IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA90/2020
[2022] NZCA 276

BETWEEN	DENI CAVALLO Appellant
AND	THE QUEEN Respondent

CA109/2020

BETWEEN	MARIO HABULIN Appellant
AND	THE QUEEN Respondent

CA130/2020

BETWEEN	MATTHEW JOHN SCOTT Appellant
AND	THE QUEEN Respondent

Hearing:	3 August 2021 (further submissions received 16 September 2021)
Court:	Kós P, Miller and Collins JJ
Counsel:	M N Pecotic for Deni Cavallo N P Chisnall and L A Elborough for Mario Habulin T M Cooper and C G Farquhar for Matthew John Scott C A Brook and P D Marshall for Respondent
Judgment:	30 June 2022 at 9 am

JUDGMENT OF THE COURT

A The applications to adduce fresh evidence are granted.

B The appeals are allowed.

C The sentences imposed in the High Court are quashed and substituted with the following sentences:

(a) Mr Cavallo: 17 years and eight months' imprisonment;

(b) Mr Habulin: 23 years and four months' imprisonment; and

(c) Mr Scott: 20 years and five months' imprisonment.

REASONS OF THE COURT

(Given by Kós P)

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[1] In 2019 this Court issued a guideline judgment concerning the sentencing of methamphetamine offending: *Zhang v R*.[1] The primary question in this appeal is how, in light of *Zhang*, cocaine offending should be sentenced.

[2] The essential facts are these. The appellants are foreign nationals who were part of an international, organised criminal group. They imported cocaine from South America through the Port of Tauranga in June, July and October 2017:

(a) Mr Habulin, a Croatian national, imported a total of 76 kg of cocaine, in three shipments, supplying some 25 kg from the first two shipments to purchasers in New Zealand and transferring some $1,498,500 to representatives of a money-laundering ring.[2]

(b) Mr Scott, an Australian national, assisted Mr Habulin to supply the first two shipments (as above), transferred some $1,192,000 to the money-laundering ring, and then assisted Mr Habulin to import the third shipment (46 kg).[3]

(c) Mr Cavallo, a Serbian national, assisted Mr Habulin to import the third shipment (46 kg).[4]

[3] Search warrants were executed, resulting in seizure of the third shipment and 5 kg remaining from the first two shipments.[5] Cash amounting to $623,627 was also located and seized. It may be noted that this is the second largest intercepted importation of cocaine into New Zealand to date. This outline serves for present purposes. The facts are set out in their full detail in the sentencing notes of Powell J.[6]

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

2 Resulting in the following charges: 1 x importing cocaine, 2 x supplying cocaine, 1 x money laundering, 1 x possessing cocaine for supply, 1 x participating in an organised criminal group.

3 Resulting in the following charges: 1 x importing cocaine, 2 x supplying cocaine, 1 x money laundering, 1 x possessing cocaine for supply, 1 x participating in an organised criminal group.

4 Resulting in the following charges: 1 x importing cocaine, 1 x participating in an organised criminal group.

5 Nothing turns on this detail, but the evidence was that the cocaine seized had a very high purity level, at 88–90 per cent.

6 *R v Scott* [2020] NZHC 68 [Sentencing notes] at [5]–[15].

[4] The appellants each pleaded guilty at the beginning of the trial, in the face of what the Judge described as an "overwhelming Crown case".[7]

The sentencing

Approach to sentencing

[5] The Judge began by setting out the primary purposes of sentencing found in s 7(1)(a), (e) and (f) of the Sentencing Act 2002:[8]

> … to hold each of you accountable for the harm that you have done, to denounce the conduct that each of you has been involved in, and to deter you and importantly others from committing similar offences in the future.

[6] The Judge emphasised deterrence as of particular importance, noting that New Zealand was seen as a desirable target market for cocaine and Mr Habulin, in an intercepted communication, had described the authorities here as "completely clueless, so you need to take advantage".[9]

[7] The Judge went on to reference the observations in *Zhang* about the importance of deterrence in cases of commercial drug dealing where a rational choice has been made to offend, and the need to apply the sentencing scale set by Parliament, consistent with s 8(c) of the Sentencing Act.[10]

Starting points

[8] In New Zealand, following the decisions of this Court in *R v Taueki* and *Moses v R*, sentencing involves two stages of analysis:[11]

(a) The first stage calculates a provisional "adjusted starting point", incorporating all aggravating and mitigating features of the offence.

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7 At [108].
8 At [16] .
9 At [17].
10 At [18], citing *Zhang v R*, above n 1, at [92]–[93].
11 *R v Taueki* [2005] 3 NZLR 372 (CA) at [8] and [44]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [6] and [46].

(b) The second stage incorporates all aggravating and mitigating factors personal to the offender, together with any guilty plea discount, which should be calculated as a percentage of the adjusted starting point.

[9] In addressing the first stage, the Judge noted that setting a starting point in cocaine-related offending was "not straightforward".[12] There were a limited number of such sentences, and no guideline judgment. He continued:[13]

> There is, however, a guideline judgment recently issued for methamphetamine offending — the case of *Zhang v R*, to which all counsel have referred in their submissions and you will have heard numerous references to that decision today. This decision of the New Zealand Court of Appeal recently replaced an earlier guideline judgment in *R v Fatu*. It largely confirmed the approach to be taken in respect of large-scale commercial drug offending. Although both [*Zhang*] and *Fatu* deal with methamphetamine they are, as all counsel have acknowledged, directly relevant to cocaine offending as during the period for which *Fatu* was the authoritative guideline judgment, the Court of Appeal adopted the approach of utilising the bands in *Fatu* as a cross-check on cocaine-related sentencing, and it is clearly appropriate, as you have heard counsel submit, to use the *Zhang* decision in the same way.

[10] In *Zhang*, this Court had focused on two distinct considerations in setting the starting point for methamphetamine offending: quantity (as a proxy for individual and collective social harm); and role in the offending (whether "lesser", "significant" or "leading", being directly relevant to culpability for the offending).[14]

[11] One of the authorities referred to by the Judge in the passage quoted above at [9], *Clarke v R*, involved a 3-kg cocaine importation, and this Court looked at the sentencing bands in *R v Fatu* for guidance as to relativity with other offenders.[15] In the present case, and essentially taking the same approach, the Judge considered that the quantity of cocaine imported meant the conduct of each of the appellants fell comfortably within band five of *Zhang*.[16] That band applies to offending exceeding 2 kg of methamphetamine.[17]

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12 Sentencing notes, above n 6, at [26].
13 At [26], referring to the earlier judgments of this Court in *R v Fatu* [2006] 2 NZLR 72 (CA) and *Clarke v R* [2013] NZCA 473 at [25].
14 *Zhang v R*, above n 1, at [104], [106]–[117] and [126]–[128].
15 *Clarke v R*, above n 14, at [25].
16 Sentencing notes, above n 6, at [27].
17 *Zhang v R*, above n 1, at [125].

[12] In terms of prior cocaine sentencing decisions, the Judge noted:[18]

> … there is only really one case where the quantities of cocaine involved are even remotely comparable to current offending, that of *R v Cook*, where 35 kg of cocaine was in issue. However, the present case differs significantly in a number of substantial respects. Most importantly, apart from the differences in quantity, it involved only a single importation, and the offenders were not found guilty of being part of an organised criminal group and its implication of knowledge of the operation as is the case here.

In *Cook v R* the starting point adopted for a 35-kg importation, for an offender this Court described as having a "mid to low-level 'significant role'",[19] was 19 years.[20] That was subsequently reduced by this Court to 17 years, based on Mr Zhang's appeal in *Zhang* (methamphetamine, 17.9 kg, significant role but lower end, 15-year starting point)[21] and *Pai v R* (methamphetamine, 22.6 kg, significant role but lower end, 15-year starting point).[22]

[13] The Judge then turned to role, the other primary factor in setting a starting point for the offending.

[14] Mr Habulin was "the principal operative on the ground in New Zealand" of the organised criminal group behind the importations.[23] It is apparent the Judge regarded him as having a "leading" role, in the sense used in *Zhang.*[24] The Judge observed:[25]

> … those off-shore clearly trusted you to play a key role in organising each phase of the operation and your substantial role and indeed particular skills, rendered you critical and indeed almost indispensable, to the overall success of the operation.

The Judge said Mr Habulin's "total responsibility for the offending [was] at an extremely high level", far exceeding those in the majority of sentencing precedents referred to the Court.[26] The Judge adopted a starting point of life imprisonment on the importation charge.[27]

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18 Sentencing notes, above n 6, at [29], citing *R v Cook* [2017] NZHC 2034.
19 *Cook v R* [2020] NZCA 469 at [42].
20 *R v Cook*, above n 18, at [54].
21 *Cook v R*, above n 19, at [43], citing *Zhang v R*, above n 1, at [246] and [256]–[257].
22 *Pai v R* [2020] NZCA 146 at [51]–[52] and [56].
23 Sentencing notes, above n 6, at [38].
24 See *Zhang v R*, above n 1, at [126].
25 Sentencing notes, above n 6, at [40].
26 At [41].
27 At [41].

[15] Mr Scott was considered to have played a "leading" role, motivated by financial gain, and seeking (and taking) a much greater involvement in the third (and largest) importation (for which he was to receive 2 kg of the 46 kg imported).[28] His role in relation to the first two shipments was also critical, involving protection, storage, distribution and laundering of the proceeds. Although his roles were "significantly different" to those undertaken by Mr Habulin, Mr Scott's "total responsibility for the offending was also at a very high level".[29] The Judge adopted a starting point of 28 years on the importation charge, a figure uplifted in light of the other associated charges to reflect the totality of the offending.[30]

[16] Mr Cavallo was considered to have played a higher-level "significant" role, both preceding and in relation to the third importation:[31]

> … throughout you discussed the operation with Mr Habulin as an equal, including Mr Scott's role and his request for a share of the cocaine payment, and the sourcing of cocaine from South America which you had recently visited. Like Mr Habulin, you too communicated with other senior members of the syndicate further confirming the significance of your role in the offending and … directly referred at least in passing, to the possibility of significant financial gain if the third importation was successful.

Mr Cavallo did not however "undertake the same range of tasks and responsibilities that characterised Mr Habulin and Mr Scott's involvement".[32] The Judge noted a number of indicia of "leading" role were present, and adopted a starting point of 27 years on the importation charge.[33]

Personal circumstances

[17] Turning to the second stage of the sentencing process, and Mr Habulin's personal circumstances, the Judge declined a discount for socioeconomic or cultural deprivation as it was "difficult to see any substantive nexus either direct or indirect" between Mr Habulin's personal circumstances and his involvement in the offending.[34] However, the Judge gave a five per cent discount for Mr Habulin's foreign national

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28 At [45]–[48].
29 At [51] .
30 At [50]–[51].
31 At [56] .
32 At [57].
33 At [59].
34 At [72].

status, which would make the sentence harder than usual to bear, and a further five per cent discount for remorse.[35]

[18] The Judge also declined to give Mr Scott any discount for socioeconomic or cultural deprivation, previous good character, positive employment and rehabilitation prospects, or remorse.[36] However, the Judge did give a three per cent discount for Mr Scott's foreign national status, which was less than for Mr Habulin because Mr Scott was a native English speaker and New Zealand was a less alien environment to him.[37]

[19] Finally, the Judge declined to give Mr Cavallo any discount for socioeconomic or cultural deprivation, rehabilitation prospects, mental health issues, or remorse.[38] However, the Judge did give a five per cent discount for Mr Cavallo's foreign national status.[39]

Guilty pleas

[20] The sentencing took place before this Court's decision in *Moses v R*, which determined that a discount for guilty plea is a mitigating factor personal to the defendant and is to be considered at the second stage of sentencing.[40]

[21] Given the late stage of plea (at the start of the trial) and the "overwhelming Crown case", the Judge considered a 10 per cent discount for each of the appellants' guilty pleas was appropriate.[41]

Sentences imposed

[22] In consequence, the sentences imposed were:

(a) Mr Cavallo: 23 years' imprisonment;

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35 At [75] and [78].
36 At [84]–[86] and [88].
37 At [87].
38 At [94]–[95] and [97]–[98].
39 At [96].
40 *Moses v R*, above n 11, at [46]-[47].
41 Sentencing notes, above n 6, at [108] and [110].

(b) Mr Habulin: 27 years and six months' imprisonment; and

(c) Mr Scott: 24 years' imprisonment.[42]

Minimum period of imprisonment

[23] The Judge declined to impose any minimum periods of imprisonment. He observed:[43]

> Having discussed the issue at length with counsel and notwithstanding the serious nature of each of your [offences] and the substantive roles that you have each played … I nevertheless do not consider that the sentences imposed in any case are insufficient to hold you accountable, to denounce your conduct, to deter you or others from committing similar offending and/or to protect the community. I therefore, in each case, decline to order any additional minimum period of imprisonment beyond that effectively prescribed by the Parole Act.

Appeals

[24] Mr Habulin contends a principled application of s 8(a) of the Sentencing Act, which must recognise methamphetamine's elevated social harm vis-à-vis cocaine, disengages the application of s 8(c) of the Act because the offending was not "within the most serious of cases". He therefore submits the Judge was wrong to consider that the starting point of life imprisonment was within range. He contends, with what can only be termed a remarkable measure of optimism, that a starting point of between 20–22 years was more appropriate.

[25] He further contends the Judge erred by not finding there was at least some nexus between his background and the offending. He suggests a "contributory" approach to linkage, not an "all or nothing" approach, and submits some reduction (five to 10 per cent) to the starting point was appropriate. He also submits the discount given for his foreign national status was insufficient to alleviate the disproportionate hardship he would suffer.[44] He proposes a discount of 10 per cent instead.

[26] Mr Scott submits the relationship between sentencing levels for cocaine and methamphetamine should be determined by the comparative level of harm caused by

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42 At [112].
43 At [115].
44 Citing Sentencing Act 2002, s 8(h).

each substance. Alternatively, he contends his starting point was too high in comparison to analogous cases, and that the Judge was wrong to regard him as having taken a "leading" role. He further contends the Judge erred by uplifting the starting point for the money-laundering and organised criminal group charges, and submits a starting point of 23 years was more appropriate. Mr Scott also contends the Judge erred in not discounting the starting point for his previous good character, prospects of employment, and childhood events which are said to be causative of the offending. He suggests a discount of 15 per cent for that, and a further 15 per cent discount for his guilty plea.

[27] Mr Cavallo contends his role "was not as high" as the Judge considered, but more on par with a Mr Northway, a co-offender whom the Court found to have played a secondary role. Mr Cavallo submits a lower starting point of 17 years should have been adopted. He also contends a greater discount than five per cent ought to have been given for his foreign national status, along with discounts for socioeconomic and cultural deprivation, good character, remorse and prospects of rehabilitation.

Issues on appeal

[28] This is not a guideline judgment, unlike *Zhang*. No parties beyond the appellants and the Crown participated. It is a conventional sentence appeal under ss 244 and 250 of the Criminal Procedure Act 2011. As a decision of a permanent court dealing with an evidence-based challenge to sentencing for a subset of Class A drug offending, it may have repercussions for other appellants in the future. We are conscious of that prospect in writing this judgment.

[29] Given the length of sentence terms here, we had intended to issue this judgment after delivery and review of the judgment of the Supreme Court in *Berkland v R*[45] and *Harding v R*.[46] That judgment is not yet to hand, however, and we consider the delivery of this judgment should not be delayed further.

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45 For which leave to appeal was granted in *Berkland v R* [2020] NZSC 125.
46 For which leave to appeal was granted in *Harding v R* [2020] NZSC 127.

[30] In *de Macedo v R* this Court observed:[47]

> Given the circumstances and timing of this appeal, we will assess the challenge to Mr de Macedo's sentencing by reference to the guidelines in *Zhang*. That is permissible because the legislature has categorised both as class A drugs and *Fatu* has traditionally been used as a cross-check when sentencing for other class A drugs. In doing so, we do not intend that the *Zhang* guidelines should automatically apply in all cases of cocaine dealing. Rather, on the record before us in the present appeal, there is no reason to suppose that cocaine should be considered more pernicious than methamphetamine. The question whether any distinction should be drawn can be left for another day.

This appeal takes up that invitation. We are invited to conclude that a distinction in favour of the appellants may be drawn because they imported cocaine, rather than methamphetamine. Whether that is so will depend, substantially, on the evidence before us.

[31] This appeal therefore comes down to two broad issues:

(a) Should cocaine offending be sentenced more leniently than methamphetamine offending?

(b) Were the individual sentences here manifestly excessive?

Application to adduce fresh evidence

[32] The appellants have applied to adduce fresh evidence in the form of expert reports. We discuss their content in detail below, but they address, amongst other things, the comparative harm and toxicity of cocaine and methamphetamine.[48] As the information in the reports is cogent and the Crown does not oppose its receipt, we grant these applications.[49]

Should cocaine offending be sentenced more leniently than methamphetamine offending?

[33] We will start with the evidence adduced at sentencing and now on appeal.

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47 *De Macedo v R* [2020] NZCA 132 at [6].
48 Court of Appeal (Criminal) Rules 2001, r 12B.
49 *Lundy v R* [2013] UKPC 28, [2014] NZLR 273 at [120]. See also *R v Bain* [2004] 1 NZLR 638 (CA) at [22].

[34] Cocaine is plant alkaloid obtained from the coca bush found largely in the foothills of the Andes in South America. Used traditionally, chewed or in tea, it maintains energy, protects against some aspects of mountain sickness, is not euphoric and does not cause dependence. But it can be extracted from the coca plant in salt form, which is known as cocaine powder. Cocaine powder may be consumed either by insufflation ("snorting") or in solution (and injected intravenously). If the salt element is removed, then free-base cocaine is produced, often known as "crack" which, unlike cocaine powder, can be smoked.

Evidence of Professor White

[35] At sentencing the Judge had a report from Emeritus Professor Jason M White of the University of South Australia. He was formerly Professor of Addiction Studies at the University of Adelaide and Professor of Pharmacology at the University of South Australia. He has served as the Director of Drug and Alcohol Services South Australia, has over 20 years' experience in the treatment of people with alcohol and drug problems, and is the chair of the World Health Organization Expert Committee on Drug Dependence.

[36] Professor White notes that cocaine use is particularly prevalent in the Americas and Europe. In many countries in those regions it is the most widely used illicit stimulant, more common than amphetamine and methamphetamine (in contrast to the Western Pacific region). Commenting on cocaine effects on mental state and behaviour, Professor White notes that cocaine users can engage in impulsive behaviour that may put themselves and others at risk; cocaine-induced psychosis is common in people who use the drug frequently and is a particular risk for people who have a pre-existing psychotic disorder. Withdrawal or rebound from cocaine after cessation of repeated use can induce severe depression such that the affected person may become suicidal. Alternation between euphoria, energy and self-confidence after cocaine use, and fatigue and depression when use ceases, can result in unstable mental states as well as considerable difficulties in social relations. Repeated use of cocaine over time can lead to cocaine dependence. The effects of cocaine are potentially fatal. Professor White cites studies of cocaine users showing that cocaine's mortality rate is approximately five times higher than those of people not using illicit drugs — a rate

comparable to amphetamine.[50] He notes that a number of attempts have been made to consider how different drugs rate in terms of the amount of harm they produce. No one approach to this has proven either ideal or free from criticism. However, whatever methodology is used, Professor White notes that:

> … cocaine is ranked very highly among the licit and illicit drugs in terms of the risk to users. The level of risk for cocaine was comparable to or greater than that for methamphetamine.

[37] As to the distinction with methamphetamine, Professor White notes that the main difference is that cocaine has a much shorter duration of effect compared to methamphetamine, which can result in more frequent dosing of cocaine. Adverse effects, including potentially fatal effects, are very similar as between the two drugs. Again, the main difference is the shorter duration of action of cocaine. Professor White concludes:

> … at least some data on comparative mortality has shown long term cocaine users to be at greater risk than long term methamphetamine users and comparisons of overall harms by experts or based on the relative toxicity [of] doses used places cocaine such that it is at least comparable to methamphetamine and by some measures more dangerous.

Evidence of Professor Nutt

[38] The appellants provided an expert opinion from Professor David Nutt, a psychiatrist and Professor of Neuropsychopharmacology at Imperial College London. Professor Nutt also gave evidence that was accepted by this Court in *Zhang*.[51] Professor Nutt is a Fellow of the Royal College of Physicians, the Royal College of Psychiatrists, and the Academy of Medical Sciences (United Kingdom). He was appointed chair of the United Kingdom government's Advisory Council on the Misuse of Drugs technical sub-committee for the assessment of drug harms, has published over 500 research papers, and for over 25 years has acted as the editor of the Journal of Psychopharmacology. He has served as President of the European Brain Council, the European College of Psychopharmacology, the British Association of Psychopharmacology and the British Neuroscience Association.

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50 Referencing research done in Europe where amphetamine is used in preference to methamphetamine.

51 See *Zhang v R*, above n 1, at [67]–[72], [78] and [145].

[39] In common with Professor White, Professor Nutt observes that repeated use of cocaine can lead to dependence. When used at the same dose, cocaine powder and smoked crack cocaine are similarly addictive, although some studies suggest crack cocaine is substantially more harmful to the user and to society than cocaine powder. Snorted cocaine is less addictive for the same dose due to the slower onset of action and lower peak level achieved. Repeated cocaine use, once leading to addiction, is associated with a withdrawal syndrome when use stops, characterised by a loss of energy, extreme fatigue and sleepiness, muscle cramps and twitches, and great drug craving. Essentially cocaine dependence or addiction is similar to other forms of addiction. It leads to many personal and social consequences, such as criminality to support the habit, breakdown of social relationships, and loss of employment.

[40] Turning then to the comparative harm of cocaine, Professor Nutt observes that assessment is challenging "because of the different formulations and routes of administration". Professor Nutt's own analysis, using a multicriteria decision analysis methodology, assessed various available drugs, licit and illicit, by reference to harm to users and harm to others. As is common in such analyses, licit narcotics such as alcohol and tobacco ranked towards the upper scale in terms of combined harm. Professor Nutt references in his evidence a study prepared by himself, Leslie A King and Lawrence D Phillips on behalf of the Independent Scientific Committee on Drugs, which produced the following table:[52]

[52] David J Nutt, Leslie A King and Lawrence D Phillips *Drug harms in the UK: a multicriteria decision analysis* (2010) 376 The Lancet 1558 at 1561.

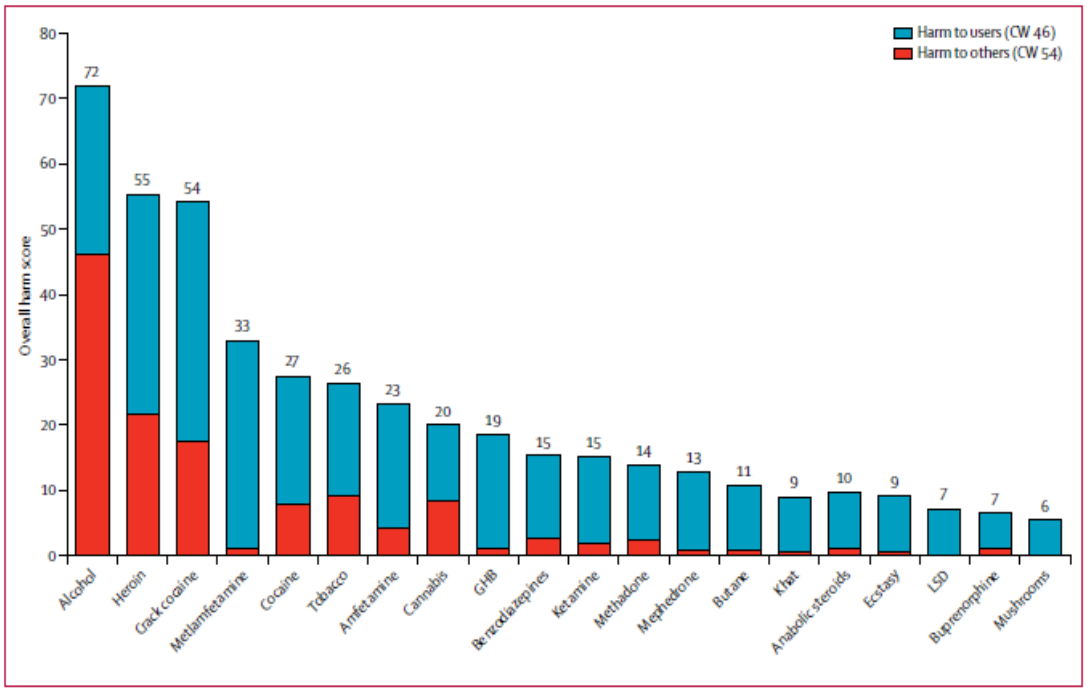

Figure 2: Drugs ordered by their overall harm scores, showing the separate contributions to the overall scores of harms to users and harm to others
The weights after normalisation (0–100) are shown in the key (cumulative in the sense of the sum of all the normalised weights for all the criteria to users, 46; and for all the criteria to others, 54). CW=cumulative weight. GHB=γ hydroxybutyric acid. LSD=lysergic acid diethylamide.

[41] In that analysis, crack cocaine is substantially more harmful than cocaine powder, and methamphetamine falls between the two. The report is based on United Kingdom-based research. From a New Zealand context, the low scoring of "[h]arm to others" in the case of methamphetamine causes some wonder but, while the low score is noted in the paper, it is not explained further.[53]

[42] Professor Nutt's approach has been broadly replicated by other international studies, including one in Australia by Yvonne Bonomo and others, which shows a more familiar social harm assessment for methamphetamine.[54] Professor Nutt summarised the results of this study in his evidence as follows:

	Cocaine HCl[55]	Methamphetamine (crystal meth)	Heroin	Alcohol	Cannabis
Harms to user	**368**	670	715	665	205
Society	**167**	330	250	430	75
Total	**535**	1000	965	1095	280

53 At 1561. Compare the discussion in *Zhang v R*, above n 1, at [79]–[80].
54 Yvonne Bonomo and others "The Australian drug harms ranking study" (2019) 33(7) Journal of Psychopharmacology 759.
55 That is, cocaine powder.

[43] A similar analytical project is planned by the University of Otago, but its results are not yet available.

[44] Professor Nutt's conclusions are that cocaine powder is "significantly less harmful [to users] than methamphetamine or heroin". The harms of cocaine powder to society are also lower than those for methamphetamine and heroin.

Evidence of Dr Schep

[45] Finally, the appellants also provided an expert opinion by Dr Leo John Schep, an independent forensic toxicologist and former member of staff of the National Poisons Centre at the University of Otago.[56] He notes that both cocaine and methamphetamine act in a similar manner when ingested by humans. Both are stimulants and, by increasing the release of dopamine in the brain, thereby increase vigilance, arousal, reward and executive functions. Repeated and prolonged use in each case is associated with physiological consequences, resulting in changes to the vascular and central nervous systems. But there is, as Dr Schep notes, a difference in the toxicity between the two drugs. Methamphetamine displays greater toxicity compared to cocaine.[57] In particular, Dr Schep notes that the elimination of cocaine from the body is far more rapid than that of methamphetamine: the elimination half-life of cocaine is 60 to 90 minutes, whereas in the case of methamphetamine it is 11 to 12 hours. As he puts it, "[t]he resultant increased exposure to [methamphetamine], therefore, causes more prolonged injury when compared to cocaine, where exposure is substantially shorter thereby reducing the time for injury to occur".

[46] Dr Schep concludes:

> Both cocaine and methamphetamine are stimulants producing similar psychoactive and adverse clinical effects. However, based on their pharmacokinetic profiles, the mode of action in neuronal cells, animal investigations and reports of clinical trials and acute case reports, some of which resulted in death, [methamphetamine] is substantially more toxic than cocaine.

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[56] We note Dr Schep also gave evidence in this Court's earlier decision in *R v Ingram* [2018] NZCA 252, [2018] 3 NZLR 783: see at [70]–[71].

[57] That is, the capacity of a substance to cause injury or fatality to a living organism.

Submissions

[47] Mr Chisnall (for Mr Habulin) argued the Judge erred by not recognising that the guidelines in *Zhang* were "a direct response to the social harm caused by New Zealand's most pernicious drug — not a general Class A guideline judgment". *Zhang* was said to have concluded that methamphetamine is "New Zealand's apex Class A drug", following the hearing of comprehensive expert evidence establishing the ways in which it harms users and the community. Mr Chisnall submitted that there is a reasoned basis for differentiation between Class A drugs, and that the Judge:

> … ought to have taken into account that *Zhang* should be used cautiously as a "cross-check", and in a way that reflects the existing state of the evidence about the social harm posed by cocaine.

Mr Chisnall also submitted that Professor Nutt's report suggested that cocaine poses a substantially lower risk of harm to users and to society when compared to methamphetamine. The degree of social harm is relevant to the requirement in s 8(a) of the Sentencing Act, which requires a judge to take into account the gravity of offending, including the degree of the offender's culpability. Methamphetamine's elevated social harm compared to cocaine is relevant to that provision. Notwithstanding s 8(c), which requires a judge to impose the maximum penalty prescribed if the offending is within the "most serious" of cases for that penalty, the seriousness of a case of Class A drug offending does depend on the nature of the substance dealt. Moreover, Mr Chisnall submitted, it is a principled application of s 8(e)'s requirement that there be a logical and consistent sentencing scale between the most and least serious of cases.

[48] Ms Cooper (for Mr Scott) submitted that the "cross-check" approach used to compare sentencing one Class A drug with another lacks clarity.[58] The case law, Ms Cooper submitted, lacks explanation of the "precise manner" in which methamphetamine sentences can act as a cross-check in relation to other drug offending. As she put it:

> … there is no guidance as to whether a leading role concerning 2kg of methamphetamine discloses equal culpability to a leading role concerning 2kg of cocaine, and if not, by what criteria the relationship should be determined.

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[58] See, for example, *Clarke v R*, above n 14, at [25].

Ms Cooper submitted this Court in *Zhang* had suggested its conclusions regarding personal mitigating circumstances would apply to all instances of Class A drug offending.[59] But this Court refrained from any suggestion that its revised guidelines would also apply to the first stage of sentencing, on starting points, in sentencing cocaine or other Class A drug offending. Ms Cooper submitted that the cross-check approach should now be discarded. It lacks proper justification for equating, even roughly, methamphetamine offending and cocaine offending. The relationship between sentencing levels for those two drugs should instead be determined "with a proper evidential basis", discussing the comparative levels of harm caused by each substance.

[49] Ms Pecotic (for Mr Cavallo) adopted the submissions of Mr Chisnall and Ms Cooper on this point.

[50] Ms Brook (for the Crown) accepted that the decision of this Court in *Zhang* did not apply directly. But she submitted that modification or adjustment as between starting points for methamphetamine and cocaine was "somewhat beside the point". That was because the quantities here would place each of the appellants at or near the maximum penalty, given the statutory imperatives in s 8(c) and (d) of the Sentencing Act and the requirement of s 85(4)(a) of that Act for sentences to reflect the totality of the offending. On that basis alone the sentences imposed here were within the available range.

[51] Ms Brook accepted that cocaine does pose a different set of challenges for the community. Further, it was not the Crown's position that the effects and impacts of cocaine offending are the same as those arising from the methamphetamine trade. But general consistency between sentencing for offending involving the two drugs is warranted, and she resisted the submission that cocaine offending would always require a downward adjustment from the starting points that might have been adopted for methamphetamine offending under *Zhang*. In particular, the time for deterrence may logically arrive before a substance takes hold within a community. The relative scarcity of cocaine in New Zealand and the relative absence of an addiction-based

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59 See *Zhang v R*, above n 1, at [136].

dealing network (in contrast to methamphetamine) means that cocaine will impact on different sectors of the community. Ms Brook submitted:

> There is a unity in principle to be found in the authorities: any differentiation between drugs of the same class must be rooted in principle and rationally connected to the purposes and principles of sentencing. Accordingly, though cocaine and methamphetamine may affect users and the community in different ways, a variety of factors support the submission that no meaningful distinction in the gravity of offending between the substances should result.

Discussion

[52] The issue of intra-class sentencing differentiation was considered by this Court in 2018 in *R v Ingram*, which examined the sentencing levels for MDA.[60] This Court's views were summarised very clearly early in the judgment:[61]

> We are unable to agree with the Crown's primary submission that sentencing courts may not make individualised assessments of the comparative harm caused by drugs within the same class. Firstly, as a matter of statutory interpretation the Sentencing Act 2002 is not displaced by [the Misuse of Drugs Act 1975's] classification and sentencing courts must, where the evidence justifies it, make comparative harm assessments. Secondly, the extensive case law in New Zealand touching on this question does not support the proposition that sentencing courts may not differentiate between drugs in the same class. Thirdly, the evidence provided by the parties on the question of relative harm demonstrates that MDA is less harmful than methamphetamine but more harmful than MDMA. Finally, we conclude the Sentencing Act provides that this evidence may not be ignored, although its impact on starting points is necessarily constrained by the [Misuse of Drugs Act] classification.

[53] MDA is a Class A drug closely related to methamphetamine, but was demonstrated on the evidence presented in *Ingram* to be less potent, and probably less toxic and lethal, than its relative.[62] The difference was "significant and therefore material for sentencing purposes".[63] It is sufficient for present purposes to summarise this Court's analysis in *Ingram*.

[54] The first issue dealt with was the inter-relationship between the Misuse of Drugs Act 1975 and the Sentencing Act.[64] The former provides in s 3A for the

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60 *R v Ingram*, above n 56.
61 At [20].
62 *R v Ingram*, above n 56, at [78].
63 At [79].
64 See at [22]–[40].

classification of controlled drugs into three classes based on perceived risk of harm "to individuals, or to society, by [their] misuse". Class A drugs are those identified as posing a "very high" risk of harm; Class B a "high" risk of harm.[65] Methamphetamine was added to Class A in 2003 (having previously been in Class B).[66] Cocaine was added to Class A in 1988.[67] As this Court noted, potential penalties are harsh: life imprisonment in the case of Class A drug offending (with a presumption in favour of imprisonment), 14 years' imprisonment in the case of Class B drug offending, and 8 years' imprisonment in other cases.[68]

[55] We pause here to note that the Misuse of Drugs Act was the subject of a comprehensive review by the Law Commission in 2011.[69] The Law Commission considered whether a more nuanced classification system, using a scientifically-based drug harm matrix, should replace the tripartite "ABC" classification. Ultimately it rejected that proposal on the basis that expanding the number of classifications would make categorisation based on harm far harder, and had the potential to distort the sentencing process because it would create a large number of offences with little between them in terms of culpability.[70] The Law Commission concluded:[71]

> We have concluded that an ABC classification system should be retained. Three classes provide for a more accurate discrimination between the different levels of harm posed by different drugs than two classes. It also avoids the difficulty, which arises under a multi-tiered system, of attempting to make very precise nuanced decisions with incomplete and imprecise evidence and information. A three-tier division provides adequate guidance to the courts over the level of penalty for different types of offending involving particular drug types.

The Law Commission did however recommend that the classification system should reflect only the relative harmfulness of each drug, along with modest modification of the existing statutory criteria for assessing risk of harm.[72]

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65 Misuse of Drugs Act 1975, s 3A(a) and (b).
66 Misuse of Drugs (Changes to Controlled) Drugs Order 2003, cls 4 and 5(2).
67 Misuse of Drugs Amendment Act (No 2) 1987, s 8.
68 *R v Ingram*, above n 56, at [24], citing Misuse of Drugs Act, ss 6(2)(a)–(c) and (4).
69 Law Commission *Controlling and Regulating Drugs: A Review of the Misuse of Drugs Act 1975* (NZLC R122, 2011).
70 At [6.101].
71 At [6.102].
72 At [6.119].

[56] In *Ingram*, this Court then considered the relevant provisions of the Sentencing Act.[73] It focused in particular on the purposes and principles set out in ss 7 and 8. It noted that harm was central to accountability under s 7(1)(a) and (b). Section 8(a) requires courts to take account of the gravity of offending in a particular case; 8(b), the comparative seriousness of the offence category as reflected in the prescribed maximum penalties; 8(e), "the general desirability of consistency" in the treatment of similar offenders committing similar offences in similar circumstances; and 8(f), where relevant, any information provided concerning the effect of the offending on the victim. Finally, this Court also noted s 9(1)(d), which permits courts to treat any identified damage or harm resulting from the offence as a potential aggravating factor. (To that analysis we would add that s 8(b) and (c), focusing on the seriousness of the offence, also by implication embraces the degree of harm caused or that could have been caused had the criminal activity not been intercepted and stopped.)

[57] It followed, this Court concluded, that both Acts referenced harm as a core factor in the exercise of the respective discretions each contained.[74] In the Misuse of Drugs Act, risk of harm was the focal point; in the Sentencing Act, actual harm. Assessment of harm was woven throughout the considerations underlying ss 7, 8 and 9 of the Sentencing Act. This Court then said:[75]

> We do not agree that as a matter of statutory interpretation, [the Misuse of Drugs Act] fulfils, through classification, the harm assessment requirements of the Sentencing Act in drug offending. It is true that [the Misuse of Drugs Act] is specific to drug offending and the Sentencing Act is general in its application. But the Sentencing Act is a newer measure whose key innovation was to establish, for the first time in legislative form, a coherent analytical framework for sentencing. The harm assessment aspects of that framework are fundamental to the balance both conceptual and practical that ss 7, 8 and 9 provide. If the harm related provisions in the Sentencing Act were to have no application to drug offending, we would have expected the legislature to have said so explicitly either as an addendum to the framework itself or by amendment to [the Misuse of Drugs Act].
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> …
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> That said, [the Misuse of Drugs Act] does of course have a powerful effect on the discretion available to sentencing courts. Classification sets the sentence's

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73 *R v Ingram*, above n 56, at [29]–[33].
74 At [34].
75 At [36] and [38].

> upper limit and, in doing so, signals the broad range within which sentences in that class should fall. Differentiation between drugs in the same class based on harm assessment is necessary where the evidence requires it, but the range is limited. This is confirmed by the direction in s 8(b) of the Sentencing Act that the court must keep in mind the seriousness signal inherent in the offence category itself. Similarly, s 8(e) requires the court to take account of the desirability of consistency in sentencing. In this way [the Misuse of Drugs Act's] harm-based classification system and the case specific harm assessment provisions of the Sentencing Act may be readily reconciled.

[58] The Court then reviewed the authorities engaging intra-class differentiation based on harm since 1982.[76] It is sufficient for present purposes to repeat the conclusion of that analysis:[77]

> This Court came down firmly in the 1980s in favour of intra-class differentiation. By the 1990s, concerns were being expressed by appellate judges over whether differentiation was leading to overly lenient sentences for hallucinogen offending. Suggestions that the matter might be revisited were always qualified by an acceptance that any change would be evidence-based. That is why *Arthur* and *Fatu* were careful to restrict their reach to methamphetamine only in the absence of more broadly applicable evidence. They did not adopt the approach advocated in *Wallace* which must, in our view, be understood in light of its particular circumstances: the need to set a tariff for a drug that had been under-classified. *Close*, which is the most recent decision of this Court, did suggest that uniformity was preferred, but the Court was not making a carefully reasoned point. The two initial reasons for rejecting differentiation for GBL in class B were, in our view, more cogent. First, there was no evidence before the Court on relative harm and therefore no basis upon which a differentiation could be made; and second, there were ample examples of GBL sentencing against which that Court could cross-check the sentences imposed in that case.
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> Finally, and most importantly of all, none of the authorities after 2002 engage with the requirements of ss 7, 8 and 9 of the Sentencing Act on this question or with the relationship between these provisions and [the Misuse of Drugs Act].
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> We conclude that, viewed in the round, 25 years of New Zealand jurisprudence on the effect of [the Misuse of Drugs Act] classification on sentencing suggests that, if the evidence justifies intra-class differentiation, that is an appropriate approach. This, as we have said, is consistent with the statutory regime.

[59] It follows from *Ingram* that intra-class differentiation, based on relative harmfulness, is appropriate and necessary where justifiable on the scientific evidence available. We make this point also: when guideline judgments for drug offending

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[76] At [41]–[63].

[77] At [64]–[66] (footnote omitted), referring to *R v Arthur* [2005] 3 NZLR 739 (CA); *R v Fatu*, above n 13; *R v Wallace* [1999] 3 NZLR 159 (CA); and *Close v R* [2011] NZCA 434.

differentiate starting points by reference to quantity, they use quantity primarily as a proxy for the actual or potential individual and social harm the drug causes or may cause.[78] It might well be thought that to differentiate only in that way, notionally, when some differentiation based on actual harm caused is also possible, would defy common sense.

[60] This leads us to Ms Cooper's criticism of "cross-checking" between methamphetamine guideline sentencing levels and sentencing for other drugs.[79] It is necessary to start by identifying what the concept, endorsed in the authorities, actually entails. It is, we suggest, a relatively modest but necessary exercise, reflecting these considerations:

(a) *Zhang* (and *Fatu* before it) provided first-stage sentencing guidelines (that is, starting points driven by quantity, as a proxy for harm) only for methamphetamine offending.

(b) Guidelines have not been devised for other Class A drug offending.

(c) Harm attributable to methamphetamine dealing and consumption lies towards the upper end of the scale for Class A drug offending — as the studies outlined at [40]–[42] above confirm. Heroin and crack cocaine are likely to exceed the harm wrought by methamphetamine; harm from other Class A drugs will be proximate to or below methamphetamine, assessed on a gram-for-gram basis.

(d) Cross-checking therefore involves a judicial thought exercise involving looking at sentences for other Class A drug offending, as if they involved identical quantities of methamphetamine instead, and were subject to the same other first-stage factors — in particular, the role assumed in the offending. The purpose of the exercise is to ensure that the imposed or proposed sentence *does not exceed* that appropriate for methamphetamine. The underlying assumption is that there is no basis

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78 *Zhang v R*, above n 1, at [104]. It may also be indicative of commerciality, deserving greater denunciation. See also *R v Fatu*, above n 13, at [9], [26] and [31].

79 See [48] above.

to consider other Class A drugs (apart from heroin or crack cocaine) as more pernicious than methamphetamine.[80]

[61] Explained in these terms, the cross-checking methodology is unobjectionable. It does not however grapple with the issue of whether a *lesser* sentencing level should be imposed for other Class A drugs (apart from heroin and crack cocaine). We turn now to that question.

[62] Our assessment of the evidence — set out at [34]–[46] above — is as follows:

(a) Methamphetamine and cocaine are similar inasmuch as they are stimulants which can trigger impulsive and psychotic behaviour which may put the user and others at significant risk.

(b) We are satisfied the evidence demonstrates that cocaine powder is somewhat less toxic (in the sense explained by Dr Schep at [45]–[46] above) than methamphetamine.

(c) Assessed overall, we are satisfied the evidence establishes that cocaine powder is somewhat less harmful than methamphetamine, although that will depend on the purity, dosage, consumption method, characteristics of the user and, in particular, the extent and duration of use.[81]

(d) However, cocaine powder is also capable of being converted into a far more harmful substance, crack cocaine. A comparative harm assessment must therefore allow for that potentiality.

[63] Taking these four conclusions together, we consider that the appellants have established that sentencing for like quantities: (1) should not, in the case of cocaine, exceed sentencing for methamphetamine; and (2) should generally be sentenced slightly below comparable methamphetamine starting points – engaging a discount of around five per cent. The second assessment is however dependent on crack cocaine

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80 *De Macedo v R*, above n 47, at [6].

81 Picking up the point made by Professor White in the passage quoted at [37] above.

consumption remaining rare in New Zealand. Further studies – including that noted at [43] – may enable more robust conclusions to be drawn at a later time.

Were the individual sentences manifestly excessive?

[64] We can be relatively brief in addressing this section. We will start with the first-stage starting points and both cross-check these against the equivalent quantity in methamphetamine sentencing (as explained at [60]) and subject these to the modest further discount applicable to cocaine (as explained at [63]). We will then turn to each appellant's personal circumstances and the submissions summarised earlier.[82]

Stage one: sentence starting points

[65] As this Court explained in *Cheung v R*, *Zhang*, generally speaking, did not reduce starting points for those playing a substantial role in large-scale commercial drug dealing.[83] That is what we are dealing with here, with knowing involvement in quantities of not less than 46 kg in Mr Cavallo's case and 76 kg in the case of Messrs Habulin and Scott. These quantities, and the leading or significant roles occupied in fact by the appellants, point compellingly to the need for strongly deterrent sentence starting points.

[66] Methamphetamine, which is what *Zhang* dealt with, is a pernicious drug that causes terrible dependencies, misery and other criminal offending.[84] It is at the upper end of seriousness among Class A drugs. Parliament has set the sentencing range for Class A drugs.[85] Section 8(c) and (d) of the Sentencing Act provides that judges:

> (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
>
> (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; …

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82 At [24]–[27] above.
83 *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259 at [63].
84 See *Zhang v R*, above n 1, at [72]–[73] and [77]–[80].
85 Misuse of Drugs Act, s 6(2)(a).

Commercial dealing in methamphetamine by an offender occupying a leading role in the offending and involving substantial band five quantities engage these mandatory principles.

[67] *Zhang* did not change that. What it did was two things: (1) provide for greater sentencing discrimination at lower band levels;[86] and (2) authorise broader consideration of personal circumstances — in particular, addiction — even where the offending was commercial in nature.[87] Sentencing judges are not permitted to shrink from setting substantial starting points at the first stage of the sentencing process simply because greater, and yet greater, quantities can be imagined. A point comes where the volumes are so substantial, and the actual or potential harm they represent so serious already, that more means not much at all and the real discriminating issue remaining in setting a starting point is the role occupied by the offender. In commercial-level dealing, decisions under the former *Fatu* guidelines remain relevant at the first sentencing stage.[88]

[68] Counsel made various rather deflecting challenges to the Judge's assessment of Messrs Habulin and Scott's roles as "leading", and Mr Cavallo's as "significant", but we are entirely satisfied the Judge was right in those assessments. The scale of importation and degree of knowledge and engagement, and actual or prospective financial reward, compel the Judge's assessments. We need say no more, as the assessments were open to the Judge and we are not persuaded that he erred.

[69] Cross-checking the sentences, then, against *Zhang*, we do identify a difficulty. The guideline judgment in *Zhang* dealt also with the appeal of a Mr Yip. He imported 60.9 kg of methamphetamine and had a leading role, albeit not at the highest end of that role description because his remuneration was relatively low ($10,000) and he had relatively limited decision-making power.[89] Ultimately we described Mr Yip as occupying a "mid-to-lower level leading role".[90] A starting point of 23 years'

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86 See *Zhang v R*, above n 1, at [118] and [123].
87 See at [130]–[163], but especially at [139]–[150].
88 See *R v Fatu*, above n 13, at [36].
89 *Zhang v R*, above n 1, at [293] and [298]–[299].
90 At [300].

imprisonment was fixed.[91] This decision is, we consider, the most material in setting the starting points in these appeals.

[70] The following post-*Zhang* decisions are also material:

(a) In *Fakaosilea v R* this Court reduced the appellant's starting point for her part (assessed as "somewhere between 'lesser' and 'significant'") in importing 501 kg of methamphetamine from 28 to 25 years' imprisonment.[92] The starting points of 32 years' imprisonment for "leading" members of the importing group went unchallenged.

(b) In *Tran v R* a "lesser" role in importing 109.6 kg of methamphetamine attracted a reduced starting point of 19 years on appeal.[93]

[71] Bearing in mind the observation noted at [65] above to the effect that *Zhang* generally did not reduce starting points for those playing a substantial role in large-scale commercial drug dealing, it is also useful to consider sentencing levels for substantial commercial drug-dealing under the prior guideline judgment, *R v Fatu*:[94]

(a) In *Chen v R* this Court upheld starting points of life imprisonment for two leading members of a group that imported 96 kg of methamphetamine, and 25 years for other members who, in *Zhang* terms, would be described as occupying a "significant" role.[95]

(b) In *Chan v R* a "significant" (but lower-end) role in importing 60.9 kg of methamphetamine earned a starting point of 20 years.[96] (Mr Chan was a co-offender of the Mr Yip referred to at [69] above.)

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91 At [300].
92 *Fakaosilea v R* [2021] NZCA 401 at [92].
93 *Tran v R* [2021] NZCA 464 at [42].
94 *R v Fatu*, above n 13.
95 *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158.
96 *Chan v R* [2018] NZCA 148.

(c) In *Cheung v R* this Court declined to interfere with a starting point of 25 years for a "significant" role in importing 176 kg of methamphetamine.[97]

[72] Finally, we refer to one post-*Zhang* cocaine sentencing appeal, *Cook v R*, which we have already mentioned at [12] above. *Cook* involved 35 kg and a mid-to-low-level "significant" role. This Court adopted a starting point of 17 years' imprisonment, a reduction of two years against the first instance sentencing decision.[98]

[73] Turning to Mr Habulin, we observe that the quantity concerned was 76 kg of cocaine powder, and that he enjoyed substantial autonomy — being described as "almost indispensable" by the Judge.[99] Drawing on the authorities just discussed, we consider he occupied a considerably greater "leading" role than Mr Yip, and with a significantly higher quantity. A starting point of 29 years' imprisonment would have been appropriate had the substance imported been methamphetamine. Making the allowance identified in [63] above, we fix a starting point of 27 years and six months' imprisonment for Mr Habulin.

[74] Mr Scott also took a "leading" role, albeit one identified by the Judge by implication as below that of Mr Habulin. The importation involved the same quantity as Mr Habulin. A starting point of 27 years' imprisonment would have been appropriate had the substance imported been methamphetamine, and we therefore fix a starting point of 25 years and seven months' imprisonment for Mr Scott.

[75] Mr Cavallo occupied a high-level "significant", rather than "leading", role, and the volume with which he was concerned was less than his co-offenders: 46, rather than 76 kg. A starting point of 22 years' imprisonment would have been appropriate had the substance imported been methamphetamine, and we fix a starting point of 20 years and 10 months' imprisonment for Mr Cavallo.

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97 *Cheung v R*, above n 83.
98 *Cook v R*, above n 19, at [43].
99 Sentencing notes, above n 6, at [40].

Stage two: considerations personal to the appellants

[76] We turn now to the second stage in the sentencing process, in which considerations personal to the appellants are taken into account by way of increase to, or discount from, the first-stage starting point.

(a) Personal and cultural background considerations

[77] As noted earlier, Mr Habulin contends the Judge erred by not finding there was at least some nexus between his background as a displaced veteran and released prisoner in France, and his offending. He suggests a "contributory" approach to linkage, not an "all or nothing" approach, and submits some reduction (five to 10 per cent) to the starting point was appropriate. Mr Scott contends that despite success enjoyed as an adult, the poverty of his childhood and criminality of his father were likely contributory to his failure "to discern between right and wrong". Mr Cavallo's cultural report, prepared pursuant to s 27 of the Sentencing Act, points to his unhappy experience in the Yugoslav army, culminating in his being shot and then deserting, and depression resulting in six months' psychiatric care.

[78] In *Zhang* this Court observed that systemic deprivation impairing a defendant's choice, and therefore diminishing moral culpability, will require consideration in sentencing.[100] Social, cultural or economic deprivation that has a demonstrative nexus with the offending may be relevant in mitigation.[101] Whata J noted in *Solicitor-General v Heta* that the cogency of any s 27 information, the strength of the link between any deprivation, the offender and his or her offending, and the availability of rehabilitative measures to specifically address the effects of systemic deprivation will be critical to the assessment.[102] Section 27 contemplates in substantial part mitigation of sentence because of the prospect of family or community mechanisms to resolve issues arising from the offending, to mitigate its effects, and to rehabilitate the offender.[103] We observe that s 27 reports based almost solely on self-reporting offer the Court modest assistance only beyond the submissions of counsel and do not serve the wider purposes intended by the provision.

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100 *Zhang v R*, above n 1, at [159].
101 At [162].
102 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [49].
103 See Sentencing Act, s 27(1).

[79] Here the argument made is a bare claim to discount based on deprivation and dislocation during childhood and/or adulthood. In Mr Scott's case, he overcame his early difficulties to develop into a successful adult. He was waylaid here not so much by a systemic inability to discern right from wrong, but by the temptation to gain wealth by serious criminal offending. There is very modest cogency only in the arguments made for Messrs Habulin and Cavallo, and we are not disposed to make any allowance in the case of Mr Habulin bearing in mind the scale of offending involved and his leading role in organising it for substantial personal gain. Mr Cavallo's position is potentially more complex given his past mental health issues, but the psychological report tendered does not connect the offending to those issues and does not in our view compel a different response.

(b) Foreign prisoners

[80] Messrs Habulin and Cavallo were afforded a five per cent discount on account of the greater hardship they would face as a result of serving a sentence in a country removed from family and because English is not their first language (although they have reasonably good English). Mr Scott received a three per cent discount, given the former factor only. The Judge bore in mind that they had chosen to come to New Zealand to offend seriously, and profit substantially, which somewhat mitigated the required response to hardship.[104]

[81] Following the hearing this Court sought, via counsel, further information regarding the proportion of foreign national prisoners who receive an early release (that is, parole on their first or second hearing). The information provided suggests a slightly higher incidence of release in contrast to domestic prisoners, but the data set is small and we put it aside for present purposes.

[82] We are not persuaded the Judge erred in setting the discounts just described, which are consistent with the approach taken by this Court in *Zhang.*[105] We therefore confirm the discount of five per cent in Messrs Habulin and Cavallo's cases, and three per cent in Mr Scott's.

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[104] Sentencing notes, above n 6, at [75].
[105] See *Zhang v R,* above n 1, at [163]. See also at [301].

(c) Good character, remorse and rehabilitation

[83] As noted earlier, Mr Scott also contends the Judge erred in not discounting the starting point for his previous good character and rehabilitative prospects. Mr Cavallo contends he should have received discounts for good character, remorse and prospects of rehabilitation.

[84] Mr Scott's prior convictions in our view essentially exclude a good character discount. Although his previous offending is of a different order of magnitude, it demonstrates the present offending was not an isolated lapse.[106] Departing however from the Judge in one respect, we would allow Mr Scott some discount for rehabilitative prospects, given the evidence shows his capacity to make good in business in adult life after the adversity of his childhood and subsequent drug addiction. An allowance of seven per cent is appropriate in Mr Scott's case.

[85] We are not persuaded such allowance should be made in Mr Cavallo's case, and the improbability of the special pleading he makes in his letter to the High Court retards rather than advances his case in this respect.

(d) Guilty pleas

[86] We consider the discount allowed by the Judge, 10 percent for pleas made on the very eve of trial and in the face of an overwhelming Crown case, cannot be impeached.[107] We therefore confirm the discount of 10 per cent in each case for the guilty plea.

(e) Conclusion

[87] It follows from the foregoing that the starting point sentences must be discounted in each case:

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106 *Taylor v R* [2017] NZCA 574 at [25].

107 See generally *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 at [15]–[19]; and *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [51], [57] – [58] and [65].

(a) Mr Cavallo: by 15 per cent from a starting point of 20 years and 10 months, producing a final sentence of 17 years and eight months' imprisonment.

(b) Mr Habulin: by 15 percent from a starting point of 27 years and six months, producing a final sentence of 23 years and four months' imprisonment.

(c) Mr Scott: by 20 per cent from a starting point of 25 years and seven months, producing a final sentence of 20 years and five months' imprisonment.

Minimum period of imprisonment

[88] We record our joint view that, this being a case of very serious and substantial commercial importation of Class A drugs, minimum periods of imprisonment would have been an appropriate response.[108] The appellants here are fortunate in that the Judge saw fit not to follow that practice, and the Solicitor-General saw fit not to appeal that decision.

Result

[89] The applications to adduce fresh evidence are granted.

[90] The appeals are allowed.

[91] The sentences imposed in the High Court are quashed and substituted with the following sentences:

(a) Mr Cavallo: 17 years and eight months' imprisonment;

(b) Mr Habulin: 23 years and four months' imprisonment; and

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[108] See *Zhang v R*, above n 1, at [167]–[168] and [171].

(c) Mr Scott: 20 years and five months' imprisonment.

Solicitors:
Crown Law Office, Wellington for Respondent