IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA779/2024
[2025] NZCA 400

BETWEEN	LYNMARIE CARTER Appellant
AND	THE KING Respondent

Hearing: 16 June 2025

Court: Ellis, Peters, Walker JJ

Counsel: D J Allan for Appellant
Z Zhang and M J Lillico for Respondent

Judgment: 13 August 2025 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of five years and four months' imprisonment is set aside and a sentence of four years and four months' imprisonment is imposed.

REASONS OF THE COURT

(Given by Walker J)

[1] The appellant, Ms Carter, pleaded guilty to charges involving serious drug offending. She was sentenced to five years and four months' imprisonment in the District Court at Auckland.[1] Ms Carter now appeals her sentence. She contends it is manifestly excessive because the starting point was too high, the allowance for guilty

1 *R v Carter* [2024] NZDC 26887 [sentencing notes] at [13].

plea inadequate and the imposition of a five per cent uplift for previous convictions was unwarranted.

Offending

[2] Ms Carter was charged with her partner of 45 years, Mr Pearce. Judge Cocurullo's sentencing notes summarised her offending based on the amended summary of facts to which Ms Carter pleaded guilty:

> [2] I refer to the amended summary of facts of 16 July 2024. You were identified as somebody in this network of methamphetamine suppliers just below a Mr Ball. You were caught by the police obtaining telephone data for you over generally that period from September 2021 to January 2022. The communications showed that you were a busy lower-level dealer with a customer base of at least 33 separate individuals around Hamilton. The communications revealed your partner, Mr Pearce, who is your co-accused involved in a support role for you. It was identified that on occasion he was delivering methamphetamine and on two other occasions providing enforcement or debt collection services.
>
> [3] You, Ms Carter, were admitted to hospital during the course of the investigation and the summary of facts shows that Mr Pearce, who I am yet to deal with, took over the operations and asked for an update.
>
> [4] The summary of facts makes a typical chain of events where Mr Ball would purchase kilogram quantities of methamphetamine from Auckland and deliver one to three ounce quantities to either you or Mr Pearce, usually on credit. The summary of facts details what the methamphetamine was being bought for and the sums set out. It then specifically turns to the factual matrix in respect of each of the charges, the possession for supply, together with the remaining five charges of supplying methamphetamine.
>
> [5] The short point is that you are to be sentenced today responsible for a massive amount of methamphetamine, 524.25 grams …

[3] While Ms Carter and Mr Pearce were convicted jointly in respect of some charges, the quantities of methamphetamine attributed to each of them were different and Ms Carter was also convicted of further individual charges. Given the linked nature of the pair's offending, we set out below a description of the charges taken from the amended summary of facts which goes some way to explain the different sentencing outcomes:

(a) Charge 1 (representative): Ms Carter possessed 463 grams of methamphetamine for the purposes of supply between 1 August 2021

and 6 January 2022. Mr Pearce possessed 155 grams of methamphetamine for supply between 30 October 2021 and 6 January 2022 (this formed part of the total 463 grams).

(b) Charge 2 (representative): Ms Carter supplied 20.2 grams of methamphetamine on 45 separate occasions between 1 August 2021 and 6 January 2022. Mr Pearce supplied two grams of methamphetamine on six occasions between 30 October 2021 and 6 January 2022.

(c) Charge 3 (representative): Ms Carter offered to supply a total of 3.05 grams of methamphetamine over seven occasions between 1 August 2021 and 6 January 2022. Mr Pearce offered to supply methamphetamine on two occasions (half a gram and a quarter gram respectively) between 30 October 2021 and 6 January 2022.

(d) Charge 8: Ms Carter possessed 4.5 grams of methamphetamine for supply (the methamphetamine was contained in plastic bags found inside Ms Carter's purse and bags during a search conducted by police on 10 August 2022).

(e) Charge 10 (representative): Ms Carter offered to supply a total of 3.5 grams of methamphetamine on six occasions between 4 December 2021 and 7 August 2022. Police identified 10 further offers to supply where the amount of methamphetamine could not be quantified.

(f) Charge 11 (representative): Ms Carter supplied a total of 30 grams of methamphetamine over five transactions between 28 November 2021 and 12 July 2022. Police identified eight further transactions where the amount of methamphetamine could not be quantified.

[4] Mr Pearce pleaded guilty at or around the same time as Ms Carter and was sentenced, by the same Judge on the same day, to two years and four months'

imprisonment.[2] His appeal to the High Court against that sentence was dismissed by Muir J on 19 December 2024.[3]

[5] As noted, Ms Carter and Mr Pearce were sentenced by reference to different quantities of methamphetamine, even in respect of the joint charges, although the charges were not amended to reflect this difference. Materially, Ms Carter's drug offending was said to relate to a total of 524.25 grams while Mr Pearce's drug offending related to a total of 157.75 grams.

District Court sentence

[6] The Judge assessed that Ms Carter's offending sat within band four of the guideline judgment of *Zhang v R* considering the duration of her offending, its "shape" and the quantity involved.[4] He recognised, however, the fluidity between the *Zhang* bands and the contest over whether Ms Carter's role was "lesser" or "significant" in terms of the role profiles refined by the Supreme Court in *Berkland v R*.[5] Noting Ms Carter's addiction issues, he considered the quantities involved "far outweigh[ed] any fuelling solely for [her] own habit".[6] This led him to describe Ms Carter's role as "significant" with some factors more consistent with a "lesser" role.[7]

[7] Despite the reference to band four of *Zhang*, the Judge adopted a starting point of seven and a half years' imprisonment.[8] This is less than the band four entry starting point of eight years. He uplifted the starting point by five per cent for previous recent drug offending. In terms of credits, he described the guilty plea as coming late in the face of a "fairly strong case", justifying a credit of 13 per cent.[9] Turning to personal mitigating factors, he applied a combined allowance of 20 per cent for health matters, addiction and related background factors.[10]

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2 *R v Pearce* [2024] NZDC 27595.
3 *Pearce v R* [2024] NZHC 3925.
4 Sentencing notes, above n 1, at [7], referring to *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
5 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
6 Sentencing notes, above n 1, at [8].
7 At [8].
8 At [9].
9 At [9].
10 At [10].

[8] The Judge declined to give any deduction for time spent on a non-electronically monitored curfew, or a discrete allowance for remorse which he considered to be included within the guilty plea credit.[11]

[9] The result was an end sentence of five years and four months' imprisonment (rounded down).[12]

Was the sentence manifestly excessive?

[10] To allow the appeal, this Court must be satisfied there is an error in the sentence reached, and that a different sentence should have been imposed.[13] It is the end sentence imposed, rather than the process by which it is reached, which is relevant on appeal.[14] In most cases, the Court will not intervene if the sentence is within the range justified by accepted sentencing principles.[15]

[11] We turn to each of the grounds relied on by Ms Carter.

Starting point — submissions

[12] Mr Allan, on behalf of Ms Carter, contends that her offending should have been placed in band three of *Zhang* and a starting point of six and a half years adopted. He says that, by reason of Mr Pearce being held responsible for possession of 155 grams during Ms Carter's period of hospitalisation, she did not fulfil a significant role in respect of that quantity.[16] Consequently, her significant role should be restricted to 369.25 grams or around 70 per cent of the quantity at issue.[17] Mr Allan describes the offending as unsophisticated "lower-level street dealing" akin to a corner dairy

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11 At [11].
12 At [12]–[13].
13 Criminal Procedure Act 2011, s 250(2).
14 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
15 At [32]–[36].
16 In late October 2021, Ms Carter became seriously ill with COVID-19 and was hospitalised for an extended period.
17 There appears to be a slight (and largely immaterial) arithmetical discrepancy in the submission. Mr Pearce was sentenced in respect of 157.75 grams of methamphetamine. On the appellant's argument, this would mean that Ms Carter should have been sentenced for her "significant role" in relation to 524.25 grams less 157.75 grams, being 366.5 grams rather than 369.25 grams.

rather than a supermarket and driven by addiction which saw the couple indebted to their drug supplier.

[13] In response, the Crown highlights that, while the quantity of methamphetamine at issue places Ms Carter's offending squarely within band four, the starting point adopted by the Judge was below the eight-year entry point for that band; positioning it instead within band three.[18] The Crown says that reflected a conscious decision by the Judge to apply the bands from this Court's guideline case in a fluid manner. It emphasises that Ms Carter was running her own supply operation with a customer base of 33 separate individuals and at the time was serving a sentence of one year's intensive supervision for earlier methamphetamine offending. Despite that being an aggravating factor by reference to s 9(1)(c) of the Sentencing Act 2002, this did not result in an uplift to the starting point. Taking all these matters into account, the Crown suggests the Judge's evaluation of starting point was arguably lenient.

Starting point — discussion

[14] In *Zhang*, this Court recognised that the quantity of methamphetamine involved in the offending serves as a "reasonable proxy" for the social harm which the drug causes and the illicit gains from dealing in it.[19] However, quantity alone does not determine culpability. Positioning within a band depends on the role of the offender with reference to the description of the various role profiles set out in *Zhang* and subsequently refined by *Berkland.*[20] It is also well recognised that there is flexibility to move within or between the quantum driven bands depending on the "potency of role".[21] There is also room for gradations of culpability within the role categories.[22] This is to avoid offenders becoming trapped in a sentencing band because of the quantum of drugs involved and movement, within the band or below it, becoming unduly constrained.[23]

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18 *Zhang v R*, above n 4, at [125]. Band three of *Zhang* invites a sentence of between six and 12 years' imprisonment while band four invites a sentence of between eight and 16 years.

19 At [103].

20 At [118] and [126]–[128]; and *Berkland v R*, above n 5, at [65] and [71]. The Court in *Berkland* described the updated role profiles as a "useful lens" through which to view the facts rather than a "straitjacket".

21 *Berkland v R*, above n 5, at [64].

22 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [36].

23 At [36].

[15] Mr Allan did not seek to argue that Ms Carter did not have a significant role in respect of the greater portion of the methamphetamine offending. Rather, the crux of this aspect of the appeal is whether the Judge sufficiently accounted for Ms Carter's lesser role in respect of the 157.75 grams which Mr Pearce dealt with during Ms Carter's hospitalisation.

[16] We consider the answer to the question — framed in that narrow way — is yes. The starting point adopted by the Judge placed Ms Carter's offending within band three of *Zhang* after considering the respective roles of Mr Pearce and Ms Carter over the entire period of offending. However, we also consider that the way in which the charges are framed lends further support for placing Ms Carter's offending well within band three. The total quantity of methamphetamine in fact involved is less than clear and the summary of facts does little to elucidate this aspect. This gives rise to a concern that there has been double counting due to the temporal overlap between the charges (except charge eight). We are not satisfied that the charges of possession for supply, offering to supply and actually supplying necessarily relate to different methamphetamine, resulting in potentially exaggerated culpability in terms of quantity.[24]

[17] It is also apparent that, despite the fact that charge one was a joint charge, Mr Pearce's sentence did not hold him to account for his (lesser) role in relation to possessing the 369.25 grams at all, whereas Ms Carter was held responsible (albeit while recognising that her role changed while she was in hospital) for possessing the full amount. While that may logically suggest that Mr Pearce was merely fortunate in the sentence he received, we do not consider the question of disparity should wholly be put to one side when considering Ms Carter's position.

[18] We find the starting point to be slightly out of range for these reasons, and because categorisation of Ms Carter's role as significant does not adequately recognise the driver of her offending and the associated level of her culpability within that role. We consider that Ms Carter's role, even in respect of the larger quantity of

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[24] By which we mean that Ms Carter may have been charged with possessing, and then offering and then supplying the *same* methamphetamine.

methamphetamine dealing, places it on the cusp of the upper end of lesser and lower end of significant.

[19] While we accept that an offender's own operation can equate to operational or management functions, and so constitute a "significant" role, Ms Carter's dealing does not have the hallmarks of a significant commercial enterprise. She was supplying repeat customers without any influence on those above her in a chain and would have had only low-level awareness or understanding of the scale of that operation.[25] It cannot fairly be said that she was directing others, such as her partner Mr Pearce, in a relevant sense. Additionally, there is nothing to suggest that she was financially benefitting, aside from sustaining her own methamphetamine needs and repaying her own supplier who supplied on credit.

[20] We therefore conclude that the Judge made an error in treating Ms Carter's offending as "significant" without a more nuanced assessment of her actual culpability within that role. We consider that a starting point of seven years, rather than seven and a half years, more accurately reflects her culpability.

Uplift for prior offending while serving a sentence

[21] As to the uplift for offending while serving a sentence, Mr Allan submitted this led to Ms Carter receiving a greater penalty through the five per cent uplift than she did for the original offending. We are not persuaded by the Crown's contention that the starting point was lenient for failing to explicitly address the mandatory factor under s 9(1)(c) of the Sentencing Act. The five per cent uplift for prior convictions implicitly addressed this because Ms Carter's only prior convictions were those for which she was serving a sentence of intensive supervision at the time of the present offending.

[22] Relevantly, those prior convictions were in respect of two charges of offering to supply and supplying methamphetamine across a three-month period in 2019. Analysis identified that Ms Carter offered to supply a total quantity of 47.1 grams

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[25] With reference to the factors set out in *Berkland v R*, above n 5, at [71].

on 34 occasions and supplied a total of 3.6 grams on nine occasions.[26] The sentencing Judge assessed the offending as falling within the lower to middle range of band two of *Zhang*, and warranting a starting point of three and a half years.[27] After a guilty plea credit of 25 per cent and deductions for an established nexus between Ms Carter's addiction and offending, the end sentence was two years' imprisonment. This was commuted to home detention for 11 months. An application to cancel this sentence was granted in July 2021 when Ms Carter had to vacate the approved address and had no suitable alternative address. The sentence was then converted to 12 months' intensive supervision with special conditions.

[23] The sentencing notes in respect of these convictions indicate that the sentence was principally focused on Ms Carter's rehabilitative prospects against a backdrop of no convictions (at that time) and good prospects. It is likely that addiction was not only the catalyst for her offending but also led to Ms Carter's failure to address those needs. The Provision of Advice to Courts (PAC) report for sentencing in the present case records Ms Carter's engagement in that regard was less than satisfactory, but this was largely due to her not being able to report due to poor health.

[24] It is well recognised that uplifts for prior convictions must strike a balance between achieving deterrence and the need to avoid punishing offenders twice for the same offence. Generally, uplifts which exceed the original sentences are unlikely to be considered proportionate.[28] However, it does not necessarily follow that an uplift is not available where previous offending only attracted a community sentence. A more nuanced evaluation is required.

[25] While a five per cent uplift appears modest in percentage terms, practically it equated to an increase of four and a half months' imprisonment on Ms Carter's sentence. Against the backdrop of Ms Carter's limited offending history, personal circumstances and her only other sentence being one of intensive supervision, we consider an uplift of no more than two months to be appropriate.

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26 *R v Carter* [2020] NZDC 27752 at [4].
27 At [2], referring to *Zhang v R*, above n 4.
28 *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [41], citing *Patel v R* [2017] NZCA 234 at [61].

Guilty plea credit — submissions

[26] Mr Pearce received a 20 per cent guilty plea credit for his part in the offending while Ms Carter received 13 per cent. Mr Allan contends that the principle of parity requires that Ms Carter receive the same guilty plea credit because they both took the same steps at the same time resulting in the prosecution withdrawing several charges for both parties.

[27] The Crown contends that this difference is explicable for three reasons. First, the tangible and genuine remorse displayed by Mr Pearce in both an articulate letter submitted on the eve of sentencing and his PAC report, compared to the lack of insight displayed by Ms Carter in her own pre-sentence report. Secondly, that a benevolent credit or lenient sentence for one offender cannot create an expectation that other offenders will receive the same indulgence.[29] Thirdly, the strength of the case against Ms Carter was assessed by the Judge as being "fairly strong", while no such assessment was made in relation to (essentially the same) case against Mr Pearce.[30]

Guilty plea credit — discussion

[28] The assessment of a guilty plea credit is an evaluative assessment reflecting all the circumstances of the case.[31] We find that the Judge erred in distinguishing between the pair in this aspect of his sentencing because there was an inadequate basis to do so. While Ms Carter had a more significant role for most of the offending period — such that intercepted communications strengthened the case against her — their offending and the timing of their guilty pleas were linked to such an extent that it is artificial to assess the appropriate guilty plea credit separately.

[29] Relatedly, we reject the submission that Mr Pearce's letter accepting responsibility on the eve of sentencing somehow elevated his remorse over and above that of Ms Carter. Indeed, we note that Mr Pearce takes responsibility in that letter for introducing Ms Carter into the drug world.

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29 Relying on *Moses v R* [2024] NZCA 121 at [40].
30 Sentencing notes, above n 1, at [9].
31 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [57], [65] and [74]–[77].

[30] Neither do we accept that Ms Carter lacked insight. She explained to the pre-sentence report writer that she could not afford to support her daily methamphetamine habit and any money she made from selling the drug enabled her to purchase methamphetamine on credit. Given that she lived in emergency housing, this explanation rings true. While she acknowledged that she did not consider the impact of her offending on the wider community at the time, she told the report writer that she believes that children were going without basics such as food to enable adults to pay for the drug. That illustrates at least a degree of frank insight into the harm caused by this type of drug offending.

[31] Finally, while the quantity of methamphetamine attributed to Mr Pearce's offending was significantly reduced before his guilty plea (which explains the late timing of the plea which came nearly two years after the charges were laid),[32] charges were also withdrawn against Ms Carter as part of the resolution of the prosecution.

[32] For those reasons, we consider that the same guilty plea credit of 20 per cent ought to have been received by Ms Carter.

[33] In sum, we consider that the Judge erred in three respects — the starting point was too high, the uplift for previous offending was too great and the guilty plea credit ought to be the same 20 per cent that Mr Pearce received. These factors necessarily require the conclusion that the result is a manifestly excessive sentence. Adjusting for these factors, and maintaining all other aspects of the sentence, we reach an end sentence of four years and four months (rounded down) calculated as follows:

(a) a starting point of seven years;

(b) an uplift of two months for prior offending;

(c) a guilty plea credit of 20 per cent; and

(d) a combined credit of 20 per cent for s 27 factors including addiction.

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[32] *Pearce v R,* above n 3, at [8].

Result

[34] The appeal is allowed.

[35] The sentence of five years and four months' imprisonment is set aside. A sentence of four years and four months' imprisonment is substituted.

Solicitors:
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