IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA182/2021
[2022] NZCA 285

BETWEEN	GREGORY JASON MARTIN Appellant
AND	THE QUEEN Respondent

Hearing: 15 February 2022

Court: Goddard, Katz and Edwards JJ

Counsel: C G Tuck and T D A Harré for Appellant
J A Eng and T R Simpson for Respondent

Judgment: 1 July 2022 at 11.00 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B The appeal against sentence is allowed.

C The sentence of five years and six months' imprisonment is quashed and substituted with a sentence of two years' imprisonment.

REASONS OF THE COURT

(Given by Goddard J)

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Introduction

[1] Mr Martin, an unusually naive and gullible man, fell for a criminal scam. He was persuaded to travel to Thailand to sign some papers which, he was told, would result in payment of USD 10.5 million into his bank account. The "officials" he was dealing with advised him (after he arrived in Thailand) that he would also need to bring back to New Zealand a suitcase of "gifts" to be delivered to a "payment officer" in New Zealand. Shortly before he was due to leave Thailand, Mr Martin was given a suitcase containing the supposed gifts. He was concerned about the possibility that the case contained hidden drugs. He exchanged texts about his concerns with his sister, and also with the scammers. But he did not find anything untoward when he searched the suitcase, and the scammers reassured him everything was above board. He went to the airport and checked in his bags, including the suitcase, for his return

flight to New Zealand. On his arrival at Auckland he declared that he was carrying luggage for another person. The suitcase was searched, and approximately 1.4 kg of methamphetamine was discovered.

[2] Mr Martin was charged with importing methamphetamine. He pleaded not guilty. Following a trial before Judge Moala and a jury in the District Court, he was convicted. Judge Moala sentenced him to five years and six months' imprisonment.[1]

[3] Mr Martin appeals to this Court against both his conviction and sentence.

Background

[4] We begin by setting out the background in a little more detail.

[5] In January 2019 Mr Martin received an email, purportedly from officials of the "Nigeria Payment Review Unit", advising him that he was a "beneficiary" and entitled to payment of USD 10.5 million. To obtain payment of that sum, he would need to pay a documentation fee of USD 650.

[6] The email could hardly have been a more obvious scam. It was full of nonsensical and absurd statements, ungrammatical and strangely expressed. But Mr Martin appears to have taken it at face value. He responded, and engaged in correspondence with an individual who identified himself as Sampson Kanu. He also subsequently corresponded with someone calling himself Charles Bee.

[7] Mr Martin advised the "officials" that he could not pay the fee of USD 650: he was living paycheque to paycheque and had no spare money. Initially they offered to reduce the amount he had to pay to USD 400, which was described as a "subsidized rate approve [sic] by the United Nations (UN) and International Monetary Fund (IMF)". The email was headed "Do your best". Then, when he said he could not pay that amount, they pressed him to "be honest" and say what money he did have and could pay. Mr Martin's response was "I am being honest sir". He explained he had $34.21 "to last me until next Wednesday".

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1 *R v Martin* [2021] NZDC 4099 [Sentencing notes].

[8] The scammers then changed tack. In an email headed "DEVELOPMENT" they said he was "not expected to pay a dime in receiving of your funds and anybody who asks you to pay money must be lying to you". They suggested that instead he should travel to an unspecified destination where documents were held in "our other corresponding vault" which he would need to sign in person. His travel expenses and accommodation would be paid for. On his return to New Zealand he would receive the USD 10.5 million.

[9] Very few people would fall for such a blatant scam. But Mr Martin did. (And that is of course the way such scams work — they cast a wide net, and catch only a few exceptionally naive, trusting and gullible victims.) His response was:

> Dear Mr Sampson,
>
> Wow ok sir, thank you for your email, yes I will be prepared to fly over to you to receive the funds, so where would I have to fly to ? And yes I will reimburse the people who paid for my flights and accommodation, thank you once again sir, I will look forward to hearing from you
>
> Kind regards
>
> Greg Martin

[10] Further correspondence ensued. Mr Martin was told he would be travelling to Thailand. He was sent flight and hotel booking information. He took leave from his employment as a security guard and flew to Bangkok in March 2019. He expected to be met on arrival at the airport, but was not. He took a taxi to the hotel that had been booked for him, which was some distance from the airport. When he arrived at the hotel around midnight he discovered that he could not check in until the following day. He had almost no money with him. He borrowed money from a member of the hotel staff to get a room at a nearby motel for the night. He contacted the scammers, who sent him reassuring messages and agreed to provide him with some money for living expenses. He was sent 300 euros by Western Union money transfer. He used that to repay the money he had borrowed for the motel room, and for subsistence for the next few days.

[11] Mr Martin stayed at the hotel for a number of days, venturing out only occasionally. The day before his return flight, he was advised to expect a visit from a "lady official" called Miss Jenny, who would bring the documentation for him to sign. She would also bring some "gifts" which, as already mentioned, he was to take back to New Zealand and give to a "payment officer".

[12] The request to bring a bag back to New Zealand did belatedly arouse Mr Martin's suspicion. He was concerned about the possibility the bag, or items in it, might contain drugs. He exchanged a number of text messages with his sister about that risk. She advised him to search the bag "like they do on border control".

[13] Mr Martin also expressed his concerns to the scammers. He wrote:

> What are these gifts I'm supposed to be taking back to New Zealand with me? I am concerned what these gifts are, if it is dodgy and illegal then I don't want anything to do with it, I'm sorry Charles but this has kept me up most of the night thinking about it, all I want to do is sign the documents and go home …

[14] The scammers assured him "this legal free". He needed to follow instructions to get the payment. They said: "I am assuring you again to calm down".

[15] On the day of his return flight Mr Martin prepared to travel home. He packed his bag and was ready to go. He waited in the hotel for Miss Jenny to come. He exchanged anxious messages with the "officials", who assured him that she would be with him very soon. Mr Kanu wrote (in caps):

> THE ONLY CONVINCED YOU NEED IS TO GET PAID OF THE FUNDS
>
> PLEASE YOU ARE IN LAST STAGE OF THIS TRANSACTION THEREFORE YOU MUST BE CAREFUL AND ENSURE YOU FOLLOW MY INSTRUCTION AND THAT OF MR CHARLES BEE. IN THAT GIFT YOU WILL HAND OVER TO THE PERSON IN NEW ZEALAND THERE IS AN ACCESS CODE MEANT FOR THE OFFICIAL ONLY THE PAYMENT AGENT IN NEW ZEALAND WILL CONFIRM THAT THROUGH THE GIFT TO BE ABLE TO KNOW THAT YOU ARE RIGHTFUL BENEFICIARY OF THIS FUNDS. PLEASE AND PLEASE FEEL FREE AND DO YOUR BEST TO COOPERATE WITH THE OFFICIALS.
>
> HAVE YOU SIGN THE DOCUMENT? ONCE AGAIN FOLLOW THE INSTRUCTION TO ENABLE YOU GET PAID AS PROGRAMMED.

[16] Eventually, not long before Mr Martin needed to leave for the airport, Miss Jenny arrived. She asked him to sign some forms. Mr Martin declined to do so until he had a look inside the bag. He searched the bag. His evidence at trial was that:

> I took everything out, they told me there was supposed to be shoes and a watch in there plus clothes, there was only clothes in there. I emptied everything out, I searched all the pockets, searched around, ran my hands over the insides, everything then I couldn't find anything else.

[17] Mr Martin signed the documents, and Miss Jenny left.

[18] Mr Martin gave evidence that he was still "pretty worried". He emailed Mr Bee to say:

> She has been and left, she has given me a small suitcase, ive checked it but im still not sure there could be drugs hidden in there, it has a funny smell to it

[19] While he was in the taxi to the airport he made further attempts to communicate with Messrs Bee and Kanu. He messaged them that he did not feel right about what was happening. They did not get back to him until he was more than halfway to the airport. They sent a mix of reassuring and firm messages, including the following from Mr Kanu (again, in caps):

> FROM WHAT I HEARD FROM MR CHARLES BEE I AM NOT HAPPY WITH YOU AND TOTALLY DISAPPOINTING THAT YOU ARE MISBEHAVING. YOU TO LISTEN TO MR CHARLES BEE IF YOU DON'T WANT ANY PROBLEM FROM THE OFFICIALS. YOUR FUNDS IS CLOSE TO BE RELEASED IN YOUR NAME. PLEASE CONTACT MR CHARLES BEE IMMEDIATELY AND APOLOGIZE TO HIM AND OTHER INVOLVED PERSON.

[20] Mr Martin told Messrs Bee and Kanu that he might just put the gifts in his own suitcase and abandon the one given to him by Miss Jenny. The scammers told him that he could not do this. He would have to come back to the hotel and leave the suitcase there for Miss Jenny. Mr Martin asked them to arrange for her to meet him at the airport and he would give it to her there. But they would not agree to that. They told him he should continue as agreed.

[21] Throughout this period Mr Martin was also messaging his sister, expressing concern about the situation. One of his messages he sent from the taxi to his sister said that he did not feel at ease at all. Another said:

> Just emailed him and pretty much said to him what you said, I even added that I might take the clothes out and put them in my bag and ditch the small one, just waiting for his reply

[22] And, some six minutes later:

> He told me to leave the bag at the hotel and she will come back and pick it up, but I said that I'm halfway to the airport

[23] Then, around half an hour after that:

> I'm getting him to call me, he still insist that I take it back, shall I, I have to check in, in 20 minutes

[24] But as his sister told him, he did not have time to go back. The tight timing seems likely to have been designed to limit his ability to seek help or advice, or to back out.

[25] When Mr Martin arrived at the Bangkok airport he checked in his bags, including the suitcase given to him by Miss Jenny. He continued to communicate with the scammers, including a final message from Bangkok saying he was about to board the flight.

[26] On arrival in New Zealand, Mr Martin messaged an overseas telephone number provided by the scammers, saying "I've just landed, wish me luck going through customs".

[27] On his arrival card, which he filled in on the plane, Mr Martin ticked the box to say he was carrying a bag on behalf of somebody else.

[28] Mr Martin was approached by customs officers after he had landed, as he had been flagged in their computer system. He told them that he was carrying a bag on behalf of another person. The customs officers searched his bags and found approximately 1.4 kg of powder concealed within the lining of the suitcase provided

by Miss Jenny. Testing confirmed that the substance was methamphetamine with a purity of 80 per cent. The approximate street value of this quantity of methamphetamine was between $188,000 and $280,000.

[29] Under cross-examination, Mr Martin accepted that at the time he was living paycheque to paycheque. Receipt of USD 10.5 million would have changed his life completely. Mr Kanu had told him this was his best opportunity to become rich, and he had believed that.

[30] Mr Martin also accepted under cross-examination that he had specifically considered there might be drugs in the suitcase. That suspicion remained with him all the way until he came back to New Zealand. He accepted that he had remained in contact with Messrs Bee and Kanu throughout, including on his return to New Zealand, and that he was hedging his bets. He knew that what he was doing was risky, but he thought there was still a chance he would make it to the hotel in Auckland and that the USD 10.5 million would still be on the table.

[31] While he was in the car with customs officers on the way to the police station, Mr Martin said he wanted to tell his whole story to enable Customs to "get the guys that put him up to this". Subsequently, the lawyer acting for Mr Martin at the time of his arrest sent an email to Customs suggesting the possibility of a controlled delivery. However, that did not eventuate.

[32] Mr Martin was charged with importing methamphetamine, a class A controlled drug.[2]

Pre-trial application to admit expert evidence

[33] Mr Martin's lawyers applied to admit expert evidence from Dr Marika McAdam and Ms Therese Bogart on human trafficking and online scams. The application was heard by Judge Moala on the first day of trial.

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[2] Misuse of Drugs Act 1975, s 6(1)(a) and (2)(a).

[34] The application in relation to Ms Bogart's report was not pursued before the Judge.

[35] The Judge declined the application to adduce evidence from Dr McAdam on the first day of the trial, finding that the proposed evidence would not be substantially helpful to the jury. The main issue to be determined at trial was whether Mr Martin had the requisite reckless knowledge. The Judge could not see how Dr McAdam's brief would assist the jury with that narrow issue.[3]

The trial

The Crown case

[36] At trial the Crown case was presented on the basis that Mr Martin had been reckless as to whether the bag contained illegal drugs. That is a sufficient mental state for the offence of importation of a class A drug, as the Supreme Court held in *Cameron v R*.[4]

Mr Martin's evidence

[37] Mr Martin gave evidence at trial in which he effectively confirmed each element of the Crown case. He agreed with almost every proposition put to him in cross-examination.

[38] In her sentencing notes, the Judge described what happened at trial as "bizarre".[5] She could not understand why Mr Martin had not pleaded guilty and obtained a substantial discount for doing so, if he was willing to admit each element of the offence. She saw counsel in chambers after Mr Martin gave evidence, and asked whether Mr Martin's admissions meant that she should direct the jury to find him guilty. However the next day, when she saw counsel in chambers again, she agreed with the Crown's submission that it would not be appropriate for her to do so.

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3 *R v Martin* [2020] NZDC 20189.

4 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [12]–[13]. See also *Kupec v R* [2018] NZCA 377 at [7] and [40].

5 Sentencing notes, above n 1, at [10].

[39] In the course of that chambers discussion with counsel the Judge told Mr Tuck, counsel for Mr Martin, that he needed to talk to his client and ensure he understood what he had done. She said it was "bad before he got in [the witness box], but what he has done is admitted all of the essential ingredients". The Judge said that she could not understand what the issues Mr Tuck was raising had to do with the essential ingredients of the offence that she would be directing the jury they needed to be sure of. She reiterated the need for Mr Tuck to talk to Mr Martin, presumably with a view to considering whether even at that late stage he wished to change his plea.

Question trail

[40] The Judge provided the question trail for the jury to counsel in draft, for consideration overnight. She saw counsel in chambers before court on the final day of the trial and asked (among other things) if they had any comments on the question trail.

[41] Counsel for the Crown made some minor comments that are not relevant for present purposes.

[42] The Judge specifically checked with Mr Tuck that in relation to the questions where she had added "not in dispute" he could confirm that that was correct. Mr Tuck confirmed that there was no dispute in relation to those items. The only issue was recklessness.

[43] Mr Tuck made one suggestion in relation to question 6, which noted that "'[u]nreasonable' actions are actions that a reasonable and prudent person would not have taken". He proposed adding after that the words "in the situation that the defendant found himself in". The Judge did not accept that suggestion: she considered it would make the test less objective and wrong.

[44] Mr Tuck added that he would be submitting that the reasonable person test is applied in the factual matrix that is presented. The Judge noted that, and did not express any concern about Mr Tuck closing on that basis. He proceeded to do so.

[45] The question trail that was provided to the jury is attached as an appendix to this judgment.

Verdict

[46] As already mentioned, the jury found Mr Martin guilty on the charge of importing methamphetamine.

Sentencing

Psychiatric report

[47] The Judge sought a psychiatric report in relation to Mr Martin under s 38(1) of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

[48] The report set out in some detail Mr Martin's background and personal circumstances as he recounted them to the psychiatrist. He reported experiencing serious abuse in his childhood, the details of which are not necessary to traverse here, although we note that the psychiatrist's view was that this may have impacted on Mr Martin's self-esteem, ways of coping with stress, and maladaptive behaviours involving abuse of alcohol and cannabis in his adult life.

[49] Mr Martin also described himself as an accident-prone child with a number of episodes of injuries. He said that when he was five years old, he was knocked over by a car and had to have a metal plate inserted in his head. He struggled to pass examinations at school and left from the fifth form when he was 17 years old. He did not like going to school and found it hard to concentrate. After leaving school he worked as a butcher for seven years. When the butcher's shop at which he worked closed, he found work as a security guard. He had continued work as a security guard until he was arrested on the methamphetamine importation charge.

[50] The psychiatrist did not identify any signs or symptoms of a mood or psychotic disorder. Mr Martin described some symptoms of anxiety, but they did not meet the criteria for an anxiety disorder. Mr Martin described symptoms consistent with alcohol and cannabis use disorder involving a problematic pattern of substance use leading to clinically significant impairment. But he said he had ceased using

cannabis some years earlier, and more recently had significantly cut down his consumption of alcohol. The report writer did not consider that Mr Martin had an abnormal state of mind. He did not meet the criteria of a mental disorder.

[51] The psychiatrist added that the stresses that Mr Martin reported he was facing at the time of the offending, including a relationship break-up, having to move out from his house, and potential loss of his job as a security guard, would have increased his vulnerability to be exploited by a scam.

[52] The psychiatrist recommended that Mr Martin would benefit from one-on-one counselling to address any psychological issues which may have stemmed from childhood trauma. He would also benefit from participating in an alcohol and drugs programme.

Other reports

[53] The Court received the usual pre-sentence report from the probation service.

[54] Mr Martin is of Māori descent. But no report pursuant to s 27 of the Sentencing Act 2002 was provided addressing his cultural background.

[55] Nor was any report obtained on Mr Martin's intellectual functioning, despite his obvious naivety and lack of sophistication, his reported difficulties at school, and his reported head injury as a child.

Sentencing decision

[56] In her sentencing notes the Judge began by setting out the background to Mr Martin's offending. She recorded that Mr Martin would be sentenced on the basis that he was reckless about the drugs being in the suitcase. That is, although he did not know for certain that drugs were in the bag, he recognised the real possibility that there were drugs in the bag, yet went ahead and brought the bag into New Zealand.[6]

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6 Sentencing notes, above n 1, at [8].

[57] The Judge noted that Mr Martin had admitted all the essential ingredients of the offence when he gave evidence.[7] She added:

> [10] There is no issue here about you being addicted to drugs or being under some other mental disability that I can take into account. This was a situation where you needed money and you were prepared to run the risk by bringing in a large quantity of methamphetamine to this country, so your lawyer's suggestion that you are just a victim of this offending is unrealistic and I do not accept it. I do not accept it having heard the evidence, in particular, your own evidence. The only thing that exercises my mind about this case is why you did not plead guilty and take significant discounts. Instead, this went to trial and you gave evidence confirming the Crown's case. It was bizarre.

[58] The Judge referred to this Court's guideline judgment on methamphetamine sentencing in *Zhang v R*.[8] The amount of methamphetamine imported by Mr Martin came within band four of *Zhang* (500 g to 2 kg), which would mean a starting point of eight to 16 years' imprisonment.[9] But after considering Mr Martin's role, including the element of coercion involved in the circumstances of the importation, the Judge agreed with the Crown's submission that Mr Martin should be placed in the lower band three category. She adopted a starting point of seven years' imprisonment.[10]

[59] The Judge then considered whether there were any mitigating factors relevant to Mr Martin. He did not have any previous serious convictions. There were a number of letters of support from his family. The psychiatrist's report referred to his vulnerabilities. That report did not suggest Mr Martin had any intellectual disability or other kind of personality disorder, other than that he is vulnerable to scams of the kind involved in this offending. As the Judge noted, he had been taken in by similar scams before.[11] The Judge allowed a discount of 12 months for Mr Martin's previous good record and another six months for the information in the psychologist's report about his background and his vulnerability.[12]

[60] The end sentence was therefore five years and six months' imprisonment.[13]

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7 At [9].
8 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
9 At [125].
10 Sentencing notes, above n 1, at [13]–[14].
11 At [16].
12 At [16].
13 At [16].

Conviction appeal

Appellant's submissions

[61] Mr Martin challenged his conviction on two grounds. He argued that:

(a) The Judge erred by declining to admit the proposed expert evidence from Dr McAdam, and not allowing his defence that he was the victim of human trafficking to be put to the jury. Mr Martin submitted that this led to a miscarriage of justice.

(b) A narrative of withdrawal from the offending emerged from the evidence at trial, and the jury should have been directed to consider this as a possible defence.

[62] The second of these issues was initially framed as an issue relating to jurisdiction. The argument appeared to be that Mr Martin had not taken any steps in New Zealand in furtherance of the importation. But in written submissions and in oral submissions before us Mr Harré, who presented the argument on behalf of Mr Martin, quite rightly abandoned any argument about jurisdiction. Instead, he reframed the argument about the steps Mr Martin took in New Zealand on arrival in terms of withdrawal.

[63] Mr Harré submitted that in other jurisdictions, including the United Kingdom, a defence of human trafficking has emerged in recent years. However it was not necessary to deal with the applicability of such a defence in New Zealand law in the context of this appeal. Rather, the submission was that because Mr Martin was vulnerable, and that vulnerability had been exploited, he was a victim of human trafficking for forced criminal activity. In those circumstances he lacked the requisite mens rea for the offence.

[64] Mr Harré submitted that the contextual information in Dr McAdam's report about international developments in human trafficking law was essential in order to allow Mr Martin to counter the Crown's theory of recklessness.

[65] Mr Harré said that the issue of trafficking should have been left to the jury to make a finding of fact. In closing, the Crown had said it is not a defence to the charge that the defendant was tricked or scammed. The Judge directed the jury to that effect. Mr Harré submitted that this was a misdirection. If the jury considered Mr Martin had been scammed, and considered that the scam may have brought about a mistake as to facts, then this may in law found a defence. The jury had been directed to consider what a reasonable person would have done in the circumstances. But, as became evident through the course of the trial, Mr Martin was not a reasonable person.

[66] Mr Harré accepted that no argument based on withdrawal from the offending was advanced by the defence at trial. But, he submitted, through the evidence at trial a narrative of withdrawal emerged. Mr Martin, through his actions upon landing in New Zealand, had taken every reasonable step available to him to prevent the importation from occurring.

Discussion

[67] It was common ground at trial that Mr Martin was gullible and easily led. His vulnerability was illustrated by his willingness to engage in email correspondence with the perpetrators of this obvious scam. It was underscored by his willingness to travel to Thailand in the hope of obtaining a windfall: a hope that no reasonable person would have entertained. His approach to the scammers in connection with the bag he was asked to bring back to New Zealand — seeking reassurance from them, when they were plainly behind the request to bring it to this country — further confirms his gullibility.

[68] However Mr Harré struggled to articulate how that gullibility was relevant to the appeal against conviction. He also struggled to explain how his argument about international developments concerning human trafficking, and Dr McAdam's report on that subject, could be relevant to the issues put to the jury in the question trail.

[69] If the scam had resulted in Mr Martin being deceived about the contents of the suitcase, and wholly unaware of the risk that it might contain drugs, that would have been highly relevant to the matters for determination by the jury. But such an argument was hopeless on the facts, as confirmed by Mr Martin's own evidence.

[70] We asked Mr Harré which questions the issue of trafficking might shed light on. Mr Harré suggested that there should have been a preliminary question before question 5, asking the jury to find as a matter of fact whether Mr Martin was a victim of human trafficking. Dr McAdam's evidence would, he submitted, be relevant to that question. However Mr Harré was not able to articulate how that question would have informed the legal test reflected in subsequent questions in the question trail. Mr Harré submitted that it might have required some adjustment of questions 5 and 6. But he accepted that the question trail, and those questions in particular, were consistent with the approach adopted by the Supreme Court in *Cameron*.[14] The question trail followed the structure expressly approved by this Court in *Kupec v R* in the context of a defendant carrying a suitcase which the defendant suspected but did not know for certain might contain drugs.[15] The Supreme Court declined leave to appeal from this Court's decision in *Kupec*.[16]

[71] Mr Harré accepted that question 5 was already framed in subjective terms, and was not able to suggest any possible changes to it. He focused his argument on question 6, suggesting that this should have been reframed in subjective terms. However as Mr Harré acknowledged, there is no New Zealand authority post-*Cameron* that would support that approach. Nor had any argument to this effect been advanced in his written submissions.

[72] The argument that the questions in the question trail in relation to Mr Martin's mental state should have been expressed differently is in our view quite hopeless. It is inconsistent with the decision of the Supreme Court in *Cameron*, and of this Court in *Kupec*. Mr Harré did not seek to persuade us that those cases should be departed from. (Nor would it be appropriate for a Divisional Court of this Court to do so.) The question trail, and the Judge's direction to the jury, accurately reflected the authorities on the required mental state for the offence.

[73] Nor is it arguable that Dr McAdam's report was relevant to the questions for the jury, let alone substantially helpful to them. Asking the jury to consider whether

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14 *Cameron v R*, above n 4.
15 *Kupec v R*, above n 4, at [7]. See also at [40].
16 *Kupec v R* [2018] NZSC 113.

Mr Martin had been trafficked by reference to various international law definitions would have been irrelevant, and confusing. Nothing in Dr McAdam's report could have assisted the jury to answer the questions that were properly before it. The Judge was right to rule that this evidence was inadmissible.

[74] We can deal briefly with the withdrawal argument. Mr Harré accepted that this argument had not been raised by trial counsel. It was not raised in connection with the question trail or in closing submissions. The appeal was not advanced on the basis of trial counsel error: indeed Mr Tuck, who appeared at trial, also appeared for Mr Martin on this appeal.

[75] Mr Tuck's decision as trial counsel not to pursue a withdrawal argument was in our view wholly justified. On the evidence, the issue simply did not arise. Having set the importation of the suitcase into motion by checking it in at the airport in Thailand, it is not easy to see what Mr Martin could have done to effectively withdraw from participation in the offending. It may well be that withdrawal at that late stage simply was not possible as nothing that Mr Martin could do would be capable of undoing the effect of the steps he had already taken to import the drugs into New Zealand.[17]

[76] But in any event, it is clear on the facts that Mr Martin did not unequivocally withdraw. Even after he landed in Auckland, he was communicating with the scammers, and asking them to wish him luck as he went through Customs. As he acknowledged in cross-examination, he was still hoping that he might manage to clear Customs and obtain the promised windfall.

[77] Mr Harré did not pursue the withdrawal argument vigorously. He was right not to do so.

[78] In summary, Mr Martin's conviction appeal is wholly without merit. It must be dismissed.

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[17] See generally *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [134]–[138].

[79] We add that we share the Judge's concern that Mr Martin, who did not deny any of the essential elements of the offending with which he was charged, nonetheless proceeded to trial with the result that he was not eligible for any guilty plea discount on sentencing. It is not easy to understand how a defendant in his circumstances who had the benefit of sound legal advice could have adopted that course. We return to this below.

Sentence appeal

Appellant's submissions

[80] Mr Harré submitted that the Judge should have referred to the expert reports from Dr McAdam and Ms Bogart in connection with sentencing. Greater weight should have been given to Mr Martin's gullibility, and the deception that was practised on him.

[81] In his written submissions, Mr Harré argued that Mr Martin should be treated as having had limited involvement in the offence. His conduct within New Zealand must have come down to a period of minutes only, being the time period between picking his bags up from the conveyor belt and being approached by customs officers. However that point was not advanced before us. And rightly so: Mr Martin's culpability fell to be assessed by reference to the whole of his conduct connected with the importation, both within and outside New Zealand.

[82] Mr Harré submitted that the discounts allowed for Mr Martin's vulnerability, and the other factors referred to in the psychological report, were insufficient. In particular, insufficient weight was given to the factors of duress and undue influence, which had resulted in Mr Martin's choice being overborne or diminished.

[83] Mr Harré also submitted that Mr Martin had indicated a willingness to participate in a controlled delivery of the drugs. He said that there should have been a discount for this offer of cooperation.

Crown submissions

[84] Ms Simpson, who presented the argument for the Crown on the sentence appeal, submitted that the Judge had adopted an orthodox sentencing approach, and had not erred in the respects contended for by Mr Martin.

[85] In assessing Mr Martin's role and culpability, the central question for the Judge was the extent to which Mr Martin's offending was a result of deception or vulnerability, as against hope of gain. The Judge was well placed to make that assessment, with the benefit of hearing the evidence at trial. It was clear the Judge took Mr Martin's suggestibility and gullibility into account. She did not err in not referring to the evidence of Dr McAdam or Ms Bogart. The evidence on trafficking and scams was not capable of adding anything to that analysis.

[86] Ms Simpson submitted the Judge had recognised Mr Martin's lesser role in the importation in selecting a starting point of seven years' imprisonment. As this Court explained in *Zhang*, elements of duress, naivety or other vulnerability may result in the adoption of a lower band: that is what the Judge did in this case.[18] The sentencing approach approved by a Full Court of this Court in *Zhang* applied squarely to Mr Martin, and accommodated issues such as naivety and gullibility. There was no need to consider an alternative approach.

[87] Nor can there be any criticism of the Judge's starting point of seven years, which reflected Mr Martin's vulnerability and lesser role, and the wider context of the scam. There was no need to provide a further discount for vulnerability, as that was reflected in the Judge's assessment of Mr Martin's culpability, and the appropriate starting point.

[88] A further discount of six months to reflect all the information in the psychologist's report was sufficient. There was no challenge to the 12-month discount for Mr Martin's previous good record. A further discount for cooperation was not justified; there had been very limited cooperation by Mr Martin after the offence was complete and had been detected.

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[18] *Zhang v R*, above n 8, at [115] and [126].

Discussion

[89] The Judge adopted an orthodox sentencing approach based on the *Zhang* guidelines, which take as their starting point the quantity of drugs involved in the offending, and expressly contemplate an adjustment to reflect the role played by the offender.[19] But as this Court expressly recorded in *Zhang*, the Supreme Court emphasised in *Hessell v R* that sentencing must involve a "full evaluation of the circumstances to achieve justice in the individual case".[20] This is a very unusual case, in which the default approach in *Zhang* requires significant adjustment to reflect both the circumstances of the offending and Mr Martin's personal circumstances.

[90] We make three preliminary observations about the rationale behind the *Zhang* bands, and their application in this case.

[91] First, as this Court emphasised in *Zhang*, role is an important consideration in fixing culpability and thus the sentence starting point:[21]

> Due regard to role enables sentencing judges to properly assess the seriousness of the conduct and the criminality involved, and thereby the culpability inherent in the offending, in the holistic manner required by *Taueki* and *Hessell*.

A lesser role may require movement not only within a band, but also between bands.[22]

[92] Second, the sentencing bands for methamphetamine offending that had previously been set by this Court in *R v Fatu* in 2006 were premised on knowledge of the elements of the offence.[23] It was not until *Cameron* in 2017 that it was established that recklessness sufficed in this context.[24] The issue of liability based on recklessness did not arise in *Zhang*, and was not expressly addressed when the bands were adjusted. It follows that particular caution is needed in applying the *Zhang* bands uncritically to

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19 At [104].
20 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38], as cited in *Zhang v R*, above n 8, at [104] and [120].
21 *Zhang v R*, above n 8, at [118], citing *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 (CA); and *Hessell v R*, above n 20.
22 At [118].
23 *R v Fatu* [2006] 2 NZLR 72 (CA).
24 *Cameron v R*, above n 4.

cases where conviction is based on recklessness rather than knowledge, for two reasons.

(a) First, the mental state on which the conviction is based is inherently highly relevant to culpability.[25]

(b) Second, it is especially problematic to treat the quantity of methamphetamine carried as a primary determinant of sentence in a case where the person had no knowledge of the nature or quantity of the drugs involved in the offending. Quantity remains relevant, but as a matter of logic its relevance to culpability must be diminished in such cases.

[93] Third, and following on from the second point, quantity generally remains relevant even where an offender did not know the quantity of drugs involved — as is not infrequently the case for couriers, "catchers" and others — because it is usually a reasonable proxy for the social harm that has been or could be done by the drug, and for the illicit gains made from making, importing and selling it.[26] But quantity does not always serve as a proxy for these important factors: for example, where a person with a lesser role receives no illicit gains or receives a benefit that is not linked to the quantity of drugs involved, quantity does not serve that second proxy function.

[94] The present case engages all three of these factors. Mr Martin did not know he was carrying drugs. He did not want to carry drugs. He did not agree to do so. He did not seek to obtain any illicit gain. He did hope to receive a large (and fanciful) windfall from the scammers. But the offer of that windfall was not linked to any form of wrongdoing on his part. Once Mr Martin was told he was required to carry a bag back to New Zealand he recognised the risk it might contain illicit substances of some kind. But he made it clear he was not willing to be involved in any such enterprise. And he took three steps to reduce the risk of importing anything illicit.

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25 See generally AP Simester and WJ Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at [4.4].

26 *Zhang v R*, above n 8, at [104].

(a) First, he sought assurances from the "officials" that everything was legal and above board. He was given those assurances. A prudent person capable of exercising an ordinary degree of judgment and common sense would not have placed any trust in those assurances. But Mr Martin has amply demonstrated his inability to see through such deceptions.

(b) Second, he searched the bag. It was only when he did not find anything untoward that he agreed to bring it back to New Zealand and give it to the "payment officer". That second step was ineffective: the drugs had been effectively concealed from him as well as from the authorities.

(c) But third, and very importantly, Mr Martin proactively disclosed to Customs that he was carrying a bag on behalf of someone else. That last step ensured the bag would be searched (this time, by people who knew what they were doing) and any illicit substance detected.

[95] Mr Martin did not know what quantity of drugs had been concealed in the suitcase. As we have noted, he did not expect to receive any illicit benefit, let alone one that was related to the quantity of drugs concealed in the bag. He took steps that cumulatively ensured that the harm the drugs would have caused if they reached the streets in New Zealand would not eventuate. So none of the rationales for treating quantity as a primary determinant of sentence is directly applicable in this case.

[96] To this must be added the very brief time during which Mr Martin was an unwitting participant in the criminal enterprise. He was stampeded into carrying the suitcase shortly before he checked it in, and his role was effectively terminated by his voluntary disclosure to Customs on landing. This was not a case of offending that was planned in advance, or carried out over an extended period. His earlier travel to Thailand at the scammers' behest involved no wrongdoing, and deserves sympathy rather than blame. Having travelled there, he found himself on the last day of his visit in a fast-moving, time-constrained, stressful and difficult position. He deserves some blame for his conduct in those few hours. But also, given his demonstrated naivety and lack of sophistication and the pressure he was under, considerable sympathy.

[97] On these very unusual facts, it seems to us that it would be arbitrary and unfair for the quantity of drugs located by Customs to be given undue weight in determining Mr Martin's sentence. Role must loom larger. He is no more culpable than if the search had located a smaller quantity of drugs. Mr Martin's offending is not materially more culpable than that of the knowing courier of a much smaller quantity of methamphetamine: arguably, less so.

[98] There are no comparable cases that have been considered by this Court. Perhaps the closest case considered in the High Court is *R v King*.[27] In 2015 Mr King received an email telling him that someone with the same name had been left a substantial inheritance in South Africa. If he travelled there and signed some documents to facilitate the release of the inheritance he would receive half the funds, being $15 million. He agreed to participate in this fraudulent enterprise. He travelled to South Africa and spent three weeks there. His host, a "Ms Elizabeth", provided him with accommodation and transport and took him on excursions. On one excursion, Ms Elizabeth took him shopping, insisting that he buy clothes for himself and gifts to give to others. She also bought him a suitcase with four wheels which she said would be easier for him to use due to mobility issues caused by a stroke he suffered in 2001. She packed the new clothes and gifts into the new bag and took away his old bag.

[99] When Mr King arrived back in Auckland his bag was searched by Customs. They found 1.96 kg of methamphetamine with a purity of 46 per cent, concealed in a hidden compartment which could only be accessed by cutting the bag open. Mr King gave differing accounts to Customs officials. He first said that he knew the contents of his luggage and that he had packed the bag himself. After the bag was searched and the methamphetamine discovered, he said that Ms Elizabeth had packed the bag for him. As van Bohemen J said, to that extent at least, he had been shown to be untruthful.[28] Telephone intercepts suggested strongly that Mr King had no involvement in setting up the importation, had no direct knowledge of what had been planned, and may have been coached to give his initial explanation to Customs for reasons he may or may not have appreciated.

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27 *R v King* [2018] NZHC 2540.
28 At [9].

[100] Tests showed that the stroke Mr King suffered in 2001 had significantly impaired his frontal lobe function, which is concerned with aspects of reasoning such as recall and retention of memory, changing cognitive themes, abstract thinking and making adaptive judgments.

[101] The psychiatrist who prepared a report for Mr King's sentencing concluded that he suffered from a moderately severe neurocognitive disorder which caused him significant physical and cognitive impairment. Mr King's impaired frontal lobe function impeded his ability to have "theory of mind" — the ability to attribute mental states to himself and to others, and to understand that others have beliefs, intentions, desires and perspectives that are different from his own. Naive innocence was a prominent characteristic of his cognitive functioning. The Judge considered that naivety was a significant factor in his offending.[29] Mr King also had a record of falling for fraudsters and scams. On two previous occasions he had lost significant sums of money to email scams asking for an upfront payment for which he was promised a substantial sum in return.

[102] The Judge adopted a starting point of five years' imprisonment.[30] That reflected the substantial quantity of methamphetamine involved (and its relatively low purity), Mr King's limited role, his state of mind, and his limited intellectual capacity and understanding. Mr King's mental impairment was seen as relevant to both the starting point and as a mitigating personal circumstance.[31] The quantity of drugs involved would have put Mr King in band four of the then effective *Fatu* sentencing bands, indicating a starting point of between 12 years and life imprisonment.[32] But the lower purity of the methamphetamine imported, Mr King's conviction based on a mental state of recklessness, and his lesser role and mental impairment justified a starting point of five years' imprisonment.[33] After taking into account personal mitigating circumstances, the end sentence was 12 months' home detention.[34]

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29 At [17].
30 At [45].
31 At [25], citing *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [45] and [48].
32 At [26], citing *R v Fatu*, above n 23, at [36].
33 At [37]–[45].
34 At [75]. See also *R v Roche* [2021] NZDC 25020, a scam case very similar to the present in which the Judge followed *King* and adopted a starting point of five years' imprisonment and imposed an

[103] We agree that the factors identified by the Judge in *King* required the adoption of a starting point well below what would have been produced by reference solely to the quantity of the drugs involved in the offending. We note that in *Zhang*, which was delivered after *King* was decided, this Court adjusted the *Fatu* bands and re-emphasised the importance of role in determining an appropriate starting point. In light of *Zhang*, and the various factors at play in *King*, we consider that a similar case today would attract a starting point of no more than four years' imprisonment.

[104] The present case has obvious similarities with *King*. The level of naivety and gullibility seem much the same, though there has been no diagnosis of a specific neurocognitive disorder on Mr Martin's part.[35] Mr King imported a higher quantity of drugs, and — importantly — did not make any disclosure to Customs to trigger a search of his bag, and lied to Customs about packing the bag himself. Overall his conduct was in our view more culpable than that of Mr Martin.

[105] In the present case, having regard to the factors identified at [94]–[97] above, we consider that a starting point of three years' imprisonment appropriately reflects the culpability of the offending. This can be conceptualised as a move from band four of *Zhang* to the lower end of band two[36] to reflect the limited relevance of quantity in this case and the multiple factors which distinguish the seriousness of Mr Martin's offending from the paradigm case for band four, or even band three, intentional offending. As already explained, those factors require much greater weight to be given to role than to the quantity of drugs in this case.

[106] We turn to personal mitigating factors. The Judge was right to give a substantial discount of approximately 15 per cent for Mr Martin's previous good character. We agree that a discount in that range is appropriate. We therefore discount the adjusted starting point by six months. We also consider a further discount of six months is needed to reflect the factors discussed in the psychiatrist's report, in particular Mr Martin's background, his childhood head injury and his extreme

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end sentence of home detention.

35 It is unfortunate that the Court did not have the benefit of mental function investigations similar to those carried out in respect of Mr King, or of a s 27 report. The psychologist's report that was obtained was limited in scope and did not address a number of potentially relevant issues.

36 Band two applies to quantities of between 5 g to 250 g, and corresponds to starting points of two to nine years' imprisonment: *Zhang v R*, above n 8, at [125].

vulnerability and gullibility. These bear directly on what society can reasonably expect of a person in his position. He should not be punished severely for errors of judgment that he had a diminished capacity (or no capacity) to avoid. An aggregate discount of 12 months is appropriate.

[107] That gives an end sentence of two years' imprisonment.

[108] We consider that this end sentence fully reflects the circumstances of Mr Martin's offending. It is difficult to see how a more severe sentence of imprisonment in this case could serve any of the sentencing objectives set out in s 7 of the Sentencing Act. The goals of denunciation and holding Mr Martin accountable for his foolish and reckless conduct are adequately served by the entry of a conviction, coupled with a less severe sentence.[37] There is no need for a sentence of imprisonment of five years and six months to deter Mr Martin from repeating his unfortunate error. Nor will imprisoning him for a period of that length deter other equally naive and gullible people from engaging in similar conduct — such people are likely to be few and far between, and they will not be aware of or influenced by the specific level of sentence imposed in such cases.[38] Time spent in prison will not help to rehabilitate Mr Martin or reintegrate him into the community — quite the reverse.[39] None of the other goals is engaged.

[109] One of us (Goddard J) considers that there is another available route to the same result.[40] Guideline judgments are just that — guidelines to the proper application of the Sentencing Act. But they do not displace the requirements of that Act. As this Court noted in *Moses v R*, "every guideline judgment recognises that judges must apply the Act and may depart from the guidelines where appropriate".[41] Nor do

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37 Sentencing Act 2002, s 7(1)(a) and (e).

38 Section 7(1)(f).

39 Section 7(1)(h).

40 Katz and Edwards JJ endorse the summary of the relevant principles at [109] and [110] above. As for [111], they are of the view that if the application of the *Zhang* guidelines on methamphetamine sentencing led to a lengthy sentence of imprisonment for Mr Martin, the final step of standing back and assessing the appropriateness of that sentence would likely necessitate a further adjustment to the end sentence in this case. Given, however, that the appeal was not argued on that basis, and a decision on the issue is not necessary to determine the appeal, they express no view on the likely extent of any such adjustment.

41 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [34].

guideline judgments displace the obligations of the sentencing judge under the New Zealand Bill of Rights Act 1990. As the Chief Justice said in *Fitzgerald v R*:[42]

> In exercising the discretions conferred under the Sentencing Act, judges are bound by the Bill of Rights and must respect and affirm the rights and freedoms preserved there. That is the effect of s 3 of the Bill of Rights.

And so, as the Supreme Court observed in *Hessell*, the sentencing judge "in the end, must stand back and decide whether the outcome of the process followed is the right sentence".[43] Similarly, in *Moses* this Court noted that "guideline judgments emphasise that the sentencing judge should stand back and inquire whether the final sentence is correct in all the circumstances".[44] And as the Court went on to say:

> [49] As explained …, guideline judgments such as this one promote transparency of analysis and principled consistency of outcome, so furthering objectives of the Sentencing Act. We repeat that the ultimate question, however, is not whether an applicable guideline judgment is followed but whether the sentence is a just one in all the circumstances. When answering it the sentencer should stand back and consider the circumstances of offence and offender against the applicable sentencing purposes, principles and factors.

[110] The final step of standing back and considering whether a sentence is more severe than can be justified by reference to the purposes of the Sentencing Act is also consistent with basic principles governing the exercise of statutory powers. It is elementary that the powers conferred by an Act must be exercised for the purposes for which those powers are conferred.[45] The more coercive and rights-limiting the exercise of a power, the clearer the link that must be able to be demonstrated between the exercise of the power and the relevant statutory purpose.

[111] If the application of the *Zhang* guidelines on methamphetamine sentencing led to a lengthy sentence of imprisonment for Mr Martin, the final step of standing back and assessing the appropriateness of that sentence would, in the view of Goddard J, necessitate a further adjustment. As we explained at [108], none of the purposes of the Sentencing Act requires a sentence more severe than the two-year term arrived at above. Standing back from the detail of the sentencing analysis in this case, a sentence

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42 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [118] per Winkelman CJ.
43 *Hessell v R*, above n 20, at [77].
44 *Moses v R*, above n 41, at [37].
45 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [51]–[53].

in excess of two years' imprisonment cannot be justified as necessary to achieve any of the purposes of the Act. Thus even if we had not arrived at that result through the reasoning process set out at [104]–[107], Goddard J would have arrived at the same result when he came to the end of the sentencing process and stood back to ask if the outcome was the right sentence. Neither the sentence imposed in the District Court, nor any other sentence in excess of two years' imprisonment, could be described as the just sentence in all the (unusual) circumstances of the present case.

[112] We add that it is difficult to understand how Mr Martin ended up going to trial and missing out on the credit that would have been received for an early guilty plea.[46] The documentary evidence made conviction inevitable on the basis of recklessness as to the presence of drugs in the suitcase. So too did the evidence that Mr Martin would give at trial, as it appears he planned to do. Particularly careful advice on the question of plea was needed in this case, having regard to Mr Martin's naivety, and the significant adverse consequences for him of going to trial in circumstances where none of the essential elements of the offending was in dispute. We find it difficult to believe that someone as biddable as Mr Martin would not have acted on advice that there was no realistic prospect of avoiding a conviction, and his best option was to plead guilty at an early stage.

[113] It was not argued before us that Mr Martin's failure to plead guilty was the result of trial counsel error. But something appears to have gone awry in the period leading up to trial and, as a result, Mr Martin proceeded to trial — a decision that the Judge appropriately described as "bizarre".[47] If Mr Martin had pleaded guilty at an early stage, a sentence other than imprisonment might well have been considered. But he did not, and he has now spent almost 16 months in prison.

Result

[114] The appeal against conviction is dismissed.

[115] The appeal against sentence is allowed.

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46 See *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298; aff'd *R v Hessell*, above n 20.
47 Sentencing notes, above n 1, at [10].

[116] The sentence of five years and six months' imprisonment is quashed and substituted with a sentence of two years' imprisonment.

Solicitors:
Crown Law Office, Wellington for Respondent

Appendix: Question Trail

QUESTION TRAIL

GREGORY MARTIN

NOTE
On all issues, the burden of proof beyond reasonable doubt lies on the Crown

CHARGE 1: Importing methamphetamine

QUESTION 1 Are you sure that Mr Martin brought into New Zealand a quantity of material in a suitcase at Auckland Airport on 7 March 2019?

(Not in dispute)

If yes **Go to Question 2**
If no **Find Mr Martin not guilty**

QUESTION 2 Are you sure that the imported material was a controlled drug methamphetamine?

(Not in dispute)

If yes **Go to Question 3**
If no **Find Mr Martin not guilty**

QUESTION 3 Are you sure that, prior to the completion of the importation, Mr Martin was involved with the importation?

In this case, importation starts when the suitcase enters New Zealand and ceases or is completed when the package is seized by the customs officers at the airport.

(Not in dispute)

If yes **Go to Question 4**
If no **Find Mr Martin not guilty**

QUESTION 4 Are you sure that Mr Martin intended that the suitcase and its contents be brought into New Zealand?

(Not in dispute)

If yes **Go to Question 5**
If no **Find Mr Martin not guilty**

QUESTION 5

Are you sure that at the time he brought the suitcase into New Zealand, Mr Martin believed there was a real possibility the suitcase contained an illegal drug?

If yes	**Go to Question 6**
If no	**Find Mr Martin not guilty**

QUESTION 6

Are you sure that Mr Martin, believing there was a real possibility that the suitcase contained a controlled drug, he unreasonably disregarded that risk?

"Unreasonable" actions are actions that a reasonable and prudent person would not have taken.

If yes	**Find Mr Martin guilty**
If no	**Find Mr Martin not guilty**