IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA606/2018
[2019] NZCA 507

BETWEEN	JING YUAN ZHANG Appellant
AND	THE QUEEN Respondent

CA617/2018

BETWEEN	JACQUELINE JOSEPHINE HOBSON Appellant
AND	THE QUEEN Respondent

CA726/2018

BETWEEN	SHANE THOMPSON Appellant
AND	THE QUEEN Respondent

CA750/2018

BETWEEN	LOK SING YIP Appellant
AND	THE QUEEN Respondent

CA771/2018

BETWEEN	JONELLE RACHEL PHILLIPS Appellant
AND	THE QUEEN Respondent

CA783/2018

	BETWEEN	LEANNE MAREE CRIGHTON Appellant
	AND	THE QUEEN Respondent

Hearing:	16–17 April 2019 (further submissions received 29 May 2019)
Court:	Kós P, French, Miller, Brown and Clifford JJ
Counsel:	M A Corlett QC for Appellants Zhang and Yip A J Bailey and E Huda for Appellant Hobson M J Phelps for Appellant Thompson M N Pecotic for Appellant Phillips A J D Bamford and E J Riddell for Appellant Crighton M J Lillico and M L Wong for Respondent A S Butler, J M Paenga and S W H Fletcher for Human Rights Commission as Intervener J R Rapley QC and E J Watt for New Zealand Law Society, New Zealand Bar Association and Auckland District Law Society as Interveners C W J Stevenson and E A Hall for Criminal Bar Association of New Zealand and Public Defence Service as Interveners C P Merrick and E I Haronga for Te Hunga Rōia Māori o Aotearoa as Intervener
Judgment:	21 October 2019 at 11.30 am

JUDGMENT OF THE COURT

CA606/2018 Zhang v R

A The appeal against sentence is dismissed.

CA617/2018 Hobson v R

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

C The appeal against sentence is allowed.

D The sentence of nine years' imprisonment is quashed and substituted with a sentence of seven years and 10 months' imprisonment.

E The minimum period of imprisonment imposed is quashed.

CA726/2018 Thompson v R

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

G The appeal against sentence is dismissed.

CA750/2018 Yip v R

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

I The appeal against sentence is allowed.

J The sentence of 16 years and six months' imprisonment is quashed and substituted with a sentence of 15 years' imprisonment.

K The minimum period of imprisonment is quashed and substituted with a minimum period of imprisonment of seven years and six months.

CA771/2018 Phillips v R

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

M The application to adduce further evidence on appeal is declined.

N The appeal against sentence is allowed.

O The sentence of four years and three months' imprisonment is quashed and substituted with a sentence of three years and two months' imprisonment.

CA783/2018 Crighton v R

P The application for leave to bring a second appeal is granted.

Q The appeal against sentence will be allowed, but further submissions are sought on formal disposition of the appeal in light of [201] and [202] of the judgment.

REASONS OF THE COURT

(Given by Kós P and French J)

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A. INTRODUCTION

[1] Since 2005 sentencing for methamphetamine-related offending has been based on the guideline decision of this Court in *R v Fatu*.[1] In December 2018, this Court signalled its intention to reconsider aspects of *Fatu*. It did so in response to concerns that *Fatu* was resulting in disproportionately severe sentences and that certain assumptions made by the Court in 2005 no longer held true.

[2] In a minute issued in December 2018, we identified the particular issues which the Court wished to address in the context of certain selected appeals. The issues identified were:[2]

(a) The weight that should be given to the role played by the offender when assessing culpability.

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1 *R v Fatu* [2006] 2 NZLR 72 (CA), governing sentencing for methamphetamine offending pursuant to s 6(1)(a)–(c) and (f) of the Misuse of Drugs Act 1975.

2 *Chen v R* CA610/2017, 11 December 2018 (Minute of Kós P) at [2].

(b) The relevance of an offender's personal circumstances, particularly addiction issues.

(c) The approach to be taken to imposing minimum periods of imprisonment for methamphetamine offending.

[3] The Court also invited evidence as to the link between methamphetamine offending and addiction, and the extent to which prison sentences and the length of those sentences has a deterrent effect on methamphetamine offending.

[4] Ultimately six appeals were selected as raising the issues which the Court wished to address. In addition to seeking submissions from the parties to the selected appeals, submissions were sought from the Criminal Bar Association of New Zealand, the New Zealand Law Society, the New Zealand Bar Association, the Auckland District Law Society, the Public Defence Service, the Human Rights Commission, the New Zealand Police, the New Zealand Drug Foundation, Te Ohu Rata o Aotearoa — Māori Medical Practitioners Association and Te Hunga Rōia Māori o Aotearoa — the Māori Law Society.

[5] All of these organisations filed written submissions. The majority of them also chose to make oral submissions at the subsequent hearing which, because of the importance of the case, was heard by a full court of five judges.

[6] We are most grateful for the submissions that were received, all of which we found informative and helpful.

[7] In section C of this judgment, we discuss matters of general application.

[8] In section D, we consider each of the six appeals and apply the principles articulated in section C.

[9] Before doing so, in section B we summarise the conclusions reached in the course of the judgment.

B. SUMMARY OF JUDGMENT

[10] In this judgment we conclude:

(a) Sentencing must achieve justice in individual cases. That requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed in this and similar judgments.

(b) In sentencing methamphetamine offending, quantity remains a reasonable proxy both for the social harm done by the drug and the illicit gains made from making, importing and selling it. It is therefore an important consideration in fixing culpability and thus the stage one sentence starting point.

(c) The *Fatu* quantity bands are therefore retained, but with some significant modifications.

(d) In particular, we hold that the role played by the offender is an important consideration in the stage one sentence starting point. Due regard to role enables sentencing judges to properly assess the seriousness of the conduct and the criminality involved, and thereby the culpability inherent in the offending.

(e) A more limited measure of engagement in criminal dealing deserves a less severe sentence than a significant or leading role. Diminished role in methamphetamine dealing offending may result in an offender moving not only within a band — as currently happens or is supposed to happen under *Fatu* — but also between bands.

(f) Although we do not adopt the two grid matrix (involving quantity bands and role categories) devised by the United Kingdom Sentencing Council, we record that, in assessing role, sentencing judges may find

it helpful to have regard to the Council's categorisations of role (into "leading", "significant" and "lesser"). In considering the individual appeals before us, we make use of those categorisations.

(g) The *Fatu* sentencing distinction between supply, importation and manufacture is removed. Evaluation of role will satisfactorily account for functional differentiation.

(h) The *Fatu* bands themselves are adjusted: there are now five bands (the fourth *Fatu* band being subdivided), and the sentencing start points for bands one to four are lowered from those previously applying.

(i) We observe that judges need to be willing to set starting points in sentences beneath the stated entry points where culpability is truly low; most likely where an offender plays a lesser role in offending.

(j) At stage two of the sentencing exercise, personal mitigating circumstances relating to the offender are applicable to all instances of Class A drug offending, including methamphetamine dealing, as in the case of any other offending.

(k) Addiction shown to be causative of the offending is a mitigating consideration. It may in its own terms justify a sentence discount of up to 30 per cent, although that is not to be treated as an absolute limit. Addiction will often combine with mental health issues, and the two may need to be considered in combination, although without the doubling-up of an otherwise appropriate discount. Addiction also calls for consideration of a rehabilitative response as part of sentencing.

(l) Poverty and deprivation (potentially but not necessarily resulting from loss of land, language, culture, rangatiratanga, mana and dignity) are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability. Such vulnerabilities (where established, and whether associated with addiction or not) require consideration in sentencing.

(m) Counsel and sentencing judges are encouraged to make greater use of the power in s 25 of the Sentencing Act 2002 to adjourn sentencing to enable rehabilitation programmes to be undertaken. Use of that power is appropriate where independent evidence suggests the offending was caused by the factor(s) which the proposed programme is designed to target.

(n) Minimum periods of imprisonment must not be imposed as a matter of routine or in a mechanistic way. A reasoned analysis is required under s 86 of the Sentencing Act, both as regards the imposition of a minimum period of imprisonment and its length. If a practice has developed that an end sentence of nine years' imprisonment automatically triggers a minimum period of imprisonment, such a practice must cease.

(o) Deterrence, denunciation and accountability are likely to be at the forefront of decisions in drug cases involving the imposition of a minimum period of imprisonment. As a general rule, therefore, lengthy minimum periods of imprisonment are properly reserved for cases involving significant commercial dealing.

(p) This judgment applies to all sentencings that take place after the issue of this judgment regardless of when the offending took place. It applies to sentences that have already been imposed, if and only if two conditions are satisfied: (1) an appeal against the sentence has been filed before the date the judgment is delivered and (2) the application of the judgment would result in a more favourable outcome to the appellant.

[11] Taken together, these are significant amendments to the sentencing regime that has developed under *Fatu.* If they do not go as far as some parties and submitters may have expected, that is for two reasons. The first, as we note later, is that the courts are not permitted to apply a more lenient sentencing scale than that set by the legislature. In 2003 the maximum sentence for methamphetamine dealing was increased to life imprisonment. The second is that methamphetamine offending is serious criminal conduct, which causes very serious physical, mental and economic harm to individual New Zealanders. Some of the harm caused is described in this judgment. Those who willingly participate in commercial-level dealing in methamphetamine will gain little succour from this judgment. Its benefits lie more for those who take a lesser role in methamphetamine offending, and particularly those who do so as a result of vulnerability.

C. MATTERS OF GENERAL APPLICATION

The *Fatu* guideline judgment

[12] The *Fatu* decision was prompted by the reclassification of methamphetamine under the Misuse of Drugs Act 1975 from a Class B controlled drug to a Class A controlled drug.[3] The reclassification occurred in May 2003 and was clearly intended by Parliament to serve as a signal that methamphetamine was considered one of the most dangerous of drugs.[4] It followed a recommendation given to the Minister of Health by the Expert Advisory Committee on Drugs. The reasons given for the recommendation were:[5]

(a) The use and manufacture of methamphetamine in New Zealand is growing, seizures are increasing, and it has potential appeal to vulnerable populations.

(b) There are pronounced long-term physical and psychological adverse effects associated with methamphetamine abuse.

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3 *R v Fatu*, above n 1, at [1].
4 See (13 May 2003) 608 NZPD 5663.
5 *The Expert Advisory Committee on Drugs (EACD) Advice to the Minister on: Methamphetamine* (2002) at 3.

(c) There are significant risks to public health from intravenous use of methamphetamine, as well as the dangers posed by illicit clandestine laboratories.

(d) There are few, if any, therapeutic applications for methamphetamine.

(e) Methamphetamine has been linked to deaths both in New Zealand and overseas.

(f) There is a high physical and psychological dependence potential.

[13] In the view of Parliament's Health Committee, reclassification would provide the Ministry of Health with an opportunity to work through non-regulatory measures, public education programmes and community action plans as well as giving the police the power to search and seize without a warrant.[6]

[14] Reclassification also meant a significant increase in penalties which the Committee saw as part of an overall strategy to "reduce the prevalence of the drug in New Zealand society over the long term".[7] Whereas previously the importation, manufacture or supply of methamphetamine had been subject to a maximum penalty of 14 years' imprisonment, the new maximum was imprisonment for life.

[15] This posed a difficulty for sentencing judges. As noted by a divisional court in *R v Arthur*, there is "a huge difference in culpability between the case of a man who gives a point of methamphetamine to his wife and the case of Mr Big heading a mammoth heroin importation or supervising a [methamphetamine] lab with a million-dollar annual turnover".[8] Yet each in theory was liable to imprisonment for life. The Court also noted it was a matter of some regret that Parliament had not given greater guidance as to the level of penalty. The Court then articulated some guidelines for sentencing judges to follow pending a formal guideline judgment from a permanent court which it clearly saw as imperative.[9]

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6 Misuse of Drugs (Changes to Controlled Drugs) Order 2003 (select committee report) at 3.
7 At 3.
8 *R v Arthur* [2005] 3 NZLR 739 (CA) at [8].
9 At [18]–[21].

[16] The Permanent Court heeded that call in *Fatu*.[10] The *Fatu* decision confirmed that the courts were required to respond to the reclassification of methamphetamine and promulgated guidelines in the form of four separate sentencing bands. The bands set out a range of starting points for sentences, first in relation to offending involving the supply or sale of methamphetamine, secondly for importation of methamphetamine and thirdly for manufacture of methamphetamine.[11]

[17] As this Court explained, by use of the term "starting point" it meant the sentences which reflect the culpability of the offending but before allowance is made for aggravating and mitigating circumstances that are personal to the offender.[12]

[18] The sentencing bands — which we detail below — were premised on the following key findings:[13]

(a) A drug manufacturer and importer can be regarded at least normally as being at the top of the supply chain.

(b) The culpability of a manufacturer is greater than that of an importer given the health hazards associated with the manufacturing process.

(c) It is desirable for the bands to be based on objective criteria.

(d) The most helpful measure of culpability is the quantity of the drug involved rather than anticipated monetary yields. The latter was problematic not least of all because prices varied and were often dependent on availability. Sentencing by monetary yield would produce the perverse result that the greater the availability of a particular drug the lower the sentencing level.

(e) Objectivity and consistency are best served if the weight calculations proceed on a basis that is referable to purity. The sentencing bands

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10 *R v Fatu*, above n 1, at [10].
11 At [34], [36] and [43].
12 At [21].
13 At [22]–[32] and [42].

should apply to the weight of what the market would regard as "P", a form of the drug in which the purity is of the order of or exceeds 60 per cent.

(f) Where an offender fits within any particular band will depend not just on the quantity and purity of the drug involved but also the role played by the offender. Those who are primary offenders can expect starting point sentences towards the higher end of the relevant band with the converse applying to those whose role is less significant.

(g) The principles of sentencing referred to in s 8 of the Sentencing Act and the mitigating and aggravating factors relating to the offending as set out in s 9 will also be highly relevant in fixing the starting point within a particular band.

(h) In cases involving importation and supply, considerations of commerciality may be significant. Where there is a complete absence of commerciality (as when small quantities are imported or supplied for personal consumption) and an absence of aggravating features such as giving the drug to school children, sentencing judges may sentence outside the bands.

(i) In contrast, methamphetamine manufacture always (or almost always) involves significant commerciality. The difficulties, expense and risks involved in manufacturing methamphetamine make it inherently unlikely that such an operation would be set up to produce drugs for purely personal consumption.

[19] The four bands can be conveniently summarised in the following table:

	Supply	**Importation**	**Manufacture**
Band one — low level (less than 5 grams)	2–4 years' imprisonment	2.5–4.5 years' imprisonment	N/A — manufacture will almost always involve significant commerciality
Band two — commercial quantities (5 grams to 250 grams)[14]	3–9 years' imprisonment	3.5–10 years' imprisonment	4–11 years' imprisonment
Band three — large commercial quantities (250 grams to 500 grams)	8–11 years' imprisonment	9–13 years' imprisonment	10–15 years' imprisonment
Band four — very large commercial quantities (500 grams or more)	10 years to life imprisonment	12 years to life imprisonment	13 years to life imprisonment

[20] As will be apparent, the essential feature of the bands was that they involved a gradated sentencing response referable to the quantity of methamphetamine involved. The borderline between bands one and two reflects the five gram weight at which the presumption for supply occurs.[15]

Criticisms of *Fatu* by appellants and interveners

[21] Counsel for the appellants and the interveners were united in their criticisms of *Fatu* and the restrictive way it was said to have been applied by sentencing judges.

[22] There were essentially three major concerns.

[23] First, that sentencing for methamphetamine (and indeed other drug offending) was based on a flawed premise, namely that lengthy prison sentences are an effective deterrent both for the individual offender and others who might be like minded. The scientific evidence however was said to show that is not the case.

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14 In cases of manufacture, there is no band one and band two covers all quantities up to 250 grams.

15 *R v Fatu*, above n 1, at [9]; and Misuse of Drugs Act, s 2(1A) and sch 5.

[24] The focus on deterrence to the exclusion of other purposes of sentencing such as rehabilitation had, it was said, led to excessively long sentences and an unjustifiable and unprincipled disregard of the personal circumstances of the offender. Of particular concern were cases of lower level offending involving those who were dealing in methamphetamine on a subsistence basis to fund an addiction. It was said that the appropriate sentence in such cases and the one that offered the only real prospect for an offender's rehabilitation was a non-custodial sentence involving treatment programmes. However, *Fatu* precluded judges from being able to take that approach.

[25] In the submission of all the appellants and interveners, the undue emphasis placed on deterrence was contrary to the Sentencing Act, the prohibition on disproportionately severe sentences in the New Zealand Bill of Rights Act 1990 and contrary to the fundamental principle that sentencing is meant to be an individualised process. Ignoring personal factors was also seen as perpetuating further inequality particularly in relation to Māori.

[26] The second and related criticism of *Fatu* was that the bands were only based on one criterion, namely quantity. It was acknowledged that quantity was a marker of harm and thus relevant to an assessment of moral culpability but that it was unprincipled and unjust for it to be the sole determinant. Submitters described this singular focus as "distorting the sentencing process", causing rigidity, preventing proper assessments of criminality, removing judges' discretion and preventing the courts from having any regard or proper regard to other factors which on any fair view should be highly relevant to culpability such as role and addiction. Under *Fatu*, the role of an offender was only relevant to their placement within a band. It could not take them outside a band.

[27] The point was also made that the reliance on quantity presupposed that the offender was aware of the relevant quantity involved, whereas the reality was that in many cases, particularly those involving offenders with lesser roles in the supply chain such as couriers, the offender had no idea.

[28] The third concern related to the imposition of minimum periods of imprisonment. Submitters complained these were frequently imposed in a routine,

mechanistic way, and without reasons being given. If reasons were given, reliance was typically placed on the need for deterrence. Yet, it was submitted, there is no evidence that the deterrent effect of a prison sentence is demonstrably enhanced by requiring the offender to serve a minimum period of imprisonment. It was also said that judges regard an end sentence of nine years' imprisonment or over as automatically attracting a minimum period of imprisonment.

[29] According to the submitters, the approach being taken by sentencing judges to minimum periods of imprisonment was contrary to the relevant provision in the Sentencing Act.[16] The approach was also said to impact particularly harshly on foreign nationals who may not have any family living in New Zealand to support them while they serve their prison sentence. Language difficulties may also adversely affect the ability of foreign nationals to access treatment programmes while in prison.

[30] In addition to these concerns, submitters also pointed to changes that have occurred since *Fatu* regarding the nature of methamphetamine offending, the understanding of the effects of methamphetamine and community attitudes. These changes include the fact that manufacturing of methamphetamine is no longer as prevalent as it was at the time *Fatu* was decided and that some of the health hazards associated with manufacture are now considered to have been overstated. The vast majority of methamphetamine is now imported and the quantities involved are significantly greater than they were a decade ago, as illustrated by the following table:

Year	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
Number of incidents	12	21	27	16	41	110	170	242	245	201
Quantity (kilograms)	10.8	19.5	27.5	6.4	20.8	82.3	290.7	415.9	427.2	254.0
Quantity (litres)						2.3	20.4	2.5	160.0	4.6
Potential Harm ($ million)	13.4	24.2	34.1	7.9	25.8	101.9	360.2	515.3	529.3	314.7

New Zealand Customs Service border seizures of methamphetamine

(evidence produced by Bruce Geoffrey Berry)

[16] Sentencing Act 2002, s 86.

[31] Another important development identified is a growing community acceptance that drug addiction is a health issue and should be treated as such.

[32] The submitters advanced various solutions to address the concerns. Some advocated a reduction in the starting points and/or an increase in the quantities of each band or the insertion of additional bands. Others advocated following the English approach and amending the *Fatu* bands to give role the same prominence as quantity. Other submitters went further and suggested the Court should replace the *Fatu* bands with multi-factorial bands.

The Crown's stance

[33] The Crown was opposed to any radical change and submitted that the current band structure based on quantity should remain. That said, Mr Lillico acknowledged orally that role was a very important sentencing consideration and that the Crown was *not* arguing that "role should not be formalised in [setting] the starting point".

[34] However, it considered the concerns identified by the other submitters had been overstated and that insofar as there were problems, these had largely resulted from the way some judges had applied *Fatu*, rather than the *Fatu* decision itself. Correctly interpreted, the *Fatu* framework was, it contended, sufficiently flexible to fairly address offending at each end of the culpability spectrum. In particular, *Fatu* did allow for sentencing outside the bands for reasons other than commerciality and there were said to be a number of cases where courts had imposed community-based sentences despite the offending falling within band one or two of the *Fatu* guideline. The Crown also challenged what it regarded as attempts to downplay the harm caused by methamphetamine.

[35] While opposing significant changes, the Crown did however consider that this review offered the Court an opportunity to provide further valuable guidance in two areas:

(a) First, the way in which *Fatu* might be applied to cater more effectively for offenders whose actions are driven by addiction, especially (although not exclusively) those whose offending sits at the lower end

of the scale in terms of seriousness. There was, the Crown said, scope to take into account substance abuse in assessing culpability where such abuse is causative of methamphetamine offending and supported by evidence. Establishing a causal link was only likely to be possible at the lower level of offending but even in more serious cases, discounts could be available for prospects of rehabilitation where for example the offender had engaged in successful treatment.

(b) Secondly, the approach to be taken in the most serious dealing cases to ensure effect is given to Parliament's intention to heavily penalise those responsible for the worst methamphetamine offending. Apart from quantity, sophisticated importation methods, large scale manufacture, transnational aspects, money laundering and organised crime were all indicators of the most serious offending. Life imprisonment should be treated as available particularly if the offender cannot rely on an aggregation of significant mitigating factors.

[36] In support of these central submissions, the Crown advanced the following points.

[37] Deterrence is a legitimate sentencing purpose. Real life experience tells us that it works for at least some people. However, it cannot in itself justify higher starting points nor the imposition of minimum periods of imprisonment. And *Fatu* did not say otherwise. Indeed, deterrence is not even mentioned in *Fatu.*

[38] Quantity is an objectively verifiable factor, the best marker of harm and a rational measure of culpability for offending which poses a danger to public health. Quantity-based bands are principled. Harm inflicted on the community is particularly important in sentencing for commercial drug offending because of its corrosive effect on communities.

[39] Quantity is not however determinative. It should be recognised as only a guide, a first step or place holder to determining the starting point. Movement within bands

— and where appropriate between bands — can be informed by consideration of the offender's role and other offence-related features including addiction.

[40] Attributing equal weight to quantity and role would be problematic because of the difficulties in proving role. An initial focus on role in setting the starting point range would also risk rewarding the intentionally fractured organisational structure that characterises many commercial drug supply operations. Further, treating role as a provisional marker for culpability would run counter to the way in which culpability is assessed in other contexts — for example, violence perpetrated by a group.

[41] That is not to say role is unimportant. Currently judges do almost invariably make some attempt to define an offender's role but there is a need for this to be formalised and greater guidance given by this Court. That is best done by the Court providing guidance through narrative as to how role should work. That is preferable to including role as part of a grid which tends to become mechanistic. The guidance should include a statement that in appropriate cases, role may take an offender outside a band. The Crown would oppose firmly any taxonomy of roles — for example, "entrepreneur", "catcher" or "mule" — given the diverse nature of drug dealing.

[42] There is not, nor should there be, special rules relating to personal factors in drug cases. Personal factors should and do carry the same weight as they do when sentencing for other types of offending.

[43] The Court needs to be cautious in considering the approaches taken in other jurisdictions. In the United Kingdom for example, there is no specific guideline for methamphetamine. Methamphetamine is not consumed in the United Kingdom in the same way it is in New Zealand, it is not as prevalent and it does not have the same purity. Australia is more akin to New Zealand and is the best reference point. In Australia, the courts have been careful to avoid a set of criteria for determining role. Most Australian states follow a quantity-based penalty regime.

The functions and limits of guideline judgments

[44] A survey of the history of sentencing practice in New Zealand shows that it was not until the 1970s that this Court, following the example of its English

counterpart, started to exercise greater control over sentencing in the interests of consistency. Up until that point, the emphasis was very much on the sentencing judge's discretion, so much so that in a 1950 decision, the Court actually rebuked counsel for bringing other cases to its attention.[17] Sentences were seldom overturned on appeal.[18]

[45] Since 1978, guideline or tariff judgments have been an important feature of this Court's supervision of sentencing practice. After the first guideline judgment was issued in 1978, others followed detailing a range of sentences for various offences.[19] Over time, the judgments have become increasingly more complex, evolving from the purely descriptive — setting ranges by reference to existing sentencing patterns — to the prescriptive — setting norms. The issuing of the judgments has sometimes been in response to legislative change such as occurred with the reclassification of methamphetamine,[20] changes in societal attitudes,[21] or concerns about consistency or difficulties in relation to a specific offence.[22]

[46] Typically, the most recent guideline judgments identify aggravating features of the offence or offences under review and then set out sentencing bands with a range of starting points.[23] Which band any particular case will fall into depends on the number and nature of the aggravating features present. In this regard, *Fatu* is different from other guideline decisions because as already discussed placement in a band turns on one criterion. To assist sentencing judges, the judgments typically give examples of how the bands might be applied in given fact situations.

[47] The prime justification and function of the guideline judgment is to promote consistency in sentencing levels nationwide.[24] Like cases should be treated in like

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17 *R v Brooks* [1950] NZLR 658 (CA) at 659.

18 Although this was not an absolute rule: see, for example, *R v Radich* [1954] NZLR 86 (CA).

19 See, for example, *R v Pui* [1978] 2 NZLR 193 (CA) (sexual violation by rape); and *R v Urlich* [1981] 1 NZLR 310 (CA) (dealing in Class A drugs).

20 *R v Fatu,* above n 1.

21 See, for example, *R v Mako* [2000] 2 NZLR 170 (CA) at [2].

22 See, for example, *R v Terewi* [1999] 3 NZLR 62 (CA); *R v Wallace* [1999] 3 NZLR 159 (CA); and *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

23 *R v Taueki* [2005] 3 NZLR 372 (CA); and *R v AM (CA27/2009)*, above n 22.

24 Sentencing Act, s 8(e).

manner, similarly situated offenders should receive similar sentences and outcomes should not turn on the identity of the particular judge.

[48] Consistency is not of course an absolute and in the guideline judgments, this Court has been careful to emphasise that sentencing is still an evaluative exercise.[25] The guideline judgments are just that, "guidelines", and must not be applied in a mechanistic way. The bands themselves typically allow a significant overlap at the margins. Sentencing outside the bands is also not forbidden, although it must be justified.[26]

Legislative framework

[49] Methamphetamine is classified as a Class A drug under the Misuse of Drugs Act.[27] As a consequence, the maximum penalty for any dealing-related offence is imprisonment for life.[28] This resulted from a reclassification of the drug in May 2003.[29] The underlying rationale for change reflected concern over the increased prevalence of use of methamphetamine in New Zealand, its links to criminal offending (particularly violent offending) and the physical and psychological harm caused to members of the community. In debate the Associate Minister of Health referred to the need to "send a message" that methamphetamine is "unacceptable", and to the need for increased penalties "to address the harms that methamphetamine is causing in our communities".[30]

[50] The reclassification of methamphetamine as a Class A drug, and the associated maximum penalty of life imprisonment, has meant that methamphetamine offending has necessarily been treated in the courts as serious criminal offending.[31] In consequence, long sentences of imprisonment may be warranted. Particular weight has been given to the purpose of deterrence, this being seen as the dominant sentencing

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25 See, for example, *R v Taueki*, above n 23, at [10]; and *R v AM (CA27/2009)*, above n 22, at [36] and [79].

26 *R v Taueki*, above n 23, at [27]; *R v Fatu*, above n 1, at [32], [34] and [36]; *R v AM (CA27/2009)*, above n 22, at [83]; and *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23 at [62].

27 Misuse of Drugs Act, sch 1.

28 Section 6(1)(a)–(c), (f) and (2)(a).

29 Misuse of Drugs (Changes to Controlled Drugs) Order 2003.

30 (13 May 2003) 608 NZPD 5663.

31 *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [5]; and *McLean v R* [2015] NZCA 101 at [53].

principle for serious drug offending.[32] One consequence has been that there has been seen to be less scope for recognition of personal mitigating factors.[33]

[51] Yet Class A drug offending varies significantly. At one end lies what Mr Corlett QC called the "head of the snake", often beyond the jurisdiction of New Zealand authorities, masterminding manufacture or importation, and distribution. At the other end lies a solo mother in a provincial town, given free methamphetamine by a drug member to addict and indebt her, who is then forced herself to deal the drug to get by. In between lies gang leaders, entrepreneurial criminals willing to deal with gang leaders, gang members, couriers (or "mules") who may or may not apprehend the scale of the contents of their bags or bodily passages, and members of the community who may or may not be committed criminals and who may well be addicted themselves to the drug. As this Court observed in *R v Arthur*, shortly after the 2003 reclassification, each in theory is liable to imprisonment for life.[34] The condign maximum penalty available reflects the harm caused by methamphetamine, but unlike murder for instance, no distinction is drawn by the legislation between inflicted and attempted harm.[35] The offence is complete by mere possession for supply; it does not require supply itself. The maximum penalty of life imprisonment therefore creates some difficulty.

[52] Penalties close to the maximum have rarely been imposed. Life imprisonment has been imposed on Class A drug offenders in five instances, and in only two involving methamphetamine offending. In *Chen v R* this Court upheld a sentence of life imprisonment for the importation of 96 kilograms of methamphetamine where the offender had served a lead role in the operation.[36] The other case is *R v Rhodes* where the life sentence for a principal actor in a large scale manufacturing and supply operation, involving the manufacture of 1.4 kilograms of methamphetamine, was also upheld by this Court.[37]

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32 See, for example, *R v Jarden*, above n 31, at [12]–[14].
33 *Parata v R* [2017] NZCA 48 at [6].
34 *R v Arthur*, above n 8, at [8].
35 The maximum penalty for attempted murder is 14 years' imprisonment: Crimes Act 1961, s 173(1).
36 *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158 at [179].
37 *R v Rhodes* [2009] NZCA 486 at [98]–[99].

[53] Section 6 of the Misuse of Drugs Act provides:

> **6 Dealing with controlled drugs**
>
> (1) Except as provided in section 8, or pursuant to a licence under this Act, or as otherwise permitted by regulations made under this Act, no person shall—
>
> (a) import into or export from New Zealand any controlled drug; or
>
> (b) produce or manufacture any controlled drug; or
>
> (c) supply or administer, or offer to supply or administer, any Class A controlled drug or Class B controlled drug to any other person, or otherwise deal in any such controlled drug; or
>
> (d) supply or administer, or offer to supply or administer, any Class C controlled drug to a person under 18 years of age; or
>
> (e) sell, or offer to sell, any Class C controlled drug to a person of or over 18 years of age; or
>
> (f) have any controlled drug in his possession for any of the purposes set out in paragraphs (c), (d), or (e).
>
> (2) Every person who contravenes subsection (1) commits an offence against this Act and is liable on conviction to—
>
> (a) imprisonment for life where a Class A controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed:
>
> (b) imprisonment for a term not exceeding 14 years where paragraph (a) does not apply but a Class B controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed:
>
> (c) imprisonment for a term not exceeding 8 years in any other case.
>
> (2A) Every person who conspires with any other person to commit an offence against subsection (1) commits an offence against this Act and is liable on conviction to imprisonment for a term—
>
> (a) not exceeding 14 years where a Class A controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed:
>
> (b) not exceeding 10 years where paragraph (a) does not apply but a Class B controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed:

(c) not exceeding 7 years in any other case.

(3) *[Repealed]*

(4) Notwithstanding anything in Part 1 or section 39 or section 81 of the Sentencing Act 2002, where any person is convicted of an offence relating to a Class A controlled drug—

(a) against paragraph (c) or paragraph (f) of subsection (1); or

(b) against paragraph (a) or paragraph (b) of subsection (1) committed in circumstances indicating to the Judge or court an intention to offend against paragraph (c) of that subsection,—

the Judge or court shall impose a sentence of imprisonment (within the meaning of that Act) unless, having regard to the particular circumstances of the offence or of the offender, including the age of the offender if he is under 20 years of age, the Judge or court is of the opinion that the offender should not be so sentenced.

(4A) Without limiting anything in subsection (4) or in Part 1 or section 39 or section 81 of the Sentencing Act 2002, where any person is convicted of an offence relating to a Class A controlled drug or a Class B controlled drug against any of paragraphs (a), (b), (c), and (f) of subsection (1), the Judge or court, if he or it decides to impose a sentence of imprisonment, shall consider whether or not he or it should also impose a fine.

(5) For the purposes of paragraph (e) of subsection (1), if it is proved that a person has supplied a controlled drug to another person he shall until the contrary is proved be deemed to have sold that controlled drug to that other person.

(6) For the purposes of subsection (1)(f), a person is presumed until the contrary is proved to be in possession of a controlled drug for any of the purposes in subsection (1)(c), (d), or (e) if he or she is in possession of the controlled drug in an amount, level, or quantity at or over which the controlled drug is presumed to be for supply (*see* section 2(1A)).

(7) *[Repealed]*

[54] As can be seen, s 6(4) provides a presumption for imprisonment in cases of manufacture, importation, supply, offer and possession for supply of a Class A drug. The provision mandates the end-sentence outcome, rather than the starting point in

terms of the universal three-stage sentencing approach now followed in New Zealand.[38] As this Court observed in *R v Arthur*:[39]

> [20] In methamphetamine cases, the sentencing Judge must first determine whether imprisonment is appropriate. There is a presumption in favour of imprisonment under s 6(4) of the Misuse of Drugs Act, a subsection which overrides the general principles to be found in the Sentencing Act.

[55] In (it has been said) relatively exceptional circumstances, the presumption for imprisonment may be displaced.[40] Youth, for instance, is a material consideration.[41] Similarly, realistic prospects of rehabilitation may displace the presumption.[42] There is a significant body of cases in relation to the approach to be taken to the imposition of home detention in cases of Class A drug offending, given the existence of the presumption of imprisonment. In *R v Hill* this Court noted that sentences of home detention have usually been imposed in cases where the offender has accepted responsibility for the offending by entering a guilty plea and the sentencing judge has been persuaded that the offender's real prospects of rehabilitation were sufficient to justify a sentence of home detention.[43]

[56] It may also be observed that a recent amendment to the Misuse of Drugs Act confirms that there is discretion whether to prosecute possession cases (not involving dealing), and that a prosecution should not be brought unless required in the public interest.[44] Section 7(6) goes on to provide that in assessing the public interest in prosecution, "consideration should be given to whether a health-centred or therapeutic approach would be more beneficial". Although this does not apply to s 6 dealing charges with which we are here concerned, it nonetheless indicates an increasing recognition that some aspects of offending need to be viewed through a therapeutic lens. As we go on to discuss, that is particularly the case when addiction has contributed to the offending.[45]

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38 Per *R v Taueki*, above n 23, at [8], [28] and [42]–[44], stage one sets a starting point based on an objective evaluation of the gravity of the offending. Stage two adjusts that starting point by reference to aggravating and mitigating considerations personal to the offender. Since *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607, stage three allows a discrete discount for a plea of guilty.

39 *R v Arthur*, above n 8.

40 *R v Hill* [2008] NZCA 41, [2008] 2 NZLR 381 at [43]; and *R v Honan* [2015] NZCA 94 at [29].

41 Misuse of Drugs Act, s 6(4), as recognised in *Morton v R* CA273/92, 23 October 1992.

42 *R v Hill*, above n 40, at [39].

43 At [30].

44 Misuse of Drugs Act, s 7(5), inserted by the Misuse of Drugs Amendment Act 2019, s 6.

45 See below at [142]–[150].

[57] We turn now to the relevant provisions of the Sentencing Act. We draw particular attention to ss 7, 8, 9, 16, 25 and 27.

[58] Sections 7 to 9 of the Sentencing Act set out the general approach to be taken. Section 7(1) sets out a series of purposes for which a Court *may* sentence an offender. None need be given greater weight than any other.[46] In the context of methamphetamine sentencing, particularly relevant purposes include holding the offender accountable for harm, the promotion of a sense of responsibility, denunciation of the conduct, the deterrence of the offender and other persons from committing similar offending, the protection of the community, and assistance in an offender's rehabilitation and reintegration. We will discuss deterrence later in this judgment. However, the absence of likely deterrence from criminal offending (whether because of perceived non-risk, perceived super-profit opportunity, or impaired capacity to perceive at all because of addiction or some other cause) does not of itself compel a more lenient sentence. Rather, it requires the acknowledgement of that limitation, and a close analysis of the remaining purposes identified. And as this Court observed over 60 years ago in *R v Radich*:[47]

> The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment.

[59] Section 8 of the Sentencing Act sets out 10 principles which (it has been said) are largely a codification of prior case law and which are to be considered in respect of every sentencing decision.[48] Many of these principles are obvious, such as account being taken of the gravity of the offending, including the degree of culpability of the offender, and the seriousness of the type of offence in comparison with other types of offences. But we draw particular attention to s 8(c) and (d) which require imposition of the maximum penalty prescribed by statute for the offence if the offending is "within the most serious of cases for which that penalty is prescribed", and a penalty near the maximum "if the offending is near to the most serious of cases for which

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46 Sentencing Act, s 7(2).

47 *R v Radich*, above n 18, at 87.

48 Simon France (ed) *Adams on Criminal Law — Sentencing* (online ed, Thomson Reuters) at [SA8.01].

that penalty is prescribed", unless "circumstances relating to the offender make that inappropriate".

[60] Against that consideration stands the requirement in s 8(g) that the court must impose the least restrictive outcome appropriate in the circumstances. Likewise, s 16 of the Act, which provides that when considering the imposition of a sentence of imprisonment for any particular offence the court "must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community", and must not impose a sentence of imprisonment unless satisfied that the purposes in s 7(1)(a)–(c), (e), (f) and/or (g) cannot be achieved by a sentence other than imprisonment. But those two provisions take effect subject to the contrary presumption in s 6(4) of the Misuse of Drugs Act, discussed earlier.[49]

[61] In this context, the observations of this Court in *R v Finau*, an attempted murder case, are apposite:[50]

> [22] Parliament has indicated to the Court that, in the words of s 8(d) of the Sentencing Act 2002, it must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate.
>
> [23] This instruction must be firmly borne in mind. It can of course be tempered, if appropriate, by reference to the offender's personal circumstances; as for example where the offender has diminished intellectual capacity or understanding: see s 9(2)(e) of the Sentencing Act. But the extent to which the sentence can be so tempered will depend on the weight of the mitigating factor or factors, when viewed against the level of seriousness which brought the case within s 8(d) in the first place.

[62] Section 8(h) is important also in requiring that the court must take account of the particular circumstances of the offender that mean a sentence (including of imprisonment) would be disproportionately severe. That provision connects also to s 9 of the New Zealand Bill of Rights Act which requires that punishments not be "disproportionately severe". We agree with the submission that Mr Butler made to us on behalf of the Human Rights Commission that the Sentencing Act is thereby made consistent with standards required by the New Zealand Bill of Rights Act and by

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49 *R v Arthur*, above n 8, at [20].
50 *R v Finau* (2003) 20 CRNZ 333 (CA).

the International Covenant on Civil and Political Rights, ratified by New Zealand in 1978.[51]

[63] In the context of s 8 we also take cognisance of s 8(i) which provides that the court:

> must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; …

There is a connection between that provision and s 27 of the Sentencing Act which provides a right to present information to the court on the personal, family, whānau, community, and cultural background of the offender, how that background may have related to the commission of the offence, and how that, along with family, whānau, or community support, may be relevant to the nature of the sentence imposed. We will come back to that subject later in the judgment.[52]

[64] We need also to draw attention to s 9(3) of the Sentencing Act which provides that despite s 9(2)(e), the court must not take into account by way of mitigation the fact that the offender was at the time of committing the offence affected by the voluntary consumption or use of alcohol or other drug (save for bona fide medical purposes). That, plainly, is potentially material to whether offender addiction is a mitigating consideration. We address this later in the judgment.[53]

[65] Finally, we refer to s 25 of the Sentencing Act. That provides:

> **25 Power of adjournment for inquiries as to suitable punishment**
>
> (1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:
>
> (a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:
>
> (b) to enable a restorative justice process to occur, or to be completed:

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51 *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

52 See below at [161].

53 See below at [142]–[150].

(c) to enable a restorative justice agreement to be fulfilled:

(d) to enable a rehabilitation programme or course of action to be undertaken:

(da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:

(e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

(2) If proceedings are adjourned under this section or under section 10(4) or 24A, a Judge or Justice or Community Magistrate having jurisdiction to deal with offences of the same kind (whether or not the same Judge or Justice or Community Magistrate before whom the case was heard) may, after inquiry into the circumstances of the case, sentence or otherwise deal with the offender for the offence to which the adjournment relates.

[66] There was argument before this Court on the appeal that this provision is insufficiently used, particularly in the case of methamphetamine offenders who are themselves addicted. In consequence we asked Mr Lillico to make enquiries of Crown solicitors as to the approach taken where applications are made under s 25 for the adjournment of sentencing. We discuss that matter also later in the judgment.[54]

Methamphetamine: history, use and harm

[67] Expert evidence was tendered in this appeal. We refer here particularly to the evidence of Professor David Nutt of Imperial College London, Detective Superintendent G J Williams and Detective Sergeant D T Lyons.

[68] Methamphetamine is a derivative and close relative of amphetamine. Both are stimulants that act by releasing dopamine and noradrenaline in the brain.[55] That release leads to the "high" these drugs produce, explaining effects such as alertness, insomnia, and in some cases paranoia.

[69] Methamphetamine was discovered over one hundred years ago. It was initially used as a treatment for asthma, though is rarely used for that purpose today. In some countries (such as the United Kingdom) it is still licensed for the treatment of

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[54] See below at [178].

[55] Dopamine and noradrenaline are termed "neurotransmitters".

narcolepsy, a neurological disorder of sudden sleep onset. Professor Nutt observes that patients with that disorder have often been on a course of methamphetamine for decades with little evidence of harm. In some countries, also, methamphetamine is used to treat Attention Deficit Hyperactivity Disorder (ADHD). Professor Nutt observes that a significant proportion of people using methamphetamine apparently recreationally are in fact self-medicating for ADHD.

[70] During the Second World War there was widespread use made of methamphetamine by Japanese and German forces to sustain wakefulness, enabling soldiers to fight for days on end without sleep. Periods of long sleep were needed to recover when methamphetamine use ceased. Some of the characteristic signs of heavy methamphetamine use became apparent during this period, particularly hallucinations of bugs under the skin and paranoia. Allied forces also used a stimulant, amphetamine sulphate, which is shorter acting and less powerful. It produced fewer adverse side effects.

[71] Methamphetamine has a longer action than amphetamine — up to 24 hours after a single dose, twice as long as amphetamine. It is cleared more slowly from the body and tends to be recycled in the brain.

[72] Methamphetamine can be made in a form called "free-base". This form can be smoked, which gives users a very fast hit and produces very high brain concentrations predisposing users to psychiatric consequences such as addiction and paranoia. Methamphetamine taken instead in the form of a tablet (which is the form used for the medicinal purposes referred to earlier) does not give such a dramatic stimulation or "high". That form has a lower propensity to result in dependence and addiction. But when used in solution form for injecting or free-base form for smoking, the impact is very fast and strong, and has a much greater propensity for dependence and addiction.

[73] As we will see, higher quantities of methamphetamine have been seized in New Zealand in recent years. At the same time the market price of methamphetamine has fallen somewhat. Perhaps counter-intuitively, set against those statistics, the use of methamphetamine in New Zealand has reduced. Evidence before the Court

demonstrated that, as at 2009, methamphetamine use peaked in New Zealand in about 2001 at about five per cent of the population. This proportion had reduced by 2009 to about two per cent. Provisional health survey data for 2015 indicated that 0.9 per cent of the New Zealand population aged 16 to 64 years had used amphetamines (including methamphetamine). Reported use remained higher for males (1.2 per cent) than females (0.7 per cent). As at 2015/2016, Māori were 3.4 times more likely to have used amphetamines in the past year than non-Māori.[56]

[74] Some 43 per cent of methamphetamine consumed is excreted in the form of drugs and metabolites. This has enabled indirect scientific study as to consumption levels. The New Zealand Police-funded "Drugs in Wastewater" project has been undertaken by the Institute of Environmental Science and Research (ESR). Originally it sampled wastewater in Christchurch, Auckland's North Shore and Whangārei monthly. The project has now expanded to 38 sites around New Zealand: 21 are tested monthly and 17 are tested bi-monthly. The project covers 74 per cent of the population of New Zealand, but national results can readily be extrapolated. Similar testing exists in Europe, and Australia has also introduced such a scheme.

[75] The results of this study are startling. For instance, methamphetamine drug use per person is more than twice as high in Whangārei as it is in Auckland and Christchurch (where the numbers are relatively similar). Auckland, which contains 33.5 per cent of the New Zealand population, appears to consume approximately eight kilograms of methamphetamine a week or a little over 400 kilograms a year.

[76] Purity levels of methamphetamine seized by law enforcement agencies in New Zealand are comparatively high relative to other countries at an average of 73 per cent. Methamphetamine in a "base" state takes liquid form. The maximum purity of methamphetamine in solid form is 80 per cent. Typically methamphetamine in solid form is achieved by mixing 80 per cent methamphetamine with 20 per cent hydrochloride. It is common for methamphetamine to be "cut" or adulterated with other products, however, such as isopropylbenzylamine, the dietary supplement dimethylsulphone, or caffeine.

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[56] Ministry of Health *Amphetamine Use 2015/16: New Zealand Health Survey* (December 2016).

[77] Evidence before us was that the use of methamphetamine produces a "rush" or "hit" lasting between five and 30 minutes. Heartbeat races and metabolism, blood pressure and pulse soar. A sensation of pleasure and elevated mood arises. The user then enters a "high stage" lasting between four and 16 hours where they feel energised, talkative, will dominate conversation and become argumentative. Typically the user will attempt to maintain that through what is known as the "binge period" of the methamphetamine addiction cycle, where for some three to 15 days they will consume more methamphetamine. Hyperactivity, sleep deprivation and paranoia frequently arise during this period. A heavy user of methamphetamine may use up to a gram of methamphetamine a day during this period. However further dosing fails to recreate the initial euphoric high; frustration, unpredictability and potential for violence emerge. The user then experiences what is called the "crash stage" where the user's body is exhausted and needs to rest and sleep. A temporary period of normality then arises, which may last two to 14 days, followed by a 15 to 90 day withdrawal period where the user may experience anxiety, insomnia, cravings and depression, together with mood swings and poor concentration. Some users become suicidal. This period is often followed by re-consumption of further methamphetamine.

[78] Methamphetamine abuse has both short and long-term adverse health effects. The release of noradrenaline from the peripheral nervous system leads to increased heart rate and blood pressure that can cause heart attacks and strokes. Smoking or injection in particular generates significant dependency levels. As Professor Nutt observed in his evidence:

> Methamphetamine dependence/addiction is a brain disorder that once established is hard to overcome. It does not go away on its own by simply stopping someone using methamphetamine. The desire to use is often present for years after stopping because the memories of the effects of methamphetamine, especially when smoked or injected, are so powerfully pleasurable that they never go away. The desire to use again, even when the person knows that to do so will lead them back into the addiction, or even to prison, can be profound and in many cases will overwhelm their intention not to use.

[79] Significant external social costs also arise from methamphetamine dependencies. These include criminal offending to fund addiction, and the breakdown of personal and employment relationships. A vivid example of the external

social harm associated with methamphetamine was given by Detective Superintendent Williams. It related to the Kawerau community in the Bay of Plenty. In 2017 a police operation focused on the Kawerau Mongrel Mob who were alleged to be in control of the sale of methamphetamine in that district. The gang was said to have a strategy designed to sell into a very vulnerable community. During the course of the investigation 6.5 per cent of the community were identified as using methamphetamine, considerably above the national average. Significant social deprivation was observable, with children going without food, adequate clothing and school supplies, and household incomes being used to fund methamphetamine use. In March 2018 search warrants were executed at 38 addresses in the Bay of Plenty district. Identified methamphetamine users were encouraged to engage with treatment services. Iwi and community leaders were assisted to effect change following the disruption of the supply of methamphetamine to that community. Detective Superintendent Williams observed:

> The effect of Operation Notus has had a significant positive impact on the Kawerau community. In the first three months after the termination there was a 34% reduction in overall recorded crime, which included a 38% drop in violence offences, 46% drop in dishonesty offences, and 46% in drugs in antisocial offences. After 6 months this had levelled out to a 12% reduction showing a sustained impact. The community is mobilising to rid the town of methamphetamine. In January 2019 a hikoi was organised by a group calling themselves the 'Anti P Ministry.' Multiple people continue to seek treatment for their addiction. Local Iwi are developing their own response based on the Te Ara Oranga Northland Project. The Bay of Plenty Police are also working right across the region with Iwi and partners in an attempt to combat the impact of methamphetamine abuse.

[80] The Ministry of Health has attempted to analyse the social harm associated with methamphetamine use through an index called the "Drug Harm Index". It includes three categories of social cost and nine components. They are: (1) personal harm (premature death and loss of quality of life); (2) community harm (family and friends, acquisitive crime, organised crime, reduced tax base); and (3) intervention costs (health, Police and Customs, and Courts and Corrections). The Drug Harm Index calculates the total social costs associated with methamphetamine in 2016 at

approximately $1,239,000 per kilogram. As Detective Superintendent Williams explained:[57]

> In Whangārei approximately 46 grams of methamphetamine was being used every day. At a price of $500 per gram over the period results were obtained, this means methamphetamine dealers were receiving approximately $23,000 a day, $161,000 per week or $8.3 million in cash per year. The amount identified by ESR would equate to an approximate consumption of 16.7 kilograms a year. This equates to a social harm of $20.7 million into the Whangārei community per year.

In Auckland, the figures for which were given earlier, the social harm cost associated with methamphetamine is approximately $515 million per annum.

Methamphetamine offending in New Zealand

[81] The evidence of Detective Superintendent Williams was that national methamphetamine seizures have increased from 13 kilograms in 2012 to 923 kilograms in 2016. In 2016 a single operation resulted in the seizure of 494 kilograms of methamphetamine, the import of which had been attempted from a fishing boat. Distribution is described as "entrenched" with supply from Asian organised crime syndicates. But more recently syndicates based in North America (sourcing methamphetamine from Mexican cartels) and Africa have also emerged as risks. The evidence was that there is now a supply glut offshore, and New Zealand is seen as a promising target because of relatively high retail prices.

[82] Distribution in New Zealand is similarly entrenched with ethnic gangs such as the Mongrel Mob and Black Power, and outlaw motorcycle gangs such as the Rebels, Comancheros and Bandidos. Detective Superintendent Williams notes that some of the latter gangs have been significantly bolstered by the deportation from Australia of people in key leadership roles. There is, also, evidence that some overseas organised crime groups have attempted to establish their own distribution networks in New Zealand, particularly in Auckland, operating independently of New Zealand-based organised crime groups.

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[57] Using data obtained from the Drugs in Wastewater project.

[83] Police analysis shows that the number of frequent drug users who purchase methamphetamine from gang members has increased from 36 per cent in 2013 to 50 per cent in 2014. A reported phenomenon is of distributor gangs addicting solo mothers for the purpose of inducing them to deal drugs for gangs. Many consumers of methamphetamine do not wish to purchase from gang members. The addicted solo mother then sells methamphetamine on behalf of the gang in order to fund her own drug use and repay accruing debt.

[84] The number of people charged in court for drug offences generally almost halved between 2009 and 2018, falling from 11,219 to 6,516. That reduction is consistent with a general reduction in crime in New Zealand. Yet methamphetamine offending has gone the other way: charges almost doubled in the same period, rising from 1,766 in 2009 to 3,087 in 2018. In 2018 just less than half of all drug charges in court concerned methamphetamine offending. Similarly, during the same period the number of people sent to prison for all offences fell slightly from 8,716 in 2009 to 7,990 in 2018. The number of people sent to prison for drug offending generally has remained broadly stable. Against that, the number of people sent to prison for methamphetamine offending more than doubled, from 387 in 2009 to 858 in 2018.

Sentencing serious drug offending: deterrence, denunciation and accountability

[85] Deterrence is one of several stated purposes of sentencing in s 7 of the Sentencing Act.[58] Its consideration is permissive: it may or may not be taken into account in individual sentence-setting. Logically, the extent to which it will be taken into account depends on the extent to which a sentence may reasonably be expected to either deter the community generally from similar offending or deter the individual specifically from doing so.

[86] In the context of methamphetamine offending, the expert evidence from Professor Simon Mackenzie (for the Crown) and Associate Professor Nathan Berg (for the appellants) suggested that severity of sentencing had at best a modest deterrent effect. Professor Mackenzie observed:

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[58] Sentencing Act, s 7(1)(f).

> The evidence for imprisonment as a specific deterrent is reasonably clear: it does not work. At best, imprisonment has no specific deterrent effect. It may even make reoffending more likely.
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> … There is evidence that punishment has a general deterrent effect on crime. Much about this evidence base is still in dispute, and exactly how this effect occurs remains uncertain. It is clear that the possibility of deterrence depends on the 'sanction risk perceptions' of would-be offenders. Sanction risk perceptions can be divided into two categories: perception of *certainty* of sanction, and perception of *severity* of sanction. Among these two, certainty seems on the current available evidence to be by far the more important variable.
>
> … Lengthening the sentence of imprisonment applicable to a given crime is not likely to achieve a significant deterrent effect in respect of that crime. At best there is only a modest deterrent effect from increasing already long prison sentences. More likely there is no significant effect in such cases. Increasing the length of shorter sentences may have more deterrent power than increasing the length of already long sentences, but (a) it is probably still not significant enough to be a driver of sentencing policy, (b) doing so raises a host of other problems beyond simply the question of deterrence and (c) even in such cases, increasing the certainty of apprehension and punishment will be a more powerful deterrent than increasing the length of shorter sentences.

[87] Associate Professor Berg observed:

> Attempts at deterring drug supply with long prison sentences are extremely expensive and largely ineffective. They lead to a gross misallocation of expenditures on imprisoning low-level drug resellers for whom imprisonment is especially counterproductive, and for which there is considerable evidence that exposure to prison increases rates of future offences. For this large subpopulation of low-level drug re-sellers (i.e. not producers), the theory of specific deterrence is contradicted outright. First-time drug-sales offenders, who could have been rehabilitated outside of prison (and gained self-sufficiency in lawful employment), instead become lifetime criminals or dependent on government assistance …

[88] We have referred already to the increasing number of convictions for methamphetamine sentencing.[59] The increase may perhaps suggest the 2003 adjustment to the maximum penalty has had little deterrent effect. For the Criminal Bar Association and Public Defence Service, Mr Stevenson and Ms Hall submitted to us that shows deterrence is "largely illusory" in methamphetamine sentencing. These submissions echoed those of counsel for the appellants. Mr Corlett, for instance, submitted that absent any credible evidence to the contrary, and in light of the evidence set out before the Court, "it can be assumed that increases in the severity

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[59] See above at [84].

of punishments for [methamphetamine] offending are unlikely to reduce rates of [methamphetamine] offending in New Zealand".

[89] However, we consider the issue of deterrence in methamphetamine sentencing is more complex than these submissions suggest. We make four points.

[90] The first is that it is wrong to wholly detach deterrence from denunciation, accountability and community protection when responding to a crime as harmful as dealing in methamphetamine. That deterrence is in issue at all, given the gravity of the harm, is first and foremost a product of the enormous profitability of the methamphetamine trade. That cannot in itself be a reason to moderate sentencing. The contrary might reasonably be observed. Deterrence is also put in issue is where the offender is vulnerable, by reason (for instance) of addiction, mental health disability, economic deprivation, duress or undue influence. That consideration reduces the relevance of individual, rather than general, deterrence. It is not a consideration of general application, compelling moderation of sentencing in all cases. In the usual way, post-*Taueki*, it raises an issue for consideration after objective offending sentence starting points are considered (at stage one) when (at stage two) considerations personal to the offender are considered.[60]

[91] Secondly and relatedly, for the reasons given in our decision in *R v Radich* quoted at [58] above, it remains the case that a failure to impose appropriate, but not unduly severe, sentences of imprisonment can only encourage the pernicious trade in human misery which dealing in methamphetamine is. Certainty of prosecution may, as Professor Mackenzie observed, have greater deterrent effect than increasing sentence lengths. His observation echoes that of Catherine the Great in 1767: "The most certain curb upon crimes is not the severity of the punishment, but the absolute conviction in the people that the delinquents will be inevitably punished".[61] Nonetheless, Professor Mackenzie did observe that there is evidence punishment has some general deterrent effect on crime, but that there are factors that make deterrence less likely to work in relation to some drug offenders. The profitability of

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60 *R v Taueki*, above n 23.

61 Catherine II *The Grand Instructions to the Commissioners Appointed to Frame a New Code of Laws for the Russian Empire* (1767) at [222].

commercial-scale drug offending, and its associated sophistication, make apprehension and sanction remote for those who lead the trade. But the proposition that they — and their ability to recruit others — should then be rewarded by moderate sentencing does not appeal.

[92] Thirdly, the principle of general deterrence is said to be based on a theory of "rational choice". That is, that the offender may weigh up the pros (profit and pleasure) and cons (detection and punishment) in choosing whether or not to offend. It may well be that in drug offending in particular, the perceptions of risk are relatively low, and the perceptions of reward relatively high — at least for those engaged at a significant level in the distribution chain. But the principle of rational choice is less relevant, and general deterrence is less likely, where that rational choice is constrained by mental disorder (so that the choice may not be rational at all), addiction, poverty, duress or other supervening vulnerability. The evidence before us, and some of the cases we are considering, demonstrate that these vulnerabilities are present in much methamphetamine offending. It is here, and in the case of offenders who have a very limited role in a distribution chain, that enlightened sentencing policy should focus.

[93] Fourthly, the legislative lead in s 8 of the Sentencing Act remains plain: the courts are not permitted to apply a more lenient sentencing scale than that set by Parliament. That is the simple consequence of New Zealand adopting a wholly statutory criminal code. In 2003 the maximum sentence for dealing-related methamphetamine offending was increased to life imprisonment. The effect of s 8(c) is that this Court must impose that maximum penalty if the offending is within the most serious of cases for which the penalty is prescribed. The effect of s 8(e) is that there must be a logical and consistent sentencing scale between the most serious of cases (attracting life imprisonment) and the least serious of cases (which, subject to s 6(4) of the Misuse of Drugs Act, may attract a non-custodial sentence). These considerations preclude radical departure from existing sentencing principles, and indeed from *Fatu* itself. But it does not mean that, within those constraints, some modifications in approach may not be made.

Sentencing experience under *Fatu*

[94] The Crown helpfully provided the Court with a schedule of sentencing appeal decisions in which the guideline judgment in *Fatu* had been applied. These are decisions both of this Court and the High Court. We have taken the Crown data and had it depicted graphically for each of the four *Fatu* sentencing bands. The resultant graphs appear in the schedule to this judgment. The next few paragraphs should be read with those graphs at hand.

[95] What is depicted is the methamphetamine quantity concerned and the starting point adopted on appeal. For ease of analysis, we have split the band four sentencing into two graphs. So the last graph shows band four sentencing only for quantities under 10 kilograms.

[96] Some observations may be offered in relation to the results when depicted graphically.

[97] First, there is a very wide variation — as much as 100 per cent — between sentences involving identical quantities. Those variations will reflect, in part, whether the activity is supply, importation or manufacture. Fundamentally, however, the variation reflects judicial appreciation of culpability based on differing roles played, taken in combination with quantity.

[98] Secondly, bands one and two show the median sentence rising as quantity also rises. That is what one might expect, if quantity is a proxy for harm or potential harm. Further, one would expect notional starting points in a lower band to rise towards the *opening* starting point in the band immediately above as one approached the quantity borderline between the bands. But that progression is less evident in band three sentencing, and in band four sentencing once one passes a quantity of one kilogram.

[99] Thirdly, there are a number of instances in bands two, three and four where courts have fixed starting points below the *Fatu* guideline starting points. This is evident also in a number of first instance sentences. As we note later, these variations

reflect judges' appreciation of low culpability given the very limited role played by the offender in those cases.[62]

[100] Fourthly, notably however, at least among the appellate decisions referred to in the Crown's table, there are no band one decisions where the starting point has been set below the *Fatu* guideline opening starting point of two years. That is surprising, given quantities of less than five grams are involved. In *Fatu* itself this Court said that supply in small quantities "where there is no commerciality and no other aggravating features" may result in starting points outside — that is to say, below — band one.[63] The presumption in s 6(4) of the Misuse of Drugs Act, it should be recalled, talks about the imposition of a sentence of imprisonment. It does not require that sentence to be two years or more. The potential for conversion of a lesser sentence to home detention should not distort the initial sentencing process in setting the starting point.

Stage one analysis: factors relevant to setting the starting point for methamphetamine sentencing

[101] In *Fatu*, this Court, drawing on an earlier divisional decision in *R v Arthur*, said "[w]e have decided that the quantity of the drug involved in the offending (rather than anticipated monetary yields) provides the most helpful measure of culpability".[64] In consequence the Court established sentencing bands which were based on overlapping weight of methamphetamine of a purity of 60 per cent or more. The Court went on to say that:[65]

> [w]here an offender fits within any particular band will depend not just on the quantity and purity of the drugs involved but also the role played by the offender. Those who are primary offenders can expect starting point sentences towards the higher end of the relevant band, with the converse applying to those whose role is less significant.

[102] The courts in *Fatu* and *Arthur* however lacked the benefit of the range of argument presented to this Court.

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62 See below at [107].
63 *R v Fatu*, above 1, at [34].
64 At [26]; and *R v Arthur*, above n 8.
65 At [31].

[103] It may be observed that the High Court of Australia has taken a different approach. In *Wong v R*, that Court said that the use of weight of a narcotic as the chief factor in determining sentence, even where other factors enable movement within that range or even outside of it, was wrong in principle.[66] Gaudron, Gummow and Hayne JJ described as a "false premise" that "gravity of the offence can usually (perhaps even always) be assessed by reference to the weight of the narcotic involved".[67] We think there is some force in this criticism. However, we are not disposed to dispense with quantity as the first determinant of sentencing. Nor did the burden of submissions we received suggest it should be dispensed with. Quantity remains a reasonable proxy both for the social harm done by the drug and the illicit gains made from making, importing and selling it.

[104] Quantity is valuable in assessing culpability, as this Court observed in *Fatu*, but it alone cannot determine culpability. The Crown accepts that that is so. Quantity is highly relevant to culpability, because it is an indicator of harm or potential harm to the community. It may also be indicative of commerciality, which is deserving of greater denunciation. But as the Crown accepts, there are other considerations that flow into the assessment of culpability on an objective basis, in setting a starting point under the first stage of sentencing under the *Taueki* model. The variations in sentence starting point for the same quantity are explicable on the basis of differing degrees of culpability, and that is primarily justifiable on the basis of differences in role played by the offender. As the Supreme Court emphasised in *Hessell v R*, sentencing must involve a "full evaluation of the circumstances to achieve justice in the individual case".[68]

[105] Even the finite bandwidths in *Fatu* are vast: seven years in the case of band two manufacturing. In the case of band four supply, the range is 10 years to life. Setting culpability within bands of that breadth and generality requires not just a numerical scaling based on quantity alone, but at the very least some effort by the sentencing judge to assess the relative role played by that offender in contrast to others sentenced earlier for the same band and category. Nothing else could be said

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66 *Wong v R* [2001] HCA 64, (2001) 207 CLR 584 at [72]–[73].
67 At [73].
68 *Hessell v R*, above n 38, at [38].

to meet the requisite "full evaluation of the circumstances to achieve justice in the individual case" required by *Hessell.*

[106] We have noted already that *Fatu* provides that where an offender fits *within* any particular band will also depend on role.[69] And that the judgment in *Fatu* noted that supply in small quantities "where there is no commerciality and no other aggravating features" might result in starting points below band one.[70] Apart from that indication, the decision does not sanction other extra-quantitative shifts out of band.

[107] Mr Corlett drew our attention to 10 recent decisions of the High Court where role has been influential in judges fixing starting points below the bands otherwise applicable under *Fatu*. One example is *R v Kupkovic*, where a Mr Hoe was sentenced as a party to the manufacture of 607 grams of methamphetamine.[71] Although that would place Mr Hoe in band four, in fact the Judge, Brewer J, a very experienced criminal judge, fixed a starting point of 10 years' imprisonment at the very bottom of band three, taking into account Mr Hoe's limited participation in the offending.[72]

[108] In another decision, *R v Keogh*, the defendant also was a party to manufacturing methamphetamine, again well within band four.[73] But Moore J, again a very experienced criminal judge, fixed a starting point within band three, observing:

> [28] Placing too heavy a reliance on the amount of methamphetamine you were involved in producing would result in an excessively high starting point. It cannot be overlooked [that] you were involved in just two manufactures spanning a period of less than a month. In that regard I accept you were very much a secondary participant. The Crown too accepts this. As already noted, I am also mindful that addiction rather than avarice drove you to become involved in this dark trade.

[109] There are other decisions to similar effect.[74]

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69 *R v Fatu*, above n 1, at [31].
70 At [34].
71 *R v Kupkovic* [2014] NZHC 1946 at [49].
72 At [54].
73 *R v Keogh* [2016] NZHC 508.
74 See, for example, *R v Burdett* HC Auckland CRI-2007-092-5673, 20 November 2007 at [23]; *R v Baldwin* HC Palmerston North CRI-2008-054-1871, 10 September 2009 at [11]; *R v Soles* [2014] NZHC 2665 at [9]; *R v Hughes* [2015] NZHC 22 at [14]–[17]; *R v Pene* [2016] NZHC 2787 at [29]; *R v Harland* [2017] NZHC 1226; *R v Wellington* [2018] NZHC 2196 at [41]–[43]; and *R v King* [2018] NZHC 2540 at [42] and [45].

[110] It is patent that role has a fundamental impact on culpability, and one that is more significant than can be accommodated by simply moving *within* bands. Referring to the evidence of Detective Superintendent Williams about the experience of Kawerau, where gang members were giving solo mothers free methamphetamine to addict and then recruit them as dealers,[75] Mr Rapley QC and Ms Watt for the New Zealand Law Society, New Zealand Bar Association and Auckland District Law Society submitted that it was not difficult to envisage a situation where the gang member was charged with supplying the three grams necessary to addict the mother, and the mother was then charged with dealing a much greater quantity. As they submitted, in such a case the relationship between culpability and quantity in respect of those two offenders would be inverted.

[111] Mr Stevenson and Ms Hall for the Criminal Bar Association and Public Defence Service made a similar point. A courier or "mule" may have a very substantial quantity of methamphetamine on their person for which they might be paid a small sum of money or a small amount of methamphetamine to feed addiction. In contrast, an offender might be more culpable than the weight suggested. Little quantity might be found on that person, but yet large sums of unexpected cash and assets might suggest that the person had a greater role in a large commercial operation.

[112] Mr Rapley and Ms Watt argued that the starting point should be set by reference to five culpability factors: role, quantity, commerciality, links to organised crime and exploitation of others.

[113] Mr Stevenson and Ms Hall proposed a less articulated approach, based on the United Kingdom Sentencing Council Definitive Guideline for Drug Offences of 2012.[76] That has a tabulated approach based on two factors: quantity and role.

[114] The Sentencing Council divides quantity into four bands (or "categories"): up to five grams, up to 150 grams, up to one kilogram, and up to five kilograms. The sentence range for a leading role up to five kilograms of Class A drugs

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75 See above at [79].

76 Sentencing Council (UK) *Drug Offences: Definitive Guideline* (2012).

(including methamphetamine) is 12 to 16 years, against a maximum sentence of life imprisonment. As we apprehend the guideline, offending above five kilograms is effectively treated as a separate category, potentially running to the maximum sentence.

[115] Role is divided into three categories. First (and attracting a more substantial scale) there is the "leading role". This applies where the offender is directing or organising buying and selling on a commercial scale and/or is closely connected to product source and/or has an expectation of substantial financial gain. The second is the "significant role". That is where the offender has an operational or management function within a chain, has subordinates (who may have been recruited or intimidated by the offender) and/or is motivated by financial or other advantage. The third tier is the "lesser role". Here the offender will probably have performed a limited function under direction and/or may have been engaged by duress, naivety or other vulnerability.

[116] The United Kingdom sentencing guideline makes some limited distinction between supply, importation and manufacture, with importation generally attracting a slightly higher starting point than the other two categories. That is different to the approach taken by this Court in *Fatu*, where manufacture attracted the highest level of starting point, in part because of perceived additional health dangers.[77]

[117] The significance of role under the United Kingdom sentencing guideline is demonstrated by the fact that the starting point for sentencing in each category for a lesser role is approximately half the starting point for offending in a leading role, and in the case of category four (five grams or less) it is less than a third of the starting point for offending in a leading role.

A new sentencing approach for methamphetamine offending

[118] We may summarise our proposed approach at the outset. After extensive consideration and debate upon the matter, we propose to retain the *Fatu* quantity bands, but with some significant modifications. In particular, we confirm that the role

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77 *R v Fatu*, above n 1, at [23].

played by the offender is an important consideration in fixing culpability and thus the stage one sentence starting point. Due regard to role enables sentencing judges to properly assess the seriousness of the conduct and the criminality involved, and thereby the culpability inherent in the offending, in the holistic manner required by *Taueki* and *Hessell*.[78] It means that a more limited measure of engagement in criminal dealing deserves a less severe sentence than a significant or leading role. Role may result in an offender moving not only within a band — as currently happens or is supposed to happen under *Fatu* — but also between bands. As already mentioned, it was suggested role could be formalised by adopting the United Kingdom Sentencing Council two grid matrix (using quantity and role category) discussed at [114]–[115] above. However, after significant debate, we decline to take that course because we consider it is likely to encourage a "tick box" approach to sentencing, replacing one form of undue rigidity with another.

[119] We make eight points.

[120] First, we restate the Supreme Court's fundamental observation that sentencing must involve "a full evaluation of the circumstances to achieve justice in the individual case".[79] That injunction calls for flexibility and discretion in setting sentences. A guideline judgment is not supposed to alter that fundamental requirement.

[121] Secondly, we consider the *Fatu* bands require adjustment. Band four, which is required to cover quantities ranging between 500 grams and (in practice) more than 500 kilograms, is simply too broad. It requires subdivision. The first adjustment we therefore make is to subdivide it and to create a new band five, for quantities in excess of two kilograms. We select that number having regard to the data point distribution shown in the graphs discussed at [95]–[100] above.

[122] Thirdly, we are persuaded that we need no longer subdivide the *Fatu* bands functionally, between supply, importation and manufacturing. The relevant offending falls within a group of offences punished identically by s 6(2) of the Misuse of Drugs Act, whether involving production, importation or possession for supply, because the

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78 *R v Taueki*, above n 23, at [28] and [42]; and *Hessell v R*, above n 38, at [38].
79 *Hessell v R*, above n 38, at [38].

harm caused is identical regardless of method. The safety concerns relating to manufacture, seen in *Fatu* as justifying a higher starting point, are less distinct almost 15 years later when the major focus of crime prevention in this area is on importation by organised crime groups. Knowing participation in importation or manufacture should simply be treated as indicative of a more significant role and degree of culpability, attracting a higher sentence starting point across the range indicated.

[123] Fourthly, we consider judges must be more willing to set a starting point below the range specified in *Fatu* for a band where culpability (other than in terms of quantity) is low. Primarily that will be the case where an offender plays a lesser role in the offending. We have considered whether it would be sufficient to simply state that expectation, and leave the starting points as they are in *Fatu* (excepting of course the new band five). We have decided that that would not send a sufficiently clear message. We are particularly concerned at the need to consider more flexible sentencing solutions in band one, where community-based sentences need to be a starting point open to the court, not merely an end point.[80] Accordingly, we shall reduce slightly the sentence starting points in bands one to four. Access to the lower sentence starting points may be expected only by those whose role is found to be lesser in degree, and where quantities are at the lower end of the relevant range. We record that although the new entry points are intended to encompass most cases of low culpability in setting a starting point, we do not exclude the possibility of a case involving minimal participation which might fall below even those entry points. The data in the schedule indicates two such cases historically. There will be other cases in the future, where this is necessary to do justice in a particular case. The *Phillips* appeal before us raises this very issue.

[124] Fifthly, we have made certain other minor adjustments to the starting point ranges for internal consistency and fairness. These adjustments are self-evident in the table below. They include a revised upper level for bands one to four, reflecting change in entry points, data captured in the schedule reflecting actual (albeit unreformed) sentencing practice over the last fifteen years and the greater emphasis

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[80] As to that end point, we observe that a more liberal application of the proviso in s 6(4) of the Misuse of Drugs Act is appropriate where an offender plays a lesser role in offending, and particularly where health issues contribute to the offending.

of this judgment on reserving sterner sentencing for commercial dealing in methamphetamine.

[125] The new bands are as follows:

	Former: *Fatu*	**New: *Zhang***
Band one: < 5 grams	2 – 4.5 years	**Community to 4 years**
Band two: < 250 grams	3 – 11 years	**2 – 9 years**
Band three: < 500 grams	8 – 15 years	**6 – 12 years**
Band four: < 2 kilograms	10 years to life	**8 – 16 years**
Band five: > 2 kilograms	10 years to life	**10 years to life**

[126] Sixthly, we have not adopted the double axis approach of the United Kingdom Sentencing Council. Nevertheless, in assessing role, sentencing judges may find it helpful to have regard to the Council's descriptions of roles and relevant indicia to be taken into account. We set these out below, modified slightly to reflect New Zealand circumstances. We observe that indicia 2, 3 and 4 for "lesser role" categorisation are descriptive of conduct. Any discount for associated mitigating personal considerations is a matter for the second sentencing stage.

Role		
Lesser	**Significant**	**Leading**
1. Performs a limited function under direction; 2. engaged by pressure, coercion, intimidation; 3. involvement through naivety or exploitation; 4. motivated solely or primarily by own addiction; 5. little or no actual or expected financial gain; 6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved; 7. no influence on those above in a chain; 8. little, if any, awareness or understanding of the scale of operation; and/or 9. if own operation, solely or primarily for own or joint use on non-commercial basis.	1. Operational or management function in own operation or within a chain; 2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward; 3. motivated solely or primarily by financial or other advantage, whether or not operating alone; 4. actual or expected commercial profit; and/or 5. some awareness and understanding of scale of operation.	1. Directing or organising buying and selling on a commercial scale; 2. substantial links to, and influence on, others in a chain; 3. close links to original source; 4. expectation of substantial financial gain; 5. uses business as cover; and/or 6. abuses a position of trust or responsibility.

[127] We are conscious that role is a matter more likely to be known by the offender than the Crown. The prosecution may have difficulty establishing the exact nature of the offender's role. By virtue of s 24(2) of the Sentencing Act, the Crown has the burden of proving aggravating facts in dispute, and disproving mitigating facts in dispute, that relate to the offender's part in the offence. But this issue exists already inasmuch as this Court has already said in *Fatu* that where an offender fits within any particular band will also depend on the role played by the offender. In practice the facts necessary to establish guilt often justify inferences about role, knowledge and gain. Where these inferences are sufficient to prove an aggravating fact, an evidential burden will move to the offender to displace the inference. The Crown already faces the need to disprove mitigating role-related factual assertions advanced by offenders in Class A drug sentencing. We do not see this decision as altering that, simply as a

consequence of reinforcing and enhancing the consideration of role in assessing culpability.

[128] Seventhly, we do not consider it necessary to make specific reference here to the other culpability factors suggested by counsel for the New Zealand Law Society and the New Zealand Bar Association. We think commerciality, links to organised crime and the exploitation of others are sufficiently provided for and reflected in the three "role" categories identified above.

[129] Finally, we noted earlier in this judgment that purity levels of methamphetamine seized in New Zealand tend to be high, at an average of 73 per cent. That reflects, in part, the relatively low cost of supply from source. The approach taken in *Fatu* was that the quantity computations apply to purity levels in the order of 60 per cent or more.[81] Reduced purity corresponds to reduced harm, and may command a reduction in the quantity calculated — if need be after a disputed facts hearing. As this Court observed in *Fatu*, in cases where the purity levels are less than 60 per cent, the sentencing response can be "less stern".[82] We received no submissions suggesting change to that approach in *Fatu*, and we see no need to alter it here. Accordingly, the same approach to the level of purity will apply now as before.

<u>Stage two analysis</u>: personal mitigating and aggravating circumstances not to be relegated in serious drug offending sentencing

[130] In a number of decisions of this Court it has been suggested that methamphetamine is so grave a form of offending that less weight should be given to personal circumstances at the second stage of the sentencing process.[83] In *R v Jarden* the Supreme Court said commenting in the context of a sentencing on one count of conspiracy to supply methamphetamine that:[84]

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81 *R v Fatu*, above n 1, at [30]. That percentage corresponded to "P" sold at street level.
82 At [30].
83 See, for example, *Chen v R*, above n 36, at [174].
84 *R v Jarden*, above n 31, at [12].

> [a]s the Courts have repeatedly said, and we emphasise again, in sentencing those convicted of dealing commercially in controlled drugs the personal circumstances of the offender must be subordinated to the importance of deterrence. But this does not mean that personal circumstances can never be relevant.

[131] In that case the Supreme Court also observed that the personal circumstances of an offender may be relevant either because they contribute in some way to the offending, or on purely compassionate grounds.[85] In that case Mr Jarden had suffered anxiety and depression, but that was not shown to be causally connected with his offending. However, the Supreme Court reduced his sentence by six months to reflect the "very tragic situation in which Mr Jarden found himself shortly before his trial" (namely the suicide of his partner).[86]

[132] We make three observations.

[133] First, given the outcome in *Jarden*, we do not apprehend the Supreme Court to have used "subordinated" in any sense implying exclusion of consideration of personal circumstances. Rather, such circumstances are to be weighed in the balance with the needs of deterrence, denunciation, accountability and public protection.[87] These considerations, in conjunction with the maximum sentence scale enacted, require a stern response to offending of this kind. Personal circumstances may well have a more limited temporal effect in the context of serious commercial drug dealing of the kind the passage in *Jarden* was contemplating. That is because the starting point will be very much higher in the first place for offending of that kind.

[134] Secondly, we think the segregated analysis in modern New Zealand sentencing practice under the *Taueki* and *Hessell* decisions adequately balances the sentencing purposes stated in s 7 of the Sentencing Act. At the first stage culpability for the offending, assessed objectively, is weighed, setting a starting point. Starting points almost inevitably will be higher when serious commercial Class A dealing is engaged. Consistency is important at this stage, so one case can be compared with another in future sentencing. At the second stage, a substantial measure of discretion is vested in

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85 At [14].
86 At [15].
87 Sentencing Act, s 7.

the sentencing judge to mitigate the starting point for personal circumstances that mean applying the starting point would be inconsistent with s 7(h) — the rehabilitation and reintegration of offenders — and the considerations expressed in the latter part of s 8.

[135] Thirdly, we think considerable caution must be exercised in the expression of broad principles which may diminish the inherently discretionary weighting of aggravating and mitigating factors in stage two of the sentencing exercise. Indeed, it is a qualified discretion in any event. Section 9(2) of the Sentencing Act requires the court to take into account certain mitigating factors to the extent they are applicable to the particular case. Section 9(3) makes clear the list in s 9(2) is non-exclusive. Section 8(g) requires the court to impose the least restrictive outcome appropriate in the circumstances. Importantly, s 8(h) requires the court to take into account any particular circumstances of the offender that mean the sentence would be disproportionately severe. None of these provisions are expressed by Parliament as being inapplicable, or less applicable, in certain classes of crime.[88]

[136] It follows that we consider that personal mitigating circumstances relating to the offender, at stage two of the sentencing exercise, are applicable to all instances of Class A drug offending, as in any other offending.

[137] There are certain mitigating considerations particularly germane to methamphetamine offending:

(a) addiction;

(b) mental health;

(c) duress or undue influence; and

(d) social, cultural and economic deprivation.

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[88] To state the obvious, Class A drug offending does not attract a mandatory life sentence.

[138] These considerations are relevant in three ways. The first is because each can impair the rational choice made to offend, and thereby diminish moral culpability. The second is that diminished opportunity to make a rational choice also diminishes the deterrent aspect of sentencing, both general and specific, as we have discussed already. The third is that some of these impairments alter the effect of a term of imprisonment on the individual offender and add to its severity. This third consideration is one of proportionality.[89]

(a) Addiction

[139] The Crown conceded that it would be appropriate to adjust *Fatu* to cater more effectively for offenders whose actions are driven by addiction, and whose offending sits at the lower end of the scale in terms of seriousness.

[140] First, Mr Lillico said that the rationale for factoring in an offender's addiction may be considered similar to that for mental health allowances. The Crown submitted that addiction should only be relevant where it is causative of the offending. It suggested based on decisions of this Court that addiction should not be treated as having mitigating effect in cases where the offender operated above street level or self-sufficient dealing.[90]

[141] Secondly, the Crown submitted that any such discount be based on persuasive evidence, as opposed to mere self-reporting. Mr Lillico relied on the decision of the South Australian Court of Criminal Appeal in *R v Young*:[91]

> It is common for offenders to claim that they are, or were, heavily addicted and that drugs found in their possession were primarily for their own use. It is necessary for Judges to carefully evaluate those claims. The indicia of commerciality are well known. When claims of addiction and own use are pressed as factors in mitigation in the face of evidence of substantial commerciality they may need to be supported by evidence on oath or other corroborative material.

[142] We make seven points.

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89 *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [70]; and *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [45].

90 *He v R* [2017] NZCA 77 at [19].

91 *R v Young* [2016] SASCFC 102, (2016) 126 SASR 41 at [69].

[143] First, we need to address the implication of s 9(3) of the Sentencing Act. This provides that voluntary consumption of alcohol or drugs, other than for a bona fide medical purpose, cannot be taken into account by way of mitigation. We need as a result to refer to the 2011 decision of this Court *R v Wihongi*.[92] Ms Wihongi, a battered woman with significant mental health deficits and a history of alcohol abuse, stabbed her partner to death following an argument. The Crown appealed an eight year determinate sentence for murder. The sentencing Judge disregarded her intoxication at the time of the offending, but did take into account her underlying alcoholism as one of a number of material impairments affecting culpability.[93] This Court observed:

> [54] … [It] is clear that the intention of the legislature is that, where the level of intellectual impairment at the time of the offending is affected by alcohol, the Court cannot take that into account. In our view this prevents the Court from taking into account alcohol consumption even where the consumption of the alcohol reflects an underlying alcohol abuse impairment or a compulsive consumption of alcohol. We therefore accept [counsel's] submission that the Judge erred in this respect.
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> [55] However, it has to be recognised in the present case that two different factors were at play: the underlying mental impairment of Ms Wihongi, and her consumption of alcohol, which is linked to that mental impairment. The fact that consumption of alcohol cannot be taken into account does not diminish the significance of Ms Wihongi's diminished intellectual capacity under s 9(2)(e).

[144] This aspect of *Wihongi* does not appear to have been considered since by this Court. However we do not see that decision as authority that a pre-existing state of addiction contributing to the index offending may not be considered as a mitigating consideration. Significantly, the Crown did not advance such an argument. Rather, its position was that subject to two qualifications addiction might be considered in just that way. We will return to the Crown's qualifications shortly.

[145] Secondly, the evidence of Professor Nutt, Dr James Foulds, and Detective Sergeant Varnam demonstrates that a number of relevant mitigating considerations do arise in relation to addiction. The first is that an offender's otherwise strong pro-social tendencies may be overwhelmed by dependence and addiction, even

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92 *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775.
93 *R v Wihongi* HC Napier CRI-2009-041-2096, 30 August 2010 at [44].

if they have ceased using methamphetamine. Secondly, offenders may be unwilling to seek treatment because of both social stigma and threat of punishment. Thirdly, there is some evidence that offenders use methamphetamine as a coping mechanism for childhood trauma and in response to developmental difficulties. They may also be self-medicating for mental health issues such as ADHD, anxiety or depression. And fourthly, the effect of methamphetamine addiction results in the prioritisation of the narcotic over needs such as food, shelter and personal relationships. As a consequence addicts may lose family and whānau support to the inexorable progress of the addiction. As Dr Foulds observed:

> Addictive substances activate brain systems which evolved to help lay down habits important for survival. In other words, the addictive behaviour comes to be pursued as if it were important for survival. In an addicted individual, behaviours necessary to obtain and use the preferred substance are therefore prioritised over other activities in the person's life, even when this is harmful or is inconsistent with a person's morals or goals such as avoiding legal sanctions.

[146] Thirdly, we have noted already that addiction calls in question the effectiveness of deterrence, in the same way that a mental health issue may do. That point is conceded by the Crown. We accept the submissions by Mr Butler and Ms Paenga on behalf of the Human Rights Commission that addiction engages other considerations under the Sentencing Act. In particular, it engages the purpose of assisting an offender's rehabilitation and reintegration. In *R v Rawiri* this Court confirmed that exceptional circumstances were not required before a consideration of a community-based sentence, in the context of offending by an addict involving possession of precursor substances and material and equipment with the intention that they be used in manufacturing methamphetamine at a clandestine laboratory.[94]

[147] Fourthly, we turn to the Crown's first reservation, which is that addiction should only be relevant where it is causative of the offending, and that addiction should not be treated as having mitigating effect in cases where the offender operated above street level or self-sufficient dealing. We accept that non-causative addiction will be of little mitigatory relevance, as is the case with a non-contributory mental health condition, unless in the sense referred to below. We also accept that commercial

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[94] *R v Rawiri* [2011] NZCA 244, (2011) 25 CRNZ 254 at [12].

dealing is likely to be inconsistent with the impairment of the ability to exercise rational choice, which is what diminishes culpability and justifies discounting the sentence. But we would not exclude the possibility of a case in which that impairment co-exists with more substantial offending. Furthermore, as we noted earlier, addiction is relevant in a second way unrelated to the choice made to offend: that is, in potentially rendering a term of imprisonment more severe (but not necessarily, if addiction treatment programmes are available). Each aspect is a matter for the sentencing judge to have regard to.

[148] Fifthly, we are more sympathetic to the Crown's second reservation. That was that any such discount should be based on persuasive evidence, as opposed to mere self-reporting. We agree. Inasmuch as a stage two discount for mitigating circumstances is engaged, the onus of proof (to the civil standard) lies on the offender to establish the extent and effect of addiction.[95]

[149] Sixthly, we consider addiction may logically give rise to a discount of up to 30 per cent of the sentence depending on the extent to which it mitigates moral culpability for the offending. There is we acknowledge a degree of arbitrariness in that figure, and it can be indicative only. It is not to be regarded as an absolute upper limit. In some cases, a sentencing judge may well have grounds to conclude that there is no material difference between the mitigating impact of the addiction presented and a serious mental health disorder. In such a case a greater discount could not be condemned as unduly lenient, although clear reasons ought to be given for that course being taken.

[150] Finally, addiction in particular calls for consideration of a rehabilitative response as part of sentencing. We encourage sentencing judges to explore rehabilitative options in sentencing addicted offenders. We return to this topic shortly.[96]

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[95] Sentencing Act, s 24(2)(d). We see addiction as a stage two mitigating consideration falling within the offender's burden under that provision.

[96] See below at [175].

(b) Mental health

[151] Mental impairment, even beyond the limited provision for diminished intellectual capacity or understanding under s 9(2)(e) of the Sentencing Act, is a mitigating consideration. Mental impairment short of insanity affects the sentencing level in the three respects identified at [138].

[152] The evidence before us suggested that methamphetamine is both attractive to users with mental health issues and can itself be causative of mental health issues. Accordingly where there is an evidential basis to suggest that mental health issues have contributed to the offending, or otherwise should alter the assessment of the appropriate sentence, a discount is available. We need note only the reality that mental health issues and addiction may operate in combination, and the need to ensure that there is no improper doubling-up of discounts for personal circumstances.

[153] The degree of discount is said to depend on the severity of the mental health condition issue and the strength of the causal link between that condition and the offending.[97] In *E (CA689/10) v R*, this Court reviewed a range of discounts treated as appropriate when a mental condition had contributed to the offending.[98] The range discerned was from 12 to 30 per cent. The decision also noted *R v Gordon* where combined discounts taking into account mental illness and other factors reached 50 per cent of the starting point.[99] This is not the case in which to review discount levels for contributing mental health conditions. That is a question for another day. It will suffice for present purposes to record their potential availability in cases involving methamphetamine offending.

(c) Duress or undue influence

[154] Sentencing discounts may also apply where an offender has acted under duress, short of a full defence, or the undue influence of a person upon whom the offender is dependent (which we term undue influence) for the simple reason that personal

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97 *Edri v R* [2013] NZCA 264 at [17].
98 *E (CA689/10) v R*, above n 89, at [71]–[83].
99 At [79], citing *R v Gordon* CA276/04, 16 December 2004.

responsibility is altered where volition is overborne or diminished.[100] This prospect appears most likely to be raised in gang-related offending, or intra-familial offending, and it is unnecessary to say more about this at this stage.

(d) Social, cultural and economic deprivation

[155] Māori alcohol and other drug use-related morbidity is about double that of non-Māori. As we observed earlier, Māori were 3.4 times more likely to have used amphetamines in the past year than non-Māori. There is evidence, also, that Māori are more than four times more likely to be convicted of illicit drug dealing.[101] The proportion of Māori offenders proceeded against in court for possession, use and utensils for methamphetamine has increased from 33 per cent in 2010 to 47 per cent in 2018. The proportion of European offenders proceeded against for the same matters has dropped from 56 per cent to 42 per cent in the same timeframe.

[156] The example of the Kawerau community discussed earlier in this judgment, a community with a Māori population of almost 62 per cent, is indicative of the scale of the problem on a communal basis. Evidence demonstrated the deliberate addiction of solo mothers and other persons in order to recruit them as salespeople, with users being forced to sell methamphetamine to clear debts owed to dealers.

[157] We received evidence and submissions from Te Hunga Rōia Māori o Aotearoa, the Māori Law Society. We express our appreciation for the submissions delivered by Mr Merrick and Ms Haronga, and the evidence of Associate Professor Khylee Quince, Drs Vicki Macfarlane and Rawiri Jansen, and Mr Rawiri Pene, Te Pou Oranga at Te Whare Whakapiki Wairua, the Alcohol and Other Drug Treatment Court in Auckland and Waitakere. Their evidence and submissions focused on the extent of methamphetamine abuse by Māori, the consequence for whānau, hapū and wider communities, and therapeutic criminal justice initiatives addressing abuse, addiction and related offending as primarily a health issue calling for a healing (rather than punitive) response.

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[100] *R v McCarthy* (1996) 13 CRNZ 578 (CA); and *R v Cullen* HC Tauranga CRI-2008-070-2188, 23 April 2008.

[101] Alan Johnson *Are You Well? Are We Safe?* (The Salvation Army Social Policy & Parliamentary Unit, February 2019) at 81.

[158] We make five points.

[159] First, ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability. Where these constraints are shown to contribute causatively to offending (whether associated with addiction or not), they will require consideration in sentencing.[102]

[160] Secondly, distinct rehabilitative and reintegration considerations applicable to Māori that make use of the power in s 25 of the Sentencing Act to adjourn sentencing to enable rehabilitative programmes to be undertaken are particularly relevant. We will revert to this subject shortly.[103]

[161] Thirdly, these are matters where the right to address the court on personal, family, whānau, community and cultural background and support under s 27 of the Sentencing Act is clearly relevant.

[162] Fourthly, social, cultural or economic deprivation that has a demonstrative nexus with the offending may be presented in mitigation regardless of the specific ethnicity of the offender. Likewise, the tools available in ss 25 and 27 are there for use by any relevant offender.

[163] Finally, we touch upon offenders from foreign jurisdictions. We accept Mr Butler and Ms Paenga's submission that the isolation of, and denial of family support to, foreign nationals imprisoned for drug offending may be treated as a mitigating factor where it makes the sentence harder than usual to bear, and at the discretion of the sentencing judge. It has been treated as such in the High Court, on occasion.[104]

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102 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [50]; *Fane v R* [2015] NZCA 561 at [46]; and *Arona v R* [2018] NZCA 427 at [59].

103 See below at [175].

104 *R v Yung* [2017] NZHC 895 at [6]; and *R v Yuen* [2016] NZHC 571 at [15].

Minimum periods of imprisonment in serious drug offending sentencing

[164] As mentioned, the frequent imposition of minimum periods of imprisonment in serious drug offending was criticised by several counsel in these appeals.

[165] The power to impose a minimum period of imprisonment, or non-parole period as it is commonly called, is governed by s 86 of the Sentencing Act.

[166] Section 86 provides:

> **86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment**
>
> (1) If a court sentences an offender to a determinate sentence of imprisonment of more than 2 years for a particular offence, it may, at the same time as it sentences the offender, order that the offender serve a minimum period of imprisonment in relation to that particular sentence.
>
> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:
>
> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.
>
> (3) *[Repealed]*
>
> (4) A minimum period of imprisonment imposed under this section must not exceed the lesser of—
>
> (a) two-thirds of the full term of the sentence; or
>
> (b) 10 years.
>
> (5) For the purposes of Part 6 of the Criminal Procedure Act 2011, an order under this section is a sentence.

[167] The effect of the section is that a sentencing judge may impose a minimum period of imprisonment where the judge considers that the period after which

the offender would otherwise be eligible for parole is insufficient for certain specified purposes. The specified purposes include deterrence, denunciation and public safety.

[168] Potential deportation of an offender is not a consideration in sentence-setting. It is the function of the courts to impose sentences appropriate to the particular offending. In performing that task, the distinct administrative processes for removal under the Immigration Act 2009, which may or may not apply to one offender or another, have no bearing.[105] Likewise, this Court has also held that the prospect of deportation is not a proper ground for refusing to impose a minimum period of imprisonment which would otherwise have been justified.[106]

[169] As this Court has emphasised in other decisions, minimum periods of imprisonment must not be imposed as a matter of routine or in a mechanistic way. It is not sufficient for a judge simply to recite s 86 without more. A reasoned analysis is required, both as regards the imposition of a minimum period of imprisonment and its length. In a number of recent appeals, this Court having undertaken that analysis has concluded that either the sentencing judge was wrong to impose a minimum period of imprisonment or that its length was excessive and not justified.

[170] In the context of drug dealing offences, there are two further important points to be made.

[171] The first is that for the reasons already discussed, it is deterrence, denunciation and accountability that are likely to be at the forefront of decisions in drug cases involving the imposition of a minimum period of imprisonment. That in turn means that as a general rule, lengthy minimum periods of imprisonment are properly reserved for cases involving significant commercial dealing.

[172] The second is that if a practice has developed that an end sentence of nine years' imprisonment automatically triggers a minimum period of imprisonment, then such a practice must cease. It is contrary to s 86 and is a wrongful exercise of discretion.

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105 *R v Zhang* CA56/05, 24 May 2005 at [11]–[16]; *R v Sabuncuoglu* [2008] NZCA 448 at [34]; *R v Ondra* [2009] NZCA 489 at [7]–[12]; and *Xie v R* [2019] NZCA 218 at [25].

106 *Bi v R* [2014] NZCA 10 at [6]; and *Olua v R* [2014] NZCA 105 at [67].

[173] It is correct that in *R v Anslow* this Court, after surveying 71 cases, noted that minimum periods of imprisonment were commonly imposed for drug dealing offences where the sentence handed down was nine years' imprisonment or more.[107] However, the Court was not thereby purporting to create a presumption or threshold but simply reflecting the reality that offending which is serious enough to warrant the imposition of a minimum period of imprisonment will generally attract a prison sentence of at least nine years.

[174] There are no presumptions, no rules of thumb. As it was put by the Crown, the s 86 test still needs to be applied in individual cases and must not be fettered.

The use of a wider range of legislative tools to treat drug offenders in the course of sentencing and detention

[175] As already mentioned, submitters advocating for a greater focus on rehabilitation expressed concern about what they saw as the under-utilisation of s 25 of the Sentencing Act. It will be recalled that s 25(1)(d) and (e) empowers a judge to adjourn a sentencing to enable an offender to undertake a rehabilitation programme and for the offender's response to the programme to be taken into account when sentencing subsequently takes place.

[176] The enactment of such a power was the result of a recommendation made by the Justice and Electoral Committee and was directed at concerns about the increasing prison population.[108] The clear intent was to encourage participation in rehabilitation programmes which if successfully completed could upon resumption of the sentencing process mean a custodial sentence was likely to be avoided.

[177] The provision would appear to be tailored for offenders whose offending has been caused by drug addiction. However, it appears from our own review of the case law and the information given to us by counsel that s 25 is used relatively infrequently. As a result, this Court has had limited opportunity to comment on s 25. However, it has itself adjourned an appeal for two months to enable an appellant to attend a

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107 *R v Anslow* CA182/05, 18 November 2005 at [27].

108 Sentencing and Parole Reform Bill 2001 (148–1) (explanatory note) at 1; and Sentencing and Parole Reform Bill 2001 (148–2) (select committee report) at 23 and 28.

residential treatment programme and, on receiving an updated report indicating a positive response, quashed a custodial sentence and replaced it with supervision containing a condition that the appellant continue the programme.[109] This Court has also in previous decisions such as *R v Barry* and *R v Ward* endorsed the benefit of rehabilitative sentences generally.[110]

[178] It appears from the enquiries made by Mr Lillico that Crown solicitors have no formal policy regarding when prosecutors should oppose or consent to adjournments sought under s 25.

[179] This case provides a further opportunity for this Court to encourage counsel and sentencing judges to make greater use of s 25 in appropriate cases where possible.

[180] As to what is an appropriate case, the starting point must be that adjournments under s 25(1)(d) are only appropriate where independent evidence suggests the offending was caused by the factor(s) which the proposed programme or course of action is designed to target. In this context, self-reporting as to the causes of the offending will generally not be sufficient.

[181] If counsel wish to invoke s 25, they should present the court with a considered plan supported by written confirmation that the offender has already enrolled in the programme or has a start date. In an addiction case, that will mean providing the judge with information from a recognised drug rehabilitation centre regarding the available programmes as well as an objective assessment of the offender's willingness to participate and a prognosis of whether the treatment is likely to be successful.

[182] The offender's personal circumstances such as age, criminal history and family support are also relevant. In this context, it may well be that s 27 of the Sentencing Act could also be engaged with information being provided about the support available from whānau and community to assist the offender in completing the proposed plan. If an offender has previously participated in a treatment programme but failed or been excluded from it that may tell against granting an adjournment.

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109 *R v Barry* CA228/93, 17 June 1993; and *R v Barry* CA228/93, 17 August 1993.
110 *R v Barry* CA228/93, 17 June 1993 at 5; and *R v Ward* CA182/89, 29 September 1989 at 6.

[183] Other factors which may be taken into account are the offender's bail history and compliance with court orders as well as any risk factors and issues of victim safety. As some of the Crown solicitors surveyed by Mr Lillico have pointed out, bail of some form is usually required when an adjournment under s 25 is granted and therefore the usual bail considerations will apply.

[184] According to Mr Lillico's survey, some but not all Crown solicitors consider the likely end sentence to be a relevant factor in terms of whether they would oppose a s 25 adjournment. Although s 25 is primarily aimed at cases where successful treatment could mean the difference between a custodial or community-based sentence, it is not expressed to be limited to such cases. Accordingly, it would be wrong for judges to superimpose such a limitation on the wording of the section and so fetter their discretion. In our view, even if a custodial sentence is inevitable because of the seriousness of the offending, that of itself should not automatically result in the judge declining an adjournment. It may well be that successful completion of a programme warrants a reduction in the length of the prison sentence that might otherwise have been imposed.

[185] Finally, we note the point that even if an offender does not complete the programme, valuable progress may still have been made and we agree with counsel that this should be carefully considered and acknowledged or rewarded as appropriate.

[186] Section 25 is a valuable tool in the sentencing judge's toolkit and we would endorse the comments of those advocating that greater use be made of it where a rehabilitation programme is available and there is reason to believe a use of the power would serve a good purpose.

Whether this guideline judgment applies retrospectively?

[187] This judgment is to be issued on 21 October 2019. It applies to all sentencing that takes place after that date regardless of when the offending took place. The more difficult issue is whether it should also apply to those who have already been sentenced and if so in what circumstances.

[188] The approach that has consistently been taken by this Court in previous guideline judgments is that the judgment only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant.[111]

[189] We have considered whether this approach is consistent with s 25(g) of the New Zealand Bill of Rights Act and s 6 of the Sentencing Act. Section 6 states that an offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty. Section 25(g) is to similar effect.

[190] However, we have concluded that neither section is engaged in the current context. That is because a change in sentencing practice does not alter the penalty provided by the legislation creating the offence but is an exercise of the sentencing discretion in an individual case. To put it another way, a change in guideline does not amount to a change of penalty for the purposes of those two provisions.

[191] We are satisfied that the approach adopted in the past should also be applied to this judgment. It is a principled approach that preserves the integrity of the criminal justice system.

D. INDIVIDUAL APPEALS

[192] We now consider the individual appeals before the Court. We approach them in order of starting point in the sentence appealed, starting with the lowest.

Leanne Maree Crighton

[193] Ms Crighton pleaded guilty to and was convicted on 11 charges of offering to supply methamphetamine, three charges of supplying methamphetamine, one charge

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[111] *R v Vadati* CA 256/05, 19 December 2005 at [8].

of possessing methamphetamine and other minor offending.[112] Judge Zohrab sentenced Ms Crighton to 22 months' imprisonment on these charges, with leave to apply for home detention.[113]

[194] Ms Crighton appeals her sentence on the basis that the starting point was manifestly excessive. The sentence should have been community-based, the most obvious sentence being intensive supervision with conditions that Ms Crighton attend a residential rehabilitation facility and undergo psychological counselling and treatment. Special conditions such as electronic monitoring could be imposed to satisfy the requirement of a punitive element; or alternatively community work could have been an appropriate sentence.

Leave to bring second appeal

[195] Ms Crighton's first appeal against sentence was dismissed by Cooke J in the High Court at Nelson on 12 December 2018.[114] She now seeks leave to bring a second appeal against sentence. Given the general and public importance of guidance relating to methamphetamine sentencing, and the lack of Crown opposition, we grant leave for Ms Crighton to bring a second appeal.[115]

Background

[196] Ms Crighton became involved in supplying methamphetamine in order to feed her addiction as well as that of her partner. As a result of Operation Tulip, a police operation to target the commercial supply and distribution of methamphetamine in Nelson, Ms Crighton was identified via her cellphone number sourcing methamphetamine from the principal targets of the operation. Production of Ms Crighton's phone allowed the police to identify 14 occasions where Ms Crighton supplied or offered to supply methamphetamine to associates. The total amount of methamphetamine supplied or offered was 3.75 grams.

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112 The other charges were disorderly behaviour, possession of utensils, possessing a knife, breach of community work and driving while disqualified.
113 *R v Crighton* [2018] NZDC 16378.
114 *Crighton v R* [2018] NZHC 3282.
115 Criminal Procedure Act 2011, s 253(3)(a).

Sentence appealed

[197] Judge Zohrab adopted a starting point of two years and 10 months' imprisonment on all charges, having regard to the *Fatu* bands as considered in a sentence indication. A credit of approximately 12 per cent was allowed for Ms Crighton's personal circumstances, taking the sentence to 30 months. A further discount of 25 per cent was allowed for the guilty plea, resulting in an end sentence of 22 months' imprisonment. The Judge considered it appropriate to grant leave to apply for home detention either to a residential treatment programme or to a more appropriate address than the one Ms Crighton had provided.[116]

Discussion

[198] Applying Ms Crighton's offending to the new sentencing guidelines, the quantity supplied or offered to supply was under five grams, falling into band one.[117] The appropriate starting point range is therefore a community-based sentence to four years' imprisonment. In setting a starting point, we are required to balance the quantity involved (in the upper part of the band, but mitigated by the fact there was little expected gain) and the role undertaken by Ms Crighton. Ms Crighton should be regarded as having a lesser role, as she had no influence on those above her in the chain of operations, appeared to have little, if any, awareness or understanding of the scale of the operation and (significantly) there was little or no actual or expected financial gain. Ms Crighton offended to pay for her own drug use and to supply her partner with methamphetamine, at least in part to prevent any violence. Although Mr Bamford submitted that a community-based sentence would be an appropriate starting point in these circumstances, we consider a starting point of two years' imprisonment appropriately reflects these considerations.

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116 *R v Crighton*, above n 113, at [3], [13] and [19].

117 On the basis that the current approach to offers to supply is continued, wherein it is open to the court to assume that Ms Crighton had the ability to make good on her offers: *Dodd v R* [2013] NZCA 138 at [14]. However, Mr Bamford submitted that this is problematic because in practice, often an offender will contact multiple people in the hope that one of them will buy the amount or have not actually sourced the product when they make the offers. This argument is difficult to reconcile with s 6(1) and (2) of the Misuse of Drugs Act, which make no distinction between supplying/selling and offering to supply/sell controlled drugs.

[199] Turning to factors relevant to Ms Crighton personally, information available at sentencing confirmed that Ms Crighton has a difficult personal history. Ms Crighton experienced and witnessed abuse during her childhood. She moved in and out of foster care during her teenage years. Ms Crighton then experienced several abusive and violent relationships. The psychologist's report provided at sentencing described a pattern of intimate relationships across her life as having "largely been characterised by violence". Ms Crighton and her most recent partner, the father of two of her children, separated in 2016 or 2017 and a protection order was put in place for the benefit of Ms Crighton and the children. However, at the time of the pre-sentence report, the children had been removed from Ms Crighton's care and placed in the care of their father. Ms Crighton reported that she had been diagnosed with anxiety and depression, although denied any current suicidal ideation. The psychologist's report also suggested that Ms Crighton demonstrated symptoms of Post-Traumatic Stress Disorder (PTSD) as a result of the assaults she experienced as a teenager. Methamphetamine was used as a coping mechanism to deal with these issues.

[200] To that end, Ms Crighton also adduced evidence establishing a causative link between her use of methamphetamine and her offending, the offending having been primarily motivated by a desire to fuel her own addiction.

[201] We consider that a discount of 30 per cent is warranted in light of these personal circumstances, involving both mental health and addiction vulnerabilities. We see little purpose served by attempting to divide the discounts between these two factors, given their interconnection. A further discrete discount of 25 per cent for the guilty pleas also applies. This would reduce Ms Crighton's sentence to 12 months' imprisonment.

[202] The question then becomes whether it would be appropriate to substitute this with a community-based sentence. While we consider that this is a situation where a sentence of intensive supervision would likely have been appropriate given Ms Crighton's personal circumstances and rehabilitative prospects, we are faced with the difficulty that Ms Crighton finished serving her sentence just one week after the hearing, in April 2019. Ultimately, we recognise and commend Ms Crighton's commitment to seeking rehabilitative options. This was clearly a possibility envisaged

by the Judge when granting leave to apply for home detention at a residential treatment facility. The imposition of a sentence of intensive supervision on appeal would in effect re-punish Ms Crighton. She has served eleven months' imprisonment and been subject to post-release conditions for a further five. She remains subject to post-release conditions today. Her appeal will be allowed, but we consider the precise disposition of the appeal requires further submissions from counsel for Ms Crighton and the Crown. The Court will issue a minute separately in this appeal.

Result

[203] Ms Crighton's appeal will be allowed, but further submissions are sought on formal disposition of the appeal in light of [201] and [202] of the judgment.

Jonelle Rachel Phillips

[204] Ms Phillips pleaded guilty to two charges of supplying methamphetamine, one representative charge of supplying methamphetamine, and one charge of possessing methamphetamine for supply. She was also convicted of one charge of possession of a Class B controlled drug, one representative charge of supplying cannabis and one charge of possessing cannabis for supply. She was sentenced by Collins J to four years and three months' imprisonment.[118] Ms Phillips appeals her sentence on the basis that it was manifestly excessive.

Leave to appeal out of time

[205] Ms Phillips' notice of appeal was filed approximately three months out of time. The Crown does not oppose Ms Phillips' application for an extension of time and we are satisfied it is appropriate to grant in the circumstances. We grant the application accordingly.

Further evidence on appeal

[206] Ms Phillips also sought to adduce a second affidavit for the purposes of the appeal. The affidavit details Ms Phillips' experience in prison. She says she has

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[118] *R v Phillips* [2018] NZHC 2119.

not been able to properly address her PTSD or build supportive networks in the prison environment and is concerned at the impact her imprisonment is having on her children. While we have sympathy for Ms Phillips' plight, these matters do not bear on the correctness of her sentence at the time it was imposed. Rather they are matters for the Department of Corrections and the Parole Board. We therefore decline the application to adduce further evidence on Ms Phillips' appeal.

Background

[207] Ms Phillips' offending was detected during the course of a police operation targeting the commercial supply of methamphetamine in Wellington. Ms Phillips and Mr Smith were identified as Auckland-based suppliers who would sell methamphetamine to offenders in Wellington. Mr Smith, with whom Ms Phillips was in a relationship, was in contact with an importer. On two occasions, Mr Smith and Ms Phillips drove to Wellington where they supplied at least six kilograms of methamphetamine. The Judge observed that Ms Phillips was "clearly not the party taking a lead" in the supplies and accepted that she accompanied Mr Smith out of a sense of loyalty.

[208] However, the Judge also considered Ms Phillips could properly be described as a low-level supplier in her own right. Between 18 March 2017 and 11 April 2017 Ms Phillips received numerous calls and messages from associates wanting to obtain cannabis or methamphetamine. Ms Phillips regularly met with customers and would sometimes travel long distances to do so. At least one customer arranged supplies on her behalf. This conduct formed the basis of the representative charges of supplying methamphetamine and cannabis. The quantity supplied by Ms Phillips in her own right was unable to be determined. The three possession charges resulted from discoveries in Ms Phillips' house, vehicle and on her person of cannabis (a total of 18.8 grams), methamphetamine (an undetermined quantity, but less than 22 grams), 16 NBOMe tabs (a Class B drug) and materials including digital scales.[119]

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[119] At [10]–[12] and [17]. According to the summary of facts to which Ms Phillips pleaded guilty, the combined weight of the small plastic container with a screw on lid and the methamphetamine contained within was 22 grams.

Sentence appealed

[209] The Judge adopted a starting point of five years' imprisonment for the two leading supply charges. A one year uplift was imposed to reflect Ms Phillips' personal drug dealing charges, resulting in global starting point of six years' imprisonment. Ms Phillips' previous convictions, which included 13 convictions in 2011 for conspiring to deal in methamphetamine, received an uplift of six months.[120]

[210] The Judge then turned to consider Ms Phillips' personal circumstances. These included a diagnosis of PTSD in relation to a traumatic event in her past which was the catalyst for her methamphetamine use. Following completion of a residential rehabilitation programme during her 2011 sentence, Ms Phillips avoided methamphetamine for five years. However, she relapsed after entering into a relationship with Mr Smith. Ms Phillips met the criteria for a methamphetamine dependency prior to her arrest. Ms Phillips explained her offending to the pre-sentence report writer by saying "I wasn't thinking, I was in love". At the time of sentencing Ms Phillips was completing the Salvation Army Residential Alcohol and Other Drug programme and reported that she had not used methamphetamine for 16 months. A psychologist's report prepared for sentencing considered a long term of imprisonment might trigger Ms Phillips' PTSD. The Judge considered a nine month discount was appropriate to reflect these circumstances.[121]

[211] The Judge also gave Ms Phillips a three month discount for remorse and a six month discount for time spent on restrictive bail conditions. Finally, a 15 per cent discount was given for Ms Phillips' guilty pleas entered a few weeks before trial.[122]

[212] The Judge ultimately imposed a sentence of four years and three months' imprisonment on the two charges of supplying methamphetamine. Sentences ranging from one month's imprisonment to two years' imprisonment were imposed on the remaining charges. The sentences were imposed concurrently. It may be observed that, by contrast, Mr Smith received a starting point of 17 years' imprisonment (an end sentence of thirteen years and six months' imprisonment) on two charges of supplying

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120 At [22], [23] and [25].
121 At [26]–[30].
122 At [31]–[33].

methamphetamine, and the representative charge of supplying methamphetamine, involving a quantity of 15 kilograms in all.[123]

Discussion

[213] Ms Pecotic for Ms Phillips submitted that the end sentence imposed by the Judge was manifestly excessive. Ms Phillips' sentence was said to be disproportionate to her culpability, as a result of her being sentenced on the basis of quantum, which dictated the starting point. As well as the starting point being too high, insufficient credit was given for Ms Phillips' personal mitigating circumstances and her guilty plea. A community-based sentence would have been in the best interests of both Ms Phillips and society.

[214] We address the starting point adopted and the discounts granted for Ms Phillips' personal circumstances and guilty pleas in turn.

[215] Ms Pecotic criticised the starting point adopted by the Judge as being dictated by quantum. She submitted that for offenders such as Ms Phillips, the appropriate approach is for culpability to be determined first, with quantum and the extent of commerciality being aggravating factors. On this approach, a starting point of two years or less could have been adopted. In assessing Ms Phillips' culpability, it was relevant that she did not own the drug and was merely acting as a driving companion for Mr Smith. Ms Phillips was in a relationship with Mr Smith at the time of the offending and was "very much under his influence". She was also in the grips of a drug addiction. Moreover Ms Phillips was not involved in the offending for commercial gain and obtained no commercial benefit. Her input in the offending was minimal. The charges in respect of Ms Phillips' personal dealing involved low-level transactions and the offending was for the purpose of feeding her drug addiction. In these circumstances, a community-based sentence should have been imposed.

[216] The Crown did not agree that quantity dictated Ms Phillips' starting point, noting that the quantity involved indicated a starting point firmly within band four of

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[123] *R v Smith* [2018] NZHC 2118 at [21] and [35]. The end sentence included a six month uplift for firearms charges.

Fatu was appropriate. However, the Judge took Ms Phillips' particular role and circumstances into account in reaching a starting point at the top of band one or the bottom of band two of *Fatu.* Had quantity been the determining factor, a starting point remaining within band four would have been adopted.

[217] We agree with the Crown that the Judge clearly took Ms Phillips' limited role in the joint offending with Mr Smith into account. While noting that Ms Phillips' offending fell within band four of *Fatu*, the Judge found that Ms Phillips' culpability was "significantly less than that of Mr Smith".[124] As mentioned, the Judge accepted that Ms Phillips accompanied Mr Smith out of a sense of loyalty. The starting point adopted by the Judge was generous in light of the *Fatu* paradigm, and was clearly not dictated by quantum as seen by the departure from the *Fatu* starting point range that corresponded to the quantity involved.

[218] Under the new sentencing guidelines, the quantity of methamphetamine involved in the main supplies engages band five, being over two kilograms. That engages a starting point between 10 years and life imprisonment, which is the same as band four under *Fatu*. The Judge applied a starting point of five years' imprisonment, well below the entry point, because of his appreciation of the very limited role played by Ms Phillips in an operation essentially conducted by Mr Smith. We do not think he was wrong to do so. For present purposes, therefore, we see no need to alter the starting point — bearing in mind also that the Crown does not challenge the sentence imposed.

[219] We agree with the one year uplift imposed for Ms Phillips' personal drug dealing charges. This results in a global starting point of six years. The six month uplift reflecting Ms Phillips' relevant previous convictions was also appropriate.

[220] Ms Phillips does not challenge the discounts given for time spent on restrictive bail and remorse. We agree those discounts were appropriate. The material before the Judge supported a finding that Ms Phillips displayed genuine and significant remorse.

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[124] *R v Phillips*, above n 118, at [21].

[221] In relation to Ms Phillips' personal circumstances, the discount of nine months given by the Judge amounted to approximately 15 per cent. Ms Pecotic submitted this was inadequate. Ms Phillips' background as set out in the psychological report and the affidavit she prepared for sentencing was directly linked to Ms Phillips' offending. She suffered from PTSD at the time of the offending. The traumatic event she experienced led to her consumption and ultimate addiction to methamphetamine. Consequently there is a clear documented nexus between her addiction and her offending. Ms Phillips had also made significant progress in addressing the reasons behind her addiction prior to her remand in custody and had engaged in rehabilitation.

[222] The Crown disputed the causal nexus alleged by Ms Phillips, pointing out that Ms Phillips indicated she was involved as a result of being "in love". On her own account, addiction was not the only, or significant, causative factor. Further her offending went well beyond what was required to feed her addiction. Apart from the two major supplies with Mr Smith, Ms Phillips had customers "all over the North Shore, Whangarei and South Auckland and travelled large distances to supply them at all hours of the day". The Crown submitted that the nine month discount awarded was generous. Ms Phillips' circumstances were said to be an example of a case where the mere presence of addiction will not necessarily have a significant effect on the assessment of culpability in the absence of a proper causal connection.

[223] We consider that a discount was warranted to reflect Ms Phillips' personal circumstances. It is apparent from the material before the Court that Ms Phillips has experienced significant trauma in her past. The result of this trauma, and the volatile nature of relationships in which she has been involved, have contributed to discernible depression and also led to her using methamphetamine as a coping mechanism. In consequence she became addicted to the drug, although she demonstrates the ability to shake that addiction off with rehabilitative intervention. We accept that, to a moderate degree, combined mental health and addiction issues contributed to the offending. We note also that the psychologist's report prepared for sentencing suggested a long term of imprisonment may trigger Ms Phillips' PTSD and make any sentence more difficult for her, as she will experience high levels of distress.

[224] We also consider the progress Ms Phillips made towards rehabilitation prior to sentencing deserves recognition. At the time of sentencing she was completing the Salvation Army Residential Alcohol and Other Drug programme and had remained addiction free for some time. The pre-sentence report also indicated she was receiving counselling. Considering Ms Phillips' personal circumstances in totality, we consider a discount of 30 per cent is appropriate. To avoid doubt, this discount is imposed equally on the bases that Ms Phillips' mental health and addiction issues were contributory, and that her personal circumstances would render a sentence of imprisonment more severe than for another offender.

[225] In respect of the 15 per cent guilty plea discount, Ms Pecotic submitted that the indication Ms Phillips would plead guilty was provided to the Crown well before trial, and the delay in entering the plea was because it took an inordinate length of time to reach agreement on the summary of facts. In terms of consistency, Ms Phillips ought to have been given the discount of approximately 20 per cent which was the credit permitted to the other offenders involved in the operation as part of a sentence indication process.

[226] The Crown submitted that the 15 per cent discount was appropriate, noting that all circumstances in which a plea has been entered must be taken into account.[125] Ms Phillips benefited from a negotiated summary of facts, on which she was sentenced. This resulted in delayed entry of pleas, but Ms Phillips cannot claim the benefit of both. Ultimately the plea was entered only a few weeks prior to trial, and consequently was not at the first available opportunity. The discount awarded was adequate.

[227] We agree with the Crown. The 15 per cent discount awarded was appropriate in the circumstances, particularly given Ms Phillips did not engage in the sentence indication process. However, the nine months' of further discounts given by the Judge — noted at [211] above — must carry through on appeal. The end result is a sentence of three years and two months' imprisonment.

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125 *Hessell v R*, above n 38, at [62].

Result

[228] Ms Phillips' appeal is allowed. Her sentence of four years and three months' imprisonment is quashed and substituted with a sentence of three years and two months' imprisonment.

Jacqueline Josephine Hobson

[229] Ms Hobson pleaded guilty to and was convicted of three charges of importing methamphetamine, three charges of possession of methamphetamine for supply and one charge of conspiracy to import methamphetamine. Judge Andrée Wiltens sentenced Ms Hobson to nine years' imprisonment on these charges, with a four and a half year minimum period of imprisonment.[126]

[230] Ms Hobson appeals against her sentence, saying the starting point was manifestly excessive as the *Fatu* bands are now inappropriate; there was a lack of parity with co-offenders; and the minimum period of imprisonment was imposed in error. Ms Hobson does not appeal the discounts given by the Judge for her personal circumstances and guilty plea.

Leave to appeal out of time

[231] Ms Hobson's appeal was filed approximately 13 months out of time. Ms Hobson has applied for an extension of time to file her appeal.[127] The Crown does not oppose the extension. We are satisfied it is appropriate to grant an extension of time to appeal and do so accordingly.

Background

[232] In February 2015, the New Zealand Customs Service commenced an investigation into the importation and distribution of methamphetamine by Ms Hobson and three co-offenders. The charges related to three successful importations of methamphetamine into New Zealand and one importation that was intercepted in Thailand.

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126 *R v Hobson* [2017] NZDC 18173.
127 Criminal Procedure Act, s 248(4).

[233] Ms Hobson's involvement was identified through text message content. Ms Hobson would text an addressee's name and postal address to the supplier in Thailand. A package containing methamphetamine would then be sent from Thailand to New Zealand. Three of the packages that arrived in New Zealand were collected by a co-offender and delivered to Ms Hobson. Ms Hobson would then prepare the methamphetamine for sale, with a co-offender assisting by providing equipment to weigh and package the drugs on one occasion. Ms Hobson would supply quantities of the drug to various persons for onward dealing, then collect the money owed from the sales and arrange the remittance of that money to Thailand as payment for the drugs; sometimes via her co-offenders.

[234] The quantity of methamphetamine identified by police in relation to the successful importations was a minimum of 300 grams. The failed importation (which was intercepted in Thailand) related to 290 grams of methamphetamine. The social costs associated with the former quantity alone would be some $371,000.[128]

Sentence appealed

[235] Given that a minimum of 300 grams had been imported, the Judge considered Ms Hobson's offending to fall within band three of *Fatu,* a starting point range of nine to 13 years' imprisonment. Had the conspiracy to import been successful, the further 290 grams would have placed Ms Hobson in band four, with a starting point between 12 years and life imprisonment. Taking these factors into account, the Judge considered that a starting point of 12 years' imprisonment was appropriate, reflecting 10 years for the importation charges and an uplift of two years for the conspiracy charge. In setting this starting point, the Judge had regard to the fact that Ms Hobson was an organiser of the importation, rather than a courier or a mule, and therefore had a significant role in the offending.[129]

[236] Although accepting that Ms Hobson's personal circumstances as reflected in the pre-sentence report were positive, the Judge considered this secondary to her

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128 See above at [80].

129 *R v Hobson*, above n 126, at [4]–[7] and [9]–[10]. The Judge considered a four year uplift would have been appropriate for the conspiracy charge but given an indication in the prosecution submissions that they would only seek a one year uplift had given Ms Hobson a "certain expectation", settled on a two year uplift.

significant criminal culpability, and therefore of limited assistance in terms of mitigation. The Judge also had regard to the sentences imposed on Ms Hobson's co-offenders, but noted that their roles were much lesser and personal circumstances more significant. In light of Ms Hobson's possible rehabilitation in time, the need to impose the least restrictive outcome, her late guilty plea and personal circumstances and community support, the Judge reduced the starting point by 20 per cent, rounding the sentence down to a total of nine years' imprisonment to be served on all charges concurrently.[130]

[237] The Judge also considered a minimum period of imprisonment was necessary to reflect that the offending involved importing three separate lots of methamphetamine, an attempt to import a fourth, larger lot, and selling it in the community. The Judge therefore imposed a four and a half year minimum period.[131]

Discussion

[238] Applying the new guidelines to Ms Hobson's offending, the quantity imported fits into band three (being more than 250 grams but under 500 grams). That attracts a potential sentence of six to 12 years' imprisonment. The amount concerned is just above the start of band three. Ms Hobson's role sits at the lower end of "leading", having a management function within the organisation and being in contact with the supplier in Thailand, but in a relatively unsophisticated operation. The summary of facts also suggests Ms Hobson, at least in the mid-to-latter stages of her offending was primarily motivated by financial gain. She was a user, but not addicted to methamphetamine. Consequently, the appropriate starting point under the proposed framework would be at the mid-point of the six to 12 year band. A starting point of nine years' imprisonment would be appropriate on the importation charges.

[239] Had Ms Hobson succeeded with the further offence of conspiracy, the total amount supplied would have been 590 grams of methamphetamine, warranting a starting point of 10 years and six months' imprisonment under the new sentencing

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130 At [11]–[13] and [15].
131 At [16] and [17].

guidelines.[132] Allocating half of that potential increase for the incomplete offence has been identified by this Court as the correct approach.[133] On this basis, an uplift of nine months is appropriate.

[240] It is difficult to assess the 20 per cent global discount adopted by the Judge without that figure having been broken down. However, we consider that a 10 per cent discount for Ms Hobson's potential for rehabilitation and a 10 per cent discount for her guilty plea is generous but within range. This results in an end sentence of seven years and 10 months' imprisonment, to be served on all charges concurrently.

[241] In respect of parity, Mr Bailey submitted that Ms Hobson's co-offender, Ms Matiu was given a starting point of four years' imprisonment, despite being involved in all three importations (and therefore fitting into band three of *Fatu*, which should apply regardless of role).[134] This manifestly inadequate starting point, combined with an excessive discount, resulted in an end sentence of nine months' home detention. There was such a disparity between Ms Matiu's sentence and Ms Hobson's that intervention was required in the form of a reduction in Ms Hobson's sentence.

[242] We do not consider Ms Hobson's sentence ought to be lowered on this basis. Although it is generally desirable that there is consistency of sentences between offenders committing the same or similar offences,[135] this principle is not absolute.[136] Rather, the question is whether a reasonable-minded independent observer, having regard to all the circumstances, would think that something had gone wrong with the sentencing process.[137] A lenient or unusually merciful sentence extended to one offender cannot create a legitimate expectation that other related offenders will receive the same indulgence.[138] Here, Ms Hobson was significantly more culpable than Ms Matiu, being the leader of the operation.[139]

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132 However, the maximum penalty for conspiracy to supply a Class A drug is 14 years' imprisonment: Misuse of Drugs Act, s 6(2A).
133 *Parata v R* [2017] NZCA 48 at [5].
134 *R v Matiu* [2016] NZDC 14859.
135 Sentencing Act, s 8(e).
136 *O'Sullivan v R* [2015] NZCA 147 at [21].
137 At [21], citing *R v Lawson* [1982] 2 NZLR 219 (CA) at 223.
138 *Anderson v R* [2019] NZCA 294 at [39], citing *Macfarlane v R* [2012] NZCA 317 at [24].
139 See, for example, *Chen v R* [2019] NZCA 299 at [54].

Minimum period of imprisonment

[243] Finally, Ms Hobson submitted that the Judge misapplied the s 86 statutory criteria and/or placed too much emphasis on deterrence and therefore wrongly imposed a minimum period of imprisonment.

[244] We accept this argument. There is nothing out of the ordinary about Ms Hobson's offending. Although she was in essence running the operation, it was relatively small. Ms Hobson's risk of reoffending was assessed in the pre-sentence report as medium but her rehabilitative prospects and ability to comply with any sentence imposed were high. She had accepted responsibility for her actions and, although she had prior criminal convictions, none were for drug dealing. Her degree of insight into her offending made her, in the view of the pre-sentence report writer, a suitable candidate for a short rehabilitative programme. In due course Ms Hobson will return to the community within New Zealand. There are at least reasonable prospects that she will not re-engage in drug-dealing. We think this is a case where rehabilitative prospects must be given their ordinary scope, if possible. The extent of offending, although grave, does not call for unusual intervention. In these circumstances, we do not consider the concerns of deterrence or protection of the community (or any of the other purposes in s 86(2)) to be engaged such as to warrant the imposition of a minimum period of imprisonment.

Result

[245] We allow Ms Hobson's appeal, quashing her sentence of nine years' imprisonment and substituting a sentence of seven years and 10 months' imprisonment, to be served on all charges concurrently, with no minimum period of imprisonment.

Jing Yuan Zhang

[246] Mr Zhang pleaded guilty to and was convicted of one charge of importing 17.9 kilograms of methamphetamine. Judge Johns sentenced him to eight years and

six months' imprisonment with a 50 per cent minimum period of imprisonment (that is, four years and three months).[140]

[247] Mr Zhang appeals the imposition of the minimum period of imprisonment on the basis that it is manifestly excessive.

Background

[248] Mr Zhang is a Canadian national. He arrived in New Zealand on 24 January 2018 with a female associate and was issued with a three month visa permit.

[249] On 20 February 2018, a courier consignment, labelled as "toner", arrived in New Zealand addressed to Mr Zhang from the United States. On 22 February, New Zealand Post, after deeming the consignment to be of a commercial nature, contacted the importer advising that the consignment required customs clearance before it could be released. Mr Zhang contacted the New Zealand Customs Service on 13 March and subsequently obtained an importer code. On 15 March, the consignment was examined by customs officers. There were twelve toner cartridges, containing approximately 18 kilograms of a white powder substance. When tested on site, the presence of methamphetamine was identified.

[250] The powder was replaced with a placebo substance and a controlled delivery of the packages was conducted on 21 March at approximately 12.26 pm.[141] Mr Zhang accepted delivery. At about 3.30 pm he left the address and bought two 20 litre containers, a large plastic spoon, a plastic mallet, a set of scales and ziplock bags. At about 6.00 pm customs officers executed a search warrant at the address. They found Mr Zhang in the kitchen. Of the three packages delivered earlier, one was located in the lounge and the other two in a bedroom. The package in the lounge was open and the placebo substances had been extracted and placed into two plastic bags. The other two packages were unopened. The search also uncovered three mobile phones, a laptop and the items purchased earlier. Mr Zhang was arrested.

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140 *R v Zhang* [2018] NZDC 19381.
141 Misuse of Drugs Amendment Act 1978, s 12.

[251] Subsequent testing established that there was 17.9 kilograms of powder which contained methamphetamine with a purity of 80 per cent. The Judge said this quantity of methamphetamine would be worth between $4,743,000 and $8,950,000.[142] The social harm caused by a successful importation and distribution of this quantity would be of the order of $22 million.[143]

Sentence appealed

[252] The Judge set a starting point of 17 years' imprisonment in band four of *Fatu*.[144]

[253] The Judge noted that Mr Zhang was remorseful, had no previous convictions and was previously of good character and living a productive life. The Judge also referred to "additional information" she had received the benefit of, which Mr Zhang says reflects the fact that he cooperated with and assisted the New Zealand Customs Service. Mr Zhang also pleaded guilty at an early opportunity. The Judge determined that a 50 per cent total discount for all these factors was appropriate. This brought the end sentence to eight years and six months' imprisonment.[145]

[254] The Judge imposed a 50 per cent minimum period of imprisonment. In doing so, the Judge referred to the purposes in s 86 of the Sentencing Act and said she needed to consider if the usual parole period would be insufficient for any of the purposes specified therein. The Judge further held that:

> [26] In cases involving significant importations of methamphetamine and the like minimum terms of imprisonment are routinely in fact nearly always imposed, and whilst you have received a significant discount, it does not detract from the serious offending that you were involved in. In my view is if you were to be paroled on the first occasion, it would not be sufficient to hold you accountable for the harm done nor denounce your conduct or try and deter you and others from like offending. My view is that, in the circumstances, a minimum period of imprisonment of 50 percent should be imposed.

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142 *R v Zhang*, above n 140, at [10].
143 See above at [80].
144 *R v Zhang*, above n 140, at [22].
145 At [11], [23]–[24] and [27].

Discussion

[255] Though Mr Zhang does not appeal his sentence (merely the imposition of the minimum period of imprisonment), we make a brief comment on how the new sentencing guidelines would apply to Mr Zhang's offending. First, the quantity at issue falls clearly into category five (being well over two kilograms).

[256] We would assess the role played by Mr Zhang as significant, but at the lower end. He served an operational function within a chain, travelling to New Zealand to meet a consignment of drugs once it arrived and taking steps to ensure it cleared customs. Moreover, the actions he took after he received the consignment indicate that he was intending to package it for sale. In that respect, Mr Zhang was more than merely a "catcher". However, there is no evidence demonstrating that he was to take an active role in the supply stage of the operation. In his pre-sentence report interview Mr Zhang indicated that he was being supplied with money for receiving the packages, but the quantity or relative proportion of that compensation is not in evidence. There is also no evidence that he was involved in directing others in the operation and he himself appears to have been receiving instructions from someone higher up in the chain of command.

[257] The available range of starting points is between 10 years' and life imprisonment. Because Mr Zhang's role is at the lower end of significant, but the import involves a large quantity of methamphetamine, with potentially very serious consequences, we would have set the starting point at 15 years' imprisonment.

[258] As discussed, the Judge gave discounts totalling 50 per cent. The correct sentencing methodology is to apply any discounts for personal mitigating factors first, followed by any discounts for guilty pleas. The Judge should not have combined these discounts together. However, our view is that the discounts given by the Judge could properly be divided into a 30 per cent discount for personal mitigating factors and a 20 per cent discount for the guilty plea.

[259] We consider the 30 per cent discount for personal mitigating factors to be within range. The 20 per cent guilty plea discount is also appropriate, Mr Zhang having pleaded guilty at an early stage.

[260] Applying these discounts in the correct order, Mr Zhang's end sentence would have been eight years and five months' imprisonment. Had the sentence been challenged, we would not have disturbed it on appeal on the basis of this one month reduction from the sentence in fact imposed.

Minimum period of imprisonment

[261] Mr Corlett submitted that Mr Zhang's sentence was manifestly excessive because a minimum period of imprisonment was neither necessary nor justified for any of the purposes of sentencing listed in s 86(2) of the Sentencing Act and therefore should not have been imposed. Mr Zhang's personal circumstances strongly indicated that a minimum period of imprisonment was not warranted, namely: that he was a young man, he accepted his role in the offending at the earliest opportunity and expressed remorse, he was previously of good character and he was assessed as being at low risk of reoffending.

[262] The Crown submitted that the ordinary parole period would be insufficient to hold Mr Zhang accountable, denounce his conduct and deter others. Whilst the Crown accepted that public protection was not a significant consideration, given Mr Zhang has no previous convictions and has been assessed as posing a low risk of reoffending, it was noted that importing 17.9 kilograms of high purity methamphetamine into New Zealand is grave offending. The offending bears the hallmark of organised transnational criminals targeting New Zealand communities. Moreover, Mr Zhang had no addiction issues so must have been motivated by profit, increasing the seriousness of the offending.[146]

[263] Given that Mr Zhang is a first time offender and has been assessed at being at low risk of reoffending, we accept that community protection alone would not justify a minimum period of imprisonment. The provision of assistance to authorities is also a factor weighing arguably against imposition of a minimum period of imprisonment. However, this was knowing participation in substantial, commercial-scale drug offending with potentially very serious social consequences. It is unmitigated by vulnerability of any kind. Absent imposition of a minimum period, Mr Zhang would

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146 Relying on *Nguyen v R* [2007] NSWCCA 15.

be eligible for release after just two years and 10 months' imprisonment. We consider that would send an unacceptable message to those participating, or minded to participate, in commercial-scale drug dealing. Mr Zhang is now remorseful and he poses little future risk to New Zealand, but deterrence, denunciation and accountability for commercial-scale drug offending, all require he serve a longer sentence than two years and 10 months' imprisonment. We therefore agree with the Judge that a minimum period of 50 per cent of the end sentence was justified in this case.

Result

[264] Mr Zhang's appeal accordingly is dismissed.

Shane Thompson

[265] Mr Thompson pleaded guilty to one representative charge of supplying 4.2 kilograms of methamphetamine, and one charge of possessing 2.6 kilograms of methamphetamine for supply. Mr Thompson was sentenced by Judge Rea in the District Court at Napier to 13 years' imprisonment on these charges, with a 50 per cent minimum period of imprisonment.[147] Mr Thompson appeals against the imposition of the minimum period of imprisonment only.

Leave to appeal out of time

[266] Mr Thompson's notice of appeal was filed approximately five months out of time. The Crown does not oppose Mr Thompson's application for an extension of time and we are satisfied an extension is appropriate in the circumstances. We grant an extension of time in which to appeal accordingly.

Background

[267] It was not disputed at sentencing that Mr Thompson was the principal offender in an extensive methamphetamine distributing network which he had established in the Hawke's Bay. The Judge described Mr Thompson as being in business in a very sophisticated and complex way and the most comprehensive methamphetamine dealer

147 *R v Thompson* [2018] NZDC 11394.

Hawke's Bay has ever seen. Mr Thompson was involved in supplying methamphetamine at both wholesale and retail level between November 2016 and September 2017. He arranged for others to make deliveries and receive payments and was constantly fielding calls or texts from lower level suppliers. Written records of deliveries were kept and there was a high turnover rate.[148]

[268] A total of 4.2 kilograms of methamphetamine was supplied by Mr Thompson. On termination of the police operation that detected this offending, Mr Thompson was found in possession of a further 2.6 kilograms of methamphetamine, located at a co-offender's address. Mr Thompson himself did not use methamphetamine. The social harm associated with the successful distribution of these quantities would exceed $8 million.[149]

Sentence appealed

[269] The Judge set a starting point of 18 years' imprisonment, in band four of *Fatu*. A six month discount for time spent on electronically monitored bail was awarded, as well as an agreed three month discount for the forfeiture of certain vehicles. A full discount of 25 per cent was awarded for Mr Thompson's guilty pleas. The resulting sentence of 13 years' imprisonment was imposed concurrently on each charge.[150]

[270] A minimum period of imprisonment of 50 per cent, being six years and six months, was imposed. The Judge said:

> [14] There has been debate about a minimum non-parole period. It is almost standard for somebody who operates methamphetamine dealing at the level you have, to incur a minimum non-parole period. In fact, the authorities show pretty clearly that almost always anybody who is sentenced to nine years or more will receive a minimum non-parole period. They are necessary to hold you accountable for the harm that you have done to the community and to individuals by this offending. You probably do not see or accept that but that is the very real truth of it.
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> [15] Your conduct needs to be denounced and there needs to be a deterrent to you and to others involved in a similar offending. Lastly, and perhaps far more importantly, there is a need to protect the community from the continued distribution of this drug.

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148 At [4]–[5] and [8].
149 See above at [80].
150 *R v Thompson*, above n 147, at [11]–[13].

> [16] I set the minimum non-parole period at half of the sentence so there will be a minimum non-parole period of six years and six months. …

Discussion

[271] Though Mr Thompson does not contest his sentence of 13 years' imprisonment, as with Mr Zhang we make a brief comment on how the new sentencing guidelines would apply to Mr Thompson's offending.

[272] Under the new sentencing guidelines, a starting point range of 10 years to life imprisonment would apply to the supply charge. This reflects the fact that the quantity involved (4.2 kilograms) falls into band five. As the principal offender in a large methamphetamine distribution network, Mr Thompson's role falls into the top end of the leading role band. A starting point of 16 years' imprisonment on the supply charge is within the available range. A two year uplift to reflect the possession for supply charge would also be appropriate. We therefore consider the Judge's starting point of 18 years' imprisonment on both charges to be within range under the new guidelines.

[273] The discounts awarded by the Judge to reflect Mr Thompson's personal circumstances were orthodox and would not be affected by the changes we have signalled above.

Minimum period of imprisonment

[274] The question remains whether the Judge erred in imposing a minimum period of imprisonment under s 86 of the Sentencing Act.

[275] Mr Phelps for Mr Thompson submitted that the Judge simply imposed a minimum period of imprisonment to reflect the s 86(2) factors, without the nuanced analysis that the section requires. On a fulsome analysis of Mr Thompson's personal circumstances, a minimum period of imprisonment was inappropriate. Mr Thompson accepted responsibility at an early stage, had a relatively minor criminal history,[151] and had not been sentenced to imprisonment previously. The pre-sentence report was

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[151] Consisting of nine District Court convictions, the majority being for driving offences.

indicative of positive family support, and his risk of reoffending was assessed as being low. In these circumstances, any term of imprisonment let alone a term of 13 years carried with it in significant measure the purposes of deterrence, denunciation and accountability. Mr Thompson's offending was not driven by an addiction to methamphetamine, meaning his prospects of rehabilitation and reintegration were more positive than those who had succumbed to addiction. It was submitted that given the nature of Mr Thompson's offending and the length of the sentence it was not feasible that parole would in fact be granted at the one third mark.

[276] The Crown submitted that a minimum period of imprisonment was justified. While acknowledging that Mr Thompson's attitude following arrest was to his credit, the Judge's characterisation of the methamphetamine operation illustrated just how serious his conduct was. Accountability and denunciation therefore assumed particular importance in Mr Thompson's case. It was also suggested the absence of addiction could in fact be considered to increase the seriousness of the offending, as Mr Thompson was not motivated by addiction but by profit — there being something particularly insidious about offending that exploits others' addictions for financial gain. While Mr Thompson was assessed as having a low risk of reoffending, the high turnover and persistent nature of his operation while it was running meant the Judge was entitled to consider public protection as a relevant factor. The Crown concluded that Mr Thompson's offending, being large-scale and premised on the exploitation of others for the purpose of financial gain, properly engaged the criteria in s 86.

[277] We begin by observing that, in accordance with the discussion above in this judgment, a sentence of nine years or above should not be viewed as a threshold above which the imposition of a minimum period of imprisonment is expected.[152] Rather in each and every case an enquiry must be made as to whether the minimum period of imprisonment that would otherwise apply would be insufficient to achieve the prescribed purposes in s 86(2).

[278] We therefore agree with Mr Phelps that a more particular analysis of s 86 as it applied to the current facts was required. We note Mr Thompson's acceptance of

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[152] See above at [172].

responsibility, his family support, and the fact he was assessed as being at a low risk of reoffending are factors which, as in Ms Hobson's appeal, tend against imposition of a minimum period of imprisonment. They are factors which arguably diminish the community protection consideration in s 86(2)(d).

[279] However, we consider the imposition of a 50 per cent minimum period of imprisonment was nonetheless appropriate in this instance. We agree with the Crown that accountability and denunciation assume particular importance in this case, such that s 86(2) is engaged. Mr Thompson established and led a very substantial operation of methamphetamine distribution and was engaged in the offending over a relatively long period of time (almost one year). We do not accept that the absence of addiction tells against the imposition of a minimum period of imprisonment; rather we agree with the Crown that it makes Mr Thompson's offending more serious and calls for greater accountability. Mr Thompson's willingness to accept responsibility for his actions, commendable as it is, does not detract from this analysis. To some extent it is recognised in the discount awarded for his early guilty plea, and we do not consider a separate discount for remorse is warranted.

[280] While Mr Phelps submitted it would be unlikely that Mr Thompson would receive parole after the minimum one third period, this is a matter for the Parole Board. We do not consider it appropriate for the Court to speculate as to Mr Thompson's likely release date. The statutory test is clear. We are satisfied that the minimum period of imprisonment that is otherwise applicable would not be sufficient to hold Mr Thompson accountable for the harm done to the community, denounce his conduct, and deter other persons from committing the same or a similar offence. Indeed, given the leading role played by Mr Thompson, unmitigated by vulnerability or youth, we consider a greater minimum period of imprisonment than 50 per cent might well have been justifiable.

Result

[281] Mr Thompson's appeal is dismissed.

Lok Sing Yip

[282] Mr Yip pleaded guilty to seven charges of methamphetamine offending — two of importing, two of supply and one of attempted supply, and two of possession for supply. These charges were all committed jointly with Messrs Kam and Chan. On 9 February 2016, Woodhouse J sentenced Mr Yip to 16 years and six months' imprisonment on the lead charge of importing, with an eight year minimum period of imprisonment.[153]

[283] Mr Yip appeals against his sentence on the basis that his starting point was too high in light of his role and the sentence of his co-offender, Mr Chan. Further disparity resulted from the imposition of a minimum period of imprisonment for Mr Yip but not Mr Chan. A minimum period of imprisonment was not warranted.

Leave to appeal out of time

[284] Mr Yip's appeal was brought approximately two years and nine months out of time. Mr Yip filed an affidavit in which he states that he expressed dissatisfaction with his sentence after the sentencing, but trial counsel indicated it was satisfactory and should not be appealed. His subsequent attempts to arrange for other lawyers to visit him to discuss his case were hindered by his lack of support in New Zealand and the fact he spoke limited English.

[285] The Crown opposes this extension of time. In the ordinary course of events, a delay of this duration would require considerable scrutiny. However given the nature of this judgment, and acknowledging Mr Yip's personal circumstances, particularly the difficulties associated with being a foreign national incarcerated in New Zealand with limited English, we consider it is appropriate to grant an extension of time to bring the appeal and we do so accordingly.

Background

[286] Mr Yip was part of a criminal organisation based in Hong Kong. The organisation sent him to New Zealand to participate in the importation and

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153 *R v Kam* [2016] NZHC 110.

distribution of methamphetamine. Mr Yip acknowledged that he was "effectively the person on the ground in New Zealand taking instructions from Hong Kong and passing these onto others".[154]

[287] The lead importing offence occurred on 5 March 2015. A consignment was imported on a ship. Approximately 60.9 kilograms of methamphetamine was concealed inside garden hoses in the container. The consignment was intercepted by police and customs officials. All but 20 grams of the methamphetamine was replaced with a placebo. The consignment was delivered to a storage unit in Mt Eden on 24 March. We note that the social harm associated with a successful distribution of 60.9 kilograms of methamphetamine, had that occurred, would have been of the order of $75 million.[155]

[288] Mr Yip had arrived in Auckland on 14 March 2015 with his girlfriend — Ms Ng — and travelled to the South Island as part of a tour group. They both returned to Auckland on 19 March, travelled to Rotorua and stayed one night there, then travelled back to Auckland. On 20 March, Mr Yip and Ms Ng were picked up by Mr Kam and Mr Chan and taken to an address where Mr Yip communicated with other operatives in Hong Kong and New Zealand about the importation and arranging supplies. Mr Yip was also involved in the methamphetamine extraction process. Finally, he arranged for the imported methamphetamine to be on-sold to various clients.

[289] The further instance of importing involved the importation of a package directed to the Mt Eden storage unit on 15 March 2015. It contained methamphetamine crystals, the precise quantity of which could not be established, mixed with grey powder.[156]

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154 At [9].
155 See above at [80].
156 The other charges arose out of the lead offending: *R v Kam,* above n 153, at [10]–[13].

Sentence appealed

[290] Based on the lead charge of importing 60.9 kilograms of methamphetamine, the Judge set a starting point of 25 years' imprisonment.[157]

[291] In respect of personal circumstances, the Judge considered Mr Yip's youth (he was 20 years old at the time of the offending); the lack of evidence that Mr Yip was to take a share of the profit from the drug dealing, merely a "modest" payment of $10,000 (given the street value of the methamphetamine might have been around $60 million); the lack of previous convictions; genuine remorse; the fact Mr Yip spoke and likely read little English; and lack of family support in New Zealand. A three year reduction was given for these circumstances (a 12 per cent discount). Mr Yip also received a 25 per cent discount for his guilty pleas, resulting in an end sentence of 16 years and six months' imprisonment.[158]

[292] The Judge then applied a minimum period of imprisonment of eight years on the basis that s 86 of the Sentencing Act and relevant authorities clearly indicated a minimum period should be imposed.[159] The sentences imposed for the other charges were to be served concurrently.

Discussion

[293] The quantity of methamphetamine imported in the lead offence is 60.9 kilograms. Under the new guidelines, this falls into band five, well surpassing the threshold of two kilograms and is high up in that category. We note that the sentencing Judge understood this to be the second largest seizure of imported methamphetamine into New Zealand at that time.[160]

[294] Regarding role, Mr Corlett submitted that more emphasis should have been placed upon Mr Yip's "limited" role in setting the starting point and not just on quantity. Mr Yip's role was also not so markedly different from that of his co-offender Mr Chan that a difference of five years in starting point was appropriate.

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157 At [19].
158 At [21], [35], [37], [40] and [41].
159 At [43] and [48(a)].
160 At [8].

[295] The Crown opposed the characterisation of Mr Yip's role as being "limited", submitting that Mr Yip's culpability was affected by the enormity of the operation and his role was essential to the criminal enterprise — given he was the person "on the ground" in New Zealand, and was involved in extraction and supply. The fact that he was working for a fixed fee did not reduce his culpability.

[296] In relation to the disparity argument, the Crown submitted that this Court considered Mr Yip's role in Mr Chan's appeal and found that he had greater responsibility than his co-offenders. It was said that:[161]

> [23] Mr Yip … was the more senior of the three and gave instructions in New Zealand to both Mr Chan and Mr Kam. Mr Chan undertook tasks with Mr Kam, but the evidence supports the conclusion that Mr Kam and Mr Yip held positions of greater responsibility and undertook a wider range of tasks to facilitate the importation. Mr Kam and Mr Yip completed the paperwork in connection with the importation. Mr Chan had no role in that. Mr Kam and Mr Yip were involved in the processing of the drug in New Zealand; "cleaning" or "drying" the drugs. Mr Chan played no role in that. Mr Kam and Mr Yip were involved in setting up supply transactions, as evidenced by coded text communications. Mr Chan was not party to coded drug communications, playing only a minor role in the supply. Although each of the three men communicated with Hong Kong direct, the evidence as to the circumstances of the offending and the roles played supports the conclusion that Messrs Kam and Yip were more closely tied to the Hong Kong-based criminal organisation behind the importations and were higher in the hierarchy of that organisation.

[297] The Crown said that Mr Yip's submission that Mr Chan was sentenced following a trial in which Mr Yip did not participate, and was therefore unable to contest factual assertions made about his role, was immaterial. The description of Mr Yip's role in *Chan v R* was consistent with the description of his role by the sentencing Judge.

[298] We would assess the role played by Mr Yip as a leading one. It seems that he had substantial links to the Hong Kong criminal organisation from whom it appears the drugs were sourced, and had some importance in the hierarchy of that organisation. He relayed instructions from Hong Kong to other members of the operation in New Zealand and supervised a co-offender. He must have understood the large scale of the operation. He had oversight of the extraction process and brought materials to

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161 *Chan v R* [2018] NZCA 148.

New Zealand to facilitate this. He was involved in setting up supply transactions. All these activities show that Mr Yip was involved in importing methamphetamine on a commercial scale. The pre-sentence report indicated that financial advantage was the primary motivator for Mr Yip, in the form of a cash payment of around $10,000.

[299] However, two factors prevent this offending from falling at the highest end of the leading role description. First, the compensation Mr Yip was to receive, though not insignificant, was out of proportion to the quantity of drugs and the risk involved. The Judge noted that the street value of 60 kilograms of methamphetamine might be around $60 million. There was no evidence that Mr Yip was to receive a share of the profits beyond the one-off payment. Secondly, it does not appear that Mr Yip had a significant amount of decision-making power. It appears that most decisions were reserved for members of the criminal operation in Hong Kong and were merely relayed to the New Zealand operatives by Mr Yip. The operatives in Hong Kong masterminded the importing operation. Mr Yip was not the leader of that hierarchy, but an employee.

[300] The starting point available under category five is in the range of 10 years to life imprisonment. Because of the very high quantity and Mr Yip's mid-to-lower level leading role in the offending, we would set the starting point at 23 years' imprisonment. In differing slightly from the Judge, we place somewhat greater emphasis on the two mitigating considerations noted in the preceding paragraph at stage one of the sentencing process. Given this adjustment to the starting point, there is no need to consider the disparity argument any further.

[301] Turning to personal circumstances, we agree that a discount is warranted for Mr Yip's youth; his genuine remorse (as assessed by the Judge); lack of prior convictions; limited English and the fact that his support systems were in Hong Kong. In particular, as discussed above, the denial of family support to foreign nationals imprisoned for drug offending may be treated as a mitigating factor as it renders a sentence of imprisonment more severe.[162] This is such a circumstance. The discount

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[162] See above at [163].

was not contested by either party on appeal, and we consider a three year discount, which in light of the reduced sentence amounts to a 13 per cent discount, to be appropriate.

[302] The Judge gave a full 25 per cent discount for the guilty plea. Although we consider this discount generous, as Mr Yip did not indicate a definitive intention to plead guilty until seven months after he was charged, we do not propose to disturb it here.

[303] This results in an end sentence of 15 years' imprisonment.

Minimum period of imprisonment

[304] As noted by Mr Corlett, the Judge did not articulate reasons as to why a minimum period of imprisonment should be imposed. The Judge said:[163]

> Neither defence counsel submitted that there should not be a minimum period of imprisonment. Section 86 of the Sentencing Act, and the authorities on that provision — the cases on that provision — indicate clearly that there should be a minimum period of imprisonment, and there will be one of around 50%.

[305] Mr Corlett said that this Court should consider the imposition of a minimum period of imprisonment afresh. A minimum period was not warranted in light of the fact that Mr Yip is a young foreign national with no previous convictions, who is remorseful and pleaded guilty, and who will be deported upon release.

[306] The Crown submitted that a minimum period of imprisonment was warranted. Mr Yip's offending involved one of the most serious methamphetamine importations in New Zealand history. Accordingly it was "difficult to see" how a standard one-third non-parole period could adequately meet the purposes of accountability, deterrence, public protection and particularly the need for denunciation. In response to the points made by Mr Yip the Crown submitted that the authorities show that a minimum period of imprisonment may be imposed on a young person or a foreign national.[164]

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163 *R v Kam*, above n 153, at [43].
164 *Hart v R* [2017] NZCA 521 at [15]; and *O'Connor v R* [2016] NZCA 414 at [34] and [40].

[307] We note that the Judge should have provided reasons why a minimum period of imprisonment was required to serve the purposes in s 86 of the Sentencing Act.

[308] However, we are satisfied that, as in the appeal by Mr Zhang, a minimum period of imprisonment was required in this case. This was knowing participation in substantial, commercial-scale drug offending with potentially extremely serious social consequences. Mr Yip played a leading role in organising that criminal activity, albeit at a mid-to-lower level. As in Mr Zhang's case, his participation was unmitigated by vulnerability of any kind. Absent imposition of a minimum period of imprisonment, Mr Yip would be eligible for release after five years' imprisonment. Again, we consider that would send an unacceptable message to those participating, or minded to participate, in commercial-scale drug dealing. The sheer scale of that offending, plainly appreciated by Mr Yip, means the considerations of deterrence, denunciation and accountability for commercial-scale drug offending all require he serve a longer sentence than five years' imprisonment. A minimum period of imprisonment of 50 per cent of the end sentence was justified in this case. But for the factors mitigating the extent to which Mr Yip undertook a fully leading role, and his youth, it might justifiably have been higher.

Result

[309] The appeal is allowed. The sentence imposed of 16 years and six months' imprisonment is quashed and is substituted with a sentence of 15 years' imprisonment on the lead importing charge, to be served concurrently with the sentences imposed by the sentencing Judge on the other charges.

[310] The minimum period of imprisonment on the lead importing charge is quashed and substituted with a minimum period of imprisonment of seven years and six months.

E. RESULT

[311] We set out the results in the order analysed above.

CA783/2018 Crighton v R

[312] The application for leave to bring a second appeal is granted.

[313] The appeal against sentence will be allowed, but further submissions are sought on formal disposition of the appeal in light of [201] and [202] of the judgment.

CA771/2018 Phillips v R

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

[315] The application to adduce further evidence on appeal is declined.

[316] The appeal against sentence is allowed.

[317] The sentence of four years and three months' imprisonment is quashed and substituted with a sentence of three years and two months' imprisonment.

CA617/2018 Hobson v R

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

[319] The appeal against sentence is allowed.

[320] The sentence of nine years' imprisonment is quashed and substituted with a sentence of seven years and 10 months' imprisonment.

[321] The minimum period of imprisonment is quashed.

CA606/2018 Zhang v R

[322] The appeal against sentence is dismissed.

CA726/2018 Thompson v R

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

[324] The appeal against sentence is dismissed.

CA750/2018 Yip v R

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

[326] The appeal against sentence is allowed.

[327] The sentence of 16 years and six months' imprisonment is quashed and substituted with a sentence of 15 years' imprisonment.

[328] The minimum period of imprisonment is quashed and substituted with a minimum period of imprisonment of seven years and six months.

Solicitors:
Bamford Law, Nelson for Appellant Crighton
Crown Law Office, Wellington for Respondent
Human Rights Commission, Wellington for Human Rights Commission as Intervener
Gibson Sheat, Lower Hutt for New Zealand Law Society and New Zealand Bar Association as Interveners
Public Defence Service, Wellington for Public Defence Service as Intervener
Kāhui Legal, Wellington for Te Hunga Rōia Māori o Aotearoa as Intervener

SCHEDULE — GRAPHS REFERRED TO AT [94] OF THIS JUDGMENT

We provide these notes for the reader:

(a) The first graph shows the correlation between starting point and quantity across all *Fatu* bands.

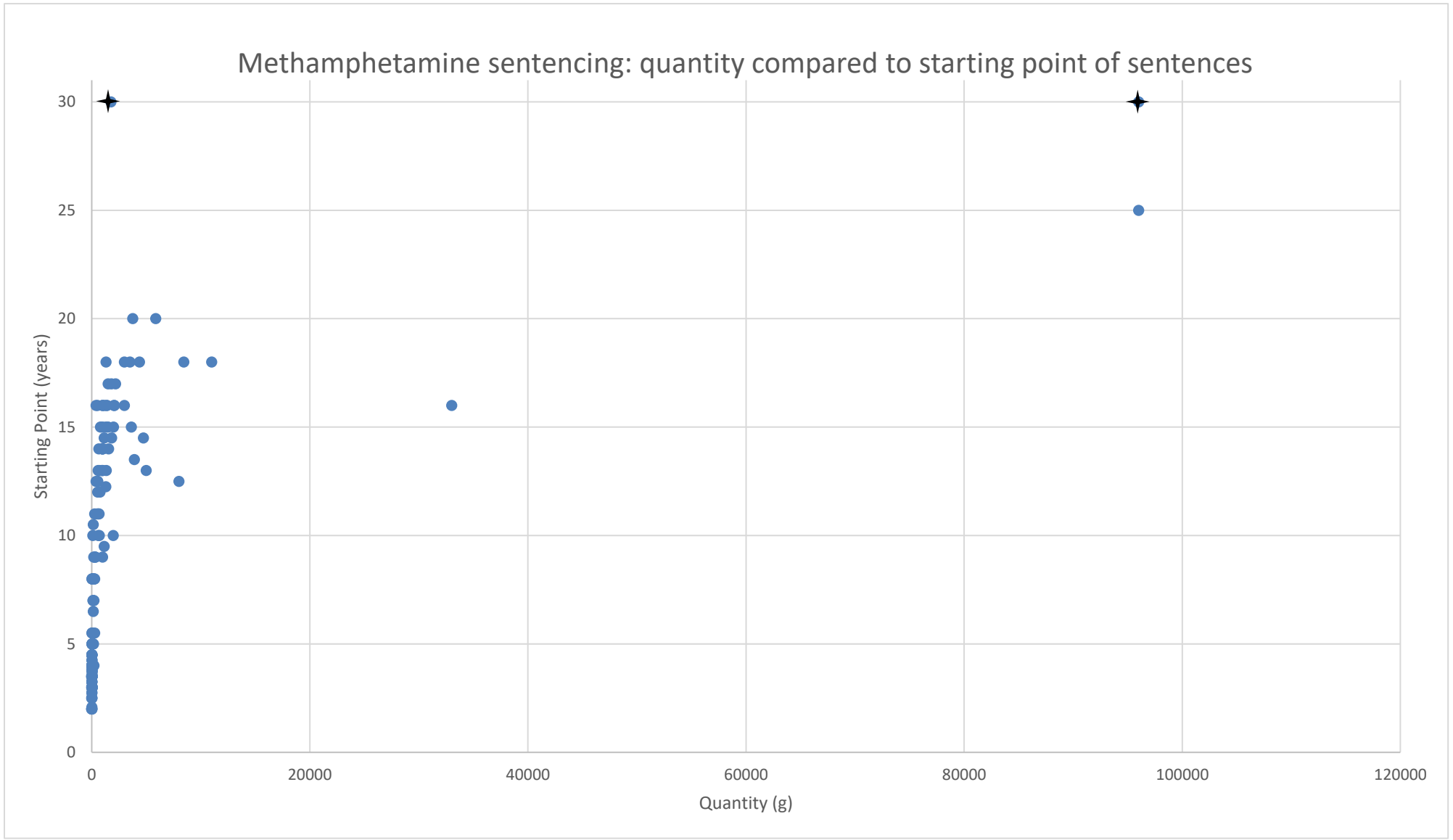
(b) There is then a graph for each *Fatu* band.

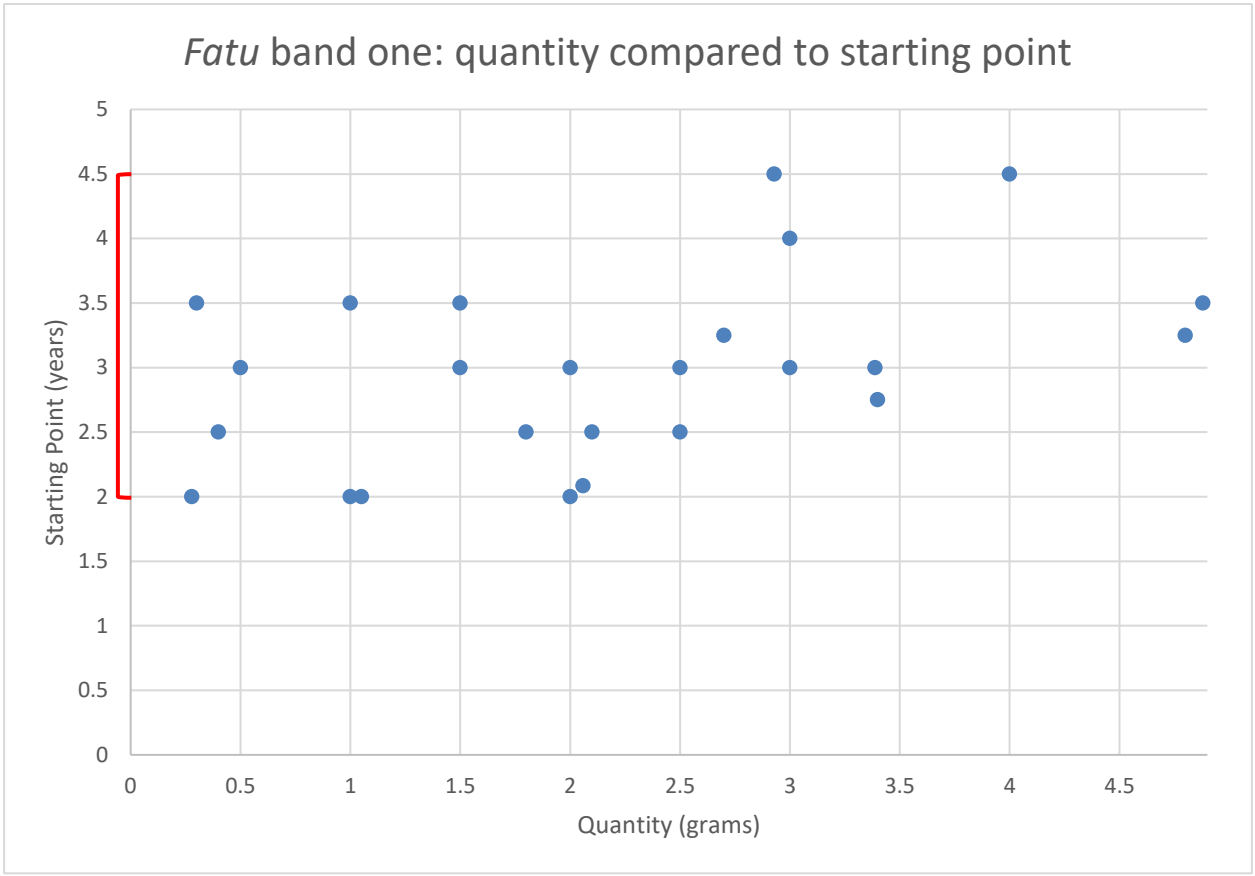
(c) The final graph captures part of the data shown in the penultimate graph, for *Fatu* band four.

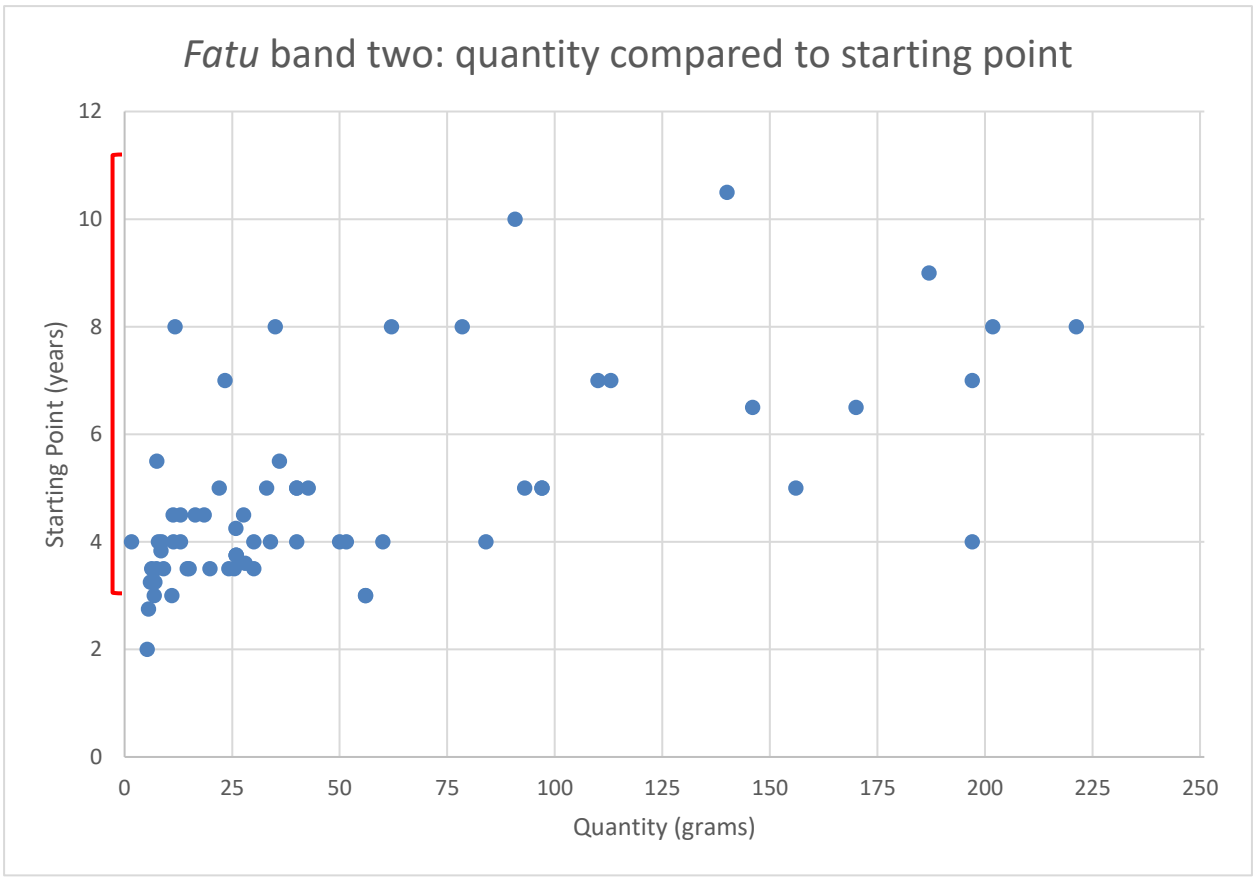
(d) When we have sorted the data into bands, we have done so according to the quantity that the band captures (except for one charge of manufacturing based on an amount less than five grams that has been placed in band two, given there is no band one for manufacture).

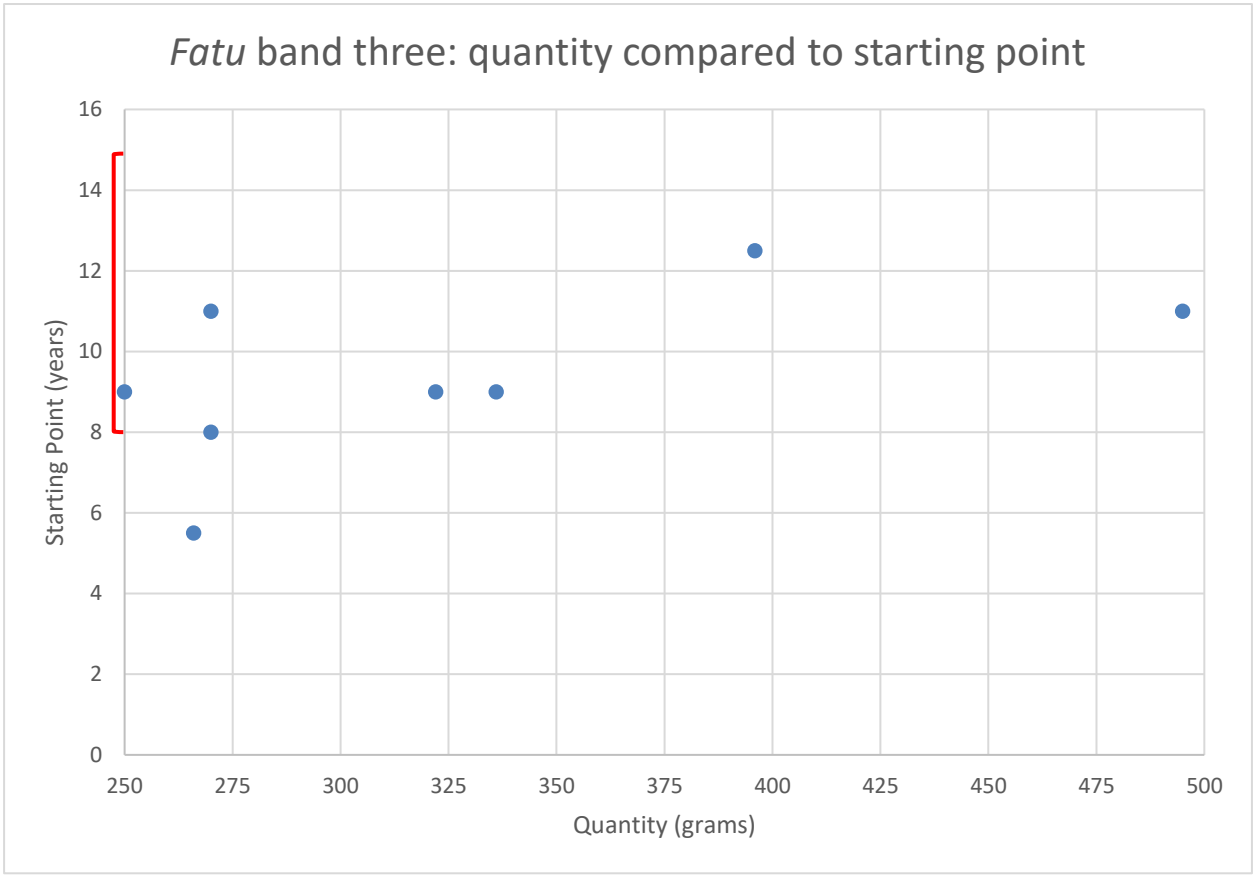
(e) Red lines to the side of the graphs indicate the range of starting points that *Fatu* says should be used for quantities within that band (all forms of offending).

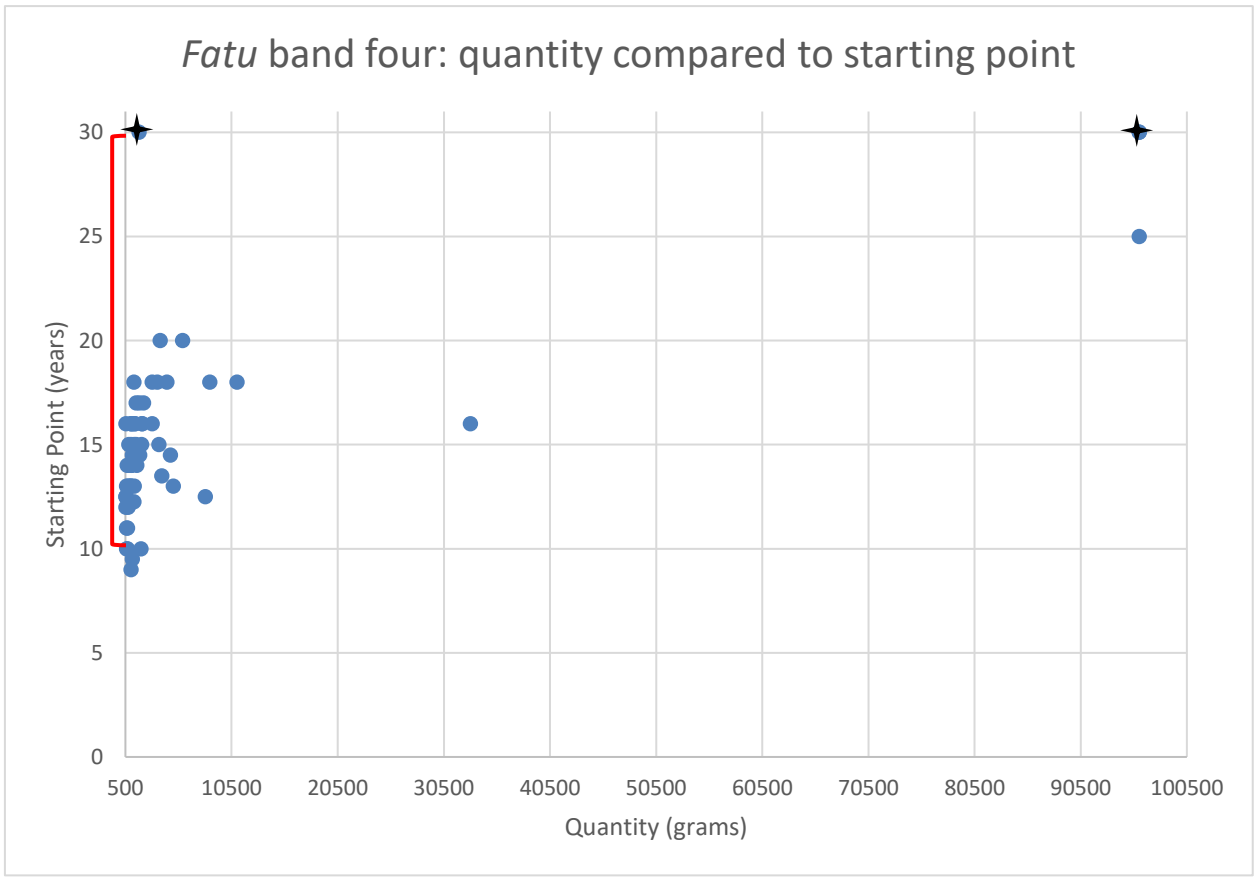
(f) Crosses on the first graph and band four graphs are sentences of life imprisonment.

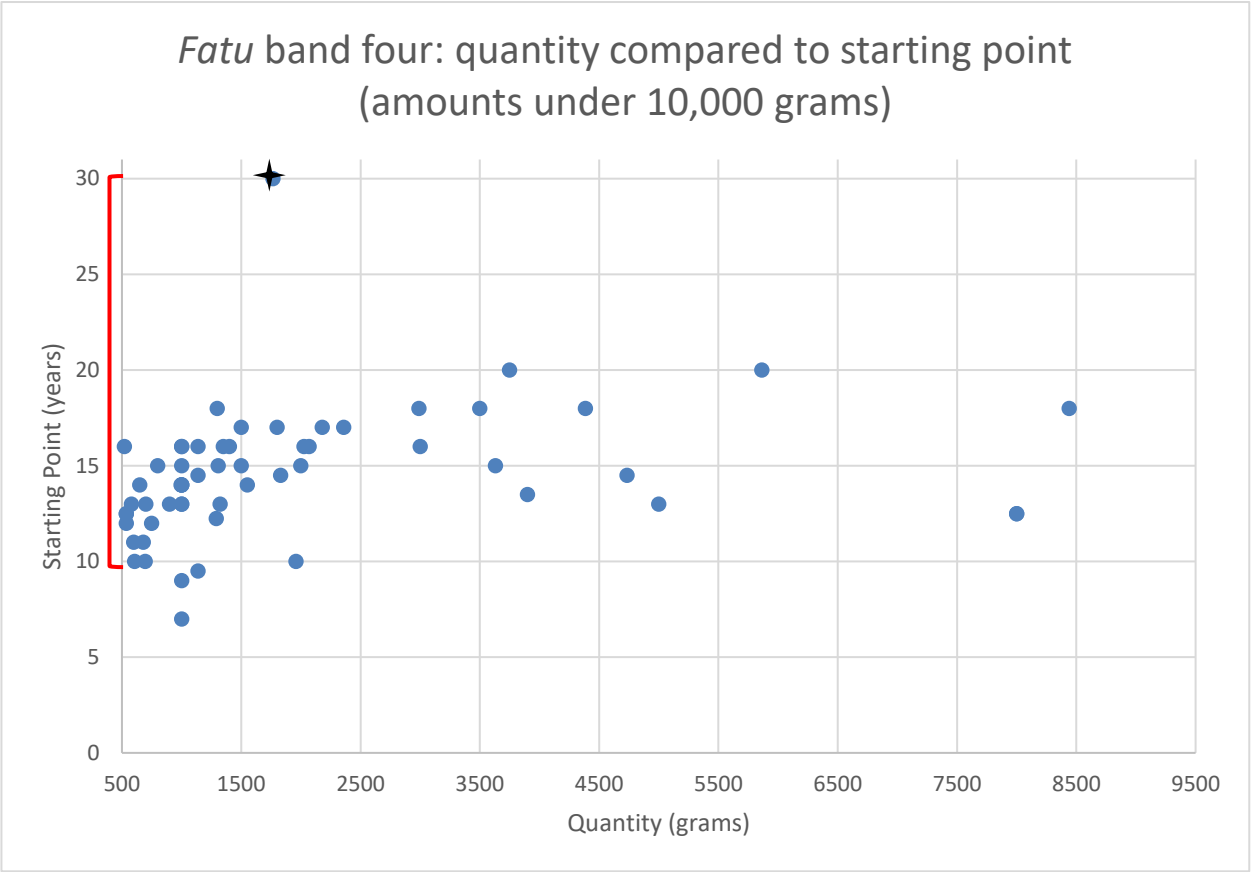

Methamphetamine sentencing: quantity compared to starting point of sentences
Starting Point (years)
30
25
20
15
10
5
0
0
20000
40000
60000
80000
100000
120000
Quantity (g)


Fatu band one: quantity compared to starting point
Starting Point (years)
Quantity (grams)
0
0.5
1
1.5
2
2.5
3
3.5
4
4.5
5


Fatu band two: quantity compared to starting point
Starting Point (years)
Quantity (grams)
0
2
4
6
8
10
12
0
25
50
75
100
125
150
175
200
225
250


Fatu band three: quantity compared to starting point
Starting Point (years)
16
14
12
10
8
6
4
2
0
250
275
300
325
350
375
400
425
450
475
500
Quantity (grams)


Fatu band four: quantity compared to starting point
Starting Point (years)
30
25
20
15
10
5
0
500
10500
20500
30500
40500
50500
60500
70500
80500
90500
100500
Quantity (grams)


Fatu band four: quantity compared to starting point
(amounts under 10,000 grams)
Starting Point (years)
30
25
20
15
10
5
0
500
1500
2500
3500
4500
5500
6500
7500
8500
9500
Quantity (grams)