IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA589/2024
[2025] NZCA 71

BETWEEN	KIMELA PIUKANA Appellant
AND	THE KING Respondent

Hearing: 26 February 2025

Court: Hinton, Woolford and Edwards JJ

Counsel: P K Hamlin and B A Mugisho for Appellant
M W Nathan and T A O T Veikune for Respondent

Judgment: 25 March 2025 at 11 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Hinton J)

[1] On 5 June 2024, Mr Piukana pleaded guilty to one charge of participating in an organised criminal group for his role in a syndicate involved in the commercial importation of methamphetamine into New Zealand.[1]

[2] The syndicate operated out of Auckland International Airport and involved a crew of corrupt baggage handlers, organised by Mr Piukana's older brother, who was

[1] Crimes Act 1961, s 98A. Maximum penalty: 10 years' imprisonment.

a service and delivery leader at the domestic terminal. Mr Piukana was a baggage handler but his role in the syndicate was not in that capacity: rather, he was a "messenger".

[3] On 16 August 2024, Wilkinson-Smith J declined Mr Piukana's application for a discharge without conviction and sentenced him to 14 months' imprisonment, which she commuted to seven months' home detention.[2]

[4] Mr Piukana now appeals against the refusal to grant him a discharge without conviction. If that appeal is dismissed, he does not otherwise appeal against his sentence.

[5] Mr Piukana's key point on appeal is that the Judge made a number of errors in assessing the gravity of Mr Piukana's offending and consequently wrongly concluded his offending was "serious". In particular the Judge placed too much weight on the more serious group offending and wrongly treated Mr Piukana as if he were involved in his role as a baggage handler and therefore had breached his employer's trust. This last factor is said to have also impacted on the Judge's allegedly erroneous conclusion that the consequences of Mr Piukana's offending were not out of all proportion to the gravity of that offending.

Background

[6] We adopt the Judge's description of what occurred:[3]

> [4] In June 2021, Police commenced a joint investigation with the New Zealand Customs Service (Operation Selena). The investigation arose out of two previous Police and Customs operations that had identified a number of syndicates involved in the importation of methamphetamine, operating out of Auckland International Airport.
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> [5] Throughout 2021, your older brother received instructions from the leader of the syndicate regarding importations of commercial quantities of methamphetamine onboard Malaysian Airlines flights from Kuala Lumpur, Malaysia (MH145) and Air New Zealand flights from Los Angeles, United States (NZ5). Your older brother worked for Air New Zealand as Service and Delivery Leader out of the domestic terminal at Auckland Airport. He was responsible for assigning baggage handling staff to particular flights and for

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2 *R v Piukana* [2024] NZHC 2311 at [62].
3 *R v Piukana,* above n 2.

unloading baggage when the crew was short staffed. By virtue of his employment, he had airside access to international flights arriving at Auckland Airport.

[6] Throughout 2021, your older brother organised a crew of baggage handlers to remove shipments of methamphetamine from recently arrived aircraft. Your brother had access to large amounts of cash as a result.

[7] You contributed to the activities of the syndicate by passing important messages between key members of the syndicate. In January and February 2021, you acted as a messenger between your brother, and the leader of the syndicate, whom you contacted via the encrypted messaging application 'Wickr'. You would pass messages onto your brother via text.

[8] In January 2021, you, your brother, and the leader of the syndicate arranged for a "test bag" to be put on to an aeroplane presumably to see whether it could be removed without detection. You passed on a message saying, "Tell him duffel bag with a photo of it and make sure the bag has a fake tag on it and to message once the plane takes of with it".

[9] On 7 February you passed on a message about the availability of the crew to assist with the importation of methamphetamine. The message read "USO I need a date for when you have the full team on deck please".

[10] In May 2021, there was an arrangement for commercial quantities of methamphetamine to be imported via flight MH145 with an expected arrival date in Auckland of 18 or 19 May 2021. On 15 May 2021 at 11.04 pm, your brother advised one of your co-offenders that there would be "big coin on Tuesday" when the importation arrived. A few days later on 17 May 2021, another of your co-offenders received a message from their partner saying "please be careful tomorrow morning okay. I know we need this money but it's not worth the trouble".

[11] On 18 May 2021 at 5.34 am, your brother messaged you that the importation date had changed to 19 May 2021 saying, "Dox cancelled today its tomorrow". You acknowledged this change and instantly messaged one of your co-offenders saying, "Can it's tomorrow". On 20 May 2021, this same co-offender enquired with you as to whether the importation had gone ahead. You informed him that, again, the importation had been delayed to 22 May 2021.

[12] On 17 November 2021, Police executed a search warrant at your home address and arrested you.

Legal principles on applications for discharge

[7] The Court may grant a discharge without conviction if it is satisfied that the direct and indirect consequences of conviction would be out of all proportion to the gravity of the offending.[4]

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4 Sentencing Act 2002, ss 106–107.

[8] The accepted course is to assess the gravity of the offending having regard to all relevant aggravating and mitigating factors; identify the consequences of conviction of which there is a real and appreciable risk; and determine whether those consequences are out of all proportion to the gravity of the offending.[5]

Sentencing

[9] The Judge adopted the orthodox approach to applications for discharge without conviction, as set out above.[6] She found that the operation involved serious offending, and a level of corruption unusual in New Zealand. Mr Piukana's involvement was assessed as being near the bottom of the organisation. He was not an organiser but a messenger acting on instructions. The Judge considered Mr Piukana must have had a good idea of what was occurring, and in particular that the organisation was engaged in serious drug dealing. She further found that Mr Piukana gave real assistance to the organisation because contact between members is integral.

[10] The Judge then said it was a reasonable inference that Mr Piukana obtained some financial gain. It was a commercial operation and his brother had access to large amounts of cash. Mr Piukana had told the pre-sentence report writer that "the bills got paid".

[11] The Judge corrected an error in the agreed summary of facts, where it was suggested Mr Piukana had assisted with removal of drugs from aircraft.

[12] Mitigating factors were also considered. The Judge noted that Mr Piukana was aged 20 to 21 at the time of the offending, and that the offending appeared to have been out of character with his previous record. Mr Piukana had been at university until his father became unwell and he left university to assist his family's financial situation. The Judge noted further that the pre-sentence report was very positive, and the writer considered Mr Piukana expressed genuine remorse. The Judge assessed that Mr Piukana had a low risk of reoffending.

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5 *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [27]; and *DC (CA47/2013) v R* [2013] NZCA 255 at [43].

6 *R v Piukana*, above n 2, at [14]–[16]; and Sentencing Act, ss 106–107.

[13] At [23] after setting out Mr Piukana's personal circumstances as noted above, the Judge said:[7]

> Taking into account all of these factors I remain of the view that the offending is serious. In coming to that conclusion, I am influenced by the amount of methamphetamine and the repeated importations as well as the modus operandi of the group, the undermining of the security of the border by corrupt baggage handlers. You were involved from as early as January 2021 until May 2021. Your role was minor and that does lessen the gravity of the offending as far as you are personally concerned but you assisted your brother who was at a mid-level in the hierarchy. No one should be under any illusion that becoming involved in the commercial importation of methamphetamine, in any role, will not be regarded as serious by the Courts. The harm done by that drug is simply too high. It is said that you did not know what the drug was. I regard that an unlikely situation. If you did not know, you were at best wilfully blind.

[14] Returning to her assessment of the offending the Judge said at [29]:

> I consider, as I've said, that the offending was moderately serious. I cannot accept that it is not serious to any degree or that it is of a completely low level. Your personal circumstances bring the seriousness of it down – they mitigate it. But the actual operation was so serious. So, as I say, I regard becoming involved in any capacity in such a significant commercial drug importation as moderately serious offending.

[15] The Judge then turned to the direct and indirect consequences of conviction.[8] She noted counsel's view that it would be permanently damaging for Mr Piukana's career and could impair his ambitions to become a fitness trainer and to secure finance. The Judge reflected on Mr Piukana's family responsibilities after his father's death in 2021, his mother's death in 2023 and his brother's lengthy incarceration. She accepted a conviction would make it more difficult to find employment but said it would not impede him from continuing his studies or prevent him becoming a personal fitness trainer. The Judge considered that "[t]he consequences raised [were] largely the natural consequences of being convicted of a serious charge".[9] Overall, the Judge found that the harm a conviction would do to Mr Piukana's career ambitions would not be disproportionate to his wrongdoing.

[16] The Judge observed that Mr Piukana's offending was "committed in the context of facilitating others to use their trusted employment positions to import

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7 *R v Piukana*, above n 2.
8 At [24].
9 At [26].

drugs".[10] She considered the Court should not prevent future employers knowing that there were some roles he may not be suitable for, given his willingness to be involved in the offending.

[17] After declining to grant a discharge the Judge adopted a starting point of two years and three months' imprisonment. She allowed a 15 per cent discount for Mr Piukana's guilty plea, and 25 per cent for his previous good character, youth, remorse, and attempts at rehabilitation. She then gave a two-month discount to account for the time that Mr Piukana had spent on restrictive bail to arrive at a sentence of 14 months' imprisonment, which was then commuted to seven months' home detention. This sentence, as we noted above, is not under appeal if the appeal against the Judge's refusal to grant a discharge without conviction is dismissed.

Submissions on appeal

[18] Mr Hamlin, for the appellant, submits that the Judge wrongly assessed Mr Piukana's offending as serious, making a number of errors in this regard as follows:

(a) The Judge wrongly treated Mr Piukana as being engaged in the offending as a baggage handler, and therefore acting in breach of trust.

(b) The Judge wrongly thought, or was influenced by the Crown's submission, that over 241 kgs of methamphetamine was imported by the group, whereas in her later finding following a disputed facts hearing, she concluded that the total importation was of "at least 100 kilograms of methamphetamine".[11]

(c) The Judge wrongly proceeded on the basis that Mr Piukana was a participant in a successful importation whereas his text messages preceded the first of these. His role was therefore even less than the Judge considered it to be.

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10 At [32].

11 A figure that the Judge described as "conservative" in the disputed facts judgment, *R v Pritchard* [2024] NZHC 3090, at [75].

(d) Mr Piukana had received no direct financial benefit.

(e) The agreed summary of facts did not provide any evidence that the appellant knew anything about the conspiracy beyond the four messages that he sent.

(f) Most importantly, the Judge did not adequately take into account Mr Piukana's very limited involvement in the group, holding no rank, acting solely under the direction of his older brother, and sending only four text messages on behalf of his older brother to two other group members. Rather she wrongly focussed or over-focussed on the offending of the group as a whole.

[19] The appellant further submits that the fact the appellant did not breach any employer's trust in his offending suggests that the Judge's concerns that prospective employers should know about his offending (in terms of her overall assessment) were misplaced.

[20] Overall, the appellant says, his level of culpability is significantly lower than the seriousness of the offending. The conviction would be very hard for him to move past, cause lifelong hardship, and, in general, cause consequences out of all proportion to the offending.

Did the Judge err in her assessment of the gravity of the offending?

[21] We consider it is clear that the Judge did not assess Mr Piukana's offending overall as "serious". She described the underlying offending as "serious" or "so serious",[12] which cannot be contested. After taking account of Mr Piukana's participation being "at the lowest level"[13] and his personal mitigating circumstances, the Judge said that the offending was "moderately serious".[14] We suspect from reading [23] and [29] of the sentencing notes and taking account of the sentence imposed, the

12 At [19] and [29].
13 At [20].
14 At [29].

Judge's final assessment was that the offending is at the low end of "serious", an assessment with which we concur.

[22] We note in this regard that the Court's role is to apply the legal principles set out in ss 106 and 107 of the Act and to ensure that all relevant factors are taken into account. There can be no doubt the Judge did consider all relevant factors in this case and applied the correct test. The actual labels placed on the offending for this purpose are necessarily imprecise.

[23] There is no suggestion in the sentencing notes that the Judge thought Mr Piukana was engaged in the offending as a baggage handler or breached trust as an employee.

[24] There is also no basis for the claim that the Judge was unduly influenced by Crown submissions in relation to the amount of methamphetamine imported. She observes in the sentencing notes at [44] that the group imported more than 100 kgs of methamphetamine. This matches with her later finding at the disputed facts hearing. The fact that the Crown argued for a much higher quantity is irrelevant. Further, the quantity of 100 kgs is towards the top end of offending of this nature in any event.

[25] It is clear from the agreed summary of facts that the Judge was not operating under the mistake that Mr Piukana had been involved in actual importation. Mr Piukana was not charged with importation. Some, including his brother, were. Mr Piukana was clearly involved in steps leading to the first importation. The fact that had not been successfully completed by the last of his text messages is irrelevant.

[26] We likewise do not accept the submission that Mr Piukana received no financial gain from the offending. The Judge observed that the enterprise was a commercial operation, and that Mr Piukana told the pre-sentence report writer that "the bills got paid". In addition, his brother is said to have made significant profits. It is wholly unrealistic to think that Mr Piukana might not have financially benefitted. Mr Hamlin appears to be submitting that if it was only a matter of the bills being paid, Mr Piukana did not receive any *direct* financial benefit from his actions. That is a clearly unsupportable proposition. An "indirect" financial benefit is still a benefit.

[27] We also do not accept that the agreed statement of facts suggests that Mr Piukana was unaware of the nature and purpose of the organisation. It is obvious on the facts he must have been aware. Mr Piukana's brother was at a high level in the organisation. The agreed statement of facts observes that Mr Piukana passed messages between Mr Iuvale and Matangi Piukana about a "test" importation of methamphetamine to come in through the airport, and "arranged" for that test importation, with others. In May 2021, Mr Piukana advised another member of the group that a planned import was cancelled and provided an update as to when the planned import had been rescheduled for. The offending continued over six months. The operation was being conducted through the international airport. It could reasonably be inferred in all the circumstances that Mr Piukana knew it involved commercial quantities of methamphetamine.

[28] Looking at this offending in broad context, the group's offending was plainly very serious. It involved the importation of a large amount of methamphetamine in a sophisticated and persistent fashion. The social harm caused by such offending is immense. The corruption involved in this case was unusual and damaging both domestically and internationally.

[29] Mr Piukana's role, as the Judge rightly recognised, was comparatively minor. But this does not mean that his offending was also minor. Minor participation in major crimes is still serious offending. A drug syndicate in particular cannot operate without all parties, including those at the bottom, performing their respective roles. The Judge said that Mr Piukana gave "real assistance" in his role as messenger.[15] The Judge was entitled to consider the overall culpability of the wider criminal group in assessing Mr Piukana's offending. As this Court said in *Paku v R*:[16]

> Whilst culpability is not to be assessed by just collating the offending of each individual member, there nevertheless is a degree of responsibility for the wider scale of the offending which is to be visited on each participant. That is the very purpose of the organised criminal group charge.

[30] Mr Piukana's personal circumstances in general were taken into account by the sentencing Judge, and appropriately so. Youth could arguably have been emphasised

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15 *R v Piukana,* above n 2, at [20].
16 *Paku v R* [2011] NZCA 269 at [12].

more, but this is not a case of reckless, impetuous criminal acts where a youth discount can feature strongly. Rather this was participation in an organised group over a period of months for purposes of financial gain. The mitigating factors are not sufficient to disturb the assessment of the offending overall as being at the lower end of serious – but still serious.

Did the Judge err in terms of the consequences of conviction?

[31] The appellant did not take serious issue with the Judge's assessment of the consequences for Mr Piukana.

[32] We accept, as the Judge did, that Mr Piukana's conviction may impact on him through his life and that he may experience difficulty with finding employment or securing finance. However, we agree with the Judge that these consequences are normal consequences of a conviction of this type. To some extent the consequences may be less than normal in this case because as the Judge said a conviction may not impede Mr Piukana becoming a fitness trainer, a potential career path he has identified for himself. There is no evidence to the contrary. We accept that in other respects the consequences may be greater than normal. A conviction such as this will be a big burden for a young man.

[33] The Judge's observation that employers had a right to know about the offending was not key to her analysis, but was correct in our view. It was not, as Mr Hamlin claimed, premised on a mistaken view that Mr Piukana had been involved in the offending as an employee. Anyone involved in this criminal group had clearly been aware of and prepared to facilitate corruption of employees of a large organisation on a significant scale. We acknowledge, as the Judge did, that Mr Piukana was himself no doubt suborned, and his role was minor. Nonetheless employers might quite rightly think twice before employing him in a position requiring trust. It is not for the courts to deny them that information without good reason.

[34] The appellant submits that employers would interpret this conviction as reflecting serious criminal involvement. This would be an accurate assessment. Mr Piukana was, in fact, involved in serious criminal activity. But given the light sentence Mr Piukana received, employers might also reasonably assess that his role

was at a relatively low level and therefore minor in the overall scheme. That interpretation would be more than fair to Mr Piukana.

Did the Judge err in concluding that the consequences of conviction were not out of all proportion to the gravity of the offending?

[35] It follows from the above that we agree with the Judge. The consequences of conviction are not out of all proportion to the offending. The Judge was correct to decline a discharge without conviction. We note further that the Judge took great care in her analysis and the sentence imposed was kind to Mr Piukana, given the nature of the offending.

Result

[36] The appeal is dismissed.

Solicitors:
Legal Services Commissioner, Auckland for Appellant
Crown Solicitor, Auckland for Respondent