that Mr Philip had to be treated the same as Ms Hayman, that his offending was to be seen as driven by addiction, and that he was to be placed in the lesser category of those in *Zhang*. The Crown could have inferred that some at least of these different views were motivating the Judge, but they could not be sure when drafting additional submissions.

[135] We consider that, at least by analogy, the process required under s 24(2)(a) should have been adopted in the unusual circumstances that arose. We acknowledge that at no point did the memoranda on behalf of the Crown raise that as an expectation, and nor are we aware of a precedent for doing so. It is necessary to retain fairness to both sides in such exceptional circumstances. In general terms the Crown memoranda reiterated that eight years' imprisonment should be seen as a generous starting point and an end sentence of home detention was not available.

[136] The Judge did proceed cautiously but we consider the opportunity afforded the Crown to contest the different view that the Judge sought to adopt of the facts may well have been inadequate to provide the Crown a fair opportunity to contend for the sentencing analysis as agreed in the summary of facts relied on in the sentence indication.

Reconsideration of the sentence

[137] Given that concern and our view that there do appear grounds for the Crown submission that the end sentence was manifestly inadequate, we have undertaken our own sentencing analysis.

[138] The quantity of methamphetamine in a commercial operation remains the first determinant of an offender's sentence, it reflects both the social harm and the potential illicit gains made from dealing in the drug.[102] Quantity is also highly relevant to culpability and can also be indicative of commerciality which requires greater denunciation.[103] Mr Philip's possession of an agreed amount of six kilograms put him well into band 5 of *Zhang* which begins at two kilograms and which calls for a strong response in terms of deterrence, the promotion of accountability, and public protection.[104] Given that quantity, any reduction below the bottom of the band at 10 years would generally require involvement that falls in the lesser category.[105] The agreed summary of facts reflected participation at least on the cusp between lesser and significant categories of involvement. The Judge relied on the characterisation of Mr Philip in the Crown closing at Mr McMillan's trial as "a mule and hired muscle".[106] As Mr Burston has submitted, that was in the course of responding to Mr McMillan's attempts to minimise his own involvement. Mr Burston submitted that if balanced regard was had to evidence at Mr McMillan's trial, then other evidence supported a higher level of involvement by Mr Philip than in the lesser category.

[139] These matters included that Mr Philip and Ms Hayman were involved in eight purchases of methamphetamine from Mr James's Auckland premises rather than the five that they were charged with. They had completed one transaction for Mr McMillan whilst he was in South America and they were the only ones of Mr McMillan's associates to engage with Mr James. They were trusted to carry substantial amounts of cash to pay for methamphetamine.[107] On one trip to Mr James' Auckland premises they acquired an Audi motor vehicle that was registered in Mr Philip's name and which was inferentially paid for out of amounts earned for transporting methamphetamine. Mr Philip and Ms Hayman arranged for the involvement of others as drivers, in particular Mr Minns, and Mr Philip involved himself in the consequences of the Nissan Tiida motor vehicle being impounded in

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102 *Zhang v R*, above n 21, at [103].
103 At [104].
104 At [125] and [133]–[134]; and *Wan v R* [2020] NZCA 328 at [18]. See also Sentencing Act 2002, s 7(1).
105 *Zhang v R*, above n 21, at [123]; and *Pratap v R* [2021] NZCA 308 at [17].
106 Philip sentencing notes, above n 3, at [35].
107 A photograph in evidence showed the distinctive back of Mr Philip's mongrel mob patched jacket, alongside stacks of cash estimated at approximately $160,000.

Taupō. At that time he confronted Mr James in what was observed to be an intimidating manner and then travelled to Taupō to participate in attempts to get the vehicle released.

[140] These points tend to corroborate the nature of Mr Philip's involvement as portrayed in the summary of facts. They could not justify a categorisation any lower than the cusp between lesser and significant participation.

[141] The summary of facts made little of Mr Philip's gang involvement so the Judge's observation from Mr McMillan's trial that his gang membership was not relevant to his offending is not a post-sentence indication change.

[142] The new factor was that reports subsequently provided, satisfied the Judge that Mr Philip's offending was driven by his addiction to methamphetamine. Given the other features of his offending, that could not justify a starting point 40 per cent lower than the bottom of band 5.

[143] Mr Paino emphasised that neither he nor Mr Philip had any involvement in the McMillan trial, so he was limited in the response he could make on what constituted a balanced summary of all the evidence at it. He focused on the importance of the changes in Mr Philip's role, as perceived by the Judge at her own initiative. Mr Paino did not rely on other appeals in which a similar scale of offending produced six-year starting points. Rather, he emphasised the importance of parity with Ms Hayman.

[144] Our view is that by giving credit for each of the factors relied on by the Judge to characterise Mr Philip's involvement in the lesser category, and in particular the Judge's view of it being addiction-driven offending, it could not be put any less than on the cusp between lesser and significant involvement. Another appeal where the offending was put on that cusp is that of *Faiyum*.[108] The appellant in that case picked up packages of drugs on behalf of importers. He participated at the direction of others. A significant role included some awareness of the scale of the operation given the number of packages and other details apparent to him, indicating a level of sophistication. However, Mr Faiyum had no influence on those above him in the chain

[108] *Faiyum v R* [2020] NZCA 523.

and did participate subject to a degree of coercion. The quantity involved in his offending was 3.2 kilograms of methamphetamine and 535 grams of cocaine. This Court characterised his role as somewhere between lesser and significant and approved a starting point of 10 years.[109]

[145] Taking all considerations into account, absent an accepted sentence indication, it would be difficult to justify a starting point lower than nine years' imprisonment.[110]

[146] We do not consider that the argument about parity with Ms Hayman can avail Mr Philip. Mr Burston was unequivocal that the Crown considers Ms Hayman's sentence was also manifestly inadequate, but the Crown has reasons for not pursuing a sentence appeal against her. Ms Hayman is the primary carer of two infants and has no previous criminal convictions. This Court has on a number of occasions held that a gross and unjustifiable disparity does not necessarily result in a co-offender receiving a reduction in sentence. The Court applies the principle that no greater adjustment is made than is required to protect the integrity of the criminal justice system.[111] In this case upholding a manifestly inadequate sentence purely on the basis of parity would do more to diminish public confidence in the administration of justice.[112] However, Mr Philip committed to guilty pleas, thereby relieving the Crown of the burden of proving the charges against him, on the basis that the starting point would not be more than eight years. Given that factor, and in the context of a Crown appeal, we set the starting point at eight years' imprisonment.

[147] The Crown also challenged the extent of discounts amounting to some 67 per cent as overly generous. Mr Burston suggested they may have been tailored to enable the end sentence of home detention which he correctly submitted should not occur where such a result could not otherwise be justified on the application of usual sentencing principles.[113] The first discount was one of 20 per cent allowed for guilty pleas where they were entered one week before trial. There were complications in that

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109 At [4] and [22]–[23].
110 See *De Macedo v R* [2020] NZCA 132 at [20]–[21]; *Singh v R* [2020] NZCA 211 at [20]; and *Faiyum v R*, above n 108, at [23].
111 *Mau'u v R* [2011] NZCA 385 at [28], citing *R v Ryder* CA116/98, 23 June 1998 and *R v Thompson* CA245/98, 22 December 1998.
112 See *Frank v R* [2013] NZCA 447 at [39].
113 See *R v Kennedy* [2011] NZCA 109 at [32].

some charges had been transferred from a different trial in Auckland that was not due to occur for a further year. Also there had been a change of counsel and progressive prosecution disclosure. We would not interfere with the Judge's assessment of that discount.

[148] Mr Philip had the advantage of a thorough and supportive s 27 report that disclosed a traumatic childhood with intergenerational history of social and economic deprivation leading to dependence on drugs for most of his adult life. The Judge allowed a 30 per cent discount for these personal factors. This Court treats 30 per cent as being at the upper end of discounts available for such personal factors, with 15 per cent being a much more usual discount in cases where a causal link is made out between offending and seriously disadvantaged personal backgrounds.[114]

[149] Notwithstanding the compelling case made out for a meaningful discount in the s 27 report and other materials before the Court, it is inarguably generous.

[150] The Judge had allowed Ms Hayman a 20 per cent discount for the impact her sentence would have on their infant son. There was evidence that both parents had strong bonds with their baby and that contributing fully to his care was a positive feature in Mr Philip's conduct on bail. Although both parents have some support from their families in the vicinity, importance was attached to the impact that sending Mr Philip to prison would have on the wellbeing of the child. The Judge allowed a further 10 per cent discount to mitigate the impact of Mr Philip's sentencing on the child.[115]

[151] On appeal, Mr Paino filed a statement from the midwife caring for Ms Hayman who confirms that she is expecting the couple's second child. Mr Paino sought to admit that as fresh evidence in the event this Court undertook any reconsideration of Mr Philip's sentence. We have had regard to the fact that removing Mr Philip to prison would not only impact on their first child, but compound difficulties for Ms Hayman with the birth of a second child.

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114 *King v R* [2020] NZCA 446 at [28]–[30], citing *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241; *Carr v R* [2020] NZCA 357; *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583; and *Zhang v R*, above n 21.

115 Philip sentencing notes, above n 3, at [61].

[152] Given the generous discount for Mr Philip's own personal background as a mitigating factor, this additional discount of 10 per cent cannot be justified. The compassionate approach enabling both participants in the significant commercial methamphetamine dealing to care for their infant children is admirable, but only possible here by granting unwarranted additional leniency to Mr Philip.

[153] From the starting point of eight years, discounts of 50 per cent reduce it to a sentence of four years' imprisonment. From that point Mr Philip is entitled to some discount for the period of some 22 months that was spent on EM bail. The Judge was troubled by breaches of bail conditions where Mr Philip had consumed cannabis and gave a six-month discount. We would not alter that assessment, resulting in an end sentence of three years and six months' imprisonment.

[154] Mr Paino submitted that the Judge ought to have taken into account the period of some six months during which Mr Philip was remanded in custody before being granted bail. That is not a consideration on resentencing as the period in custody on remand is taken into account in calculating a prisoner's entitlement to release.[116]

[155] Mr Paino's parting shot was that on any reconsideration of the sentence, the Court should recognise that incarcerating an offender who had adjusted to, and served, part of a non-custodial sentence was unduly harsh and inhumane. He submitted it was especially so for Mr Philip where he has pursued rehabilitative steps and continues to play a major role in parenting an infant (soon to be two infants). Regrettably, the Court cannot rely on that aspect to diverge from what is otherwise the appropriate response to a successful challenge to a sentence found to be manifestly inadequate. This is not a case in which the appeal was pursued solely to avoid the creation of a wrong precedent.[117]

[156] Mr Philip would have been inducted into his present sentence of home detention shortly after sentencing in mid-September 2021, meaning he would have served approximately seven months by the time this judgment is delivered. Credit is warranted on a week for week basis for that portion of a sentence served so that in

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116 Sentencing Act 2002, s 82; and Parole Act 2002, s 90.
117 *R v Kennedy*, above n 113, at [32]–[33].

allowing the Crown appeal we quash the sentence of home detention and take time served on it into account in imposing instead a sentence of two years and 11 months' imprisonment.

Result

[157] The Solicitor-General's appeal against sentence is allowed.

[158] The sentence of one year's home detention is quashed and substituted with a sentence of two years and 11 months' imprisonment.

Order

[159] The sentence of imprisonment is to take effect from 3:00 pm on Tuesday 12 April 2022. The current sentence of home detention is to continue in effect until that time.

[160] Mr Philip must surrender himself to the Prison Director at Manawatu Prison at 3:00 pm on Tuesday 12 April 2022 to commence his sentence of imprisonment.

Solicitors:
Crown Solicitor, Wellington for Respondent in CA505/2021 and CA572/2021 and Appellant in CA604/2021
Paino & Robinson, Upper Hutt for Respondent in CA604/2021