

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA42/2019
[2020] NZCA 150**

BETWEEN WILLIAM BERKLAND
 Appellant

AND THE QUEEN
 Respondent

Hearing: 3 March 2020 (further material received 4 March 2020)

Court: French, Dobson and Moore JJ

Counsel: L C Ord and E T Blincoe for Appellant
 C Ure for Respondent

Judgment: 8 May 2020 a t 11 am

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is granted.**
 - B The appeal against sentence is allowed.**
 - C The sentence of 13 years and three months' imprisonment imposed by the High Court is quashed and substituted with a sentence of 12 years and nine months' imprisonment.**
 - D The minimum period of imprisonment of six and a half years imposed by the High Court is quashed and substituted with a minimum period of imprisonment of six years and three months.**
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REASONS OF THE COURT

(Given by French J)

[1] Following a sentencing indication, Mr Berkland pleaded guilty to serious drug dealing offences. He was sentenced in the High Court by Collins J to a term of imprisonment of 13 years and three months, with a minimum period of imprisonment of six and a half years.¹

[2] Mr Berkland now appeals his sentence.

[3] The appeal was filed out of time due to difficulties in finding legal representation. The Crown did not oppose an extension of time being granted and we so order.

[4] The key issues raised by the appeal are:

- (a) Was the Judge's starting point too high in light of this Court's subsequent decision in *Zhang*,² or too high because of disparity with the sentence imposed on a more culpable co-offender Mr Blance?
- (b) Was a sufficient discount allowed for personal mitigating factors?
- (c) Was a minimum period of imprisonment justified?

Background

[5] The charges arose out of a covert police investigation targeting the commercial supply of bulk methamphetamine by Messrs Blance and Berkland, both senior members of the Porirua Mongrel Mob. The investigation commenced on 30 November 2016 and terminated on 11 April 2017. It is said to have identified both men as drug dealers of some note who had established a methamphetamine dealing network supplying other suppliers from the greater Wellington region.

¹ *R v Berkland* [2018] NZHC 1520.

² *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

The summary of facts

[6] The police summary of facts describes the operation of the network and the respective roles of the two men in it as follows.

[7] Mr Blance was the head of the operation and his home address in Coates Street was its central hub. Mr Berkland lived a short distance away in Tremewan Street. He was Mr Blance's right hand man and would run the supply network from the Coates Street address in Mr Blance's absence. In some instances, if customers were unable to contact Mr Blance they would contact Mr Berkland to check on the availability of either of the two men or their supply of methamphetamine.

[8] Mr Berkland was also in charge of counting and concealing the large amounts of cash earned from the methamphetamine sales.

[9] The Coates Street address was heavily fortified with sophisticated surveillance systems including the use of a drone.

[10] Mr Blance and Mr Berkland were purchasing kilogram amounts of methamphetamine from suppliers who transported the methamphetamine from Auckland to the Coates Street address. The police investigation established that during October 2016 and 16 March 2017 the two men purchased at least 15 kilograms of methamphetamine estimated conservatively to have cost a minimum of \$5,250,000. In turn, Mr Blance and Mr Berkland sold this to their customers, supplying it at an estimated rate of about 1 kilogram a week, and in the process realising a profit of no less than \$1,555,000.

[11] The majority of the customers visiting the Coates Street address were themselves drug dealers. Between 20 February 2017 and 11 April 2017, when police were intercepting private communications between Mr Blance and Mr Berkland, there were over 700 visitors to the Coates Street address some of whom were repeat customers. In the intercepted communications, the two men discuss the on-supply of the methamphetamine and previous kilogram supplies, deal with current customers, count large amounts of cash and conduct supplies.

[12] During the period of the covert operation, two major transactions took place with the Auckland suppliers. On both occasions, when the Auckland suppliers arrived in Wellington, Mr Blance contacted Mr Berkland who then came to the Coates Street address.

[13] The first transaction on 3 March 2017 involved the purchase of at least two kilograms of methamphetamine, Mr Berkland arriving with a heavy suitcase and the Auckland supplier leaving with a back pack containing approximately \$700,000 in cash. The second transaction which occurred on 16 March 2017 involved a larger amount, this time no less than four kilograms, the cash involved amounting to approximately \$1.4 million.

[14] In addition to intercepting private communications, police also deployed undercover officers who had a number of interactions with Mr Berkland. When one of them inquired about buying an ounce of methamphetamine and then larger amounts such as five ounces, Mr Berkland told him the prices and indicated that he would be able to go to Mr Blance's address and get the quantities wanted almost immediately provided the money was paid to Mr Berkland up front.

[15] Mr Berkland described himself as Mr Blance's "number one". Mr Blance was "the boss" and he was "the key holder". He told the officers that Mr Blance looked after him. Mr Blance paid him a quarter ounce of methamphetamine a week — until recently, it had been a half ounce — and also gave him \$1,000 cash at least once a week, sometimes twice a week. In the two months, he had been saving he had managed to be able to put away \$10,300. We interpolate here that later the police located \$10,000 in a safe at his mother's address which she said belonged to Mr Berkland.

[16] The prices Mr Berkland quoted to the police officer for a quarter ounce was \$3,500 and a half ounce was \$7,000. A gram he said he was selling at \$600.

[17] In addition to the weekly cash payments and the methamphetamine, Mr Berkland also told the undercover officers that Mr Blance had a \$100,000 nest egg waiting for him until he Mr Berkland learnt to stop spending.

[18] Mr Berkland talked too about being involved with Mr Blance in million dollar deals. When asked what a million dollars looked like, he stated “its three bags, a million dollars is fuck all”. He further stated that when he did his first “million and 50” deal by himself it was “wow” and not many people can say they have done that. He went on to say he has done it several times now and a million dollars will only get you three to four kilograms of methamphetamine.

[19] Mr Berkland also indicated to the officers that he and Mr Blance were exploring different money laundering techniques including writing off some of the money as cash earned from sales of whitebait. He also talked about concealing assets and said he and Mr Blance were looking to purchase a warehouse with enough space to store their classic vehicles and Mr Blance’s campervan.

[20] As well as the supply of methamphetamine from Coates Street, Mr Berkland has his own personal customer base to whom he would sell smaller amounts of methamphetamine and other controlled drugs such as NBOMe. During the course of the police investigation, Mr Berkland offered to supply tabs to an undercover police officer on two occasions. On one occasion, he supplied 100 tabs of NBOMe, being in possession of 300 tabs.

[21] Mr Berkland serviced his own customer base from his home address at 54 Tremewan Street and a garage across the road at 46 Roberts Street. Mr Blance was his usual source for methamphetamine, but not his only one. During the investigation, when Mr Blance was out of stock, Mr Berkland told a police officer he had already purchased two grams earlier in the day from his (that is, Mr Berkland’s) brother and was likely to purchase another two grams later that evening. Mr Berkland himself was a user of methamphetamine.

[22] The police investigation was terminated on 11 and 12 April 2017 with the execution of search warrants of the Coates Street address, another address occupied by Mr Blance’s girlfriend, and three properties associated with Mr Berkland, namely the Roberts Street garage, his home address at 54 Tremewan Street and another Tremewan Street property, 60 Tremewan Street.

[23] At the Coates Street address, police found cash totalling \$37,500 which had been concealed, numerous rounds of ammunition and a number of parts for firearms, plastic snap lock bags used for storing methamphetamine and battery jump starting bags similar to those used by the Auckland suppliers.

[24] Mr Berkland's van was parked at 60 Tremewan Street. In the front of the van, was a package of methamphetamine that weighed 842 grams, valued at \$505,200. Police also found cash totalling \$60,000 and a stun gun.

[25] On the floor of the van under a mat there were numerous firearms — a Remington Model 770 rifle, a Long Branch rifle with a cut down stock, a double barrelled shotgun, a sawn off shotgun, an Escort Jubilee shotgun, six air rifles, six air pistols/handguns — as well as numerous boxes of ammunition and loose ammunition.

[26] Inside the house at 60 Tremewan Street, there was a loaded .38 calibre pistol and a stun gun in a shopping bag. The bag also contained 1.948 kilograms of methamphetamine valued at \$1,168,800 as well as numerous unused empty snap lock bags of various sizes and a metal scoop.

[27] In addition to the cash in the shopping bag, police found \$400,000 concealed in a wall cavity. It had been sorted into bundles and sealed in vacuum packaging with amounts written on them, consistent with the method Mr Berkland had told the undercover officer he used when packaging cash belonging to himself and Mr Blance.

[28] Within the basement area, there were other firearms, parts of firearms and numerous boxes of ammunition as well as numerous tools and documents identified as belonging to Mr Blance.

[29] At 54 Tremewan Street where Mr Berkland lived, police located more firearms, cash totalling \$2,759.00 and numerous snap lock bags, one of which contained 20 NBOMe tabs. Another contained cannabis head material, and another used bag contained several grams of methamphetamine.

[30] Finally, in the garage at Roberts Street, police found evidence of cannabis cultivation, a sawn-off single barrel shotgun and 11 shotgun cartridges as well as more plastic snap lock bags, a number of which contained Diazepam tablets. Another four shotgun cartridges were found in the glove box of another vehicle belonging to Mr Berkland.

The charges

[31] Mr Berkland pleaded guilty to 14 charges. In respect of eight of them, he was jointly charged with Mr Blance. Those eight were:

- (a) one representative charge of supplying methamphetamine;
- (b) one representative charge of possession of methamphetamine for supply;
- (c) two charges of possession of methamphetamine for supply;
- (d) two representative charges of offering to supply methamphetamine; and
- (e) one charge of conspiracy to supply methamphetamine;
- (f) one representative charge of unlawfully possessing a firearm;
- (g) one representative charge of unlawfully possessing ammunition; and
- (h) one representative charge of unlawfully possessing a taser.

[32] The remaining charges were:

- (a) one representative charge of supplying NBOMe;
- (b) one representative charge of offering to supply NBOMe;
- (c) one representative charge of possession of NBOMe for supply;

- (d) one charge of possession of cannabis for supply;
- (e) one charge of possession of Diazepam for supply; and
- (f) one charge of cultivating cannabis.

Sentencing in the High Court

[33] The Judge said although the Crown claimed there was much more than 15 kilograms of methamphetamine involved, he was sentencing Mr Berkland on the basis that the amount was 15 kilograms and that he was Mr Blance’s right hand man.³ The Judge said he considered “right hand man” was an apt description of Mr Berkland’s culpability.⁴

[34] The Judge referred to various comparator cases cited to him by counsel.⁵ Of those cases, the Judge said he considered that Mr Berkland’s offending was most similar to offending in *Le’Ca* and *Murray* where starting points of 18 years’ imprisonment had been imposed.

[35] In light of those authorities and the need to reflect the harm caused by methamphetamine, the Judge said he had decided to adopt an initial starting point of 16 and a half years’ imprisonment in respect of the methamphetamine charges.⁶ He then uplifted that by 12 months on account of all of the other drug and firearms related offending, arriving at a total starting point of 17 and a half years’ imprisonment.⁷

[36] Turning to factors personal to Mr Berkland, the Judge said he was prepared to allow a discount of six months to reflect personal mitigating factors as well as a discount of three years and nine months (20 per cent) for the guilty pleas.⁸ The guilty pleas were entered three months before the trial date.

³ *R v Berkland*, above n 1, at [17]–[18].

⁴ At [26].

⁵ *R v Le’Ca* [2018] NZHC 274; and *Murray v R* [2014] NZCA 189.

⁶ *R v Berkland*, above n 1, at [27].

⁷ At [30]–[31].

⁸ At [35]–[36].

[37] That resulted in an end sentence of 13 years and three months' imprisonment.

[38] As previously mentioned, the Judge also imposed a minimum period of imprisonment of six and a half years which represented just under 50 per cent of the end sentence.

Was the starting point too high in light of *Zhang*?

[39] The sentence was imposed on 22 June 2018. The decision of this Court in *Zhang* was issued on 21 October 2019. Mr Berkland filed his notice of appeal before 21 October 2019 and therefore *Zhang* applies to his appeal.

Arguments on appeal

[40] Ms Ord submitted on behalf of Mr Berkland that the starting point of 16 and a half years' imprisonment was too high having regard to the nature of Mr Berkland's involvement and his role compared to Mr Blance. In her submission, the Judge without the benefit of *Zhang* had given insufficient recognition to Mr Berkland's lesser role.

[41] Ms Ord was also inclined to be critical of the police summary of facts which she suggested had led the Judge into error. She described it as internally contradictory. In particular, she contended it made very general propositions about the network being a joint operation, inaccurately inflating Mr Berkland's role to that of right hand man. That was a phrase which suggested a somewhat egalitarian relationship, perhaps a junior partner. Yet, when one came to consider the specifics in the summary, the underlying evidence, including the actual number of supplies that Mr Berkland personally undertook, it was apparent contrary to the view taken by the Judge that "right hand man" was not an accurate descriptor.

[42] In support of this central proposition, Ms Ord made the following points.

[43] It was Mr Blance who was the master mind, the ring leader and in charge. It was his address that had the sophisticated surveillance systems and his address that was the centre of the business. He was the point of contact for the Auckland based

suppliers. He set the price, he decided what Mr Berkland would receive from the profits and he kept the lion share for himself. Mr Berkland did not have any autonomy and that was the case even when he was holding the fort in Mr Blance's absence. He had no authority to negotiate the prices set by Mr Blance and at all times acted on instructions. He only received a very small amount of the profits and only ever visited Coates Street occasionally. Any on-selling Mr Berkland did on his own account was modest.

Our view

[44] The first point we would make is that if counsel took issue with the summary of facts and did not want the Judge to rely on it, then the appropriate course of action was to seek a disputed facts hearing. When this was put to Ms Ord, she suggested that the lawyer acting for Mr Berkland at sentencing was taken by surprise. However, we do not accept that submission which was not supported by any affidavit evidence. The summary had been agreed and importantly it was the basis of the sentencing indication which had been given three months before the sentencing. The sentencing indication contains exactly the same statements as appear in the sentencing notes to which Ms Ord now takes exception.

[45] It is however entirely appropriate that we re-visit the starting point adopted by the Judge in light of *Zhang*.

[46] In *Zhang*, this Court reviewed sentencing for methamphetamine related offending and issued revised guidelines which it then applied to six appeals that had been part of the review.

[47] The Court re-affirmed that in determining culpability and thus the sentence starting point, the quantity of methamphetamine involved was a primary consideration.⁹ It therefore retained sentencing bands based on quantity but with significant modifications. Relevantly, one of those modifications was to emphasise that the role played by an offender was also an important consideration in setting the starting point. Role may reduce the culpability of a low-level offender found in

⁹ *Zhang v R*, above n 2, at [103].

possession of a large quantity of methamphetamine but conversely it may increase culpability where the quantity seized is only a small part of an ongoing operation.¹⁰

[48] In relation to role, the Court suggested that sentencing judges might find it helpful to have regard to the indicia of different roles developed by the United Kingdom Sentencing Council. Those indicia adapted for New Zealand conditions are:¹¹

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

¹⁰ At [118].

¹¹ At [126].

[49] Applying the *Zhang* guidelines to this case, the 15 kilogram quantity involved here falls within band five. Band five is for quantities in excess of two kilograms. The starting point range for band five cases is 10 years at the lower end to life imprisonment.¹² The quantity involved in this case clearly takes it to the higher end of band five.

[50] We acknowledge the factual matters raised by Ms Ord. It is clear that Mr Berkland was not the leader and that Mr Blance was in control and the ultimate decision maker. But while Mr Berkland may not have been the leader, he was, in our view, the trusted deputy and plainly in the ‘significant’ category.

[51] He performed operations and management functions. He was responsible for the counting, safe keeping and concealment of the money. He was the go-to person after Mr Blance. He was the person who came with the money to purchase the major supplies and by his own admission had conducted major deals on his own. Contrary to a submission made by Ms Ord, we do not dismiss that admission as puffery and idle boasting. The trust Mr Blance placed in Mr Berkland was such that it is perfectly conceivable Mr Blance would have been willing to sanction Mr Berkland doing that. That is not to say, that either man would have regarded the money as solely belonging to Mr Berkland.

[52] Mr Berkland also seems to have been the main custodian of what can fairly be described as an arsenal of firearms. It is noteworthy too that he had over half a million dollars worth of methamphetamine in his van.

[53] Mr Berkland was motivated primarily by financial advantage. He expected to profit and did profit. Whether there was or was not a nest egg does not matter for present purposes. What matters is that Mr Berkland genuinely thought there was. It may well be that Mr Blance was concerned that excessive spending would attract unwanted attention and that was why he held some money back.

¹² At [125].

[54] In any event, in addition to the promised reward of a \$100,000 nest egg, there were weekly payments by way of methamphetamine (worth over \$4,000 to Mr Berkland) and cash of between \$1,000 to \$2,000.

[55] Mr Berkland was conversant with the detail of the operation and its scale. The intercepted communications between him and Mr Blance as well as his statements to the undercover police show an intimate knowledge. He talked to the officers about such matters as the operation's preference for purchasing rock methamphetamine, its sales tactics, and money laundering ideas. He conferred with Mr Blance about deals and stocks. He knew Mr Blance's availability, the state of the stocks, and when 'reloading' was going to happen. Mr Berkland may not have been a frequent visitor to Coates Street but the two men must have been in frequent communication.

[56] Having regard to all those circumstances we agree with the Crown that Mr Berkland's role can be considered towards the upper end of significant. That combined with the quantity of methamphetamine involved indicates that a starting point of 16 and a half years' imprisonment on the methamphetamine charges was within range under the new guidelines as well as the previous case law relied upon by the Judge.

[57] That is further reinforced by consideration of the sentencing outcomes in the most comparable cases in *Zhang* itself, namely the cases of Mr Zhang and Mr Thompson.

[58] Mr Zhang was convicted of one charge of importing 17.9 kilograms of methamphetamine.¹³ The quantity was thus greater than in this case. But his role was at the lower end of significant. A starting point under the new guidelines was said to be a term of imprisonment of 15 years.¹⁴

[59] Conversely, Mr Thompson had a leading role but the quantity was lower than in this case, totalling 6.8 kilograms comprising one representative charge of supplying 4.2 kilograms and one charge of possessing 2.6 kilograms for supply.¹⁵ An 18 year

¹³ At [246].

¹⁴ At [256]–[257].

¹⁵ At [265].

starting point was approved, calculated on the basis of a 16 year starting point on the supply charge and an uplift of two years on the possession for supply charge.¹⁶

[60] We conclude the starting point of 16 and a half years' imprisonment for Mr Berkland's methamphetamine offending was not in itself excessive and that *Zhang* would not result in a more favourable starting point for Mr Berkland.

Was the starting point too high for reasons of disparity?

[61] Ms Ord submitted that even if we were to find the starting point was available to the judge, appellate intervention was warranted because of the disparity between it and the starting point adopted for Mr Blance. In making that submission, she was relying on well-established authority that an appellate court may reduce a sentence which it considers apart from disparity is otherwise appropriate.

[62] Mr Blance was sentenced by Collins J on the same day as Mr Berkland.¹⁷

[63] The Judge noted that in terms of Mr Blance's overall role, he was said to be the mastermind of the operation.¹⁸ In respect of the methamphetamine offences (with which he and Mr Berkland had been jointly charged), the Judge imposed a starting point of 18 years' imprisonment with an uplift of one year for the firearms related charge and a charge of receiving stolen property.¹⁹ The latter related to a stolen Harley Davidson motorbike. Unlike Mr Berkland, Mr Blance was not convicted of other drug dealing unrelated to the business he operated out of Coates Street.

[64] The sentencing decisions for both Mr Berkland and Mr Blance record the Judge saying that in order to ensure consistency in sentencing, he noted that three of the other co-defendants from the same police investigation had already been sentenced.²⁰

¹⁶ At [272].

¹⁷ *R v Blance* [2018] NZHC 1518.

¹⁸ At [17].

¹⁹ At [23]–[26].

²⁰ At [18]; and *R v Berkland*, above n 1, at [19].

The Judge then stated the starting points that had been adopted in their cases,²¹ but did not mention details of Mr Berkland's sentence in Mr Blance's sentencing notes or vice versa. As previously mentioned, they were both sentenced on the same day but it is unclear which of them was sentenced first.

[65] There is an 18 month difference between the starting point imposed in respect of Mr Berkland and the starting point imposed for Mr Blance and that is a differential which Ms Ord submits does not fairly and accurately reflect their respective culpability.

[66] Usually, disparity arguments are advanced by the co-offender with the higher starting point advocating a reduction in the differential, and not as in this case a co-offender with the lower starting point advocating an increase in the differential. But the general underlying principle that justice should be even handed must still apply. And so too must the established test of when appellate intervention is warranted.

[67] Before appellate intervention on the grounds of disparity is warranted, the disparity in question must be unjustifiable and gross and be such as to lead a reasonably minded observer to the belief that something has gone wrong with the administration of justice.²² The fact that a co-offender has been treated too leniently is not necessarily a ground for interfering with an otherwise appropriate sentence for the other.

[68] We accept that in this case other judges may well have imposed a greater differential, possibly in the order of two years. However, we are not persuaded that the differential of 18 months that was imposed can properly be described in all the circumstances of the offending as gross and unjustifiable. There is the further point that under *Zhang*, the starting point for Mr Blance appears to be too low.

²¹ The respective starting points were five and a half years' imprisonment for a mid level dealer involving 83.5 grams: *R v McGoldrick-Savaii* [2018] NZHC 233; four years imprisonment for a street level dealer involving 36.1 grams: *R v Waiariki* [2018] NZHC 31; and three years' imprisonment for a middle person between drug dealers and the retail market involving 15.45 grams: *R v Svenson* [2017] NZDC 22165.

²² See for example *R v Rameka* [1973] 2 NZLR 592 (CA) at 593–594; *R v Lawson* [1982] 2 NZLR 219 (CA) at 223; and *Macfarlane v R* [2012] NZCA 317 at [24].

[69] We therefore conclude that appellate intervention is not warranted in relation to the starting point.

Was a sufficient discount allowed for personal mitigating factors?

[70] As already mentioned, the Judge reduced the sentence by six months for personal mitigating factors. He did not specify what those mitigating factors were but he did refer to a drug assessment report from an addiction therapist and submissions made in a letter from Mr Berkland's partner. The Judge noted the therapist considered that Mr Berkland is likely to have a dependency on methamphetamine, a diagnosis which the Judge said was consistent with Mr Berkland's statements about his motives for offending.²³

[71] Ms Blincoe, who argued this part of the appeal on behalf of Mr Berkland, submitted that six months was an insufficient discount for Mr Berkland's drug addiction and his social, cultural and economic deprivation both in his early life and more recently that led to his addiction and offending.

[72] In support of this central submission, Ms Blincoe pointed to material about Mr Berkland's upbringing and the effect of his brother's death. According to that material, Mr Berkland had had a strained relationship with his older brother due to built-up anger that the brother had failed to protect him from physical and sexual abuse as a child. However, the two reconciled shortly before the brother passed away. He died in Mr Berkland's arms. The death had a profound emotional effect on Mr Berkland leading him to relapse into drug abuse which he said he had used in his teens to block out his traumatic childhood. Prior to that, his criminal history had been relatively limited, his last conviction being in 2003 for possession of cannabis. Certainly, nothing on the scale of the index offending.

[73] Ms Blincoe advised it appeared that for some reason the Judge did not have all the relevant material before him which could at least in part explain the small discount given. The Judge would also, she said, have felt constrained by previous decisions to the effect that personal circumstances count for little in drug offending. However, in

²³ *R v Berkland*, above n 1, at [34].

Zhang this Court had rejected that approach and significant discounts were now available.

[74] We accept that for some reason the Judge did not have all the material filed on Mr Berkland's behalf before him. We say that because it was not on the High Court file and it is not mentioned in the sentencing notes.

[75] We also acknowledge that this Court in *Zhang* confirmed there is no blanket rule that personal mitigating circumstances relating to the offender do not apply or have less weight in sentencing of class A drug related offending. Rather, they are applicable to all instances of class A drug offending including methamphetamine dealing just as in the case of any other offending.²⁴ It was also said that addiction may on its own terms justify a sentence discount of up to 30 per cent and that this was not to be treated as an absolute limit.²⁵

[76] However, the Court in *Zhang* also emphasised there must be a material causal link between the addiction or deprivation and the offending.²⁶ That is because the underlying rationale for allowing a discount is that those factors impair the rational choice to offend and thus diminish moral culpability.

[77] We have considered all the material submitted on Mr Berkland's behalf. We accept he has an addiction. However, we do not accept it was an operative cause of his offending in terms of *Zhang*. The scale of his offending, its commerciality, his willingness to deal in more than one drug, and the fact the offending gave him income well beyond a subsistence level all tell strongly against that. As Ms Ure for the Crown submitted, his addiction and his background including his gang connections may be the reason for his familiarity with the drug world. But they are not causative of his offending as explained in *Zhang*. We agree that only minimal recognition of these factors was warranted.

[78] Where we consider Ms Blincoe is on stronger ground is that the material the Judge did not see included two very positive letters from Corrections officers

²⁴ *Zhang v R*, above n 2, at [133]–[136].

²⁵ At [149].

²⁶ At [147] and [159].

disclosing that Mr Berkland is an exemplary prisoner and has made genuine attempts to address his addiction and rehabilitate himself. It is likely that had the Judge been aware of that information he would have considered the effort being made by Mr Berkland in prison deserved recognition and allowed a larger discount.

[79] It is obviously unjust that Mr Berkland should be denied the discount he would likely have received because of an administrative glitch. We consider an additional six month discount is warranted, taking the total discount for personal mitigating factors to 12 months.

[80] Ordinarily, the reduction of a sentence of this length by six months might be open to criticism for tinkering. However, in our view, the situation is analogous to cases where a sentencing judge has made a mathematical error in calculating the sentence producing a result he or she did not intend. In those cases, the sentence will be reduced to accord with the judge's intentions.²⁷ The same reasoning applies here.

Was a minimum period of imprisonment justified?

[81] Section 86 of the Sentencing Act 2002 provides that a sentencing judge may impose a minimum period of imprisonment if satisfied that the parole eligibility date that would otherwise apply is insufficient for all or any of the purposes of holding the offender accountable for the harm done to the community, denouncing the offender's conduct, deterring the offender and other like-minded persons and protecting the community from the offender.

[82] As previously mentioned, the Judge imposed a minimum period of imprisonment of six and a half years, representing just under 50 per cent of the end sentence. In the absence of a minimum period of imprisonment, Mr Berkland would, under the sentence imposed by the Judge, be eligible for release after serving four years and five months.

²⁷ See for example *Maihi v R* [2013] NZCA 69 at [21]; and *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

[83] On appeal, Ms Ord submits that the minimum period of imprisonment was unnecessary given the overall circumstances of this case and that the statutory test was not met. In support of that general proposition, she relies on her submissions regarding Mr Berkland's lesser role as well as his acceptance of responsibility evidenced by his guilty pleas, the efforts he has made to address his addiction and his limited criminal record. The latter demonstrated, she said, that Mr Berkland is capable of living offence free with the right support which he still has from his children, partner and former partner. All gave references to the Court and spoke in positive terms about Mr Berkland.

[84] The matters raised by Ms Ord relate primarily to individual deterrence and protection of the community from Mr Berkland. However, we consider that in this case, accountability and denunciation as well as general deterrence assume particular importance. This was knowing participation in substantial commercial scale drug offending with very serious social consequences. In our view, a minimum period of imprisonment of 50 per cent of the end sentence was fully justified in terms of the requirements of s 86.

[85] It does however follow from our decision to adjust the end sentence that the length of the minimum period of imprisonment also requires a corresponding adjustment downwards. Maintaining the same percentage discount as that adopted by the Judge results in the minimum period of imprisonment being six years and three months.

Outcome

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

[87] The appeal against sentence is allowed.

[88] The sentence of 13 years and three months' imprisonment imposed by the High Court is quashed and substituted with a sentence of 12 years and nine months' imprisonment.

[89] The minimum period of imprisonment of six and a half years imposed by the High Court is quashed and substituted with a minimum period of imprisonment of six years and three months.

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