

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

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CRI-2019-085-001094  
[2021] NZHC 2393**

**THE QUEEN**

v

**JASON BRENDON PHILIP**

Hearing: 13 September 2021  
Counsel: T G Bain for the Crown  
P Paino for Mr Philip  
Judgment: 13 September 2021

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**SENTENCING NOTES OF GWYN J**

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**Introduction**

[1] Jason Brendon Philip, you appear for sentence having pleaded guilty to seven charges in total: five charges of possession of methamphetamine for supply;<sup>1</sup> and two charges of possession of cannabis.<sup>2</sup>

[2] You came before me for a sentence indication in February 2021.<sup>3</sup> I indicated a maximum end sentence of six years, two months' imprisonment. At that time I did

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<sup>1</sup> Misuse of Drugs Act 1975, s 6(1)(f) and 6(2)(a) and Crimes Act 1961, s 66; maximum penalty life imprisonment.

<sup>2</sup> Section 7(1)(a) and (2); maximum penalty three months' imprisonment or fine of \$500.

<sup>3</sup> *R v Philip* [2021] NZHC 42.

not have all relevant reports before me that might indicate a further discount is warranted. You accepted that sentence indication and pleaded guilty.

[3] I now have a Provision of Advice to Courts (PAC) Report dated 7 May 2021, a comprehensive alcohol and drug assessment report from John Duncan dated 19 March 2021, a s 27 cultural report from Harry Tam dated 24 March 2021, a psychological report from Dr Duncan Thomson dated 8 June 2021, and a report from your time at the Kahukura rehabilitation programme dated 7 September 2021. Those reports have given me more relevant information to decide on a final sentence. I emphasise at the outset that your sentence will not be higher than what I indicated in February, so please do not worry about that.

[4] Although you heard the comments I made in my sentence indication in February, I will repeat those comments which explain the way in which I reach the sentence. Because sentencing is a public function, I will also describe the background facts that are relevant to the sentencing process.

[5] In sentencing you today, I apply a law called the Sentencing Act, which sets out the purposes and principles of sentencing. The purpose of sentencing in your case is to hold you accountable for the harm you have done to the community through your offending; to promote a sense of responsibility for, and acknowledgment of, that harm; to denounce and deter the criminal conduct; to protect the community; and to assist in your rehabilitation and reintegration into society.<sup>4</sup> What that means in practice is that I have to look at the whole situation and do what I can to take account of the seriousness of what you have done, but also to acknowledge who you are and your particular circumstances and background.

[6] I will first set out your offending, explain your personal circumstances, and set out counsel's submissions. I will then calculate a sentence by adopting a two-step approach: first, I set a starting point based on the offending. At that stage I will talk about a case called *Zhang*, which is what we call a "guideline" judgment for offences involving methamphetamine,<sup>5</sup> and other cases which are similar. Second, I will apply

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<sup>4</sup> Sentencing Act 2002, s 7.

<sup>5</sup> *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

uplifts and discounts to reflect your personal aggravating and mitigating circumstances.

### **The offending**

[7] All seven of the charges result from two police operations – Operation Superdry in relation to Wellington-based offending, and Operation Maddale in relation to Auckland-based offending. Your co-offender, Mr McMillan, was the main individual targeted in the Wellington-based offending. You were an associate of Mr McMillan and assisted his drug business in various ways.

[8] The five methamphetamine charges arise from Operations Superdry and Maddale. Between December 2018 and March 2019, you were involved in the transport of five shipments of methamphetamine from Auckland to Mr McMillan in Wellington. In all five instances, you were accompanied by your co-offender, Ms Hayman (who is also your partner). On two occasions, you were also accompanied by another co-offender, Mr Minns. The methamphetamine was concealed in cars, driven by yourself, or Ms Hayman, or Mr Minns.

[9] The fifth methamphetamine charge arises from Operation Superdry, when you drove with Ms Hayman and Mr Minns to Auckland to collect two kilograms of methamphetamine in March 2019. The methamphetamine was concealed within a car by a sophisticated method, and Mr Minns then drove it back to Wellington. However, Mr Minns was stopped by Police along the way, and the car was impounded in Taupō for an unrelated driving offence. The methamphetamine was subsequently discovered by Police.

[10] The first four methamphetamine charges arise from Operation Maddale, and follow a similar fact pattern. However, the methamphetamine on those occasions was never seized, so the exact amount transported is unknown. Police estimate a total of 6–10 kilograms of methamphetamine was transported across all five incidents. As I did in your sentence indication,<sup>6</sup> for the purposes of sentencing I proceed on the basis that six kilograms of methamphetamine in total was transported.

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<sup>6</sup> *R v Philip*, above n 3, at [6].

[11] The two cannabis charges arise from the termination phase of Operation Superdry. Police executed a search warrant at Ms Hayman's parents' house in Taihape on 10 May 2019, and you and Ms Hayman were located at the address in possession of 28 grams of cannabis. A second bag containing approximately 10 grams of cannabis was located inside a backpack on the floor of the bedroom where you and Ms Hayman were located.

### **Personal circumstances**

[12] I turn now to consider your personal circumstances, based primarily on the reports I have already referred to.<sup>7</sup>

[13] Mr Tam's report records that you are Tainui on your mother's side, but you have never had the opportunity to learn your whakapapa or tikanga Māori.

[14] You experienced severe disadvantage as a child, including parental neglect, exposure to violence, abuse by your stepfather, and physical abuse while in state care.

[15] Mr Tam and Mr Duncan suggest you suffer from undiagnosed disorders, which may include foetal alcohol spectrum disorder (FASD), attention deficit hyperactivity disorder, post-traumatic stress disorder (PTSD), and dyslexia. You have also experienced poor physical health as an adult, including cancer.

[16] Mr Tam confirms the relationship between trauma and negative outcomes is well established, particularly in the form of psychological issues and addiction. He also explains that PTSD is associated with higher rates of recidivism, and FASD can cause complex physical and behavioural problems including impulsivity and criminal behaviour.

[17] Mr Duncan confirmed you have a history of severe and pervasive substance use problems – you started sniffing glue at the age of nine; you began using alcohol, cannabis, LSD, and benzodiazepines in your teens; and you began using GHB and methamphetamine in your late 20s. Mr Duncan confirmed you currently meet the

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<sup>7</sup> See above at [3].

DSM V criteria for severe alcohol, cannabis, sedative, and stimulant use disorders, as well as a severe persistent gambling disorder.<sup>8</sup> You also meet the criteria for severe inhalant use disorder, in sustained remission.

[18] Mr Duncan reported that you suffer flashbacks as a result of your traumatic childhood and low mood, and you told him you often use drugs to “block out memories”. Mr Tam also observed that your drug abuse appears to have been a means of self-medication for the trauma you have experienced.

[19] You became a patched member of the Mongrel Mob in your 20s, and still retain your gang connections. Mr Tam explained that you are culturally disconnected, and gang membership is common amongst people who have become disconnected from family and cultural identity, and who have suffered abuse and institutionalisation. He also emphasised that your abuse while in state care may have contributed to a mistrust of people in authority, which may explain your gang membership – he explains gangs provide protection and camaraderie and a sense of family for those who do not have support. Dr Thomson also confirmed that the Mongrel Mob provided an alternative source of familial belonging for you.

[20] In terms of the offending itself, you told Mr Duncan you were hired as a driver, and were paid in methamphetamine in return. You described your offending as the “worst mistake” you ever made, and you regret your actions. You also expressed remorse to Mr Tam and accepted responsibility for your offending.

[21] Since your arrest, Ms Hayman has given birth to your son. You currently live with Ms Hayman, your son, and your father in Taihape, near Ms Hayman’s parents. You told Dr Thomson that you love being with your son. In his report, Dr Thomson explained that he visited you at your home, together with Ms Hayman and your son, for approximately three and a half hours in February 2021. Dr Thomson’s report paints a picture of you both as good parents, and he observed that your son appears happy and safe. His assessment is confirmed by your son’s “health book”, which records he

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<sup>8</sup> The Diagnostic and Statistical Manual of Mental Disorders V (DSM V) is the handbook used by healthcare professionals as an authoritative guide to the diagnosis of mental disorders. DSM V contains descriptions, symptoms and other criteria for diagnosing mental disorders including substance use and provides criteria for establishing the severity of such disorders.

is a healthy and “happy boy”. You told Mr Tam you are committed to abstaining from methamphetamine, because you want to continue playing a role in the upbringing of your son.

[22] You attended the Kahukura Drug and Substance Rehabilitation Initiative (Kahukura) from July to August 2021 at the Te Tapairu Marae. A report from the programme coordinator, Mahinaarangi Robinson, dated 7 September 2021 (the Kahukura report) confirmed that you were motivated and engaged in every aspect of the programme “whole-heartedly”. You tested negative for methamphetamine twice during your time on the programme. Of concern you did test positive for cannabis twice; I will come back to that later. The Kahukura report advises that you have participated in daily online sessions since completing the residential component of the programme. You have also engaged with a local medical centre and are in the process of getting a referral to an alcohol and drug counsellor to support your maintenance and recovery. Overall, the Kahukura report says you responded well to the treatment.

[23] I have also received your letter to the Court, where you express your gratitude for being able to attend Kahukura. You acknowledge that self-medicating with drugs is not the best approach, and you no longer want drugs to be a part of your life. You confirm you wish to better yourself, so you can be the role model your son deserves. I have also read letters from Ms Hayman and your father. They both say how proud they are of you for the work you have done at Kahukura, and describe you as an “awesome father”.

[24] I understand you started your own shearing business prior to your arrest. Mr Tam advised that you have a strong work ethic. Your father is supportive of you, and is willing to support you financially to help you establish your business again.

[25] You have an extensive criminal history, with 61 recorded convictions dating back to 1989. You have received multiple short term imprisonment sentences (for periods of less than two years), for a range of offending. You have nine convictions over the last decade, for burglary, shoplifting, assault, threatening to kill, disturbing the peace, and wilful damage. Within the last decade, the longest prison sentence you

received was seven months. You have no convictions for drug-related offending. You told Mr Duncan all of your previous offending was related to your substance use.

### **Submissions**

[26] Mr Bain, counsel for the Crown, submitted:

- (a) at the time of the sentence indication, that a starting point of 14 years' imprisonment is appropriate for the five methamphetamine charges – for the purposes of today, he submitted the eight year starting point I indicated in February should be adopted;
- (b) no uplift is necessary for the cannabis charges;
- (c) a modest uplift is required for your previous convictions;
- (d) you are entitled to some reduction in sentence for time spent on electronically-monitored bail (EM bail); and
- (e) a guilty plea discount of 10 per cent is available.

[27] Your counsel, Mr Paino, submitted:

- (a) a starting point of six years' imprisonment is appropriate;
- (b) no uplift is warranted for your previous convictions;
- (c) a guilty plea discount of 20 per cent is available;
- (d) the maximum discount for the matters identified in your s 27 report is appropriate;
- (e) a discount for remorse and rehabilitation prospects is appropriate; and
- (f) you should receive a discount for the 22 months you have spent on EM bail.

## Starting point

[28] I agree with the Crown that the appropriate approach is to adopt a global starting point for the five methamphetamine charges. I do not consider an uplift to reflect the remaining charges is necessary, and I agree with the Crown that they should be dealt with by way of a concurrent sentence.

[29] The Court of Appeal decision in *Zhang v R* provides guidance on sentencing in methamphetamine-related cases, by establishing five sentencing bands by reference to the quantity of drugs involved.<sup>9</sup> Based on quantity alone, your offending falls in band five, more than two kilograms of methamphetamine, which attracts a sentence of between 10 years' and life imprisonment.<sup>10</sup> However, quantity alone does not determine the appropriate sentence – the Court explained that a lesser role deserves a less severe sentence than a significant or leading role, and a lesser role may result in an offender moving not only within a band but also between bands.<sup>11</sup>

[30] The Court provided guidance on what constitutes a “lesser” or “significant” role.<sup>12</sup> Factors that indicate a “lesser” role are:

- (a) performed a limited function under direction;
- (b) engaged by pressure, coercion, intimidation;
- (c) involvement through naivety or exploitation;
- (d) motivated solely or primarily by own addiction;
- (e) little or no actual or expected financial gain;
- (f) paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved;

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<sup>9</sup> *Zhang v R*, above n 5.

<sup>10</sup> At [125].

<sup>11</sup> At [10(e)].

<sup>12</sup> At [126].



- (g) no influence on those above in a chain;
- (h) little, if any, awareness or understanding of the scale of operation; and/or
- (i) if own operation, solely or primarily for own or joint use on non-commercial basis.

[31] Factors that indicate a “significant” role are:

- (a) operational or management function in own operation or within a chain;
- (b) involves and/or directs others in the operation whether by pressure, influence, intimidation or reward;
- (c) motivated solely or primarily by financial or other advantage, whether or not operating alone;
- (d) actual or expected commercial profit; and/or
- (e) some awareness and understanding of scale of operation.

[32] For the sake of parity, I note the starting points adopted for your co offenders.

- (a) Mr Paulo was sentenced in July 2020 on a single charge of supplying methamphetamine as a party. Cooke J adopted a starting point of three years’ imprisonment with an end sentence of home detention.<sup>13</sup>
- (b) Mr Stone was sentenced in March 2021 for his role in assisting Mr McMillan. I adopted a starting point of three years, six months, with an end sentence of home detention.<sup>14</sup>

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<sup>13</sup> *R v Paulo* [2020] NZHC 1797.

<sup>14</sup> *R v Stone* [2021] NZHC 636.

- (c) Mr Minns was sentenced in March 2021 for his role in the transportation that gave rise to the fifth methamphetamine charge you face. I adopted a starting point of four years, six months' imprisonment.<sup>15</sup>
- (d) Ms Hayman was sentenced in March 2021 for almost identical offending to yours. I adopted a starting point of six years' imprisonment, with an end sentence of home detention.<sup>16</sup>
- (e) Mr McMillan was sentenced in August 2021 for his role as the leader of the Wellington based offending. I adopted a starting point of 17 years' imprisonment.<sup>17</sup>

[33] The primary issue in setting an appropriate starting point for you is determining whether you played a lesser or significant role in the drug business. Mr Bain submitted that you played a significant role, as you must have been aware of the scale of Mr McMillan's operation, your role was operational as you directed others (primarily Mr Minns, and to a certain extent Ms Hayman), you are a patched gang member with an extensive criminal history, and you were a "trusted lieutenant" of Mr McMillan. Mr Bain also highlighted that when the car Mr Minns was driving was impounded, you confronted Mr McMillan's Auckland-based supplier (Mr James), before escorting Mr Paulo and Mr Minns to Wellington to meet with Mr McMillan; he said this is further evidence of your operational role in Mr McMillan's business. Mr Bain maintained that you played a greater role than Ms Hayman, and submitted there is nothing before the Court that would warrant a reduction from the starting point that I indicated in February, of eight years.

[34] Mr Paino pointed to the fact that you did not benefit financially, acted under the direction of Mr McMillan, and were paid primarily in methamphetamine due to your addiction.

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<sup>15</sup> *R v Minns* [2021] NZHC 638.

<sup>16</sup> *R v Hayman* [2021] NZHC 642.

<sup>17</sup> *R v McMillan* [2021] NZHC 2118.

[35] I gave the sentence indications for both you and Ms Hayman before the five-week trial of Mr McMillan. During the course of that trial, the Court heard extensive evidence of Mr McMillan's methamphetamine dealing, including the involvement of you, Ms Hayman, and the other co-offenders. Of particular relevance, the Crown's evidence established you did not play a significant role in Mr McMillan's business – in closing, the Crown referred to you as “a mule and hired muscle”. Your gang connections proved to be largely irrelevant – your connection to Mr McMillan was through your daughter (who was Mr McMillan's partner), rather than your gang connections. One of your co-offenders took a photo of a large amount of cash with your patch, and this was the only time your gang connection really featured in the evidence. Police also gave evidence that you have only five records in the Police database linking you to the Mongrel Mob between August 2007 and your arrest, and you appear to hold no formal position within the gang. You have no previous convictions for supplying methamphetamine. The evidence at trial also disclosed that neither you nor Ms Hayman were trusted to see the methamphetamine or cash being loaded into the secret compartments in the cars – you had limited contact with Mr James and limited knowledge of the details of his operation with Mr McMillan.

[36] As a result of that evidence, my view now is that, looked at in the round, you and Ms Hayman operated together and neither one of you could be described as the “leader” as between you. It is also clear from your reports that you were motivated by your addiction to methamphetamine. The Crown's evidence at trial also established that you had no money or assets at the time of your arrest, which in my view supports the submission that you were motivated by receiving methamphetamine to feed your addiction, and not by monetary gain.

[37] Having heard the evidence at trial, I find you played a “lesser” role. In particular, in terms of the factors in *Zhang*, I accept that you: performed a limited function under direction; were motivated primarily by your own addiction; received limited or no financial gain; were paid in drugs to feed your own addiction, or cash significantly disproportionate to the quantity of drugs or risk involved; and had no influence on those above you in the chain. In terms of your co-offenders, I find you played a greater role in Mr McMillan's business than Mr Paulo, Mr Stone, and

Mr Minns. Unlike at your sentence indication, I find you played essentially the same role as Ms Hayman.

[38] The issue then is the extent to which your limited role should reduce the starting point in your case. Mr Bain pointed to a number of cases,<sup>18</sup> with starting points ranging from five years, six months' imprisonment for lesser roles, to 17 years' imprisonment for significant roles. He submitted there is nothing before the Court to justify a starting point lower than eight years. Mr Paino submitted that the starting point should be six years, the same as for Ms Hayman.

[39] The highest starting point Mr Bain relied on was in *Smith v R*,<sup>19</sup> where the Court of Appeal declined an application for an extension of time to appeal the High Court's starting point of 17 years' imprisonment.<sup>20</sup> Mr Smith delivered approximately 15 kilograms of methamphetamine from Auckland to Wellington, at the direction of an Auckland based supplier. This case was more serious than yours for two key reasons: the amount of methamphetamine involved was more than double; and Mr Smith displayed all of the indicators of playing a significant role,<sup>21</sup> including the accumulation of serious wealth.<sup>22</sup> In contrast, you received little financial gain for your role, and no assets have been found or seized since your arrest.

[40] I also consider that other cases the Crown relied on with high starting points, ranging from 11 to 15 years' imprisonment,<sup>23</sup> are distinguishable on the basis they involved defendants travelling internationally to New Zealand for the purpose of assisting in the importation of class A drugs, indicating they played a more significant operational role than you did.

[41] A more useful reference point is my sentencing of Ms Hayman, given you are charged with almost identical offending. I adopted a starting point of six years for

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<sup>18</sup> *Wan v R* [2020] NZCA 328; *Zhang v R*, above n 5; *Smith v R* [2020] NZCA 221; *de Macedo v R* [2020] NZCA 132; *Su v R* [2020] NZCA 128; *Wirihana v R* [2020] NZCA 151; *Singh v R* [2020] NZCA 211.

<sup>19</sup> *Smith v R*, above n 18.

<sup>20</sup> *R v Smith* [2018] NZHC 2118.

<sup>21</sup> *Smith v R*, above n 18, at [15].

<sup>22</sup> At [6].

<sup>23</sup> *Wan v R*, above n 18; *Zhang v R*, above n 5; *de Macedo v R*, above n 18.

Ms Hayman.<sup>24</sup> I characterised Ms Hayman’s role as a lesser one within Mr McMillan’s business,<sup>25</sup> and I considered *R v Phillips* to be the most similar to Ms Hayman’s situation.<sup>26</sup> Ms Phillips drove between cities with her partner on two occasions, and transported a total of six kilograms of methamphetamine. She was also a low-level supplier in her own right. The High Court found she was “clearly not the party taking a lead on the major supplies”,<sup>27</sup> and was merely accompanying her partner out of loyalty.<sup>28</sup> A starting point of five years was adopted, with an uplift of one year for other drug-related charges. The Court of Appeal described the starting point as “generous” and declined to change it.<sup>29</sup>

[42] When giving my sentence indication, I found you likely played a greater role than Ms Hayman, given you are significantly older than her, and you are a patched gang member.<sup>30</sup> I found the “primary distinguishing feature” between you and Ms Hayman was the fact that there was no evidence you were motivated by your own addiction to methamphetamine, as Ms Hayman was.<sup>31</sup> As outlined above, evidence at Mr McMillan’s trial showed that was clearly not the case – your gang connection turned out to be of very limited relevance, and you were motivated by your own addiction to methamphetamine. I consider these factors constitute information that materially affects the basis on which my sentence indication was given,<sup>32</sup> and I therefore consider it appropriate to adopt the same starting point as I did for Ms Hayman.

[43] Mr Bain also submitted the need to achieve parity between you and Ms Hayman, and the fact Ms Hayman received what he termed the “windfall of a lower starting point”, should not prevent me imposing a higher starting point for you. He emphasised a “manifestly lenient sentence” for one co-offender does not entitle other co-offenders to the same treatment.<sup>33</sup> I do not consider that a relevant

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<sup>24</sup> *R v Hayman*, above n 16.

<sup>25</sup> At [32].

<sup>26</sup> *R v Phillips* [2018] NZHC 2119.

<sup>27</sup> At [17].

<sup>28</sup> At [10].

<sup>29</sup> *Zhang v R*, above n 5, at [217].

<sup>30</sup> *R v Philip*, above n 3, at [22].

<sup>31</sup> At [22].

<sup>32</sup> Criminal Procedure Act 2011, s 116.

<sup>33</sup> *R v Feterika* [2008] NZCA 127.

consideration here – I am not adopting a lower starting point for you solely out of a desire to achieve parity with Ms Hayman; rather I consider the starting point adopted for Ms Hayman was an appropriate reflection of her culpability, and, having heard all of the evidence at trial and considered your own addiction issues, I consider the same starting point is appropriate for you.

[44] Given the lesser role you played, in particular the fact that you appear to have been motivated almost entirely by your own addiction, I adopt a starting point of six years' imprisonment.

### **Personal aggravating and mitigating factors**

#### *Previous convictions*

[45] I am able to impose an uplift for your previous convictions,<sup>34</sup> because they “are relevant as an indicator of character and culpability, or because they show the need for a greater deterrent response, or as an indicator of risk of reoffending.”<sup>35</sup>

[46] I did indicate at the sentencing indication that I would apply a two-month uplift for your previous offending because you have an extensive criminal history, with 61 recorded convictions dating back to 1989.<sup>36</sup>

[47] However, as I did when I declined to impose an uplift when sentencing Mr Minns,<sup>37</sup> I note that addiction, poverty and other vulnerabilities can diminish the ability of individuals to make rational choices about offending, which consequently diminishes the deterrence aspect of sentencing.<sup>38</sup> Mr Duncan and Mr Tam's reports illustrate how that applies to you. You suffer from addiction and have endured poverty and trauma, and until this year had never received rehabilitation for your addiction issues or counselling to address your background.<sup>39</sup> Clearly adding more time to your sentence is not going to have a deterrent effect. Given your previous convictions are

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<sup>34</sup> Sentencing Act, s 9(1)(j).

<sup>35</sup> *Orchard v R* [2019] NZCA 529 at [39].

<sup>36</sup> See above at [25].

<sup>37</sup> *R v Minns*, above n 15, at [39]-[42].

<sup>38</sup> *Zhang v R*, above n 5, at [86]-[90].

<sup>39</sup> For the purposes of s 116 of the Criminal Procedure Act, I am satisfied the fuller picture of Mr Philip's personal circumstances constitutes information that materially affects the basis on which my sentence indication was given.

not particularly relevant to the current offending, as you have no convictions for drug-related offending, I am persuaded that in these circumstances, there should be no uplift for previous offending, and I will not apply an uplift.

### *Guilty plea*

[48] At your sentence indication, the Crown submitted you should receive only 10 per cent discount for your guilty plea. Mr Paino submitted you should receive a full 25 per cent guilty plea discount,<sup>40</sup> consistent with my sentencing of Ms Hayman. Although the trial for the Operation Superdry charges was set down for 9 February 2020, Mr Paino highlighted that the trial for the Operation Maddale charges was not set down until March 2022. Mr Paino also noted that before your plea, you changed counsel, there was significant disclosure of documents and lengthy CCTV footage to deal with, you were caring for your newborn baby and supporting Ms Hayman while she engaged in rehabilitation, and COVID-19 restrictions in 2020 affected your ability to meet and communicate with your counsel.

[49] I do not consider the full 25 per cent is available for you as it was for Ms Hayman, given she accepted her sentence indication some months before you, and the Operation Superdry trial was only one week away at the time of your indication. However, given the complexity of the material and the time to the Operation Maddale trial, I consider a discount of one year, two months (approximately 20 per cent) is appropriate.

### *Personal mitigating factors*

[50] In sentencing you today, I must take into account your personal, family, community, and cultural background.<sup>41</sup> As I have already discussed,<sup>42</sup> you have been dependent on drugs for most of your adult life, following a traumatic childhood. The intergenerational history of both social and economic deprivation undoubtedly diminished your opportunities and shaped the choices you made. That does not relieve you of personal responsibility for your actions, but it does help me to understand how

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<sup>40</sup> Sentencing Act, s 9(2)(b); *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].

<sup>41</sup> Section 8(i).

<sup>42</sup> See above at [12]-[20].

you got to the point where you became involved in this offending and to that extent it modifies your culpability.

[51] As the Court of Appeal said in *Zhang*:<sup>43</sup>

... ingrained, systemic poverty resulting from loss of land, language, culture, ranitiratanga, 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.

[52] In *Carr v R* the Court of Appeal, referring to this passage in *Zhang*, said:<sup>44</sup>

We consider this means that where a cultural report provided under s 27 of the Sentencing Act contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse including by whānau members, unemployment, educational underachievement and violence as features of the offender's upbringing such matters ought to be taken into account in sentencing.

[53] Mr Bain submitted the most common credit for personal mitigating circumstances is 15 per cent, with reference to 60 recent High Court and Court of Appeal decisions. He also highlighted that discounts for personal circumstances must remain proportional to the culpability of the overall offending.<sup>45</sup> Balanced against that, the Court of Appeal has confirmed a discount of 30 per cent for such issues is “clearly at the upper end”, and such large discounts are only available where there are identifying linkages between personal circumstances and the offending.<sup>46</sup>

[54] Mr Bain also highlighted that, although you have tested negative for methamphetamine, you tested non-negative for cannabis twice during your time at Kahukura and once pursuant to a test required by Police pursuant to the Bail Act 2000. The Kahukura report advises that the two occasions while you were at Kahukura may have been historic use, as cannabis can remain in the system for up to three months; however, the report writer did not explore this issue with you. Regardless, these results

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<sup>43</sup> *Zhang v R*, above n 5, at [159].

<sup>44</sup> *Carr v R* [2020] NZCA 357 at [60].

<sup>45</sup> *Moses v R* [2020] NZCA 296.

<sup>46</sup> *King v R* [2020] NZCA 446 at [28]; citing *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241. See also *Poi v R* [2020] NZCA 312 at [51], where a discount of 25 per cent for cultural factors and diminished intellectual understanding was upheld.



are a concern to me, because you have been subject to an EM bail condition not to consume illegal drugs. Mr Bain also submitted that, while Kahukura has a clear focus on cultural education (which the Crown accepts is valuable), there is little information about what addiction-specific treatment was actually provided. Given these factors, Mr Bain submitted I should put little weight on the fact you have completed the Kahukura programme.

[55] I share the Crown’s concerns about your cannabis use while on EM bail. But having said that, I recognise that beating a drug addiction is not an easy thing and recovery does not always go in a straight line; often there are slip-ups along the way. As your counsel put it, it is a journey, not a short trip. I consider it more important that you tested negative for methamphetamine. Mr Paino also recently arranged for you to undergo an urgent drug screening test, and has filed a letter from your primary health nurse in Taihape confirming you tested negative for cannabis on 10 September 2021. As I did when I adjourned your original sentencing date to enable you to attend Kahukura, I again confirm that Kahukura appears to have been an appropriate rehabilitation option for you.

[56] I consider there is a clear link between your background and addiction issues and your current offending. I also acknowledge your commitment to your rehabilitation, and the remorse you have expressed,<sup>47</sup> which show you accept responsibility for your offending.

[57] The Court of Appeal has held that discounts of between 12 and 30 per cent may be available,<sup>48</sup> depending on the circumstances, for mental health issues where there is evidence that mental health issues were causative of the offending and therefore moderate an offender’s culpability.<sup>49</sup> Although the causal link is less strong than it is for your background, and is more relevant in explaining your reliance on drugs to “block out memories”, I will also take into account the impact of your mental health issues on your culpability.

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<sup>47</sup> Sentencing Act, s 9(2)(f).

<sup>48</sup> *E (CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411 at [68]; *Gotz v R* [2019] NZCA 99 at [20].

<sup>49</sup> At [68].

[58] A discount of one year, nine months (approximately 30 per cent) is appropriate to reflect your very difficult background, drug addiction issues, mental health issues, remorse, and prospects for rehabilitation.

*Impact on dependent child*

[59] I also consider a further separate discount is necessary, to take account of the impact your sentencing will have on your son. In other cases, a discount of 10-20 per cent has been appropriate, where a sentence of imprisonment would impact on an offender's dependent children.<sup>50</sup>

[60] Dr Thomson's report says that your son has a secure attachment with both you and Ms Hayman. That is an important and positive indicator. Dr Thomson is a very experienced clinical psychologist, and he has noted in his report that the quality of infant-parent attachment is a powerful predictor of a child's social and emotional outcomes later in life. He also advised that children who are exposed to the imprisonment of a household member are at a heightened risk for poor health-related quality of life into adulthood. The PAC report also records that you are "fully focused" on your family, and you are enjoying spending so much time with your young son. Ms Hayman has also confirmed that you have a strong bond with your son, and your time away at Kahukura was "extremely hard on everyone".

[61] I granted a discount of 20 per cent for Ms Hayman, to reflect the impact a sentence of imprisonment would have on your son. Taking into account the totality principle, and the fact that Dr Thomson's report painted Ms Hayman as your son's primary carer, I consider a discount of seven months (approximately 10 per cent), is appropriate to mitigate the impact of your sentencing on your young child.

*EM bail*

[62] You are entitled to a discount for time spent on EM bail.<sup>51</sup> Mr Paino advised that after approximately six months remanded in custody, you have spent the last 22 months on EM bail. Your EM bail conditions have required you to primarily stay

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<sup>50</sup> Sentencing Act, s 8(h); *Theodore v Police* [2018] NZHC 2364 at [39].

<sup>51</sup> Section 9(2)(h).

home, or at the Kahukura facility, with some number of hours permitted for exercise on certain days of the week. Your bail conditions were varied in November 2020 to allow you to work, and for a brief period in December 2020 to allow you to assist your father at his home.

[63] Although the Court of Appeal has confirmed that discounts for time spent on EM bail are discretionary and not subject to strict mathematical formula, the Court has confirmed discounts should not be so high as to be on a one-for-one basis.<sup>52</sup> Discounts for time spent on EM bail tend to be up to half of the time spent on EM bail, with the Court of Appeal in *Parata v R* holding a discount of four months for 10 months spent on EM bail was “not ... inadequate although ... a higher figure would not necessarily be wrong.”<sup>53</sup> The Court of Appeal in *Tanuvasa v R* also upheld a discount of four months in exchange for 14 months on EM bail.<sup>54</sup>

[64] While I acknowledge you have spent a long time on EM bail, the credit I can give you for this is somewhat restricted by the breach of your conditions (the consumption of cannabis).

[65] I consider a discount of six months is appropriate for the time you have spent on EM bail.

[66] I therefore arrive at an end sentence of two years' imprisonment.

### **Home detention**

[67] As your sentence of imprisonment is one of two years or less, I am able to convert it to home detention if I consider that appropriate.<sup>55</sup> There is a presumption of imprisonment for offending relating to the supply of methamphetamine,<sup>56</sup> which can be displaced in “exceptional circumstances”, for example where an offender has

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<sup>52</sup> *Cunningham v R* [2019] NZCA 622 at [30].

<sup>53</sup> *Parata v R* [2017] NZCA 48 at [15].

<sup>54</sup> *Tanuvasa v R* [2019] NZCA 217.

<sup>55</sup> Sentencing Act, s 15A(1).

<sup>56</sup> Misuse of Drugs Act, s 6(4).

accepted responsibility by pleading guilty and has real prospects of rehabilitation that would be better supported by a sentence of home detention.<sup>57</sup>

[68] I acknowledge the PAC report does not recommend home detention, based primarily on your risk of reoffending and your gang connections. However, as I have already discussed,<sup>58</sup> and as the PAC report itself acknowledges, I am satisfied you do not currently have any strong connection to the Mongrel Mob. You have no previous methamphetamine convictions. Your father also appears to be willing and able to support you in establishing the shearing business I mentioned before. Given the obvious benefits associated with you continuing to care for your son, the gains you have made in your rehabilitation and your ongoing commitment to remaining free of methamphetamine, and the positive prospects you have for working in Taihape, I consider home detention is appropriate.

[69] I am optimistic about your prospects for rehabilitation. You say you are motivated to be drug-free. You have demonstrated a commitment to your family and to doing what is best for them (and obviously that must include being drug-free). You clearly have a very strong work ethic and your proposed business providing shearing services to lifestyle block owners shows real initiative. You have also shown a willingness to explore tikanga Māori and te reo Māori even though, as you explained in your letter, that was not easy for you. Your whānau/family have demonstrated that they are there to support you. All of those things indicate that you have the drive and the support to follow a different path than in the past.

[70] The PAC report dated 7 May 2021 confirms your current address in Taihape is suitable for home detention.

## **Result**

[71] On five charges of possession of methamphetamine for supply, I sentence you to one year's home detention. You are subject to the conditions outlined in the PAC report dated 7 May 2021, as follows:

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<sup>57</sup> *Zhang v R*, above n 5, at [55].

<sup>58</sup> See above at [35].

- (a) You are to travel directly from the Wellington High Court to the Taihape address specified in the PAC report and await the arrival of a Probation Officer and/or a representative from the monitoring company.
- (b) You are to reside at the specified address for the duration of the home detention sentence.
- (c) You are not to possess and/or consume alcohol or illicit drugs for the duration of the home detention sentence.
- (d) You are to attend and complete alcohol and drug counselling with a counsellor as may be directed by the Probation Officer.
- (e) You are to attend an assessment with the departmental psychologist as directed by the Probation Officer, and if suitable attend and complete any treatment and/or counselling as recommended by the assessment, to the satisfaction of the Probation Officer.
- (f) You are to attend any counselling and/or programme directed at reducing your risk of re-offending as may be directed by the Probation Officer.
- (g) You are not to associate directly or indirectly with your co-offenders (other than Jazinda Hayman) unless you have the prior written approval of the Probation Officer.
- (h) You are able to attend employment/training with prior approval of the Probation Officer.

[72] The following special conditions of home detention also apply:<sup>59</sup>

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<sup>59</sup> Sentencing Act, s 80D.

- (a) You are permitted to leave the specified address up to three times each week, for a maximum of one hour on each occasion, at times to be agreed in consultation with your Probation Officer.
- (b) You are permitted to leave the specified address to attend at medical appointments for yourself, your son and your partner. You are to advise your Probation Officer of such absences.

[73] The standard post-detention conditions apply for a period of 12 months from the detention end date.<sup>60</sup> In addition, the following special post-detention conditions, as recommended in the PAC report dated 7 May 2021, apply for a period of 12 months from the detention end date:<sup>61</sup>

- (a) To attend an assessment with a departmental psychologist as directed by the Probation Officer and if suitable to attend and complete any treatment and/or counselling as recommended by the assessment, to the satisfaction of the Probation Officer.
- (b) To attend and complete alcohol and drug counselling with an alcohol and drug counsellor as may be directed by the Probation Officer. This also includes residential rehabilitation if assessed as suitable.
- (c) To attend any counselling and/or programme directed at reducing your risk of reoffending as may be directed by the Probation Officer.

[74] On two charges of possession of cannabis, I convict and discharge you.

[75] In relation to the ancillary orders sought by the Crown, I order the destruction of:

- (a) all drug related utensils and paraphernalia and items including cell phones used to facilitate the drug offending; and

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<sup>60</sup> Section 80N(2) and 80O.

<sup>61</sup> Section 80P.

(b) all controlled drugs seized.

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**Gwyn J**

Solicitors:  
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