

28 and a half years' imprisonment, with a minimum period of imprisonment of 10 years.¹

[2] The sentences were imposed by Moore J in April 2017 on the basis of the guidelines on methamphetamine sentencing set out in this Court's decision in *R v Fatu*.² In May 2017 Mr Harding filed an appeal in relation to his conviction and his sentence. His conviction appeal was heard in May 2019 and was dismissed on 26 June 2019.³ The sentence appeal was postponed pending the outcome of this Court's review of sentencing for methamphetamine offending. On 21 October 2019 this Court delivered a new guideline judgment in relation to sentencing for methamphetamine offending: *Zhang v R*.⁴

[3] Mr Harding's counsel concedes that the sentence was available under *R v Fatu*. The appeal is brought on the basis that *Zhang* has changed the sentencing levels for manufacturing methamphetamine.

[4] We do not consider that the decision in *Zhang* requires any change to the overall starting point of 30 years' imprisonment adopted in the High Court. Nor do we consider that the end sentence imposed of 28 and a half years' imprisonment was manifestly excessive. We therefore dismiss the appeal.

Background

[5] Mr Harding, who was aged 40 when he was sentenced, was a patched member of the Headhunters motorcycle gang. He put together, and directed, a group of 11 other patched members and associates of the gang (the Group) to manufacture methamphetamine on an industrial scale. It was very successful. During the short period in which the Organised and Financial Crime Agency of New Zealand gathered evidence on the Group (September 2014 to December 2014) there were six separate manufactures of methamphetamine which produced at least 6.5 kilograms of the drug.

¹ *R v Harding* [2017] NZHC 675 [High Court decision]. An order was also made under s 32(3) of the Misuse of Drugs Act 1975 for the forfeiture of a sum of \$120. There was no challenge to that order on appeal.

² *R v Fatu* [2006] 2 NZLR 72 (CA).

³ *Harding v R* [2019] NZCA 259.

⁴ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

It was very potent. The purity level was 73 per cent which is very close to the maximum technically achievable.

[6] Mr Harding's Group supplied the methamphetamine they manufactured to others in the Headhunters gang for sale into the Auckland market. It was only the intervention by the police which prevented the Group from continuing to manufacture and distribute the drug.

[7] Mr Harding's role was not limited to overall direction of the Group. He was personally involved in all aspects of the work of manufacturing and distributing the methamphetamine. That included sourcing the precursor substances to be used in the manufacturing.

[8] Mr Harding was not an addict. He never used methamphetamine. He was motivated by profit. He told the pre-sentence report writer he would do it all again.

[9] This case was at the time of sentencing, and according to counsel's research remains, the largest single case of manufacturing to have come before the courts in New Zealand. The sentencing Judge commented:⁵

[27] What is also striking about your operation was the multiplicity and diversity of the roles of the various participants. In September the operation was relatively modest but grew larger and more sophisticated over the period of interceptions. Different members of the Group carried out different functions. There were those who worked inside the house either as lead cooks or as assistants to the cooks. There were those involved in the weighing and packaging of the drug for distribution and sale. Others, including your family members, provided assistance by delivering essential equipment and materials or by driving the main participants to and from the address. I have also sentenced those who were involved in the distribution of the drug or helped in hiding or concealing the profits generated by the Group's activities. Some participants assumed multiple roles. Some were involved at the beginning; others later. The cooks and their assistants worked in shifts. The manufacturing was undertaken in batches rather like a factory assembly line with different phases being run by one cook and other phases by different cooks. All, to a greater or lesser extent, worked together in a co-ordinated fashion which ensured the success of the wider operation. And you were the co-ordinator of it all.

⁵ High Court decision, above n 1.

[10] Mr Harding was arrested in December 2014. A number of participants in the Group’s activities were also arrested. The four principal “cooks” all pleaded guilty and received sentences with starting points ranging from 19 to 25 years’ imprisonment. Other defendants, whose culpability was somewhat lower, were sentenced as parties to manufacturing methamphetamine and possession of methamphetamine for supply, and participating in an organised criminal group.

[11] Mr Harding was initially charged with a large number of offences. However, as a result of negotiations between the Crown and the defence, it was agreed that if he pleaded guilty to 11 charges the balance would be withdrawn. On 2 June 2016 Mr Harding pleaded guilty to 11 charges, including six charges of manufacturing methamphetamine. The charges are set out in full in the table below:

Charge	Particulars	Dates of Offences	Maximum penalty
1	Manufacture methamphetamine	23 to 26 September 2014	Life imprisonment
2	Manufacture methamphetamine	30 September to 1 October 2014	Life imprisonment
3	Manufacture methamphetamine	8 to 9 October 2014	Life imprisonment
4	Manufacture methamphetamine	20 to 23 October 2014	Life imprisonment
5	Manufacture methamphetamine	28 to 31 October 2014	Life imprisonment
6	Supplied Evanda Harding with Pseudoephedrine	30 October 2014	14 years’ imprisonment
7	Conspired to supply class A controlled drug	5 November 2014	14 years’ imprisonment
8	Manufacture methamphetamine	6 to 14 November 2014	Life imprisonment
9	Possessed a class A controlled drug for supply	14 November 2014	Life imprisonment
10	Conspired to supply methamphetamine	15 November 2014	14 years’ imprisonment
11	Participates in an organised criminal group	23 September 2014 to 16 December 2014	10 years’ imprisonment

[12] Mr Harding's sentencing was adjourned on a number of occasions because it was agreed it was preferable to sentence him after his co-defendants' positions had been determined. Sentencing was set down for 1 September 2016. However there were further delays. Following those delays Mr Harding made an application to vacate his guilty pleas in relation to a number of the charges.

[13] On 4 April 2017 Mr Harding's application to vacate his pleas of guilty was heard by Moore J, who dismissed the application.⁶

[14] The Judge then conducted a disputed facts hearing under s 24 of the Sentencing Act 2002. The Judge concluded that he was satisfied beyond reasonable doubt that Mr Harding was, at all material times, the director and undisputed head of the Group's manufacturing and distribution operation. The Judge was also satisfied beyond reasonable doubt that at least 6.5 kilograms of methamphetamine was manufactured by the Group which Mr Harding headed.⁷

[15] On the basis of the findings made at the disputed facts hearing, the Judge proceeded to sentence Mr Harding on 7 April 2017.

High Court sentencing decision

[16] After setting out the relevant facts and the procedural background to Mr Harding's sentencing, the Judge began his analysis of the appropriate sentence by considering whether a sentence of life imprisonment should be imposed. Section 8(c) of the Sentencing Act provides that:

... [the Court] must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate...

[17] The Judge considered that the offending should be assessed globally. He said:⁸

[54] I now turn to consider the appropriate sentence. The lead charges, as accepted by all counsel, are obviously the six charges of manufacturing methamphetamine. However, in your case I agree with the Crown that it

⁶ *Harding v R* [2017] NZHC 1188.

⁷ *R v Harding* [2017] NZHC 1181 at [116]–[117].

⁸ High Court decision, above n 1. (Footnotes omitted).

would be somewhat arbitrary and artificial to separate out your remaining offences and apply discrete uplifts for each of these. They are all closely connected to the manufacturing charges and your role as head of the Group. Instead, I shall assess your offending "globally" and select a starting point which reflects your total culpability. Furthermore, because the charges are of a "similar kind" and "connected" the appropriate approach is to impose concurrent sentences.

[18] The Judge held that the quantity of the drug produced and Mr Harding's leading role in it engaged s 8(c): Mr Harding's offending "does fit within the most serious of cases of methamphetamine manufacture for which life imprisonment is prescribed".⁹

[19] The Judge then turned to consider Mr Harding's personal circumstances, and whether they were such as to make a life sentence inappropriate.

[20] The Judge recorded that Mr Harding had 43 previous convictions, but no previous convictions for drug-related offending.¹⁰

[21] The Judge considered that Mr Harding's lack of previous drug-related offending, combined with his guilty pleas, made a sentence of life imprisonment inappropriate. This was a judgment he reached "by a fine margin". The Judge was not convinced the offending, while undoubtedly serious, had risen to the level which calls for a sentence of life imprisonment on its own.¹¹

[22] It was therefore necessary for the Judge to determine what an appropriate finite sentence would be in his case. In the usual way, the Judge began by assessing a starting point appropriate for the offending. He moved on to consider Mr Harding's personal circumstances. He then considered what discount, if any, should be allowed to reflect Mr Harding's guilty plea.

Starting point

[23] The Judge began by comparing Mr Harding's culpability with that of other participants in the Group's activities. He placed his culpability above that of

⁹ At [65].

¹⁰ At [68] and [73].

¹¹ At [75].

Mr Rogers, who was involved in all six of the manufactures and was involved in some distribution of the product. His starting point was 25 years' imprisonment. Mr Hura was involved in five manufactures but was not involved in the distribution of the product or precursors. He did not share in the profits. Lang J set his starting point at 21 years' imprisonment. Mr Mangu was involved in three manufactures. In two of those he played a relatively minor role but he was actively engaged in the sixth phase. Moore J set the starting point for him at 20 years' imprisonment. Mr Lang was involved in two manufactures. He played a minor role in the fourth phase and was a good deal more active in the sixth. He was not involved in distribution and he did not share in any profits. Moore J set Mr Lang's starting point at 19 years' imprisonment.¹²

[24] The Judge set a starting point for Mr Harding's involvement in the six manufactures of between 25 and 26 years' imprisonment. He considered that figure needed to be uplifted to take into account the supply of large quantities of pseudoephedrine and the possession for supply of large quantities of methamphetamine. The Judge said that an uplift of the order of four to five years would be appropriate, bringing the overall starting point to one of 30 years' imprisonment.¹³

[25] The Judge said that in setting the figure of 30 years he had also had regard to a number of cases involving large importations of methamphetamine. He noted that in *Fatu* some comment was made about methamphetamine manufacturing being in a worse class of offending than importation, reflecting the dangers implicit in manufacture and the period over which it takes place. And it is rare for the primary organisers of importations to be caught. Those apprehended tend to be lower in the hierarchy.¹⁴

[26] The Judge referred to *R v Sze*¹⁵ and *R v Yuen*¹⁶ in which a husband and wife oversaw the importation of 40 kilograms of methamphetamine into this country. An overall starting point of 23 years' imprisonment was adopted for the husband and

¹² At [78]–[80].

¹³ At [82].

¹⁴ At [83].

¹⁵ *R v Sze* [2016] NZHC 1703.

¹⁶ *R v Yuen* [2016] NZHC 571.

22 years' imprisonment for the wife. In *R v Kam* a starting point of 25 years' imprisonment was adopted for a defendant who took delivery of over 60 kilograms of methamphetamine imported into this country.¹⁷ In another recent case¹⁸ a starting point of 30 years' imprisonment was adopted for an offender who was a "conscientious participant" in a syndicate which imported nearly 500 kilograms of methamphetamine into New Zealand, the largest importation case to come before the courts at that time.¹⁹

[27] The Judge said that it was the lesser roles played by these offenders that precluded sentences of life imprisonment despite the massive quantities involved. The Judge considered that Mr Harding's role as superintendent of the largest methamphetamine manufacture to come before the New Zealand courts placed his culpability somewhere near the "conscientious participant" in New Zealand's largest importation case. That reinforced the correctness of the 30-year starting point he had adopted.²⁰

Personal circumstances

[28] The Judge then turned to the second stage, and addressed Mr Harding's personal circumstances. The Judge considered that there was nothing in his personal circumstances which could attract a sentencing discount.²¹

Guilty plea

[29] The Judge set out the complex procedural background to Mr Harding's guilty pleas, including the attempt to withdraw them and the disputed facts hearing. The Judge considered that given the delay, cost and prevarication which those steps involved, Mr Harding was entitled to only a five per cent discount for his guilty pleas.²²

¹⁷ *R v Kam* [2016] NZHC 110.

¹⁸ The details of this offender have been suppressed.

¹⁹ High Court decision, above n 1, at [86].

²⁰ At [86].

²¹ At [87].

²² At [88]–[91].

End sentence

[30] Taking all those factors into account, the Judge considered the appropriate sentence was 28 and a half years' imprisonment. The Judge imposed that sentence on each of the six charges of manufacturing methamphetamine and lesser sentences on the other charges. All sentences were concurrent.

[31] The Judge imposed a minimum period of imprisonment of 10 years' imprisonment. Section 86(4) of the Sentencing Act provides that a minimum period of imprisonment in respect of a finite sentence must not exceed the lesser of two-thirds of the full term of the sentence or 10 years' imprisonment. So 10 years was the applicable limit in Mr Harding's case.

Appellant's submissions

[32] Mr Harré, counsel for Mr Harding, submitted that although the High Court decision could not be impeached under the *Fatu* guidelines, it needed to be revisited in light of *Zhang*. In particular, he submitted, following *Zhang* it is not appropriate to distinguish between manufacturing methamphetamine and other offences under s 6(1) of the Misuse of Drugs Act 1975, such as importation. The manufacture of 6.5 kilograms of methamphetamine needs to be seen in context, alongside the large quantities that are imported into New Zealand. Set in that context, it cannot be said that Mr Harding's offending falls within s 8(c) of the Sentencing Act: it is not within the most serious of cases to which s 6(1) of the Misuse of Drugs Act applies. And in that context, the finite sentence imposed on Mr Harding was manifestly excessive.

[33] Mr Harré accepted that Mr Harding had played a leading role in the manufacture of 6.5 kilograms of methamphetamine. But he submitted that that does not put him in the same position as a person with a leading role in relation to the importation of tens or hundreds of kilograms of methamphetamine. The extent of harm caused by his activities, and thus his culpability, should be informed by the relatively modest quantity of methamphetamine compared with the benchmark set by importation cases. Mr Harré submitted that organising importation of large quantities of methamphetamine into New Zealand involved more complexity and more "moving parts" than a manufacturing operation such as Mr Harding's.

[34] In response to questions from the Court about parity with Mr Harding's co-offenders, Mr Harré submitted that the relevance of the sentences imposed on those co-offenders was tempered by the fact that those sentences were imposed under the *Fatu* guidelines, and by the possibility of appeals by them in light of *Zhang* and in light of the outcome of the present appeal.

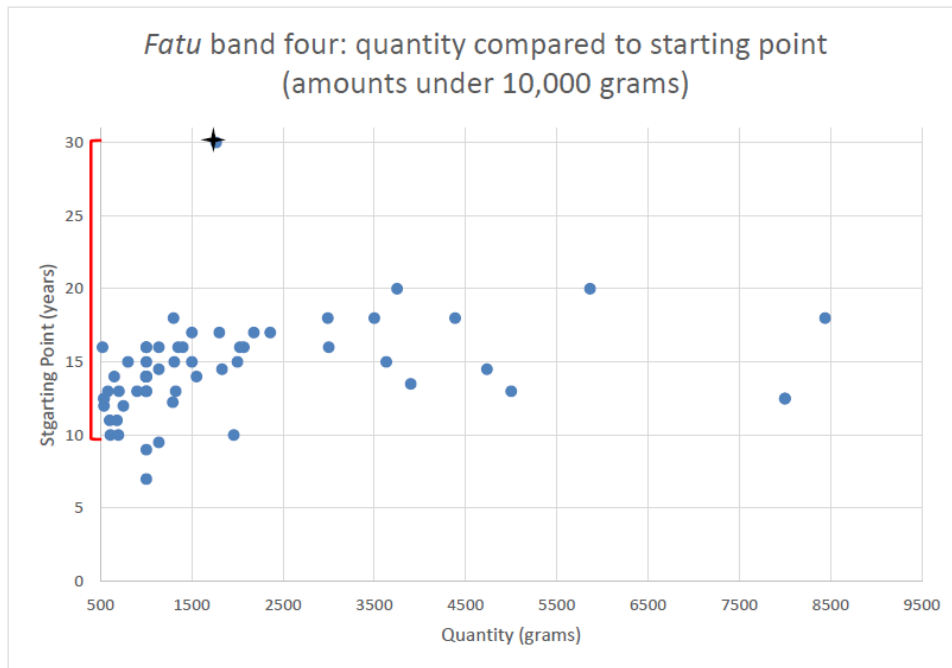
[35] Mr Harré suggested that a parallel could be drawn with one of the appellants in the *Zhang* decision, Mr Thompson. Mr Thompson pleaded guilty to one representative charge of supplying 4.2 kilograms of methamphetamine, and one charge of possessing 2.6 kilograms of methamphetamine for supply. So his offending involved an overall quantity of 6.8 kilograms of methamphetamine. The sentencing Judge adopted a starting point of 16 years' imprisonment on the supply charge, with a two-year uplift to reflect the possession for supply charge. On appeal this Court observed that as the principal offender in a large methamphetamine distribution network, Mr Thompson's role fell into the top end of the leading role band. The starting point of 16 years' imprisonment on the supply charge, and the overall starting point of 18 years' imprisonment on both charges, were "within range under the new guidelines".²³

[36] Mr Harré submitted that following *Zhang*, it was not appropriate to distinguish between Mr Harding and Mr Thompson on the basis that they offended against different limbs of s 6(1) of the Misuse of Drugs Act. Manufacturing was no longer to be seen as intrinsically more serious offending.

[37] Mr Harré accepted that the offences for which the appellant was convicted fall within band five of *Zhang*, which contemplates a starting point of 10 years' to life imprisonment. He also accepted that the appellant played a leading role in the offending. And he accepted that *Zhang* was of most benefit to defendants offending at a lower scale than the appellant. But set in the broader context of offending against s 6(1) of the Misuse of Drugs Act, Mr Harding's offending should not be seen as sitting at the very top of the scale. Mr Harré drew our attention to the chart of sentencing appeal decisions relating to methamphetamine in the range of

²³ *Zhang*, above n 4, at [272].

500 grams to 10 kilograms included in this Court's judgment in *Zhang*, which we set out below for ease of reference:²⁴



[38] Mr Harré submitted that by reference to that chart, it could be seen that the starting point of 30 years' imprisonment was an outlier by a significant margin.

[39] Turning to mitigating factors, Mr Harré submitted that factors relating to the appellant's mental health and issues surrounding addiction, which were set out in the pre-sentence report and in a psychiatric assessment, were not properly taken into account. They should have attracted discounts.

[40] On the material available to the Court at sentencing, it was apparent that the appellant suffered from personality disorders on the spectrum of sociopathy. Mr Harré submitted that this should be treated as reducing the appellant's moral culpability, and thus attract a discount.

[41] Mr Harré also submitted that there was a potential causal connection between the offending and the appellant's addiction issues relating to alcohol and gambling. He accepted it could not be put higher than that.

²⁴ See the Schedule attached to *Zhang v R*, above n 4.

Analysis

[42] As the Judge said, Mr Harding sat at the apex of the most significant methamphetamine manufacturing operation yet seen in New Zealand. He directed every facet of the manufacturing including the downstream supply of the product. The quantity produced was significant: 6.5 kilograms.

[43] On quantity alone, Mr Harding’s manufacturing of methamphetamine clearly falls within band five of the *Zhang* bands:²⁵

	Former: <i>Fatu</i>	New: <i>Zhang</i>
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

[44] Mr Harding’s leading role in the operation means that his sentence must be at the upper end of this band.

[45] In *Zhang* this Court decided that the guideline bands should not be subdivided functionally between supply, importation and manufacturing. These offences are punished identically under s 6(2) of the Misuse of Drugs Act because “the harm caused is identical regardless of method”. Rather:²⁶

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.

[46] Manufacturing methamphetamine carries a maximum sentence of life imprisonment.²⁷ Section 8(c) of the Sentencing Act provides that the Court *must*

²⁵ At [125].

²⁶ At [122].

²⁷ Misuse of Drugs Act, s 6(2)(a).

impose life imprisonment on Mr Harding if his offending is within the most serious cases of manufacturing, unless his personal circumstances make that inappropriate.

[47] In our view, the scale of the offending, and particularly Mr Harding's apex role in it, meant life imprisonment had to be considered. The Judge stepped back from life imprisonment "by a fine margin" because Mr Harding's criminal history did not show he was a recidivist drug dealing offender and he eventually entered pleas of guilty. We agree that the Judge was correct to step back from life imprisonment.

[48] The charges additional to the six manufacturing charges capture the extent of Mr Harding's role. They are not subsumed by the manufacturing charges. Mr Harding was not a manufacturer of methamphetamine as a contractor producing the drug on order and handing it over to his principal. The manufacturing was part of his commercial operation to sell methamphetamine through the Headhunters to the Auckland market.

[49] We do not consider that the culpability of Mr Harding's offending is diminished in any way by the fact that in recent years very large quantities of methamphetamine have been imported into New Zealand. It remains the case that this was a major manufacturing operation and is within the most serious cases of its type. Mr Harding sat at its apex and was involved in every facet of its activities.

[50] We accept Mr Harré's submission that there is no reason for manufacturers of very large quantities of methamphetamine to be punished more severely than importers, other things — in particular, role — being equal. We also accept that manufacture and importation are not intrinsically more culpable than the establishment and operation of a major distribution network. Each step in the chain is necessary for the drugs to reach end users and cause the social harm that the legislation is aimed at reducing. But, just as quantity must be the first step in assessing culpability, so must role be the second step.

[51] We do not consider that this Court's observations in *Zhang* about the sentence imposed on Mr Thompson suggest the overall starting point of 30 years' imprisonment in the present case is too high. Mr Thompson's offending was summarised at [35]

above. The quantity involved in his offending (6.8 kilograms of methamphetamine in total) was very similar. Mr Thompson was the principal offender in an extensive methamphetamine distribution network which he had established in Hawke's Bay. The Judge who sentenced Mr Thompson described him as being in business in a very sophisticated and complex way, and the most comprehensive methamphetamine dealer Hawke's Bay has ever seen. He was involved in supplying methamphetamine at both wholesale and retail level between November 2016 and September 2017. The Judge set a starting point of 18 years' imprisonment. As noted above, this Court considered that that starting point was within range under the new guidelines. However that was not a sentence imposed by this Court, and it was not challenged on appeal: only the minimum period of imprisonment imposed was in issue. So only limited guidance is provided by this Court's observation that the starting point was within range. And we see Mr Harding's culpability as significantly greater than Mr Thompson's, in particular because he was the leader in both the manufacture and supply of the drug.

[52] The Judge in the present case chose to assess the overall starting point by fixing a starting point for the six manufacturing charges and then uplifting it for the other charges. He could equally have assessed all the charges "globally" (as he initially said he would do). Our task is to decide whether, however calculated, the end sentence of 28 and a half years' imprisonment is manifestly excessive.

[53] In our view, given the preceding discussion, the overall starting point of 30 years' imprisonment was available to the Judge.

[54] We do not accept Mr Harré's submission that the Judge's starting point of 25 to 26 years' imprisonment for the six manufacturing charges should be revisited in light of *Zhang*. As Ms Grau for the Crown submitted, nothing in *Zhang* suggests that more lenient sentences are appropriate for offenders who play a leading role in offences falling within the highest quantity band identified in that case.

[55] Nor do we consider that the starting point of 25 to 26 years' imprisonment is an outlier by reference to the chart of pre-*Zhang* sentences set out at [37] above, having

regard to Mr Harding's directing role in the manufacture of such large quantities of methamphetamine.

[56] The remaining charges capture Mr Harding's criminality beyond having the directing role in the manufacturing. The Judge chose to impose an uplift of four to five years' imprisonment to recognise that. In doing so he risked double counting. But, on a totality basis, as we have said, we accept the overall starting point of 30 years was within range.

Adjustments for personal circumstances

[57] We agree with the Judge that there is no evidence establishing the necessary link between any mental health issues, or Mr Harding's abuse of alcohol and gambling, and the offending. In particular, there is nothing to suggest that any of those matters impaired Mr Harding's ability to exercise rational choice in relation to the offending. If anything, Mr Harding's personality issues underscore the risk he poses to the community, as the Crown submitted. None of these factors can justify a discount.

Guilty plea

[58] We agree with the Judge that a five per cent discount was the most that could be appropriate for Mr Harding's guilty pleas, having regard to the steps he subsequently took to seek to withdraw those pleas and the need for a disputed facts hearing on sentencing.

Overall assessment

[59] In summary, we are not persuaded that the matters raised by Mr Harré support the conclusion that the sentence imposed was inconsistent with the approach to methamphetamine sentencing adopted by this Court in *Zhang*. Nor are we persuaded that the sentence was manifestly excessive.

[60] We consider, however, that the length of the sentence imposed in this case raises an issue that may need to be considered by this Court in the future: are finite sentences of this length consistent with the purposes and principles of

the Sentencing Act? It could be argued that a sentence of 30 years' imprisonment does not materially contribute to the goals of accountability, denunciation or deterrence, as compared with a sentence of (say) 20 years' imprisonment, and could only be justified if a sentence of that length is required to protect the community in a particular case.²⁸

[61] One of us (Goddard J) considers that there is a second issue that emerges from this appeal that may need to be considered by this Court in the future. It might be argued that the sentence of 28 and a half years' imprisonment imposed on a person in Mr Harding's circumstances (a Māori male in his early 40s) is tantamount to a life sentence. That argument might be informed by statistical information about the healthy life expectancy of relevant demographic groups (in this case, Māori males). If personal circumstances render a life sentence inappropriate under s 8(3) of the Sentencing Act, they also arguably render inappropriate a finite sentence that is tantamount to a life sentence for that particular offender.

[62] However neither of these arguments was pursued in the present appeal. If they had been, the Court would have needed to consider whether they should be heard by a Full Court. It would not be appropriate for us to comment on either issue in this judgment.

[63] For the sake of completeness, we note that there was no challenge to the imposition of a 10-year minimum period of imprisonment.

Result

[64] The appeal against sentence is dismissed.

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²⁸ In *Zhang* this Court discussed deterrence in methamphetamine sentencing, and its relationship to other relevant sentencing objectives, at [89]–[93]. The Court noted at [93] the need for a “logical and consistent sentencing scale between the most serious of cases (attracting life imprisonment) and the least serious of cases”. The Court was not asked to address, and did not address, where the upper bound of that scale lies in cases where life imprisonment is not appropriate and a determinate sentence is imposed, or the specific sentencing objectives that would require the imposition of a sentence at that upper bound in a particular case.